

# Management Alert



## Court of Appeal Delivers On Newspaper Carrier Misclassification Case

On July 2, 2012, the California Court of Appeal affirmed a trial court ruling denying class certification to a group of newspaper carriers claiming they were misclassified as independent contractors. In *Sotelo v. Medianews Group, Inc.*, the Court of Appeal concluded that plaintiffs' proposed class of newspaper carriers could not be certified because the class was not ascertainable and common issues of law and fact did not predominate.

### The Trial Court Ruling

Plaintiffs, a group of seven newspaper carriers, sought certification of a class of all newspaper carriers who contracted with Medianews Group—newspaper publishers and conglomerates operating in California—claiming they were misclassified as independent contractors. They argued that, as a result of the misclassification, they were entitled to the benefits of employment, and pled causes of action for, among other things, violation of California minimum wage and overtime laws, and failure to provide meal and rest breaks.

The trial court denied plaintiffs' motion for class certification. The court determined that the class was not ascertainable and there was not a preponderance of common issues of fact and law. Specifically, there was no objective criteria by which class membership could be determined, because even if a person signed a contract to deliver newspapers, to ascertain whether they actually bagged and delivered newspapers during the class period would require a series of mini-hearings. Likewise, the trial court found that individualized issues predominated because merely determining whether the newspaper carriers were misclassified as independent contractors was insufficient; plaintiffs still had to show there was a uniform policy and practice with respect to overtime and meal and rest breaks that could be established by common evidence. Plaintiffs appealed.

### The Appeal

Plaintiffs argued on appeal that the proposed class was ascertainable because it was sufficient for class members to come forward and identify themselves. Alternatively, the class could be limited to include only those individuals who previously had been identified by defendants.

The court acknowledged that self-identification by potential class members was appropriate in circumstances where class members had direct relationships with defendants. Here, however, the unidentified class members had no discernable relationship with defendants because they folded and bagged newspapers for individuals who had the relationship. As such, there was a complete lack of objective evidence, such as business records, that would indicate class membership, so there was no way to notify prospective class members. Thus, the "theoretical ability to self-identify as a member of the class" was useless where "one never receives notice of the action."

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Plaintiffs further argued that since defendants were responsible for the difficulties in identifying putative class members because they failed to keep accurate records, they should not be permitted to defeat class certification by their own wrongdoing. The court, however, disagreed. Noting that defendants' obligation to track members of the class depended on the merits of the suit being brought—i.e. whether they were employees or independent contractors—the plaintiffs could not “bootstrap their action merely by assuming as true what they are obligated to prove.”

Plaintiffs' alternative suggestion to narrow the class to include only those newspaper carriers previously identified was also rejected by the court. While limiting the class would result in an ascertainable class because a list of putative class members had been generated during discovery, the proposed class still failed to meet the other requirements for class certification, namely predominance.

On the issue of predominance, the court reiterated that merely showing that the putative class was misclassified was insufficient, because this was only one part of the equation. Even if plaintiffs showed that the putative class was misclassified, plaintiffs still had to provide evidence showing that there was a uniform policy or practice requiring newspaper carriers to work overtime. Similarly, to win certification of a meal and rest break class, plaintiffs had to allege a uniform policy on defendants' part to deny putative class members the ability to take meal and rest breaks. It was insufficient for plaintiffs to merely claim that because they were misclassified, they were necessarily compelled to work overtime and were unable to take meal and rest breaks.

## What *Sotelo* Means for Employers

The court's ruling on plaintiffs' motion for class certification is generally helpful to employers as the court made clear that to certify a class plaintiffs must show through common evidence that there was a uniform policy and practice in place. The case, however, may have a rather limited application, arguably germane only to misclassification class actions.

As the court notes, most class actions seeking remedies under the Labor Code will not have the same specific ascertainability and notice issues plaintiffs confronted here because employers are required to maintain business records that can identify putative class members. The court's ruling prohibiting the bootstrapping of an underlying claim to establish ascertainability and predominance, however, may be useful in those contexts where an employee claims a class-wide entitlement as a result of a showing on the merits. The class action inquiry in these circumstances will consist of two parts: (1) whether the putative class member is entitled to the benefit in the first instance (i.e. was he or she properly classified); and (2) whether there was a uniform policy to deprive the class member of the benefit. Thus, given the multi-level inquiry, employers will have additional opportunities to argue that individual issues predominate and class certification is inappropriate.

By: *Jeffrey A. Berman* and *Anthony J. Musante*

*Jeffrey A. Berman* is a partner in Seyfarth's Los Angeles office and *Anthony J. Musante* is an associate in Seyfarth's Sacramento office. If you would like further information, please contact your Seyfarth attorney, Jeffrey A. Berman at [jberman@seyfarth.com](mailto:jberman@seyfarth.com) or Anthony J. Musante at [amusante@seyfarth.com](mailto:amusante@seyfarth.com).

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