



[Jackson Hewitt Tax Preparers Denied Class Cert. In Wage Suit, 2021 Law360 118-75](#)

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Summary

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Body

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In an order and unpublished opinion Tuesday, U.S. District Judge John Michael Vazquez denied the bid for class certification, saying the tax preparers were too vague about how many members would be in a proposed class of workers at Jackson Hewitt franchisees and subclasses of workers in various states.

"Plaintiffs' lack of concrete information means that the court would have to speculate as to the number of members in the proposed classes," Judge Vazquez said in the opinion. "Accordingly, plaintiffs fail to establish numerosity for the nationwide franchisee and state subclasses."

The workers had sought approval for a nationwide class of tax preparers for Jackson Hewitt subsidiary Tax Services of America Inc. from the 2013-14 tax season to the 2016-17 season who allegedly received less pay because the companies deducted the value of promotional gift cards provided to customers.

They also sought certification for a nationwide class of tax preparers who worked for Jackson Hewitt franchisees over the same period and subclasses of tax preparers jointly employed by Jackson Hewitt and the franchisees in each of 10 states.

But Judge Vazquez said the workers failed to show that the nationwide franchisee class and state subclasses would be numerous enough for certification.

The employees had claimed that more than 13,000 tax preparers had prepared at least one tax return in each year in the relevant time period at a franchisee, according to Tuesday's opinion. They also claimed there would be at least 40 members of each subclass because each state had more than 40 franchise locations and the court should assume that at least one preparer worked at each location, the opinion said.

But those estimates were too vague, the judge said.

"Where a putative class is some subset of a larger pool, the trial court may not infer numerosity from the number in the larger pool alone," the judge said, quoting from Third Circuit precedent. "A court must be presented with evidence that would enable the court to do so without resorting to mere speculation," the judge added, quoting the precedent.

Because the tax preparers gave the more concrete number of 5,000 potential class members for the Tax Services of America class, the judge said they had met the numerosity requirement for that class.

But the Tax Services of America class failed certification for a different reason; individual issues predominated over class ones because of differences among their contracts, the judge said.

The judge rejected the preparers' argument that there were only "minor variances with regard to specific terms" in the contracts, and that those differences mostly impacted damages and therefore didn't create predominating individualized issues.

"Plaintiffs have not sufficiently demonstrated that the differences are limited to damages," the judge said.

The dispute stems from a 2016 proposed class action by seven current or former tax preparers against three Jackson Hewitt entities and unnamed franchisees. Thirteen more tax preparers later joined the suit, and specific franchisees became named as defendants.

The tax preparers alleged that their compensation was based on revenue they generated and that the companies deducted from their revenue when calculating commissions the value of prepaid gift cards provided to customers as part of a promotional deal, resulting in breach of contract and unjust enrichment.

In 2017, the court ruled that Jackson Hewitt couldn't escape the breach of contract and unjust enrichment claims, saying the tax preparers had sufficiently pled their claims and hadn't waived their litigation rights by not reporting pay discrepancies.

In 2019, the judge dismissed some of the franchisee defendants from the case for lack of personal jurisdiction.

Then in July 2020, the tax preparers filed for class certification and Jackson Hewitt asked the court to deny certification. The remaining franchisees didn't join the bid to deny certification and haven't made appearances in the case.

Andrew T. Thomasson of Thomasson PLLC, who represents the tax preparers, said they plan to pursue certification again after more discovery.

"We're disappointed in the court's initial ruling regarding class certification, but we're encouraged that the opinion recognizes that all of the Rule 23(a) elements for the TSA class were met and it explicitly provides that the ruling for predominance is without prejudice," Thomasson told Law360 on Wednesday.

Counsel and a spokesperson for the Jackson Hewitt defendants did not immediately respond to requests for comment.

The tax preparers are represented by Andrew T. Thomasson of Thomasson PLLC, Caroline Ramsey Taylor and John C. Whitfield of Whitfield Bryson LLP, Robert W. Bishop and John S. Friend of Bishop Friend PSC, Jeffrey L. Taren and Jesse Wing of MacDonald Hoague & Bayless, and Robert Ahdoot and Bradley King of Ahdoot & Wolfson PC.

The Jackson Hewitt defendants are represented by Kevin Joseph O'Connor and Shannon Danielle Azzaro of Peckar & Abramson PC.

The case is *Mardis et al. v. Jackson Hewitt Tax Service Inc. et al.*, case number 2:16-cv-02115, in U.S. District Court for the District of New Jersey.

--Additional reporting by Bill Wichert. Editing by Leah Bennett.

Update: Plaintiffs' counsel information has been updated.

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