

FedEx MDL Plaintiffs: Appellate Ruling Bolsters Case

By **Ben James**, ben.james@portfoliomedia.com

Friday, Aug 17, 2007 --- The plaintiffs in multidistrict litigation over FedEx Ground Package System Inc.'s employment practices are asking an Indiana court to take note of an appellate ruling from California affirming a trial court's decision that FedEx Ground drivers who sued the company were employees, rather than independent contractors.

Thursday, the Indiana plaintiffs filed their request for judicial notice of the Court of Appeal for the State of California's Second Appellate Division's August 13 published decision on appeals lodged by FedEx Ground stemming from a case in Los Angeles County Superior Court.

The appeals court's recent decision in *Estrada v. FedEx Ground* is directly relevant to the 29 pending class certification motions in the Indiana litigation because FedEx's opposition to those bids for class certification many of the same arguments rejected by the California Court of Appeal, say the Indiana plaintiffs.

FedEx spokesperson Maury Lane said on Friday that the company preferred to do its arguing before a judge, as opposed to in the media.

"We're not going to respond to every motion that is filed publicly," Lane said. "We're going to try this in the federal court in Indiana and not in the court of public opinion. Historically, these issues are better adjudicated in a court room, not in the press room, although the plaintiffs' bar may feel differently."

The August 13 *Estrada* decision affirmed the trial court's determination that the class of pickup and delivery drivers were not independent contractors, but employees; affirmed the class certification order, holding that common questions of law and fact predominated over individual issues; and rejecting FedEx's claims that federal regulations required the many controls it imposed on the drivers and that it had already indemnified the drivers by making settlement payments, according to the request the plaintiffs filed Thursday.

The appeals court's order notes that the *Estrada* case has come before it three times. In this third appeal, FedEx not only challenged the courts finding with respect to the employee or contractor status of the plaintiffs and the certification order, but the trial court's reimbursement awards and its post-trial attorneys fee award. The drivers cross-appealed, taking issue with the limitations imposed on the reimbursement awards as well as pretrial orders dismissing class members.

“We affirm the finding that the drivers are employees, the certification order, and the finding that attorneys’ fees are recoverable, but reverse the fee award because the amount must be reconsidered, reverse two orders limiting the scope of reimbursable expenses, and remand to the trial court for further proceedings and recalculation of the attorneys’ fee award,” the appeals court wrote.

The Estrada plaintiffs sued FedEx Ground claiming that they were employees and not independent contractors “for the limited purpose of their entitlement to reimbursement for work-related expenses,” the appeals court noted, adding that FedEx that the trial court eventually ordered to reimburse the drivers for some but not all of these expenses (in total, about \$5 million, including interest) and cough up \$12.3 million to cover the plaintiffs’ attorneys’ fees and costs.

Plaintiffs’ counsel Robert I. Harwood said Friday that there was a lot of common ground between the Estrada case and the cases in the Indiana MDL, and that when the judge overseeing the Indiana litigation looked at the facts, he would conclude that FedEx Ground’s drivers were employees, not contractors.

“He’s not going to conclude that FedEx treated its drivers in California one way, and the drivers across the country another way,” Harwood said. “They’re treated uniformly.”

Harwood added that the California appeals court wasn’t the first judicial body to conclude that FedEx Ground’s drivers were employees, citing a “string of NLRB regional decisions.”

“They’ve all concluded these are employees,” Harwood said. “They’re entitled to employee rights.”

The plaintiffs in the Indiana MDL have accused FedEx Ground of mischaracterizing its drivers as independent contractors when they were in fact employees, a distinction which the plaintiffs said FedEx Ground used to rob them of rights and benefits.

Attorneys in the MDL estimate that, ultimately, more than 35,000 plaintiffs could be involved in the litigation.

Attorneys for the plaintiffs in the Indiana suit could not be immediately reached to discuss the cases.

A FedEx ground spokesperson was not immediately available for comment.

The plaintiffs are represented in this matter by Leonard Carder LLP, Harwood Feffer LLP, Hamilton Law Firm PC and Lockridge Grindal Nauen PLLP.

FedEx Ground Package System Inc. is represented in this matter by

EMPLOYMENT LAW 360

Ogletree Deakins Nash Smoak & Stewart PC, O'Melveny & Myers LLP,
Jackson Lewis LLP, Scopelitis Garvin Light & Hanson PC, Baker & Daniels.

The case is In re: FedEx Ground Package System Inc., Employment
Practices Litigation, case number 05-527, in the U.S. District Court for the
Northern District of Indiana.