You Can't Opt-Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-In Collective Actions under the FLSA

By Allan G. King, Lisa A. Schreter, and Carole F. Wilder

SUMMARY

Nearly 2,000 collective actions under the Fair Labor Standards Act have been filed in the federal courts during the past year, continuing a trend of several years' duration. A pivotal juncture in these cases arises when plaintiffs move for "conditional certification," or more precisely court-assisted notice to potential opt-in plaintiffs.

The Supreme Court has not endorsed any standard for deciding these motions nor does the statute or its regulations provide any guidance. As a result, courts have resorted to an *ad hoc* procedure, which in most instances results in subjecting this motion to a very relaxed standard of scrutiny. This article critically assesses that practice and examines the argument for applying the principles for class certification set forth in Rule 23 to these motions. It draws on the authority of the Rules Enabling Act, specifically the abrogation clause, and explains the narrow circumstances under which courts may modify the Federal Rules. In addition, it discusses the Rules of the Court of Federal Claims, which provide an example of how class action principles can accommodate the opt-in requirements of the FLSA. This example is pertinent because the Court of Federal Claims, in contrast to the Federal Rules, permits only opt-in class actions.

Lastly, the article points out that by failing to apply Rule 23 principles in FLSA cases when they are joined with state law claims that are subject to Rule 23 (which is commonplace), courts can reach inconsistent conclusions—certifying essentially the same case under one set of principles but not the other.

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By Allan G. King, Lisa A. Schreter, and Carole F. Wilder[1]

"[T]he district courts of this Circuit appear to have coalesced around a two-step method ... not required by the terms of FLSA or the Supreme Court's cases ..."[2]

I. Introduction.

The procedures federal courts follow in determining whether to "conditionally certify"[3] a collective action under §216(b) of the Fair Labor Standards Act (FLSA)[4] are *sui generis*. Indeed, neither the statute or its regulations define the term "collective action." The pertinent section of the statute merely provides:

> An action . . . may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his

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1 The authors are attorneys with the firm of Littler Mendelson, P.C.

2 *Myers v. Hertz Corp*., 624 F.3d 537, 554 - 555 (2d Cir. 2010).

3 *Myers* may finally have put an end to the use of term "conditional certification" in connection with this statute, at least in the Second Circuit. It notes that "certification" of an FLSA collective action is an empty gesture, which is neither necessary nor sufficient for the case to proceed as a collective action:

> Indeed, while courts speak of "certifying" a FLSA collective action, it is important to stress that the "certification" we refer to here is only the district court's exercise of the discretionary power, upheld in *Hoffmann-La Roche*, to facilitate the sending of notice to potential class members. Section 216(b) does not by its terms require any such device, and nothing in the text of the statute prevents plaintiffs from opting in to the action by filing consents with the district court, even when the notice described in *Hoffmann-La Roche* has not been sent, so long as such plaintiffs are "similarly situated" to the named individual plaintiff who brought the action. *See Morgan v. Family Dollar Stores, Inc*., 551 F.3d 1233, 1259 (11th Cir. 2008) (noting that "certification" of a collective action is a device to facilitate notice to potential class members and does not actually "create a class of plaintiffs" for a FLSA collective action). Thus "certification" is neither necessary nor sufficient for the existence of a representative action under FLSA, but may be a useful "case management" tool for district courts to employ in "appropriate cases."

Id. at 555, n. 10 (citing *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169, 174 (1989)).

4 FLSA §16(b) is codified at 29 U.S.C. §216(b) (hereinafter referred to as "FLSA §216(b)" or simply "§216(b)," although quotes from some courts refer to "§16(b)").

> consent in writing to become such a party and such consent is filed in the court in which such action is brought.[5]

Based upon the designation of employees who consent to join the action as "party plaintiffs," a reasonable perspective is that these cases are "mass actions," in which the claims of a number of plaintiffs are joined together in one proceeding. However, each individual plaintiff still must present evidence with respect to his or her claim in order to prevail.[6] Most courts, however, do not accept this view and instead consider collective actions under §216(b) to be "representative actions," in which evidence regarding a subgroup of plaintiffs is extrapolated to the absent parties.[7] If we are to accept this framework, collective actions are, in reality, just a different type of class action. In fact, under this interpretation, the only truly significant difference is that, in a Rule 23 class action, plaintiffs must affirmatively decline to participate in the suit (*i.e.*, "opt out") to avoid being bound by its result, whereas under FLSA §216(b) "similarly situated"

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[5] 29 U.S.C. § 216(b).

[6] *See* A.G. King & C. C. Ozumba, "Strange Fiction: The 'Class Certification' Decision in FLSA Collective Actions," 24 LAB. LAW. 267 (2009).

[7] Those circuit courts that have considered the question regard FLSA collective actions as "representative actions," which may be litigated by representative plaintiffs on behalf of others who are absent from the litigation. *See, e.g.*, *Myers*, 624 F.3d at 542 ("plaintiffs in FLSA representative actions must affirmatively 'opt in' to be part of the class and to be bound by any judgment"); *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1259 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009) ("The action proceeds throughout discovery as a representative action for those who opt-in"); *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2008) ("Section 216(b) establishes two requirements for a representative action"); *Harkins v. Riverboat Servs.*, 385 F.3d 1099, 1101 (7th Cir. 2004) ("In a collective (or, as it is sometimes called, a representative) action under the FLSA, a named plaintiff sues 'in behalf of himself . . . and other employees similarly situated'"); *Sperling v. Hoffmann-La Roche, Inc.*, 862 F.2d 439, 446 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989) ("the section's authorization of a representative action, 'surely must carry with it a right in the representative plaintiff to notify the people he would like to represent that he has brought a suit, and a power in the district court to place appropriate conditions on the exercise of that right") (quoting *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982)); and *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652, 655 (9th Cir. 1971) ("The Act itself does not define the unusual expression 'collective action.' But the legislative history indicates that Congress intended the term to apply only to a representative action").

employees must file a consent to be part of the suit (*i.e.*, "opt in").[8] For this reason, many courts refer to collective actions under §216(b) as "opt-in class actions."[9] Despite these similarities, courts have developed a unique procedure, completely different from Rule 23's stringent standards, for determining whether an FLSA case may proceed as a representative action.

This article addresses this anomaly, examining the language and purpose of the collective action provisions of §216(b) and the requirements of Rule 23, as well as the Rules Enabling Act, which addresses conflicts between the Federal Rules and federal statutes. We conclude that the opt-in requirements of FLSA §216(b) and the opt-out procedure in Rule 23 are insufficient to exempt §216(b) collective actions from Rule 23 in its entirety, including its rigorous certification requirements.

As support for this conclusion, this article examines the "abrogation clause" of the Rules Enabling Act and how Congress has signaled its intention to exclude certain statutes from the purview of Rule 23. It next considers the class action procedures of the Court of Federal Claims, which demonstrate how the opt-in requirement of §216(b) can harmonize with other features of Rule 23. The Rules of the Court of Federal Claims (RCFC), adopted in 2002, permit *only* opt-in class actions, regardless of the substantive

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[8] *See, e.g.*, *Myers*, 624 F.3d at 542 ("Unlike in traditional "class actions" maintainable pursuant to Federal Rule of Civil Procedure 23, plaintiffs in FLSA representative actions must affirmatively "opt in" to be part of the class and to be bound by any judgment") (citing *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001)); and *Acevedo v. Allsup's Convenience Stores, Inc*., 600 F.3d 516, 518 (5th Cir. 2010) ("Section 216(b) only authorizes such representative actions to be filed on behalf of individuals who have given their 'consent in writing to become . . . a party'").

[9] *See Law v. Continental Airlines Corp*., 399 F.3d 330, 331 (D.C. Cir. 2003) ("Plaintiffs brought an "opt-in" class action suit against Continental"); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001) ("Class actions under the ADEA are authorized by 29 U.S.C. §626(b), which expressly borrows the opt-in class action mechanism of the Fair Labor Standards Act of 1938"); *Hipp*, 252 F.3d at 1217 ("To maintain an opt-in class action under §216(b), plaintiffs must demonstrate that they are 'similarly situated'"); and *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 198 (3d Cir. 2000) ("the court certified the action as an opt-in class action").

claim. Because the Court of Federal Claims interprets its procedural rules to correspond as closely as possible with the Federal Rules and the decisions of Article III courts, the RCFC provide a working example of how to incorporate the carefully struck balances embodied in Rule 23 into §216(b) cases.

Finally, this article considers the Second Circuit's decision in *Myers v. Hertz Corporation*,[10] in which the plaintiff's state wage claim was entirely derivative of the FLSA claim. *Myers* demonstrates the irrational and inconsistent results that occur when courts apply two different standards for class certification -- one imputed to §216(b) and the other provided by Rule 23 -- to the same class claims.

The problem this raises can be seen in the varying approaches courts take in "hybrid" cases, so-called because they assert collective claims under §216(b) and class claims under similar state statutes, which are subject to Rule 23. Some courts have properly been concerned about litigating both an FLSA opt-in collective action and a class action asserting similar claims under a corresponding state statute in a single "hybrid" lawsuit. The problem they perceive is that because the state law claims are subject to Rule 23's opt-out provisions, plaintiffs may obtain federal jurisdiction with an FLSA claim and then "sidestep §216(b)'s opt-in requirement by asserting an opt-out class claim under parallel state law that lacks an opt-in requirement."[11]

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[10] 624 F.3d 537(2d Cir. 2010).

[11] *Woodard v. FedEx Freight Express., Inc*., 250 F.R.D. 178, 188 (M.D. Pa. 2008); *accord Otto v. Pocono Health Sys*., 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006) ("To allow a Section 216(b) opt-in action to proceed accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress' intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)'s opt-in requirement."); *McClain v. Leona's Pizzeria, Inc*., 222 F.R.D. 574, 577 (N.D. Ill. 2004) ("allowing McClain to use supplemental state-law claims to certify an opt-out class in federal court would undermine Congress' intent to limit these types of claims to collective actions. McClain cannot circumvent the opt-in requirement and bring unnamed parties into federal court by calling upon state statutes similar in substance to the FLSA that lack the opt-in requirement."); *Leuthold v. Destination Am.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004) ("the

Ironically, other courts find no incompatibility between claims that are subject to the opt-in requirement of §216(b) on the one hand, and the opt-out procedure of Rule 23 on the other. Nevertheless these courts conclude that *whether* to certify each type of representative action must be decided by different principles.[12] These courts do not appear troubled by the fact that, in hybrid cases such as *Myers*, they often subject the same substantive claim, brought by the same plaintiffs and attorneys, on behalf of the same group of employees, seeking the same relief, to two different "class certification" procedures that potentially reach different conclusions.[13]

The approach discussed in this article -- applying Rule 23's certification requirements to opt-in collective actions under the FLSA -- eliminates this inconsistency. In addition, it provides for more efficient case management, effectuates Congress' intent in imposing an opt-in requirement for FLSA collective actions, and complies with the Rules Enabling Act and the Supreme Court's directive that the Federal Rules are to be applied in federal court.

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policy behind requiring FLSA plaintiffs to opt in to the class would largely 'be thwarted if a plaintiff were permitted to back door the shoehorning in of unnamed parties through the vehicle of calling upon similar state statutes that lack such an opt-in requirement.'") (quoting *Rodriguez v. Texan, Inc.*, 2001 U.S. Dist. LEXIS 24652, at *3 (N.D. Ill. Mar. 7, 2001).

[12] *See, e.g., Guzman v. VLM, Inc.*, 2007 U.S. Dist. LEXIS 75817 (E.D.N.Y. Oct. 11, 2007) and *Guzman v. VLM, Inc.*, 2008 U.S. Dist. LEXIS 15821 (E.D.N.Y. Mar. 2, 2008) in which the same district court first conditionally certifies a §216(b) FLSA collective action under a lenient standard, finding the more stringent certification requirements of Rule 23 inapplicable, and then finds the two types of cases are not incompatible and could proceed simultaneously in the same action.

[13] *See, e.g., Leuthold*, 224 F.R.D. at 470 (granting plaintiffs motion to certify plaintiffs' claims under the FLSA for purposes of giving notice, but denying the same claims under California state law for failure to satisfy the requirements of Rule 23(b)(3)).

II. The "Conditional Certification" Procedure Under FLSA §216(b)

A. Neither the Supreme Court's Decision in *Hoffmann-La Roche v. Sperling* nor the Language of the Statute Itself Excludes FLSA Collective Actions from Rule 23's Class Certification Requirements

The sole indication in §216(b) of how a collective action shall proceed is the following:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No 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 in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.[14]

Nothing in this text requires or even suggests that representative actions under this statute should proceed independently of Rule 23. In fact, when Congress amended the FLSA in 1947, modern Rule 23, with its opt-out provision, was 19 years from being drafted.[15]

The U.S. Supreme Court has never held, nor even suggested, that Rule 23's certification requirements do not apply to FLSA collective actions. In *Hoffmann-La Roche v. Sperling*, generally cited as the seminal case on procedural issues under FLSA §216(b), the U.S. Supreme Court addressed only "the narrow question whether, in an ADEA action [governed under FLSA §216(b)], district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to the

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[14] 29 U.S.C. §216(b).

[15] *See* 29 U.S.C. §216(b) Historical and Statutory Notes and Fed. R. Civ. P. 23, Advisory Committee Notes, 1966 Amendment.

potential members of the class on whose behalf the collective action has been brought."[16] The Court's holding is equally narrow: "We hold that district courts have discretion, in appropriate cases, to implement 29 U.S.C. §216(b) . . . by facilitating notice to potential plaintiffs."[17] Other than that, the Supreme Court did not address -- and has not addressed -- the procedures and standards that apply in determining whether an FLSA §216(b) case should proceed as a collective action. The Court has not addressed the plaintiff's burden of proof, the degree of scrutiny a district court must give to the qualifications of class counsel, the process for determining whether the plaintiffs are similarly situated, nor when the district court should make these decisions. Nor does *Hoffmann-La Roche* suggest in any way that Rule 23's procedures do not apply to these cases. In fact, in discussing the important role the district court should play in facilitating communications in §216(b) representative actions, the Court analogized to Rule 23:

> We have recognized that a trial court has a substantial interest in communications that are mailed for single actions involving multiple parties. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981), we held that a District Court erred by entering an order that in effect prohibited communications between the named plaintiffs and others in a Rule 23 class action. Observing that class actions serve important goals but also present opportunities for abuse, we noted that "because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties." 452 U.S. at 100. The same justifications apply in the context of an ADEA action. Although the collective form of action is designed to serve the important function of preventing age discrimination, the potential for misuse of the class device,

[16] *Hoffmann-La Roche*, 493 U.S. at 169.

[17] *Id.* (internal statutory citations omitted).

> as by misleading communications, may be countered by court-authorized notice.[18]

In the absence of Supreme Court guidance, the lower courts have designed their own rules to determine whether a case should proceed as an FLSA §216(b) collective action. Most common is a two-step procedure, often referred to as the *Lusardi* two-step, after the widely cited case that seems to have begun the practice.[19] Indeed, a recent Lexis search using the search "FLSA and 'collective action' and 'two-step'" resulted in 422 hits.[20] Among these hits were decisions from four circuit courts. Substituting "two-stage" for "two-step" added an additional 235 opinions.

The two-step procedure has been described by the Fifth Circuit as follows:

> Under *Lusardi* the trial court approaches the "similarly situated" inquiry via a two-step analysis. The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members.
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> Because the court has minimal evidence, this determination is made using a fairly lenient standard and typically results in "conditional certification" of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.
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> The second determination is typically precipitated by a motion for "decertification" by the defendant usually filed after discovery is largely complete and the matter is ready for trial. At this stage, the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question. If the

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[18] *Id.* at 171.

[19] *Lusardi v. Lechner*, 855 F.2d 1062, 1074 (3d Cir. 1988); *see also Allen v. McWane, Inc.*, 2006 U.S. Dist. LEXIS 81543, at *11 (E.D. Tex. Nov. 7, 2006) ("The *Lusardi* two-step approach is the prevailing test among federal courts.").

[20] Visited on Nov. 29, 2010.

> claimants are similarly situated, the district court allows the representative action to proceed to trial.[21]

The second step in the "certification" proceedings arises when (and if) the defendant moves to "decertify" the class. At this stage, the similarly-situated inquiry is more stringent than at the first stage.[22] In determining whether the case should remain a collective action, courts consider the: "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendants which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations."[23] As the Eleventh Circuit has pointed out, at the second stage the court's analysis "must extend 'beyond the mere facts of job duties and pay provisions.' Otherwise, 'it is doubtful that §216(b) would further the interests of judicial economy, and it would undoubtedly

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[21] *Mooney v. Aramco Servs. Co*., 54 F.3d 1207, 1213-14 (5th Cir. 1995). Although courts differ in how light a burden to impose at the first step, as stated above, courts generally make their decision based solely on the pleadings, affidavits, and declarations submitted by the plaintiffs. *See, e.g., Hipp*, 252 F.3d at 1218; *Shajan v. Barolo*, 2010 U.S. Dist. LEXIS 54581 (S.D.N.Y. June 2, 2010); *Sexton v. Franklin First Fin., Ltd*., 2009 U.S. Dist. LEXIS 50526 (E.D.N.Y. June 16, 2009). However, while courts routinely credit affidavits submitted by plaintiffs, many, particularly in the Second Circuit, have ignored similar evidence proffered by defendants. *E.g., Francis v. A&E Stores, Inc*., 2008 U.S. Dist. LEXIS 83369, at *8-9 (S.D.N.Y. Oct. 15, 2008) ("while Defendant has supplied what it calls 'undisputed store manager affidavits,'. . . on which it also relies for the proposition that [assistant store manager] duties are variable, those affidavits should be discounted at this stage."); *see also In re Penthouse Exec. Club Comp. Litig*., 2010 U.S. Dist. LEXIS 114743, at *7 (S.D.N.Y. Oct. 27, 2010) (in deciding conditional certification, "the court does not resolve factual disputes, decide ultimate issues on the merits, or make credibility determinations"); *Vaughan v. Mortgage Source L.L.C.*, 2010 U.S. Dist. LEXIS 36615 (E.D.N.Y. Apr. 14, 2010), at *21 (Apr. 14, 2010) (declining to assign weight to defendants' competing affidavits and reasoning that "[a]ttacks on credibility . . . are not properly addressed in the context of a motion for conditional certification"); *Cohen v. Gerson Lehrman Group, Inc*., 686 F. Supp.2d 317, 330 (S.D.N.Y. 2010) (declining to wade into a thicket of competing factual assertions at this preliminary stage). In contrast, "[i]n evaluating a motion for class certification [under Rule 23], the district court is required to make a 'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues,' and must resolve material factual disputes relevant to each Rule 23 requirement." *Brown*, 609 F.3d at 476; and *Damassia v. Duane Reade, Inc.*, 2006 U.S. Dist. LEXIS 73090 (S.D.N.Y. Oct. 4, 2006) (concluding that defendant's attacks on plaintiffs' affidavits and other evidence are "premature" at the notice stage)).

[22] *Anderson v. Cagle's Inc*., 488 F.3d 945, 953 (11th Cir. 2007); and *Thiessen v. GE Capital Corp*., 267 F.3d 1095, 1103 (10th Cir. 2001).

[23] *Anderson,* 488 F.3d at 953.; *Cruz v. Lyn-Rog Inc*., 2010 U.S. Dist. LEXIS 128332 (E.D.N.Y. Dec. 6, 2010); and *Harris v. Vector Mktg. Corp*., 2010 U.S. Dist. LEXIS 122126 (N.D. Cal. Nov. 5, 2010).

present a ready opportunity for abuse.'"[24]

Commonly, and in increasing numbers, FLSA plaintiffs have availed themselves of the lenient standards applied by the courts to "conditionally certify" collective actions.[25] Although this procedure anticipates a second stage, in which courts revisit their initial certification decision in light of a fuller record,[26] practically speaking the second stage is reached only in a small minority of cases.[27] Because conditional certification frequently subjects employers to "mind-boggling" discovery costs,[28] the costs and resources required to defend a case, even if only "conditionally" certified, places enormous pressure on employers to settle cases prior to reaching the second step.[29] These costs are not confined to the employer, because courts too are burdened by cases that persist only because judges have deferred carefully scrutinizing whether, in fact,

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[24] *Anderson*, 488 F.3d at 953 (internal citations omitted).

[25] As reported by LexisNexis CourtLink, the number of FLSA collective actions filed in federal courts from 1988, when *Lusardi* endorsed the two-step process, to 2010 increased from six to 1,994. In contrast, during the same period the number of employment civil rights class action filed in federal courts (mostly Title VII discrimination cases) increased from 13 to 114, as reported by LexisNexis CourtLink. This dramatic increase in FLSA collective actions is certainly not what Congress intended when it passed the Portal-to-Portal Act in 1947, adding the opt-in requirement for collective actions, to curb "the flood of litigation" that was occurring at that time. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir. Pa. 2003) (citing 93 Cong. Rec. 2,087 (1947)).

[26] *Id*.

[27] For example, of more than 50 cases identified in the Southern District of New York (using a Lexis search for "FLSA and decertif!") only four actually decide the question of decertification and none "decertify" the collective action.

[28] *Williams v. Accredited Home Lenders, Inc.*, 2006 U.S. Dist. LEXIS 50653, at *16 (N.D. Ga. 2006).

[29] Rachel K. Alexander, Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions", 58 AM. U.L. REV. 515, 541 (2009) (noting that conditional certification results in settlement pressure because it "signals the potential expansion of the case and the need for significant and expensive class-wide discovery"); William C. Martucci and Jennifer K. Oldvader, "Addressing the Wave of Dual-Filed Federal FLSA and State Law "Off-The-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform," 19 KAN. J.L. & PUB. POL'Y 433, 451 (2010) (noting that the costs of discovery following conditional certification, which "may be granted if the plaintiff does as little as make 'substantial allegations' showing possible FLSA violations . . . can result in enormous pressure on defendants to settle").

they can be tried in representative fashion.[30]

III. An Overview of Rule 23 Procedures.

The Federal Rules of Civil Procedure, which were promulgated under the Rules Enabling Act of 1934,[31] include in Rule 23 a comprehensive set of principles that govern class actions in federal court. This rule was designed to weed out cases that are unlikely to achieve the overarching goals of judicial efficiency and due process by, among other things, prescribing the procedures courts must follow to certify a case as a class action.[32] Rules 23(a) and (b) set forth the criteria plaintiffs must meet to certify a case as a class action. Rule 23(a) requires a plaintiff to establish four elements, usually referred to as numerosity, commonality, typicality, and adequacy of representation. A plaintiff also must meet the requirements of one of Rule 23(b)'s subsections.[33] Rule 23(b)(3), the subsection that most likely would apply to FLSA collective actions, requires proof that a class action would be superior to other methods of fairly and efficiently adjudicating the case, and that common questions of law or fact predominate over individual issues. This subsection also provides that once a class is certified, class members are bound by any judgment unless they "opt out" of the litigation. Rule 23(c)(1)(A) requires courts to decide class certification "at an early practicable time."

The Supreme Court has instructed courts to engage in a "rigorous analysis" of the pleadings, declarations, and other record evidence to assess whether plaintiffs have

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30 *West v. Border Foods, Inc*., 2006 U.S. Dist. LEXIS 96963, at *7 (D. Minn. June 12, 2006) ("[N]either the remedial purposes of the FLSA, nor the interests of judicial economy, would be advanced if we were to overlook facts which generally suggest that a collective action is improper.").

31 28 U.S.C.S. § 2072.

32 *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982).

33 In the Second Circuit and elsewhere this proof must be made by a predominance of the evidence. *Brown*, 609 F.3d at 476.

satisfied those burdens.[34]

> As we noted in *Coopers & Lybrand v. Livesay*, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.[35]

If a class is certified, Rule 23(c) prescribes that the court must issue an order defining the class, identifying class claims, and appointing class counsel. Rule 23(g) indicates the factors the court must consider in making that appointment. Rule 23(c) also prescribes the content of the notice the court must direct to class members after the class is certified, explaining the nature of the action and the class member's right to opt out.

Rule 23(d) describes the district court's power to issue orders controlling the course of proceedings. Rule 23(e) specifies the terms under which a class action may be settled, dismissed, or compromised. Rule 23(h) concerns the attorney's fee that may be awarded to counsel and the procedures that govern that determination. In 1998, the Supreme Court amended Rule 23 to include subsection (f), providing for a permissive interlocutory appeal, at the sole discretion of the court of appeals, from a certification order.

Rule 23(c)(1)(C) was amended in 2003 to delete the provision that a class certification "may be conditional." The Advisory Committee explained the reason for the deletion: "A court that is not satisfied that the requirements of Rule 23 have been met

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34 *Falcon*, 457 U.S. at 162.

35 *Id*. (internal citations omitted).

should refuse certification until they have been met."[36]

IV. The Procedural Differences Between Rule 23 and FLSA §216(b) as Applied by the Courts.

The procedures courts have devised under the FLSA depart dramatically from Rule 23's requirements. A brief review suffices to identify these marked differences. Aside from the distinction between an opt-in and opt-out class, discussed above, salient procedural differences include the following:

- Rule 23 discourages "conditional certification," whereas conditional certification is widely viewed as the initial step in FLSA collective actions.

- Rule 23 requires courts to engage in a "rigorous analysis" and resolve those factual disputes necessary to determine whether a plaintiff has satisfied Rules 23(a) and appropriate subsections of 23(b), *prior* to notifying putative class members;[37] under §216(b) courts apply a "lenient" analysis in deciding whether to "conditionally certify" a class, and apply heightened scrutiny only *after* notifying potential class members, and then only if the defendant moves to "decertify" the class.[38]

- Rule 23 prescribes in considerable detail what the notice must contain;[39] under §216(b) courts craft notices on an *ad hoc* basis.

- Rule 23 requires courts to assess whether the representative parties, including their counsel, will fairly and adequately represent the class, and the court appoints class counsel; under §216(b) courts make no inquiry into the qualifications of class counsel or the adequacy of the representative plaintiff(s).[40]

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[36] FED. R. CIV. P. 23, 2003 Advisory Committee's Note.

[37] *Brown*, 609 F.3d at 476 ("In evaluating a motion for class certification, the district court is required to make a 'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues,' and must resolve material factual disputes relevant to each Rule 23 requirement. The Rule 23 requirements must be established by at least a preponderance of the evidence.").

[38] *Prizmic v. Armour, Inc.*, 2006 U.S. Dist. LEXIS 42627, at *2 (E.D.N.Y. June 12, 2006) ("Only after discovery has been completed should the Court engage in a second more heightened stage of scrutiny to determine whether the class should be decertified or the case should proceed to trial as a collective action.").

[39] Fed. R. Civ. P. 23(c)(2)(b).

[40] *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 263 (S.D.N.Y. 1997) ("Section 216(b), which provides for collective actions under the FLSA, is silent on the issue of adequacy of representation, nor does it direct courts to follow the dictates of Rule 23 in certifying a class. Consequently, the prevailing view among federal courts, including courts in this Circuit, is that §216(b) collective actions are not subject to Rule 23's strict requirements, particularly at the notice stage.").

- Rule 23(b)(3)(d) requires courts to consider "the likely difficulties in managing a class action" before certifying a class; under §216(b), courts usually defer considering questions of case management until deciding whether to "decertify" the class.[41]

- Rule 23 permits parties to appeal either the denial or granting of class certification, subject to the appellate court's discretion; under §216(b), appellate courts routinely conclude that they lack jurisdiction to consider orders pertaining either to the first or second-step certification decisions.[42]

V. The Federal Rules Govern Federal Courts in the Absence of a Specific Statutory Conflict or an Express Exception to the Rules.

A. Federal Courts Must Apply the Federal Rules of Civil Procedure.

Are the procedures adopted by the courts for FLSA representative actions mandated by the substantive terms of the FLSA or are they, instead, an unauthorized departure from the Federal Rules? To help answer the question, we begin with the Rules Enabling Act (REA),[43] enacted in 1934 to establish the primacy of the Federal Rules of Civil Procedure in federal courts. The REA states in pertinent part: "All laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect."[44] This provision, referred to as the "abrogation clause," reflects Congressional intent that the Federal Rules shall supersede all pre-existing procedural rules. Laws and procedures enacted after the Federal Rules take precedence

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41 *Vondriska v. Premier Mktg. Funding, Inc*., 564 F. Supp.2d 1330, 1336 (M.D. Fla. 2007) (asserting that "concerns regarding the manageability of the proposed class and whether the interests of judicial economy will actually be served by a collective action . . . are more appropriately addressed at the decertification stage when additional information is available regarding the characteristics of the class"); *Gieseke v. First Horizon Home Loan Corp*., 408 F. Supp.2d 1164, 1168 (D. Kan. 2006) (deferring manageability issues to the decertification stage). *But see, e.g., D'Anna v. M/A-COM, Inc*., 903 F. Supp. 889, 894 (D. Md. 1995) ("As a matter of sound case management, a court should, before offering [to assist plaintiff in locating additional plaintiffs], make a preliminary inquiry as to whether a manageable class exists.") (quoting *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 266-67 (D. Minn. 1991)).

42 *See Myers*, 624 F.3d at 557 (finding court lacked pendent appellate jurisdiction to consider Collective Action Order).

43 28 U.S.C. §2072.

44 *Id.* § 2072(b).

only to the extent they create an actual conflict with the Rules.[45]

The Federal Rules themselves provide: "These rules govern the procedure in all civil actions and proceedings in the United States district courts except as stated in Rule 81."[46] Rule 81(a)(6) states: "These rules, to the extent applicable, govern proceedings under the following laws, *except as these laws provide other procedures* ..." Rule 81, most recently amended in 2007, identifies seven statutes, including the National Labor Relations Act; it does not include the Fair Labor Standards Act. Thus, even in this special category of laws, the Federal Rules are deemed to apply unless the statute in question states otherwise.

As the Supreme Court explained in *Amchem Products, Inc. v. Windsor*, the procedures of the Federal Rules should not lightly be disregarded:

> Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. *See* 28 U.S.C. §§2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule *outside the process Congress ordered*, a process properly tuned to the instruction that rules of procedure "shall not abridge . . . any substantive right."[47]

Similarly, in *Hanna v. Plumer* the Court observed:

> the [district] court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[48]

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45 *Callihan v. Schneider*, 178 F.3d 800, 802 (6th Cir. 1999)..

46 Fed. R. Civ. P. 1.

47 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (emphasis added).

48 380 U.S. 460, 471 (1965).

No court has found that the certification procedures of Rule 23 violate the Constitution or the REA, or abridge a substantive right. Accordingly, based on the REA, and in accordance with the pronouncements of the Supreme Court, Rule 23's certification requirements apply unless they conflict with an express statutory directive to the contrary, enacted *subsequent* to Rule 23.

The Supreme Court's opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate* holds that "like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies 'in all civil actions and proceedings in the United States district courts.'"[49] More specifically the Court observed:

> Congress, unlike New York, has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit -- either by directly amending the rule or by enacting a separate statute overriding it in certain instances. The fact that Congress has created specific exceptions to Rule 23 hardly proves that the Rule does not apply generally. In fact, it proves the opposite. If Rule 23 did not authorize class actions across the board, the statutory exceptions would be unnecessary.[50]

For an example of how Congress indicates its intent to remove a statute from the purview of Rule 23 consider the Immigration and Nationality Act, §1252 (e)(1):

> Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, *no court may* -- (A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien . . . except as specifically authorized in a subsequent paragraph of this subsection, or (B) *certify a class under Rule 23 of the Federal Rules of Civil Procedure* in any action for which judicial review is

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[49] *Shady Grove Orthopedic Assocs., P.A. v. Allstate*, 130 S. Ct. 1431, 1438 (2010) (emphasis added).

[50] *Id*. at 1438.

> authorized under a subsequent paragraph of this subsection.[51]

Nothing approaching this clear expression of intent appears in §216(b).

Nevertheless, a few courts find support for denying the applicability of Rule 23 to FLSA collective actions in a sentence in the 1966 Advisory Committee Notes, which states, "[t]he present provisions of 29 U.S.C. §216(b) are not intended to be affected by Rule 23, as amended."[52] Thus, it has been suggested, FLSA collective actions in all respects are exempt from Rule 23's class certification requirements. This sentence provides no such support.

To reiterate, the REA provides that amendments to the Federal Rules abrogate all other procedural rules in effect when the amendment is adopted. Because the FLSA's opt-in provision, which was amended to the statute in 1947,[53] was in effect when modern Rule 23 was adopted (in 1966),[54] the opt-in provision arguably would have been abrogated by the opt-out provisions of Rule 23. The Advisory Committee apparently added this sentence to preserve the §216(b) opt-in procedure. It is pure fiction, however, to suggest that this sentence also was intended to retain *Lusardi*'s two-step procedure because that invention would not become part of FLSA litigation for another 20 years!

B. At Least One Federal Court Has Recognized that Rule 23 Certification Requirements Apply to §216(b) Collective Actions.

Shushan v. University of Colorado at Boulder[55] exposed the inconsistency between the purpose, legislative history, and language of §216(b), and the approach courts have taken to "conditionally certify" collective actions. While recognizing that

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51 8 U.S.C. §1252(e)(1).

52 FED. R. CIV. P. 23, Advisory Committee Notes, 1966 Amendment..

53 29 U.S.C. §216(b) Historical and Statutory Notes.

§216(b)'s opt-in provision is irreconcilable with Rule 23's opt-out feature, *Shushan* concludes that "it does not follow that every other feature of Rule 23 is similarly irreconcilable"[56] and holds that representative actions under §216(b) "must satisfy all of the requirement of FED. R. CIV. P 23, insofar as those requirements are consistent with 29 U.S.C.A. §216(b)."[57] As the court points out, there is no logical reason to infer that because Congress did not provide any procedural guidance for collective actions under §216(b), other than the opt-in mandate, it intended that Rule 23 should *not* apply.

> In light of this deafening silence, it does not seem sensible to reason that, because Congress has effectively directed courts to alter their usual course and not be guided by Rule 23's "opt-out" feature in ADEA class actions [which are governed by §216(b)], it has also directed them to discard the compass of Rule 23 entirely and navigate the murky waters of such actions by the stars or whatever other instruments they may fashion.[58]

VI. Notwithstanding the Rules Enabling Act, Most Courts Hold that Rule 23 Does Not Apply to FLSA §216(b) Collective Actions

Despite the Rules Enabling Act, as well as the reasoning and legislative history supporting *Shushan*, no court of appeals has endorsed its approach, and at least four appellate courts either have expressly adopted the two-step framework, or disapproved of *Shushan's* reliance on Rule 23.[59] The most frequent reasons for rejecting the Rule 23

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54 Fed. R. Civ. P. 23, Advisory Committee Notes, 1966 Amendment.

55 132 F.R.D. 263 (D. Colo. 1990).

56 *Shushan*, 132 F.R.D at 266.

57 *Id.* at 265; *accord St. Leger v. A.C. Nielsen Co*., 123 F.R.D. 567 (N.D. Ill. 1988) (stating that certification was inappropriate because common questions did not predominate).

58 *Shushan*, 132 F.R.D. at 266.

59 *See McKnight v. D. Houston, Inc*., 2010 U.S. Dist. LEXIS 122357, at *11 (S.D. Tex. Nov. 18, 2010) ("Courts recognize two methods to determine whether to authorize notice to similarly situated employees advising them of their right to join an FLSA collective action. These methods are the two-step *Lusardi* approach and the class action-based *Shushan* approach. Most courts, including district courts in this circuit, use the "two-step ad hoc approach" as the preferred method for the similarly situated analysis rather than the Rule 23 requirements."); *see also Villatoro v. Kim Son Rest.*, 286 F. Supp.2d 807, 809 (S.D. Tex. 2003) (citing cases from the Fifth, Seventh, Tenth, and Eleventh Courts of Appeals); and *Lusardi*, 855

criteria have been: (1) the FLSA's opt-in framework makes it procedurally incompatible with Rule 23; and (2) Congress' failure to indicate that it intended Rule 23 to apply to §216(b) actions leaves courts free to fashion their own procedures.

Regarding the first reason, courts frequently cite *LaChapelle v. Owens Illinois, Inc.* for the proposition that there is "a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA §[2]16(b)."[60] The quoted phrase in *LaChapelle*, however, refers to the obvious difference between the opt-in requirement of §216(b) and the opt-out requirement of Rule 23. *LaChapelle* does not address any other Rule 23 provisions or their compatibility with §216(b). In fact, *LaChappelle* concerns whether the FLSA's opt-in provisions also apply to collective actions under the Age Discrimination in Employment Act:

> Since ADEA § 7(b) adopts [FLSA § 216(b)], we must hold that only "opt-in" type class actions may be utilized in age discrimination cases. Rule 23 cannot be invoked to circumvent the consent requirement of the third sentence of FLSA §[2]16(b) which has unambiguously been incorporated into ADEA by its Section 7(b).[61]

In other words, while *LaChapelle* confirms that ADEA and FLSA collective actions under §216(b) require potential plaintiffs to opt in to a collective action under those statutes, it says nothing about the procedures to apply in determining whether a case should be certified.

Regarding the second reason for refusing to apply Rule 23's certification requirements to FLSA §216(b) cases, the Sixth Circuit recently observed:

F.2d at 1074 ("we again acknowledge *Lusardi*'s correct statement that FLSA §[2]16(b) class actions alleging a pattern or practice of discrimination are not governed by Fed.R.Civ.P. 23").

60 *LaChapelle v. Owens Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975).

61 *Id*. at 289.

> While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA . . . . The district court implicitly and improperly applied a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated. This is a more stringent standard than is statutorily required . . . . We do not suggest that aspects of Rule 23 could never be applied to a FLSA collective action. Rather, applying the criterion of predominance undermines the remedial purpose of the collective action device.[62]

According to the Sixth Circuit, Rule 23's certification requirements, and in particular Rule 23(b)(3)'s predominance requirement, do not apply to §216(b) cases because the FLSA did not expressly so provide, and doing so would "undermine the remedial purpose of the collective action" provision in the statute.[63]

The premise that Congress affirmatively must state that the Federal Rules govern proceedings under a particular statute for the Federal Rules to apply is backwards. In accordance with the REA, and the Supreme Court's holding in *Shady Grove*, Congress must affirmatively *exempt* a statute from the reach of the Federal Rules. The idea that courts are free to disregard the Federal Rules in the absence of statutory language mandating that the Rules apply therefore turns federal jurisprudence on its head. For this reason, it is exceedingly rare for any statute to reference the Federal Rules.

VII. Congress' Intent in Amending the FLSA Is Effectuated by Applying Federal Rule 23.

A. Rule 23's Certification Requirements Are Consistent with the Policies and Legislative History Behind the Opt-in Provisions of §216(b).

As a matter of policy, Rule 23's certification requirements are consistent with the

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62 *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584-86 (6th Cir. 2009).

purpose of representative actions under §216(b). To certify a case as a representative action (*i.e.*, a class action) under Rule 23(b)(3), a court must find that: (1) all of the factors of Rule 23(a) are satisfied (numerosity, commonality, typicality and adequacy of representations); (2) common questions of law and fact predominate over individual questions; and (3) a class action is superior to other available methods for fairly and efficiently adjudicating the matter.[64] The 1996 Advisory Committee Notes reflect that the purpose of Rule 23(b)(3)'s predominance inquiry is to ascertain whether a class action will be an efficient use of judicial resources: "It is only where this predominance exists that economies can be achieved by means of the class action device."[65] The Second Circuit emphasized this point recently in *Myers v. Hertz*:

> The "predominance" requirement of Rule 23(b)(3) "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The requirement's purpose is to "ensure[] that the class will be certified only when it would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[66]

Section 216(b) serves the same public policy. In discussing the benefits of collective actions under §216(b), the Supreme Court in *Hoffmann-La Roche* expressed the same policy interest and even used Rule 23's commonality language to articulate the concept:

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63 *Id.* at 585.

64 Fed. R. Civ. P. 23(a) and (b)(3). Neither the FLSA nor the Supreme Court provide any guidance in determining who is "similarly situated" for purposes of determining whether should issue and a case should proceed as a class action. Because "notice" is also principally at issue in determining whether to "certify" an FLSA collective action, it is logical to use the same criteria set forth in Rule 23(b)(3) for §216(b) actions as well. The Advisory Committee Notes to the 1966 Amendments to Rule 23 support this concept, stating that "[s]ubdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense and promote uniformity of decisions as to persons similarly situated..." There is no reason to endow the same phrase in §216(b) that differ markedly from Rule 23(b)(3).

"The judicial system benefits by efficient resolution in one proceeding of *common issues of law and fact* arising from the same alleged . . . activity."[67]

Nothing in the FLSA's legislative history supports applying a lenient "conditional certification" standard in place of Rule 23's more stringent requirements. Congress added the opt-in provision to the FLSA to reduce the expanded liabilities and burdens to employers resulting from "representative actions." Describing the historical background that motivated §216(b)'s opt-in language, the Tenth Circuit emphasized Congress' desire to curtail "excessive and needless litigation," and the discovery burdens a representative action under the FLSA places on employers.

> In describing the financial burdens affecting interstate commerce, the House of Representatives' Report stated: "The procedure in these suits follows a general pattern. A petition is filed under section [2]16(b) [providing for representative actions] by one or two employees in behalf of many others. To this is attached interrogatories calling upon the employer to furnish specific information regarding each employee during the entire period of employment. The furnishing of this data alone is a tremendous financial burden to the employer." H.R. Rep. No. 71, 80th Cong., 1st Session 4 (1947); 1947 U.S. CODE CONG. & AD. NEWS, (80th Cong., 1st Session) 1032. Not only did Congress disapprove of the normal discovery practices associated with class actions but it also made the specific finding that unless the provisions of the FLSA of 1938 were changed "the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged." § 1(a)(7) Portal-to-Portal Act of 1947.[68]

Similarly, the Third Circuit has stated:

> Responding to this increase in litigation [under the FLSA],

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53 *Id*.
66 *Myers*, 624 F.3d at 547.
67 *Hoffmann-La Roche*, 493 U.S. at 170 (emphasis added).
68 *Dolan v. Project Constr. Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984).

> Congress sought "to define and limit the jurisdiction of the courts" through the Portal-to-Portal Act, Pub. L. No. 80-49, ch. 52, § 1(b)(3), 61 Stat. 85 (1947). 93 Cong. Rec. 2,087 (1947) ("The attention of the Senate is called to a dramatic influx of litigation, involving vast alleged liability, which has suddenly entered the Federal courts of the Nation."). Noting the "immensity of the [litigation] problem," *id*. at 2,082, Congress attempted to strike a balance to maintain employees' rights but curb the number of lawsuits. Under the Portal-to-Portal Act, an FLSA action for overtime pay could be maintained by "one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b). But the statute contained an express opt-in provision: "No 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 in the court in which such action is brought." *Id.*[69]

The "light scrutiny" or "lenient standard" that courts apply at the "conditional certification" stage, allowing notice to be issued and broad discovery to commence before fully determining whether the case should be maintained as a representative action, ignores this legislative history and undermines Congress' intent to restrict -- not expand -- the growth of representative actions under the FLSA.

B. Rule 23's Certification Standards Do Not Conflict With Courts' Discretion to Manage Their Dockets.

Courts have the inherent power to manage their dockets.[70] Their discretion to do so is limited by Rule 83(b), which provides in pertinent part: "A judge may regulate the practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§2072 [the Rules Enabling Act] and 2075 [Bankruptcy Rules], and the district's local rules."[71] The Advisory Committee Notes to Rule 83(b) reference such ancillary case management devices as "internal operating procedures, standing orders, and other internal

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69 *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir. 2003)

70 *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275 (2d Cir. 2000).

directives."[72]

The Supreme Court's decision in *Hoffmann-La Roche v. Sperling* also identifies court-assisted notice to potential opt-in plaintiffs as another Rule 83(b) case management tool,[73] citing *Gulf Oil Co. v. Bernard*,[74] a seminal decision on communicating with putative class members under Rule 23. The Court specifically stated:

> Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is *orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure*.[75]

Based on the references to Rule 23 in *Hoffmann-La Roche*, the Court clearly does not regard FLSA collective actions as standing apart from the Federal Rules, nor does it endorse the nascent practice of sending notices to potential class members before fully deciding if a collective proceeding is warranted.

VIII. The Rules of the Court of Federal Claims Demonstrate that Opt-in Class Actions Harmonize with Rule 23 Opt-out Class Actions

In 2002, the Court of Federal Claims adopted procedural rules that follow the Federal Rules of Civil Procedure as closely as practicable.

> In the 2002 revision, the court has endeavored to create a set of rules that conforms to the Federal Rules of Civil Procedure as amended through November 30, 2001, to the extent practicable given differences in jurisdiction between the United States district courts and the United States Court of Federal Claims.[76]

Thus, Rule 23 of the U.S. Court of Federal Claims (RCFC 23) closely follows the corresponding Federal Rule of Civil Procedure 23 -- the primary exception being that all

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71 Fed. R. Civ. P. 83(b).
72 Fed. R. Civ. P. 83(b), Advisory Committee's Notes.
73 *Hoffmann-La Roche*, 493 U.S. at 172.
74 *Id.* (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981))
75 *Id.* at 170 (emphasis added).

class actions require class members to opt in to the action. RCFC 23(a) requires a plaintiff to establish the same elements as Federal Rule 23(a). RCFC 23(b) requires a plaintiff to establish that the United States has acted or refused to act on grounds generally applicable to the class, as well as "predomination" and "superiority." The 2002 Rules Committee Note to RCFC 23 explains that because the relief available is generally confined to money damages (as is true under §216(b)), "the rule does not accommodate situations redressable through declaratory and injunctive relief contemplated under FRCP 23(b)(1) and (b)(2)."[77]

RCFC 23(c) requires a court to determine whether to certify a class "at an early practicable time," and to appoint class counsel by considering the same set factors specified in Federal Rule 23(g). Like Federal Rule 23, RCFC 23(c) directs the court to send notice to putative class members once it certifies a class, informing each person of the time and manner in which they can request inclusion, and that they may enter an appearance through an attorney. These procedures have been applied to several opt-in class actions,[78] including, most notably, *Delpin Aponte v. United States*,[79] a claim arising under the FLSA.

Delpin Aponte was initially filed in federal court, but subsequently transferred to the Court of Federal Claims.[80] The plaintiffs were U.S. States Postal Service (USPS) employees suing USPS on behalf of a large number of current and former employees allegedly owed overtime pay under the FLSA. Their substantive claim was that the

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[76] U.S.C.S. Claims Ct. Prec. R. 1, 2002 Advisory Committee's Note.

[77] U.S.C.S. Claims Ct. R. 23, 2002 Advisory Committee's Note.

[78] *See Barnes v. United States*, 68 Fed. Cl. 492 (2005), for an example of how the elements of RCFC 23 are applied to a class-wide claim for premium pay.

[79] 83 Fed. Cl. 80 (2008).

government erred in calculating overtime pay, basing it on the "base" rate of pay rather than the "regular" rate, as defined by 29 U.S.C. § 207(e). The plaintiffs sought to amend their pleadings to expand the putative class's scope beyond Puerto Rico.

The government opposed the amendment, partially on the grounds that the class claims, which would have to be determined under the RCFC class action rules, were incompatible with FLSA §216(b)'s procedures. As the court bluntly phrased it, "[t]he government contends that ... the special provisions of the FLSA do not allow for class action lawsuits."[81] The court rejected the argument:

> The Court does not interpret the FLSA as somehow preempting or displacing our procedures for class actions . . . . Because our rules provide for opt-in, not opt-out, class actions, the "irreconcilable difference" between class actions and collective actions under the FLSA is simply not present in our court. There appears to be no reason why RCFC 23 may not be used to advance FLSA claims.[82]

The court thus granted the amendment seeking class certification but limited the putative class to Puerto Rico, as the plaintiffs first pled in their complaint.

Thus, the Rules of the Court of Federal Claims demonstrate that with just slight modifications, Federal Rule 23 easily accommodates FLSA §216(b)'s opt-in feature. In other words, §216(b) and the Federal Rule 23 are not "irreconcilable," for the Court of Federal Claims provides a working example of how well they conform.

IX. The Unique Posture of *Myers v. Hertz Corporation* Demonstrates the Inconsistencies that Can Result from Applying Different Certification Standards.

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80 *Id*. at 86.
81 *Id*. at 91.
82 *Id*. at 91-92.

The Second Circuit's recent decision in *Myers v. Hertz Corporation*[83] vividly illustrates the need for consistency between the certification procedures of §216(b) and Rule 23. The *Myers* plaintiffs alleged claims under both the FLSA and New York state labor law. State law class claims are subject to the certification requirements of Rule 23, while most courts, particularly within the Second Circuit have applied the much more lenient "conditional certification" standards to FLSA collective action claims. *Myers*, is unique, however, because the state law class claims were identical to, and derivative of, the FLSA claims. Despite the identify of the issues, *Myers* suggests that the same federal court could reach different conclusions regarding the viability of the same representative action under Rule 23 and §216(b). Yet, whether a representative action will serve the interests of efficiency and fairness depends on the nature of the claims at issue and the evidence that will be presented to support the claims, not on whether the claims are based on a federal statute or state statute. If two procedures potentially yield different answers to the question of the viability of a representative action based on the same claims, they cannot co-exist.

The procedural background of *Myers* is helpful in demonstrating the potential -- even the likelihood -- that two inconsistent and contradictory certification standards will result in contrary and inconsistent treatment of similar claims. Jennifer Myers was a station manager for Hertz; she contended that she was misclassified as an exempt employee and that her job duties did not satisfy the criteria for the FLSA's executive exemption, as Hertz asserted. She sued Hertz for overtime pay under the FLSA, as well as three New York State law provisions. The district court dismissed two state law

83 *Myers v. Hertz Corp*., 624 F.3d 537 (2d Cir. 2010).

claims, leaving only her claim under New York Labor Law §191. Section 191 obligates an employer to timely pay wages, but it is silent with respect to how much those wages should be. The Second Circuit panel observed that the state law claim is:

> coextensive with, and derivative of, plaintiffs' FLSA claim. The only reason Hertz is alleged to have violated §191 is that it failed to pay plaintiffs the overtime wages to which they claim to be entitled under FLSA. . . . To prove their §191 claim, moreover, plaintiffs will have to prove an underlying violation of FLSA and nothing more. As for damages on the §191 claim, plaintiffs seek only those overtime wages to which they already claim to be entitled pursuant to FLSA. In summary, plaintiffs' state law claim is merely and nothing more than an alternative method of seeking redress for an underlying FLSA violation.[84]

Myers first moved the court to assist in notifying potential plaintiffs of their opt-in rights, *i.e.*, to "conditionally certify" the case as a collective action. However, the district court denied the motion. Pursuant to §216(b)'s "similarity" analysis, it found that a collective action was not feasible because:

> any collective action would require the Court to make a fact-intensive inquiry into each potential plaintiff's employment situation. Thus, . . . any determination as to their right to overtime would require a highly individualized analysis as to whether the duties they performed fell within that exemption.[85]

The district court noted that the problem was intrinsic to plaintiff's claim, for "further discovery cannot cure [the fact that] liability as to each putative plaintiff depends upon whether that plaintiff was correctly classified as exempt."[86]

Myers later moved to certify her state law claim under Rule 23(b)(3). The district

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84 *Id.* at 546.

85 *Id*. at 544.

86 *Id*.

court denied that motion as well, invoking the "law of the case" doctrine, and refusing to revisit the "similarly situated" findings supporting its prior decision not to certify the case as an FLSA collective action. The district court also concluded that

> the plaintiffs failed to satisfy Rule 23's commonality, typicality, and predominance requirements because the main issue to be decided in the case, whether each potential plaintiff was properly classified as "exempt" from FLSA's overtime guarantees, required, as [the district court] had found earlier in the Collective Action Order, a "fact-intensive inquiry into each potential plaintiff's employment status under the FLSA." [87]

Thus, the district court implicitly determined that if employees are not "similarly situated," thereby precluding a collective action under §216(b), they cannot satisfy the commonality and predominance requirements of Rules 23(a) and (b)(3).

Pursuant to Rule 23(f), Myers appealed the class certification ruling to the Second Circuit. The Second Circuit panel readily affirmed the district court's refusal to certify the case under Rule 23, based primarily on the plaintiff's failure to establish that common issues predominated, as required by Rule 23(b)(3). Based on the record evidence of the varied duties of station managers, the court concluded that:

> the predominance requirement requires a district court to consider "*all* factual or legal issues," to determine whether the issues subject to generalized proof are more "substantial" than those subject to individual inquiry. The "conceded" issues in this case, such as whether station managers worked overtime, whether they were paid overtime, and whether Hertz classified them as exempt pursuant to a common policy, are clearly less substantial in the overall mix of issues this case presents when compared to the ultimate (contested) question the district court would have to decide in any potential class action—whether

[87] *Id.* at 545.

> plaintiffs were *legally entitled* to the overtime they were not paid.[88]

The court next considered whether it had pendent appellate jurisdiction to review the district court's denial of "conditional certification" of the FLSA collective action.

> The doctrine allows us, "[w]here we have jurisdiction over an interlocutory appeal of one ruling," to exercise jurisdiction over other, otherwise unappealable interlocutory decisions, where such rulings are "inextricably intertwined" with the order over which we properly have appellate jurisdiction, or where review of such rulings is "necessary to ensure meaningful review" of the appealable order.[89]

The court thus decided that its jurisdiction to review the §216(b) "certification" depended upon whether that decision was integral to the district court's Rule 23 decision.

In making that assessment the Second Circuit all but ignored the district court's conclusion that the case should not be certified as a Rule 23 class action based on its earlier determination not to certify the case as a collective action under §216(b) because individual issues predominated.[90] Rather, while observing that the two-step procedure is not required by the terms of the FLSA or Supreme Court decisions, the Second Circuit nevertheless described the procedure, around which "the district courts in this circuit appear to have coalesced," as "sensible." The court then described the two-step procedure and compared the "modest factual showing" standard, applied at the first step of a putative FLSA collective action, with the commonality and predominance standards for certification in a Rule 23 class action. It concluded that

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88 *Id*. at 550-51 (citations omitted)(emphasis in the original).

89 *Id*. at 552 (quoting *Bolmer v. Oliveira*, 594 F.3d 134, 141 (2d Cir. 2010)).

90 "[I]t is the 'issues presented' to this Court," the Second Circuit stated, that must be 'inextricably intertwined' for pendent appellate jurisdiction to be properly exercised, not the issues presented to the district court." *Id.* at 556.

> [w]hile the two issues in this case are admittedly similar, we are easily able to determine here that the higher predominance standard has not been met without addressing whether the same evidence plaintiffs have put forward in support of Rule 23 class certification could satisfy the lower standard for the sending of notice pursuant to § 216(b)...."[91]

Accordingly, the court held, the two rulings were not "inextricably intertwined":

> Review of the Collective Action Order on the merits would require us to determine whether the district court abused its discretion in determining that plaintiffs had failed to make the "modest factual showing" that potential plaintiffs existed who were "similarly situated" to themselves. That question is quite distinct from the question whether plaintiffs have satisfied the much higher threshold of demonstrating that common questions of law and fact will "predominate" for Rule 23 purposes in the eventual action.[92]

Most disturbing, having affirmed the district court's denial of class certification under Rule 23, the Second Circuit suggested, nevertheless, that a class might be certified under FLSA §216(b):

> We note, however, that our decision not to exercise pendent appellate jurisdiction over the Collective Action Order should not be taken as bearing on that order's merits one way or the other. Our decision today does not prevent plaintiffs from renewing their motion for the district court to facilitate opt-in notice for a potential FLSA collective action in this case, perhaps after further factual investigation by plaintiffs' counsel, or after the district court allows further discovery between the parties (a decision lying within that court's discretion, of course).[93]

Thus, instead of providing clear guidance on the requirements for certification of §216(b) collective actions, the Second Circuit's decision continues to leave the door

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91 *Id*. at 556.

92 *Id.* at 555-56 (citations omitted).

93 *Id*. at 557 (citations omitted).

open to inconsistent rulings on the same issue via two different procedural devices -- one of which contravenes the Federal Rules, thereby violating the REA.

X. Conclusion.

Suits in the U.S. district courts are governed by the Federal Rules of Civil Procedure. In accordance with the Rules Enabling Act, the Federal Rules supersede all pre-existing procedural rules. Laws and procedures enacted subsequent to the Federal Rules take precedence *only to the extent* they create an actual conflict with the Federal Rules. As the Supreme Court has admonished, courts are simply not free to devise their own contrary procedures.

The procedures most courts have fashioned in deciding whether to certify collective actions under §216(b) violate these principles. Other than the requirement that plaintiffs must opt-in to pursue a representative action under §216(b), the FLSA does not specify any requirements or standards for certification of an FLSA case as a representative action. There is no other statutory or Supreme Court authority, except Rule 23, that prescribes standards for permitting representative actions.

Nothing in the language or legislative history of the FLSA conflicts with the procedures or requirements of Rule 23 for certification of a representative action. To the contrary, the legislative history and opinions of the Supreme Court regarding §216(b) indicate that its certification standards are not intended to be more lenient. Further, the Rules of the Federal Court of Claims, and FLSA cases decided in that court, illustrate that the rules governing collective actions can conform to Rule 23 while still maintaining the opt-in requirement mandated by §216(b). Based on all of these factors, there is no rational justification for federal courts to continue to apply certification procedures in FLSA collective actions that conflict with the Federal Rules.