New Notice Standard Established in FLSA Collective Actions

By John M. McNichols, *Litigation News* Associate Editor

Employers now have expanded protection from broad collective actions under the Fair Labor Standards Act (FLSA). Before a court can authorize notice of a collective action to potential plaintiffs, their employer must have an opportunity to show that those plaintiffs are subject to arbitration agreements waiving their rights to sue, the U.S. Court of Appeals for the Seventh Circuit held. Because notice often drives settlement discussions in FLSA collective actions, ABA Litigation Section leaders expect that, if followed, the ruling will increase employers' settlement leverage.

In *Bigger v. Facebook*, a Facebook employee filed a putative collective action against Facebook alleging violations of the overtime-pay requirements. Facebook objected to the plaintiff's motion to certify on the ground that many employees had signed arbitration agreements waiving their rights to participate. The U.S. District Court for the Northern District of Illinois granted the plaintiff's motion.

The Seventh Circuit reversed, holding that before the district court could send notice to the plaintiff's proposed group, the employer should have an opportunity to show that individual members of the group were subject to valid and enforceable arbitration agreements. The court reasoned that although collective actions can enhance efficiency by resolving common issues in a single proceeding, they also present dangers, including the potential for adding pressure to settle simply by increasing the number of claimants, regardless of the merits of their claims.

Litigation Section leaders highlight the decision's emphasis on the import of notice in FLSA collective actions. "The decision is very important because it focuses on the notice stage, which is a controversial stage in this type of case," observes David E. Gevertz, cochair of the Section's Employment & Labor Relations Committee. "The danger to a corporate defendant in an FLSA collective action is that the notice can really expand the number of claimants, because it's an opt-in format," agrees Adam Polk, cochair of the Section's Class Actions & Derivative Suits Committee.

The *Bigger* decision is notable in its willingness to address the realities of litigation. "The value of the decision is that it explicitly acknowledges what practitioners already know, which is that the collective action notice can be the tail that wags the dog in wage and hour cases," Gevertz comments. "There is not an insignificant cost to gathering all of the information required by the notice, and the notice will solicit persons who may have other types of claims, all of which can create a host of satellite problems for the employer," he adds.

Polk agrees that "disproportionate discovery can be a factor in this type of case," but notes that the Seventh Circuit's remedy may be unnecessary. "In an ordinary class action, the existence of arbitration agreements among potential class members would be addressed as a typicality problem. That would work under FLSA, too," he states. Polk also warns that by litigating the validity of arbitration agreements at the notice stage, a court "may be establishing an arbitration requirement for absent class members, who may not even be represented. That's a problem."

For FLSA litigants and their counsel, *Bigger* helps set expectations about the role that arbitration agreements will play in litigation. This decision "is the first one to lay out the steps to determine whether arbitration agreements will limit the scope of the lawsuit. So for practitioners, it gives us a higher degree of confidence when we're talking with a client about the arbitration agreements that it has with its employees," notes Gevertz. "If you're a plaintiff's attorney, be cognizant of how you define your class, as certain potential members may be subject to arbitration. But if you're a defense lawyer, get the issue of arbitrability going right out of the gate, because the case gives you an opportunity to take a stand at an earlier juncture," Polk counsels.

DOJ Can Convict—But Can It Imprison?

By Ashlee E. Hamilton, *Litigation News* Contributing Editor

A person convicted of distributing marijuana may now assert that an annual rider for congressional appropriations bars his or her federal imprisonment. In *Sandusky v. Goetz*, the U.S. Court of Appeals for the Tenth Circuit allowed a man who had been imprisoned for operating a medical marijuana company to seek his immediate freedom on this basis.

In 2012, Aaron Sandusky, who was the president of a medical marijuana cooperative, was convicted in the U.S. District Court for the Central District of California of two counts of marijuana trafficking in California, where medical marijuana is legal. Sandusky was sentenced to 120 months in prison.

Sandusky filed a motion pursuant to 28 U.S.C. § 2255 to set aside or correct his sentence. A section 2255 motion must raise a challenge based on alleged violations of federal law. Sandusky argued that the Rohrabacher-Farr amendment bars his incarceration because it prohibits the U.S. Department of Justice (DOJ) from using funds to prevent states from "implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

Sandusky argued that the Federal Bureau of Prisons, an agency of the DOJ, violated the amendment by incarcerating him. The district court dismissed his motion, holding that his incarceration was not an expenditure of funds that prevented California from implementing its medical marijuana laws.

Because Sandusky was imprisoned in Colorado, he filed a petition for writ of habeas corpus in the U.S. District Court for the District of Colorado pursuant to 28 U.S.C. § 2241. "A section 2241 petition is filed in the place of incarceration and directly attacks execution of a federal sentence," explains David Schoen, Montgomery, AL, chair of the ABA Litigation Section's Criminal Justice Subcommittee of the Civil Rights Litigation Committee.