Gig Economy Companies Can't Thwart Class Certification with Shoddy Recordkeeping

By Emily Melvin

Gig economy companies increasingly face class action lawsuits brought by their workers. Uber, Lyft, Instacart, Doordash, and Amazon, to name a few, have confronted multiple lawsuits alleging the companies misclassified employees as independent contractors. While the merits of these claims are vigorously debated in the courtroom, legislature, and public arena, some courts may have quietly—and unintentionally—made it easier for workers to seek class certification for these claims.

The Third Circuit Sets the Scene

In *Hargrove v. Sleepy's LLC*, No. 19-2809 (3d Cir. Sept. 9, 2020), a group of delivery drivers for Sleepy's brought suit against the New Jersey-based mattress company, alleging that it misclassified them as independent contractors and violated various employment laws in the process. Like Amazon's drivers, Sleepy's drivers were nonexclusive and could work for other companies when not delivering for Sleepy's. However, the New Jersey district court found that certain named drivers were indeed misclassified as independent contractors.

The plaintiffs then added additional drivers to the lawsuit and sought class certification. To do so, the drivers had to show that the class members were "currently and readily ascertainable" using an "administratively feasible" method relying on "objective criteria." The drivers submitted thousands of pages of contracts, driver rosters, security gate logs, and pay statements obtained from Sleepy's as evidence. They claimed the documents could be cross-referenced to identify the class members. However, many of the records contained gaps, which Sleepy's claimed rendered them too unreliable and incomplete for class certification purposes. The district court agreed and denied class certification to the drivers.

On appeal, the Third Circuit reversed the district court's denial of class certification, holding the trial court erred by denying class certification based on gaps in Sleepy's records.

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First, the Third Circuit found the evidence sufficient because a plaintiff need not identify all the members at the class certification stage. Instead, a plaintiff need only show that the class members *can be* identified or ascertained.

Second, and most importantly, the Third Circuit refused to reward Sleepy's for its inadequate record-keeping. The Third Circuit held that where an employer's lack of records makes it more difficult to ascertain the members of an otherwise objectively verifiable class, the employees in the class should not be penalized for the employer's faulty record keeping.

According to the Third Circuit, to hold otherwise would contradict the United States Supreme Court decisions in *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S. Ct. 1036, 1040, 194 L.Ed.2d 124 (2016), and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). In those decisions, the Supreme Court held that an employee's wage claims against an employer should not suffer simply due to an employer's failure to maintain pay records that it is required to keep by law. The Third Circuit extended the same reasoning to the case at hand.

Finally, the Third Circuit rejected Sleepy's argument that it acted in good faith when it failed to keep complete records for the proposed class members because it thought they were independent contractors. The Third Circuit emphasized that allowing employers to thwart class

actions with this argument would incentivize employers to keep incomplete records to avoid potential lawsuits.

Uncertainty for Gig Economy Companies

Hargrove begs the question: Did the Third Circuit just make it easier for plaintiffs to certify class actions? The answer is not so straightforward. *Hargrove* may simply soften the edges around the Third Circuit's stricter-than-most class certification standards by opening the door for litigants with incomplete evidence.

Historically, federal courts held that a class is ascertainable if it is clearly defined by objective criteria. *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657 (7th Cir. 2015). In 2013, the Third Circuit created a circuit split when it added the requirement that the method of identifying class members be "administratively feasible." *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 (3rd Cir. 2013). This standard has been dubbed the "heightened standard" of ascertainability and has been adopted by only a handful of courts. Circuits rejecting the heightened standard argue that it upsets the balance of interests codified in Rule 23 of the Federal Rules of Civil Procedure. *See, e.g.*, *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017). Indeed, the Third Circuit has rejected class certification in cases where other circuits might grant it.

Hargrove gave the Third Circuit a chance to show that the heightened standard has some muscle to it. The Third Circuit meticulously distinguished this case from its own adverse precedent. For instance, it observed that would-be class members in prior cases proposed identifying the class with records that had yet to be sought in discovery, which the Third Circuit found insufficient. Plaintiffs in other cases relied primarily on affidavits, which the court also found insufficient. In contrast, here, the Sleepy's drivers were "stacks away from such a dearth of documents" and their reliance on affidavits was secondary.

So, what does this mean for gig economy class actions? It is unclear whether other circuits will adopt a per se rule that purported class members are not to be penalized for an employer's insufficient recordkeeping. While *Hargrove* may be limited to its facts, employers should take heed that the Third Circuit's reasoning may resonate with other courts.

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