

WARN Act Damages Not Subject to Massachusetts Wage Act

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Employee Creditors May Not Assert Claim for Such Damages Derivatively Against Corporate Officers

Corporate insolvencies and near insolvencies regularly generate significant claims and litigation initiated by creditors seeking payment of unsatisfied indebtedness and judgments. On December 28, 2018, the Massachusetts Supreme Judicial Court (SJC) rendered a significant decision addressing claims of a class of employee creditors of a Delaware corporation. The employees sought to recover damages from officers of the corporation under the Massachusetts Wage Act (the Wage Act) for breach of the Federal Worker Adjustment and Retraining Notification Act (the WARN Act). The employees also asserted a derivative claim on behalf of the corporation alleging that the officers had breached their fiduciary duties to the corporation by allowing the corporation to breach the WARN Act. The SJC affirmed the dismissal of the employees' complaint in all respects.

The Wage Act establishes a private right of action and imposes personal liability on certain corporate officers who improperly fail to pay earned wages in accordance with the Act. The concept of "earned wages" is fundamental to analysis under the Wage Act. The WARN Act requires sixty days' advance notice of a plant closing or mass layoff by business enterprises that employ at least one hundred full-time employees or are otherwise covered enterprises.

The SJC's decision in *Calixto v. Coughlin* arose from a Delaware corporation's failure to comply with the WARN Act. The corporation had abruptly ceased operations and, without giving the required WARN Act advance notice, had terminated all of its employees as a result of financial difficulties. Employees of the corporation brought a class action lawsuit against the corporation in federal court under the WARN Act and obtained a \$2 million default judgment. Being unable to collect the judgment against the insolvent corporation, they brought a class action against the officers of the corporation under the Wage Act for the amount of the default judgment and further sought to assert a derivative claim as creditors of the corporation. A Superior Court judge granted a motion to dismiss the employees' complaints for failure to state a claim, and an appeal to the SJC followed.

The employees' claim in the case raised a key question: are WARN Act damages "earned wages" for purposes of the Wage Act? The SJC rejected the employees' contention that WARN Act damages were earned wages that would trigger Wage Act penalties. The SJC applied the "plain and ordinary meaning" of the term "earned wages". The SJC held that to be "earned wages" under the Wage Act, unpaid wages must be owed for work actually performed and a payment for the work must actually be due at the time of suit. "Wages" for work that would have been performed if a WARN Act notice had been timely given and for which payment was not presently due did not qualify as "earned wages" for purposes of the Wage Act.

The SJC similarly rejected the employees' claims that the officers of the corporation were liable to the corporation for breach of their fiduciary duties in causing the corporation to incur WARN Act liability¹. As the SJC noted, under Delaware law, creditors of an insolvent corporation have standing to maintain derivative claims² against directors³ for breaches of fiduciary duties. However, under Delaware law, these creditors do not have a right to bring a direct claim for breach of fiduciary duty against directors. The SJC found that on the facts of this case, the fiduciary duty claim "simply repackages" the employees' argument that the officers breached duties owed to the employees under the WARN Act. The SJC noted that "[b]y its express terms, the WARN Act is the exclusive remedy for WARN Act violations."

The decision in this case is an important one for officers of corporations that are insolvent or nearing insolvency and that have operations in Massachusetts. As determined by the SJC, the Wage Act's substantial penalties will not apply to the results of a failure to provide timely notices under the WARN Act and the corporate officers will not be liable under the Wage Act for such penalties. Moreover, in a Massachusetts action relating to a Delaware corporation based on facts similar to those in this case, a claim against officers of a

corporation with respect to WARN Act damages brought by employee creditors, though, in the SJC's words, "styled" as a derivative claim, cannot be used to circumvent limitations of the Wage Act in order to create substantial liabilities for corporate officers. Some care must be exercised in applying this decision in other contexts. The decision does not provide guidance as to whether generally a Massachusetts court would follow the Delaware approach to rights of creditors to bring derivative claims in a case involving a Massachusetts corporation nor does it suggest a result in situations where claims asserted by creditors are more clearly derivative in substance and remedy sought.

1. The SJC stated that the Massachusetts corporate statute required that Delaware substantive law be applied to the derivative claims and their disposition.
2. A derivative claim is a claim brought by stockholders of a corporation to assert rights of the corporation on its behalf.
3. The SJC did not distinguish the corporation's officers from directors for this purpose.

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