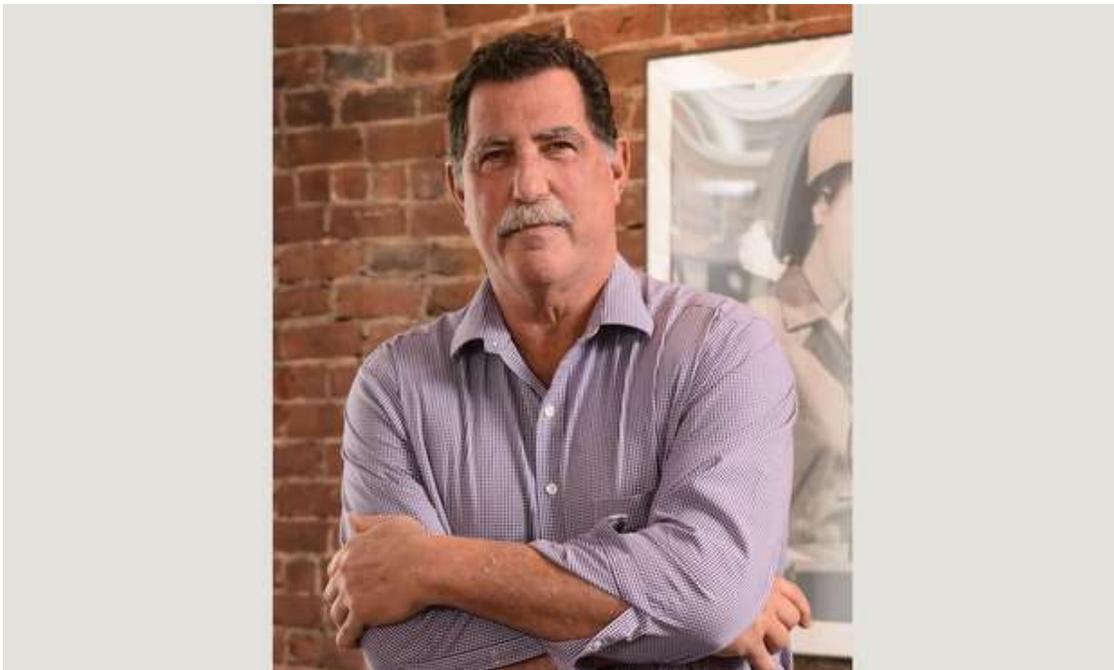


In Battle Over Gig Economy Employee Status, Certification Wrongly Withheld From Class of Delivery Drivers

The ruling represents a victory for plaintiffs in a case that is part of a larger battle over independent contractor status in the gig economy.

By **Charles Toutant** | September 09, 2020 at 05:21 PM



Harold Lichten, of Lichten & Liss-Riordan. Courtesy photo

The U.S. Court of Appeals for the Third Circuit has ruled that Sleepy's mattress delivery drivers who claim they were wrongly classified as independent contractors are entitled to class certification.

By a 2-1 margin, the **appeals court said** the U.S. District Court for the District of New Jersey misapplied the ascertainability standard when it denied certification based on the plaintiffs' failure to identify all class members by name.

The ruling represents a victory for plaintiffs in a case that is part of a larger battle over independent contractor status in the gig economy. The plaintiffs in the Sleepy's case are represented by Lichten & Liss-Riordan, a veteran of other high-profile employment cases including one challenging the use of independent contractor status at ride-hailing companies **Uber and Lyft**.

The court's ruling on ascertainability is important, because defendants in other class actions have often opposed certification based on the inability to determine the names of every class member. Judges Thomas Ambro and L. Felipe Restrepo of the U.S. Court of Appeals for the Third Circuit said it wasn't necessary to identify all class members at the certification stage, but only to make a showing that all class members can be identified.

"Appellants have met that requirement. They submitted thousands of pages of contracts, driver rosters, security gate logs, and pay statements, as well as testimony from a dozen class members stating they were required to work exclusively for Sleepy's full-time. Affidavits, in combination with records or other reliable and administratively feasible means, can meet the ascertainability standard," Ambro wrote for the court.

Harold Lichten of Lichten & Liss-Riordan lauded the win.

"Companies argue that you can't certify the class because you can't ascertain who's in the class. Sleepy's said, 'how do we know who is driving the truck each day?' Our position was, you could go back and look at the drivers log and gate records," said Lichten. "Courts are going both ways on ascertainability. Judge Ambro really wanted to take this opportunity to explain who this should run and how courts have abused the ascertainability issue."

Lichten said the Third Circuit ruling will likely result in the case heading back to the district court for entry of class certification and then trial on damages. Plaintiffs are seeking monetary recovery for unpaid overtime and for penalties imposed by Sleepy's for various issues such as damage to a customer's home during delivery, which they claim are illegal under New Jersey law. Although Sleepy's was sold to another company, Mattress Firm, that entity is not a party, although the defense has assured the court that it has sufficient reserves to pay any damages awarded in the case, Lichten said.

Lichten's co-counsel, Anthony Marchetti Jr. of Sewell, added that the decision "is a win for the drivers here and more broadly for victims of these types of wage and hour cases. The court makes clear, again, that ascertainability does not require a plaintiff to prove his case at the class certification stage."

The decision would preclude employers from arguing that they can avoid class certification because they failed to keep accurate employment records, Marchetti said. "This is important because the class action mechanism is really the only way that a group of workers can ever efficiently seek justice when fighting deep-pocket businesses that refuse to take responsibility for their misclassification and wage theft," he said.

According to the suit, which was filed in 2010, Sleepys delivery workers sign independent contractor agreements and do not receive benefits from the company. The plaintiffs claim the agreements they signed are merely a way for the company to avoid paying them benefits, and they seek paid overtime, health and pension benefits and family and medical leave.

The case made one previous trip to the Third Circuit. In 2012, U.S. District Judge Peter Sheridan of the District of New Jersey dismissed the case, applying the common-law right-to-control standard, which looks at factors such as who sets the work schedule.

The Third Circuit then sent the case to the New Jersey Supreme Court for clarification of what standard applies.

The Supreme Court **said in January 2015** that the so-called ABC rule applies. That rule says an independent contractor must be free from direction and control in connection with performance of the service. The Third Circuit then **reversed Sheridan's ruling** dismissing the case. In October 2016, Sheridan ruled on summary judgment that the three named plaintiffs—Samuel Hargrove, Andre Hall and Marco Eusebio—are employees.

On the case's latest trip to the Third Circuit, Sheridan wrongly treated the renewed motion for class certification as a motion for reconsideration, Ambro said. Sheridan also based his denial of certification in part on gaps in employment records kept and produced by Sleepy's.

But employees should not bear the cost of an employer's faulty record keeping, Ambro said, citing U.S. Supreme Court rulings in ***Anderson v. Mt. Clemens Pottery*** and ***Tyson Foods v. Bouaphakeo***.

Judge Thomas Hardiman of the U.S. Court of Appeals for the Third Circuit, in his dissent, said the *Anderson* and *Tyson Foods* cases should not be applied as precedent because there was never any doubt whether the plaintiffs in those cases were employees.

Sleepy's was represented by Marc Esterow, Theo Gould, Matthew Hank, Paul Lantis and Jonathan Shaw of Littler Mendelson. They did not respond to requests for comment.

Correction: *This story has been updated to reflect that the Third Circuit found certification was wrongly withheld from the delivery drivers.*