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## Trials & TRIBULATIONS

# The Bills make me want to sue!

While the 2017 season has certainly been a promising one for the Buffalo Bills and their fans—including a huge upset victory two weekends ago in Atlanta—off the field, the Bills recently received a loss at the hands of four former Buffalo Jills.

As many readers are probably aware, the Buffalo Jills is the name of the cheerleading squad that works in association with the Bills. Over the past several years, many other former and current National Football League (NFL) cheerleaders, including the Jills, have commenced lawsuits against their respective teams seeking to recover unpaid wages. These lawsuits included the Raiderettes, the cheerleaders for the Oakland Raiders, who settled their class-action against the team for \$1.25 million in May of this year.

In November 2015, the four former Jills commenced their action against the NFL, the Buffalo Bills, Cumulus Radio Company, Stephanie Mateczun and Stejon Productions Corporation. The main thrust of their complaint is that the Jills were deliberately misclassified as independent contractors rather than employees. As a result, the Jills claim they were paid significantly less than what they were owed as employees.

Specifically, the Jills submitted affidavits claiming that they were not paid for performing at the Bills games or for hundreds of hours of practice. They also averred that they were not paid for their sales of modeling calendars or for the time spent making the calendars. Additionally, the Jills claim that



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they were forced to sell tickets to annual golf tournaments, instruct participants at cheerleading camps, and attend other promotional events each year, for which they were seldom paid.

In support of their claims, the Jills submitted “appearance records” from the 2012-13 season for five Buffalo Jills.

The records reflect that the Jills each worked more than 360 hours that year, yet none was paid for more than 18 hours of work. Based on their annual salary, none of the five Jills earned more than \$2.60 per hour for the 2012-13 season.

In a Sept. 29 decision, the Fourth Judicial Department affirmed the lower court’s decision granting the Jills motion for class certification. In support of its affirmance, the Fourth Department held that the lower court properly considered the evidence before it and that the Jills successfully met the five requirements for class certification under CPLR 901(a).

First, pursuant to CPLR 901(a), a class action suit is appropriate where the class is sufficiently numerous. According to the Jills, there are approximately 134 potential class members. The Fourth Department stated that classes consisting of as few as 53 members have been deemed well above the numerosity threshold.

Second, turning to the prerequisite of commonality among class members, the court found that while the amount of damages flowing to each member was distinct, this alone is not sufficient cause to prevent the suit from proceeding as a class action as this is typical of most class action cases. Instead the court found that the common questions among the class were whether the putative class member was an employee or an independent contractor and whether the defendants failed to pay them in accordance with the law.

With respect to the third prerequisite, typicality, the evidence demonstrated that the Jills had been under the same management since 2002 and affidavits of putative class members demonstrated that the claims of the class representatives were typical of class members as a whole, dating back to the 2008-09 season.

The fourth prerequisite of class certification under the CPLR requires that the class representatives will fairly and adequately protect the interests of the class. In support of their motion, the Jills asserted that they had no conflicts of interest with any other putative class members and were committed to prosecuting the claims until their conclusion. The Fourth Department noted that while the class representatives had elected to waive their right to liquidated damages, this was not a barrier to class certification as putative members were free to file individual claims if they chose to pursue such damages.

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Finally, the fifth prerequisite for class certification requires that class action is the superior method for adjudicating the controversy. In its review, the Fourth Department concluded that with respect to wage disputes, class action is the superior method to resolve the controversy. This is due in large part to the fact that each class member's individual claim is likely to be insignificant, rendering litigation unrealistic due to legal fees.

In this case, the Fourth Department

noted that each class representative was only a Jill for one season and had worked for fewer than 400 hours. As such, pursuit of their claims on an individual basis was unrealistic and failing to certify the class would essentially preclude the Jills' day in court. The Fourth Department did also note that while two putative class members had elected to pursue their claims individually, those individuals had been members of the Jills for a much longer period of time and therefore, arguably had damages several times greater than other class members. In any event, the

court did not find that the pursuit of individual claims by two former Jills eroded the superiority of resolving the dispute by class action.

Ultimately, the Fourth Department agreed that the lower court had properly certified the class action as required by CPLR 902. While it remains to be seen whether the Jills will prevail on their claims, at the very least they will have their day in court.

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