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Top Labor & Employment Lawyers 2017

Malcolm A. Heinicke

FIRM:

Munger, Tolles & Olson LLP

CITY

San Francisco

SPECIALTY

Class actions, employee mobility matters

Companies turn to Heinicke for their most challenging employment litigation matters. Clients include Wells Fargo Bank NA, 99 Cents Only Stores Inc., AmeriGas Propane Inc., Fidelity Investments, NCI Building Systems Inc., Yelp Inc., Square Inc. and York Risk Services Group.

“I sure do like working on interesting issues,” he said. “We take aggressive approaches and employ creative strategies.”

When Wells Fargo faced a potential class action challenging two parts of its compensation policy for hundreds of home mortgage consultants in California, Heinicke served as lead counsel. The suit alleged that the bank violates state labor law when it adjusts compensation to reflect a customer’s failure to pay certain fees. And it claimed that Wells Fargo violates state law by paying meal period premiums at the base rate of pay instead of the regular rate used for overtime compensation.

Heinicke said he recognized early the differences in the two large claims. “We pursued a two-part strategy to gut the case,” he said.

First, he moved for summary judgment on the deduction claims, persuading U.S. District Judge Philip S. Gutierrez of Los Angeles last October that the home mortgage consultants’ wages are not “earned”

until final calculations have been performed in accordance with the terms of Wells Fargo’s compensation plan. That ruling was doubly helpful because it implicitly validated other adjustments within the plan.

Second, Heinicke made the novel argument that even though all the consultants were paid the same disputed rate for meal period premiums, there was no commonality — a prerequisite for class actions — sufficient to permit certification on liability. He contended successfully that even if the bank chose to pay a premium without proof of a meal period violation, it was not legally required to pay any such premium unless individual plaintiffs proved a violation in the first place, and that would require individualized review.

In March, Gutierrez declined to certify the class.

“We reframed the claims and made clear that they were as simple as the plaintiffs made out,” Heinicke said. *Torres v. Wells Fargo Bank NA*, 5:15-cv-02225 (C.D. Cal., filed Sept. 15, 2015).

In another challenge to the bank’s employment policies, Heinicke leads the team defending against a potential class action asserting that the company has misclassified its business payroll specialist sales representatives as exempt from overtime and related requirements. He said he obtained significant admissions from the



named plaintiffs in discovery, then won dismissal of the class’ Fair Labor Standards Act claims. Heinicke continues to represent Wells Fargo in respect to similar state law claims in California plus related claims pending in Pennsylvania in a different case. *Cota v. Wells Fargo Bank NA*, 3:16-cv-5543 (N.D. Cal., filed Sept. 29, 2016).

“We put in a team effort for a wonderful client,” he said of his work for the bank.

— John Roemer