



May 12, 2011

Contact:
Brian P. Rigonan
Attorney at Law
415.984.8531
brigonan@mpplaw.com

Appellate Courts Continue to Uphold Class Certification Denials Based on Specific Issues Predominating

In *Mora v. Big Lots Stores, Inc.*, No. B221949 (Second District, filed April 18, 2011), for the second time in two years, the Second Appellate District upheld a trial court's denial of class certification based on specific, individual issues predominating over common questions of fact or law (*Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723 was a prior case upholding a similar trial court ruling for similar reasons).

Facts of the Case

Plaintiffs alleged that Big Lots intentionally and improperly misclassified store managers as exempt. They contended that store managers were classified as exempt based solely on their job description rather than the actual tasks performed. Their theory of liability was that store managers' actual duties were predominately nonexempt, and that any purportedly exempt duties involved little or no discretion because Big Lots strictly dictated its stores' operations through uniform corporate policies and practices, reinforced through rigorous compliance with corporate manuals and action plans, standardized training, and supervision by district managers.

The class certification hearing came before the trial court after three years of extensive discovery. Plaintiffs submitted deposition testimony from Big Lots, declarations from 44 putative class members, and a declaration from an expert about how a survey *could be* created to determine how much time class members spent on managerial versus non-managerial duties. Big Lots presented declarations from 141 putative class members and district managers, deposition testimony from 23 of the 44 declarants plaintiffs submitted, and expert reports based on in-store observations of 44 different store managers.

The trial court found plaintiffs' evidence unpersuasive. It evaluated the 44 declarations as repetitive, not specific, and not detailed. It also determined that for some of plaintiffs' 44 declarations, a declarant's deposition testimony contradicted his or her declaration. Finally, it viewed plaintiffs' expert testimony as unhelpful because it merely discussed the proper methodology for conducting a proposed survey, not facts or conclusions gleaned from a survey actually performed. In comparison, the trial court evaluated Big Lots' declarations as specific and supported by details without being repetitive or identical. The trial court also emphasized that, although not perfect, Big Lots' expert testimony was factual not theoretical.

From the evidence presented, the trial court concluded that Big Lots plainly and clearly showed that it did not operate its stores or supervise its managers in a uniform and standardized manner; rather, the

activities of store managers varied substantially based on multiple and differing factors. Accordingly, the evidence did not support plaintiffs' liability theory. In other words, because there is no uniformity or standardization, a court could not determine on a class-wide basis whether or not store managers were misclassified. Rather, it would require a case-by-case analysis of each store managers' unique circumstances. As a result, the trial court concluded that common questions of fact or law did not predominate.

Throughout its opinion, the appellate court emphasized both the trial court's careful analysis of the evidence, and the deferential treatment it must give to the trial court's evaluation of that evidence. The appellate court disagreed with plaintiffs that the trial court improperly considered the likelihood of success on the merits rather than simply considering whether there are common questions of fact and law. The appellate court concluded that the trial did not apply an improper legal standard, but instead, reasonably concluded that the plaintiffs' theory of recovery was not susceptible to common proof. As a result, the appellate court held that the trial court properly denied certification.

Finally, the appellate court found no reversible evidentiary errors. Regarding the plaintiffs' evidentiary objections, the trial court was within its discretion to overrule them. Regarding Big Lots' objections, although some were improperly sustained, no prejudice ensued since the specific evidence or argument excluded was presented by plaintiffs through other means, and therefore, fully considered by the trial court.

Impact for Employers

This is a clear victory for employers. Hopefully it is part of a developing trend by trial and appellate courts to force plaintiffs to establish the grounds for class certification through legitimate, factual evidence, rather than unsupported allegations in declarations or potential scientific evidence.