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No Longer a Second-Class Class Action? Finding Common Ground in the Debate over Wage Collective Actions with Best Practices for Litigation and Adjudication

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NO LONGER A SECOND-CLASS CLASS ACTION? FINDING COMMON GROUND IN THE DEBATE OVER WAGE COLLECTIVE ACTIONS WITH BEST PRACTICES FOR LITIGATION AND ADJUDICATION

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Abstract

Rule 23 class actions include all potential members, if granted certification. For wage claims, 29 U.S.C. § 216(b) allows not class but collective actions covering only those opting in. Courts have practiced Rule 23-style gatekeeping in collective actions – requiring certification motions, which they deny if members lack enough commonality. Our 2012 article argued against this practice. No statute or rule grants judges the § 216(b) gatekeeping power early cases assumed, and with good reason: opt-in reduces the agency problems justifying Rule 23 gatekeeping; and Congress passed § 216(b) as not a stricter, opt-in form of class action, but liberalized joinder for wage claims presumptively sharing a common issue justifying joinder. Our 2012 article argued that collective actions may proceed with no "certification" process; instead, defendants must prove them improper as Rule 21 "misjoinder" – and must do so under Rule 20 liberal joinder, not Rule 23(b)(3) strict commonality, standards.

Some judges agreed, citing our article to allow no-certification collective actions. Others judges, even if agreeing that collective actions are joinder (not class) cases, noted that eliminating certification raises difficult questions we never addressed.

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- If named plaintiffs and counsel are not certified to represent others, how can they settle hundreds or thousands of plaintiffs' claims?

- How can judges authorize notice to potential opt-ins without certifying the propriety of litigating collectively?

- If opt-in plaintiffs are parties, not absentee class members, must the trial evidence include all plaintiffs, or just a sample?

We now tackle these questions with a comprehensive set of proposals.

(A) Judges assess notice if plaintiffs request, and the propriety of collective treatment if defendants argue misjoinder.

(B) Defendants may challenge collective actions as Rule 21 misjoinder, and may settle collectively, subject to plaintiffs' below obligations.

(C) Plaintiffs may litigate and solicit opt-ins without certification – and court notice is an optional request – but counsel must send consent, authority, and rights provisions ("CARP") detailing plaintiffs':

(1) rights to sue individually – if they prefer the greater control of individual suit over collective litigation;

(2) communication rights and duties – counsel must inform them of proposed settlements or other major case events; and

(3) settlement consent and rights – they can opt out of a collective settlement, but failing to opt out can serve as settlement consent.

INTRODUCTION

Plaintiffs filing claims as a class action – whether civil rights, environmental, consumer, or other group harms – must file a motion for class "certification" with evidence proving their claims sufficiently similar to litigate them together.[1] Under a Fair Labor Standards Act ("FLSA")[2] provision that preceded Rule 23, however, FLSA wage claims proceed not as Rule 23 *class* actions covering all members not *opting out*, but as *collective* actions covering only those *opting in*.[3] That provision, 29 U.S.C. § 216(b), lacks much detail on how collective actions work. For decades, courts required, as under Rule 23(c), that plaintiffs file an evidence-supported certification motion proving themselves "similarly situated" – the only phrase in § 216(b) hinting at a standard for collective actions.[4]

Once a backwater topic compared to the Rule 23 class action, the FLSA collective action is growing into its own as a topic of heated controversy, following a dramatic trend: FLSA litigation grew over 500% from 1994 to 2014; it now is 3% of the entire federal civil docket, "with most of that increase happening in the last 10 years."[5] Yet the academic commentary has not kept up: a few law journal articles a year, on average, address FLSA collective actions, far fewer than on employment discrimination class actions.[6] And most FLSA collective

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[1] Fed. R. Civ. P. 23(c).

[2] *See generally* 29 U.S.C. §§ 201–219.

[3] *See* 29 U.S.C. § 216(b).

[4] See Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 543 (2012) [hereinafter *Second-Class Class Action*].

[5] GAO: FLSA Lawsuits Rose 500% in Last 20 Years, 342 FAIR LAB. STANDARDS HANDBOOK FOR STATES, LOC. GOV'T & SCH. NEWSL. 7, 7 (Mar. 2014) ("[T]he U.S. Government Accountability Office . . . . found that 8,148 FLSA lawsuits were filed in fiscal year 2012, up from . . . 1,327 in 1991. In 1991, FLSA lawsuits made up 0.6 percent of all federal civil lawsuits. By 2012 they accounted for 3 percent of all civil lawsuits.").

[6] In Westlaw's *Law Reviews & Journals* database, 33 articles since 2000 have "216(b)," "16(b)," or "collective action" in the title and address the FLSA. That admittedly is not an *entirely* comprehensive search, but one that should reach enough of the articles on FLSA collective actions to show that there are only a few such articles per year, and fewer than for employment *discrimination* class actions – because a similar article-title search on that topic found five articles in 2017 alone. (Searches conducted on Oct. 18, 2018; on file with author)

action articles are not by academics: most are in bar journals[7] or are law review articles by litigators[8] or law students.[9] That is no criticism of the bar: if anything, it shows the bar is well ahead of academia in noticing, and struggling with, this important trend.

The literature not only is limited, but features highly divergent views on whether FLSA collective actions should be easier, harder, or just different. One view is that the certification standard should be stricter: "courts should silence the recurring refrain that the 'similarly situated' standard is 'less stringent'" than Rule 23 – mainly the stringent 23(b)(3) requirement "common questions predominate" and "individual questions do not predominate."[10] Another advocate goes further, demanding not only predomination of common over individual questions, but a "Unanimity Rule" insisting upon *no* material divergence among the plaintiffs.[11] Taking an opposing view are articles arguing against requiring Rule 23(b)(3) "predomination" of common issues in collective actions,[12] defending the caselaw "that

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[7] Of the 33, five are in a private publisher's professional publication (*Aspatore*); three are in state bar magazines (New Jersey, Colorado, and Minnesota); three are in ABA publications. (Searches conducted on Oct. 18, 2018; on file with author)

[8] Five of the 33 are in a law journal symposium issue, but "written by experienced practitioners . . . based upon presentations made at the National Employment Lawyers Association (NELA) Impact Litigation Seminar." Douglas D. Scherer & Robert Belton, *Introduction to the Symposium on Class and Collective Actions in Employment Law*, 10 EMP. RTS. & EMP. POL'Y J. 351, 352 (2006) (summarizing symposium contributions). Three are by one employment litigator at a defense-side firm who writes regularly on the topic (Allan G. King of Littler Mendelson, P.C.) and several others are by private-practice litigators as well. (Searches conducted on Oct. 18, 2018; on file with author)

[9] Six of the 33 are student notes or case comments. (Searches conducted on Oct. 18, 2018; on file with author)

[10] Brian R. Gates, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 NOTRE DAME L. REV. 1519, 1553, 1558 (2005) (emphasis omitted).

[11] Allan G. King & Andrew Gray, *The Unanimity Rule: "Black Swans" and Common Questions in FLSA Collective Actions*, 10 FED. CTS. L. REV. 1, 6-7 (2017) (proposing a new "Unanimity Rule" of certifying only if "facts presented by the representative plaintiffs can be extrapolated *without exception* to non-testifying plaintiffs," making the key question: "Is there a segment of plaintiffs, *however small*, who are different enough . . . that if the jury were constrained to return a common answer for all . . . [it] would violate the Unanimity Rule?") (emphases added).

[12] William C. Jhaveri-Weeks & Austin Webbert, *Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws*, 23 GEO. J. POVERTY L. & POL'Y 233, 266-67 (2016) ("Even if individualized issues predominate . . . [or] employees are divided among different work locations that all need to be evaluated separately, courts should still permit the case to proceed on a collective basis whenever they can determine a workable method . . . . [A]

court-authorized notice can and should be mailed to potential opt-in class members at the pleading stage of the litigation upon a fairly lenient evidentiary standard,"[13] and criticizing arguments for more pre-certification discovery or for greater "scrutiny [of] the proof that potential class members are similarly situated."[14]

In 2012, we levied a more fundamental criticism: there is neither legal basis nor justification for requiring a judicial grant of "certification" before FLSA wage claims can proceed as collective actions.[15] Our article, The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules, detailed how no statute or rule grants judges the § 216(b) gatekeeping power that early cases assumed and how this was no accidental omission by legislators or rulemakers.[16] Rather, the legislative history and early FLSA caselaw confirm: Congress passed § 216(b) as not a stricter, opt-in form of class action, but liberalized joinder for wage claims presumptively sharing common issue justifying joinder.[17] Nor do the policy reasons for Rule 23 judicial gatekeeping apply to FLSA collective actions: the § 216(b) opt-in requirement mitigates the agency problems of Rule 23 classes – fear of lead class plaintiffs or class counsel neglecting or selling out class members who never chose to join.[18] Our article thus argued that, contrary to decades of caselaw, collective actions may proceed with no certification process; instead, defendants must prove them improper as Rule 21 "misjoinder" and must do so under Rule 20 liberal joinder, not Rule 23(b)(3) strict commonality, standards.[19]

Surprising nobody more than us, some judges read *Second-Class Class Action* and agreed, citing it to rule that FLSA collective actions need not have, and can proceed without, any certification process – as in these first two such rulings:

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court might nonetheless conclude that the FLSA claims can be tried using evidence from several or all of the different locations. This accords with the goal of allowing employees to challenge wage violations collectively.").

[13] David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 129, 156 (2003).

[14] *Id*. at 146.

[15] *Second-Class Class Action*, *supra* note 4, at 527-29.

[16] *Id*. at 539-41.

[17] *Id*. at 542-45.

[18] *Id*. at 555-59.

[19] *Id*. at 570-71.

> [P]laintiff moved . . . to conditionally certify . . . a collective action . . . . [as] is common practice . . . under the FLSA . . . . However, this approach is not specified by the plain text of the statute or binding precedent. *See generally* Scott A. Moss & Nantiya Ruan, *The Second–Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 Am. U.L. Rev. 523 (2012). The FLSA does not require that a plaintiff obtain conditional certification of the collective action in order to proceed . . . . The court denies plaintiff's motion . . . as unnecessary.[20]

> [T]he "certification" rubric borrowed from Rule 23 has no place in wage claim litigation . . . . [I] agree with legal scholars and practitioners who have recently critiqued courts' reliance on class "certification" concepts in FLSA cases, finding them the result of . . . a misunderstanding of precedent and legislative intent, and excessive path dependence in the application of *stare decisis*. *See* Scott A. Moss, Nantiya Ruan, *The Second-Class Class Action* . . . . In their well-crafted critique, Professors Moss and Ruan explain that the . . . "class certification" approach to FLSA collective actions . . . . [was] triggered by imprecise pleading and "stare decisis yield[ing] path-dependence and lock-in." . . . The proper approach . . . is to presumptively allow workers . . . to join as a collective . . . . [I]ndividuals may be challenged . . . [if] their joinder proves erroneous [but,] . . . . [r]ather than subject them to . . . proving commonality, . . . handling them as any other challenge to a Rule 20 joinder[,] . . . . [as] Rule 21 (misjoinder) and Rule 42 (severance).[21]

Of course, not everyone agreed with us. Some judges did agree, citing either our article or the two initial decisions that cited it;[22] other courts flatly rejected our approach;[23] but a third category is especially interesting. Specifically, some agreed with our diagnosis – that collective actions are *not* as much like class actions as prior cases

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[20] McClendon v. United States, No. 12-81C, 2013 WL 285584, at *1-3 (Fed. Cl. Jan. 24, 2013) (citing *Second-Class Class Action*, *supra* note 4).

[21] Turner v. Chipotle Mexican Grill, Inc., 123 F. Supp. 3d 1300, 1305-06, 1309 (D. Colo. 2015) (citing *Second-Class Class Action*, *supra* note 4), *petition for mandamus denied*, In re Chipotle Grill, Inc., No. 17-1028, 2017 WL 4054144 (10th Cir. Mar. 27, 2017).

[22] *See infra* Part II(B)(1) (collecting decisions).

[23] *See infra* Part II(B)(2) (collecting decisions).

assumed – yet reached very different conclusions about exactly what collective actions *are*. Those judges agreed that FLSA collective actions are less like Rule 23 class actions than previously thought, but held that if Rule 20 joinder standards apply, then all members are full party plaintiffs, not absent members represented by the lead plaintiffs, such that discovery and personal settlement consent may be require from each individual in the collective.[24] Yet all such courts – those deeming collective action plaintiffs individual parties and those rejecting any certification process – raised difficult questions that *Second-Class Class Action* never addressed.

- *Settlement:* If named plaintiffs or counsel are not certified to represent others, how can they settle collective actions without individual consent from potentially hundreds or thousands of plaintiffs?

- *Notice of right to join:* If judges never scrutinize or certify that litigating collectively is proper, how can they authorize notice to potential opt-ins of the right to join, as was usual after certification?

- *Trial/discovery evidence:* If opt-in plaintiffs are full parties, not absent class members, must the discovery and trial evidence – individual documents and testimony – include *all* of the potentially hundreds or thousands of plaintiffs, or is just a *sample* of the plaintiffs sufficient?

In retrospect, the problem is that our prior Article was demolition without construction, the takedown of an edifice without any blueprint for a new structure. Courts have admirably tried different approaches; we now aim to fill the void left by the demolition of the Rule 23-based certification scheme for collective actions.

Part II reiterates only briefly our critique of existing certification practice in our prior article, as a prelude to detailing the mixed judicial responses to that article. Before any of our specific solutions, Part III tackles a broad, big-picture issue that *Second-Class Class Action* did not fully address: that wage collective actions are *not class actions* run by lead plaintiffs and class counsel, they still *are representative actions* in which not every plaintiff must

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[24] *See infra* Part II(B)(3) (collecting decisions).

participate fully. Part IV then details the prescriptions this Article offers: a comprehensive set of best practices for how parties can litigate, and courts can adjudicate, wage collective actions – in a manner carefully walking the line between respecting that they are representative actions and respecting the need to protect the rights of all individual parties.

> (A) *Judges* assess notice *if* plaintiffs request, and the propriety of collective treatment *if* defendants argue misjoinder.
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> (B) *Defendants* may challenge collective actions as Rule 20 misjoinder, and may settle collectively, subject to plaintiffs' below obligations.
>
> (C) *Plaintiffs* may litigate and solicit opt-ins without certification, and seeking court notice is optional – but counsel must send consent, authority, and rights provisions ("CARP") detailing plaintiffs':
>
> > (1) *rights to sue individually* – if they prefer the greater control of individual suit over collective litigation's efficiency;
> >
> > (2) *communication rights and duties* – counsel must inform them of proposed settlements or other major case events; and
> >
> > (3) *settlement consent and rights* – they can opt out of a collective settlement, but failing to opt out can serve as settlement consent.

II. FLSA COLLECTIVE ACTIONS: OUR CRITIQUE OF THE TURN FROM ITS SIMPLIFIED JOINDER ORIGINS TO COMPLEX RULE 23-LIKE PROCESSES.

A. The Existing Rule 23-Based Treatment of FLSA Collective Actions, and Our Prior Article's Critique of It.

Enacted in 1938, and applicable to later employment laws codified in the same statutory chapter, § 216(b) of the FLSA provides that "[a]n action . . . may be maintained against any employer . . . by any one or more employees for . . . other employees similarly

situated."[25] Congress amended § 216(b) in 1947 to require workers themselves to be the plaintiffs[26] and to require anyone other than an original plaintiff to "opt in" affirmatively, by filing a written consent.[27] Enacted before modern class actions existed,[28] § 216(b) does not mention any judicial gatekeeping power over whether a case can proceed as a collective action; § 216(b) requires merely that members be "similarly situated" and opt in individually.

To determine whether workers are "similarly situated" enough for an FLSA collective action, courts for decades required a two-stage "certification" process. First, at the "notice stage," courts decide whether a collective action is proper to justify notifying potential members that they can opt into a collective action by evaluating whether the potential opt-ins are "similarly situated" to the named plaintiffs. Notice of the collective action is key in alerting workers to their FLSA claims, because the two-year statute of limitations continues to run until the person has opted into the action through written consent. Judicial oversight of notice derives from *Hoffmann-La Roche Inc. v. Sperling*, in which the Supreme Court never mentioned any "certification" process, but held that to serve the "broad remedial goal" of the FLSA, and in light of the "wisdom and necessity for early judicial intervention," courts may manage the notice and opt-in process.[29]

At this initial "notice stage," the court requires evidentiary proof, such as worker affidavits and corporate documents, that potential opt-ins are "similarly situated" – typically, working similar jobs and alleging "a common policy or plan that violated the law."[30]

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[25] 29 U.S.C. § 216(b).

[26] Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 216(b)); *see* Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 731-32 (2010) (citing James M. Fraser, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 SUFFOLK UNIV. L. REV. 95, 98 (2004)) (arguing that earlier version of FLSA enabled uninterested parties to launch "fishing expeditions [that] were costly to employers").

[27] *See* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989) (noting that the 1947 Portal-to-Portal Act added a "requirement that an employee file a written consent").

[28] *See* FED. R. CIV. P. 23 Advisory Committee's Note to 1966 Amendment (noting that Congress enacted the modern version of the Federal Rules of Civil Procedure several decades after the FLSA).

[29] *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 171-73 (1989).

[30] Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997).

In a second stage, "decertification," the court undertakes a more searching evidentiary inquiry, typically on a post-discovery defense motion, and decertifies the collective action if it deems the workers insufficiently similar.[31]

However, courts have differed significantly on how much evidentiary "proof" to require at each stage, and what legal standard of "similarly situated" to apply. Many courts describe the first-stage burden as "minimal,"[32] a "modest factual showing,"[33] or a "not . . . exacting" standard that plaintiffs can satisfy with "the allegations of the complaint and any supporting affidavits filed by the plaintiff."[34] Yet decisions describing the first-stage burden in such lenient terms still disagree on how much similarity § 216(b) requires: in some, "the 'similarly situated' requirement of 29 U.S.C. § 216(b) is considerably less stringent than the requirement of Fed.R.Civ.P. 23(b)(3) that common questions 'predominate,'" requiring only an "identifiable nexus" among plaintiffs;[35] others deny certification where plaintiffs cannot show that all members "were together the victims of a single decision, policy, or plan."[36] Still others never describe the burden on plaintiffs seeking early-stage notice as any lighter than Rule 23 class plaintiffs' certification burden, applying to § 216(b) the "normal class actions requirements" of Rule 23,[37] such as "predomination" of common questions over individual ones.[38]

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[31] *See, e.g.*, O'Brien v. Ed. Donnelly Enters., 575 F.3d 567, 585 (6th Cir. 2009); Anderson v. Cagle's, Inc., 488 F.3d 945, 952-53 (11th Cir. 2007); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001).

[32] Strauch v. Computer Sci. Corp., No. 3:14cv956, 2015 WL 3727804, at *2 (D. Conn. June 9, 2015) (citing Cuzco v. Orion Builders, Inc., 477 F. Supp. 2d 628, 632-33 (S.D.N.Y. 2007)).

[33] Griffin v. Aldi, Inc., No. 5:16-CV-354 (LEK/ATB), 2017 WL 1397320, at *2 (N.D.N.Y. Feb. 22, 2017) (citing Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010)); *see also* Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101, 104 (S.D.N.Y. 2003) (requiring "modest factual showing" that plaintiffs are similarly situated).

[34] Peterson v. Nelnet Diversified Solutions, LLC, No. 17-cv-01064-NYW, 2018 WL 3470604, at *3-4 (D. Colo. 2018).

[35] Heagney v. European Am. Bank, 122 F.R.D. 125, 127, 127 n.2 (E.D.N.Y. 1988).

[36] *Peterson*, 2018 WL 3470604, at *3 (quoting *Thiessen*, 267 F.3d at 1102).

[37] *See, e.g.,* Shushan v. Univ. of Colo., 132 F.R.D. 263, 266-68 (D. Colo. 1990) (holding that plaintiffs failed to prove "normal class actions requirements," including "numerosity, typicality, [and] adequacy"), *abrogated in part by Thiessen*, 267 F.3d at 1102.

[38] *See, e.g.,* St. Leger v. A.C. Nielsen Co., 123 F.R.D. 567, 569 (N.D. Ill. 1988) (holding certification inappropriate, and plaintiffs not similarly situated, because common questions did not "predominate," a standard derived from Rule 23(b)(3)).

In the second stage, decertification, courts more commonly import Rule 23 standards. Many decisions decertify collective actions by finding insufficient evidence of common facts among all members, including common polices or common employment settings, such as where the employer wage practices were decentralized among different managers, sites, or job categories.[39] Thus, most courts ultimately require Rule 23 commonality for § 216(b) collective actions – just with disagreement as to whether to do so at the first or second stage.

Yet this entire Rule 23-based "certification" edifice arose from a conflation of very different multi-plaintiff litigation vehicles, our 2012 article argued.[40] Section 216(b), is not an opt-in version of Rule 23; it is a liberalized form of simple Rule 20 joinder, which permits joint suit whenever claims share one common issue and address related events.[41] Nothing in § 216(b), or any other statutory or rule text on collective actions, authorizes any "certification" inquiry, nor is such judicial gatekeeping justified by economic logic: Rule 23 classes present principal-agent and asymmetric information problems because lead plaintiffs can inadequately represent unengaged members, while §216(b) collective members are party plaintiffs with individual claims, which obviates the need for judicial scrutiny.[42]

Notably for an area with so much high-stakes litigation, the Supreme Court, while repeatedly detailing the need for close scrutiny of *Rule 23* class actions, never has mandated anything like a two-stage certification process for *§ 216(b)* collective actions.[43] The main Supreme Court precedent on § 216(b), *Hoffmann-LaRoche, Inc. v. Sperling*, never addressed whether such cases require "certification," holding only that courts are authorized to supervise "notice" of opt-

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[39] *See, e.g.*, Bishop v. Petro-Chem. Transp., 582 F. Supp. 2d 1290, 1307 (E.D. Cal. 2008) (citing Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168, 1178 (9th Cir. 2007)); Rappaport v. Embarq Mgmt. Co., No. 6:07-cv-468-Orl-19DAB, 2007 WL 4482581, at *4 (M.D. Fla. Dec. 18, 2007); Jimenez v. Lakeside Pic-N-Pac, L.L.C., No. 1:06-CV-456, 2007 WL 4454295, at *5 (W.D. Mich. Dec. 14, 2007); Moeck v. Gray Supply Corp., No. 03-1950 (WGB), 2006 WL 42368, at *4 (D.N.J. Jan. 6, 2006); D'Anna v. M/A-Com, Inc., 903 F. Supp. 889, 894 (D. Md. 1995).

[40] *Second-Class Class Action*, *supra* note 4, at 549-53.

[41] *Id.* at 542-45.

[42] *Id.* at 555-59.

[43] *Id.* at 541.

in rights sent to potential members.[44] While not addressing how much commonality the "similarly situated" standard requires, *Hoffmann-LaRoche* did repeatedly use the word "joinder" to describe § 216(b) opt-in: it stated that a worker filing a "consent form . . . fulfill[s] the statutory requirement of *joinder*,"[45] and that its decision on court-supervised notice was based on courts "managerial responsibility to oversee the *joinder* of additional parties."[46] More recently, a Supreme Court decision shortly after our 2012 article arguably implied that the entire "certification" analysis should not be treated as a Rule 23-style inquiry into whether members are similar enough. *Genesis Healthcare Corp. v. Symczyk*,[47] while a holding only on one tangential issue (the effect of Rule 68 offers of judgment to collective action named plaintiffs), noted two key points: that "[t]he *sole consequence* of conditional certification is the sending of court-approved written *notice* to employees, who in turn become parties . . . only by filing written consent"[48]; and that given this limited import of § 216(b) certification, there are "significant differences between certification under . . . [Rule] 23 and the *joinder* process under § 216(b)."[49] *Genesis Healthcare* thus supports our 2012 argument against the prevailing two-stage § 216(b) certification process.

Accordingly, judicial gatekeeping via two-step certification is unauthorized for § 216(b) collective actions. In our adversarial system, parties file and resolve cases as they wish, absent specific rules granting judges authority over such decisions. Instead, § 216(b) opt-in is just simplified joinder, not a narrowing of traditional joinder. The contention that § 216(b) aimed to facilitate (not limit) joinder is supported by caselaw beginning soon after the 1947

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[44] Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 169 (1989) ("[T]his case presents the narrow question whether . . . district courts may play any role in prescribing . . . communication from the named plaintiffs to the potential members of the class on whose behalf the collective action has been brought. We hold that district courts have discretion . . . to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs.").

[45] *Id.* at 168 (emphasis added).

[46] *Id.* at 170-71 (emphasis added).

[47] Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66 (2013).

[48] *Id.* at 75 (emphasis added) (citation omitted).

[49] *Id.* at 70 n.1 (emphasis added).

enactment of § 216(b); cases such as *Hoffmann-LaRoche* and *Genesis Healthcare Corp.* regularly called it a "joinder" provision.[50]

Rule 23, enacted in 1966, did not apply to FLSA collective actions because Rule 23 created class actions that automatically include all members, and it did not repeal or displace the federal statute, § 216(b), that restricted FLSA collective actions to those who opt in affirmatively. Yet Rule 23 applied to virtually all other types of claims, from employment discrimination to securities to environmental to consumer claims, so it came to be the most commonly used, and thus most well-understood, aggregate litigation form.[51] As our 2012 article noted, "[t]his left the misimpression that § 216(b) collective actions are a *tighter version of class actions* (because of the opt-in requirement) rather than a *liberalized form of joinder*."[52]

Importantly, the standards under Rule 20 (joinder) and Rule 24 (intervention of new plaintiffs) are far more liberal than under Rule 23. Joinder requires only that claims address "the same transaction, occurrence, or series of transactions or occurrences," and share "any question of law or fact common to all plaintiffs."[53] This standard is permissive: the transaction/occurrence requirement demands only "logically related events," not the *same* events;[54] the one "common

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[50] *See* Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945).

[51] *See e.g.*, Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1851 n.98 (2008) ("From the late 1960s into the early 1980s, the federal courts were unwilling to certify even relatively simple 'single event/single situs' mass accident torts as class actions, but by the late 1980s they were certifying far more complicated and multifaceted [classes] . . . . The next decade brought a growing number of such cases into the national courts."); Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 287 (2008) ("[D]uring the 1970s and 1980s, federal courts interpreted . . . Rule 23(b)(3) to allow . . . large-scale class actions.").

[52] *Second-Class Class Action*, *supra* note 4, at 543 (emphasis in original).

[53] FED. R. CIV. P. 20(a)(1); *see also* FED. R. CIV. P. 24(b)(1)(B) (requiring same showing for intervention: that a claim "shares with the main action a common question of law or fact").

[54] Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7 FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1653, at 409 (3d ed. 2001 & 2011 Supp.); *see also* Montgomery v. STG Int'l, Inc., 532 F. Supp. 2d 29, 35 (D.D.C. 2008) (noting that the requirement that "claims arise from the same transaction or occurrence or series of occurrences" is satisfied "if the claims are logically related"); *see e.g.,* Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974) (explaining that "[a]bsolute identity of all events is unnecessary").

question" standard allows for plaintiffs otherwise differing factually or in their relief.[55] This liberal joinder standard dates to 1938, when the original Federal Rules of Civil Procedure eliminated "the old formalistic approach" to strict common law and code pleading in favor of broadly joining multiple parties.[56] Courts thus routinely grant joinder broadly, to serve "principles of trial convenience and efficiency."[57]

Plaintiffs joining claims under Rule 20 do not engage in anything like what the common § 216(b) certification requires. Plaintiffs suing together need not file any motion for joinder; they just list all their names together in the complaint caption.[58] If more plaintiffs want to join later, Rule 24(b)(1) expressly requires them to file a motion to intervene,[59] but the text of § 216(b) requires no motion. To the contrary: "[t]here is no provision in § 216(b) for a 'certification' inquiry like in Rule 23(c)(1), no provision for scrutiny of plaintiffs' counsel like in Rule 23(g), and, more generally, no requirements analogous to those in the Rule 23(a)(1)-(4) and Rule 23(b)(1)-(3) seven-subsection labyrinth."[60] Rather, § 216(b) only requires two criteria: members must be "similarly situated" and must make one of the types of employment claims covered by § 216(b), such as FLSA minimum wage or overtime claim, age discrimination, or gender pay discrimination.[61]

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[55] *See* FED. R. CIV. P. 20(a)(3) (providing that each party need not seek "all the relief demanded [because] [t]he court may grant judgment to one or more" separately).

[56] Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 815 (1989); *see also* John C. McCoid, A Single Package for Multiparty Disputes, 28 STAN. L. REV. 707, 707 (1976) (noting concerns that multiple suits proceeding independently can yield redundancy or inconsistency).

[57] Vulcan Soc'y v. White Plains, 82 F.R.D. 379, 390 (S.D.N.Y. 1979); *see* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966); Am. Ins. Co. v. St. Jude Med., Inc., 597 F. Supp. 2d 973, 980 (D. Minn. 2009); In re DIRECTV, Inc., No. C-02-5912-JW, 2004 WL 2645971, at *3 (N.D. Cal. July 26, 2004); Insolia v. Philip Morris Inc., 186 F.R.D. 547, 549 (W.D. Wis. 1999).

[58] Fed. R. Civ. P. 20(a)(1).

[59] Fed. R. Civ. P. 24(b)(1).

[60] *Second-Class Class Action*, *supra* note 4, at 540.

[61] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(a), 207(a) (2018); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (2018); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2018).

Nor is reading § 216(b) as a tightening of joinder consistent with the statutory history and purposes. The FLSA was enacted in 1938 to remedy "substandard labor conditions"[62] by setting a minimum wage, mandating overtime premium pay, requiring accurate employer time records, and banning child labor.[63] As one commentator noted, Congress was purposeful in recognizing that "social and judicial interests in the economical and efficient resolution of controversies argued for allowing one employee to challenge the unfair practice while permitting all similarly affected employees to be present . . . and reap any benefits of a favorable judgment."[64] By their nature, wage cases often challenge entire industry pay practices, spanning hundreds or thousands of workers.[65] Especially for low-wage workers, disallowing collective actions ends the claims; individual suits are cost-prohibitive.[66] Even when collective actions proceed, certification motions yield cost and delay, thwarting claims and deterring attorneys, especially given the short statute of limitations that is not automatically tolled during the often-extensive § 216(b) motion practice.[67]

In sum, the cumbersome, two-stage "certification" process, regardless of whether a court grants or denies a motion to certify, impedes efficient adjudication of wage claims – which is especially troubling given that no certification process is authorized or compelled by statute, rule, or Supreme Court precedent.

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[62] Ruan, *Facilitating Wage Theft*, *supra* note 26, at 731.

[63] 29 U.S.C. §§ 206, 207(a)(1), 211(c), 212 (2018).

[64] Gates, *supra* note 10, at 1526; *see also* Ruan, *Facilitating Wage Theft*, *supra* note 26, at 731 (detailing how the Congress that enacted the FLSA aimed to facilitate representative actions for effective redress of what it saw as then-prevalent detrimental labor conditions negatively affecting workers' "health, efficiency and general well-being").

[65] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting).

[66] *Id.* at 1633 (citing Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1118–19 (2012)).

[67] 29 U.S.C. § 255 (2018).

B. Judicial Responses to Second-Class Class Action: Some Adopt It and Others Reject It – While Others Agree Partially, in Unanticipated Ways.

1. The Positive Response: Courts Limiting or Dismantling the Practice of Two-Stage Certification Based on Second-Class Class Action.

Unexpectedly to us, some judges actually cited *Second-Class Class Action* in agreeing with one or both of its two main arguments: (a) that § 216(b) opt-in standard is lenient, more like Rule 20 joinder than Rule 23 class membership; and (b) that no "certification" at all is required for § 216(b) collective actions.

a. Liberalizing Opt-In as Lenient Joinder, Not Rule 23 Scrutiny –Because Prior § 216(b) "Certification" Practice is a "Misnomer" or "Conflicts with … the Statute."

Some courts cited *Second-Class Class Action* to adopt more lenient standards for § 216(b) opt-in, because (a) opt-in is like Rule 20 joinder, not Rule 23 class membership, and (b) the purpose of "certification" is deciding on notice, not creating a Rule 23-style class. Courts sometimes supported those holdings by expressly criticizing the prevailing "certification" process. *Alderoty v. Maxim Healthcare Services*, *Inc.*, for example, cited our point:

> [A]ny conditional certification process, including the two-step process, conflicts with the [FLSA] language . . . [B]ecause all employees who join . . . [a] collective action, unlike a Rule 23 class . . . , opt in[] . . . , it would be unfair to impose a significantly more stringent initial barrier than . . . [R.] 20 . . . . [That] § 216(b) does not describe any judicial role in certifying . . . has been cited in support of the argument that any conditional certification process, including the two-step process, conflicts with the language of the statute, and that joining . . . should be governed by Rule 20 (permissive joinder) and Rule 21 (misjoinder).[68]

While not going as far, *Oldershaw v. DaVita Healthcare Partners, Inc.*, in calling § 216(b) certification a "misnomer," declared

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[68] Alderoty v. Maxim Healthcare Services, No. TDC-14-2549, 2015 WL 5675527, at*5, *5 n.2 (D. Md. Sept. 23, 2015) (citing *Second Class Class Action*, *supra* note 4, at 533-34).

that it "agree[d]" with the leading decision that cited *Second-Class Class Action* in rejecting certification:

> [T]he Court agrees with the careful and thoughtful reasoning of Judge Kane in *Turner* . . . that "conditional certification" in a "collective action" is somewhat of a misnomer. . . . "[C]onditional certification" is the vehicle by which a court authorizes a named plaintiff to give . . . notice to other employees. . . . Consonant with the notice's limited purpose, the standard for court approval is lenient. . . . In contrast, certification of a class under Rule 23 is more significant and serves an entirely different purpose.[69]

b. Rejecting § 216(b) Collective Action "Certification" Entirely.

The first federal decision citing *Second-Class Class Action* to reject certification was a worker misclassification case against the Veterans Administration, *McClendon v. United States*.[70] While recognizing that two-stage certification is "common practice," *McClendon* denied plaintiffs' motion for certification as "unnecessary," citing *Second-Class Class Action*; it simply authorized notice.[71]

The second such decision was the one that drew both significant attention and appellate review: District of Colorado Judge John L. Kane's decision in *Turner v. Chipotle Mexican Grill, Inc.*[72] In *Turner*, restaurant workers alleged that the timekeeping system automatically clocked them out before they finished working, which denied full wages, including overtime premium pay, to roughly 10,000 employees.[73] Plaintiffs moved for conditional certification and dissemination of court-authorized notice.[74] The decision began by discussing *Second-Class Class Action*:

> [T]he "certification" rubric borrowed from Rule 23 has no place in wage claim litigation under the FLSA. It mires cases in

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[69] Oldershaw v. Davita Healthcare Partners, Inc., 255 F. Supp. 3d 1110, 1114-15 (D. Colo. 2017).

[70] McClendon v. United States, No. 12-81C, 2013 WL 285584, at *1, *1 n.2 (Fed. Cl. Jan. 24, 2013).

[71] *Id.* at *1-2.

[72] *See generally* Turner v. Chipotle Mexican Grill, Inc.,123 F. Supp. 3d 1300 (D. Colo. 2015).

[73] *Id.* at 1301-03.

[74] *Id.* at 1301.

> procedural prerequisites that thwart wage-earners' rights to discovery and redress. Instead, I agree with legal scholars and practitioners who have recently critiqued courts' reliance on class "certification" concepts in FLSA cases, finding them the result of a confluence of factors, including haphazard terminology, a misunderstanding of precedent and legislative intent, and excessive path dependence in the application of *stare decisis*. . . . In their well-crafted critique, Professors Moss and Ruan explain that the use of a two-stage "class certification" approach to FLSA collective actions . . . [was] triggered by imprecise pleading and "stare decisis yield[ing] path-dependence and lock-in." . . . The only requirement, per the statute, was that each plaintiff "gives his consent in writing . . . and such consent is filed in the court. . . ."[75]

The *Turner* District Court concluded, "[t]he proper approach, and the one I apply, is to presumptively allow workers bringing the same statutory claim against the same employer to join as a collective, with the understanding that individuals may be challenged and severed from the collective if the basis for their joinder proves erroneous."[76] Dispensing with "certification," the Court allowed any of the roughly 10,000 workers to opt in, allowed notice to the workers, tolled the statute of limitations, and held that if discovery later shows the workers not similarly situated, but "too different for collective treatment," then "Rule 21 (misjoinder) and Rule 42 (severance) are the proper vehicles for challenging individual plaintiffs in an FLSA collective action, and that is the process to be followed."[77]

Chipotle then petitioned the Tenth Circuit for mandamus relief, requesting dismissal of the opt-in plaintiffs or, alternatively, discovery as to which opt-ins truly are similarly situated, so Chipotle could seek to decertify the collective.[78] The Tenth Circuit denied mandamus, allowing the district court ruling to stand in a decision that supported much of its, and our 2012 Article's, reasoning.[79]

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[75] *Id.* at 1305-06 (citing *Second-Class Class Action*, *supra* note 4).

[76] *Id.* at 1309.

[77] *Id.*

[78] In re Chipotle Mexican Grill, Inc., No. 17-1028, 2017 WL 4054144, at *1 (10th Cir. Mar. 27, 2017).

[79] *Id.* at *3-4.

The Circuit noted that Congress never defined "similarly situated," nor set any particular collective action process – and then it reviewed the leading Circuit § 216(b) precedent, *Thiessen v. Gen. Elec. Capital Corp.*[80] Noting that district courts must determine who is similarly situated in a "manner that is orderly, sensible, and not otherwise contrary to statutory commands or . . . Federal Rules,"[81] *Thiessen* discussed three different approaches to the "similarly situated" determination:

- the common two-step certification process that, historically, has been called the "ad hoc approach";

- the "Rule 23 approach" that imported strict commonality and predominance standards from class action practice; and

- the pre-1966 requirements for *opt-in* class actions under the old form of Rule 23 that existed at the time when the FLSA and § 216(b) were enacted – historically called the "spurious class action" approach, reflecting the quasi-class/quasi-individual nature of opt-in actions.[82]

Thiessen held that the district court, in an ADEA case, "did not abuse its discretion in adopting the *ad hoc* approach" that required "certification."[83]

Thiessen and similar precedent in other circuits deemed the ad hoc certification approach *permissible*, spurring districts to adopt it widely – but it is not *mandatory*, as the Tenth Circuit in *Turner* clarified. The *Turner* District Court's approach was similar to the "spurious class action" approach, the Circuit explained – requiring opt-in, but not requiring *pre*-opt-in "certification" – and "nothing in *Thiessen* proscribes the district court from following the spurious approach consistent with § 216(b)"; rather, "the district court's order is consistent with § 216(b)."[84] While not rejecting the claimed defense right to challenge opt-in plaintiffs, the Circuit explained that such a

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[80] *Id.* at *1 (citing Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001)).

[81] *Id.* (quoting Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989)).

[82] *Id.* at *1-2 (citing *Thiessen*, 267 F.3d at 1102-03).

[83] *Id* at *2. (citing *Thiessen*, 267 F.3d at 1105).

[84] *Id* at *2-3.

challenge need not be a "threshold determination" occurring "prior to" opt-in:

> Chipotle's repeated reference to a *threshold* determination is misplaced, as there is no statutory mandate for any initial determination; the only requirement that § 216(b) imposes is that plaintiffs be similarly situated. Chipotle identifies no authority from the Supreme Court or this court stating otherwise or prohibiting the district court's . . . process here. . . . Chipotle thus conflates § 216(b)'s requirement with some sort of burden on the plaintiffs to prove similarity *prior to* formation of the collective.[85]

The Circuit further accepted the District Court's view that § 216(b) opt-in should be judged by Rule 20-21 joinder and misjoinder standards, not the stricter commonality requirements for damages class actions under Rule 23(b)(3).[86] The Tenth Circuit agreed with the Eleventh Circuit that "'section 216(b)'s "similarly situated" requirement is less stringent than that for joinder under Rule 20(a).'"[87] The Tenth Circuit also cited Rule 21, and courts' flexibility to sever or dismiss, in rejecting Chipotle's argument that the District Court's approach raised "the specter of thousands of opt-in plaintiffs found by the district court to be misjoined and subsequently severed into what could be an absurd number of lawsuits."[88] Whether claims should remain together or be severed, the Circuit explained, is a matter of trial and pretrial management discretion, but may be premature to decide early in pretrial: "it is still speculative to assume that each misjoined opt-in plaintiff would merit a singular lawsuit as opposed to a grouping scheme the district court has discretion to determine."[89]

More decisions then cited either *McClendon* and *Turner* approvingly, either (a) as precedent the decision followed, in rejecting any need for "certification,"[90] or (b) in dicta, citing the no-certification

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[85] *Id.* at *3 (emphases added).

[86] *Id.*

[87] *Id.* (quoting Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996)).

[88] *Id.*

[89] *Id.*

[90] *E.g.*, Jones v. Weatherford Labs., Inc., No. 16-cv-01385-JLK, 2017 WL 6945032, at *1-2 (D. Colo. Feb. 15, 2017) (allowing collective action notice to potential members, but

precedents with either approval or dispassionate discussion, but declining to adopt that approach, either because the parties never expressly advocated it[91] or because the facts supported traditional certification, making it unnecessary to decide whether to require certification.[92]

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holding "certification" unnecessary: "Instead, the court's function in defining the collective is to determine, on motions *of the defendant* brought pursuant to . . . [Rule] 12 or 21, whether plaintiffs *who have opted-in* are 'similarly situated.' . . . [Thus] I expressly and explicitly reject the characterization of this order as a 'certification.'") (citing Turner v. Chipotle Mexican Grill, Inc., 123 F. Supp. 3d 1300, 1309-10 (D. Colo. 2015); *Second-Class Class Action*, *supra* note 4, at 572) (emphases added)); Johnston v. Coleman Music & Entm't, L.L.C., No. 3:12-cv-448-J-99TJC-TEM, 2013 WL 12159256, at *5 (M.D. Fla. Apr. 8, 2013) ("Plaintiff's failure to move for certification does not require dismissal of the opt-in plaintiffs. . . . Contrary to Defendant's assertion, this does not mean that Plaintiff 'has abandoned his collective action claims' [] and that the opt-in plaintiffs must consequently be thrown out . . . . Rather, the [failure to move] . . . indicat[es] there was no need to facilitate notice of the action to other[s] . . . ." (citing *McClendon*, 2013 WL 285584, at *1)).

[91] *See, e.g.,* Whitlow v. Crescent Consulting, LLC, 322 F.R.D. 417, 420, 420 n.2 (W.D. Okla. 2017) ("Since *Thiessen*, the undersigned has applied the two-step approach in FLSA actions, despite the fact that *Thiessen* arose under the ADEA. . . . To the extent Defendant argues *Thiessen* and its *ad hoc* approach do not apply, the Court would alternatively adopt the analysis set forth by the District of Colorado in *Turner* . . . . Nothing in Defendant's brief convinces this Court . . . [to] deviate from . . . the *ad hoc* approach to certification in this FLSA action."); Sanchez v. Simply Right, Inc., No. 15-cv-00974-RM-MEH, 2017 WL 2230079, at *2 (D. Colo. May 22, 2017) ("Defendants ask that this Court not follow the precise two-step process outlined in *Thiessen* [and] [i]nstead . . . enforce a 'heightened standard' of 'similarly situated' . . . . The Court will not do so. . . . [T]he Tenth Circuit has recently discussed *Thiessen*, . . . but that discussion does not help defendants in any way."); *id.* at *3 n.4 ([H]ere, plaintiffs sought application of the two-stage ad hoc approach. [] The Court makes no finding whether in another case, in which the plaintiff(s) sought certification under the spurious approach used by the district court in *In re Chipotle Grill*, the Court would apply the ad hoc or spurious approaches.").

[92] *See, e.g.,* Hornaday v. Mtn. States Casing, LLC, No. 15-cv-1011-WJM-KLM, 2016 WL 8253896, at *1 n.1 (D. Colo. June 8, 2016) (citing *Turner* and noting arguments supporting it, but holding that it need not decide whether to follow it, both because Plaintiff moved for certification without expressly requesting the *Turner* approach and because the wage policy undisputedly was common enough for even traditional "certification" requirements: "Judge . . . Kane recently issued an opinion criticizing *Thiessen* and finding that the 'single decision, policy, or plan' portion of . . . *Thiessen* . . . is not binding in FLSA collective actions . . . . [Plaintiff] points out *Turner* in a footnote, apparently as a form of implicit encouragement to follow its lead. . . . [Defendant] responds . . . [that] '*Turner* should not be followed.' . . . This dispute – if it is a dispute – is immaterial because [Defendant] does not argue that [Plaintiff's certification] motion should be denied for failure to allege a single decision, policy, or plan."); Bracamontes v. Bimbo Bakeries U.S.A. Inc., No. 15-cv-02324-RBJ, 2017 WL 3190605, at *1 n.2 (D. Colo. July 19, 2017) ("Finding that plaintiffs are entitled to conditional certification under the more rigorous *Thiessen* standard, I need

2. The Negative Response: Courts Disagreeing with *Second-Class Class Action* and Still Requiring Two-Stage "Certification."

Some courts, however, decidedly disagreed with the approach of *Second-Class Class Action*, either on the merits or because it went against long-established practice.[93] For example, in *Augustyniak v. Lowe's Home Ctr., LLC*, an FLSA collective action claiming that human resources managers were misclassified as overtime-exempt, the plaintiffs followed the common practice in the Second Circuit of moving for conditional certification.[94] The District Court denied the motion, holding that "'plaintiff has failed to make even the "modest showing" required for pre-discovery conditional certification' of a nationwide class.'"[95] Further, before the certification motion, over 50 opt-ins filed consents to join, so the Court proceeded to discuss the import of certification and the "similarly situated" standard.[96]

First, though holding that certification denial "does not automatically require dismissal of those plaintiffs who opted into the case without such notice,"[97] *Augustyniak* disagreed with the *Turner*

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not address the parties' arguments on whether or not the more lenient standard discussed and adopted in *Turner* by my colleague, Judge Kane, should apply.").

[93] *See, e.g.,* Huertero-Morales v. Raguboy Corp., No. 17 Civ. 2429 (JCF), 2017 WL 4046337, at *1 n.1 (S.D.N.Y. Sept. 12, 2017) ("[P]laintiffs argue that the Court should follow *Turner* . . . . [which] found that the two-step process is inappropriate and that allowing simple permissive joinder is the correct approach to Section 216(b) collectives. . . . [T]his is contrary to long-established practice in the Second Circuit. Accordingly, I decline to apply *Turner*.") (citations ommitted); Rojas v. Kalesmeno Corp., No. 17 Civ. 0164 (JCF), 2017 WL 3085340, at *2 n.1 (S.D.N.Y. July 19, 2017) ("[P]laintiffs argue that the Court should follow *Turner* . . . . [which] found that the two step process is inappropriate and that allowing simple permissive joinder is the correct approach to Section 216(b) collectives. . . . [O]ther courts in . . . this Circuit have rejected calls to adopt the *Turner* approach. Accordingly, I decline to apply *Turner*.") (citations omitted); Gomez v. Terri Vegetarian LLC, No. 17-CV-213 (JMF), 2017 WL 2628880, at *1 n.1 (S.D.N.Y. June 16, 2017) ("Plaintiff invites the Court to follow *Turner* . . . in holding that he need not meet any burden for others to join his FLSA suit . . . . But Plaintiff abandons that argument in his reply memorandum . . . [and] acknowledges that it is contrary to the approach . . . [in] the Second Circuit. Accordingly, the Court declines Plaintiff's invitation."); Augustyniak v. Lowe's Home Ctr., LLC, No. 14-CV-00488-JJM, 2016 WL 462346, at *2-3 (W.D.N.Y. Feb. 8, 2016) (citing but rejecting *Turner*, instead requiring certification based on "similarly situated" proof).

[94] Augustyniak v. Lowe's Home Center, No. 14-CV-00488-JJM, 2016 WL 462346 (W.D.N.Y. Feb. 8, 2016).

[95] *Id.* at *1.

[96] *Id*. at *1-2.

[97] *Id*. at *2.

holding that workers "'may "consent" to join the action merely by filing an appropriate form, and it then becomes the responsibility of the other parties to move the court to dismiss or sever . . . .'"[98] *Augustyniak* deemed Second Circuit precedent that plaintiffs may opt in only "'*so long as such plaintiffs are similarly situated* to the named individual plaintiff'"[99] to mean that "[t]he burden remains with Plaintiffs to show, by a preponderance of evidence, that they and the opt-in plaintiffs are similarly situated."[100]

While disagreeing with *Turner* on the *procedure* for determining "similarly situated," *Augustyniak* agreed on the *substantive* standard – but proceeded to apply it in a stricter fashion. *Augustyniak* quoted the Eleventh Circuit in *Grayson* for the rule that "'the "similarly situated" requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20.'"[101] Yet *Augustyniak* proceeded to demand fairly stringent commonality: "'district courts in this circuit typically look to the (1) disparate factual and employment settings of the individual plaintiffs; (2) defenses available to defendants which appear to be individual to each plaintiff; and (3) fairness and procedural considerations counseling for or against collective action treatment.'"[102] *Augustyniak* thus held that for each opt-in "to remain in this action," the named plaintiff "must prove by a preponderance of the evidence" that the opt-in "is similarly situated to her with respect to FLSA violations."[103]

Other courts similarly have rejected the idea of a no-certification collective action and demanded stronger commonality proof than under Rule 20. For example, in *Huertero-Morales v. Raguboy Corp.*, an FLSA collective action involving restaurant workers' claims of off-the-clock work and tip pool impropriety, Plaintiffs moved for conditional certification, but also asked the Court to follow *Turner* and reject any need for certification.[104] The

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[98] *Id.* (quoting *Turner*, 123 F. Supp. 3d at 1306).

[99] *Id.* (quoting Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010)).

[100] *Id.* (internal quotations and citations omitted).

[101] *Id.* (quoting Grayson v. K Mart Corp., 79 F.3d 1086, 1095 (11 Cir. 1996)).

[102] *Id.* (quoting Zivali v. AT & T Mobility, LLC, 784 F. Supp. 2d 456, 460 (S.D.N.Y. 2011))

[103] *Id.* at *3.

[104] Huertero-Morales v. Raguboy Corp., No. 17 Civ. 2429 (JCF), 2017 WL 4046337, at *1, *1 n.1 (S.D.N.Y. Sept. 12, 2017).

Court cited precedent applying the certification process as authority that the *Turner* approach "is contrary to long-established practice in the Second Circuit"[105]; then, without examining the issue further, declared that it "decline[s] to apply *Turner*."[106] Other cases, some citing *Turner* and some not, continue to apply traditional two-stage certification without expressly addressing the arguments against it.[107]

3. The Unexpected Response: Courts Agreeing with Our Diagnosis, But Reaching Different Prescriptions – Restricting (Not Liberalizing) Collective Actions in Various Ways by Deeming them Individual (Not Representative) Actions.

Some courts, while agreeing that FLSA collective actions are less like class actions than previously recognized, saw that observation as creating new confusion about how such litigation should proceed. If collective action plaintiffs are less like Rule 23 class members and more like full parties entering the case through joinder, then that raises questions, these courts noted, about how, if at all, the named plaintiffs alone (or with a small sample of opt-in plaintiffs) can represent all the other plaintiffs – in discovery, at trial, or in any possible settlement.

a. Requiring Individualized Evidence.

In one of the most detailed such analyses, *Oldershaw v. DaVita Healthcare Partners, Inc.*, District of Colorado Chief Judge Marcia S. Krieger began by agreeing with *Turner* that "'conditional certification' in a 'collective action' is somewhat of a misnomer," because it has a more limited purpose than Rule 23 class "certification": "[in] FLSA claims, 'conditional certification' is the

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[105] *Id.*

[106] *Id.*

[107] *See, e.g.*, Beall v. SST Energy Corp., No. 15-cv-01741-MSK-NYW, 2016 WL 286295, at *1-2, *1 n.1 (D. Colo. Jan. 25, 2016) (citing *Turner* and not expressly rejecting it, but still requiring certification based upon proof employees are "similarly situated"); Beltran v. InterExchange, Inc., No. 14-cv-03074-CMA-CBS, 2017 WL 4418684, at *3 (D. Colo. Apr. 28, 2017) (not citing *Turner* or any other authority proposing or rejecting reform proposals, but citing *Thiessen* in granting certification and holding, "[c]ourts take a two-step approach to certifying FLSA collective actions").

vehicle by which a court authorizes a named plaintiff to give a *Hoffmann-La Roche* type of notice to other employees."[108] Yet *Oldershaw* then, "[r]eflecting upon the teachings of *Genesis*, the thoughts of other courts, and the writings of legal scholars" – including *Turner* and *Second-Class Class Action* – held that a FLSA collective action is an entirely non-representative action, simply a lawsuit with many individual plaintiffs:

> [A] named plaintiff in an FLSA action has no interest in the "collective action" beyond her individual claim because no separate legal entity is created. This is fundamentally different from a "class action" in which certification creates a "plaintiff class" which is then represented by the named plaintiff and plaintiff's counsel. In an FLSA "collective action" every named and "opt-in" plaintiff pursues his or her individual claim.[109]

From this conclusion that FLSA collective actions are not "representative" actions at all, *Oldershaw* held individualized discovery, trials, and settlement consent proper in FLSA collective actions, because each plaintiff is "free to pursue his or her individual claim[,] . . . choose his or her counsel, accept or reject a settlement proposal, and decide to go to trial."[110] Following that explanation of how FLSA opt-in creates individual plaintiffs, not representation by named plaintiffs, Magistrate Judge Nina Y. Wang granted Defendants permission to take "depositions of all opt-in plaintiffs" in the case.[111] Judge Wang's order made clear that opt-ins face full party discovery, as shown by how it required in-person depositions: while courts have discretion to permit depositions by remote means,[112] each FLSA opt-in "is a Plaintiff in this action and proceeds in this case on her own individual claim," the decision noted, so their depositions are not the sort of "'fairly uncomplicated, largely non-

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[108] Oldershaw v. Davita Healthcare Partners, Inc., 255 F. Supp. 3d 1110, 1114 (D. Colo. 2017).

[109] *Id.* at 1113-14 (citations omitted).

[110] *Id.* at 1115.

[111] *Oldershaw v. Davita Healthcare Partners, Inc.*, No. 15-cv-01964-MSK-NYW, 2018 WL 3329550, at *1 (D. Colo. July 6, 2018).

[112] *Id.* at *2 ("The parties may stipulate, or the court upon motion may order, that a deposition be taken by telephone or other remote means. FED. R. CIV. P. 30(b)(4).").

controversial'" depositions that are most feasible to conduct remotely.[113]

b. Requiring Individualized Rights Advisements and Individualized Consent to a Collective Settlement.

In a subsequent case, the *Oldershaw* Court required that "notice" detail varied rights that opt-ins hold as *individual* parties, not members of a representative action:

> [N]otice should describe the nature of the FLSA "collective action," the FLSA claim and remedies, and . . . the opportunity to "opt-in". . . . It should also advise recipients of their right to be represented by counsel for the original plaintiff, to obtain independent representation, or to participate *pro se*. It may also describe certain rights of an "opt-in" plaintiff (including . . . not to be bound by a settlement that the original plaintiff advocates). It should explain that . . . the employee can pursue an independent action . . . .[114]

Another decision appeared to take a stricter line on the need for individualized *settlement* consent. *Ruiz v. Act Fast Delivery of Colorado Inc.*, while noting that "there *could* be circumstances in which the nature or size of the opt-in group makes it impractical to solicit and obtain universal consent before an action can be settled in its entirety[,]" held that for a 73-member collective action, Plaintiffs' counsel must "effectively inform each of the opt-in plaintiffs of the nature and terms of the settlement and secure *some manifestation* of *each plaintiff's consent*." [115]

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[113] *Id.* at *3 (quoting Pappas v. Frank Azar & Assocs., P.C., No. 06-cv-01024-MSK-BNB, 2008 WL 920130, at *2 (D. Colo. Apr. 3, 2008)). *Pappas* actually says "relatively uncomplicated, largely non-controversial," No. 06-cv-01024-MSK-BNB, 2008 WL 920130, at *2 (D. Colo. Apr. 3, 2008).

[114] Johnson v. Colo. Seminary, No. 17-cv-02074-MSK-KMT, 2017 U.S. Dist. LEXIS 221614, at *9 (D. Colo. Nov. 20, 2017) (emphasis in original); *see also, e.g.,* Arfsten v. Cutters Wireline Serv., No. 16-cv-01919-MSK-KMT, 2017 WL 2400489 (D. Colo. May 26, 2017) (notice form with similar provisions).

[115] No. 14-cv-00870-MSK-NYW, 2017 U.S. Dist. LEXIS 4821, at *16-17 (D. Colo. Jan. 9, 2017) (emphases added).

c. Rejecting "Hybrid" Simultaneous Litigation of FLSA Wage Claims under § 216(b) and State Wage Claims under Rule 23.

Having found that collective FLSA claims must proceed in a fundamentally different way from state wage claims in a Rule 23 class, *Oldershaw* issued another holding that departed from the weight of the prevailing authority: bifurcating the FLSA and state wage claims, ordering adjudication of the FLSA first, because "this Court is convinced that the differences between an FLSA 'collective action' and a Rule 23 'class action' make the simultaneous consideration of both types of claims unworkable, inconvenient, costly and potentially prejudicial to some employee plaintiffs."[116] Another roughly contemporaneous decision held the same – not elaborating in depth as *Oldershaw* did, but issuing a more categorical holding:

> [T]his Court has *adopted a practice of bifurcating "hybrid" cases*, such as this, that assert both FLSA collective actions and Rule 23 class actions invoking state wage claim laws. . . . [T]he Court will adjudicate the FLSA claim . . . [to] final resolution before . . . any aspect of the . . . Rule 23 class . . . .[117]

Yet *Oldershaw's* rejection of hybrid class/collective wage actions was a departure from prevailing practice. The more prevalent practice, gradually adopted as FLSA litigation grew in the 2000s and 2010s, is allowing "hybrid" Rule 23 and § 216(b) wage litigation – letting the same case include, and litigate simultaneously, a Rule 23 class for state wage claims (which automatically includes all within the class definition) and a § 216(b) collective action for FLSA wage claims (which includes only those who opt in). "The concept of inherent incompatibility has not fared well at the appellate level" in decisions on the propriety of hybrid class/collective wage actions, the Third Circuit noted in becoming the fifth of the circuits to approve of hybrid class/collective actions in *Knepper v. Rite Aid Corp.*[118]

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[116] Oldershaw v. Davita Healthcare Partners, Inc., 255 F. Supp. 3d 1110, 1114, 1118-19 (D. Colo. 2017).

[117] Arfsten v. Cutters Wireline Serv., Inc., No. 16-cv-01919-MSK-KMT, 2017 WL 2400489, at *1 n.2 (D. Colo. May 26, 2017) (emphasis added).

[118] 675 F.3d 249, 258-59 (3d Cir. 2012) (collecting decisions approving hybrid actions from the Second, Seventh, Ninth, and District of Columbia Circuits).

Knepper adopted the following reasoning by the Seventh Circuit in *Ervin v. OS Restaurant Services, Inc.*:

> Although the potential for confusion created by a notice is a valid case-management consideration . . . , there is no indication that the problem is any worse than countless others . . . with class actions.
>
> It does not seem like too much to require potential participants to make two binary choices: (1) . . . opt in and participate in the federal action; (2) . . . opt out and *not* participate in the state-law claims. . . . [C]ourts . . . have had little trouble working out an adequate notice . . . . As a general rule, it will usually be preferable if the notice comes from a single court, in a unified proceeding, where the court and lawyers alike are paying close attention to the overall message . . . .[119]

Even within its own jurisdiction, the *Oldershaw* rejection of hybrid actions created a split as well. As another Court in the same District noted, "recent cases arising in this District tend toward approving 'hybrid' class actions,"[120] making the *Oldershaw* rejection of simultaneous collective/class hybrid litigation, like the *Turner* rejection of "certification," a cause of a split in the caselaw.

In sum, after recognizing how § 216(b) collective actions are less like class actions and more like mass joinder than previously recognized, these courts proceeded to hold that FLSA collective actions are not representative actions at all.

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[119] Ervin v. OS Restaurant Services, Inc., 632 F.3d 971, 978 (7th Cir. 2011) (allowing hybrid action).

[120] Valverde v. Xclusive Staffing, Inc., No. 16-v-00671-RM-MJW, 2017 WL 1386351, at *12 (D. Colo. Feb. 23, 2017), *report and recommendation adopted in part, rejected in part*, 2017 WL 3866769 (D. Colo. Sept. 5, 2017) (adopting portion that approved "hybrid" litigation); *see also, e.g.*, Avendano v. Averus, Inc., No. 14-cv-01614-CMA-MJW, Slip Op. at 7 (Dkt. #92, Sept. 29, 2016) (allowing hybrid litigation and noting, "the majority of federal circuit courts of appeals have concluded that these so-called 'hybrid' actions are not inherently incompatible").

III. FINDING THE BALANCE: FLSA COLLECTIVE ACTIONS AS REPRESENTATIVE ACTIONS THAT REQUIRE LIMITED JUDICIAL MANAGEMENT

A. The Broad Purpose of FLSA § 216(b): Collective and Representative

Section 216(b) is a representative mechanism for adjudicating FLSA wage rights. The starting point for determining its contours is the FLSA language: it authorizes legal action "by any one or more employees *for and in behalf of himself or themselves* and other employees similarly situated,"[121] with the opt-in provision focusing on *how* individuals become represented, not *whether* they are represented: "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed."[122] This core § 216(b) language shows Congress intended more than a "mere joinder device."[123]

The legislative history, while not extensive, confirms the congressional intent that FLSA collective actions are representative actions. The Congressional Record for the FLSA published the full "Statement of John M. Keating," an attorney invited and authorized to speak for the United Hatters, Cap, and Millinery Workers International Union. In section IV of his Statement, entitled, "*The Provision Permitting Suits Should Authorize Representative Actions and Should Require Approval of the Board Until Such Time as Board Permits Suits Without Permission*," Keating advocated "[permitting employees or unions] to bring a representative action for the benefit of all employees similarly situated. Such a provision would make the act semi-self-enforcing and would stop 90 percent of chiseling."[124] He elaborated further in answering the Chair of the Committee on Labor:

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[121] 29 U.S.C. §216(b) (2018) (emphasis added).

[122] *Id.*

[123] James M. Fraser, *supra* note 26, at 114.

[124] FAIR LABOR STANDARDS ACT OF 1937: JOINT HEARINGS BEFORE THE COMM. ON EDUC. & LABOR U.S. S. & THE COMM. ON LABOR H.R. ON S. 2475 AND H.R. 7200," 75th CONG. 457 (1937) (statement of John M. Keating).

> Representative Connery: One man representing all the organized workers to do the suing?
>
> Mr. Keating: Yes.
>
> Representative Connery: Instead of one man simply suing a small employer just to get it before the Supreme Court?
>
> Mr. Keating: That is right.[125]

Based on both the language and legislative history, commentary contemporaneous with the FLSA enactment recognized: "it is clear . . . that Congress intended to avoid multiplicity of suits and joinder difficulties by permitting a speedy and efficient determination of employee rights in some *group form of action*," and that § 216(b) is "authority for *group actions* by employees independent of general class action rules . . . to permit a more flexible and expeditious procedure."[126]

However, reconciling the two sentences of § 216(b) – "representative" actions, but with "opt in" required – has generated confusion. "While the first sentence sounds in representational terms (. . . 'on behalf of' others 'similarly situated'), the second sentence refers to those who file consents as 'party plaintiffs,' seeming to imply that all who affirmatively choose to become participants have an equal, individual stake."[127] This tension traces to the extensive amendment to § 216(b) in The Portal-to-Portal Act of 1947 (PPA),[128] which, nine years after FLSA enactment, sought to rein in FLSA suits by labor unions, as *Hoffmann-La Roche* later recounted: "In part responding to excessive litigation spawned by plaintiffs lacking a personal interest . . . representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added."[129]

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[125] *Id.* at 461.

[126] James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 ILL. L. REV. 119, 123, 132 (1942) (emphases added).

[127] Halle v. W. Penn Allegheny Health Sys. Inc., 842 F.3d 215, 223 (3d Cir. 2016).

[128] The Portal-to-Portal Act of 1947, Ch. 52, 61 Stat. 8-85, § 1 (1948).

[129] Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989); *see also* Note, *Fair Labor Standards Under the Portal to Portal Act*, 15 U. CHI. L. REV. 352, 360 (1948).

Hoffmann-La Roche cited legislative history to illuminate the intent of the 1947 PPA: to allow actions that employees file for each other while disallowing only those "representative actions" in which an agent, such as a labor union, sues for employees. Senator Donnell, Chair of the drafting subcommittee, denounced the "representative action . . . in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case."[130] Thus, the requirements that opt-in plaintiffs file written consents to join and that suit can be brought only by affected employees were added to § 216(b).

Interpreting collective actions as "representative" actions also comports with the remedial nature of the FLSA, which Congress enacted to redress unhealthy labor practices that it did not perceive as one-offs: "It was reasonable to postulate that, if one employee was suffering from excessive hours without overtime pay or pay below the minimum wage, the employee's situation was not isolated. More likely, the employee was just one of numerous workers enduring unfair conditions caused by a particular practice of the employer."[131] As an early FLSA decision noted, "[i]n addition to the necessity of a liberal interpretation of the Act by reason of its remedial nature, the Congress broadened the customary procedure of bringing claimants before the court, evidently having in mind a simplification of court procedure by bringing in claimants in groups."[132]

It is thus in conformity with this statutory text, history, and legislative purpose that *Hoffmann-La Roche* approved a role for courts in supervising notice of FLSA rights to preserve potential opt-in plaintiffs' rights against possible unawareness and the statute of limitations.[133] The Court held that concerns about case management, not due process concerns, allow courts to review and authorize notice to potential class members.[134] It did not, as some commentators and

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[130] 93 CONG. REC. 2,182 (1947).

[131] Gates, *supra* note 10, at 1526.

[132] Distelhorst v. Day & Zimmerman, Inc., 58 F. Supp. 334, 335 (S.D. Iowa 1944).

[133] 493 U.S. 165, 165 (1989).

[134] *Id.* at 171-72; *see also* Susan M. Coler et. al., *Handling Class Actions Under the ADEA*, 10 EMP. RTS. & EMP' POL'Y J. 553, 573 (2006).

courts have opined, deem "whether FLSA cases could proceed as representative actions" an open question.[135]

B. Open Questions: What Courts Miss in FLSA Representative Actions.

Even if § 216(b) FLSA collective actions are representative, group suits, the parameters of that representation remain contested and unclear. As one circuit noted, the § 216(b) language "raises more questions than it provides answers,"[136] a void that early missteps in the case law filled poorly by requiring "certification" as under Rule 23.[137] Yet eliminating unnecessary "certification" processes does not resolve all ambiguities in how to litigate or adjudicate collective actions.

First, questions arise as to *complaint sufficiency*. To plead an FLSA collective action under § 216(b), the named plaintiffs must sufficiently allege that other employees are similarly situated. If plaintiffs do not request that the litigation be "conditionally certified" or that notice be sent to other employees of their right to join (as authorized by *Hoffmann La-Roche*), defendants have taken upon themselves to move to dismiss the collective action allegations.[138] What is the court's role in determining "similarly situated" early in the case? Under Rule 20 joinder, one common issue is enough "glue" to allow permissive joinder;[139] in § 216(b) cases, should the same substantive standard apply, and when should this be analyzed—only after a defendant moves to dismiss, at summary judgment, or at some other time? How should courts redress concerns that defendant employers might face group action that includes employees that are not similar enough, and employees may have claims too dissimilar to be litigated together properly?

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[135] Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1322 (2008).

[136] Halle v. W. Penn Allegheny Health Sys. Inc., 842 F.3d 215, 223 (3d Cir. 2016).

[137] *Second-Class Class Action*, *supra* note 4, at 533–34.

[138] *See, e.g.,* McGlathery v. Lincare, Inc., No. 8:13–cv–1255–T–23TBM, 2014 WL 1338610, at *3 (M.D. Fla. Apr. 3, 2014) (dismissing opt-in plaintiffs without prejudice after plaintiffs failed to move for conditional certification by deadline); Quijano v. Tuffy Assocs., No. 2:13–cv–573–FTM–38CM, 2014 WL 4182691, at *1 (M.D. Fla. Aug. 21, 2014) (same).

[139] FED. R. CIV. P. 20; *see Second-Class Class Action*, *supra* note 4, at 543-44.

Second, the issue of *notice* to other similar employees needs resolution. As the Supreme Court recognized in *Hoffmann La-Roche,* notice to similarly-situated employees is especially important in the FLSA context where the two-year statute of limitations continues to run until affected employees join the suit by written consent.[140] Notice is critical to protect wage rights, particularly in cases involving large numbers of employees for corporate employers. If conditional certification is not required, how should plaintiffs effectuate notice sent to other potentially affected employees? Court-authorized notice, as sanctioned by the *Hoffmann La-Roche* Court, needs to be provided as soon as practicable.[141] Without conditional certification, how and when should judicial approval be sought to preserve those rights? And what should courts require in the notice – a simple alert of the right to join a suit for unpaid wages, or a more detailed list of individual party rights?[142]

Third, courts struggle with *settlement* of FLSA collective actions without certification. In the eyes of defendant employers, the goal of settlement is to fully and finally satisfy the wage claims of all affected employees. Without counsel certified as representing all opt-in plaintiffs, how do parties execute a global settlement? If opt-in plaintiffs are party plaintiffs, do plaintiffs' counsel need written consent of each one to settle their claims?[143] If so, that might be difficult if the number of affected workers number in the thousands, as in *Turner v. Chipotle* itself.[144] And if courts have no inherent "judicial gatekeeping" role over all FLSA collective actions, under what circumstances, if any, do courts scrutinize the substance (i.e., fairness and reasonableness) of a FLSA settlement?[145]

Lastly, *litigation management* of FLSA collective actions without conditional certification needs clarification. If opt-in plaintiffs are not represented by the interests of the named plaintiffs in FLSA collective actions, then do they need to participate fully in all litigation decisions? In discovery, must each opt-in plaintiff participate in all requests and fact finding, such as individually

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[140] Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170–71 (1989).

[141] *Id.* at 171.

[142] *See supra* Part II(B)(3)(b) (discussing cases requiring different forms of notice).

[143] *See supra* Part II(B)(3)(b) (discussing cases requiring individualized consent).

[144] Turner v. Chipotle Mexican Grill, Inc., 123 F. Supp. 3d 1300, 1309-10 (D. Colo. 2015).

[145] *See infra* Part IV(C)(5)(a) (discussing mixed cases on court review of FLSA settlements).

respond to all interrogatories and document requests, and sit for deposition? Must all testify at trial? The inefficiencies of having multiple similar workers is magnified as the number of affected workers grows into the hundreds and thousands. One of efficiencies of representative discovery is having a statistically significant sample of plaintiffs, who have similar claims and facts, represent the group in liability determinations. Where opt-in plaintiffs are full party plaintiffs, how does discovery and testimony proceed when only a fraction of actual parties participates?

Because these questions regularly confound parties, and plague courts struggling with qualms about the traditional FLSA certification process – or courts with cases in which plaintiffs never seek notice, and thus never put the "certification" issue before the court – the next section offers our recommendations: a set of best practices for litigating and adjudicating collective actions. The suggestions aim to strike a balance between multiple goals: respecting the nature of § 216(b) wage cases as representative actions; yet also respecting parties' rights to press individual arguments and make individual decisions; and while striking that balance, not overburdening courts and parties alike.

IV. RECOMMENDATIONS FOR LITIGATING AND ADJUDICATING COLLECTIVE ACTIONS – WITHOUT MIS-APPLYING CLASS ACTION RULES, BUT WITHOUT DENYING THEIR REPRESENTATIVE NATURE.

Class actions have well-defined rules and practices, serving different purposes for those on all sides of the case:

- for plaintiffs and their class counsel, facilitating class-wide adjudication of sufficiently similar claims, and assuring equitable and ethical representation of absent class members;

- for defendants, assuring fair opportunity to challenge the class propriety, to press for discovery and trial procedures that protect their rights, and to achieve as much closure as possible by extending settlement to as many workers as possible; and

- for the court, enhancing judicial powers to enforce the above rights and obligations on both sides – by deciding whether a class is proper and (if so) structuring discovery and trial to suit the case, by retaining power over matters normally left to

> parties such as choosing counsel and settlement terms, and by monitoring both sides' ethics compliance.

If § 216(b) collective actions are less like Rule 23 class actions than is often recognized, then these established class action rules and practices do not apply identically to collective actions. But if § 216(b) collective actions are still representative actions, not pure individual actions in which the court remains largely hands-off and each plaintiff is a full participant in all stages – depositions, paper discovery, and trial testimony – then courts need *some* set of rules and practices different from the basic ways that cases with one or just a few plaintiffs are litigated.

In short, neither fully applying class action rules nor ignoring the representative nature of the case comports with how a § 216(b) collective action is a representative action, but not a class action. Accordingly, this section details what we see as sensible rules and practices that parties and courts could apply – within the scope of existing law – to § 216(b) collective actions: for plaintiffs and class counsel (subpart (A) infra); for defendants (subpart (B); and for courts (subpart (C)).

A. Plaintiffs' Options: Collective Actions May Have Court-Authorized Notice, or May Remain Party-Managed.

1. A Motion for Court-Approved Notice Is Optional, and Not a "Certification" Motion – and If Plaintiffs File No Motion, Solicitation of Opt-In Plaintiffs Remains Proper.

Notice is no technicality; it is the one collective action procedure the Supreme Court has approved,[146] and an important part of any case too large to assume potential plaintiffs can learn of their rights and contact plaintiffs' attorneys. Notifying workers that they can join an existing suit pressing the same claims, and that their rights may expire if they do not sue, can serve both fairness (assuring similar individuals enjoy similar rights) and efficiency (avoiding redundant similar lawsuits).[147]

But because a motion for court-authorized notice is not seeking anything for the *existing* plaintiffs – the original plaintiff(s) plus

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[146] *See generally* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989).

[147] *See supra* notes 29-30 and accompanying text.

anyone opting in without notice – a denial of the motion is simply a court decision not to authorize notice to *additional* potential plaintiffs; it is no "decertification." To challenge the effort by the plaintiffs (those who filed suit and those who opted in) to litigate their claims together rather than in separate lawsuits, a defendant may move for a ruling that some or all of those plaintiffs are misjoined, as in any multiple-plaintiff case, as detailed below.[148]

2. A Party-Managed Collective Action with Permissive Opt-In Remains Proper If Court-Approved Notice Is Rejected or Not Sought.

The difference between an order rejecting certification (as is common practice) and an order rejecting just notice (as we now suggest) is not just semantics. Until and unless a misjoinder motion is granted, after an order rejecting notice, the case still may proceed as what we would call a "party-managed collective action" – *i.e.*, a collective action without a court-approved invitation for all potential plaintiffs to join. Even courts entering orders *decertifying* collective actions still allow parties to keep litigating their joinder-based collective actions, just without any further prospect of court-authorized notice or other potential benefits of the court agreeing that all opt-ins are properly part of the case.[149]

The key reason party-managed class actions can proceed when a court rejects notice is that § 216(b) does not require the sort of broad-based invitation to join that notice constitutes. Unlike Rule 23, § 216(b) *permits*, but does not *mandate*, litigating for other similar individuals. For damages class actions, under Rule 23(c)(2)(B) the court "must" notify all within "the definition of the class" that they are included in the class, can be represented by a different attorney,

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[148] *See infra* Part IV(B).

[149] Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1386 (11th Cir. 1998) (holding, after denial of certification of age discrimination action governed by § 216(b) opt-in process, that "members are not 'irreparably harmed' by a denial of class certification, because they may still intervene in the ongoing action or file their own suits"); Dixon v. Scott Fetzer Co., 317 F.R.D. 329, 331-32 (D. Conn. 2016) (after decertification of collective action, allowing joinder of 130 individuals, then 28 more, then three more, because "[a]lthough the Court has determined that these inquiries will be individualized—such that the case may not proceed as a collective action . . .... — judicial economy still warrant[s] resolving these issues in a single lawsuit").

and are bound by the case outcome unless they opt out.[150] Section 216(b) does none of these things; it neither mandates notice nor requires inclusion of others with similar claims. The relevant two sentences of § 216(b) provide only *permission* for the original plaintiffs to allow others to join: a lawsuit "*may* be maintained . . . by any *one or more* employees for and in behalf of himself *or* themselves and other employees similarly situated"; and "*[n]o employee shall be* a party plaintiff . . . *unless* he gives his consent in writing."[151]

Thus, FLSA lawsuits with just a subset of all potential plaintiffs are common, with no argument that all similar workers *must* be invited to join. One early FLSA case rejected the dismissal argument "that the plaintiffs, Townsend and Yancey, were not authorized by all of the 'red caps" to bring this action" – because (a) "it is not essential . . . [to] receive authority from every person" similarly situated, and (b) "all persons who are alleged in the complaint to be similarly situated . . . are not indispensable parties" the suit must include.[152] That joinder is permissive, not mandatory, is restated only rarely,[153] because it is taken as a given – but it is a key premise of the many FLSA decisions, since the 1940s, that set a pretrial joinder deadline, after which similarly situated workers cannot join.[154]

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[150] FED. R. CIV. P. 23(c)(2)(B).

[151] 29 U.S.C. § 216(b) (2018) (emphases added).

[152] Townsend v. Boston & M.R.R., 35 F. Supp. 938, 940 (D. Mass. 1940); *see also* Hunt v. Nat"l Linen Serv. Corp., 157 S.W.2d 608, 609 (Tenn. 1941) ("[T]his action may be begun by and for one employee primarily, but *may* include within its scope a claim for all other employees similarly situated. This would not necessarily mean that these other employees were parties to the litigation.") (emphasis added).

[153] *See, e.g.,* Nerland v. Caribou Coffee Co., 564 F. Supp. 2d 1010, 1031 (D. Minn. 2007) (noting that collective action may proceed without all potential members joining, as justification for state-law Rule 23 class: "[J]oinder of all possible state class plaintiffs has not necessarily occurred through the FLSA collective action . . . . There exists the possibility that some current store managers did not opt into the FLSA action for fear of retaliation . . . .").

[154] *See, e.g.,* Dixon v. Scott Fetzer Co., 317 F.R.D. 329, 333 (D. Conn. 2016) (setting deadline after summary judgment was denied, but before trial, for others to join); Michigan Supervisors' Union v. Dep't of Corr., 826 F. Supp. 1088, 1089 (W.D. Mich. 1993) ("[N]o more plaintiffs will be allowed to join the class after this Court signs its opinions on the issue of damages and the motion to alter or amend."); Deaton v. Titusville Bldg. Corp., 72 F. Supp. 986, 986–87 (S.D.N.Y. 1947) (limiting opt-in period to just under 11 months after complaint filing date); Barrett v. Nat'l Malleable & Steel Castings Co., 68 F. Supp. 410, 416-17 (W.D. Pa. 1946) (barring joinder after pretrial deadline; while "[a]ctions of this nature, …

While inviting all with similar claims can serve fairness and efficiency, it may be a reasonable decision *not* to invite all. Not every lawyer representing workers has the money or staff to litigate a nationwide case;[155] many could litigate a wage case for only a modest number of clients in one case. Unlike Rule 23 class counsel, a lawyer litigating a § 216(b) wage case for a limited range of plaintiffs has no duty to *potential* plaintiffs – only to those who filed as plaintiffs or opted in.

When plaintiffs decline to seek court-approved notice, they still can send notice, just not a notice whose persuasiveness is bolstered by court approval. The ethics rule on solicitation, ABA Model Rule 7.3,[156] contrary to some perceptions, is *not* a blanket ban on targeted mailings soliciting potential clients:

- Rule 7.3(a) bars solicitation only by "in-person, live telephone or real-time electronic contact";

- Rules 7.3(b) – 7.3(c) bar "written, recorded or electronic communication" solicitation only when the recipient already indicated "a desire not to be solicited" ((b)(1)), "the solicitation involves coercion, duress or harassment" ((b)(2)), or "aris[ing] out of the personal injury or death of any person";

- Rule 7.3(d) then allows other "written, recorded or electronic communication from a lawyer soliciting professional employment," as long as it bears the words "Advertising Material."[157]

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commonly termed 'representative suits," should be liberally administered since it may be that other persons interested in the same common question . . . might desire to join as party plaintiffs," it still "does not appear fair to the Court that the defendant should be 'left in the dark' as to what claims it might be called upon to answer. . .").

[155] *See, e.g.,* Saleen v. Waste Mgmt., Inc., No. 08-4959 (PJS/JJK), 2009 WL 1664451, at *8–9 (D. Minn. June 15, 2009), *aff'd*, 649 F. Supp. 2d 937 (D. Minn. 2009) (noting that plaintiffs seek substantial increase to "the size and expense of this case by issuing court-facilitated notice to all 30,000 potential opt-ins identified," and more specifically, "the expense of sending out notice to the putative collective members, the substantial widening of discovery, and the burden . . . of administering the thousands of claims brought by opt-ins nationwide").

[156] States have widely adopted ABA Model Rule 7.3. MODEL RULE OF PROF'L CONDUCT r. 7.3 (AM. BAR ASS'N). *See, e.g.,* Colo. R. Prof'l Conduct 7.3.

[157] MODEL RULE OF PROF'L CONDUCT r. 7.3 (AM. BAR ASS'N).'

Accordingly, as long as a notice from collective action plaintiffs' counsel is a non-real-time writing – such as a letter, an email, or an online or social media post – it is permissible, not barred, solicitation. The significant caveat is that if plaintiffs *do* file a motion for notice that the court *rejects* – or if the Court grants a defense "misjoinder" motion – then it may not remain proper for counsel to send a notice telling individuals that they can join the case. Whether any court decision precludes notice depends, however, on how the court decides any notice, misjoinder, or other motions – as detailed in Part (C) below.

More broadly, whether plaintiffs obtain court-authorized notice or proceed with a party-managed collective action does not much change the rights and responsibilities of defendants and courts: (1) defendants' rights to challenge the joinder (at least in cases with more than one plaintiff) of the plaintiffs into one action (*infra* Part B); and the court's duties, especially in larger collective actions in which attorney-client communication and joint adjudication are trickier, to assure that representative procedures are fair to defendants and that decisions by plaintiffs' counsel treat their clients equitably (*infra* Part C).

B. Defendants' Options: Dismissal and Misjoinder Motions – Depending on Their Strategy and Case Assessment.

It might be efficient for a defendant to move for a finding of misjoinder contemporaneously with, or as a cross-motion merged with, a plaintiff's motion for notice. But in a no-certification world in which plaintiffs may never file such a motion, that absence would not deprive defendants of their rights to challenge the substance and the procedure of allegations that numerous workers have similar unpaid wage claims. After all, defendants in non-class/non-collective actions have the right to so challenge, through various means.

1. Dispositive Motions.

A Rule 12(b)(6) motion to dismiss for failure to state a claim can dispose of claims that are facially or legally inadequate – including some FLSA claims, those resolvable by applying legal analysis to

undisputed facts.[158] However, often in class and collective actions, the parties cannot fully assess the viability of the claims until limited preliminary discovery after the complaint and answer.[159] A motion after such discovery cannot be a Rule 12(b)(6) motion to dismiss for failure to state a claim, because "a post-answer Rule 12(b)(6) motion is untimely".[160] Yet defendants still have options when then conclude only after preliminary discovery that a claim can be dismissed on motion. Rule 12(b)(6) is a specific vehicle for arguing the defense of failure to state a claim, but "according to Rule 12(h)(2) the defense is preserved and may be raised as late as trial" – so, post-answer, defendants still can seek dismissal for failure to state a claim, though "some other vehicle, such as a motion for judgment on the pleadings or for summary judgment, must be used to challenge the plaintiff's failure to state a claim."[161]

Rule 12(b)(6) and 12(c) motions, however, are proper only where a motion seeks to dismiss an entire claim, not where a motion targets particular allegations – such as allegations that workers are similarly situated enough for their FLSA claims to be litigated together. Thus, courts have rejected 12(b)(6) motions for "partial dismissal" that argue against only the "class allegations," not that all class members fail to state a claim[162] – case law that applies equally to 12(c) motions, because they apply the same standards as 12(b)(6) motions.[163]

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[158] *E.g.*, Fernandez v. Zoni Language Ctrs., Inc., 858 F.3d 45, 49 (2d Cir. 2017) (affirming grant of Rule 12(b)(6) motion to dismiss FLSA claim against for-profit entities teaching English as a second language, because undisputed nature of defendant's business showed that it qualified for the FLSA exemption for "educational establishments").

[159] *E.g.*, Herrera v. JFK Med. Ctr. Ltd. P'shp, 648 F. App'x 930, 936–37 (11th Cir. 2016) ("[T]he district court should have allowed limited discovery instead of striking the class allegations based solely on the face of the complaint. … [W]e reverse the district court's decision to strike the class allegations . . . .").

[160] 5B FED. PRAC. & PROC. CIV. § 1357 (3d ed. & 2018 update).

[161] 5B FED. PRAC. & PROC. CIV. § 1357 (3d ed. & 2018 update).

[162] *See, e.g.,* Rosales v. FitFlop USA, LLC, 882 F. Supp. 2d 1168, 1179 (S.D. Cal. 2012) (denying motion for partial dismissal of only the class allegations on sex discrimination claims); Whittaker v. Dep't of Human Resources, 86 F.R.D. 689, 689 (N.D. Ga. 1980) (denying Rule 12 motion to strike class allegations, deeming such issues properly addressed in motion for class certification).

[163] *See, e.g.,* Sanchez v. U.S. Dep't of Energy, 870 F.3d 1185, 1199 (10th Cir. 2017) ("Rule 12(c) … appl[ies] the same standards that apply to Rule 12(b)(6) dismissals."); Engler v. Arnold, 862 F.3d 571, 574–75 (6th Cir. 2017) ("To survive a Rule 12(c) motion, the

The Rule 12 case law against disposing of less than a full claim does not apply to summary judgment, however. Under Rule 56(a), a motion for summary judgment can attack only "part of [a] claim";[164] under Rule 56(g), a decision on summary judgment that "does not grant all the relief requested by the motion" still "may enter an order stating any material fact … that is not genuinely in dispute."[165] Thus, after some or all discovery, defendants can seek partial summary judgment as to particular issues related to employees' claims[166] – such as whether employees are similarly situated enough for their claims to be litigated jointly.

2. Misjoinder Motions.

With Rule 12 a poor vehicle for attacking class allegations, and Rule 56 motions often unavailable until sufficient discovery has passed, defendants' best vehicle for challenging the propriety of a collective action often will be a misjoinder motion under Rule 21, which provides as follows:

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.[167]

"'complaint must contain sufficient factual matter, accepted as true, to "'state a claim to relief that is plausible on its face.'"') (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

164 FED. R. CIV. P. 56(a).

165 FED. R. CIV. P. 56(g).

166 *See, e.g,* Alberty-Vélez v. Corporación De Puerto Rico Para La Difusión Pública, 242 F.3d 418, 422 (1st Cir. 2001) (reversing trial judgment that contravened earlier grant of partial summary judgment on plaintiff's status as employee or contractor, because district court's earlier "determination that Alberty was an employee was an entry of partial summary judgment pursuant to FED. R. CIV. P. 56(d). Facts specified in such circumstances 'shall be deemed established, and the trial shall be conducted accordingly.'") (quoting FED. R. CIV. P. 56); First Nat. Ins. Co. v. F.D.I.C., 977 F. Supp. 1051, 1055 (S.D. Cal. 1997) ("FDIC objects to this motion, arguing that First National is seeking rulings on individual issues without seeking summary judgment as to an entire cause of action. Rule 56(d), however, provides that if a motion for summary judgment will not dispose of the whole case, the Court 'shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.' Even if First National will not prevail on one of its causes of action, the Court may still grant summary adjudication as to specific issues if it will narrow the issues for trial." (citation omitted)).

167 FED. R. CIV. P. 21.

The "at any" time portion of Rule 21 distinguishes it from the main dispositive motions, both motions to dismiss for failure to state a claim (which can be filed only at the start of a case) and motions for summary judgment (which can be granted only after adequate discovery).[168] Misjoinder motions can be made up to and even after trial,[169] subject to the important proviso that such a motion will not be granted if it would unfairly prejudice any party.[170]

Thus, whether and when to file a misjoinder motion is up to the defendant, subject only to the confines of the scheduling order. Rule 16 already provides that "the district judge . . . must issue a scheduling order" early in litigation.[171] Scheduling orders can cover any number of matters, but the "required contents" already include changes to pleadings and motions: "The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions."[172] District courts' deadline-setting authority is strong; applying the deferential "abuse of discretion" review standard, appellate courts regularly affirm district court decisions denying motions as untimely, without even addressing the merits, when such motions are filed after a deadline in a scheduling order.[173]

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[168] *See supra* note 167.

[169] *See, e.g.,* Ravenswood Inv. Co. v. Avalon Corr. Servs., 651 F.3d 1219, 1223 (10th Cir. 2011) ("[A] district court can dismiss a dispensable nondiverse party pursuant to FED. R. CIV. P. 21 to cure a jurisdictional defect at any point . . . , including after judgment . . . . [T]he district court . . . attempted to invoke this exception to the time-of-filing rule in fashioning its severance and dismissal order . . . to preserve the investment of resources by the court and the parties.").

[170] *E.g.*, Atwood v. Pac. Mar. Ass'n, 432 F. Supp. 491, 495 (D. Or. 1977), *aff'd*, 657 F.2d 1055 (9th Cir. 1981) ("[I]t would be unfairly prejudicial to dismiss the Union at this stage . . . . [I]t is simply unfair to expect the Employers to litigate and defend the Union against plaintiffs' claim of unfair representation. The Union has best access to the appropriate witnesses and evidence . . . . While the Employers certainly have an interest in this issue and may participate in its trial, they should not be required to assume sole responsibility—especially in view of the relative longevity of this action . . . . [T]he Employers have relied upon the presence of the Union in this case.").

[171] FED. R. CIV. P. 16(b)(1).

[172] FED. R. CIV. P. 16(b)(3)(A).

[173] *See, e.g.,* Torres v. Puerto Rico, 485 F.3d 5, 9 (1st Cir. 2007) (affirming denial of motion for judgment on pleadings that had argued Defendants enjoyed qualified immunity, but was filed weeks after deadline for motions in scheduling order: "[T]he district court did not reach the merits but, rather, disposed of the motion as a matter of case management.

C. The Court's Powers and Role: Creative Case Management; Authorizing Notice; and Limited Supervision of Settlements and Dismissal Decisions.

Even without the cumbersome two-stage "certification" process, courts retain more powers in collective actions than in individual litigation. Below we detail several such powers, and the feasibility of our, or others' similar, suggestions are our answer to the caselaw deeming "hybrid" Rule 23 state wage class and § 216(b) federal wage collective actions "unworkable, inconvenient, costly and potentially prejudicial."[174] If the court powers and roles we suggest are feasible, that tilts the scale in favor finding hybrid actions feasible – or at least, as the Seventh Circuit noted, no less feasible than the alternatives, because "[a]lthough the potential for confusion created by a notice is a valid case-management consideration . . . , there is no indication that the problem is any worse than countless others . . . with class actions," and any such confusion likely will be ameliorated, not worsened, "if the notice comes from a single court, in a unified proceeding, where the court and lawyers alike are paying close attention to the overall message."[175]

1. Denial of a Motion for Notice.

While the rules of professional responsibility permit plaintiffs' counsel to send a private notice (i.e., non-court-approved notice) to potential plaintiffs, private notice may not be proper if plaintiffs moved for notice and the court denied the motion. Whether a court denial of notice precludes private notice depends on what the court actually determined. A denial of notice may base on an express finding that the individuals who might join are not actually similarly situated – which would preclude any later effort to join that is contrary to such a ruling.

Yet a denial of notice may not include findings on whether actual or potential plaintiffs are or are not similarly situated. The court may deny notice because it deems that (a) a "similarly situated"

Thus, a different standard of review obtains: we examine challenged case-management orders solely for abuse of discretion.").

[174] Oldershaw v, Davita Healthcare Partners, 255 F. Supp. 3d 1110, 1114 (D. Colo. 2017) (disallowing hybrid action).

[175] Ervin v. OS Rest. Servs., 632 F.3d 971, 978 (7th Cir. 2011) (allowing hybrid action).

finding is premature, requiring more discovery, or (b) notice is an unnecessary use of court discretion, because potential plaintiffs have been adequately informed already. Thus, courts should clarify, in any ruling on notice, whether it is actually deciding the "similarly situated" issue.

The presumption, though, should be that, unless a defendant has simultaneously made a misjoinder motion, a motion for notice ordinarily will not preclude later joinder. The motion seeks just notice, not joinder of specific plaintiffs, so it ordinarily will not present a full range of evidence as to all those who may join. If a defendant wants to put before the court the issue of whose joinder is or is not proper, it can make a misjoinder motion, the vehicle that properly seeks such a ruling. If the court wishes to examine the issue without a motion, it can do so sua sponte, because Rule 21 permits a court to drop or sever a party "[o]n motion or on its own,"[176] placing it in the same position as if a defendant had initiated a misjoinder motion.[177]

2. A Finding of Misjoinder, with Protections for Severed Plaintiffs.

a. The Effect of a Finding of Misjoinder.

The effect of a misjoinder finding is a matter of court discretion, subject to two Rule 21 provisos: "Misjoinder of parties is not a ground for dismissing an action"; and any misjoinder order must be "on just terms."[178] "To remedy misjoinder, then, a court may not simply dismiss a suit altogether. Instead, the court has two remedial options: (1) misjoined parties may be dropped 'on such terms as are

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[176] FED. R. CIV. P. 21.

[177] *See, e.g.*, Boyd v. City of Oakland, 458 F. Supp. 2d 1015, 1039 (N.D. Cal. 2006) ("Plaintiff's death and his attorney's subsequent failure to substitute his Estate as Plaintiff do not warrant dismissal . . . . [T]he Court hereby resolves the issue under Rule 21 by ordering that Mr. Boyd's Estate be substituted as Plaintiff."); Davis v. Fulton Cty., 884 F. Supp. 1245, 1250 (E.D. Ark. 1995) ("[A]ll of the claims . . . relate exclusively to the harms allegedly suffered by Mrs. Bobby Davis …. [N]one of these alleged harms afford Mr. Davis a cause of action . . . . [T]he Court must conclude that he has been improperly designated as a plaintiff. Accordingly, the Court will sua sponte terminate Mr. Davis' status as a plaintiff in this action.") (citing FED. R. CIV. P. 21; other citations omitted), *aff'd*, 90 F.3d 1346 (8th Cir. 1996).

[178] FED. R. CIV. P. 21.

just'; or (2) . . . misjoined parties 'may be severed and proceeded with separately.'"[179]

The strongly preferred option for misjoined claims is severing into separate actions, not dismissing. Even though a dismissal would be without prejudice (because it would not be a merits ruling), a dismissal could injure dropped parties by rendering their re-filed claims untimely – which would violate the "on just terms" proviso of Rule 21, as one multiple courts of appeal have explained:

> [It was] improper for the Court to choose dismissal instead, as this misjoinder remedy would have imposed adverse statute-of-limitations consequences on [plaintiff]. Although a district court has discretion to choose either severance or dismissal in remedying misjoinder, it is permitted under Rule 21 to opt for the latter only if "just"—that is, *if doing so "will not prejudice any substantial right."* . . .
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> This principle was recognized by . . . *Elmore v. Henderson*. That case . . . involved a district court judge's decision to . . . dismiss—rather than sever— . . . under Rule 21 to remedy misjoinder. The judge subsequently dismissed the plaintiff's separately filed complaint as untimely because it was filed outside of the statute-of-limitations period. The Seventh Circuit held that . . . '[I]n formulating a remedy for a misjoinder[,] the judge is required to avoid gratuitous harm to the parties,' and is therefore 'duty-bound' to prevent a dismissal that would have adverse 'statute [-]of[-]limitations consequences.' The district court instead should have severed the claim and allowed it 'to continue as a separate suit so that it would not be time-barred' rather than dropping and dismissing the claim.
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> We follow suit and hold that the discretion to drop and dismiss claims against misjoined defendants under Rule 21 is abated when it 'prejudic[es] any substantial right' of plaintiffs, which includes loss of otherwise timely claims if new suits are blocked by statutes of limitations.[180]

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[179] DirecTV, Inc. v. Leto, 467 F.3d 842, 845 (3d Cir. 2006) (quoting FED. R. CIV. P. 21).

[180] *Id.* at 846-47 (alterations in original) (citing Elmore v. Henderson, 227 F.3d 1009, 1011 (7th Cir. 2000)) (alterations in original) (other citations omitted).

b. Measures to Protect Rights of Misjoined Plaintiffs.

Any misjoinder should protect the rights of opt-in plaintiffs who, often through no fault of their own, were invited to join an existing lawsuit with claims that should have remained separate. Thus, a court finding misjoinder would optimally clarify what the court is actually ruling, and optimally protect all parties, by exploiting the "on just terms" provision of Rule 21 to require specific actions, such as the following: that the severance (or dismissal) will not take effect until 30 days from the order, during which time plaintiffs' counsel must notify any plaintiffs who are deemed misjoined (a) of the nature and effect of the court's decision (e.g., whether their claims were dismissed and must be refiled, or whether they were simply severed into a separate, still-pending case}, (b) that if their claims were severed, they will need to participate in the severed action personally, not by simply continuing to rely on the initial collective action named plaintiffs, and (c) that if their claims were dismissed, they will need to file a complaint of their own within the 30 days to avoid losing any portion of their limitations period.

Plaintiffs' counsel presumptively still can represent severed plaintiffs, absent a conflict of interest rising to the level that professional responsibility rules deem presumptively impermissible:

> Unless all affected clients consent . . . , a lawyer in civil litigation may not: . . . represent two or more clients in a matter if there is a substantial risk that . . . representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter.[181]

> The feared "substantial risk" need not be plaintiffs having actual claims against each other; it can be plaintiffs who, "although nominally on the same side of a lawsuit, in fact have such different interests that representation of one will have a material and adverse effect on the lawyer's representation of the other" – which, the *Restatement of Law Governing Lawyers* notes, "can occur whether the clients are aligned as co-plaintiffs . . . , as well as in complex and multiparty litigation.[182]

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[181] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 (2000).

[182] *Id.* § 128 cmt. d (2000).

However,"[n]ot all possibly differing interests of co-clients in complex and multiparty litigation involve material interests creating conflict."[183] For example, "differences within the class over what remedy is appropriate" is not a conflict precluding joint representation,[184] but if "co-claimants might wish to characterize the facts differently," that could be a conflict if it goes to the core of what each is arguing.[185] The *Restatement* offers a sensible but generalized list of factors beyond the extent of the conflict: "whether (1) issues common to the clients' interests predominate, (2) circumstances such as the size of each client's interest make separate representation impracticable, and (3) the extent of active judicial supervision of the representation."[186]

The class action case law offers more specifics on when different views among many plaintiffs creates too much conflict of interest for the same lawyer to represent all. Rule 23 requires the court to find that the representative parties and class counsel will fairly and adequately serve the interests of the class.[187] The class action case law parallels how the Restatement looks to not just whether a conflict is possible, but whether there is "a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client."[188] For example, assume a collective action against a retailer is severed because the FLSA claims of two groups had little in common: hourly staff (cashiers, salespeople, etc.) allegedly assigned off-the-clock hours; and supervisors allegedly misclassified as overtime-exempt. In such a case, attorneys for workers could not simultaneously represent supervisors involved in the alleged violations against the workers.[189] But even under Rule 23, which gives courts more power

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[183] *Id.* § 128 cmt. d(iii) (2000).

[184] *Id.* § 128 cmt. d(iii) (2000).

[185] *Id.* § 128 cmt. d(i) (2000).

[186] *Id.* § 128 cmt. d(iii) (2000).

[187] FED. R. CIV. P. 23(a)(4) (requiring for represented party); FED. R. CIV. P. 23(g)(4) (same, class counsel).

[188] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 (2000).

[189] This rule is commonly applied in Rule 23 employment class actions. *See, e.g.,* Moore v. Napolitano, 269 F.R.D. 21, 34-35 (D.D.C. 2010) (finding that Rule 23 employment discrimination class's "representation as proposed is inadequate" due to "conflicts of interests" where class included supervisors who "participat[ed] in the discriminatory conduct" against non-supervisory plaintiffs); Talley v. ARINC, Inc., 222 F.R.D. 260, 269 (D.

to find a broad class improper due to conflicting interests, "only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status."[190]

Thus, workers and supervisors often *can* be represented in the same class, despite the possibility that some equitable relief might grant rights to workers by decreasing supervisors' powers, because "not all conflicts are fatal to certification, only those that are fundamental and actual rather than hypothetical or speculative," and the supervisors had the same "desire to end any discrimination" at the employer that workers did.[191] More broadly, there is no impermissible conflict just because relief can be zero-sum among employment plaintiffs seeking similar rights and pay from the same source, absent specific evidence that such "tension" among plaintiffs actually "play[s] any role in the current litigation."[192] If conflicts grow from a hypothetical to a substantial prospect, the court then can require different counsel for each of two or more groups with conflicting interests.[193]

Absent a conflict, severed plaintiffs still can retain collective action plaintiffs' counsel for their separate cases. Under current practice, the opt-in form sent by plaintiffs' counsel may contain an

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Md. 2004) (finding "multiple conflicts," including that some plaintiffs "were managers in [Defendant's] human resources division. . . . [who] handled the discrimination complaints of other . . . Plaintiffs," making it "probable that . . . class counsel may be forced to cross-examine their own clients . . . based on statements . . . and actions they took on [Defendant's] behalf."); Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 482-83 (S.D. Ohio 2001) (holding that two subsets of employees seeking potentially conflicting relief is "sufficient to create concern on the part of [some] members . . . that counsel may not be pursuing their interests as rigorously," and "[o]ne possible remedy" is "retention of new class counsel by either" of the two subsets), *aff'd*, 370 F.3d 565 (6th Cir. 2004).

190 WRIGHT ET AL., 7A FED. PRAC. & PROC. CIV. § 1768 (3d ed. & 2018 update).

191 Latino Officers Ass'n v. City of New York, 209 F.R.D. 79, 90 (S.D.N.Y. 2002).

192 Velez v. Novartis Pharm. Corp., 244 F.R.D. 243, 269-70 (S.D.N.Y. 2007) (finding no inherent conflict in potential tension between plaintiffs seeking the right to take pregnancy leave and plaintiffs whose pay might be decreased if other employees took such leave).

193 Latino Officers Ass'n v. City of New York, 209 F.R.D. 79, 90 (S.D.N.Y. 2002) (finding conflict merely hypothetical, but noting that "[i]f an actual conflict develops, the Court is prepared to revisit this question and consider certifying a separate subclass for each rank"); Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 482-83 (S.D. Ohio 2001) (finding that where there was conflict between two groups of plaintiffs, "[o]ne possible remedy for this situation would be the retention of new class counsel by either" of the two subsets), *aff'd*, 370 F.3d 565 (6th Cir. 2004).

express agreement that the opt-in plaintiff is retaining them.[194] But sometimes they do not, and other times the bare-bones language in an opt-in form leaves many ambiguities as to counsel's authority and client's rights.[195] Ultimately, the question is mainly what attorney and client agree, not what any court orders, with one possible exception: a court issuing an order of severance could, and likely should, instruct collective action plaintiffs' counsel to inform severed plaintiffs whether or not they still represent them, and (a) if they do represent them, what if any additional measures are needed to protect their rights (*e.g.*, working with counsel to file a new complaint), but (b) if they do not represent them, that they will provide new counsel (or *pro se* plaintiffs) all necessary files to assure no prejudicial delay in clients' continued pursuit of their rights.

For plaintiffs severed from a collective, proceeding separately may or may not require a new complaint, depending on whether severed plaintiffs actually allege different facts and argue different legal interpretations. If plaintiffs are dismissed without prejudice, not than severed, they definitely need a new complaint. Either way, the new complaint need not be as burdensome to write as the initial collective complaint was. Plaintiffs can incorporate by reference the original complaint, or whatever parts apply to them, under Rule 10: "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion."[196] As a leading treatise notes, "[t]he ability to incorporate matter from other pleadings is especially useful in multiparty litigation when the presence of common questions often results in the pleadings of the parties . . . being virtually identical, which makes . . . simple incorporations by reference highly desirable."[197]

In many cases, each plaintiff could file a 2-3 page complaint saying which numbered allegations in the original complaint s/he adopts – *e.g.*, adopting all allegations except those about other plaintiffs or the scope of the collective. Each complaint would need to add only limited individual fact allegations, because FLSA claims are governed by not the Rule 9 "particularity" requirement, but the Rule

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194 *See supra* notes 311-314 and accompanying text.

195 *See supra* notes 311-314 and accompanying text.

196 FED. R. CIV. P 10(c).

197 WRIGHT ET AL., 5A FED. PRAC. & PROC. CIV. § 1326 (3d ed. & 2018 update).

8 requirement of mere "notice pleading" – "short and plain statement of the claim showing that the pleader is entitled to relief."[198] While often entailing complexity in procedural issues or evidence analysis (*e.g.*, analyzing voluminous time records), FLSA claims do not require much pleading detail to state a claim, because "[u]nlike the complex antitrust scheme at issue in *Twombly* that required allegations of an agreement suggesting conspiracy, the requirements to state a claim of a FLSA violation are quite straightforward."[199] Thus, if plaintiffs plead simply "that overtime hours were worked but overtime wages were not received, [that] sufficiently 'state[s] a claim to relief that is plausible on its face,'" so they need not plead the specific number of hours, nor the quantity of pay owed.[200]

3. How Much to Keep Consolidated: Trial versus Pretrial.

As noted above, in some cases, plaintiffs' claims are similar enough for a collective trial, while in others, they are dissimilar enough to sever early in the case. Yet many cases are in the middle: the claims are partially similar enough to consolidated *pretrial*, but not *trial*. Consolidated pretrial may be appropriate even if plaintiffs' claims are only partially similar; even differing claims may require many of the same depositions (regional managers who supervised many plaintiffs, human resources officials involved in company-wide policy, etc.), documents (corporate policy on overtime, downloads of employee time records, etc.), and pretrial rulings that could conflict if the claims were litigated separately.[201]

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[198] FED. R. CIV. P. 8(a)(2).

[199] Driscoll v. George Washington Univ., 42 F. Supp. 3d 52, 59 (D.D.C. 2012) (quoting Sec'y of Labor v. Labbe, 319 F. App'x 761, 763 (11th Cir. 2008)).

[200] *Driscoll*, 42 F. Supp. 3d at 58-59 (denying motion to dismiss that challenged pleading for lacking allegations of specific hours worked and pay owed: "An allegation of a specific number of hours adds nothing as far as the plausibility standard is concerned . . . . Furthermore, requiring Driscoll to allege the number of overtime hours he worked without compensation could be pointless when that figure may be subject to amendment after discovery and could also be contested at trial.") (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

[201] *See, e.g.,* In re Family Dollar Stores, Inc., Wage & Hour Emp't Practices Litig., 545 F. Supp. 2d 1363, 1364-–65 (U.S. Jud. Pan. Mult. Lit. 2008) ("All actions share factual questions arising out of similar allegations that . . . store managers are entitled to overtime pay under the Fair Labor Standards Act. Centralization . . . will eliminate duplicative discovery; avoid inconsistent pretrial rulings, including those with respect to certification

Under this article's theory that modest commonality is enough to justify Rule 20 joinder, and thus collective action treatment under § 216(b), a mix of similarity and dissimilarity ordinarily will suffice to make consolidated proceedings proper – but not always. The federal multi-district litigation panel, which consolidates many FLSA (and other) cases spanning multiple districts, noted as such in *In re CVS Caremark Corp. Wage & Hour Employment Practices Litigation*:[202]

> [T]he Panel has routinely centralized . . . [claims] that the defendant[s] . . . failed to pay a group of employees . . . . [D]efendants in these dockets sought the convenience of defending all . . . in a single venue. The Panel had reason to believe that the defendants' relevant corporate employment policies applied consistently throughout their locations or that their common practices would outweigh any limited variances at individual localities . . . . [T]he presence of state law claims or statewide putative classes, in addition to claims under the FLSA, has not presented an impediment to centralization, as it is "within the very nature of coordinated or consolidated pretrial proceedings . . . to apply the law of more than one state.". . .
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> . . . . Nevertheless, . . . in some other FLSA dockets, we have found the case for centralization to be less convincing, particularly where (1) the duties of the subject employees appeared to be subject to significant local variances, (2) the defendants and/or some of the plaintiffs opposed centralization, or (3) only a few or procedurally dissimilar cases were involved.[203]

In citing numerous cases rejecting consolidation, *In re CVS Caremark Corp. Wage & Hour Employment Practices Litigation* may run contrary to this article's theory that one common issue suffices

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of collective actions; and conserve the resources of the parties, their counsel and the judiciary.") (citations omitted); Morgan v. Family Dollar Stores, 551 F.3d 1233, 1247 (11th Cir. 2008) ("The parties called 39 witnesses-store managers, district managers, corporate executives, payroll officials, and expert witnesses . . . [T]he testifying store managers worked at 50 different Family Dollar stores. The testifying district managers ran . . . 134 different stores. Two testifying Family Dollar executives oversaw 1,400 stores, while a third testifying executive was in charge of all stores.").

[202] In re CVS Caremark Corp. Wage & Hour Emp't Practices Litig., 684 F. Supp. 2d 1377 (U.S. Jud. Pan. Mult. Lit. 2010).

[203] *Id.* at 1378-79 (collecting cases).

for collective treatment – but it may not, for two reasons. First, it addressed *multi-district* consolidation, which faces a higher standard than mere joinder of plaintiffs in a single collective action filed in one district. Second, it identified considerations that, even in presence of one common issue, may still militate against consolidated pretrial of many plaintiffs' claims:

> [1] [D]iscovery in each action is likely to involve individualized, location-specific examination of things such as a particular assistant manager's job duties and the specific tasks assigned to them in a given store or locality. While some common discovery will be necessary to determine . . . to what extent the corporate parent controlled the duties of those employees, such questions should entail only a limited inquiry. . . .
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> [2] [The] actions present quite different procedural postures. A significant amount of discovery has already taken place in the . . . *Henderson* action, and a motion for conditional certification is pending in the . . . *Cruz* action. By contrast, little, if any, pretrial activity has occurred in the . . . *Ducasse* and . . . *Belanger* actions. . . .
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> [3] A clear majority of plaintiffs, as well as all defendants, oppose centralization. Although movants are plaintiffs in three of the seven actions, they are all represented by the same law firm . . . . [The] motion appears intended to further the interests of particular counsel . . . .[204]

Such factors may undercut consolidated *pretrial*, but even where consolidated pretrial remains prudent, they more often undercut consolidated *trial*. Significant individual issues often will not sufficiently undercut the efficiency of consolidated pretrial: common deponents (*e.g.*, regional managers and human resources officials) can be examined at once; separate deponents (*e.g.*, individual store managers) can be examined separately, but that is no different than in non-consolidated proceedings; and even if document production is a mix of individual and company-wide, it may still be most efficiently combined in one production.

Those same significant individual issues, however, may deeply undercut the efficiency of a consolidated trial, if trial requires

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[204] *Id.* at 1379.

testimony from hundreds of individual managers and separate verdicts for plaintiffs with different claims. There are ways to mitigate the extent to which individual issues complicate a consolidated trial, as detailed in subpart (b) below. Yet such creative measures will not always suffice to render consolidated trial feasible, so there remain cases justifying consolidated pretrial, but not consolidated trial.

Accordingly, this article's view that one common issue ordinarily suffices for a collective action is just a view about consolidated *pretrial*. Many cases rejecting collective actions for insufficient commonality would not be contrary to this article if they found only consolidated *trial* inappropriate.

4. Mass Evidence: Judicial Discretion to Manage and Set Limits.

In ordinary litigation, every plaintiff has the right to present his or her evidence, and every defendant has the right to challenge each plaintiff's evidence; the Due Process Clause guarantees the right to "present [one's] own arguments and evidence" and "an effective opportunity to defend by confronting any adverse witnesses."[205] Class actions substantially lessen the need for every plaintiff to present evidence and be challenged by the defense, but not entirely: "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."[206] Yet a defendant's right is not to "individualized fact-finding or mini-trials" of each class member, because "[t]he method . . . must be 'administratively feasible'" – for example, not taking depositions or trial testimony from all members, but instead examining documentary evidence as to each plaintiff (*e.g.*, "records that purport to list" each plaintiff's transactions), and witnesses with knowledge spanning many plaintiffs (*e.g.*, "deposing a . . . record-keeper" who can testify to the documentary evidence as to each

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[205] Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

[206] Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013).

plaintiff, as well as deposing those co-workers or supervisors who each worked with a number of class members).[207]

If, as argued above, § 216(b) collective actions are *representative* actions, even if not *class* actions,[208] the nature and definition of a "representative" action is that named plaintiffs represent others in the litigation – with whatever support from other witnesses is necessary to prove that the injuries extended to others, but without need for every individual to testify personally. Accordingly, in § 216(b) actions as in class actions, to avoid the prospect of dozens, hundreds, or thousands of plaintiffs all giving essentially similar testimony, courts can use various strategies to limit the evidence to be produced by plaintiffs, or challenged by defendants.

a. Representative Discovery: Named Plaintiffs; Sampled Opt-Ins.

Class actions feature testimony and document production by just a fraction of members, typically named plaintiffs first, then a modest number of others.[209] Early discovery, preceding and focused on class certification, may be limited to just named plaintiffs and a few other witnesses.[210] Full discovery expands to more class members, but while Plaintiffs and class counsel may need to produce information as to many class members, they typically need not produce individual discovery – depositions, interrogatories, and individual document production – from each.

Notably, courts have denied plaintiffs' *and* defendants' arguments for broad individualized discovery from class members. Defendants may seek written interrogatory responses and depositions from many or all members, but courts typically reject the "laborious process of answering and/or defending, individual interrogatories or depositions[, which] would likely be overly burdensome as well as unnecessarily expensive and time-

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[207] *Id.* at 307-08.

[208] *See supra* Part III(A).

[209] *See* FED. R. CIV. P. 23(d)(1)(A) (expressly authorizing courts in class actions to "prescribe measures to prevent undue repetition or complication in presenting evidence.").

[210] *See, e.g.*, Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 234 (2d Cir. 2006) (finding no abuse of discretion in, before class certification, "allow[ing] plaintiff's deposition and the deposition of experts," but not other witnesses).

consuming."[211] Plaintiffs may resist disclosing fact summaries from class members – a common dispute in class actions – by arguing that defendants *can* depose members instead, but (at least where such summaries are unprivileged[212]) courts sometimes require disclosing the summaries, rejecting plaintiffs' alternative of many depositions: "requir[ing] [defense] counsel to depose each of the 141 individuals . . . would be unduly burdensome . . . [and] defeat the purpose of plaintiffs' class action in the sense that a class action suit allows discovery to be consolidated through representative plaintiffs."[213]

Because Rule 26 allows discovery from any party,[214] some judges who agree that § 216(b) opt-ins are fuller "parties" than Rule 23 class members have ordered full discovery from all opt-ins, even if there are over a hundred.[215] But while the rules presume any party can face any discovery device, they do not require that *every* party in a large *multi-party* case is. A deposition of one's opponent, for example, is ordinarily part of the basic right to press a claim or defense, and to challenge an opponent's claim or defense – but it is not automatic in multi-party cases. The Advisory Committee that adopted the presumptive limit of ten depositions per side also noted that "[l]eave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2)" providing for reasonableness and proportionality in the scope and extent of discovery, which is why many courts are justified in allowing dozens or more depositions in large class or collective actions.[216] Yet that same Advisory Committee Note expressly stated that a case having

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[211] Gates v. Rohm & Haas Co., No. 06-1743, 2006 WL 3420591, at *5 (E.D. Pa. Nov. 22, 2006) (requiring production of "factual information . . . on the completed questionnaires" class counsel had sent to class members, but not further individual discovery from those members).

[212] *See, e.g.*, Harlow v. Sprint Nextel Corp., No. 08-2222-KHV-DJW, 2012 WL 646003, at *6 (D. Kan. Feb. 28, 2012) ("Because the class members completed and submitted their online survey responses to Plaintiffs' counsel after the Court had certified the class, . . . members are 'clients' of Plaintiffs' counsel and their survey responses communicated to counsel may therefore be entitled to protection from discovery under the attorney-client privilege.").

[213] Morisky v. Pub. Serv. Elec. & Gas Co., 191 F.R.D. 419, 426 (D.N.J. 2000).

[214] FED. R. CIV. P. 26(b)(1).

[215] *See supra* Part II(B)(3)(a).

[216] FED. R. CIV. P. 30(a)(2)(A) advisory committee's note to 1993 amendment (1993).

multiple parties does not automatically enlarge the number of depositions:

In multi-party cases, the parties on any side are expected to confer and agree as to which depositions are most needed, given the presumptive limit on the number of depositions they can take without leave of court. If these disputes cannot be amicably resolved, the court can be requested to resolve the dispute or permit additional depositions.[217]

For interrogatories, Rule 33 too states a limit, though in different terms: a limit of 25 interrogatories, unless otherwise stipulated or ordered in a manner consistent with the basic Rule 26(b)(1)-(2) scope of discovery.[218] Neither Rule 33 itself nor its Advisory Committee Notes clarify whether a party can serve 25 interrogatories *multiplied by the number of opposing parties* – as a leading treatise notes, in concluding that, as with depositions, in multi-party cases, the parties should work out, or otherwise courts should order, a reasonable number of interrogatories:

> [One] possible area of disagreement is counting parties. . . . Consider, for example, a situation in which *ten people* injured in a bus crash sue the bus company *in a single suit represented by the same lawyer*. Should they be considered one party or ten for purposes of the interrogatory limitation? The best result would seem to be to recognize that in some instances *nominally separate parties should be considered one party* for purposes of the 25-interrogatory limitation . . . .
>
> In the absence of a stipulation, a party wishing to propound more than 25 interrogatories should seek leave of court. . . . [T]he court is to be guided by [Rule 26] proportionality considerations . . . [and] probably approach the matter initially in terms of whether there is *some articulable reason for the need to send more* interrogatories. . . . [I]n *many instances* the nature of the case may demonstrate that *substantially more interrogatory discovery will be needed*. As the Advisory Committee put it, "[t]he aim is not to prevent needed discovery, but to provide *some*

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[217] *Id.*

[218] FED. R. CIV. P. 33(a)(1).

> *judicial scrutiny* before parties make *potentially excessive use* of this discovery device."[219]

In conformity with the simultaneous presumptions of both the right to depose opponents and the limited number of depositions even in multi-party cases: even before the recent controversy our prior article detailed (and worsened) over the class-versus-party status of § 216 collective actions, some courts limited collective action discovery to a modest sample of plaintiffs, despite acknowledging how opt-ins are fuller "parties" than Rule 23 class members. "[M]any jurisdictions . . . order[] limited, representative discovery of the named plaintiffs and opt-in plaintiffs in FLSA actions," one typical district court decision summarized after surveying the caselaw.[220] That case, *Nelson v. American Standard, Inc.*, acknowledged "that under . . . § 216(b), filing a consent to join a collective action means the 'employee shall be a party plaintiff,'" thereby letting defendants seek discovery from all, because "unlike [in] Rule 23 cases, there are no 'absent parties'" and the Federal Rules "allow parties to serve interrogatories, admissions, and requests for production of documents 'on any other party.'"[221] Despite opt-in plaintiffs' "party" status, discovery from a mere sample remains proper, *Nelson* explained with more detail than in most, typically short, discovery decisions:

> [L]imiting discovery in a FLSA action to a relevant sample minimizes the burden . . . on the plaintiffs "while affording the defendant a reasonable opportunity to explore, discover and establish an evidentiary basis for its defenses.". . . The fundamental precept of statistics and sampling is that meaningful differences among class members can be determined from a sampl[e] . . . [if the] group of "Discovery Plaintiffs" is a

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[219] WRIGHT ET AL., 8B FED. PRAC. & PROC. CIV. § 2168.1 (3d ed.) (emphasis added) (quoting FED. R. CIV. P. 30(a)(1) advisory committee's note, 146 F.R.D. 401, 675-76 (1993)).

[220] Nelson v. Am. Standard, Inc., Nos. 2:07-CV-10-TJW-CE, 2:08-CV-390-TJW-CE, 2009 WL 4730166, at *3 (E.D. Tex. Dec. 4, 2009); *see also, e.g.*, Scott v. Chipotle Mexican Grill, Inc., 300 F.R.D. 188, 192 (S.D.N.Y. 2014) ("'[I]t is well-established that the [plaintiff] may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA.'") (quoting Reich v. S. New England Tel. Corp., 121 F.3d 58, 67 (2d Cir. 1997).

[221] *Nelson*, 2009 WL 4730166, at *2.

> statistically acceptable representative sample of the entire group of opt-in Plaintiffs.[222]

While the propriety of sampled discovery in § 216(b) collective actions is "well-established," there is "no 'bright line formulation' or 'percentage threshold' for . . . the adequacy of representational evidence."[223] Yet the caselaw shows two patterns: (a) a tradeoff between the *depth* of discovery (*i.e.*, depositions or just documents, and how detailed questions are) and the *breadth* of the sample (*i.e.*, the number facing discovery); and (b) the *larger the size* of the collective, the *smaller the percentage sample* courts deem necessary. For example, courts have allowed:

- *depositions* of only 33 of 162 opt-ins (20.3%), but *interrogatories* to all 162, limited to *damages only* – because this modest-sized collective action was not bifurcated into a liability phase and a later damages phase, so each opt-in would have to prove damages at trial anyway;[224]

- in a class litigated under Rule 23, yet illustrating the tradeoff between depth of discovery and breadth of sample, the court ordered a sample of 75 of 400 class members (18.8%), which was broader than plaintiffs wanted, but without the depth defendants sought – only *interrogatories and documents*, not depositions, and only on *three specified topics*;[225]

- for a large opt-in population, a far smaller percentage sample – 91 of 1,328 (6.9%) in one case,[226] 58 of 582 opt-ins plus the few named plaintiffs in another (roughly 10%),[227] and 90 of

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[222] *Id*. at *3.

[223] *Scott*, 300 F.R.D. at 192 (quoting *Reich*, 121 F.3d at 67).

[224] Krueger v. New York Tel. Co., 163 F.R.D. 446, 449-50 (S.D.N.Y. 1995).

[225] Robertson v. Nat'l Basketball Ass'n, 67 F.R.D. 691, 700 (S.D.N.Y. 1975) (allowing discovery from a "sample of not more than twenty-five" of the 350 class members who were simply typical employees (7.1%), but also from another 50 who faced discovery because their specific jobs made them fact witnesses beyond just their class membership, for a total of 75 of 400 class members (18.8%) facing individualized discovery).

[226] Nelson v. Am. Std. Inc., Nos. 2:07-CV-10-TJW-CE, 2:08-CV-390-TJW-CE, 2009 WL 4730166, at *3 (E.D. Tex. Dec. 4, 2009).

[227] *Scott*, 300 F.R.D. at 192.

> "over 1,500" (5.7-5.9%, depending on how "over 1,500" the total was) in another;[228] and
>
> • deposition and written discovery from *all* where the population was especially small – 36 in one case,[229] 49 in another.[230]

In sum, the § 216(b) grant of party status to opt-ins does not require full discovery from all, because that same statutory provision's core purpose was to streamline litigation of similar wage claims:

> The FLSA envisions a collective action . . . in which claims of similarly situated workers are adjudicated collectively rather than individually. . . . [T]he purpose of the collective action [is] . . . "efficient adjudication of similar claims, [for] 'similarly situated' employees, whose claims are often small and not likely to be brought on an individual basis."[231]

Thus, § 216(b) simultaneously grants party status to all opt-ins while streamlining the collective discovery and trial, leaving judges the discretion to limit discovery and trial testimony, as long as (a) the case is large enough to make discovery of all infeasible and (b) the sample chosen is sufficiently representative to allow the defense a fair opportunity to challenge the claims.

b. Bellwether Trials: Trials of Small Number of Plaintiffs' Claims First, in Hopes of Avoiding Mass Trials or Mass Discovery.

How to conduct a trial of hundreds or thousands of plaintiffs' claims is a question arising regularly in class actions,[232] but can be

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[228] Smith v. Lowe's Home Ctrs., Inc., 236 F.R.D. 354, 356 (S.D. Ohio 2006).

[229] Ingersoll v. Royal & Sunalliance, Inc., No. C05-1774-MAT, 2006 WL 2091097, at *3 (W.D. Wash. July 25, 2006).

[230] *See* Rosen v. Reckitt & Colman, Inc., No. 91 CIV. 1675 (LMM), 1994 WL 652534, at *1 (S.D.N.Y. Nov. 17, 1994).

[231] Scott v. Chipotle Mexican Grill, Inc., 300 F.R.D. 188, 192 (S.D.N.Y. 2014) (citing Lynch v. United Servs. Auto. Ass'n, 491 F. Supp. 2d 357, 367 (S.D.N.Y.2007)).

[232] Few class actions actually reach trial, because most settle or are dismissed, but "the need for a trial plan often comes up in the context of class certification. Perhaps it is for this reason that the majority of the cases . . . the Court has identified that make reference

more complex when, as in § 216(b) collective actions, plaintiffs are numerous, yet to an extent are individual parties. But in many cases that are *neither* class nor collective actions, hundreds of individual plaintiffs (or more) have their claims consolidated, most commonly mass tort cases in which individual plaintiffs each allege significant, yet often quite varied, physical injuries.[233] In the federal statute on when non-class actions with many plaintiffs are enough like class actions to justify removal from state court on the same terms as class actions, "the term 'mass action' means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."[234] Mass actions sharing issues of core importance (often the same tortious act, event, or product) are often consolidated for pretrial – or, conversely, inefficient and illogical to relegate to separate pretrial proceedings that would feature many of the same motions, depositions, and document productions. *Dunson v. Cordis Corp.*[235] explained why, in agreeing with the parties that consolidation of the actions "for purposes of pretrial discovery and proceedings, along with the formation of a bellwether-trial process, will avoid unnecessary duplication of evidence and procedures in all of the actions, avoid the risk of inconsistent adjudications, and avoid many of the same witnesses testifying on common issues in all actions, as well as promote judicial economy and convenience."[236]

Yet unlike class or collective actions, mass actions clearly require trials for all individual plaintiffs, not a representative trial for only a subset, because such cases lack any authorization for a

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to trial plans do so when a court is faced with a motion for class certification." Willcox v. Lloyds TSB Bank, No. 13-00508 ACK-RLP, 2016 WL 4374943, at *2 (D. Haw. Aug. 15, 2016).

[233] *See, e.g.*, *In re* Fosamax (Alendronate Sodium) Prod. Liab. Litig., 852 F.3d 268, 302 (3d Cir. 2017) (noting, in tort claims against drug manufacturer for failure to warn that osteoporosis drug could cause atypical bone fractures: "A mass tort MDL is not a class action. It is a collection of separate lawsuits that are coordinated for pretrial proceedings."); Doe I v. Unocal Corp., 395 F.3d 932, 936 (9th Cir. 2002) (mass individual claims under Alien Tort Claims Act "that the Defendants directly or indirectly subjected the villagers to forced labor, murder, rape, and torture when the Defendants constructed a gas pipeline" in Myanmar).

[234] 28 U.S.C. § 1332(d)(11)(B)(i).

[235] *See generally* Dunson v. Cordis Corp., 854 F.3d 551 (9th Cir.), *cert. denied*, 138 S. Ct. 471 (2017).

[236] *Id.* at 554.

small number of plaintiffs to litigate "as representative parties on behalf of all members" (under Rule 23)[237] or "for and in behalf of . . . other employees" (under § 216(b)).[238] Yet mass actions, despite the individualized nature of their claims, often streamline the process of resolving hundreds or thousands of claims, *Dunson* noted, with "a bellwether-trial process" – in which "the claims of a representative plaintiff (or small group of plaintiffs) are tried" *before* all others. Bellwether trials can significantly reduce the time, cost, and burden of resolving hundreds or thousands of claims simultaneously in three ways.

> (1) *Agreement for bellwether verdicts to resolve all claims.* All parties may, before the bellwether trials occur, "agree that they will be bound by the outcome of that trial, at least as to common issues."[239]
>
> (2) *Using bellwether verdicts as a settlement aid.* The "far more common" bellwether process features no agreement to be bound: "results of the trial are used in the other cases purely for informational purposes as an aid to settlement"[240] – and can be powerful, although nonbinding, because cases typically settle when uncertainty decreases.[241]
>
> (3) *Binding determinations only on specific issues.* Even with no agreement to be bound, "a verdict favorable to the plaintiff in the bellwether trial might be binding on the *defendant* under ordinary principles of issue preclusion" – such as a determination that due care was not exercised, or that a product was defective.[242]

Any of the above three scenarios can save the significant time and cost of not only trials, but possibly also discovery, of hundreds or

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[237] FED. R. CIV. P. 23(a).

[238] 29 U.S.C. § 216(b).

[239] *Dunson*, 854 F.3d at 555 (citing ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02, cmt. b, p. 87 (2010), and RESTATEMENT (2D) OF JUDGMENTS § 40, cmt. a, p. 390 (1980)).

[240] *Dunson*, 854 F.3d at 555.

[241] *See, e.g.*, Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 873-74 (2007) (discussing settlement inventives and uncertainty).

[242] *Dunson*, 854 F.3d at 555.

thousands of claims – depending on their timing. The simplest way to time bellwether trials is to conduct them after all claims complete discovery – but if discovery is especially expensive and claims are especially similar, a small number of claims could proceed through both discovery and trial *before* full discovery for all others. In one case, for example, the parties exchanged basic class-wide discovery, then engaged in deep individual discovery, and planned trials, for just a few bellwether plaintiffs; "given the importance of these bellwether trials," the court ordered disclosure of individual earnings and tax records from only each bellwether plaintiff.[243]

Most bellwether trial plans are agreed upon by the parties, as *Dunson* noted – but a judge can order them without parties' agreement. In one case, a district court denied a class certification motion as premature, "finding that bellwether trials were needed to assess the propriety of certifying such a class" – after which "several Plaintiffs were selected for the first of three bellwether trials," and the parties "completed discovery" for those plaintiffs first, in anticipation of bellwether trials that would help the court clarify the fate of the rest of the class.[244] Rather than leave key matters such as bellwether plaintiff selection and trial planning to the parties, the court issued an order detailing the following:

> (a) the pool of plaintiffs (those residing in certain counties and are represented by one of three plaintiffs' counsel);
>
> (b) the number of random selections (25);
>
> (c) the limited extent to which the parties could narrow the randomly chosen group (to 15);
>
> (d) the exact extent to which bellwether plaintiffs would have their cases tried together (three trials of five plaintiffs each), and
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> (e) a quick schedule for those trials to commence (barely six months from the date of the order).[245]

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[243] In re Norplant Contraceptive Prod. Liab. Litig., 170 F.R.D. 153, 153-54 (E.D. Tex. 1996).

[244] In re Norplant Contraceptive Prod. Liab. Litig., 215 F. Supp. 2d 795, 800-01 (E.D. Tex. 2002).

[245] In re Norplant Contraceptive Prod. Liab. Litig., MDL No. 1038, 1996 WL 571535, at *1 (E.D. Tex. Aug. 12, 1996).

Bellwether trials do not make sense for *all* collective actions. In cases with just a few dozen plaintiffs, trying the claims of 15 first (as in the above plan) hardly saves much time, and could just prolong the litigation. In cases with just barely enough common issues for collective treatment, a small number of claims is unlikely to be similar enough to the rest for a few bellwether trials to resolve much.

But *many* collective actions are perfect for bellwether trials – especially those with (a) *enough plaintiffs* that taking a small number of bellwether claims through all pretrial stages and trial would be far cheaper and quicker than trying to resolve several hundred or thousands of claims at once, and (b) *enough common issues* that the results of just several trials are likely to show the fate of the entire population, or at least to yield issue preclusion that could streamline the remaining claims.

Just as judges use their pretrial management powers to encourage parties to consider settling, they could use those powers to encourage bellwether trials – or even order them, despite a lack of agreement from the parties, if the court believes they could be fruitful. Ordering specific processes for bellwether trials, such as the one detailed above, is within judges' Rule 16 pretrial and trial management powers.

Firstly, a core Rule 16 power is to "set dates for pretrial conferences and for trial"[246] and schedule pretrial through discovery[247] and summary judgment.[248] Those powers alone could justify bellwether trials, simply with an order setting one date to complete pretrial and hold trials for most claims, but with much earlier dates for a small number, which would make them the "bellwether" claims.

Secondly, Rule 16 authorizes judges to "adopt[]special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems,"[249] and more specifically to "order[] a separate trial under Rule 42(b) of a claim . . . or particular issue"[250] – which, even if bellwether trials were not what the drafters

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246 FED. R. CIV. P. 16(b)(2)(B)(iv).
247 FED. R. CIV. P. 16(c)(2)(F).
248 FED. R. CIV. P. 16(c)(2)(E).
249 FED. R. CIV. P. 16(c)(2)(L).
250 FED. R. CIV. P. 16(c)(2)(M).

of Rule 16 had in mind, arguably fully authorizes an order of bellwether trials.

c. Trial Bifurcation of Liability and Damages – To Separate, and Possibly Obviate Need for, Individualized Damages Proceedings.

Even in class actions with highly common claims, damages for each individual, or defenses particular to certain individuals, can be too individualized for a wholly common trial. Courts therefore often bifurcate class action trials: most commonly, a class trial on liability is the first phase of trial, followed by a damages trial examining evidence of each plaintiff's damages that constitutes the second phase of trial.[251] Alternatively, if damages are formulaic enough to be capable of classwide proof by common evidence, then the first-phase trial can cover liability and damages, with a second-phase trial limited to narrow individualized issues such as defenses that apply only to certain individuals or subsets of the class.[252]

Bifurcation can save trial time and cost in two ways. First, if the first-phase liability trial yields a defense verdict, then no second-phase proceedings on damages or individualized evidence are necessary at all. Accordingly, if a bifurcated trial yields a defense verdict, then it likely saved significant time compared to a non-bifurcated trial, in which reaching a defense verdict would have required a full trial that included individualized damages and defense evidence.

Second, and most relevant here, limiting the first-phase trial to the more common liability issues, rather than the more individualized damages or defenses, lets the first-phase trial proceed without full testimony from all or even most plaintiffs. The court

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[251] *See, e.g.,* Craik v. Minn. State Univ. Bd., 731 F.2d 465, 470 (8th Cir. 1984) ("The trial of class actions is usually bifurcated into a liability phase and a remedial phase. First, in the liability phase . . . , the plaintiff must prove . . . the plaintiff class's eligibility for appropriate . . . . relief. . . [Second,] with regard to the remedial phase of the suit, . . . relief for individuals is considered.").

[252] *See, e.g.,* Willcox v. Lloyds TSB Bank PLC, No. 13-00508 ACK-RLP, 2016 WL 4374943, at *4 (D. Haw. Aug. 15, 2016) (entering order "bifurcating (1) all issues and defenses common to all class members, and (2) any claims or defenses involving individual class members that are not common to the class, including the 'unique defenses' [defendant] intends to raise" against only certain plaintiffs).

noted as such in *Willcox v. Lloyds TSB Bank PLC*,[253] a class action featuring two different contract claims against loans taken by all class members: not only liability, but the formulaic damages plaintiffs claimed, were capable of common proof in a first-phase trial, which would be followed by a second-phase trial limited to "any claims or defenses involving individual class members that are not common to the class, including the 'unique defenses' [defendant] intends to raise" against only certain plaintiffs.[254]

The *Willcox* logic about how common the liability issue was, and how formulaic damages were, applies well to those FLSA collective actions with essentially identical wage claims, such as that nobody received overtime for hours past 40 in a week, or that all workers in a certain job were misclassified as exempt:

> [T]his case involves only two claims and no subclasses, and proof of liability and damages is straightforward and achievable through common evidence. . . . [T]he "key legal issue" – whether [Defendant] permissibly passed on [a] . . . charge to borrowers . . . is common to all. . . .
>
> Plaintiffs . . . will use the same methodology to calculate damages for each . . . class [member]. . . . [A]n Excel spreadsheet that uses information obtained about the Wilcox . . . [is] how Mr. Petley intends to calculate damages for each of the loans in the class.[255]

d. Trials Without Need For All Plaintiffs To Testify.

Even in non-representative aggregate litigation – such as the "mass actions" detailed above – courts may deploy some of these strategies and are encouraged to do so by leading commentary. First, as detailed above, bellwethers trials can sometimes avoid the need for all plaintiffs to testify at trial, or even at depositions, if either (a) the parties agree that the bellwether trials will bind as to all claims, (b) the bellwether results provide useful enough information to spur settlement, or (c) the bellwether results yield the sort of plaintiff's verdict that streamlines trial of the remaining claims by issue-

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[253] *See id.*
[254] *Id.* at *4.
[255] *Id.* at *3-4.

precluding the defense from denying key issues, such as whether employees in a certain job title were overtime-exempt.

Second, there is no requirement that plaintiffs themselves testify to prove their claims, and at least on claims of relatively simpler wage violations, documents showing each plaintiff's hours worked and pay received may suffice as proof of wage violations. One or two witnesses can attest to the documents (such as a document custodian at the employer) and explain or summarize what the data shows (such as an expert witness analyzing the data, or even a lay plaintiff or other witness who can competently attest to having performed the sometimes simple FLSA math on hours and pay data). Even if few witnesses' testimony and documents can meet plaintiffs' burdens of proof, Defendants can, of course, challenge that proof by calling witnesses, including calling any plaintiffs as adverse witnesses. But at least in a large collective action, after Defendants call dozens of witnesses, a judge's discretionary powers over trial evidence include "exclud[ing] relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, *undue delay, wasting time, or needlessly presenting cumulative evidence*."[256] That authority authorizes exclusion of otherwise relevant witnesses whose testimony would be repetitive.[257]

Third, even if testimony from all plaintiffs is unavoidable, it need not take the form of live testimony. Rule 32 allows deposition testimony to be submitted into evidence under various circumstances. The most easily satisfied circumstance is "that the witness is more than 100 miles from the place of hearing or trial"[258] — which would be the situation for most plaintiffs in many nationwide or large statewide collective actions. Even as to plaintiffs within 100 miles, deposition testimony can substitute for live

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[256] FED. R. EVID. 403 (emphasis added).

[257] *See, e.g.,* Bowman v. Corrs. Corp. of Am., 350 F.3d 537, 547 (6th Cir. 2003) (affirming Rule 403 exclusion of witness with relevant testimony because another witness covered the same issues); Rountree v. Johanns, 382 F. Supp. 2d 19, 34 (D.D.C. 2005) (finding exclusion of witnesses proper under Rule 403: "Plaintiff cites cases for the proposition that a witness who offers testimony 'material to the crucial issue of intent' must be admitted . . . . However, these cases are fact specific; they certainly do not stand for the proposition that all witnesses who may add some additional detail need be allowed to testify.").

[258] FED. R. CIV. P. 32(a)(4)(B).

testimony "on motion and notice, [if] exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used"[259] – and at least in especially large collective actions, a judge's discretion would seem to include finding the need to avoid several hundred or thousand live witnesses an "exceptional circumstance." Using depositions requires that all such plaintiffs have been deposed, of course, but plaintiff's counsel who wishes to avoid live trial testimony by using depositions can substantially save the time and cost of depositions by noticing Rule 31 "Depositions by Written Questions," in which both sides submit written questions in advance, and the witness testifies to the answers with a court reporter present, but neither counsel present.[260] In a wage collective action, both sides' counsel often could write one set of questions for all plaintiffs (or one set of questions for each of several categories of plaintiffs), which would take far less time than attending hundreds of depositions.

5. Settlement.

a. Scope of Court Authority: Less Than Rule 23; But More Than Individual Cases If Too Many Plaintiffs for Individual Consent.

As noted previously, courts in § 216(b) collective actions are not governed by Rule 23 class action provisions, so they lack Rule 23(f) judicial power to decide the substantive "fairness" of a settlement. Yet at least in § 216(b) collective actions with too many plaintiffs for individual settlement approval to be feasible, they can and should still scrutinize settlements for procedural and ethics rules compliance.

Except in Rule 23 class actions, when parties file a Rule 41(a) dismissal stipulation, "the district court may not attach any conditions to the dismissal. After the notice of voluntary dismissal is filed, the district court loses jurisdiction over the case."[261] With the

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[259] FED. R. CIV. P. 32(a)(4)(E).

[260] FED. R. CIV. P. 31(b).

[261] In re Amerijet Int'l, 785 F.3d 967, 973 (5th Cir. 2015) (citation omitted).

court's losing jurisdiction as soon as a dismissal stipulation is filed, courts cannot even require parties to disclose settlement terms.[262]

However, citing two 1940s Supreme Court decisions, some courts hold that FLSA settlements, even in individual (non-collective) actions, "require the approval of the district court" or the Department of Labor.[263] Yet those two cases, *Brooklyn Savings Bank v. O'Neil*[264] and *D.A. Schulte, Inc. Gangi*,[265] were narrower than a requirement that courts approve all FLSA settlements.

"The issue presented . . . is whether in the absence of a bona fide dispute between the parties as to liability," *Brooklyn Savings Bank* held, a settlement "bars a subsequent action to recover liquidated damages. We are of the opinion that it does not bar such claim"; the Court elaborated that "the record in this case shows that the release was not given in settlement of a bona fide dispute … with respect to coverage or amount."[266] *D.A. Schulte* went further – "liquidated damages cannot be bargained away by bona fide settlements of disputes over [statutory] coverage" – but key to that holding was that "the employees receive[d] the overtime compensation in full," an employer concession of liability.[267] "Under threat of suit, petitioner paid the overtime," *D.A. Schulte* noted, with the amount undisputed: the parties "computed the amount [and] . . . raise[d] no question as to its accuracy."[268] *D.A. Schulte* expressly said its holding against compromise settlements did *not* extend to cases with dispute as to the fact or amount of liability: "Nor do we need to consider here . . . compromises in other situations . . . , such as a dispute over the number of hours worked or the regular [pay] rate."[269]

With both 1940s cases imposing judicial scrutiny only to waivers of *liquidated damages* where there was *no dispute* on the

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[262] Gambale v. Deutsche Bank AG, 377 F.3d 133, 144 (2d Cir. 2004) ("[I]t was a serious abuse of discretion for the district court to refer to the magnitude of the settlement amount—theretofore confidential."); Smith v. Phillips, 881 F.2d 904, 904 (10th Cir. 1989) ("[U]nder [Rule 41] the stipulation of dismissal divested the district court of any jurisdiction it might have had to order the settlement agreement made public.").

[263] Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015).

[264] *See generally* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945).

[265] *See generally* D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).

[266] *Brooklyn Sav. Bank'*, 324 U.S. at 703-04.

[267] *D.A. Schulte*, 328 U.S. at 114.

[268] *Id*. at 111–12.

[269] *Id*. at 114–15.

fact or amount of liability, they likely should not apply to a typical settlement, which "is an enforceable resolution of those FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves," as the Fifth Circuit has held.[270] Some courts instead have required approval for *any* "stipulated dismissals settling FLSA claims," as the Second Circuit held in *Cheeks v. Freeport Pancake House, Inc.*,[271] citing both 1940s cases and *Lynn's Food Stores, Inc. v. Department of Labor,* a similar Eleventh Circuit holding.[272] Yet there may be little real disagreement among these cases. *Lynn's Food Stores* required court scrutiny where, as in both 1940s cases, liability was not in genuine dispute by the time of the settlement, which came only *after* the Labor Department found the employer "liable . . . for back wages and liquidated damages."[273] *Cheeks* detailed a limited rationale and scope of settlement scrutiny: "[e]xamining the basis on which district courts recently rejected several proposed FLSA settlements highlights *the potential for abuse*."[274] In each example *Cheeks* gave, a court rejected a settlement for abusive pressure or conflicts of interest – that is, for impropriety, not just too low an amount:

- one settlement not only subjected employees to draconian restrictions and broad waivers, but included attorney fees of "40 and 43.6 percent of the total settlement payment without adequate documentation";

- another required "plaintiff's attorney not to represent any person bringing similar claims," which (among other problems) violates the express prohibition on any settlement "in which a restriction on the lawyer's right to practice is part of the settlement";[275] and

- in two others, workers were pressured by vulnerable circumstances that the courts feared the settlements may have exploited.[276]

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[270] Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 255 (5th Cir. 2012).
[271] Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015).
[272] Lynn's Food Stores, Inc., v. United States, 679 F.2d 1350, 1355 (11th Cir.1982).
[273] *Id.* at 1352.
[274] *Cheeks*, 796 F.3d at 206 (emphasis added).
[275] ABA MODEL R. PROF. COND. 5.6(b).
[276] *Cheeks*, 796 F.3d at 206 (collecting cases; citations omitted).

Thus, judicial rejection of FLSA settlements appears to require not just substantive insufficiency of the settlement, but some basis for fearing procedural impropriety, such as undue pressure or an attorney conflict of interest.

With the argument for judicial scrutiny of FLSA settlements a debatable and exceptional departure from the rule allowing parties to settle at will, many courts reject judicial settlement scrutiny, as in the following analysis by one court:

> [T]he plain language of the FLSA does not require judicial approval. . . . While there may be risks that low wage employees will be coerced into settlement, . . . the same risks are present in other areas of the law for which court approval is not required (. . . . "Thus, the issue . . . is broader than the FLSA, and if it is . . . a problem, it is one for Congress to address.") Holding otherwise would waste valuable resources by requiring the Court to . . . "examine the bona fides of the dispute," hold a fairness hearing, and write . . . [an] order assessing the merits of the settlement. . . . It is understandable . . . in the Rule 23 class action context, where a settlement agreement binds absent class members. . . . [However], great numbers of civil cases of all categories are settled and closed without court supervision. . . . The Court sees no reason . . . [to] depart from that practice with respect to FLSA settlements without express statutory language requiring it. . . .[277]

Yet the no-judicial-scrutiny cases still allow *some* judicial scrutiny for pressure-and-ethics improprieties. Firstly, by applying the rule that permits true compromise of disputed FLSA claims, yet disallows mere waiver of FLSA rights, courts can scrutinize whether, "under these facts[,] . . . the release resulted from a bona fide [wage] dispute."[278] The Fifth Circuit so held *Bodle v. TXL Mortgage Corp*, finding FLSA claims were *not* settled in a bona fide dispute but were waived in unrelated state court litigation, with no assurance they

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[277] Marrano v. Oyster Bay Animal Hosp., P.C., No. 14-CV-2751 (ADS)(SIL), 2015 WL 4715207, at *2–3 (E.D.N.Y. Aug. 6, 2015) (citations omitted); *see also, e.g.*, Oldershaw v. DaVita Healthcare Partners, Inc., 255 F. Supp. 3d 1110, 1116 (D. Colo. 2017) ("[J]udicial approval of a settlement agreement is not required except when stated by statute, and there is no express requirement in 29 U.S.C. § 216 that a court approve an FLSA settlement.").

[278] Bodle v. TXL Mortg. Corp., 788 F.3d 159, 161 (5th Cir. 2015).

were "bargained away" instead of waived – because in the state case, "overtime pay was never specifically negotiated[and] there is no guarantee . . . plaintiffs will be compensated for the overtime."[279] Even outside the FLSA, courts may scrutinize whether a voluntary dismissal based on whether a settlement arose from undue pressure or other impropriety:

> While . . . stipulated dismissal under Rule 41 . . . is self-executing and does not require judicial approval, a court may decline to permit a voluntary dismissal . . . to avoid short-circuiting the judicial process, or . . . safeguard . . . persons entitled to … protection. . . .[A] "court, exercising its inherent powers, may look behind [settlements] to determine whether there is collusion or other improper conduct giving rise to the dismissal."[280]

Thus, courts have similar, but broader, power to scrutinize procedural and substantive unreasonableness than under unconscionability contract law.[281]

But compared to single- or few-plaintiff cases, or to basic contracts, § 216(b) collective actions with large numbers of plaintiffs present more concern that opt-in plaintiffs may not actually enjoy autonomous decision-making, absent procedures to protected their rights to participate and make their own decisions. Accordingly, in par (b) below, we suggest a set of measures that strike a balance between preserving the representative nature of a collective action and protecting the rights of a large group of plaintiffs who cannot easily all be personal participants in major decisions such as settlement.

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[279] *Id.* at 165.

[280] Green v. Nevers, 111 F.3d 1295, 1301 (6th Cir. 1997) (noting court power to scrutinize a settlement a lawyer executes for a client who is "legally incompetent" or "under a disability" relevant to the ability to settle a case) (quoting United States v. Mercedes-Benz of N. Am., 547 F.Supp. 399, 400 (N.D. Cal. 1982))

[281] Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 666 (6th Cir. 2003) ("[T]he unconscionability doctrine has two components: (1) substantive unconscionability, *i.e.,* unfair and unreasonable contract terms, and (2) procedural unconscionability, *i.e.,* individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible.") (applying Ohio law; also citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (establishing unconscionability doctrine)).

b. The Specific Protections Appropriate for Large Collective Actions: Consent, Authority, And Rights Provisions ("CARP").

Even if the above suggestions could help collective actions proceed efficiently and with parties' rights protected, judges and parties may still have concerns about attorney-client relationship ambiguities in no-certification collective actions. While collective actions are representative actions, a § 216(b) opt-in form does not necessarily include any details about the attorney-client relationship. Even properly executed opt-ins thus leave ambiguities about the authority of named plaintiffs and counsel to settle, opt-ins' decision-making and notice rights, and other key matters.

Good practices by counsel and by judges alike can clarify these ambiguities and redress these concerns, however. Most simply, plaintiffs' counsel can have all opt-in plaintiffs execute a retainer agreement. That might seem burdensome, but plaintiffs' counsel already must provide potential opt-in plaintiffs with paperwork they must sign – the opt-in form that must be filed for any plaintiff to join – that typically is accompanied by information on the case, whether court-ordered notice or just information from counsel or from the named plaintiffs on what the case is. Accordingly, the opt-in notice can be accompanied by, or even could contain, a retainer agreement specifying the nature of the attorney-client relationship.

Whether in a retainer or in a notice, however, the exact set of rights and responsibilities for the attorney-client relationship between plaintiffs' counsel and opt-ins remains a difficult question. One of the trickiest specific issues is settlement. In a large collective action, procuring agreement on settlement terms from potentially thousands of plaintiffs can be daunting or infeasible – but counsel's mere retention is not enough to empower him or her to make the settlement decision for all opt-in plaintiffs. The relevant ethics rule is that "a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation," but under the same rule, the "lawyer shall abide by a client's decision whether to settle a matter."[282] Thus, "a client's retention of an attorney does not in itself confer implied or apparent authority on that attorney to

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[282] ABA MODEL R. PROF. COND. 1.2(a).

settle or compromise the client's claim,[283] and it is professional misconduct for attorneys to settle without client consent,[284] or even to execute attorney-client agreements delegating full settlement authority to the attorney.[285] Courts similarly reject agreements in which multiple plaintiffs delegate settlement authority to a smaller number of plaintiffs in the same case, finding them violations of the Rule 1.8(6) ban on an "aggregate settlement" covering multiple plaintiffs without "informed consent," because settlement consent cannot be "informed" if it is granted in advance of knowing the actual terms.[286]

We propose that opt-in plaintiffs be provided, by plaintiffs' counsel, a written set of disclosures and terms that we call consent, authority, and rights provisions – "CARP" – before they opt in, or promptly after they opt in if they obtained and submitted an opt-in form other than directly from plaintiffs' counsel. Following are the recommended CARP provisions:

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[283] Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1300-01 (Ind. 1998).

[284] *See, e.g.,* In re O'Meara's Case, 54 A.3d 762, 767 (N.H. 2012) ("O'Meara violated Rule 1.2(a) because . . . he communicated a demand to settle the personal injury case for $11 million even though the Conants had not authorized him to settle for this amount."); In re White, 663 S.E.2d 21, 22 (S.C. 2008) (upholding lawyer's suspension for accepting insurer's settlement offer without client's authorization).

[285] *See, e.g.,* In re Grievance Proceeding, 171 F. Supp. 2d 81, 81 (D. Conn. 2001) (holding that fee agreement delegating all settlement authority to lawyer violated Rule 1.2(a)); In re Lansky, 678 N.E.2d 1114, 1116 (Ind. 1997) (holding that fee agreement in which client gave up right to determine whether to accept settlement offer violated Rule 1.2(a)); In re Coleman, 295 S.W. 3d 857, 860, 863 (Mo. 2009) (holding that agreement stating the lawyer "shall have the exclusive right to determine when and for how much to settle this case" violated Rule 1.2(a)); In re Bilderback, 971 P.2d 1061, 1061 (Colo. 1999) (disbarring attorney who, among other violations, settled injury case without client authorization).

[286] *See generally* Abbott v. Kidder Peabody & Co., 42 F. Supp. 2d 1046, 1048, 1051 (D. Colo. 1999) (finding Rule 1.7 barred group engagement agreement permitting "steering committee" of plaintiffs to control settlement, and barring individual settlements by providing that no plaintiff could execute an individual agreement to receive any settlement proceeds until all plaintiffs had settled; holding that "any provision of an attorney-client agreement which deprives a client of the right to control their case is void as against public policy"); Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 513 (N.J. 2006) (holding attorney may not obtain clients' advance consent to abide by majority vote of clients on settlement); Hayes v. Eagle-Picher Indus., 513 F.2d 892, 894–95 (10th Cir. 1975) ("[A]llowing the majority to govern the rights of the minority is violative of the basic tenets of the attorney-client relationship . . . . [I]t is essential that the final settlement be subject to the client's ratification particularly in a non-class action case.").

> (a) *right to sue individually instead* – if they prefer the greater control of individual litigation over the clout and efficiency of collective litigation;
>
> (b) *communication rights and duties* – counsel must communicate major case events (*e.g.*, settlement), and plaintiffs must keep counsel updated; and
>
> (c) *settlement consent and rights* – named plaintiffs and counsel are authorized to negotiate settlements binding everyone not opting out after notice of the settlement terms.

These provisions would allow a settlement process that in which the named plaintiffs and counsel carry the laboring oar, but in which all opt-ins' rights are protected. Even if plaintiffs cannot delegate full *authority to settle* their claims, they certainly can delegate *authority to negotiate* a settlement proposal – as in any case in which opposing lawyers negotiate, then report back to their clients with any proposals from the other side. Thus, opt-in plaintiffs can authorize named plaintiffs and plaintiffs' counsel to negotiate settlement and obtain settlement proposals – which opt-in plaintiffs then would be free to consent to or reject.

Critically, reject/consent decisions by opt-in plaintiffs need not be express statements of consent that all of hundreds or thousands of them must personally sign. Settlements are governed by basic contract law principles,[287] and "an offer may be accepted by conduct *or acquiescence*" *if* the parties so agree, *ex ante*:

> while mere silence . . . cannot be construed as acceptance . . . , a party's silence will be deemed as acquiescence where he or she is under such a duty to speak . . . . Such a duty may be created by a course of conduct or by an explicit statement by the offeree which gives the offeror reason to understand that silence will constitute acceptance.[288]

Thus, contracting parties – including plaintiffs and their counsel – can agree in advance to the following: that party A can submit a proposal to party B, which party B may reject, but which

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[287] *See* Moss, *Illuminating Secrecy*, *supra* note 247, at 883 (noting that a "settlement is just a contractual agreement by two parties").

[288] Joy T. Carmichael et al., *Manner of acceptance of offer to contract; sufficiency—By silence or inaction*, 22 N.Y. JUR. 2D CONTRACTS § 47 (2d ed. & 2018 update).

will be deemed consented to if party B declines to object. For consent-by-acquiescence to work, however, (a) counsel must commit to promptly sending any proposed settlement to all plaintiffs, (b) plaintiffs must commit to keeping counsel updated as to their contact information, and (c) any proposed settlement must provide a reasonable period for notice and opt-out.

While CARP is not in any statute or rule, courts do have authority to implement CARP as collective action requirements. Rule 16 authorizes the typically uncontroversial initial scheduling order that courts issue – but that order can extend beyond the usual (deadlines for amendments, motions, etc.) to cover all "appropriate matters."[289] It provides that after "any conference under this rule, the court should issue an order reciting the action taken"[290] – and covered matters can include "settling the case and using special procedures to assist in resolving the dispute."[291]

The Advisory Committee Notes confirm that the references to settlement matters were meaningful additions to Rule 16, even if applicable to only a modest subset of cases. The introduction to the 1983 Note stressed that "pretrial conferences may improve the quality of justice rendered in the federal courts by . . . improving, as well as facilitating, the settlement process."[292] The 1993 Note further stressed the value of creativity in facilitating settlement, encouraging "various procedures that, in addition to traditional settlement conferences, may be helpful in settling. . . . [J]udge[s] and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial."[293]

Yet beyond Rule 16, courts have inherent power to assure ethical and procedural propriety of *any* litigation conduct, powers that courts already have exercised in large and complex non-class cases. A notable example is *New Mexico v. Aamodt*,[294] a decades-spanning water dispute that was not a class action but, like a large

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[289] FED. R. CIV. P. 16(b)(3)(B)(vii).
[290] FED. R. CIV. P. 16(d).
[291] FED. R. CIV. P. 16(c)(2)(I).
[292] FED. R. CIV. P. 16 advisory committee's note (1983).
[293] FED. R. CIV. P. 16 advisory committee's note (1993).
[294] 537 F.2d 1102 (10th Cir. 1976).

FLSA collective action, was a large, complex case with "about 1,000 . . . named" parties.[295] Objectors to a settlement cited Rule 23 precedent to argue that settlement proponents bore the burden to prove the settlement "fair, reasonable and adequate,"[296] but the Court took a middle-ground view of its settlement authority.

On the one hand, the Court rejected the argument for "placing the burden of proof on [settlement] proponents" in a non-class action, even a large, complex one: "Class action suits have the ability to bind people who are not individual litigants and thus create potential risks of prejudice and unfairness for absent class members," the Court noted, which "imposes *unique* responsibilities on the court and counsel" that are absent in even large non-class cases.[297] On the other hand, the Court exercised the power to decide whether objectors can meet a "burden . . . to prove that the settlement is *not* fair, adequate or reasonable"[298] – yet with a focus on whether the settlement arose through fair *procedure*, not whether its *substance* met the Court's approval. The actual settlement analysis that the Court undertook focused on a list of procedural propriety issues, not the substance of the settlement terms:

> (a) "arguments that the agreement is not the product of good faith, arms-length negotiations";[299]
>
> (b) whether "the negotiations have been prejudiced by not allowing for the participation of additional interested parties";[300]
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> (c) whether the settlement "violates due process";[301] and
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> (d) overall, whether the settlement causes enough "legal prejudice" to overcome "the policy consideration of encouraging

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[295] *Id.* at 1104-05 ("New Mexico brought suit . . . for determination of rights to the use of water . . . . The United States, the four Pueblos, and about 1,000 others were named defendants. . . . The United States intervened in its proprietary capacity as owner of the Santa Fe National Forest and in its fiduciary capacity as trustee or guardian for the Pueblos . . . [and] the Pueblos . . . filed a complaint in intervention.").

[296] *New Mexico v. Aamodt*, 582 F. Supp. 2d 1313, 1317 (D.N.M. 2007) (emphasis added).

[297] *Id.* (emphasis added).

[298] *Id.* (emphasis added).

[299] *Id.*

[300] *Id.* at 1318.

[301] *Id.*

> voluntary resolution of lawsuits and . . . consistency with Fed. R. Civ. P. 41(a)(2) . . . [on] voluntary dismissals of lawsuits"[302] – a framing that recognizes how deferential a settlement review must be outside the class action context.

Paralleling CARP as to court power in collective action settlements, the Court declined to opine on the substantive settlement terms, instead focusing its review on procedural propriety, ultimately imposing "a few modifications" to "the *procedure* proposed by the Settlement Parties," targeted at protecting all parties' rights to notice and an opportunity to be heard: "The modified procedure will identify and serve all persons entitled to notice, so far as they can be ascertained with reasonable diligence, serve notice on unknown claimants by publication, and afford all claimants the opportunity to be heard by the Court before it approves the settlement agreement."[303]

Applying a mix of its broad Rule 16 powers and its inherent procedural powers to protect rights such as notice and opportunity to be heard, courts adjudicating FLSA collective actions could issue orders such as the following: that within seven days of sending plaintiffs notice of a proposed settlement, plaintiffs' counsel must file proof that all plaintiffs (a) received the CARP notice, and (b) received the settlement notice to let them opt out if they choose. Of course, such orders are a matter of judicial discretion, so courts can of course vary all of these details from what we propose; the basic point simply is that courts have ample authority to assure that all plaintiffs receive proper notices of their rights, and that defendants can know whether a settlement is accepted by enough plaintiffs to achieve the desired closure, without the often-infeasible practice of requiring every one of potentially hundreds or thousands of individual plaintiffs to execute individual settlements.

Notably, some lawyers already have undertaken, and some courts already have ordered, measures similar to parts of CARP, to guard against any possibility or accusation that opt-in plaintiffs did not properly consent – to be represented by the named plaintiffs in discovery and trial, to retain plaintiffs' counsel, or to settle. In the several orders by Chief Judge Krieger in the District of Colorado, for

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[302] *Id.*

[303] *Id.* at 1319 (emphasis added).

example, the Court went further than we suggest (a) in ordering individual discovery from all opt-ins and (b) in bifurcating the FLSA and state wage claims – but (c) in requiring detailed rights-delineating notice, it provided for some of the CARP best practices:

> [N]otice should describe the nature of the FLSA "collective action", the FLSA claim and remedies, and . . . the opportunity to "'opt-in"' . . . . It should also advise recipients of their right to be represented by counsel for the original plaintiff, to obtain independent representation, or to participate *pro se*. It may also describe certain rights of an "opt-in" plaintiff (including . . . not to be bound by a settlement that the original plaintiff advocates). It should explain that . . . the employee can pursue an independent action. . . .[304]

Unlike the above *court-approved* notice, opt-in forms that *plaintiffs' counsel, pre-certification*, can file are often far less detailed. Following is an actual example of a typical bare-bones opt-in consent that satisfies § 216(b)'s bare-bones requirement – "consent in writing to become such a party . . . filed in the court":[305]

> CONSENT TO BECOME A PARTY PLAINTIFF
>
> I, _____ , consents [sic] to sue as a Plaintiff in this action, pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*
>
> By my signature below, I hereby authorize counsel to prosecute the claims in my name and on my behalf, in this action, for Defendants' failure to pay overtime wages as required under federal law.
>
> Date: _____ By: _____
> [Print Name]
> _____
> [Signature][306]

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[304] Johnson v. Colo. Seminary, No. 17-cv-02074-MSK-KMT, Dkt. #34, Slip Op. at 6 (D. Colo. Nov. 20, 2017); *see also, e.g.*, Arfsten v. Cutters Wireline Serv., No. 16-cv-01919-MSK-KMT, Dkt. #35-1 , at 2 (D. Colo. May 26, 2017) (notice form with similar provisions).

[305] 29 U.S.C. § 216(b).

[306] Mickels v. Country Club Inc., No. 1:14-cv-01189-SCJ, Dkt. #4 (N.D. Ga. June 11, 2014) (emphasis in original).

By saying literally nothing other than that the individual "consents to sue" and "authorize counsel to prosecute the claims," this form leaves all of the above-detailed ambiguities in the attorney-client relationship that trouble courts and leave counsel's scope of authority uncertain. To what extent do opt-ins authorize the named plaintiffs to offer representative evidence that could determine the fate of the entire collective action? To what extent do opt-ins authorize counsel to negotiate a settlement that, if they do not object to it, will bind him or her, etc.? To what extent have opt-ins agreed to any fee or cost arrangement with counsel who surely will expect a cut of any verdict or settlement? And with no contact information requested, how is counsel even to assure each opt-in receives notice of major case events?

While bare-bones forms are common, some counsel's opt-in consent documents do detail the retention terms and scope of authority. More detailed opt-in consents, moreover, need not be lengthy. Below are excerpts from a *one-page* opt-in form that contains not only (a) the basic opt-in consent, but also (b) many of the key provisions of a full retainer agreement on fees and costs, and (c) safeguards to assure attorney-client communication, including mutual disclosure of multiple forms of contact information (address, email, and phone), a promise of communication from counsel when a filing for the individual occurs, and an instruction for the individual to contact counsel if s/he does not receive an expected confirmation of a filing:

> I authorize [counsel] … to represent me … by joining my claims to an existing lawsuit … without prepayment of costs or fees.… [I]f Plaintiffs are successful, costs expended by attorneys on my behalf will be deducted from my settlement or judgment … pro rata.… I understand that the attorneys may petition … [for] fees and costs … paid by defendants on my behalf. I understand … fees will be … amount[s] received from the defendant or 1/3 of my gross settlement or judgment … , whichever is greater.…
>
> Send the completed form to [counsel's address, fax, or email – all listed] …. This Consent … is not valid and effective until you have received a receipt from [counsel] indicating that it has been

> filed. If you have not received a receipt within 3 weeks … , you must contact us by phone….[307]

In-between the above two opt-in forms are ones that do say the individual retains counsel, but that say nothing about any rights or obligations in the attorney-client relationship. One, for example, starts by stating, "I hereby consent to be a party plaintiff," then (after reciting the nature of the case) states only that the individual:

> (a) "authorize[s]" counsel "to pursue *any* claims I *may* have, including *such litigation* as *may* be necessary"[308] – a vague authorization saying nothing about opt-ins' consent to representative evidence, rights to notice of key litigation matters, etc.; and
>
> (b) "hereby consent[s] [and] agree[s] … to be bound by any settlement of this action or adjudication" – an *ex ante* consent to "any" settlement that, as noted above, exceeds the authority clients can grant attorneys.[309]

With such wide variation in the opt-in consents that attorneys provide and courts order, the CARP prescriptions could serve as "best practices" clarifying the above-detailed matters that existing practice too often leaves ambiguous. Resolving those ambiguities, moreover, can make FLSA collective actions more manageable to courts whose concerns about manageability may drive many courts' denials of certification, insistence upon judicial use of "certification" to supervise collective actions, and concerns about "hybrid" actions being especially unmanageable.

V. CONCLUSION

In retrospect, *Second-Class Class Action* covered only half of what needed to be said about FLSA collective actions. As a first effort at diagnosing the field, it noted the over-use of formalized Rule 23-style "certification" processes as not only unduly cumbersome, but a misapplication of FLSA language and purposes. We are under no delusion that some courts agreed because we were particularly

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[307] "Consent To Sue Under The FLSA," Getman & Sweeney PLLC (on file with authors).

[308] "Consent to Join Collective Action" in *Scura v. Shurgard Storage Centers, Inc.*, No. C 02-524 (WDB) (on file with authors).

[309] *See supra* notes 287-291 and accompanying text.

persuasive; rather, in a field that only recently grew in prominence and is under-studied by the legal literature, we called attention to a problem that itself cried out for redress.

The other half of what needed to be said about collective actions, though, is what this Article covers as our second effort at improving the "second-class" status of FLSA collective actions within the field of aggregate litigation. If *Second-Class Class Action* and the initial decisions agreeing with it are correct that collective action plaintiffs are joinder parties rather than absent class members needing protection via "certification" inquiries, then the caselaw requiring individualized discovery, settlement consent, and trial evidence may provide plausible solutions – unless there is more to the analysis than *Second-Class Class Action* offered.

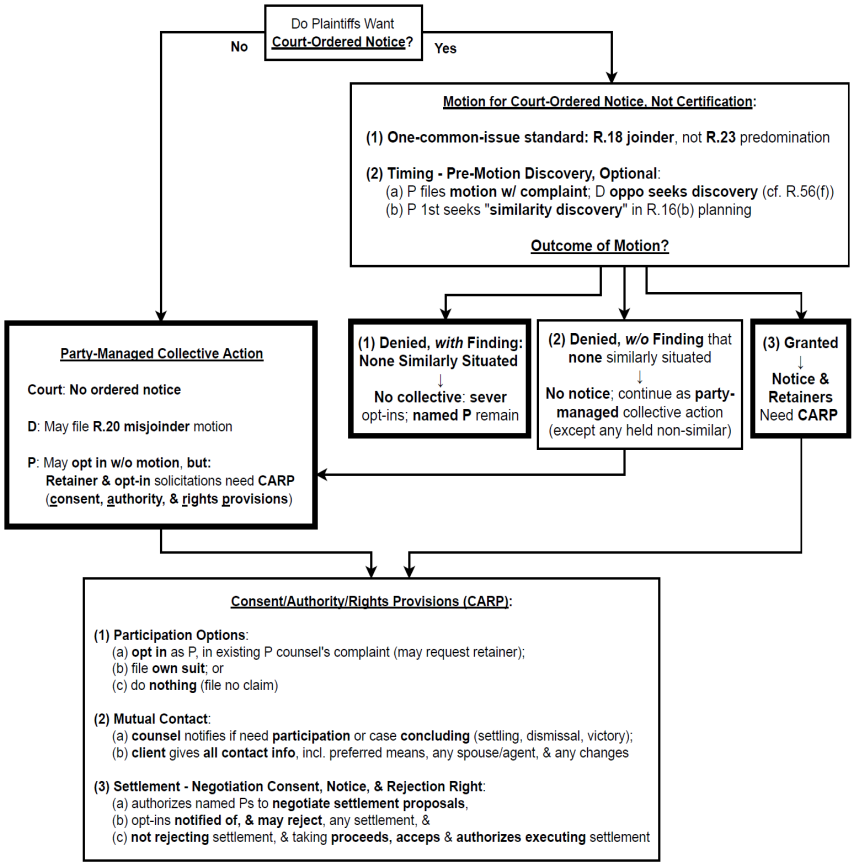
As this Article details, collective actions remain "representative actions" that do not require individualized treatment of each plaintiff, and instead allow a range of litigation management devices for aggregate litigation: representative discovery and trial evidence, to avoid the redundant evidence and excessive burdens that federal rules let judges limit in pretrial discovery and trial evidence; bifurcation of liability from damages, to allow the more heavily common-issue liability phase to occur with representative evidence, even if the later damages phase will be more individualized; and other creative trial and pretrial management techniques, such as choosing bellwether trials to proceed through pretrial and/or trial, in hopes of guiding the remaining cases to settlement or at least more streamlined pretrial and trials.

Key to proper litigation of collective actions, though, is a recognition that while courts lack broad Rule 23-style powers to protect absent members by overriding party and counsel decisions, they retain critical trial and pretrial management powers – not only to guide the litigation efficiently (as summarized in the prior paragraph), but to assure procedural propriety and ethics compliance. Toward that end, and to redress the all-too-common ambiguities in the attorney-client relationship that the ill-defined "opt-in" process causes, we propose CARP, a set of consent, authority, and rights provisions that clarify the rights and responsibilities of all parties.

Following, as a hopefully helpful shorthand, is a flowchart of how collective actions can proceed based on (a) whether plaintiffs

move for court-authorized notice or instead plan a party-managed collective action, (b) whether defendants make any misjoinder or dispositive motion, (c) what the court decides on such motions by either party, and (d) when the CARP provisions are triggered.

Figure 1:
Options for Litigating and Adjudicating Wage Collective Actions, with CARP – Consent, Authority, and Rights Provisions



CARP is quite specific, but partly by design – because some decertification decisions, and other decisions requiring full individualization of collective actions, premise on concern that there is no feasible way to manage collective actions. Whether CARP or similar processes along similar lines, we are confident that judges can manage collective actions in a manner that treats them as liberal Rule 20 joinder rather than as inaptly strict Rule 23 cases requiring close scrutiny, while also treating them as representative actions rather than as mass individual cases to be litigated with often-redundant individualized discovery, trial, and other proceedings.