

THERE IS NO BAR TO BRINGING A 23(B)(3) CLASS ACTION AND A FLSA COLLECTIVE ACTION TOGETHER

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Yesterday, the Seventh Circuit held that there is nothing in federal law that prevents a party from seeking class certification under Rule 23(b)(3) and a collective action under the FLSA in the same lawsuit in *Ervin v. OS Restaurant Services, Inc.*, Case No. 09-3029. In reaching this decision, the Court reversed a decision by the district court, which found a "clear incompatibility" between the FLSA proceeding and the proposed class action. The Seventh Circuit is the first federal appellate court to weigh in on this issue.

The plaintiffs in this case were restaurant employees who brought wage and hour claims against their employer under both the FLSA and state law. The plaintiffs moved for conditional approval of a federal collective action under 29 U.S.C. § 216(b), which authorizes employees to act together to seek redress for violations of the statute's minimum wage and maximum hour provisions. A collective action allows potential plaintiffs the opportunity to opt into the action. At the same time, the plaintiffs sought certification under Rule 23(b)(3) of three different classes alleging state-law claims, all of which would have been opt-out classes. The district court found a "clear incompatibility between the 'opt out' nature of a Rule 23 action and the 'opt in' nature of a Section 216 action," which automatically meant that the class action device was not a superior mechanism for resolving the plaintiffs' state-law claims. It, therefore, permitted the collective action to proceed, but denied class certification.

On appeal, the Court concluded that there is no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also includes a collective action brought under the FLSA.

In combined actions, the question whether a class should be certified under Rule 23(b)(3) will turn — as it always does — on the application of the criteria set forth in the rule; there is no insurmountable tension between the FLSA and Rule 23(b)(3). Nothing in the text of the FLSA or the procedures established by the statute suggests either that the FLSA was intended generally to oust other ordinary procedures used in federal court or that class actions in particular could not be combined with an FLSA proceeding.

The district court recognized that allowing the two types of actions to proceed together would mean that some of the people included as part of the state-law classes (those who did nothing) would be excluded from the FLSA collective action. It then apparently determined that this outcome would undermine the intention of Congress expressed in the FLSA.

In our view, the court jumped too quickly to congressional intent. Before taking that step, we must examine the text of the FLSA itself. Nothing we find suggests that the FLSA is not amenable to state-law claims for related relief in the same federal proceeding.

While reaching this conclusion, the Court criticized the district court for suggesting that it might treat combined actions that are first filed in a state court and then removed to federal court differently from comparable cases that originate in federal court.

There is no reason for any such distinction, however. An original filing and a proper removal are each appropriate ways to reach federal court. Once a suit is removed from state court to federal court, it is governed by the federal court's procedures, there is no exclusion for Rule 23 or for any other rule. If there is a problem with combined actions, as the district court suggested, then the problem exists for all cases within the federal court's jurisdiction.

Finally, the Court made one point that litigators should remember when preparing for any oral argument. At one point, the employer argued that having an opt-in and opt-out notice sent to the same set of employees carries too high a potential for confusing notice to potential group members.

When we asked at oral argument whether Outback's lawyers could provide any concrete examples of confusion resulting from this type of notification, they were unable to point to a single instance.

While the Court noted the "commendable concern for [the] employees' interests" by their employer, it did not find the possibility of this confusion to be dispositive.

Lessons:

1. A plaintiff may bring a 23(b)(3) class action and an FLSA collective action within the same lawsuit.
2. Application of federal procedure does not rest upon whether the case was removed to federal court or originally brought in that court.
3. If you are going to argue a practical problem with your opponent's argument, make sure to have a real-life example of that problem in action.