"Exclusive and Irreconcilable"[1] No More: a Primer on the Ninth Circuit's "Leniency" Standard for FLSA Actions and its Interplay with Rule 23 Guidelines

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I. INTRODUCTION

If one were so disposed as to survey a sufficient number of well-regarded class action practitioners, the result of that inquiry would most assuredly be a virtual consensus that the quest for class certification is, to a targeted defendant, the most feared battle waged in litigation. This is particularly true in actions alleging overtime exemption mis-classifications where, post-certification, the primary remaining issue of liability teeters on the defendant's ability to prove the exemption as an affirmative defense.

In California state courts, where this practitioner has litigated many such wage and hour class actions, the certification process is well-established, as partly evidenced by a flurry of recent state trial court certifications.[2] Yet while California state court opinions, such as the First District's decision in Bell,[3] purported to look fondly toward the federal class action procedures articulated in FRCP Rule 23 for guidance, the certification prerequisites of near-identical wage and hour claims under the federal Fair Labor Standards Act (29 U.S.C § 216) and the opt-in scheme for claims brought thereunder vary significantly between federal circuits and even among their respective district courts. Moreover, even those Rule 23 and California state court practitioners who are comfortable navigating the waters of these varied legal standards may be disenchanted with the notion of 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

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[1] Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977); *overruled*, Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165 (1989).

[2] 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); Adams v. Blockbuster, (Orange County Super Ct. Jan 2, 2001) (certifying class of video store "managers"); 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); No. BCI188014 Kung v. Food for Less, (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).

[3] Bell v. Farmers Ins. Exchange, 87 Cal. App. 4th 805, 105 Cal.Rptr.2d 59 (2001).

quickly be hollowed by the near-assured 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 FRCP Rule 23) under the procedural *opt-in* scheme mandated by the FLSA and/or confusion over the degree to which district courts will apply the Rule 23 standards. As there has yet to emerge a lasting Ninth Circuit opinion thereon, this article seeks to summarize the development of district court opinions within this Circuit with regard to the requisite showing of commonality for imposition of court-sponsored notice in FLSA collective/class actions,[4] with an emphasis upon the strategic use of plaintiff affidavits.

II. THE FLSA'S OPT-IN BURDEN COMPELS A LENIENT STANDARD FOR 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 forms of relief 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.

Unlike FRCP Rule 23 actions seeking predominantly monetary damages[6] or California state court actions,[7] "similarly situated" persons 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

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

[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.

[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. (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] California Code of Civil Procedure § 382

[8] 29 U.S.C. § 256

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 a consent is filed thereby, have led federal courts to adopt a liberal standard for granting certification motions. Since Section 216(b) does not provide guidance as to the meaning of "similarly situated," and although there is yet to emerge any clear standard from the Ninth Circuit itself on this point, district courts within its province have justified adoption of a low threshold for certification on the basis that it will allow plaintiffs to achieve certification status earlier in the prosecution, if not immediately after filing of the Complaint, thereby permitting unwitting plaintiffs discovery of the pendency of the action and the opportunity to toll their actions through filing of consents.[11] Once having done so, these opt-ins 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-in to the action, and that these class members are likely to satisfy the "similarly situated" standard of the particular federal tribunal. Despite a lack of Ninth Circuit direction on this standard, it is now fairly clear to district court practitioners in this jurisdiction that even a de minimus amount of evidence will incline the Court to permit issuance of notice of the action to potential class members, in turn producing an even more robust sized class. As was stated in Bonilla v. Las Vegas Cigar Co., "[w]hether the claims have general effect, and whether named plaintiffs can affirmatively demonstrate that there are other similarly situated potential plaintiffs who would opt in, are [superior factors] in determining whether the court should issue notice to potential plaintiffs, or permit the discovery of a list of potential plaintiffs."[12]

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[9] Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (1977), overruled on other grounds; Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165 (1989).

[10] As a testament to federal courts' reluctance to immediately 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 1131 [5th Cir. 1984])

[11] Despite a historic void of authority in the Ninth Circuit on the scope of the term "similarly situated," foreign courts have wrestled with this term-of-art, with sharp disagreement. (See, Thiessen v. General Electric Capital Corp., 267 F.3d 1095 [10th Cir. 2001] [discussing the various approaches taken by courts]; Bayles v. American Medical Response, 950 F.Supp. 1053 [D. Colo. 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]; Flavel v. Svedala Industries, Inc., 875 F.Supp. 550 [E.D. Wis. 1994]; Grayson v. K-Mart Corp., 79 F.3d 1086 [11th Cir. 1996], cert. denied, 519 U.S. 982, 117 S.Ct. 435 [1996]; Schwed v. General 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]; General Telephone Co. of the Southwest v. Falcon 457 U.S. 147 [1982])

[12] Bonilla, 61 F.Supp.2d at 1139, fn. 6.

III. THE FLSA'S RELIANCE ON THE RULE 23 SCHEME

Historically, distinctions between Section 216(b) actions and FRCP Rule 23 matters were far more fundamental than 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) through enactment of the Portal-to-Portal Act, 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. v. Sperling, 493 U.S. 165 (1989), the Circuit courts were divided 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' silence on this issue permitted notice in appropriate cases.[14] In Hoffmann, however, the Court found that lower courts held the procedural authority to manage the joinder of multiple parties in Section 216(b) actions, and did so by looking to Section 216(b)'s own language authorizing representative suits as well as to the notice procedure of FRCP Rule 83, which vests in trial judges the inherent power to regulate proceedings before them. More importantly, however, was the Hoffmann Court's comparison of Section 216(b) to Rule 23. Relying on its 1981 decision in Gulf Oil,[15] a Rule 23 case, the Court explained that, not only did the trial court have the authority to regulate complex proceedings, it had a duty to exercise control in class actions.[16] 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, yet still lacked a uniform expression of whether and/or 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, what evidentiary support was required to meet these standards, particularly given other discrepancies between the FLSA and other forms of federal class actions?

The question of whether analysis of Section 216(b) certification motions should be tied to Rule 23 standards has led to at least two seemingly irreconcilable approaches. Many of the lower courts within the Tenth and Eleventh Circuit, for example, have followed a pre-Hoffmann line of

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[13] McKenna v. Champion International Corp., 747 F.2d 1211 (8th Cir. 1984); Partlow v. Jewish Orphans' Home of Southern Cal., Inc., 645 F.2d 757 (9th Cir. 1981); Dolan v. Project Construction Corp., 725 F.2d 1263 (10th Cir. 1984).

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

[15] Gulf Oil Co. v Bernard (1981) 452 U.S. 89

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

authority, commencing with Lusardi v Xerox Corp,[17] that considers Rule 23 and Section 216(b) to be "mutually exclusive" and calls for a case-by-case analysis of the "similarly situated" standard at two separate stages of the litigation. This approach has been referred to as 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.[18] Because of its lack of direction with regard to the sufficiency of evidence required for certification and 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 much of a recognizable standard at all.

Other lower courts, even within the Tenth Circuit, have taken a different approach to the one first endorsed by Lusardi. In Shushan v. University of Colorado,[19] the plaintiffs were required to satisfy those requirements of Rule 23 that did not conflict with Section 216(b) on the ground that the procedure for the joinder of parties in a FLSA action shares qualities with the permissive joinder procedures of Rule 20 as well as the class action procedures of Rule 23. Shushan, a post-Hoffmann decision, stands for the proposition that Rule 23 provides a reasonable framework for evaluating the propriety of class treatment in FLSA actions and, as a practical consideration, adoption of this approach permits the parties to more easily forecast the likelihood of success of a motion for certification. Just as the reasoning in the Lusardi line of decisions has been followed by numerous courts, so has the rationale articulated in Shushan. Finally, Ninth Circuit practitioners should take note that, in Church v. Consolidated Freightways,[20] the Northern District of California agreed to apply some, but not all of the Rule 23 prongs, although it otherwise looked to Shushan as persuasive.

IV. UTILIZATION OF PLAINTIFF AFFIDAVITS WITHIN THE NINTH CIRCUIT

Until recently, and despite settlement of the issue of the federal trial courts' authority to sponsor class notice and utilize Rule 23's guidelines, as needed, federal courts within the Ninth Circuit lacked a model for determining the adequacy of proof necessary for granting FLSA certification motions. After Hoffmann-La Roche, many courts were comfortable applying Rule 23 concepts in the context of Section 216(b) collective actions, yet, in the Ninth Circuit, the question remained of whether trial courts were supposed to look to Rule 23 decisions for guidance in evaluating the evidentiary support for FLSA certification motions. If Rule 23 factors were to be ignored, should these courts apply a more lenient standard, given the desire to expedite notice to putative class members whose claims may become stale unless they commence their action through the filing of consents? Should perhaps a more stringent standard be applied, since a more lenient one might encourage plaintiffs to file claims that have little chance of ever surviving decertification, in turn, resulting in unnecessarily protracted class-type litigation and an extreme waste of private and

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[17] Lusardi v. Xerox Corp., 118 F.R.D. 351 (D. N.J. 1987), vacated in part on other grounds, 122 F.R.D. 463 (D. N.J. 1988).

[18] Schwed v. General Elec. Co., 1997 U.S. Dist. LEXIS 5103 (N.D.N.Y. 1997); Jackson v. New York Tel. Co., 163 F.R.D. 429 (S.D.N.Y. 1995); Severtson v. Phillips Beverage Co., 137 F.R.D. 264 (D.Minn. 1991).

[19] Shushan v University of Colorado, 132 F.R.D. 263 (D. Colo. 1990).

[20] Church v. Consolidated Freightways, 137 F.R.D. 294 (N.D. Cal. 1991).

judicial resources? Prior to 1999, Ninth Circuit practitioners could not say with certainty.

Then, in that year, the Nevada District Court, with assistance from "only two Court of Appeals cases reviewing the factors a district court should employ in determining how to 'certify' a § 216(b) action,"[21] looked to Fifth and Third Circuit decisions to blaze a trial toward establishing a litmus test within the Ninth Circuit for evaluating such motions. In doing so, the Nevada District Court in Bonilla gave a disappointed nod to Lusardi v. Xerox Corp., 855 F.2d 1062 (3rd Cir. 1988) and Mooney v. Aramco Servs. Co., 54 F.3d 1207 (5th Cir. 1995), noting that neither of these Circuit's decisions was particularly helpful. As Judge Pro wrote for the Majority in Bonilla, "[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."[22] Judge Pro further observed that, "[i]n Lusardi, the Third Circuit Court of Appeals stated, in a footnote, that the Court would be 'inclined' to treat § 216(b) collective actions as 'spurious' class actions under Rule 23 prior to the 1966 Amendments to the rule."[23] Without more, Judge Pro's Bonilla decision took the first step toward generating a FLSA certification standard, albeit in dicta, by explaining that "[t]he plaintiffs bear the burden of showing that they are similarly situated, however, this is a lenient burden for plaintiffs to meet."[24] Bonilla then began to define the standard and evidentiary requirements for fulfilling this burden by stating that the plaintiffs could satisfy that standard through the use of affidavits, a device already well-utilized by Rule 23 and state court practitioners as a tool for satisfying the essential certification elements of commonality and typicality.

Sixth months later, in Thiebes v. Wal-Mart Stores, Inc., No. 98-802-KI, 1999 U.S. Dist. WL 1081357 (D.Or. Dec. 1, 1999), Judge King of the Oregon District Court took it upon himself to transform the Bonilla 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, Judge King's Thiebes opinion looked to affidavits submitted by the lead plaintiffs in order to determine if the class was indeed "similarly situated."[25] 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 that number was a mere two from the representative plaintiffs. This duo of affidavits explained that these plaintiffs and other employees of the defendant worked uncompensated overtime due to the uniform policies of the employer and, according to Judge King, 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.[26]

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[21] Bonilla, 61 F.Supp.2d at 1134, fn. 4.

[22] Bonilla, 61 F.Supp.2d at 1134, fn. 4.

[23] Bonilla, 61 F.Supp.2d at 1134, fn. 4.

[24] Bonilla, 61 F.Supp.2d at 1139, fn. 6.

[25] Thiebes, WL 1081357 at 3.

[26] Thiebes, WL 1081357 at 4.

Two years after Thiebes, Judge King seized a second opportunity to hammer down the propriety of utilizing affidavits as a class approval method when he presided over a § 216(b) class certification dispute in Ballaris v. Wacker Silttronic Corp., No. 00-1627-KI, 2001 U.S. Dist. WL 1335809 (D.Or. Aug. 24, 2001). In Ballaris, Judge King again cited the Bonilla standard and, once again, looked to affidavits submitted by the plaintiffs in making the certification ruling. Just as in Thiebes, the Ballaris plaintiffs submitted only the affidavits of the two representative plaintiffs, wherein these workers asserted "[the defendant's] workplace policies necessitated their working off the clock" for which they received no additional wages.[27]

This time, Judge King went even farther in cementing the use of affidavits as a guiding tool for FLSA certification motions, first 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 of [the Plaintiffs] alone are sufficient to certify the collective action."[28] By so ruling, Judge King established that Plaintiffs could satisfy their burden of proof regarding the "similarly situated" standard and, thus, obtain class certification of their § 216(b) action, purely and singularly on their sworn written testimony.

V. PRACTICAL RESULT OF EVIDENTIARY LENIENCY AND THE TWO-STEP APPROACH

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. In the Ninth Circuit's trial courts, however, it is becoming quite clear that, for federal wage and hour actions, the lenient standard first suggested by Bonilla, and later pronounced distinctly in Thiebes and Ballaris, permits certification of FLSA classes with as little support as the representative plaintiffs' affidavits alleging an unlawful employment pattern or practice and that any further documentation of the conduct may be overkill and disregarded. These holdings, along with the Ballaris Court's outright refusal to look beyond plaintiff testimony, suggests the early stages of a trend in this jurisdiction in contravention of the methodology otherwise commonplace in Rule 23 and California state court actions for achieving certification.

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, at which point in time the defendant would most certainly be expected to seek decertification of the action and the court can determine class membership with precision. Insofar as federal and California state courts have long-since recognized that the decision to certify a class may be altered or amended at any time before the case is decided on the merits,[29] a defendant

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[27] Ballaris, WL 1335809 at 2

[28] Ballaris, WL 1335809 at 3.

[29] Fed. R. Civ. P. 23(c)(1); Forehand v. Florida State Hosp., 89 F.3d 1562 (11th Cir. 1996); Lowrey v. Circuit City Stores, 158 F.3d 742 (4th Cir. 1998); See, also, 2 Newberg §§ 7.17-7.22; Richmond v. Dart Industries, Inc., 29 Cal.3d 462, 469 (1981); Vasquez v. Superior Court, 4 Cal.3d 800, 94 Cal.Rptr. 796 (1971) (holding, generally, that,

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 employment of a more onerous standard at the decertification stage, generally results in the conditional certification of the class and opportunity for putative class members to join the action with the delayed threat of a far more exhaustive and higher-stakes inquest, often on the eve of trial.

VI. CONCLUSION

Clearly, the most recent district court rulings within the Ninth Circuit have made bold statements in support of a lenient burden for the use of plaintiff affidavits as the primary, if not exclusive, item of admissible evidence in the Section 216(b) certification context. Until the Ninth Circuit Court of Appeal says otherwise, practitioners in the wage and hour field are forced to rely on this line of opinions as their measuring stick for the likelihood of securing class certification of 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 evidence, particularly in cases where further evidence may potentially undermine the strength of the named plaintiffs' testimony. As California state court practitioners begin to see the bottom of the wage and hour well, the clarity provided by the opinions cited in this article, at least with regard to FLSA certification standards, will only serve as a catalyst for the migration of the plaintiffs' employment bar toward our district courts.

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while it is the express public policy of California to encourage the use of the class action device where all Class members will rely on the same evidence to establish a defendant's liability and while California law and policy favors the fullest use of the class action procedure, any doubt as to the appropriateness of certification should be resolved in favor of certification, but is subject to decertification or other form of later modification.).