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Shifting Standards of Conditional Certification

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Lusardi "Two-Step" Approach

- First applied by the U.S. District Court for the District of New Jersey in *Lusardi v. Xerox Corp*., 118 F.R.D. 351 (D.N.J. 1987), and then adopted by courts across the country
- **Step 1**: Conditional certification; also known as the "notice" stage
  - Plaintiff(s) file a motion for conditional certification, after which the court approves notice sent to the putative members of the collective
  - The standard is "lenient" -- aka very, very light
- **Step 2**: Decertification; also known as the "merits" stage
  - Defendant moves to decertify the collective, typically at the close of discovery
  - More stringent standard

Conditional Certification

- At the conditional certification or "notice" stage, courts apply a "lenient" standard
- Plaintiff's burden to show members of the collective are similarly situated
- Given the nebulous nature of the conditional certification standard, courts have applied various analyses:
  - "Substantial allegations"
  - "Modest factual showing"

Fifth Circuit: *Swales v. KLLM Transport Services, LLC* (5th Cir. 2021)

- Prior to *Swales*, the Fifth Circuit had not endorsed (or rejected) *Lusardi*
- In *Swales*, Fifth Circuit expressly rejects *Lusardi*:
  - "Two-stage certification of § 216(b) collective actions may be common practice. But practice is not necessarily precedent. And nothing in the FLSA, nor in Supreme Court precedent interpreting it, requires or recommends (or even authorizes) any 'certification' process. The law instead says that the district court's job is ensuring that notice goes out to those who are 'similarly situated,' in a way that scrupulously avoids endorsing the merits of the case. A district court abuses its discretion, then, when the semantics of 'certification' trump the substance of 'similarly situated.'"

Standard:

- (1) courts should decide what **facts and legal questions will be material to the "similarly situated" analysis** early in the case
- (2) courts **should authorize preliminary discovery** directed toward these issues; and
- (3) the court should then **analyze all of the evidence available** to determine whether the putative collective is similarly situated.

If the proposed group is "too diverse" to be similarly situated, the court may decide the case cannot proceed on a collective basis.

Sixth Circuit: *Clark v. A&L Homecare and Training Center* (6th Cir. 2023)

- 6th Circuit had not explicitly addressed the *Lusardi* two-step approach.
- The District Court applied the *Lusardi* two-step approach and its lenient standard and conditionally certified two (of three) collectives.
- The District Court declined defendant's invitation to throw out Lusardi in favor of *Swales,* but *sua sponte* certified two issues for interlocutory appeal:
    1. appropriate standard to apply to conditional certification motions;
    2. whether arbitration agreements should be considered at the conditional certification stage
- The 6th Circuit rejected *Lusardi* **and** *Swales,* holding instead that a plaintiff must show a **"strong likelihood"** they are similarly situated to those who are to get notice
    - Significantly **raises the bar** for plaintiffs to get notice
    - Allows for **pre-notice discovery** and consideration of employer's evidence
    - Common factual and legal battles *(i.e.,* discovery issues) will now be front-loaded so trial courts can decide if plaintiffs have met the "strong likelihood" standard.

Key Differences

Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430 (5th Cir. 2021)

- Requires that, very early on in a case, courts must:
  - decide what facts and legal questions will be material to the similarly situated analysis;
  - authorize preliminary discovery on issues impacting similarly situatedness; and
  - analyze all available evidence to determine whether the putative collective is similarly situated to the original plaintiff.
- Requires "final" determination on who is similarly situated.
- Geared toward ensuring notice is only sent to those who *are in fact* similarly situated.

vs.

Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003 (6th Cir. 2023)

- Discussed but explicitly rejected *Swales.*
- Maintains a 2-step approach, but heightens plaintiff's burden at the first stage:
  - Plaintiff must make show "strong likelihood" the putative opt-ins are similarly situated.
- Courts are making a provisional decision as who is similarly situated.
- Notice can go to those who *might* be similarly situated.

Federal District Court Interpretations

Several District Courts decline to follow *Swales and Clark*:

– *Hernandez v. KBR Servs., LLC*, 2023 WL 5181595 (E.D. Va. Aug. 11, 2023)

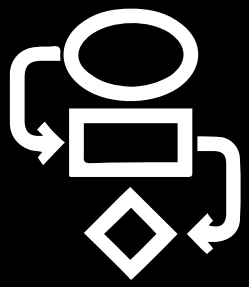
- Rejected *Swales* and *Clark* in the absence of Fourth Circuit or Supreme Court guidance.

– *Looney v. Weco, Inc*., 2022 WL 4292384, at *2 (E.D. Ark. Sept. 16, 2022) ("Defendants have not presented any persuasive reason why this Court should deviate from the widely used two-stage approach. The Court declines to apply *Swales*, as have other district courts in the Eighth Circuit.")

– *Murphy v. Lab. Source, LLC*, 2022 WL 378142, at *11 (D. Minn. Feb. 8, 2022) (declining to apply *Swales* and reasoning that "*Swales* undermines the discretion afforded to district [c]ourt[s] in implementing section 216(b)")

Ohio District Courts Adopt *Clark*, But Interpret It Narrowly…

- *Foley v. Wildcat Investments, LLC*, 2023 WL 4485571 (S.D. Ohio July 12, 2023) (Plaintiff's affidavit alleging vague knowledge of other employees subject to an allegedly FLSA-violating policy was insufficient to show a "substantial likelihood" where employer documents showed that differences in compensation and duties)
- *McElroy v. Fresh Mark, Inc.*, 2023 WL 4904065, at *6 (N.D. Ohio Aug. 1, 2023) (construing *Clark* narrowly as permitting discovery only if related to specific defenses directly relevant to the "similarly situated" inquiry, rather than with respect to all affirmative defenses at the notice stage)
- *McCall v. Soft-Lite L.L.C.*, 2023 WL 4904023, at *6 (N.D. Ohio Aug. 1, 2023) (finding that a broad reading of *Clark* has the potential to create satellite litigation early in the proceedings and further delay resolution; construing *Clark* more narrowly as merely making the "legitimate observation that a district court can (and should) consider all the available evidence (from both sides) when making its initial determination for purposes of notice")



Practical Pointers

- Leveraging *Clark* and *Swales* depends on the circuit, court, and stage of case.
- *Clark* may be more palatable than *Swales* to courts that have favorably applied *Lusardi* for years.
- Both *Clark* and *Swales* can be used to argue for expedited discovery.
  - Leverage that discovery to argue the individualized nature of exemption defenses.
- *Swales* and *Clark* are unlikely to receive Supreme Court scrutiny. Plan accordingly.
  - Consider venue transfers where feasible

thank you

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