

Defendants Have Conditional Access to Putative Class Members, Pennsylvania Federal Court Rules

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Communications with a party represented by another lawyer absent consent (sometimes called “blitzes”) are permitted in putative class actions, a federal court has ruled in a case brought under the Class Action Fairness Act and Pennsylvania law. [*Lloyd v. Covanta Plymouth Renewable Energy, LLC*](#), 2:20-cv-04330-HB, (E.D. Pa. Apr. 1, 2021).

The court’s decision affords defense counsel the opportunity to interview and obtain signed declarations from putative class members. The court clarifies the federal approach while firmly distinguishing the view of Pennsylvania state law.

Background

Holly Lloyd brought a putative class action against Covanta Plymouth Renewable Energy, a waste-to-energy processing facility. Lloyd alleged the Covanta-operated facility emitted noxious odors that interfere with the use and enjoyment of her property and that of other area residents.

Covanta brought a motion to permit ex-parte interviews of putative class members, comprised of all owners, occupants, and renters of residential property located within a 1.5-mile radius of the facility. In response, Lloyd opposed the motion on the basis that ex-parte communication between Covanta’s counsel and the putative class members violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct. Rule 4.2 prohibits communication with a party represented by another lawyer, absent consent. Fundamentally, Lloyd argued that such communication or “blitzes” infringed on the attorney-client relationship.

The Decision

Differing from the minority view followed by Pennsylvania law, which considers the attorney-client relationship to exist until the court declines to certify the class, the court ruled that Lloyd’s counsel and the putative class members do not have a “traditional attorney-client relationship.” The court further stated that the putative class members were not considered to be represented parties or even parties to the proceeding.

Judge Harvey Bartle permitted the “blitzes,” but stressed the need to balance interviews with putative class members with “the potential for abuse to allow an adverse party unfettered communication.” Covanta’s counsel may interview the putative class members, on a voluntary basis, subject to certain conditions, he said.

Under the ruling, the interviewer in a “blitz” must inform the interviewee:

1. Which party the attorney represents;
2. The nature of the lawsuit pending;
3. The plaintiff who filed the lawsuit and who the plaintiff is seeking to represent;
4. The purpose of the interview;
5. The interviewee has the right to refuse to be interviewed; and
6. The interviewee has the right to have a lawyer present.

Takeaway

Blitzes are a critical discovery device for defense counsel in class actions. Declarations obtained through blitzes may reveal key differences or vastly different experiences that may mean individuals cannot be deemed “similarly situated” and, thus, the case should not be given class treatment. In the employment context, such differences may include variations in job duties, site-specific policies, or individualized experiences with supervisors.

The court’s ruling emphasized that blitzes are a proper tool in the arsenal of defense counsel litigating in the Eastern District of Pennsylvania.

Jackson Lewis attorneys are available to answer inquiries regarding this case and other legal developments.

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