

Numerosity and Rule 23: It's Not (Only) About the Numbers

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Last month, the Seventh Circuit Court of Appeals rejected a proposed class of thirty-seven employees for failure to satisfy Federal Rule of Civil Procedure 23's numerosity requirement.

"Much ink has been spilled" over the requirements of Rule 23, the Seventh Circuit noted. But only a small share of those cases concern the numerosity requirement. Most opinions deal with commonality or typicality. Recognizing this paucity, the court took occasion to outline the parameters of the numerosity factor. The resulting opinion is a useful guide to parties engaged in smaller class actions or class actions where the commonality or typicality requirements may only apply to a smaller group of workers.

Background

Plaintiff Richard Anderson filed suit against his former employer, a roofing company in Wisconsin. He alleged that the company's travel pay practices amounted to a failure to pay overtime, in violation of the Fair Labor Standards Act ("FLSA") and Wisconsin state laws. He sought to represent a class of thirty-seven employees, who he claims were subject to the same policy, and moved for certification under Rule 23. The district court denied certification, holding that plaintiff failed to establish that the proposed class was so numerous as to make joinder of all members impracticable.

Seventh Circuit Appeal

On appeal, plaintiff argued that the district court erred in holding that he failed to satisfy numerosity. Plaintiff was just three members shy of the commonly-accepted threshold of 40 class members to satisfy numerosity. The Seventh Circuit did not dispute this proposition nor rest its affirmance on the specific number of class members. Rather, the Seventh Circuit explained, the "key numerosity inquiry under Rule 23(a)(1) is not the number of class members alone but the practicability of joinder." Courts must analyze "the nature of the action, the size of the individual claims, and the location of the members of the class or the property that is the subject matter of the dispute."

In plaintiff's case, the Seventh Circuit found two factors determinative. First, the geographic dispersion (or lack thereof) of the proposed class: all but two of the class members were located

within the Eastern District of Wisconsin, the jurisdiction where the action was pending. This, the court explained, did not present substantial obstacles to joinder of all class members. Second, the claims at issue allowed plaintiffs to recover attorneys' fees, lowering the barrier to suit caused by the small damage awards at issue in the case.

Plaintiff tried to counter these points by arguing that the class would have expanded had Defendant updated its initial discovery disclosures. But the Seventh Circuit rejected this argument too. The court noted that it was plaintiff's burden to make a sufficient evidentiary showing that the requirements of Rule 23 were satisfied. He failed to do so, leading the Seventh Circuit to affirm the district court's denial of certification.

Takeaways

The key takeaway from *Anderson* is that numerosity is not just about the number of class members, although that is a compelling piece of the inquiry. According to the Seventh Circuit, the ultimate question is whether joinder of the proposed class members is impracticable. While the number of class members is important to that analysis, other factors such as the geographic dispersion of the class and the damages at issue are of critical importance. This is particularly true in smaller proposed class actions where the number of class members is close to the commonly accepted threshold in the jurisdiction at issue.

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