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LA APPELLATE COURT REBUFFS CLASS COUNSEL'S EFFORT TO UNILATERALLY RE-WRITE GM PICK-UP TRUCK SETTLEMENT

by: Thomas A. Casey, Jr.

For the second time in the same case, a Louisiana appellate court has held that a district court cannot alter the terms of a class action settlement agreement without the consent of all parties to the settlement. *White v. General Motors Corp.,* 2002-0771 (La. App. 1 Cir. 12/20/02). Several years ago, General Motors and class counsel for the approximately 5 million member plaintiff class reached agreement in a nationwide class action involving certain General Motors pick-up trucks. Pursuant to the settlement, General Motors agreed to issue settlement certificates (that could be redeemed toward the purchase of another GM vehicle) to class members who completed applications for the certificates. The settlement required that the certificate issue in the first instance only to a class member and set forth detailed rules on how and when the certificates could later be transferred to a third party.

In the first appeal on this issue several years ago, General Motors objected to the district court's approval of something class counsel had called a "cash option." Class counsel wanted a "cash option" letter sent to class members along with the final notice of settlement that would have allowed class members to receive $100 instead of a settlement certificate in exchange for assigning the certificate to class counsel or their agents. Assignments would have enabled the mass sale of certificates to fleets and dealers in a market created by class counsel. GM argued in that appeal that the settlement did not provide for a cash option offer and, indeed, conflicted with the agreement's requirement that certificates be issued only to settlement class members. The Louisiana Court of Appeal for the First Circuit agreed. *See White v. General Motors Corp.,* 99-2585 (La. App. 1 Cir. 11/3/00), 775 So.2d 492, *on reh'g,* 99-2585 (La. App. 1 Cir. 1/16/01), 782 So.2d 9.

After GM prevailed in the Court of Appeal, GM mailed the final notice of settlement and proof of claim form to the 5.8 million eligible class members. On the same day, class counsel separately mailed the class notice of a "cash alternative," similar to the previously invalidated "cash option." GM, once again, turned to the First Circuit after the district court overruled its objection to the "cash alternative" offer. Like the previous "cash option" offer, the "cash alternative" would have allowed class members to receive $100 instead of a settlement certificate by executing a power of attorney and a request that the certificate be issued to class counsel instead. For the sec-

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ond time, the First Circuit found that the offer by class counsel violated the settlement agreement and even termed the offer "deceptive." *White v. General Motors Corp.,* 2002-0771 (La. App. 1 Cir. 12/20/02). The appellate court noted that the governing settlement agreement provided specific procedures for the settlement and, furthermore, the agreement provided that there could be "no changes or additions" to the settlement agreement without the consent of all parties. Thus, class counsel's offers, which were not provided for in the settlement agreement, violated it. As a remedy for class counsel's breach of the settlement agreement, the court (1) ordered class counsel at their expense to provide a new final notice to the class, (2) ordered class counsel to send a letter at their expense explaining that the "cash alternative" offer was invalid, and (3) remanded the matter to the district court for a possible damages action by General Motors against class counsel.

FIFTH CIRCUIT REVERSES CLASS CERTIFICATION OF RICO FRAUD CLASS BECAUSE INDIVIDUAL ISSUES PREDOMINATE

by: Nan Roberts Eitel

Consistent with its recent class action jurisprudence, the Court of Appeals for the Fifth Circuit has, once again, reversed a district court's decision certifying a class under Rule 23(b)(3) because individual issues predominate over common ones. *Sandwich Chef of Texas, Inc., d/b/a Wall Street Deli v. Reliance Nat'l Ins. Co.***,** No. 01-20924 (1/21/03).

In *Sandwich Chef*, the representative plaintiff claimed that 141 defendants overcharged thousands of employers in 44 states for workers' compensation insurance premiums, prompting plaintiff to assert fraud claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. In particular, plaintiff claimed that defendants passed through their costs for "legislatively-established involuntary markets," the so-called "assigned risk pools" or "residual markets" where employers who cannot obtain coverage in the voluntary market can obtain workers' compensation insurance coverage. In many states, workers' compensation insurers operating in the voluntary market must reinsure a state's residual market. To recoup these costs, insurers passed these "residual market loads" ("RMLs") or charges on to their employer-customers in the voluntary market, including plaintiff.

Plaintiff contended that the pass-through of these RMLs violated the

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regulator-approved rate plans and that defendants deceived state regulators by passing through the full RML. Defendants, however, contended that the parties negotiated "all pricing and payment terms, including RML expenses . . . and [that defendant] disclosed to Wall Street [the representative plaintiff] that the residual market charges differed from its rate filings." Thus, according to defendants, the customized insurance packages and individual negotiations resulted in a "unique record of oral and written communications directly relevant to the RICO fraud claim," and, therefore, individual issues concerning these communications and a particular plaintiff's knowledge and reliance would predominate over common issues.

The district court accepted plaintiff's theories that a trial could avoid proof of individual reliance issues and certified the class. According to the district court, under the so-called "invoice theory" plaintiffs could establish "proximate cause" without showing individual reliance on any alleged misrepresentations because the payment of the written invoices established that all plaintiffs suffered the same injury caused by an inflated invoice. The district court further ruled that a plaintiff's payment of an invoice established "circumstantial evidence of reliance." Under the so-called "target theory," proof of reliance by individual class members on alleged misrepresentations would not be required where plaintiffs alleged a fraud-on-the-regulator theory and showed that the regulators relied upon defendants' regulatory filings. Moreover, the district court stated that class certification "was particularly appropriate when purchasers sought redress for widespread commercial abuses."

Finding that the district court erred as a matter of law, the Fifth Circuit reversed the class certification decision because individual, "plaintiff-specific issues of reliance and causation" will predominate over common issues, making certification under Rule 23(b)(3) inappropriate. Moreover, the "pervasive issues of individual reliance that generally exist in RICO fraud actions create a working presumption against class certification." The Fifth Circuit also cautioned once again that a district court "must consider how a trial on the merits would be conducted if a class were certified." Although the Fifth Circuit acknowledged that plaintiffs could offer expert testimony about invoices and commercial transactions to justify a finding in their favor on the reliance issue, "such opinion evidence would not justify excluding proof demonstrating a lack of reliance by individual plaintiffs." The district court apparently only reviewed how plaintiff's case on the merits would be tried. Thus, the district court "did not adequately account for individual issues of reliance that will be components of defendants' defense against RICO fraud."

The Fifth Circuit likewise ruled that the "target theory" of fraud-on-the-regulators could not "excuse proof of individual reliance on fraudulent predicate acts." Although the target theory can excuse such proof in very narrow circumstances, those narrow circumstances were not present in the *Sandwich Chef* case.

Sandwich Chef is wholly consistent with the Fifth Circuit's decisions in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000), and *Patterson v. Mobil Oil Corp.,* 241 F.3d 417 (5th Cir. 2001), where the court reversed class certification decisions because the "facts required individual proof of reliance." Moreover, consistent with *Castano*, the Fifth Circuit reiterated that a district court must know how a case, including both claims and defenses, will be tried. Even though a class plaintiff may present a trial plan that seemingly obviates the need for individual proof, defendants cannot be deprived of their right to present individual proof on relevant defenses.

EMPLOYEES TURN TO WAGE AND HOUR COLLECTIVE ACTION PROCEDURE TO GANG UP ON EMPLOYERS

by: Alan F. Kansas

Although high profile race or sex discrimination class action cases have typically given employers plenty of reason for concern, the new millennium has seen a rejuvenation of multiple employee cases filed under the Fair Labor Standards Act's ("FLSA") collective action procedure. This "collective action" procedure allows employees to cumulate claimants and damages claims in a single case, similar to traditional class actions, but without passing the more rigorous procedural tests applied to class actions. Attorneys for employees have recently discovered that these rules can provide a huge advantage compared to other types of mass tort and class action cases, which has resulted in a wave of FLSA collective actions. Recently, that wave hit shore in federal court in Louisiana with the conditional certification of a massive, nationwide collective action. *Camp v. Progressive Corp.*, 2002 U.S. Dist. LEXIS 21903 (E.D. La. 2002).

First enacted in 1938, the FLSA is one of the federal government's longest standing employment laws. The FLSA requires employers to pay overtime when an employee works more than 40 hours in a work week–

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unless the employee fits within one of the law's "white collar" or other exceptions. The FLSA's penalty and procedure rules can turn minor compliance errors into major litigation nightmares. A successful plaintiff-employee can recover double the amount of lost wages under the FLSA's liquidated damages provision. Moreover, a successful plaintiff-employee is entitled to attorney's fees, and fee awards are sometimes greater than the wage recovery. This provision provides economic incentive for attorneys to pursue cases even when the amount of underpayment is relatively small.

In *Camp*, a claims representative for a national insurance company claimed the company violated the FLSA by failing to pay her overtime compensation (one and a half times her regular hourly rate) for working more than 40 hours per week. Camp argued that she was improperly classified as an "administrative" employee under the FLSA's exemption from overtime pay. Camp filed a collective action lawsuit under the FLSA seeking to represent all current and former salaried claims representatives of the insurance company.

Camp asked the trial court to conditionally certify her case as a collective action and allow her to send a notice to all of the insurance company's other claims representatives advising them of their right to join the lawsuit. "Conditional" certification means that the court allows the case to proceed as a collective action but can later re-evaluate whether the employees' are "similarly situated" such that their claims can be resolved in one suit. Unfortunately, the FLSA provides almost no guidance for courts deciding which cases should be allowed to proceed as collective actions and which procedural rules should apply to a case once it is determined to be a proper collective action. The law simply states, without elaboration, that FLSA cases may be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Over the years, the phrase "similarly situated" has spawned a two-step procedure and has taken on two different meanings, neither of which has been clearly defined by the courts. At the first stage, usually right after the suit is filed, the employee requests conditional certification and seeks the court's permission to send an official notice to other potential claimants advising them that they can join the suit by signing a piece of paper and returning it to the employee's attorney. Typically, 10 to 20 percent of the potential claimants will opt into the lawsuit.

At the second stage, after discovery is largely complete, the employer can file a motion to decertify the collective action. At this stage, "similarly situated" means something different because the court takes a more detailed look at the claims of the employees to determine if they are sufficiently "similarly situated" for the case to be tried as a collective action. Courts often decertify such actions because the claims of the employees typically involve individual questions of fact and law that cannot be fairly and efficiently decided at a representative trial (*i.e.*, where the "representative" employee puts on his or her case and the court simply applies the results to the opt-in employees without considering evidence specific to their claims). If the court decertifies the collective action, the opt-in employees are dismissed, and the original employee proceeds to trial on his or her individual claim.

In *Camp*, the insurance company argued against conditional certification by noting that the proposed class applies to claims representatives in 50 states with different job titles, different job duties, and different pay grades. The court, however, after considering the "lenient standard" for conditional certification and the "minimal evidence" necessary at the first stage, ruled that Camp is similarly situated to the other claims representatives in all 50 states, granted conditional certification, and allowed Camp to send an approved notice to all of the potential opt-in claimants.

Although the court's decision in *Camp* was consistent with those of other courts, it expressed concerns about the two step approach by stating that it may prove "wasteful and inefficient." While the court did not explain further, it may have been referring to the same concerns expressed by other commentators. Without reviewing whether the representative employee and proposed opt-in employees' claims are sufficiently similar to be decided on a collective basis, the process allows the disclosure of the names and addresses of all of the potential claimants in the proposed collective action and dissemination of an official court notice advising them of the suit and their right to "opt-in." Then, at the second stage, *after* employees have opted-in, courts frequently decertify the case and dismiss the claims by the opt-in claimants. By then, however, the court, attorneys, and parties have already invested significant time and money in the process.

To employers, this process is harmful in a number of ways—each of which makes the process more attractive to attorneys for employees. First, the official court-approved notice gives an impression of legitimacy to the lead employee's effort to recruit opt-ins. The procedure also forces employers to turn over the names and addresses of all potential claimants without requiring the lead employee to make any showing that the cases can be decided as part of the proposed collective action. Even if the court ultimately decertifies the case and dismisses the opt-in employees' claims, the opt-ins

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may still file their own lawsuits. In fact, they are more likely to file their own suits because they already have a lawyer and have decided to pursue their claims.

Because attorney's fees are available to a successful employee, his or her attorney has plenty of motivation to use the notice procedure as a springboard for numerous individual lawsuits by the former opt-in employees. The result to the employer can be very expensive—numerous cases to defend in different courts, with potential liability for attorney's fees in each one. This forces the employer to make a real Hobson's choice—allow the case to proceed as a collective action, even though the procedure may be an unfair way to decide the claims, or move to decertify and face the possibility of multiple lawsuits in multiple jurisdictions.

These factors have likely played a role in many employers agreeing to expensive settlements of large collective actions. A telephone company paid $62.8 million to settle two wage and hour collective actions. A coffee purveyor settled one for $18 million, and a poultry producer is paying $20 million to settle a U.S. Department of Labor (DOL) case and related cases brought by individual employees. These are just a few of the results that have put wage and hour claims, previously left mostly to the DOL's Wage and Hour Division to pursue, on the legal "what's hot" list.

The best way to avoid a FLSA collective action is to ensure wage and hour compliance. Many large employers increase their risk of such claims by doing nothing. But regularly reviewing employee classifications and duties and employer pay practices is the best way to prevent lawsuits and liability.

Five common FLSA compliance errors include:

1. Misclassifying employees as exempt from overtime pay requirements when they do not qualify for any of the "white collar" exceptions;

2. Making salary deductions from employees' pay that jeopardize their exempt status;

3. Treating employees as independent contractors;

4. Failing to include non-discretionary bonuses in calculating an employee's regular rate of pay; and

5. Improperly substituting compensatory time off (which is only available to certain "public" employees) for overtime pay.

The best way to find and eliminate potential problems and to avoid wage and hour litigation is to have an attorney audit your company's practices. For more information, contact Alan Kansas at akansas@joneswalker.com.

ABA TASK FORCE AND HOUSE OF DELEGATES RECOMMEND EXPANDING FEDERAL JURISDICTION OVER CLASS ACTIONS

by: Madeleine Fischer

The ABA Task Force on Class Action Legislation has voiced its support for legislation that would expand federal court jurisdiction over class actions. In a February 2003 report, the Task Force agreed that some type of federal legislation should be considered to address the problem of multiple overlapping or competing class actions when similar class action cases are filed in a variety of state courts. "Such overlapping class actions consume unnecessary litigation resources, encourage 'gaming' of court filings, and risk inconsistent treatment of like cases." Report of the ABA Task Force on Class Action Legislation, p. 3. At the February mid-year meeting in Seattle, the ABA House of Delegates passed a resolution based on the Task Force Report that seemingly endorses expansion of federal class action jurisdiction, but the resolution also expresses reservations about undue interference with state and federal relations. The resolution likewise opposes any legislation that conflicts with or addresses the requirements of existing Rule 23.

The Task Force has suggested that the following factors might be incorporated in some fashion in legislation that would somewhat expand federal court jurisdiction for class actions while "serv[ing] the objective of leaving in state courts those cases that properly belong there" (*id.*, p.6): (1) aggregating amount in controversy by combining the claims of all class members to reach jurisdictional amount; (2) setting a minimum number of plaintiffs; (3) considering the percentage of the class who are residents of the forum state as well as whether the defendants are all residents of the forum state; (4) revision of standards for removal from state to federal court, perhaps giving the federal court some discretion in whether to accept or reject the case; (5) considering whether overlapping classes or cases exist.

An expansion of federal jurisdiction for class actions that involve class members from multiple states or involve issues of nationwide impact would solve the problem that arises now when similar class actions are filed

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in different states. The cases could be removed to federal court and then consolidated under the multi-district litigation procedures.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact our Class Action Defense practice group:

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