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CORPORATE • Oct. 22, 2007

Judge OKs Class of 6,000 for Suit by Newspaper Carriers

By Don J. DeBenedictis

Daily Journal Staff Writer

SANTA ANA - Ninety percent of the newspaper industry considers those kids on bikes and men in old cars who throw the paper on the lawn to be independent contractors, not employees.

But an Orange County Superior Court judge has ruled that 6,000 former and current carriers can sue the Orange County Register as a class to collect past employee benefits. The ruling in the case, which seeks \$100 million in damages, may be the first in the country to certify a class for newspaper carriers on the issue, one of the plaintiffs' attorneys said.

"This is a precedent-setting case, the first time in the nation where such a class has been sought to be certified and has been so certified," Daniel J. Callahan of Callahan & Blaine in Santa Ana said in a statement.

The Register's attorney, David T. Van Pelt of Seyfarth Shaw in Los Angeles, said he "could not comment on active litigation."

In a ruling late Thursday, Orange County Superior Court Judge David C. Velasquez certified a class of all carriers who had delivered the Register at any time from July 7, 1999, into June of next year and who had signed a "Delivery Agent Agreement" acknowledging themselves as independent contractors. *Gonzalez v. Freedom Communications Inc.*, 03CC08756 (Orange Super. Ct., filed July 7, 2003).

Callahan said the assertion in the agreement does not determine the workers' status. Rather, under California law, the question is "whether the person has control over the means by which his or her work is accomplished," as Velasquez said in his ruling.

Callahan said the carriers have little or no control. The Register tells them when to pick up papers, where to deliver them, when to deliver them, how to assemble and stuff them and whether to wrap them in bags or rubber bands. He said supervisors - who are Register employees, he said - even instructed carriers to drive on the wrong side of residential streets to make deliveries more accurate.

The newspaper kept "ultimate control over every aspect of what they did," Callahan said, but avoided paying employee benefits or employer taxes.

In papers filed with the court, the Register said classifying carriers as independent contractors is the industry standard followed by "over 90 percent of newspaper distribution nationwide."

Its attorneys contend the carriers are free to hire others, including family members, to make the deliveries, to take on several routes and to work for other newspapers.

The carriers are seeking unpaid overtime wages, damages for uncompensated break time, and reimbursement of business expenses, according to the judge's ruling.

Callahan said, given this ruling, his firm may bring similar suits against the San Francisco Chronicle and the San Diego Union. He also said his firm has looked into suing the Los Angeles Times, but he noted that paper uses an independent delivery service company, which hires the carriers.

Frank Pitre of Cotchett, Pitre & McCarthy in Burlingame brought a carriers' class action against the Oakland Tribune and its publisher last year. A judge in September granted a demurrer with leave to amend against the fourth amended complaint, so no class has been certified. *Sotelo v. Medianews Group Inc.*, HG06287184 (Alameda Super. Ct., filed Sept. 1, 2006).

Pitre could not be reached to comment. Defense attorney Sue J. Stott of Thelen, Reid, Brown, Raysman & Steiner in San Francisco declined to discuss any matter concerning clients.

Carriers have been fighting newspapers for employee benefits since the late 1980s, according to newspaper accounts found online. But no class status on the issue of independent-contractor status appears to have been granted.

Officials and attorneys with the California Newspaper Publishers Association could not be reached

Friday to comment.

San Rafael attorney John L. Fallat won certification for a class of Contra Costa Times carriers in 1998, but not on that issue. Fallat obtained a settlement improving the contract so that carriers did not have to deliver to subscribers who had canceled, he said.

Fallat said he was impressed by the decision in the Register case, however.

"It's always been a big issue with me, how newspapers treat these people who get up at 2 in the morning," he said.

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