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Third Circuit Puts the Kibosh on Hybrid Hijinks

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Plaintiffs asserting federal and state wage and hour claims in one action often pursue both class certification of state claims under Rule 23 and collective action certification under the FLSA. In that hybrid environment, litigating FLSA collectives to judgment before addressing Rule 23 certification can saddle employers with the increased exposure of a class action without affording them the benefit of global peace upon resolution of the dispute.

Recognizing that unfairness, the U.S. Court of Appeals for the Third Circuit admonished district courts to address class certification before trying FLSA claims. In doing so, it may have provided employers with authority for an argument against class certification.

Introduction

Plaintiffs claiming that their employers failed to properly compensate them usually have available both state and federal causes of action. Asserting both types of claims in one action, and pursuing those claims on an aggregate basis, is not uncommon. Because the Fair Labor Standards Act ("FLSA") contains its own unique aggregation mechanism, however, these "hybrid" cases proceed on two tracks – one for FLSA claims under that statute's "collective action" provision, and another for state law claims under Rule 23. The former includes only those who opt in to the case, but the latter, if certified, includes all those who do not opt out of a case and thus involve far greater exposure for an employer.

Those dual tracks normally follow a choreography where plaintiffs move early for "conditional" certification of their proposed FLSA collective, discovery occurs, and then defense motions for collective action decertification and plaintiff motions for Rule 23 class certification are filed around the same time. Sometimes, however, courts abandon that sequencing by focusing on FLSA claims first, often at the plaintiff's urging.

The Third Circuit on Hybrid Actions

The Third Circuit[1] has weighed in on how courts should order the affairs of hybrid actions, making clear that trying FLSA claims before deciding class certification may violate Rule 23. In doing so, the court slowed plaintiffs' pursuit of judgment and cast doubt on the superiority of the class device for litigating wage and hour cases.

Background

Mortgage loan officers filed a complaint against their employer, a regional bank, that brought a collective action under the FLSA and parallel state law claims as a Rule 23 class action. After the district court conditionally certified the FLSA collective, the plaintiffs moved for class certification of the state law claims and the employer moved to decertify

the collective. The court granted the former and denied the latter. The employer appealed both decisions and succeeded in reversing class certification.

On remand, the district court refused to readdress certification and set the FLSA portion of the case for trial – even before considering class certification on the state law claim. Out of alternative avenues for relief, the bank petitioned for mandamus, a stay pending a decision on its petition, and reassignment to a new district judge, arguing that it was improper to try the merits of the FLSA claim prior to class certification and an opportunity for class members to opt-out. The Third Circuit granted the stay, but because the district judge joined the reassignment request it denied as moot the mandamus petition.

Guidance

In doing so, however, it provided district courts guidance on the proper interaction between class certification under Rule 23 and merits decisions on FLSA collective actions. A "trial-before-certification" approach, reasoned the court, ignores Rule 23's mandate to decide certification "[a]t an early practicable time after a person sues." What's more, that ordering invites proposed class members to wait for final judgment before deciding whether to opt-out, thus permitting them to "benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one."

That "unfair upshot" is only "compounded when what is scheduled for trial [before certification] is a hybrid wage-and-hour case." Trial on the FLSA claims would have necessarily decided a merits issue for the class claims too and in doing so "may well have satisfied" Rule 23's requirement that common questions predominate.

If the bank lost, then, members of the proposed class would have had no incentive to opt-out.

But if the bank won, the FLSA judgment would bind only the collective action participants, thus enabling the remaining putative class members to avoid the preclusive effect of an unfavorable decision. In other words, trial-before-certification would expose employers to the full scope of classwide liability but "would arbitrarily deprive [them] of the benefits of . . . the full preclusive effect of the class action judgment."

Takeaways

For employers facing hybrid wage-and-hour actions, particularly those in the Third Circuit, this opinion provides support for a more deliberate and structured approach to sequencing the myriad decision points in these cases. Fidelity to the court's reasoning will mean that courts need to carefully coordinate FLSA collective action and Rule 23 proceedings to ensure that class certification receives attention before deciding FLSA merits issues that intertwine with state law claims and certification considerations.

The decision, in recognizing that an FLSA collective action trial likely disproves a class action's superiority under Rule 23(b)(3), also provides possible ammunition for resisting class certification in a hybrid action. If judgment on the merits of FLSA claims fatally undermines the class mechanism's superiority, the mere availability of a collective action under the FLSA may as well. ❂

Note

1. *https://www2.ca3.uscourts.gov/opinarch/193046p.pdf.*

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