

Class Certification And The Underpants Gnomes

Law360, New York (December 3, 2010) -- In an early episode of the cartoon series "South Park," a boy living in South Park, Colo., discovered that gnomes were coming into his bedroom each night and stealing the underwear out of his dresser. When the main characters of the show finally caught up with these gnomes and asked them why they were taking the underpants, the gnomes explained that it was all part of their three-step business plan. Step one was to gather large quantities of underpants, and step three was to make big profits. Unfortunately, none of the gnomes had any idea what step two was; each assumed that somebody else in their organization knew the answer.

Many a plaintiffs attorney's approach to wage-and-hour class actions has become surprisingly similar to the gnomes' business plan, with plaintiffs lawyers playing the role of the gnomes (and courts sometimes enabling them in their thinking). Step one is to have the case certified. Step three is to win a big judgment at trial. Very little attention has been paid, however, to the crucial step two — how to try the case in a way that a court can reasonably manage it while still protecting the defendant's due process rights.

Perhaps one driving reason for plaintiffs lawyers' continued gnome thinking is the unwillingness of many courts to force the plaintiffs to explain step two at the class certification stage. While the U.S. Court of Appeals for the Third Circuit in *In re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), encouraged trial courts to require the party seeking certification to present a trial plan that the trial court should evaluate before certifying the case, that case has not been adopted by the Ninth Circuit for wage-and-hour class actions, and it does not appear that it has yet had a significant impact on the class certification practices of trial courts within California.

For years now, to obtain certification in a wage-and-hour case in California, it has often been sufficient for the plaintiff to intone generalities about how "innovative procedural tools" such as "statistical sampling," "expert testimony" and "representative evidence" will allow for a manageable class trial. No less an authority than the California Supreme Court, in *Sav-on Drug Stores Inc. v. Superior Court*, 34 Cal. 4th 319, 339-40 (2004), has encouraged this mode of thinking by blessing the concept of using these tools without specifying how the tools actually might be applied to a wage-and-hour class action. If a court cites *Sav-On* and mentions the possibility that innovative procedural tools will make the trial manageable, that is generally sufficient to avoid reversal of a certification decision.

Another factor that promotes continued gnome thinking is the pressure on employers to settle once certification is granted. When a case is certified, the massive potential exposure and the vast litigation expense attendant to preparing for a class trial typically succeed in pressuring all but the most well-financed or obstinate employers to settle. Even when an employer is willing to take a case to trial, a court has the power — and many seem to have the inclination — to bring tremendous pressure to bear to encourage settlement, such as denying all motions in limine until trial starts, repeatedly delaying the trial date on the eve of trial or even requiring that all direct examination be prepared in advance of trial in writing.

As a result, the vast majority of class actions resolve before the plaintiff is forced to explain how the case actually will be tried.

There have been some recent signs, however, that courts are beginning to demand plaintiffs explain the all-important step two and are decertifying cases in which the plaintiffs lack a good answer.

Most recently, in *Batiz v. American Commercial Security Services*, EDCV 06-00566-VAP (C.D. Cal. Sep. 22, 2010), Judge Virginia Philips decertified a Fair Labor Standards Act collective action that had asserted off-the-clock claims on behalf of more than 3,000 security guards. The plaintiff failed to timely designate an expert who could use the tools of "representative testimony" and "statistical sampling" to actually prove classwide damages. The Batiz court recognized that it needed expert testimony to use sampling, and with none available, all that plaintiffs could do to rationally prove classwide damages would be to have hundreds, or even thousands, of individual class members testify at trial. The court recognized that such a trial plan presented only unmanageable options for trying the case:

"The first alternative is for the court to permit plaintiffs to have each member of the class testify as to his or her individual damages. Given that the class consists of 3,065 members, however, this would be a tremendous burden on plaintiffs' and defendants' counsel as well as the court, and would be procedurally unmanageable. Alternatively, the court could attempt to extrapolate the amount of damages based on a smaller sample of the class. This would not be appropriate either as the court does not have the necessary evidence upon which to determine classwide damages, and any attempts based on the limited evidence before the court would inevitably 'result in some plaintiffs being prejudiced by underpayment on their claims as well as prejudice the defendant[s], which will overpay some of their claims.'" *Id.* at 9.

Judge Phillips is not the first district court judge within California to decertify on these grounds. Earlier this year, in *Weigle v. Fedex Ground Package System Inc.*, 267 F.R.D. 614 (S.D. Cal. 2010), the court decertified a Rule 23 class action when it was forced to address how the case would actually be tried. The case challenged the exempt status of some 500 dock managers, and the defendant argued that individualized differences in how dock managers spent their time made the case unmanageable for trial. The plaintiffs' expert admitted that, if the court wanted to obtain results with a +/- 5 percent margin of error and a 95 percent confidence level, at least 227 witnesses would need to testify.

While a smaller number of witnesses could testify if the court were willing to increase the margin of error, the court recognized that to reduce the number of witnesses to a manageable level would require a margin of error so high as to preclude the jury from drawing "reasonable and rational conclusions."

Two years earlier, Judge Dean Pregerson of the Central District of California also decertified a Rule 23 exempt misclassification class action in *Marlo v. United Parcel Service*, 251 F.R.D. 476 (C.D. Cal. 2008). The sole "collective proof" of liability that the plaintiff offered to manage individualized issues was a fatally flawed survey, as the plaintiff's expert admitted he had not taken any steps to ensure the sample used for the survey was representative of the population. Other than a junk science survey, the plaintiff had no plan to manage individualized issues, and thus failed to meet the requirement of "provid[ing] common evidence to support extrapolation from individual experiences to a classwide judgment that is not merely speculative." *Id.* at 486-87.

While the judges in these cases should be commended for taking seriously the notion of how a class action can be tried fairly and manageably, these cases are all at the district court level.

Accordingly, they are not binding on other courts. Employers can only hope that California appellate courts will follow the district courts' lead and provide further guidance to courts on when a case properly can and cannot be litigated as a class action. While class actions can serve a useful role in enforcing employees' rights under the wage-and-hour laws, for them to function fairly, it is crucial that courts and litigants spend more time addressing how these cases can actually be tried using collective proof.

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