TO CERTIFY OR NOT TO CERTIFY: A CIRCUIT-BY-CIRCUIT PRIMER ON THE VARYING STANDARDS FOR CLASS CERTIFICATION IN ACTIONS UNDER THE FEDERAL LABOR STANDARDS ACT

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INTRODUCTION

Among class-action practitioners, there is a virtual consensus that the quest for class certification is the most crucial battle waged in this type of litigation. This is particularly true in actions alleging overtime exemption mis-classifications where, after certification, the primary remaining issue of liability depends entirely on the defendant's ability to prove the exemption as an affirmative defense.

In California state courts, where the authors have litigated many such wage-and-hour class actions, the certification process is well-established, as evidenced by a flurry of recent state trial court certifications.[1] Yet, while California state court opinions, such as the decision in *Bell v. Farmers Insurance Exchange,*[2] purport to look fondly on the Federal class action procedures articulated in Fed. R. Civ. P.

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[1] O'Hara v. Factory 2-U Stores, Inc., No. 834123-5 (Alameda County Super. Ct. Dec. 3, 2001) (certifying class of store managers and assistant managers); Thomas, et al. v. California State Automobile Association, No. CH 217752-0 (Alameda County Super. Ct. May 7, 2002) (conditionally certifying class of insurance claims adjusters); Lyon v. TMP Worldwide, No. 993096 (San Francisco County Super. Ct. Nov. 15, 1999) (certifying class of advertising account servicers); Hart v. Indian Head Water Co., No. B146565 (Los Angeles County Super Ct. Nov. 1, 2000) (certifying class of delivery drivers); Kung v. Food for Less, No. BCI188014 (Los Angeles County Super. Ct. Nov. 5, 1999) (certifying class of grocery store employees); Hines v. Food for Less, No. BC20278 (Los Angeles County Super. Ct. Oct. 20, 1999) (certifying class of grocery store "managers"); Hess v. Dayton Hudson Corp. No. 777130 (Orange County Super. Ct. Oct. 13, 1999) (certifying class of department store employees); Khan v. Denny's Holdings, Inc., No. BC177254 (Los Angeles County Super. Ct. Aug 20, 1999) (certifying class of restaurant store "managers"); Magallenes v. Telemundo Network, Inc., No. BC170651 (Los Angeles County Super. Ct. Apr. 12, 1999) (certifying class of television network employees); Mynaf v. Taco Bell Corp., No. CV7661193 (Santa Clara County Super. Ct. Oct. 26, 1998) (certifying class of restaurant employees).

[2] 87 Cal. App. 4th 805 (2001).

Rule 23 for guidance, the certification prerequisites of nearly identical wage-and-hour claims under the Federal Fair Labor Standards Act of 1938[3] ('FLSA")and the opt-in scheme for claims brought thereunder, vary significantly between Federal circuits and among Federal district courts.

Moreover, even those practitioners who are comfortable navigating the waters of these varied legal standards may be discouraged from pursuing wage-and-hour actions under Section 216(b) procedures once they grasp the enormous risk associated with pursuing costly and time-consuming class litigation only to learn that few putative class members wish to join the action and/or that the victory of "certification" may quickly be rendered hollow by the almost certain subsequent filing by the defendant of a more factually comprehensive, and frequently successful, motion for decertification.

As a result of decades of confusion over the certification methods employed in Section 216(b) actions, and with a paucity of consistent judicial precedent to guide them, state court practitioners have come to view Federal court as tantamount to a forum non conveniens, due largely to the paradoxical result of attempting to litigate class issues (normally governed by the opt-out procedures of Rule 23) under the procedural opt-in scheme mandated by the FLSA, and because of confusion over the degree to which district courts will apply the Rule 23 standards in collective/class actions.[4] Because the United States Supreme Court has yet to issue a clear directive regarding whether FLSA actions are to utilize Rule 23 standards, this Article seeks to summarize the historical development of Federal case law on this issue in the district and courts of appeals. Additionally, this Article examines each Circuit's requirements for the use of plaintiff affidavits as evidentiary support for a finding of a cohesive, "similarly situated," putative class.

THE POLICY BEHIND A LENIENT STANDARD FOR FLSA "CLASS" CERTIFICATION

Unquestionably, 29 U.S.C. § 216(b) is a powerful tool for curbing unlawful wage-and-hour practices. The successful claimant in such actions may recover unpaid regular and overtime wages, an additional amount of liquidated damages equaling the amount of the wages recovered, legal or equitable relief, costs, and mandatory attorneys' fees.[5] These remedies may be sought by any number of employees on behalf of other persons "similarly situated" ("opt-ins") who file written consents to participate in the action.

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[3] 29 U.S.C. 216. The complete Act begins at 29 U.S.C. 201.

[4] In a 7-2 opinion, the United States Supreme Court in *Hoffmann-La Roche, Inc. v. Sperling*, referred to Section 216(b) collective actions as a "class device." 493 U.S. 165, 166 (1989).

[5] 29 U.S.C. § 216(b). Section 216(b) further provides that employees may seek reinstatement, promotion or other relief as the court deems proper for any violation of Section 215(a)(3) of that title. Notably, private rights of action may be maintained in such circumstances against any employer (including a public agency) in any federal or state court of competent jurisdiction.

Unlike Rule 23 actions seeking predominantly monetary damages[6] or California state court actions,[7] "similarly situated" persons under Section 216(b) are not bound by the outcome of FLSA actions (nor are the limitations periods on the filing of their actions tolled) unless and until they file written consents with the court.[8] Indeed, the filing of a consent to participate in a FLSA action is a jurisdictional matter. "[A] member of the class who is not named in the complaint is not a party unless he affirmatively "opts in" by filing a written consent-to-join with the court."[9]

The unique burden of would-be litigants to affect their own joinder in FLSA collective/class[10] actions, and the provision that the tolling of any particular plaintiff's limitations period does not occur until she files a consent, have led Federal courts to adopt a liberal standard for granting certification motions. Since Section 216(b) itself does not provide guidance as to the meaning of "similarly situated," Federal Courts of Appeal have unanimously justified adoption of a low threshold for certification, in no small part on the reasoning that it will allow plaintiffs to achieve certification status earlier in the litigation, if not immediately after filing of a complaint, thereby permitting unwitting plaintiffs discovery of the pendency of the action and the opportunity to toll their actions through the filing of consents.[11] Once opt-in plaintiffs file consents, they do not participate fully in the case as the named plaintiffs do. As a representative action, the named plaintiffs prosecute the case on behalf of all claimants who have filed consents with the court.

In order to obtain FLSA class certification status, the plaintiff bears the burden of proving that an adequate number of class members will ultimately opt into the action, and that these class members are likely to satisfy the "similarly situated"

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[6] In Rule 23(b)(3) class actions, for example, class members must protest their membership in the class by filing exclusion or "opt-out" forms. *See* Phillips Petroleum Co. v. Shutts, 472 U. S. 797 (1985). Moreover, once a class action is filed, under Rule 23, the statute of limitations is tolled for the benefit of the class until such time as the class is denied or decertified. American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

[7] CAL. CODE CIV. PROC. § 382

[8] 29 U.S.C. § 256

[9] Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977).

[10] As a testament to federal courts' reluctance quickly to label FLSA actions "class" actions merely based on the filing of the complaint, it is fairly well established that this label is not placed on the action until the filing of the first consent. Allen v. Atlantic Richfield Co., 724 F.2d 113 (5th Cir. 1984).

[11] Despite a lack of historic authority on the scope of the term "similarly situated," circuit and district courts have wrestled with this term of art, with sharp disagreement. *See, e.g.*, Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095 (10th Cir. 2001) (discussing the various approaches taken by different courts); Grayson v. K-Mart Corp., 79 F.3d 1086 (11th Cir. 1996), *cert. denied*, 519 U.S. 982 (1996); Hoffman v. Sbarro, Inc., 982 F.Supp. 249 (S.D.N.Y. 1998); Harrison v. Enterprise Rent-A-Car Co., 1998 U.S. Dist. LEXIS 13131 (M.D. Fla. 1998); Bayles v. Am. Med. Response, 950 F.Supp. 1053 (D. Colo. 1996); Schwed v. Gen. Elec. Co., 159 F.R.D. 373 (N.D.N.Y. 1995); Brooks v. Bellsouth Telecom, 164 F.R.D. 561 (N.D. Ala. 1995); Flavel v. Svedala Indus., Inc., 875 F.Supp. 550 (E.D. Wis. 1994).

standard of the relevant Federal tribunal. However, as discussed in greater detail below, this evidentiary burden is relatively de minimus; the declarations of the representative plaintiffs alone are usually enough for most Federal courts to permit issuance of notice of the action to potential class members. This notice tends to produce an even more robust-sized class and further proof of the class numerosity necessary to withstand decertification efforts after further discovery has been conducted.

THE FLSA'S PAST RELIANCE ON THE RULE 23 SCHEME

Whereas the lenient standard descried above is commonly accepted by Federal tribunals today, opinions in past decades were far from consistent with regard to the test for issuance of class notice. Indeed, historically, distinctions between Section 216(b) actions and Fed. R. Civ. P. Rule 23 matters went far beyond issues such as whether parties were required to opt out or opt in to the action, what events tolled the limitations period, and what variances existed between these rules with regard to the "similarly situated" standard. Even following sweeping amendments to Section 216(b) by the Portal-to-Portal Act of 1947,[12] which amended Section 216(b) by requiring named plaintiffs to have a stake in the outcome of the litigation and providing for an "opt-in" scheme, there was no Congressional statement as to the propriety of applying Rule 23 standards to FLSA actions. Moreover, prior to *Hoffmann-La Roche, Inc,* the Courts of Appeal were divided even as to what authority Federal trial judges had to facilitate class notice.

Before *Hoffmann-La Roche,* many lower courts refused to sanction court-facilitated notice in FLSA opt-in actions on the basis that, since Congress had not expressly authorized distribution of such notice, the courts' contact of non-parties was tantamount to a solicitation of claims.[13] Other courts reasoned that Congress's silence on this issue permitted notice in appropriate cases.[14] In *Hoffmann,* however, the Supreme Court found that lower courts had the procedural authority to manage the joinder of multiple parties in Section 216(b) actions.[15] For this conclusion, the Court relied on the language of Section 216(b) authorizing representative suits as well as the notice procedure of Fed. R. Civ. P. Rule 83, which vests trial judges with the inherent power to regulate proceedings before them.[16] More importantly, however, was the *Hoffmann* Court's comparison of Section 216(b) to Rule 23. Relying on its 1981 decision in *Gulf Oil v. Bernard,*[17] a Rule 23 case, the Court explained that the trial court not only had the authority to regulate complex

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[12] Pub. L. No. 80-49, 61 Stat. 84 (codified as amended at 29 U.S.C. § 251 et seq.).

[13] *E.g.,* McKenna v. Champion Int'l Corp., 747 F.2d 1211 (8th Cir. 1984); Dolan v. Project Constr. Corp., 725 F.2d 1263 (10th Cir. 1984); Partlow v. Jewish Orphans' Home of So. Calif., Inc., 645 F.2d 757 (9th Cir. 1981).

[14] Woods v. N.Y. Life Ins. Co., 686 F.2d 578 (7th Cir. 1982); Braunstein v. Eastern Photographic Lab., Inc., 600 F.2d 335 (2nd Cir. 1978).

[15] 493 U.S. at 171.

[16] *Id.*

[17] 452 U.S. 89.

proceedings, it had a duty to exercise control in class actions.[18] With such language, *Hoffmann* put to rest any question regarding the district courts' powers to facilitate class notice.

Following *Hoffmann,* FLSA practitioners were clear as to the powers of the district courts to facilitate class notice and the mechanics of prosecuting Federal wage claims, but lacked a uniform rule as to whether and to what extent the Rule 23 requirements for numerosity, commonality, typicality, and adequacy of representation applied in Section 216(b) certification motions. Moreover, assuming that these factors were considered, there was no standard for what evidentiary support was required to meet these standards, particularly given other discrepancies between the FLSA and other forms of Federal class actions.

For years, the question of whether analysis of Section 216(b) certification motions should be tied to Rule 23 standards was answered by reference to one of two seemingly irreconcilable approaches. On the one hand, many of the lower courts followed a pre-*Hoffmann* line of authority, commencing with the Third Circuit's holding in *Lusardi v Xerox Corp,*[19] which considered Rule 23 and Section 216(b) to be "mutually exclusive" and called for a case-by-case analysis of the "similarly situated" standard at two separate stages of the litigation.[20] This approach was quickly dubbed the "ad hoc" approach due to its lack of defined standards, and has been followed even outside the Tenth and Eleventh Circuits with some regularity.[21] Because of its lack of direction with regard to the sufficiency of evidence required for certification and its silence on the issue of how to apply the "similarly situated" standard, it is debatable whether this line of cases can even be deemed to have produced a recognizable standard at all.

The seemingly alternate approach, adopted even by some lower courts within the Tenth Circuit, was set forth in *Shushan v. University of Colorado.*[22] In *Shushan,* the court's primary inquiry was the question of whether FLSA claimants were required affirmatively to opt-in to the action before they could be bound by the results. Nevertheless, sweeping language in the opinion made clear the court's general discontent with former lines of authority regarding the degree of interrelation between Rule 23 and Section 216(b).[23] In rejecting both a categorical approval and rejection of a correlation between these potentially competing schemes, the court in *Shushan* held that the named plaintiffs there were required to satisfy only those requirements of Rule 23 that *did not conflict* with Section

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[18] *Hoffmann-La Roche,* 493 U.S. at 171.

[19] 118 F.R.D. 351 (D.N.J. 1987), *vacated in part on other grounds,* 122 F.R.D. 463 (D.N.J. 1988).

[20] *Id.*

[21] Schwed v. Gen. Elec. Co., 1997 U.S. Dist. LEXIS 5103 (N.D.N.Y. 1997); Severtson v. Phillips Beverage Co., 137 F.R.D. 264 (D. Minn. 1991).

[22] 132 F.R.D. 263 (D. Colo. 1990). Although *Shushan* was an action alleging violations of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"), and not involving FLSA claims, cases interpreting class actions involving the ADEA also look to the statutory scheme of Section 216(b).

[23] *Shushan,* 132 F.R.D. at 264-265.

216(b).[24] The court rationalized this approach on the basis that the procedure for the joinder of parties in a FLSA action shared qualities with the permissive joinder procedures of Rule 20 *as well as* the class action procedures of Rule 23. *Shushan,* a post-*Hoffmann* decision, therefore stood for the proposition that at least portions of Rule 23 provided a reasonable framework for evaluating the propriety of class treatment in FLSA actions. As a practical consideration, adoption of this approach permitted the parties more easily to forecast the likelihood of success on a motion for certification.

Since *Shushan*, Federal courts across the nation have struggled on a case-by-case basis with the propriety of these two divergent approaches, often with inconsistent results on similar facts. Surprisingly, in that time, in the absence of any guidance from the Supreme Court, the Courts of Appeals and their District Courts have almost unanimously shunned the Rule 23 standards as a bright-line test when analyzing the certification propriety of Section 216(b) actions. Instead they have focused exclusively on the highly-subjective "similarly situated" standard. Moreover, as of the time of publication of this Article, any recognizable debate with regard to the test for "similarly situated" was centered on the sufficiency of plaintiff affidavits, offered near or at the inception of the litigation, to demonstrate a likelihood that the representative plaintiffs are part of a homogeneous group of aggrieved workers.

A CIRCUIT-BY-CIRCUIT ANALYSIS OF THE AFFIDAVIT REQUIREMENTS FOR CLASS CERTIFICATION

Within the last ten years, the Courts of Appeals in each Circuit have moved toward allowing early certification as a tool to ensure early dissemination of notice merely on the basis of the representative plaintiff's having demonstrated the existence of a sufficient number of "victims of a single policy or plan." Indeed, no longer do courts wrestle with whether the three-step method (initial certification, notice and, ultimately, an in-depth analysis at decertification) for testing the propriety of class treatment should be utilized or whether the standards at the time of certification should be relaxed, relative to the standards imposed at decertification. Each of the Courts of Appeals has answered these inquiries in the affirmative. Moreover, the Federal courts are in agreement that, while initial certification questions should not be answered by reference to the Rule 23 factors, the more exhaustive analysis at the time of decertification can, and probably should, consider Rule 23's more stringent four-prong test.

Despite this migration away from utilizing the bright-line Rule 23 standard at the initial certification stage, the various Circuits still face perhaps their last conflict on the issue of what standard of proof will be required for a plaintiff to make a sufficient "demonstration" of the existence of a sufficient number of "victims of a single policy or plan" for certification purposes. As expected, this conflict exists largely due to the broad discretion Federal District Court judges are granted in

[24] *Id.* at 266.

determining whether to allow notice and what standards to employ in making that decision. Although the Circuits themselves have yet to agree on these standards, what is clear is that, despite the District Courts' broad discretion to employ the class device, the courts within each Circuit have exhibited a remarkable propensity to consistency within the Circuit.

As the following review attests, the standards employed by Federal judges in approving or rejecting the issuance of class notice run the gamut: the most liberal Circuits require only that the pleadings properly allege a common illegal employment practice, while more conservative Circuits require an actual factual demonstration that such a violation exists. The following discussion therefore examines the development within each Circuit of the threshold requirements for issuance of class notice.

A. First Circuit

Courts within the First Circuit utilize one of the more liberal standards for allowing initial class certification and notice to potential class members. District Courts in the First Circuit have allowed a class to be certified for notice purposes based solely on the plaintiff's allegations contained in the complaint and any supporting evidence provided by plaintiffs.

One of the initial decisions to employ this standard was *Reeves v. Alliant Techsystems, Inc.*[25] In *Reeves,* the First Circuit approved certification for notice purposes based solely on plaintiffs' "alleging that the putative class members were together the victims of a single decision, policy or plan."[26] The *Reeves* court approved notice based on the mere requirement that "plaintiffs can meet this burden by simply alleging "that the putative class members were together the victims of a single decision, policy, or plan" that violated the law."[27]

Although review of a well-plead complaint will generally satisfy First Circuit courts for purposes of class certification, these courts will also look at supporting evidence if presented by the plaintiffs. In *Kane v. Gage Merchandising Services, Inc.,*[28] the court looked at the allegations of the plaintiff's pleadings, as well as three affidavits (from the representative plaintiff, his counsel, and one of the defendant's officers) that tended to support those allegations, and found them collectively to constitute "substantial allegations that the putative class members were together the victim of a single decision, policy or plan" and, on that basis, certified the class for notice purposes.[29]

B. Second Circuit

The Second Circuit courts have developed what is perhaps the single most

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[25] 77 F. Supp. 2d 242 (D.R.I. 1999).
[26] *Id.* at 247.
[27] *Id.*
[28] 138 F. Supp. 2d 212 (D. Mass. 2001).
[29] *Id.* at 214-215.

lenient standard in the country, with trial courts tending to allow certification based solely on the strength of the plaintiff's allegations. One of the best examples of this liberalism can be found in *Rodolico v. Unysis Corporation.*[30] In that case, the District Court for the Eastern District of New York made an extensive review of the various judicial standards employed by a range of district courts in determining a 216(b) action's fitness for certification, and then ruled in favor of certification based solely on the strength of the plaintiffs' allegations. In doing so, the Court stated:

> Bearing in mind the broad remedial nature of the ADEA as well as concerns of fairness and judicial economy and the factors set forth in *Lusardi* and *Hyman,* the Court finds that the plaintiffs are similarly situated, so that a collective action should proceed on the issue of liability... Where, as here, the plaintiff alleges a systematic reduction in work force, the decision is one that was obviously made at a high level of the organization. The plaintiffs acknowledge that individual managers had discretion in deciding whom to retain, but argue that a few high level managers were responsible for the ultimate discriminatory plan. In particular, the plaintiffs allege that top Unysis executives determined how many people would be terminated; decided that they would have one RIF instead of two; constructed a plan that was aimed to reach the senior-most engineers at the plant; and assembled the selection process.... Thus, the defendant's alleged conduct supports the authorization of a collective action for the liability phase of the trial.[31]

The Second Circuit approach is further explained in *Harrington v. Education Management Corp.*[32] Noting that the relevant analysis is required very early in the litigation process, the court stated "[a]t this juncture, where the parties have yet to engage in any substantial discovery and trial is set for next April, the court need only reach a preliminary determination that potential plaintiffs are similarly situated to permit the opt-in notice."[33] After reviewing the allegations of the plaintiff, the court ruled that "[the plaintiff had] met his modest preliminary burden. In his affidavit submitted to the court, he claims that in response to his complaints to management that he was regularly denied overtime pay, his supervisors informed him that it was the defendants' policy not to pay assistant directors overtime compensation because the position was classified as exempt."[34]

The Second Circuit's utilization of this liberal methodology dates back to at least to *Jackson v. New York Telephone Co.* In that case, the District Court for the Southern District of New York ruled that the plaintiffs needed only show "substantial allegations that the putative class members were together the victims of a single decision, policy or plan infected by discrimination." In holding that "[u]nquestionably in the present case, the plaintiffs' ample allegations regarding the FMP create a solid factual basis upon which authorization for notice should be

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[30] 199 F.R.D. 468 (E.D.N.Y. 2001).

[31] *Id.* at 482-483 (emphasis added, internal citations omitted).

[32] 2002 WL 1009463 (S.D.N.Y. 2002).

[33] *Id.* at *2 (citing Jackson v. N.Y. Tel. Co., 163 F.R.D. 429, 431 (S.D.N.Y. 1995)).

[34] *Id.* at *2.

granted,"[35] the *Jackson* court articulated the lenient approach that prevails in the Second Circuit for achieving class/collective action status.

C. *Third Circuit*

In sharp contrast to the clear, liberal standards discussed above, the Third Circuit is split over whether to allow certification based on the plaintiff allegations and/or pleadings alone or to demand a heightened evidentiary showing. Indeed, some courts within this jurisdiction have followed the same certification standards of the First and Second Circuits, while the Circuit's most recent District Court decision, *Smith v. Sovereign Bancorp, Inc.*,[36] opted without substantial explanation to require that plaintiffs make a more rigorous factual showing before the court would certify a class.

The *Smith* opinion made the following observation regarding the lack of clear precedent on this issue:

> The Third Circuit has not yet determined what standard to apply in considering whether potential class members are "similarly situated" such that FLSA plaintiffs may be entitled to send them notice of the suit. In the absence of appellate guidance, the Court looks to other districts and circuits, which have applied varying standards. Some courts, including two within this District, have held that motions for preliminary certification and notice may be granted as long as the plaintiff merely alleges that the putative class members were injured as a result of a single policy of the defendant employer. Other courts generally apply a more stringent - although nonetheless lenient - test that requires the plaintiff to make a "modest factual showing" that the similarly situated requirement is satisfied.[37]

The court then chose to reject the standard based on plaintiff's allegation standing alone, and instead apply the "modest factual showing" test: "[Rather] than following the automatic preliminary certification route, this Court will adopt the reasoning of those courts that have required plaintiffs to make a basic factual showing that the proposed recipients of opt-in notices are similarly situated to the named plaintiffs."[38]

Smith, choosing as it does between conflicting standards without articulating a sound reason for the choice, provides little clue as to how courts within the Third Circuit will rule on the requisite standard for notice certification in the future. Practitioners can only take a cautious approach until the Court of Appeals has the opportunity to make a definitive pronouncement on the matter.

D. *Fourth Circuit*

Unlike practitioners in the Third Circuit, those in the Fourth Circuit can safely

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[35] 163 F.R.D. at 432.

[36] 2003 WL 22701017 (E.D. Pa. 2003).

[37] *Id.* at *2 (internal citations omitted).

[38] *Id.* at *3.

assume their District Courts will require that plaintiffs make some factual showing that the class members are similarly situated before granting notice certification, a standard of proof clearly delineated almost a decade ago. Decisions such as *D'Anna v. M/A-COM, Inc.*,[39] recognize the different levels of proof required by various courts, then reach their own conclusion on the standard to employ. In considering the alternate approaches to the analysis in *D'Anna,* the Maryland District Court recognized that:

> The courts have uniformly recognized that only a preliminary finding of "similarly situated" potential plaintiffs is necessary to authorize notice to potential class members; nevertheless, they have differed on the appropriate degree of factual support for class allegations prior to authorization of notice. Although court- authorized notice has been issued based solely upon allegations of class-wide discrimination in a complaint, many courts have required some factual support for the allegations prior to authorization of notice. This Court concludes that the better reasoned cases require the plaintiff to make a preliminary factual showing that a similarly situated group of potential plaintiffs exists.[40]

D'Anna proceeds to evaluate precisely what evidence would satisfy this burden within the Fourth Circuit:

> Although the requirements for court-authorized notice in ADEA class actions are not stringent, the plaintiff has failed to make the relatively modest factual showing required in *Schwed, Severtson,* and *Hoffmann-La Roche.* The plaintiff has not pointed to any company plan or policy to target older employees for termination. Plaintiff has done nothing more than identify eleven individuals who are over forty years of age and who may have been terminated during Manno's tenure. The mere listing of names, without more, is insufficient absent a factual showing that the potential plaintiffs are "similarly situated." The plaintiff has the burden of demonstrating that notice is "appropriate." In this case, plaintiff has not met this burden.[41]

The *D'Anna* court, in its interpretation of the plaintiff's burden, and while accepting it as a relatively light burden, remains unwilling to accept plaintiff's allegations as conclusive proof of the propriety of class treatment of FLSA claims without any supporting evidence to corroborate the assertions. While only one opinion among many, *D'Anna* represents perhaps the best expression of the Fourth Circuit's stance on this issue at the time of publication of this article.

E. Fifth Circuit

One of the most recent decisions out of the Fifth Circuit expresses that jurisdiction's conservative approach on authorizing notice in Section 216(b)

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[39] 903 F. Supp. 889 (D. Md. 1995).

[40] *Id.*at 893-894 (internal citations omitted).

[41] *Id.* at 894 (internal citations omitted).

collective actions. In *Villatoro v. Kim Son Rest., L.P.*,[42] the court required a clear factual demonstration of similarity among the alleged class members before granting notice, stating that plaintiffs in such actions must demonstrate they are

> similarly situated with respect to their job requirements and with regard to their pay provisions. Notice is appropriate when there is a demonstrated similarity among the individual situations . . . some factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged [policy or practice].[43]

While the court was unfortunately silent as to what constituted the "demonstrated factual nexus," and while this standard is, obviously, relatively light when compared to the burden for class certification in Rule 23 actions, a cautious reading of the so-called "demonstration" demanded by the *Villatoro* court compels the Fifth Circuit wage-and-hour practitioner to approach certification motions with more ammunition than simply a well-plead complaint and the strength of the plaintiff's affidavits.

F. Sixth Circuit

Not unlike the Third Circuit, trial courts in the Sixth Circuit vary widely on the issue of plaintiffs' evidentiary burden, relying on what appears to be a results-oriented approach rather than adhering to a prescribed standard. More problematic for the practitioner is the fact that, since *Belcher v. Shoney's Inc.*[44] first addressed this issue in 1996, little case law has emerged to offer any novel perspective on the proper handling of FLSA motions on the issue of notice imposition.

While the *Belcher* plaintiffs were successful in obtaining class certification, the court there skillfully side-stepped imposing any clear standard whatsoever:

> Although it is clear that the court may supervise notice to potential class members, the lower courts have not agreed as to the factual showing that must be made by a plaintiff to show who is "similarly situated" at the notice stage. Some courts hold that a plaintiff can demonstrate that potential class members are "similarly situated," for purposes of receiving notice, based solely upon allegations in a complaint of class-wide illegal practices. Other courts hold that a plaintiff meets this burden by demonstrating some factual support for the allegations before issuance of notice. This Court finds it unnecessary to adopt either of the competing standards because the Plaintiffs have made a sufficient showing under either standard that the individuals to whom they seek to send notice of this lawsuit are "similarly situated" to them to warrant the issuance of Court-supervised notice. The Court is not holding at this time, however, that all members of the potential class who will be sent notices are, in fact, similarly situated to Plaintiffs.[45]

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[42] 286 F.Supp.2d 807 (S.D. Tex. 2003).

[43] *Id.* at 810 (internal quotations and citations omitted).

[44] 927 F.Supp. 249 (M.D. Tenn. 1996).

[45] *Id.* at 251 (internal citations omitted).

Later, when faced with the same issue in *Clark v. Dollar General Corporation,*[46] the Middle District of Tennessee followed the "lead" of the Belcher court in declining to subscribe to any particular standard, instead merely repeating much of the text of the *Belcher* opinion.[47]

Perhaps because of this lack of guidance, the recent decision in *Pritchard v. Dent Wizard International Corp.*[48] erred on the side of caution, analyzing the certification request under a more rigorous burden:

> In the case *sub judice,* the Court concludes Plaintiff has sufficiently alleged a collective action under Section 216(b) of the FLSA. Plaintiff meets his burden of showing he is similarly situated to those whom he requests to represent under either standard set forth above. In the less restrictive standard, i.e., demonstrating "similarly situated" based upon allegations in the complaint of class-wide illegal practices, the Court concludes that Plaintiff has set forth allegations of Defendant's class-wide practice of not paying overtime wages to its paintless dent removal technicians. Under the more restrictive standard, i.e., requiring factual support for the class allegations in the amended complaint, the Court concludes that Plaintiff has set forth sufficient factual support for his class allegations in his Amended Complaint. Plaintiff has sufficiently alleged that there were numerous paintless dent removal technician's [sic] employed by Defendant in Ohio, that all of these technicians were paid on a commission basis, and Defendant did not pay these technician's [sic] overtime for certain periods of time. Whether many or few of these technicians choose to opt-in [sic] to this suit, or are capable of opting-in [sic] to this suit, remains to be seen. At this stage of this stage [sic] of the litigation, however, the Court cannot conclude that Plaintiff can prove no set of facts that would entitle him, or those he would represent, to relief.[49]

Although Sixth Circuit courts have been careful to avoid articulating any consistent cognizable standard or otherwise implying a preference for any specific certification standard, practitioners are advised to err on the side of caution to ensure the best chance of securing class certification.

G. Seventh Circuit

While a plaintiff's evidentiary burden in Seventh Circuit is less rigorous than in more conservative forums such as the Fifth Circuit, the Seventh Circuit requires a so-called "demonstration" standard that places it squarely within the camp of Circuits with more stringent certification standards. Having said this, however, the test in this jurisdiction is not nearly as demanding as the more difficult Rule 23 standards for class certification

A clear trend has developed in the Seventh Circuit requiring requiring plaintiffs to meet a "demonstrated" standard to show they are similarly situated. Among

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[46] 2001 WL 87887 (M.D. Tenn. 2001).

[47] *Id.* at *4.

[48] 210 F.R.D. 591 (S.D. Ohio 2002).

[49] *Id.* at 596.

other factors, this standard has been interpreted to include a review of the pleadings, affidavits, and any other evidence (such as statistical data) put forth by the parties.

In *Clausman v. Nortel Networks,*[50] one of several recent rulings on this issue in the Seventh Circuit,[51] the District Court for the Southern District of Indiana dealt with the question as follows:

> The Seventh Circuit has not specifically addressed a standard for determining whether potential plaintiffs are similarly-situated [sic]. However, "courts generally do not require prospective class members to be identical." Although a plaintiff need not meet the Rule 23 standards for class certification, or be identically situated to potential class members, there should be "a demonstrated similarity among the individuals." At this early stage of the case, the Court should examine the record and affidavits to determine whether notice should be given to potential plaintiffs. The standard at this time is "fairly lenient" and often results in the "conditional certification" of the class.[52]

In articulating the need for a "demonstrated similarity among the individuals," the *Clausman* court set forth one of the most direct statements of where this Circuit falls on the national spectrum. With this background, attorneys can safely assume that District Courts within this jurisdiction will look beyond the pleadings and bare forms of evidence before them to determine the existence of a "demonstrated similarity" between putative class members.

H. Eighth Circuit

The District Courts of the Eighth Circuit have confidently ruled that plaintiffs must establish a factual basis before any notice certification is entertained. The implementation of this standard seems to lean toward requiring a more developed factual showing than mere allegations of a predominant policy of plan.

This standard is demonstrated in *Campbell v. Amana Company, L.C.,*[53] where the Northern District of Iowa indicated that plaintiffs must show "some factual basis from which the Court can determine if similarly situated potential plaintiffs exist."[54] The *Campbell* court found support for its decision in *Severtson v. Phillips Beverage Co.,*[55] a 1991 decision of the District of Minnesota, which requires "evidence establishing 'at least a colorable basis' for their claim that a class of similarly

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[50] 2003 WL 21314065 (S.D. Ind. 2003).

[51] Rochlin v. Cincinnati Ins. Co., 2003 WL 2185234 (S. D. Ind. 2003); Belbis v. County of Cook, 2002 WL 31600048 (N.D. Ill. 2002); Garza v. Chicago Transit Auth., 2001 WL 503036 (N.D. Ill. 2001); Krieg v. Pell's, Inc. 2001 WL 548394 (S. D. Ind. 2001). *See also* Woods v. N.Y. Life Ins. Co., 686 F.2d 578 (7th Cir. 1982).

[52] *Clausman*, 2003 WL 21314065 at *3.

[53] 2001 WL 34152094 (N.D. Iowa).

[54] *Id.* at *2 (internal citations and quotations omitted).

[55] 137 F.R.D. 264 (D. Minn. 1991).

situated plaintiffs exist [sic]."[56]

Even more recently in the Eighth Circuit, the Western District of Arkansas stated, in *Freeman v. Wal-Mart,*[57] that notice authorization must be based on "substantial allegations of class-wide [violations] *supported by affidavits*" but may not be based solely on "unsupported allegations of widespread violations."[58] For this proposition, the court in *Freeman* cites to a twenty-year-old decision denying certification in a case where plaintiff's counsel argued his right to classwide notice "as a matter of law" without providing a single factual allegation to support his motion.[59]

Clearly, Eighth Circuit judges are inclined to require a more substantial factual showing before authorizing notice. Practitioners in this Circuit can comfortably assume that these courts will rely on the well-settled precedent of the Circuit in requiring an established factual showing before granting notice certification.

I. Ninth Circuit

The Ninth Circuit employs a certification standard on the lenient end of the national scale. This standard requires an extremely light evidentiary showing to support a plaintiff's allegations, one which may be satisfied solely by affidavits from plaintiffs themselves.

In 1999, the District of Nevada, with assistance from "only two Court[s] of Appeals cases reviewing the factors a district court should employ in determining how to 'certify' a Section 216(b) action," looked to Fifth and Third Circuit decisions to blaze a trail toward establishing a litmus test within the Ninth Circuit for evaluating such motions.[60]

In doing so, the Nevada District Court in *Bonilla* gave a disappointed nod to the Third Circuit's *Lusardi*[61] and the Fifth Circuit's *Mooney,* [62] noting that neither was particularly helpful. Recognizing that "[*Mooney*] declined to specify any particular method for certification, and merely stated that the district court did not abuse its discretion in determining that plaintiffs were not similarly situated,"[63] *Bonilla* took the first step toward generating a FLSA certification standard for the Ninth Circuit, albeit in dicta, by explaining that "plaintiffs bear the burden of showing that they are similarly situated, [sic] however, this is a lenient burden for plaintiffs to meet."[64] *Bonilla* then began to define the standard and evidentiary requirements for meeting this burden by stating that the plaintiffs could satisfy that standard through the modest use of affidavits, a device already well-utilized by Rule 23 and state

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[56] *Id.* at 267 (internal quotations omitted).
[57] 256 F. Supp. 2d 941 (W.D. Ark. 2003).
[58] *Id.* at 945 (emphasis added).
[59] *Id.* (citing Haynes v. Singer, 696 F.2d 884, 887 (11th Cir. 1983)).
[60] Bonilla v. Las Vegas Cigar Co., 61 F.Supp.2d 1129, 1134 n.4 (D. Nev. 1999).
[61] 855 F.2d 1062 (3d Cir. 1988).
[62] 54 F.3d 1207 (5th Cir. 1995).
[63] *Bonilla,* 61 F.Supp.2d at 1134 n.4.
[64] *Id.* at 1134 n.6.

court practitioners as a tool for satisfying the essential certification elements of commonality and typicality.[65]

Sixth months later, in *Thiebes v. Wal-Mart Stores, Inc.*,[66] the District of Oregon transformed *Bonilla's* dicta into a more cognizable standard. *Thiebes* brought the issue of class certification in a Section 216(b) context squarely before a Ninth Circuit trial court. Citing *Bonilla,* the *Thiebes* court looked to affidavits submitted by the lead plaintiffs to determine if the class was indeed "similarly situated."[67] While *Thiebes* declined to offer more than a recitation of the "lenient" Bonilla standard, the opinion finally offered guidance regarding the number of affidavits necessary to meet that standard, and the number was, in that case, only two from the representative plaintiffs. The two affidavits explained that the plaintiffs and other employees of Wal-Mart worked uncompensated overtime due to the uniform policies of the employer. According to the court, this testimony, "together with the allegations of the Amended Complaint, [was] sufficiently specific regarding how the alleged policies and practices are manifested and how they generally affect hourly employees in Oregon, such as plaintiffs," so as to support class certification.[68]

Two years after *Thiebes,* the District of Oregon took a second opportunity to nail down the propriety of utilizing affidavits as a class-approval method. In *Ballaris v. Wacker Silttronic Corp.*,[69] a Section 216(b) class certification dispute, the court again cited the *Bonilla* standard and looked to affidavits submitted by the plaintiffs in making the certification ruling. As in *Thiebes,* the *Ballaris* plaintiffs submitted only the affidavits of two representative plaintiffs, workers who asserted that "[the defendant's] workplace policies necessitated [employees'] working off the clock" without receiving additional wages.[70]

This time, the Oregon District went even farther in cementing the use of affidavits as a guiding tool for FLSA certification motions by noting that the plaintiffs had submitted additional documentation to support their motion for certification and then refusing to look to those documents on the ground that "the affidavits . . . alone are sufficient to certify the collective action."[71] By so ruling, the court established that plaintiffs could satisfy their burden of proof regarding the "similarly situated" standard and obtain class certification for a Section 216(b) action purely and singularly on the basis of sworn written testimony.

This approach appears to be a hybrid version of the lenient approach of certification by allegation: The court looks to the allegation in the complaint, but also requires some sort of factual support from the plaintiffs themselves to support the alleged abuses.

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[65] *Id.*

[66] 1999 U.S. Dist. WL 1081357 (D. Or. 1999).

[67] *Id* at *3.

[68] *Id.* at *4.

[69] 2001 U.S. Dist. WL 1335809 (D. Or. 2001).

[70] *Id.* at *2.

[71] *Id.* at *3.

J. Tenth Circuit

Judge Babcock of the District Court for Colorado has actively led the Tenth Circuit to a standard of class certification by allegation alone. First, in *Bayles v. American Medical Response of Colorado Inc.*,[72] he wrote that "[g]enerally, at the notice stage, courts following this line of cases require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan . . . ."[73]

Then, in *Vazlavick v. Storage Technology Corp.*,[74] Judge Babcock held that:

> In *Bayles*[,] I adopted an ad hoc approach of determining whether plaintiffs were similarly situated under Section 216(b). In particular, I employ the two-step approach to Section 216(b) certification adopted by several other courts. First, I must determine whether a collective action should be certified for notice purposes. Then, after discovery is completed and the case is ready for trial, I revisit the issue of certification. At the notice stage, courts following the ad hoc method "require nothing more than substantial allegations that the putative class members were together the victims of a single policy or plan . . . ."[75]

In *Vazlavick,* Babacock found that the "plaintiffs have certainly made substantial allegations that the putative class members were together the victims" of a single plan; therefore, "conditional certification for notice purposes is warranted."[76]

In the aggregate, these opinions make illustrate that the Tenth Circuit employs one of the most liberal approaches to class certification under the FLSA by allowing notice to the putative class members based merely on the strength of a plaintiff's allegations.

K. Eleventh Circuit

In a rare example of an instance where a Court of Appeals itself has dictated the standard to be used by its lower courts, the Eleventh Circuit permits certification on the basis of the plaintiff's allegations and supporting affidavits. In *Hipp v. Liberty National Life Insurance Co.*,[77] the Eleventh Circuit noted the widely held practice of certifying 216(b) motion based only on the pleadings and any affidavits submitted and predictably referred to this determination as being a fairly lenient standard, more often than not resulting in conditional certification.[78] The Court then made one of the strongest statements by a Court of Appeals to date in endorsing this method, stating "we suggest that district courts in this circuit adopt it

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[72] 950 F. Supp. 1053 (D. Colo. 1996).

[73] *Id.* at 1066-1067 (internal quotations and citations omitted).

[74] 175 F.R.D. 672 (D. Colo. 1997).

[75] *Id.* at 678 (internal citations omitted).

[76] *Id. See also* Reab v. Elec. Arts, Inc., 214 F.R.D. 623 (D. Colo 2002).

[77] 252 F.3d 1208 (11th Cir. 2001).

[78] *Id.* at 1218.

in future cases."[79] Disappointingly for practitioners in the Eleventh Circuit, the Court left this suggestion as just that, a suggestion, by warning that "[n]othing in our circuit precedent, however, requires district courts to utilize this approach. The decision to create an opt-in class under Section 216(b), like the decision on class certification under Rule 23, remains soundly within the discretion of the district court."[80] Nonetheless, despite the advisory nature of this language, the *Hipp* court's willingness to set forth this guidance should prove beneficial to plaintiffs' lawyers looking for an intermediate court's stamp of approval on a lenient evidentiary standard for certification of Section 216(b) actions.

STRICTER STANDARDS AT DECERTIFICATION

In non-FLSA matters, once a class action lawsuit has been filed, the parties typically engage in extensive pre- certification discovery to determine whether the prerequisites for class treatment are satisfied, although defendants may, and often do, elect to attack the pleadings by filing a demurrer or motion to dismiss for failure to state a claim at the outset of litigation. Given the lenient standard necessitated by the policy favoring issuance of notice of class action proceedings, practitioners are cautioned not to experience a false sense of security upon achieving class action status. As the preceding section reveals, despite a wide range of approaches to initial certification, all circuits have adopted a lower threshold for certification than any would apply when reviewing a motion for decertification.

Under the Section 216(b) approach, then, the real test of propriety of class treatment comes not at the time of the initial motion for class status, but after substantial and often protracted discovery has occurred. It is at this point that the defendant will most likely seek decertification of the action and the court can determine class membership with precision. Insofar as Federal and many state courts have long recognized that the decision to certify a class may be altered or amended at any time before the case is decided on the merits,[81] a defendant should be expected to argue, on a motion for decertification, that the District Court's earlier grant of class status was pro forma and hardly the product of an adversarial proceeding. This two-step approach of applying a lenient standard for the initial "similarly situated" determination or "notice" stage, and a more onerous standard at the decertification stage, generally results in conditional certification and opportunity for putative class members to join the action with a delayed threat of a far more exhaustive and higher-stakes inquest, often on the eve of trial.

CONCLUSION

Clearly, many recent rulings of the Federal Courts of Appeals and District Courts have made bold statements in support of a lenient burden for the use of plaintiff

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[79] *Id.* at 1219.

[80] *Id.*

[81] *See, e.g.*, Lowrey v. Circuit City Stores, 158 F.3d 742 (4th Cir. 1998); Forehand v. Florida State Hosp., 89 F.3d 1562 (11th Cir. 1996).

affidavits as the primary, if not exclusive, item of admissible evidence in the Section 216(b) certification context. Until the United States Supreme Court says otherwise, practitioners in the wage-and-hour field must to rely on the line of opinions within their jurisdiction to measure the likelihood of securing class certification for their FLSA claims. As a result, attorneys seeking class certification of FLSA actions should look closely to the sufficiency of affidavits for the lead plaintiffs and carefully consider the advisability of offering additional and perhaps unnecessary evidence, particularly in cases where such further evidence may potentially undermine the strength of the named plaintiffs' testimony.

In lieu of the full disclosure of evidence at the time of certification, and given each Circuit's propensity to grant it liberally, practitioners should decide carefully whether to hold such information in abeyance, where ethically permitted, until the more rigorous Rule 23 analysis is utilized at the almost-inevitable hearing on decertification. At that time, plaintiffs' counsel will hope to have enough success through the earlier dissemination of class notice to bring forward sufficiently persuasive and numerous declarations to satisfy Rule 23's four-part test.