

## Certification Battle in Ohio MERS Class Action Heats Up

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On April 23, 2012, the plaintiff in State of Ohio ex rel. David P. Joyce, Prosecuting Attorney of Geauga County Ohio v. MERSCORP, Inc., et al., N.D. Ohio Case No. 1:11-cv-02474, filed its motion seeking an order certifying the action as a class action, appointing Geauga County as class representative, and appointing plaintiff's counsel, the New York law firm of Bernstein Liebhard LLP, as class counsel.

The plaintiff argues that the case, which the plaintiff is attempting to bring on behalf of all 88 Ohio counties for relief relating to the allegedly unlawful failure of the Mortgage Electronic Registration System, Inc. (MERS) and its member institutions to record millions of mortgages and mortgage assignments throughout Ohio, meets all requirements of Rule 23(a) and that certification is proper under any one of the 3 subsections of Rule 23(b). The plaintiff hopes to persuade the court that the MERS/member institution policy concerning recordation of mortgages and assignments is a "common scheme or course of conduct" that has given rise to claims "ideally suited for class certification."

In response, the numerous defendants jointly filed both a motion to strike the class allegations, as well as a memorandum in opposition to the certification motion, asserting a litany of legal grounds as to why the case is not suitable for class adjudication. The principal argument advanced by the defendants against certification is that Geauga County and its prosecutor lack the legal authority to represent the interests of other Ohio counties.

Relying, in part, on O.R.C. 301.01, et seq., and O.R.C. 309.01 et seq., the defendants challenge the power of the plaintiff to represent a class of counties due to the sovereignty of each county as a political subdivision and the statutory limits on the authority and powers of county prosecutors. Defendants write that, "[i]f the proposed class were certified, the Prosecuting Attorney or Geauga County would be allowed to make litigation decisions on behalf of citizens of other Ohio counties, but these counties have elected their own officials and prosecutors to make such decisions on their behalf." Defendants also note the practical reality of the concerns of unauthorized representation in light of the failed efforts of Geauga County to recruit other counties to join the suit, and because the plaintiff is seeking certification under Rule 23(b)(1) and (2), which, as the U.S. Supreme Court in Wal-Mart Stores, Inc. v. Dukes observed, "provides no opportunity. . . to opt out." 131 S.Ct. 2541, 2558 (2011).

The defendants have asserted a number of other arguments as well, including that the retention of outside counsel by counties is strictly governed by O.R.C. 305.14 and 309.09(A), which the proposed class representation would violate, and that the requirements of Rule 23 have not been satisfied. For example, the defendants argue that, apart from the legal barriers to certification, the plaintiff's motion relies "entirely on the allegations of his complaint," but does not present evidence to "prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.," as Dukes requires, 131 S.Ct. 2541, 2551-52, n. 6.

The defendants also argue that, on the merits, Rule 23 cannot be satisfied, since, e.g., joinder of the 88 counties would not be impracticable (numerosity), the individualized monetary relief and heterogeneous interests of the counties concerning any order of remedial recordation defeat (b)(2) certification, and individualized issues that almost always predominate in unjust enrichment claims defeat (b)(3) certification. The defendants conclude their opposition brief by reiterating the interests that each separate

county has in controlling its own case and observe that there is no risk of inconsistent judgments from individual adjudication, because different outcomes in individual cases still wouldn't impose on the defendants any "conflicting affirmative duties."

The plaintiff's reply brief is due to be filed on or before May 25, 2012, after which time it is expected the court will take the motion(s) under consideration.

UPDATE: On May 13, 2012, the federal court remanded the case to the Ohio state court. [View the Opinion & Order.](#)

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