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NOTE

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The law, for all its failings, has a noble goal—to make the little bit of life that people can actually control more just. We can't end disease or natural disasters, but we can devise rules for our dealings with one another that fairly weigh the rights and needs of everyone, and which, therefore, reflect our best vision of ourselves.

—Scott Turow[1]

I. INTRODUCTION

The ultimate underlying question for any legal system or rule of law is "whether it provides a mechanism whereby the participants can reasonably predict the outcome of litigation prior to the actual deci-

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1. Starbucks: The Way I See It # 271, http://www.starbucks.com/retail/thewayiseeit_default.asp?act=1&last=39 (last visited May 17, 2008).

sion."[2] Predictability—that is, the ability of individuals to make some approximation of the probability of a given outcome—is one of the primary underlying goals of the American judicial system.[3] Predictability reduces the costs of litigation and promotes settlement and judicial efficiency. Predictability increases access to the judicial system by providing some basis upon which litigants can initially asses the merits of their claims, and allows for an increased faith in the judicial system as a system of laws—as a system in which cases are judged upon the merits, rather than on perceived biases of judges.[4] Judicial discretion often exists of necessity, and certainly some level of judicial discretion is inherent in statutory interpretation.[5] Judicial discretion, while necessary, particularly in the area of statutory interpretation, greatly reduces predictability, thus raising the costs of litigation, discouraging settlement, widening the information gap between litigants, and ultimately under-

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2. Gerald P. Moran, *A Radical Theory of Jurisprudence: The "Decisionmaker" as the Source of Law—The Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine as a Model*, 30 AKRON L. REV. 393, 440 (1997).

3. For good discussions on the benefits of predictability in law, see Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975); and Paul H. Rubin, *Predictability and the Economic Approach to Law: A Comment on Rizzo*, 9 J. LEGAL STUD. 319 (1980). The presumption that predictability is beneficial underlies most law and economics arguments. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988) (recognizing the legal values of "consistency, coherence, fairness, equality, predictability and efficiency").

4. Reflective of the concerns associated with ad hoc, unguided decision making is Justice Scalia's dissenting opinion in *Morrison v. Olson*, 487 U.S. 654 (1988). Addressing the issue of separation of powers, Justice Scalia criticized the majority's adoption of an ad hoc standard, stating, "Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all." *Id.* at 712 (Scalia, J., dissenting); *see also* AHARON BARAK, JUDICIAL DISCRETION 189 (Yadin Kaufmann trans., 1989) ("A fundamental characteristic of every proper judicial process is that the judge who decides the controversy acts impartially. It is essential that the parties to the proceeding and the public as a whole be convinced that the judge does not prefer one party or the other because of that party's characteristics or because he belongs to one or another group of people. . . . Absence of bias is essential to the judicial process. Without it, the public's confidence in the judiciary branch will wane. And without public faith, adjudication cannot carry out its function.").

5. For a thoughtful discussion of the uncertainty of language, see BARAK, *supra* note 4, at 46–47.

> The statutory norm is expressed in the language of humans, which is composed of signs or symbols that have no independent internal meaning, but rather constitute descriptions that are accepted by people who speak the same language. These descriptions do not always conjure up a single, unitary image in the minds of all who use the same language, but rather they occasionally produce several images within the same user and occasionally different images within different users. This is why the language of the statute is at times ambiguous, vague, obscure, and open-textured.

Id. (footnotes omitted).

mining numerous other underlying goals of the judicial system, including judicial economy, equality, and fairness.

This article analyzes broad questions of the benefits of, necessity of, and problems created by judicial discretion in the context of statutory interpretation through a case-study analysis of the current state of the law of collective-action certification under the Fair Labor Standards Act (FLSA) within the Eleventh Circuit. The narrow focus of this article will be on conditional-certification decisions by district courts within the Eleventh Circuit. FLSA collective-action certification decisions are a fruitful area for analysis, as these decisions occur in the context of wide trial-court discretion and minimal direction from the statutory enactment, the United States Supreme Court, and the circuit courts. Further, in the area of collective-action certification, broad discretion and the absence of direction have resulted in widely disparate treatment and outcomes from case to case. The current state of the law in this area in the Eleventh Circuit is highly illustrative of the problems commonly associated with unbounded judicial discretion.

In the context of FLSA collective-action litigation, where judicial discretion is not bound within a workable and predictable framework, the result is a severe reduction in predictability and an associated increase in the prevalence of ills associated with such uncertainty. Where FLSA plaintiffs already face an uncertain level of risk in the form of employer retaliation for filing claims, the uncertainty that couples collective-action certification has the potential to severely undermine both the intended goals of the collective-action provision and the FLSA more generally.

The statutory provision of the FLSA that provides for the creation of "collective actions," like many statutory provisions, paints with broad brush strokes, leaving many questions regarding the procedures and standards for the creation of collective actions unanswered. Over the years, the courts have struggled to fill in these gaps and to create workable standards and procedures that balance the competing goals of the collective-action mechanism and the FLSA more generally. Within the Eleventh Circuit, while the procedures applied to collective-action certification have become relatively standardized, the standards applied to certification decisions have remained largely amorphous. Standards set forth by the Eleventh Circuit, such as "lenient," "more lenient," and "more stringent," have left district courts largely to their own devices. The resultant lack of consistency between district court rulings has led not only to the expected result of a reduction in predictability, but in some cases has established a standard that leaves plaintiff-employees

that seek to proceed collectively trapped in a puzzle of contradictory conditions and set up to lose.

Part II of this article begins by examining some general notions and theories about judicial discretion and uncertainty[6] in the context of litigation. Part III provides an overview and history of the Fair Labor Standards Act of 1938 and the Portal-to-Portal Amendments of 1947, which created the provisions allowing for "collective actions." Part IV presents an overview of Eleventh Circuit decisions on questions of the procedures and standards to be applied to FLSA collective-action certification. Finally, Parts V and VI examine a sample of recent rulings by district courts within the Eleventh Circuit on motions for collective-action certification and provide some conclusions regarding the effects of discretion in this area of the law. These parts further address the extent to which the indefiniteness of the standards and procedures in this area of the law may ultimately serve to undermine the goals of the collective-action mechanism and the FLSA as a remedial statute, potentially leaving plaintiffs without an effective remedy.[7]

II. JUDICIAL DISCRETION AND UNCERTAINTY

Predictability is best served by clear "bright line rules," as opposed to flexible standards applied through the use of judicial discretion.[8] The question "of the extent to which legal commands should be promulgated as rules or standards . . . has received substantial attention from legal commentators."[9] Similarly, numerous legal scholars have addressed issues of the propriety of judicial discretion and the necessary balance that must be struck between discretion and rules that allow for predictability.[10] Professor Carl Schneider's observations are reflective of the

6. By "uncertainty" this article refers to a lack of predictability. Specifically, as applied within the context of litigation, by "uncertainty" I mean an inability to predict the probability of any given outcome.

7. "A legal right without a remedy would be an anomaly in the law." Peck v. Jenness, 48 U.S. (7 How.) 612, 623 (1849).

8. An examination of the literature comparing rules and standards and the literature comparing rules and judicial discretion reveal that any distinction that can be made between "standards" and "judicial discretion" is not outcome determinative. Judicial discretion can be understood as the method through which standards are applied.

9. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992) (citing Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974)). *See generally* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1969) (discussing ways to structure and check discretion); Anthony I. Ogus, *Quantitative Rules and Judicial Decision Making*, *in* THE ECONOMIC APPROACH TO LAW 210 (Paul Burrows & Cento G. Veljanovski eds., 1981) (discussing the quantitative character of rules).

10. *See, e.g.*, BARAK; *supra* note 4; Steven J. Cleveland, *Reply to Judge Easterbrook: Judicial Discretion and Statutory Interpretation*, 57 OKLA. L. REV. 31 (2004); Carl E. Schneider,

general understanding of the necessity of judicial discretion:

> In a modern society, the law regulates the complex behavior of millions of people. To do this efficiently, to do this at all, it must use broadly applicable rules. Yet such rules are bound to be incomplete, to be ambiguous, to fail in some cases, to be unfair in others. Some of these failures can be ameliorated by according discretion to the administrators and judges who apply the rules. Yet doing so dilutes the advantages of rules and spawns the risks discretion is heir to. Working out the proper balance between rules and discretion is thus both necessary and perplexing in every area of law.[11]

Discretion is present in every area of the law and is exercised by all branches of government to varying degrees.[12] However, "it is the discretion exercised in the judicial branch with which lawyers are traditionally most familiar and concerned."[13] In writing legislation, Congress often does, and indeed often must, design legislative enactments in such a way that the language of the act is ambiguous, malleable, or, in the very least, subject to more than one interpretation. The inevitable ambiguity that accompanies many statutory enactments stems in part from necessity: first, because it would be impossible for Congress to draft a statute that contemplates every potential contingency and factual circumstance to which the statutory enactment may apply,[14] and, second, because it is sometimes the case that legislators can only reach an agreement on a general policy or proposition, while continuing to disagree as to other relevant matters, such as the means and methods of implementation and enforcement.[15] The ambiguity inherent in statutes also stems from a need and desire for an efficient and effective government; were Congress to attempt to draft statutes in an exhaustive manner, very little would get done. Congress thus leaves much of the task of interpreting and applying statutory language to the judiciary, which must exercise

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Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard, 89 MICH. L. REV. 2215 (1991).

11. Schneider, *supra* note 10, at 2217; *see also* Kaplow, *supra* note 9, at 557 ("Rules typically are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret when deciding how to act and for an adjudicator to apply to past conduct. Second, when individuals can determine the application of rules to their contemplated acts more cheaply, conduct is more likely to reflect the content of previously promulgated rules than of standards that will be given content only after individuals act.") (emphasis omitted).

12. *See* Schneider, *supra* note 10, at 2232 (addressing the ubiquity of discretion in the law).

13. *Id.* at 2233.

14. Cleveland, *supra* note 10, at 31 ("The legislature cannot craft statutes to govern every (in)action.").

15. Schneider, *supra* note 10, at 2233 ("As Professor Chayes observes: 'Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. . . . [T]he result is to leave a wide measure of discretion to the judicial delegate.'" (quoting Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1314 (1976)) (alterations in original).

discretion in interpreting statutes.[16]

Various scholars have suggested numerous definitions of "judicial discretion," but the definition most often put forth is "the power the law gives the judge to choose among several alternatives, each of them being lawful."[17] Discretion is most often examined in opposition to rules, which can be defined as "mechanisms which limit discretion and engender a more reliable and predictable legal system."[18] Judicial discretion can exist to varying degrees such that "there is rarely such a thing as a pure rule or pure discretion and . . . most cases are decided through a tangled web of rules and discretion."[19] On the grey area between rules and discretion, Professor Schneider further notes,

> On the continuum between rules and discretion lie a number of intermediate categories. Some of these can be derived from the work of Ronald Dworkin. For instance, he calls "a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. . . ." He calls "a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." He distinguishes policies and principles from rules: "Rules are applicable in an all-or-nothing fashion. . . ." Policies and principles, then, can be thought of as less

16. Cleveland, *supra* note 10, at 31 ("[W]hen a statute is enacted, the legislature knows that its chosen language may bear more than one interpretation, entrusting the judiciary with discretion to identify the correct meaning of that inevitably ambiguous language. For these and other reasons, judges must exercise discretion when interpreting statutes. Of course, certain exercises of judicial discretion may be necessary or appropriate, whereas other types of judicial discretion may be unnecessary or inappropriate.") (footnotes omitted).

17. BARAK, *supra* note 4, at 7; *see also* Schneider, *supra* note 10, at 2227–28. Aharon Barak further noted,

> Judicial discretion, then, means the power the law gives the judge to choose among several alternatives, each of them being lawful. This definition assumes, of course, that the judge will not act mechanically, but will weigh, reflect, gain impressions, test, and study. Yet this conscious use of the power of thought does not define judicial discretion. It only suggests how the judge must act within the framework of his discretion. Indeed, judicial discretion, by definition, is neither an emotional nor a mental state. It is, rather, a legal condition in which the judge has the freedom to choose among a number of options. Where judicial discretion exists, it is as though the law were saying, 'I have determined the contents of the legal norm up to this point. From here on, it is for you, the judge, to determine the contents of the legal norm, for I, the legal system, am not able to tell you which solution to choose.' It is as though the path of the law came to a junction, and the judge must decide—with no clear and precise standard to guide him—which road to take.

BARAK, *supra* note 4, at 7–8.

18. Moran, *supra* note 2, at 442; *see also* Schneider, *supra* note 10, at 2226 (describing an ideal rule as an "authoritative, mandatory, binding, specific, and precise direction to a judge that instructs him how to decide a case or resolve a legal issue").

19. Schneider, *supra* note 10, at 2226.

directive and definite rules.[20]

In the context of statutes, Congress will often set forth a general policy objective at which the statutory provision is aimed. These policy statements certainly provide some framework within which judicial discretion may be bound, thus limiting judicial discretion and the ills associated therewith.

While discretion may be necessary, too much discretion has the potential to severely undermine predictability goals, thereby discouraging settlement, judicial economy, and fairness. Where parties do not have access to accurate information regarding their likelihood of success in litigation, they will be forced to make due with the information that is available. This may result in a willingness to settle otherwise meritorious claims for less compensation than might otherwise be obtained and an unwillingness to settle claims that may lack merit.[21] If the parties have no basis upon which to asses the merits of their claims, relative optimism may result in a general unwillingness to engage in settlement.[22] Further, where parties to litigation perceive a system of justice in which cases are decided without rules, faith in the judicial system may be substantially diminished.

III. HISTORY AND OVERVIEW OF THE FAIR LABOR STANDARDS ACT AND PORTAL-TO-PORTAL AMENDMENTS

A. *History and Overview of the FLSA*

Congress enacted the FLSA in 1938 to provide protection to "those who toil in factory and on farm" to obtain a fair day's pay for a fair day's work.[23] The FLSA establishes labor standards in minimum

20. *Id.* at 2226–27 (first alteration in original) (footnotes omitted).

21. Of course, "merit" is determined on the basis of rules such that the term itself only possesses meaning where judicial discretion is not absolute and some rule, policy, or principle is present.

22. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 406–07 (4th ed. 2004) ("Although there are several strands of the argument, the simplest explanation is that trials occur because the parties have different expectations about the value of a trial: the plaintiff expects a large judgment at trial, and the defendant expects a small judgment at trial. In these circumstances, the parties are *relatively optimistic*. Given relative optimism, the plaintiff demands a large settlement and the defendant offers a small settlement, so the parties cannot agree on the terms for settling out of court. . . . Relative optimism about trial makes settlement out of court difficult.").

23. Franklin Delano Roosevelt, Message to Congress Recommending Legislation Establishing Minimum Wages and Maximum Hours (May 24, 1937), *in* NOTHING TO FEAR: THE SELECTED ADDRESSES OF FRANKLIN DELANO ROOSEVELT, 1932–1945, at 109 (B.D. Zevin, ed., 1946). President Roosevelt also stated, "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours." *Id* at 104.

wage,[24] overtime pay,[25] and child labor[26] for workers "engaged in" or "in the production of goods for" interstate and foreign commerce.[27] These remedial measures were designed "to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked."[28]

The principle requirements of the FLSA are the payment of a minimum wage and the payment of time and a half for hours worked over forty per week for non-exempt employees. "Congress enacted the Fair Labor Standards Act of 1938 (FLSA) as a remedial and humanitarian measure to stabilize the economy and protect the common labor force in response to the postdepression predominance of poverty and the fear of an ever-increasing decline in the economy."[29] "Low wages, long working hours, and a high unemployment rate were" widely problematic during this time, and Congress sought a way to counteract these ills by establishing minimum-wage standards and "encouraging the spread of employment."[30]

Under the FLSA, an action for damages may be brought either individually or collectively by an aggrieved employee under section 16(b),[31]

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24. 29 U.S.C. § 206 (2000).

25. *Id.* § 207.

26. *Id.* § 212.

27. *Id.* §§ 206(a), 207(a).

28. H.R. REP. No. 75-1452, at 9 (1937); *see also* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945) ("The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce."); *id.* at 707 n.18 ("[T]he prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."); Southland Gasoline Co. v. Bayley, 319 U.S. 44, 48 (1943) ("The Fair Labor Standards Act sought a reduction in hours to spread employment as well as to maintain health."); United States v. Darby, 312 U.S. 100, 109–10 (1941) ("[The purpose of the FLSA] is to exclude from interstate commerce goods produced . . . under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of . . . spreading and perpetuating such substandard labor conditions among the workers of the several states.").

29. Ann K. Wooster, Annotation, *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. FED. 507, 522–23 (2004) (footnote omitted).

30. JOSEPH E. KALET, PRIMER ON WAGE & HOUR LAWS 13 (2d ed. 1990). When the FLSA was enacted, the dominant economic theory held that employers would respond to being required to pay overtime to employees by hiring more employees, thereby reducing the unemployment rate. Although the actual effect on firm-level employment decisions was not as economists had predicted, the FLSA greatly benefited working-class Americans through the provision of a minimum wage and overtime pay.

31. 29 U.S.C. § 216(b). It is noteworthy that section 7(b) of the Age Discrimination in Employment Act (ADEA), Pub. L. No. 90-202, § 7(b), 81 Stat. 602, 604 (1967) (codified at 29 U.S.C. § 626(b) (2000)), adopts and incorporates the enforcement provisions of the FLSA, including the collective action provision of section 16(b). *See* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 167 (1989). Because courts have treated collective actions arising under

or by the Secretary of Labor under section 16(c).[32] If the Secretary of Labor brings an action, the employee's rights to sue are terminated.[33] Hence, an employee who wishes to file a complaint regarding FLSA's minimum-wage or overtime requirements has two choices. The employee may make a complaint to the Wage and Hour Division of the Department of Labor (DOL), or the employee may file a lawsuit in state court or in federal district court. The employee must file this lawsuit within two years of the date the employer violated the law, or within three years, if the employer committed a willful violation.[34] In either a section 16(b) or a section 16(c) action, recovery ordinarily includes the amount of unpaid wages, an equal amount as liquidated damages, and, in a section 16(b) action, a reasonable attorney's fee.[35]

The enforcement provisions prescribed by the FLSA, including private suits by individuals and suits by the Secretary of Labor, are intended to serve important Congressional purposes:

> First, the provisions are designed to secur[e] to employees restitution of statutorily mandated wages. Thus, the FLSA ensures that individual employees will be compensated within the dictates of federal law. Second, the enforcement sections ensure that violators are deprived of the use of unlawfully withheld compensation . . . , thereby protect(ing) complying employers from the unfair wage competition of the noncomplying employers. Third, the enforcement provisions serve to deter future violations of the FLSA.[36]

B. *The Portal-to-Portal Amendments*

When it was first enacted, the FLSA produced a tremendous amount of litigation. Between July 1, 1946 and January 31, 1947, 1,913 "portal-to-portal"[37] actions were filed under the FLSA.[38] The 1938 version of the FLSA "gave employees and their 'representatives' the right to bring actions to recover amounts due under" the statute for minimum wage and overtime pay on behalf of themselves and other employees

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the FLSA and ADEA identically with regard to the notice issue and "similarly situated" inquiry, no distinction will be drawn for purposes of this article.

32. 29 U.S.C. § 216(c).

33. *Id.* § 216(b) ("The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under [29 U.S.C. § 217] . . . .").

34. *Id.* § 255(a).

35. *Id.* § 216.

36. Bureerong v. Uvawas, 922 F. Supp. 1450, 1464 (C.D. Cal. 1996) (alterations in original) (internal quotation marks and citations omitted) (quoting Marshall v. Coach House Rest., Inc., 457 F. Supp. 946, 951–52 (S.D.N.Y. 1978).

37. "Portal-to-Portal" represents employees' work day from starting time to quitting time.

38. 93 CONG. REC. 2082 (1947).

"similarly situated."[39] The statute specified no written-consent requirement for joinder. Courts, in interpreting the 1938 version of the FLSA, construed the statute so as to encourage representative actions.[40]

In 1947, Congress enacted the Portal-to-Portal Act[41] "in response to a 'national emergency' created by a flood of suits under the FLSA aimed at collecting portal-to-portal pay allegedly due employees."[42] Noting the "immensity of the [litigation] problem," Congress attempted to strike a balance to maintain employees' rights while curbing the number of lawsuits.[43] The stated purpose of the Portal-to-Portal Act of 1947 was "[t]o relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938."[44] Specifically, Congress determined that the Fair Labor Standards Act of 1938 had

> been interpreted judicially in disregard to long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring

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39. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989); *see also* Culver v. Bell & Loffland, Inc., 146 F.2d 29, 30 (9th Cir. 1944) (noting that employees could bring FLSA suit on behalf of "employees similarly situated").

40. *See, e.g.*, Prickett v. DeKalb County, 349 F.3d 1294, 1296 (11th Cir. 2003) ("FLSA is a remedial statute that has been construed liberally to apply to the furthest reaches consistent with congressional direction.") (internal quotation marks omitted); *Culver*, 146 F.2d at 31 ("The provisions of the Act permitting resort to representative suits should be liberally administered by the courts, since encouragement of the practice will redound to the advantage of employer and employee alike through avoidance of a multiplicity of suits."); Barrett v. Nat'l Malleable & Steel Castings Co., 68 F. Supp. 410, 416 (W.D. Pa. 1946) ("Actions of this nature, which are commonly termed 'representative suits,' should be liberally administered since it may be that other persons interested in the same common question of law or facts might desire to join as party plaintiffs and by the binder being permitted, a multiplicity of suits would be avoided and a litigious situation would be corrected at one time."); Shain v. Armour & Co., 40 F. Supp. 488, 490 (W.D. Ky. 1941) ("The [Fair Labor Standards Act] authorizes an employee to sue for himself 'and other employees similarly situated.' It is very comprehensive and inclusive; it contains no restrictions other than that the other employees be similarly situated. . . . Employees may be similarly situated without being identically situated. The evident purpose of the Act is to provide one law suit in which the claims of different employees, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other.").

41. Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (1947).

42. Arrington v. NBC, 531 F. Supp. 498, 500 (D.D.C. 1982) (footnote omitted); *see also* United Food & Commercial Workers Union, Local 1564 v. Albertson's Inc., 207 F.3d 1193, 1200–01 (10th Cir. 2000) (noting that the *Arrington* court's interpretation of Congress's intent in enacting the Portal-to-Portal Act has been embraced by almost "all courts confronting the issue"); 93 CONG. REC. 2087 (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.").

43. 93 CONG. REC. 2082 (1947).

44. Portal-to-Portal Act pmbl.

> about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; . . . (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged.[45]

The Portal-to-Portal Act amended section 16 of the FLSA in three ways. First, it limited the parties who could bring suit under that statute.[46] Specifically, section 16(b) was amended to limit "standing to pursue an action for liability . . . to employees only."[47] According to the Eleventh Circuit's review of the history of the Portal-to-Portal Amendments, "[b]y identifying 'employees' as the only proper parties in a § 216(b) action, the Portal to Portal Act aimed to ban representative actions that previously had been brought by unions on behalf of employees."[48] Second, the Portal-to-Portal Amendments provided that for purposes of the statute of limitations, a cause of action is commenced for unnamed plaintiffs to a collective action when the plaintiff files written consent with the court.[49] A member of the class who is not named in the complaint is not a party unless and until he affirmatively opts in to the action, and the statute of limitations continues to run until written consent is filed with the court.[50] Third, the Portal-to-Portal Amendments created an opt-in requirement for employees seeking to join in a representative action under the FLSA.[51] Specifically, the amendments provide that "[n]o 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."[52] Congress's aim in adding the "opt-in" language to section 16(b) "was to prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit."[53] Thus, the 1947 amendments to the

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45. *Id.* § 1(a).

46. *See* State of Nev. Employees' Ass'n v. Bryan, 916 F.2d 1384, 1391 (9th Cir. 1990) (citing Portal-to-Portal Act §5).

47. *Albertson's*, 207 F.3d at 1200.

48. Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1248 (11th Cir. 2003) (citing *Albertson's*, 207 F.3d at 1200). The *Cameron-Grant* court further noted that the ban was due to the "fear that unions, as representatives, were concretely benefiting from participation in the FLSA suits." *Id.* (citing *Albertson's*, 207 F.3d at 1200).

49. § 7(b).

50. Scott Edward Cole & Matthew R. Bainer, *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*, 13 B.U. PUB. INT. L.J. 167, 169 (2004).

51. § 5(a).

52. 29 U.S.C. § 216(b) (2000).

53. Arrington v. NBC, 531 F. Supp. 498, 501 (D.D.C. 1982). The *Arrington* court then went on to declare that "[t]he 'consent in writing' requirement . . . [sought] to eradicate the problem of

FLSA prohibit what precisely is advanced under Federal Rule of Civil Procedure Rule 23—a representative plaintiff filing an action on behalf of uninvolved class members.[54]

Hence, Congress sought to limit the availability of representative actions under the FLSA by limiting standing to employees only, providing for the continued running of the statute of limitations for putative plaintiffs until they affirmatively opt in to the action, and imposing an express obligation that plaintiffs seeking to proceed collectively affirmatively opt in. While employees retain the option to proceed individually or collectively under the FLSA, employees wishing to proceed collectively after the Portal-to-Portal Amendments are required to use the section 16(b) collective-action provisions; the Federal Rule of Civil Procedure 23 class-action mechanism is not available as an alternative mechanism.[55]

There are a number of important differences between Rule 23 class actions and collective actions under the FLSA. First, the sole inquiry under the FLSA statutory provision for a collective action is whether the individuals seeking to be joined are "similarly situated." Comparatively, under Rule 23, numerosity, commonality, typicality, and adequacy of representation are required.[56] Second, as noted previously, FLSA collective actions are "opt-in" actions whereas Rule 23 actions are "opt-out" actions. Third, in FLSA collective actions, the statute of limitations for any unnamed plaintiffs continues to run until written consent has been filed with the court.[57] Comparatively, under Rule 23, all individuals falling within the class definition are bound by any judgment unless

totally uninvolved employees gaining recovery as a result of some third party's action in filing suit." *Id.* at 502.

54. *See* State of Nev. Employees' Ass'n v. Bryan, 916 F.2d 1384, 1391 (9th Cir. 1990); *see also* Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1249 (11th Cir. 2003) ("[I]n contrast to Rule 23 class actions, the existence of a collective action under § 216(b) does depend on the active participation of other plaintiffs. In other words, under § 216(b), the named plaintiff does not have the right to act in a role analogous to the private attorney general concept.").

55. LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975) (per curiam) ("There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b). . . . It is crystal clear that § 16(b) precludes pure Rule 23 class actions in FLSA suits."); *see also Cameron-Grant*, 347 F.3d at 1249 ("In light of the history underlying the amendments to the FLSA, it is not surprising that § 216(b) is a fundamentally different creature than the Rule 23 class action. . . . Under § 216(b), the action does not become a 'collective' action unless other plaintiffs affirmatively opt into the class by giving written and filed consent. . . . Thus, in contrast to Rule 23 class actions, the existence of a collective action under § 216(b) does depend on the active participation of other plaintiffs."); Lusardi v. Lechner, 855 F.2d 1062, 1068 n.8 (3d Cir. 1988) ("Courts have generally recognized that Rule 23 class actions may not be used under FLSA § 16(b).").

56. FED. R. CIV. P. 23.

57. 29 U.S.C. § 256.

they affirmatively opt-out of the action, and the statute of limitations ceases to run once the class action has been filed. One similarity, however, between Rule 23 class actions and collective actions under the FLSA is the high degree of discretion granted to district courts in making the certification decision and otherwise managing the case. The Eleventh Circuit has stated, "The decision to create an opt-in class under § 216(b), like the decision on class certification under Rule 23, remains soundly within the discretion of the district court."[58] Nevertheless, the statutory provision establishing the collective-action mechanism, unlike Federal Rule of Civil Procedure 23, provides little guidance to the courts on the appropriate standards and procedures to be applied in making a decision regarding certification.

Collective actions have played a major role in the enforcement of the FLSA, providing a remedy for denial of minimum wages, over-time pay, and pay for time actually worked. Collective actions have been particularly important for victims of FLSA violations because "most individual cases involve a limited amount of potential remedy, and victims who file FLSA complaints are particularly vulnerable to employer retaliation."[59] The typical FLSA claim involving only a single plaintiff or a small group of employees often does not present an economically viable action.

Over the years, the courts and Congress have struggled to strike a balance between the competing goals of the collective-action mechanism under the FLSA. On the one hand, the collective-action enforcement mechanism "allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources"[60] and may have an even stronger deterrent effect on employers. Similarly, a collective-action mechanism aids in goals of judicial efficiency by allowing for "resolution in one proceeding of common issues of law and fact."[61] On the other hand, the collective-action mechanism seeks to alleviate some burden on employers by requiring that plaintiffs seeking to proceed collectively affirmatively opt in to the action and prohibiting individuals who lack a personal interest in the proceeding from bringing an action on

58. Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001).

59. Douglas D. Scherer & Robert Belton, *Introduction to the Symposium on Class and Collective Actions in Employment Law*, 10 EMP. RTS. & EMP. POL'Y J. 351, 351 (2006). It is noteworthy that some courts have permitted FLSA plaintiffs fearing retaliation to sue anonymously. *See* Doe v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000) (holding that plaintiffs may sue anonymously in Fair Labor Standards Act collective action where plaintiffs feared retaliation). Nevertheless, the ability to sue anonymously remains the exception rather than the rule; a serious risk of retaliation on the part of employers remains a prevalent problem in the context of FLSA litigation.

60. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989).

61. *Id.*

behalf of an employee. The current state of the law of FLSA collective actions is the result of amendments to the FLSA as enacted in 1938 and various court rulings on the proper standards and procedures to be applied to FLSA collective-action cases.

IV. STANDARDS AND PROCEDURES APPLIED TO CERTIFICATION DETERMINATIONS

The Collective Action provision of the FLSA provides, in relevant part,

> An action to recover [under the FLSA] 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.[62]

This statutory provision has provided little guidance to courts, leaving them to determine the appropriate standards and procedures for certification of collective actions. Prior to 1989, courts divided on two primary issues: first, whether district courts had the power to authorize and facilitate notice to putative class members and second, if yes, in what cases such notice would be appropriate. Because the collective-action provision established the requirement that putative plaintiffs affirmatively opt in to an ongoing action, but failed to provide a means by which putative plaintiffs could be notified of an ongoing action, much of the early litigation involved the first question of whether district courts had the authority to facilitate notice to putative plaintiffs.[63]

A. *Do District Courts Have the Power To Authorize Notice?*

Prior to 1989, the circuits were divided on the question of whether district courts had the authority to issue an order authorizing notice to "similarly situated" employees when such an order was sought by the

62. 29 U.S.C. § 216(b).

63. *See e.g.*, David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 129, 131 (2003) ("To opt in to an ongoing section 216(b) action, employees must become aware of the action's existence. However, unlike Rule 23, section 216(b) does not provide a procedure by which to notify potential opt-in class members of their option to join an ongoing 216(b) case. Thus, much of the early litigation under section 216(b) revolved around whether the parties or the court had the power to send notice to potential opt-in plaintiffs. The courts of appeals issuing decisions on that question split evenly on the issue, with three circuits finding that the courts have the power to facilitate the sending of notice, and three circuits ruling that courts could not facilitate the sending of notice.") (footnote omitted).

named plaintiff. This issue arose under both the FLSA and the ADEA.[64] In 1989, the United States Supreme Court weighed in on the question of court-authorized notice in *Hoffmann-La Roche Inc. v. Sperling*.[65] The *Hoffmann-La Roche* Court addressed the narrow question of "whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to the potential members of the class on whose behalf the collective action has been brought."[66] The Court held that district courts do have discretion to facilitate notice to punitive plaintiffs in an ADEA action.[67] The Court noted that Congress intended for employees to be able to proceed collectively under section 16(b) and explained its reasoning as follows:

> The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.
>
> These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate . . . .
>
> Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action. . . . By approving the form of notice sent, the trial court could be assured that its cutoff date was reasonable, rather than having to set a cutoff date based on a series of unauthorized communications or even gossip that might have been misleading.[68]

Although the Supreme Court's holding addressed only the narrow question of the propriety of notice in ADEA (and not FLSA) collective actions, this holding has been accepted as extending to the FLSA cases as well.[69] The same statutory provision is applied to collective actions

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64. *See* Cole & Bainer, *supra* note 50, at 170 ("[M]any 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. Other courts reasoned that Congress's silence on this issue permitted notice in appropriate cases.") (footnote omitted). *Compare* United States v. Cook, 795 F.2d 987, 994 (Fed. Cir. 1986) (authorizing discovery of names and addresses of potential class members), Woods v. N.Y. Life Ins. Co., 686 F.2d 578, 582 (7th Cir. 1982) (allowing court-approved notice), *and* Braunstein v. E. Photographic Labs, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam) (allowing court-authorized notice), *with* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1214 (8th Cir. 1984) (disapproving court-authorized notice), Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267–69 (10th Cir. 1984) (same), *and* Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977) (same).

65. 493 U.S. 165.

66. *Id.* at 169.

67. *Id.* at 170.

68. *Id.* at 170, 172.

69. *See, e.g.*, Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1136 (D. Nev. 1999)

under the ADEA and FLSA,[70] and the rationale underlying the Supreme Court's decision in *Hoffmann-La Roche* appears equally germane to ADEA and FLSA actions.[71] The *Hoffmann-La Roche* Court specifically noted that part of the rationale underlying its holding that courts had authority to provide notice to putative plaintiffs in ADEA actions was that providing such notice serves the *broad remedial goals* of the ADEA.[72] Those broad remedial goals are shared by the FLSA.[73]

Two years after the Supreme Court's decision in *Hoffmann-La Roche*, the Eleventh Circuit expressly addressed the question of court-authorized notice in the context of the FLSA in *Dybach v. Florida Department of Corrections*.[74] Without citing to the Supreme Court's ruling in *Hoffmann-La Roche*, the Eleventh Circuit held that "the broad remedial purpose of the [FLSA] is best served if the district court is deemed to have the power to give such notice to other potential members of the plaintiff class to 'opt-in' if they so desire . . . under appropriate conditions."[75] In spite of the strong rationale underlying the grant of judicial discretion in facilitating notice to a putative FLSA plaintiff class, the Eleventh Circuit recognized, as had the Supreme Court in *Hoffmann-La Roche*, that such judicial discretion is not without limits.[76]

("[T]he Supreme Court abrogated opinions such as *Kinney Shoe* insofar as they held that district courts could not give notice to potential plaintiffs in a § 216(b) action.").

70. *See supra* note 31. Section 7(b) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b) (2000), adopts and incorporates the enforcement provisions of the FLSA including the collective action provision of § 216(b).

71. *See Hoffmann-La Roche*, 493 U.S. at 171 ("Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time.").

72. *See, e.g., id.* at 173 ("Congress left intact the 'similarly situated' language providing for collective actions, such as this one. The broad remedial goal of the statute should be enforced to the full extent of its terms."); Dybach v. Fla. Dep't of Corr., 942 F.2d 1562, 1567 (11th Cir. 1991) ("[T]he broad remedial purpose of the Act is best served if the district court is deemed to have the power to give such notice to other potential members of the plaintiff class to opt-in if they so desire and by the district court's exercise of that power under appropriate conditions.") (internal quotation marks and citation omitted).

73. *See* discussion *supra* pp. 9–12.

74. 942 F.2d 1562. The Eleventh Circuit had declined to make a determination on the notice question in *Haynes v. Singer Co.*, holding that even if district courts possessed the authority to authorize notice in FLSA collective actions, the district court did not abuse its discretion in finding insufficient evidence to support the giving of notice. 696 F.2d 884, 888 (11th Cir. 1983).

75. *Dybach*, 942 F.2d at 1567 (internal quotation marks and citation omitted).

76. *See id.* (providing that district courts have discretion to authorize notice "under appropriate conditions"). "Before determining to exercise such power . . ., the district court should satisfy itself that there are other employees . . . who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Id.* at 1567–68; *see also Hoffmann-La Roche*, 493 U.S. at 174 ("Our decision does not imply that trial courts have unbridled discretion in managing ADEA actions. Court intervention in the notice process for case management purposes is distinguishable in form and function from the

The court in *Hoffman-La Roche* specifically held that district courts have discretion to authorize notice not in all, but only "in appropriate cases."[77] Similarly, the *Dybach* court held that district courts have the power to authorize notice "under appropriate conditions."[78] Neither the Supreme Court nor the Eleventh Circuit, however, provided guidance regarding what standards and procedures trial courts were to apply in determining what cases are "appropriate cases," or what procedures trial courts should use for authorizing or issuing notice. In determining what cases are "appropriate cases," "the primary question facing the courts was deciding whether plaintiffs and potential opt-ins were 'similarly situated.'"[79]

B. *Eleventh Circuit Standards and Procedures for Collective-Action Certification*

To understand the current state of the law of collective-action certification within the Eleventh Circuit, it is important to recognize what questions remained to be addressed after the power of district courts to authorize notice had been effectively resolved. Courts were left to resolve two primary questions in the wake of *Hoffmann-La Roche* and *Dybach*: (1) what *procedures* to apply to determining whether to certify a collective action under the FLSA,[80] and (2) what *standards* to apply in determining when individuals are "similarly situated" under section 16(b). In the context of FLSA collective-action litigation, the distinction between procedures and standards is difficult to maintain. In many ways, the procedural mechanism employed by courts in making certification decisions dictates the standards applied to those decisions. Nev-

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solicitation of claims. In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action.").

77. *Hoffmann-La Roche*, 493 U.S. at 169.

78. *Dybach*, 942 F.2d at 1567.

79. Borgen & Ho, *supra* note 63, at 132. Unlike Federal Rule of Civil Procedure 23, which clearly sets forth and defines various requirements for certification, the collective-action provision under the FLSA provides only that plaintiffs and those they seek to represent be "similarly situated." *See* 29 U.S.C. §216(b) (2000) ("An action to recover . . . 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.") (emphasis added).

80. That is, what procedures were district courts to follow when making the determination to allow for court-authorized notice and grant permission for plaintiffs to proceed collectively? This determination can be characterized as "procedures for collective-action certification." The procedures for certification of collective actions can be analogized to Federal Rule of Civil Procedure 23 class-action certification.

ertheless, it is useful for purposes of analysis to distinguish between the procedures and standards for certification.

1. PROCEDURES FOR CERTIFICATION OF COLLECTIVE ACTIONS

In the absence of guidance from the statute or the Supreme Court, trial courts initially applied two general procedural approaches to collective-action certification decisions.[81] One line of cases applied the Federal Rule of Civil Procedure 23 requirements, such as commonality and typicality.[82] The second line of cases, adopted by the majority of district courts in making certification decisions, used a two-tiered ad hoc approach, without reference to Rule 23 standards.[83]

The first court of appeals to expressly address the competing procedural approaches to be applied to collective-action certification was the Fifth Circuit in *Mooney v. Aramco Services Co.*[84] In *Mooney*, the Fifth Circuit surveyed the two methods that had been adopted by the lower courts. Although the *Mooney* court ultimately declined "to decide which, if either, of the competing methodologies should be employed in making a[ ] . . . class certification decision," the court provided an extensive explanation of each approach and held that the district court did not abuse its discretion in applying the two-tiered ad hoc approach.[85] The *Mooney* court provided an often-cited description of the two-tiered ad hoc approach:

> The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision—usually based only

81. *See, e.g.*, Johnson v. TGF Precision Haircutters, Inc., 319 F. Supp. 2d 753, 754 (S.D. Tex. 2004) (noting that there are two methods used to resolve the issue of whether potential plaintiffs are "similarly situated," with the first method involving a two-stage class certification and the second method treating the "similarly situated" inquiry as coextensive with Federal Rule of Civil Procedure 23 class certification).

82. See *Bayles v. American Medical Response of Colorado, Inc.*, 950 F. Supp. 1053 (D. Colo. 1996), which describes the three different approaches in those cases applying the Federal Rules of Civil Procedure 23 requirements. The first such approach is a two-step procedure under which representative plaintiffs must meet the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a). *See id.* at 1058–59. The second approach that has been taken by some courts requires that plaintiffs meet all of the Federal Rule of Civil Procedure 23 requirements. *Id.* at 1060. The third approach, referred to as the "spurious class action" approach, requires that a party show that one common question of fact or law existed among the class and that the members of the class sought a common relief. *Id.* at 1064. However, under this approach, a court could also refuse to certify a class where it would waste judicial resources or unfairly prejudice the party opposing certification. *Id.* at 1065.

83. *See, e.g.*, Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102–03 (10th Cir. 2001); Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213–14 (5th Cir. 1995); Lusardi v. Xerox Corp., 118 F.R.D. 351, 354 (D.N.J. 1987).

84. 54 F.3d 1207.

85. *Id.* at 1216.

> on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members.
>
> 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.
>
> 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 claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice.[86]

In 2001, in *Hipp v. Liberty National Life Insurance Co.*,[87] the Eleventh Circuit "suggested" that district courts adopt the two-tiered ad hoc approach to certification as described by the Fifth Circuit in *Mooney v. Aramco Services Co.*, stating that this methodological approach provides an effective tool for "managing these often complex cases."[88] However, the Eleventh Circuit's suggestion that district courts adopt the two-tiered ad hoc approach was merely a suggestion, and the court noted that "[n]othing in our circuit precedent . . . requires district courts to utilize this approach. The decision to create an opt-in class under § 216(b) . . . remains soundly within the discretion of the district court."[89] Hence, district courts were left with minimal assistance and a great deal of discretion on the procedures to be applied to collective-action certification. This procedural discretion to adopt the two-tiered approach, or any other procedural approach the district court finds appropriate in making a certification decision, has the potential to greatly influence the outcome of individual cases. However, in practice, nearly all district courts have accepted the Eleventh Circuit's recommendation that they adopt the two-tiered approach.

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86. *Id.* at 1213–14 (footnote omitted). The quoted language of *Mooney* provides guidance with respect to both the procedure (two stage procedural approach requiring plaintiff to file the initial motion for conditional certification and defendant to later move for decertification) and the standards (proscribing a "relatively lenient" standard at the early notice stage and a somewhat more stringent standard at the later decertification stage after discovery is largely complete).

87. 252 F.3d 1208.

88. *Id.* at 1219.

89. *Id.*

The two-tiered approach provides a means by which district courts can more effectively manage often complex FLSA collective actions by allowing district courts to become involved in managing these cases at an early stage.[90] The two-tiered nature of this approach permits courts to raise the evidentiary burden placed on plaintiffs seeking to proceed collectively during the course of litigation, as information becomes available through discovery. Specifically, during the initial "notice stage," when plaintiffs have not had an opportunity to conduct substantial discovery that would permit them to establish a high degree of similarity between themselves and those they seek to represent, the evidentiary burden is intended to be relatively low. After discovery is largely completed and plaintiffs have had an adequate opportunity to discover evidence of similarity between themselves and those they seek to represent, the burden is more stringent. Ultimately, however, outcomes in the application of the two-tiered approach depend upon how courts define the statutory "similarly situated" requirement—a requirement that must be met at each stage of the two-tiered approach, although the burden varies from one stage to the other.

2. DEVELOPMENT OF THE "SIMILARLY SITUATED" STANDARD

Early Eleventh Circuit case law on the appropriate standard for determining when putative plaintiffs are "similarly situated" occurred outside the context of the two-tiered procedural mechanism ultimately "suggested" by the Eleventh Circuit and adopted by a majority of district courts within the Eleventh Circuit. Nevertheless, the standards set forth in these early cases have managed to fit within the two-tiered procedural approach with relatively minimal modification.[91]

The Eleventh Circuit first addressed the appropriate standard for determining whether individuals are "similarly situated" for purposes of

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90. As the Supreme Court noted in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989),

> [b]ecause trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice . . . . One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation.

91. Although pre-*Hipp* decisions by the Eleventh Circuit regarding the standards for collective-action certification addressed the "similarly situated" inquiry generally, the Eleventh Circuit subsequently recognized that the more lenient standard applied in these earlier cases was intended to be applied to the earlier stages of litigation. *See* Anderson v. Cagle's, Inc., 488 F.3d 945, 952 (11th Cir. 2007) ("In *Hipp*, we followed *Grayson*, but we also acknowledged, albeit somewhat implicitly, that the lenient standard we adopted in the *Grayson* opinion may be most useful when making a certification decision early in the litigation before discovery has been completed.").

collective-action certification in 1991 in *Dybach v. Florida Department of Corrections*.[92] The *Dybach* court, after recognizing the authority of district courts to facilitate notice to putative plaintiffs, held that, before facilitating notice, "the district court should satisfy itself that there are other employees . . . who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions."[93] Although district courts would have to wait until 2001 for guidance from the Eleventh Circuit on the appropriate procedures to be applied to collective-action certification,[94] the *Dybach* requirements, that (1) there are other employees who desire to opt in and (2) that those employees are similarly situated, have come to play a prominent role in certification decisions by district courts within the Eleventh Circuit.[95]

The Eleventh Circuit returned to the question of the appropriate standards to be applied to the "similarly situated" inquiry in 1996 in *Grayson v. K Mart Corp.*,[96] an ADEA case. The court in *Grayson* held that "the 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance). . . . [A] unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)."[97]

The court continued:

> For an opt-in class to be created under section 216(b), an employee need only show that he is suing his employer for himself and on behalf of other employees "similarly situated." Plaintiffs need

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92. 942 F.2d 1562 (11th Cir. 1991).

93. *Id.* at 1567–68. For purposes of modern analysis of collective-action certification, the essential element taken from the Eleventh Circuit's decision in *Dybach* is the two-part burden placed upon plaintiffs seeking to proceed collectively under the FLSA: (1) Plaintiffs must establish that there are others who desire to opt in to the action, and (2) Plaintiffs must establish that those individuals falling within the class definition are "similarly situated" with respect to job requirements and pay provisions. *Id.*

94. *See Hipp*, 252 F.3d at 1219.

95. *See Dybach*, 942 F.2d at 1568 ("[W]e leave it to the district court to establish the specific procedures to be followed with respect to such possible 'opting-in.'").

96. 79 F.3d 1086 (11th Cir. 1996).

97. *Id.* at 1095. The rule allowing for joinder found in Federal Rule of Civil Procedure 20 provides that

> [All] [p]ersons may join in one action as plaintiffs if:
>
> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> (B) any question of law or fact common to all plaintiffs will arise in the action.

FED. R. CIV. P. 20. The requirement for severance found in Federal Rule of Civil Procedure 42 provides that, "[i]f actions before the court involve a common question of law or fact, the court may: join for hearing or trial any or all matters at issue in the actions." FED. R. CIV. P. 42.

> show only that their positions are similar, not identical, to the positions held by the putative class members.
>
> . . . .
>
> . . . [P]laintiffs bear the burden of demonstrating a "reasonable basis" for their claim of class-wide discrimination. The plaintiffs may meet this burden, which is not heavy, by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which successfully engage defendant's affidavits to the contrary.[98]

These standards provided minimal clarification on the question of what standards should be applied to collective-action certifications. While the *Grayson* court provided some explanation of what level of similarity was *not* necessary,[99] the court provided little guidance as to what was sufficient to satisfy the "similarly situated" requirement, stating only that the burden is "not heavy" and may be met by "substantial allegations of class-wide discrimination," a requirement that is not easily paralleled to the FLSA context, where discrimination is not a relevant component. Hence, particularly in the context of FLSA certification decisions, district courts were provided very little direction regarding what standards to apply to conditional-certification decisions.

The Eleventh Circuit next returned to the question of the standards for determining whether plaintiffs are "similarly situated" in 2001 in *Hipp v. Liberty National Life Insurance Co.*[100] The *Hipp* court, in describing the two-tiered approach to certification of collective actions, provided that the standard to be applied at the notice stage is a "fairly lenient standard" and implied that the standard to be applied at the later decertification stage is more stringent, because the court (and the parties) has significantly more information upon which to make its determination.[101] The court also quoted the standard for "similarly situated" it had set forth in *Grayson v. K Mart Corp.*, clarifying the continued validity of that standard as applied to the two-tiered approach.[102]

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98. *Grayson*, 79 F.3d at 1096–97 (internal quotation marks and citations omitted). "The 'similarly situated' requirement, in turn, is considerably less stringent than the requirement of [Rule 23(b)(3)] that common questions 'predominate,' or presumably, the Rule 20(a) requirement that claims 'arise out of the same action or occurrence.'" *Id.* at 1096 (alteration in original) (internal quotation marks omitted) (quoting *Flavel v. Svedala Indus. Inc.*, 875 F. Supp. 550, 553 (E.D. Wis. 1994)).

99. The *Grayson* court, in holding that "the 'similarly situated' requirement of § 216(b) is . . . *less stringent than*" that for joinder under Rule 20(a) or for separate trials under Rule 42(b), essentially established an illusory bar at or below that required for joinder and separate trials without providing any guidance to trial courts as to how much lower the bar truly is. *Id.* at 1095 (emphasis added).

100. 252 F.3d 1208 (11th Cir. 2001); *see also* discussion *supra* Part IV.B.1.

101. 252 F.3d at 1218.

102. *Id.* at 1219. Specifically, the *Hipp* court stated,

In 2007, the Eleventh Circuit again had occasion to address the appropriate standards to be applied to certification determinations in *Anderson v. Cagle's, Inc.*[103] In addressing the appellant-employees' reliance on the standards for certification set forth in *Hipp* and *Grayson*, the Eleventh Circuit expressly noted what had been implied in *Hipp*, that the more lenient standard set forth in *Grayson*[104] ought to be applied to the earlier notice stage. The *Anderson* court also addressed the appropriate standard to be applied at the second stage of collective-action certification, the "decertification" stage.[105] Specifically, the court held that the district court had not abused its discretion in granting the defendants' motions for decertification and stated,

> The "similarly situated" standard at the second stage is less "lenient" than at the first, as is the plaintiffs' burden in meeting the standard. Exactly how much less lenient we need not specify, though logically the more material distinctions revealed by the evidence, the more likely the district court is to decertify the collective action.
>
> We also need not specify how plaintiffs' burden of demonstrating that a collective action is warranted differs at the second stage. It is sufficient to conclude, again quite logically, that at the second stage plaintiffs *may*—the ultimate decision rests largely within the district court's discretion—not succeed in maintaining a collective action under § 216(b) based solely on allegations and affidavits, depending upon the evidence presented by the party seeking decertification.[106]

To an even greater degree than had been true with prior cases, the Eleventh Circuit's discussion of the appropriate standards to be applied to collective-action certification in *Anderson* left wide discretion to district courts in making the determination to conditionally certify or later

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> This Court expressed its view of the similarly situated requirement in *Grayson*: "[T]he 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance). [A] unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b). [P]laintiffs bear the burden of demonstrating a reasonable basis for their claim of classwide discrimination. The plaintiffs may meet this burden, which is not heavy, by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which successfully engage defendants' affidavits to the contrary."

Id. (alterations in original) (citations omitted).

103. 488 F.3d 945 (11th Cir. 2007).

104. Specifically, the court stated that the plaintiffs need only "demonstrat[e] a 'reasonable basis' for their claim of class-wide discrimination . . . by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which 'successfully engage defendants' affidavits to the contrary.'" *Grayson*, 79 F.3d at 1097.

105. 488 F.3d at 953.

106. *Id.* (citation omitted).

decertify a collective action. Thus, at present, district courts have wide discretion and very limited direction both as to the procedures and standards to apply when making a certification determination under the FLSA.

A review of the preceding case law in the Eleventh Circuit makes clear that district courts hold a great deal of discretion with respect to both the procedures and standards applied to collective-action certification. Following the Eleventh Circuit's suggestion in *Hipp* that district courts adopt the two-tiered ad hoc approach, nearly all subsequent district court rulings on motions for certification of collective actions under the FLSA have followed this procedural approach to certification.[107] Hence, while discretion exists as to the procedure for collective-action certification, it has created little problem with regards to predictability because district courts within the Eleventh Circuit appear to universally apply the same procedural approach. However, the standards applied at each of the two stages of the two-tiered approach have not shown the same level of uniformity.

Given the wide degree of discretion and limited direction provided to district courts, rulings on motions for collective-action certification at the notice and decertification stages tend to vary widely and be highly fact specific. The discretion left to district courts and absence of clear standards in making the "similarly situated" determination seems to result in an apparent disconnect between actual rulings on motions for certification and the theoretical framework and competing goals upon which those rulings purport to be based. An examination of a sample of district court rulings reveals very few trends: District courts focus on varying factors and require varying quanta of evidence from plaintiffs seeking to proceed collectively. The result is an absence of predictability in this area of the law and, under some courts' standards, the potential for the complete evisceration of FLSA plaintiffs' ability to proceed collectively.

V. District Court Rulings

An examination of some of the rulings on motions for certification at the "notice stage" by district courts in the Eleventh Circuit is informative in understanding how district courts have dealt with motions for certification of collective actions and how application of a uniform procedure, where there is an absence of definite rules and standards, often results in highly disparate outcomes. Although district courts in the Eleventh Circuit have uniformly applied the two-tiered approach to cer-

107. *See, e.g.*, Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1243 n.2 ("Since *Hipp*, the district courts in our circuit have utilized the two-tiered approach . . . .").

tification decisions, purporting to apply a more lenient standard at the notice stage and a somewhat more stringent standard after the parties have had an opportunity for discovery, outcomes have varied widely from case to case. Some courts have granted motions for conditional certification on the pleadings and affidavits of named plaintiffs alone while others have found even numerous affidavits from other employees seeking to join insufficient to overcome what has been called a minimal burden at the notice stage.

Although most district courts have required that, at the notice stage, plaintiffs seeking conditional certification show that (1) there are other employees who desire to opt into the action and (2) the employees who desire to opt in are "similarly situated," these requirements appear to lack uniform definition. An examination of rulings by district courts reveals little in the way of a pattern or standard. The sections that follow examine how district courts have analyzed and applied each of the two requirements at the notice stage and draw some conclusions about the current state of the law of collective actions under the FLSA within the Eleventh Circuit.

A. *Other Employees Desire To Opt In*

Many district courts within the Eleventh Circuit have denied motions for conditional certification and court-authorized notice on the ground that the plaintiff seeking conditional certification failed to satisfy the first element set forth in *Dybach*: that other employees desire to opt in to the action.[108] The Eleventh Circuit in *Dybach* stated only that "the district court should satisfy itself that there are other employees of the department-employer who desire to 'opt-in' ";[109] it did not set a standard for a requisite number of employees or percentage of the total class that must be shown desirous of opting in to the collective action. Nevertheless, some courts have read a sort of numerosity[110] requirement into this language.[111] Other courts have found the pleadings and affidavits of the named plaintiffs and affidavits or consents to join from a small number

108. Dybach v. Fla. Dep't of Corr., 942 F.2d 1562, 1567 (11th Cir. 1991).

109. *Id.*

110. Analogy can be made here to Federal Rule of Civil Procedure 23(a)(1), which requires, for class actions under that rule, that "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23.

111. Nevertheless, those courts that have imposed a "numerosity" requirement have not stated any rationale for the ultimate determination that the plaintiff failed to meet his burden. These courts have expressed neither a percentage nor otherwise expressed a quantum of proof necessary to overcome the plaintiff's burden. The simultaneous acknowledgement that some burden exists coupled with a refusal to identify how it might be measured can be analogized to Justice Potter Stewart's oft-quoted statement regarding the legal definition of obscenity: "I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

of other employees sufficient to overcome plaintiff's burden of showing that other employees desire to opt in at the notice stage.[112]

In *Robinson v. Dolgencorp, Inc.*, the magistrate judge issued a Report and Recommendation denying the plaintiff's motion for an order permitting court-supervised notice to employees of their opt-in rights.[113] The court, addressing the two elements that comprise the plaintiff's burden at the notice stage, found that the plaintiff had failed to present sufficient evidence to overcome either burden.[114] Although the plaintiff in *Robinson* provided affidavits of herself and two other former employees as well as notices of consent to join by those two employees, the court determined that the plaintiff failed to establish that there were *sufficient* employees who desire to opt in to the action.[115] While acknowledging that at the notice stage "courts apply a lenient standard, requiring a plaintiff to show only that similarly situated persons exist that may wish to join the suit,"[116] the court ultimately determined that the plaintiff, who had filed affidavits of three employees, had failed to satisfy the first prong under *Dybach* that there were other employees who desired to "opt-in" to the action.[117] The court further stated that "[t]he bottom line is that only three employees out of a potential class of the 58,000 nationwide hourly employees employed by Defendant at any given time and the 26,000 employed in Florida filed affidavits to support Plaintiff's request for conditional certification."[118]

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112. *See, e.g.*, Tyler v. Payless Shoe Source, Inc., No. 2:05-cv-33-F, 2005 U.S. Dist. LEXIS 31682, at *7–8 (M.D. Ala. Nov. 23, 2005) (five consents to join were sufficient to establish that others desired to opt in); Pendlebury v. Starbucks Coffee Co., No. 04-80521-CIV, 2005 U.S. Dist. LEXIS 574, at *4, *12 (S.D. Fla. Jan. 3, 2005) (plaintiffs allegations and four affidavits by employees indicating that others desired to opt in were sufficient); Bell v. Mynt Entm't, LLC, 223 F.R.D. 680, 682 (S.D. Fla. 2004) (seven affidavits by employees with specific allegations of wage violations were sufficient).

113. No. 5:06-cv-122-Oc-10GRJ, 2006 U.S. Dist. LEXIS 85471, at *2 (M.D. Fla. Nov. 13, 2006).

114. *Id.* at *24.

115. *Id.* at *14–15, *19.

116. *Id.* at *12.

117. *Id.* at *24.

118. *Id.* at *19. The court also stated,

> Defendant—on the other hand—through the filing of twenty declarations of the Dolgencorp officers, district managers, store managers, assistant store managers, lead clerks and store clerks/sales associates, identifies a substantial segment of the potential class of employees who have no desire to join the lawsuit and who allege that they never observed any overtime violations during the time period at issue.

Id. at *20. Ultimately, the court concluded,

> [E]ven assuming *arguendo* that the affidavits submitted by Plaintiff were considered sufficient to establish that there are other employees who might be interested in joining in a collective action, the Court nonetheless, concludes that the Plaintiff has also failed to establish that a class of other . . . employees is similarly situated to the Plaintiff, as required under the second prong of *Dybach*.

Comparatively, in *Bell v. Mynt Entertainment, LLC*, the United States District Court for the Southern District of Florida granted the plaintiffs' renewed motion for court-ordered notification, finding seven affidavits from the current-named plaintiffs sufficient to overcome the plaintiffs' burden at the notice stage.[119] Each of the seven affidavits submitted with the motion for conditional certification set forth details of the hours each affiant worked each week, hourly pay, and the procedures comprising the alleged FLSA violation. The affiants "also claim[ed] to be familiar with other similarly-situated" employees who would be interested in joining the litigation.[120] The court held that "[t]hese affidavits contain sufficiently detailed allegations to demonstrate a reasonable basis for the plaintiffs' claim of classwide discrimination."[121] The factual allegations included in the affidavits in *Bell* initially appear quite similar to those contained in the affidavits submitted in *Robinson*. However, the allegations contained in the affidavits in *Robinson* were described as "conclusory" and "[w]ithout any explanation of whether a company or store wide policy was involved."[122] Nevertheless, even where the submitted affidavits can be distinguished with regards to content contained therein, the content goes to the second prong of *Dybach*, and the *Robinson* court specifically focused on the number of affidavits filed by the plaintiffs in reaching its determination that conditional certification was due to be denied.[123]

In *Rivera v. Cemex, Inc.*, the United States District Court for the Middle District of Florida granted the plaintiff's motion for conditional certification and permission to send court-supervised notice to similarly situated employees of their opt-in rights.[124] In *Rivera*, the plaintiff "submitted his own affidavit and the affidavit of three additional former employees" of the defendant-employer, all alleging that they had not been paid over-time pay as required by the FLSA.[125] The court held that the plaintiff had submitted sufficient evidence to overcome his burden at the notice stage.[126]

Id. at *21.

119. 223 F.R.D. 680, 682 (S.D. Fla. 2004).

120. *Id.* at 683.

121. *Id.*

122. 2006 U.S. Dist. LEXIS 85471, at *15.

123. *See id.* at *19 ("The bottom line is that only three employees out of a potential class of the 58,000 nation-wide hourly employees employed by Defendant at any given time and the 26,000 employed in Florida filed affidavits to support Plaintiff's request for conditional certification.").

124. No. 6:06-cv-687-Orl-31DAB, 2006 U.S. Dist. LEXIS 84557, at *7 (M.D. Fla. Nov. 21, 2006).

125. *Id.* at *5.

126. *Id.*; *see also* Robbins-Pagel v. WM. F. Puckett, Inc., No. 6:05-cv-1582-Orl-31DAB, 2006 U.S. Dist. LEXIS 85253, at *6–7 (M.D. Fla. Nov. 22, 2006) ("Plaintiff has submitted her own affidavit and the affidavits of two additional former employees of Defendant. All three affidavits

Similarly, in *Tyler v. Payless Shoe Source, Inc.*, the United States District Court for the Middle District of Alabama denied the plaintiffs' motion for certification of a collective action and authorization to send nationwide and international notice to putative plaintiff class members, but concluded that three valid consents to join were sufficient to overcome the plaintiffs' burden of demonstrating that other employees desire to opt in to the action.[127] It is noteworthy that the plaintiffs in *Tyler*, like the plaintiff in *Robinson*, sought nationwide and international notice. However, unlike the *Robinson* court, the *Tyler* court did not impose a numerosity requirement based on the total size of the proposed class. In fact, the *Tyler* court never even addressed the size of the proposed class in its discussion of the requirement that the plaintiff demonstrate that others desire to opt in to the action, other than to mention that the plaintiffs sought nationwide and international notice.

In *Rodgers v. CVS Pharmacy, Inc.*, the United States District Court for the Middle District of Florida denied the plaintiff's motion for conditional certification for several reasons, including that the plaintiff had failed to establish the existence of other employees who desired to opt in to the lawsuit.[128] Like the plaintiff in *Robinson*, the plaintiff in *Rodgers* only filed his own declaration and affidavits of two employees who worked at a different location.[129] The court held that "Plaintiff has failed to provide sufficient evidence that there are other employees who desire to opt in to this action, other than the two who have filed consents. . . . The significance of this number is drastically minimized when compared to the 250,000 [putative class members sought to be represented]."[130] Again, the court appears to have placed a sort of numerosity requirement on the plaintiff seeking to proceed collectively.

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allege that the employees were not paid over-time pay as required by the FLSA . . . . Plaintiff has submitted sufficient evidence to establish a reasonable basis to believe that there are similarly situated individuals who may be interested in joining the action, if given notice.") (citation omitted).

127. No. 2:05-cv-33-F, 2005 U.S. Dist. LEXIS 31682, at *8, *20 (M.D. Ala. Nov. 23, 2005). The *Tyler* court reasoned,

> [h]ere, while it is unknown what percentage of potential plaintiffs might wish to participate, Tyler points out that five other Payless employees have filed consents to sue pending before this Court, and this is evidence that at least some potential plaintiffs are interested in joining the suit. Though two of these potential plaintiffs were not employed during the relevant period, three other potential plaintiffs remain prepared to join this suit. . . . [Thus,] the Court concludes that Tyler has sufficiently demonstrated at this stage of the proceedings that other persons desire to join in the suit.

Id. at *7–8 (citation omitted).

128. No. 8:05-CV-770-T-27MSS, 2006 U.S. Dist. LEXIS 23272, at *20–21 (M.D. Fla. Mar. 22, 2006).

129. *See id.* at *10.

130. *Id.* at *14.

In *Barten v. KTK & Associates, Inc.*, the United States District Court for the Middle District of Florida denied the plaintiffs' motion for conditional certification and permission to send court-supervised notice for failure to satisfy the first prong of *Dybach*.[131] In support of their motion for conditional certification, the plaintiffs filed affidavits and consents to join from two additional employees and declarations from three of the named plaintiffs stating that they had friends who were employees and were afraid to join the FLSA suit for fear of retaliation.[132] The court noted that "[c]ertification of a collective action and notice to a potential class is not appropriate to determine *whether* there are others who desire to join the lawsuit. Rather, a showing that others desire to opt in is required before certification and notice will be authorized by the court."[133] The court then held that the plaintiffs failed to satisfy their burden of demonstrating that other employees desired to opt in to the lawsuit.[134]

This principle that "certification of a collective action and notice to a potential class is not appropriate to determine *whether* there are others who desire to join the lawsuit" has been expressed by numerous district courts in denying motions for conditional certification of collective actions.[135] While in theory the requirement placed on plaintiffs to make *some* showing that other employees exist who desire to opt in to the action is rational, in application, particularly in the context of nationwide and international collective actions, and where courts require plaintiffs to meet a more stringent burden, this requirement seems in many ways to create a "Catch-22" for employees seeking to proceed collectively.

In cases such as *Robinson v. Dolgencorp, Inc.* and *Rodgers v. CVS Pharmacy*, where the court placed a sort of "numerosity" requirement and mandated that the plaintiff offer "detailed allegations supported by affidavits which successfully engage defendants' affidavits to the contrary,"[136] plaintiffs have limited chance for success in seeking conditional certification.[137] The information disparity between the plaintiff-

131. No. 8:06-CV-1574-T-27EAJ, 2007 U.S. Dist. LEXIS 54068, at *8 (M.D. Fla. July 24, 2007).

132. *Id.* at *2–3.

133. *Id.* at *6 (citation omitted).

134. *Id.* at *7 ("A plaintiff's belief in the existence of other employees who desire to opt in and unsupported expectations that additional plaintiffs will subsequently come forward are insufficient to justify certification of a collective action and notice to a potential class.") (internal quotation marks omitted).

135. *See, e.g., id.* at *6; Mackenzie v. Kindred Hosp. E., L.L.C., 276 F. Supp. 2d 1211, 1220 (M.D. Fla. 2003).

136. Rodgers v. CVS Pharmacy, Inc., No. 8:05-CV-770-T-27MSS, 2006 U.S. Dist. LEXIS 23272, at *7 (M.D. Fla. Mar. 22, 2006) (quoting Grayson v. K Mart Corp., 79 F.3d 1086, 1097 (11th Cir. 1996)).

137. Laura L. Ho, *Class and Collective Actions in Employment Law*, 10 EMP. RTS. & EMP.

employee and the defendant-employer at this stage of the litigation is usually quite large. On one hand, the defendant, as employer, has ready access to officers, managers, and current and past employees from whom it can obtain declarations alleging no desire on the part of employees to opt in to the collective action and challenging the existence of FLSA violations. On the other hand, particularly where the plaintiffs are seeking to represent a nationwide or international class of employees, plaintiff-employees are limited in their ability to obtain evidence regarding whether other employees desire to opt in by discovery rules, the ineffectiveness of notice issued without court authorization, and, to a limited extent, ethical rules prohibiting solicitation of clients.

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonpriviliged matter that is relevant to any party's claim or defense . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."[138] Further, under Federal Rule of Civil Procedure 26(d) no discovery may be conducted prior to the initial meeting of counsel.[139] Because the statute of limitations continues to run on FLSA claims for each individual employee until he affirmatively opts in to the action by filing a consent with the court,[140] plaintiffs generally file a motion for conditional certification almost immediately after filing the complaint. "In this scenario, [the parties will not be able to conduct discovery] before the hearing date on the certification motion."[141] Further, even if the parties were able to conduct discovery prior to such a ruling, the scope of discovery would be limited to the individual action brought by the plaintiff, unless the court expressly expanded the scope of discovery, hence making discovery of the names and contact information of other employees sought to be represented outside the scope of discovery.

A collective action under the FLSA, whether initially filed as a collective action or certified by later motion to proceed collectively, does not become a collective action until the court has certified it as such *and* other employees affirmatively opt in to the action. As the Eleventh Cir-

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POL'Y J. 427, 429 (2006) ("However, where plaintiffs cast too broad a net in defining employees who are similarly situated or do not sufficiently support their allegation that plaintiffs are similarly situated, courts do not hesitate to limit the scope of the notice or deny notice altogether.").

138. FED. R. CIV. P. 26(b)(1).

139. Specifically, Rule 26(d)(1) states that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order."

140. *See* 29 U.S.C. § 216(b) (2000). A two-year statute of limitations was created for actions to enforce FLSA, the Walsh Healey Act, and the Davis-Bacon Act (a 1966 amendment that permits actions for willful violations to be brought within three years).

141. Aashish Y. Desai, *The Discovery Problem*, 44 ORANGE COUNTY LAW. 10, 10 (2002).

cuit noted in *Cameron-Grant v. Maxim Healthcare Services*, "§ 216(b) is a fundamentally different creature than the Rule 23 class action. . . . Under § 216(b), the action does not become a 'collective' action unless other plaintiffs affirmatively opt into the class by giving written and filed consent."[142] The nature of the collective-action mechanism under the FLSA affects the ability of plaintiffs to obtain information through discovery. On the question of discovery in the context of FLSA collective actions, Laura L. Ho observes,

> The most important and most pressing discovery plaintiffs must take is the discovery of names and addresses of similarly situated potential plaintiffs. Such discovery allows plaintiffs to notify similarly situated employees of the action and of their opportunity to join.
>
> There are two ways plaintiffs can obtain the names and addresses of potential plaintiffs. First, plaintiffs can seek court supervised notice sent to potential plaintiffs . . . which, if the court agrees, usually results in a list of names and addresses being disclosed to plaintiffs' counsel. Second, names and addresses may be obtained in advance of the notice motion.[143]

With regard to the second alternative recognized by Ho, specifically, seeking discovery of the names and addresses of employees sought to be represented prior to the initial conditional-certification decision, some courts have granted such motions.[144] Nevertheless, the ability of plaintiffs to obtain discovery of the names and contact information for members of the putative plaintiff class prior to conditional certification remains indeterminate.

The Supreme Court, in *Hoffmann-La Roche Inc. v. Sperling*, in affirming the district court's grant of discovery of the names and addresses of putative plaintiff class members, reasoned,

> Without pausing to explore alternative bases for the discovery, for instance that the employees might have knowledge of other discoverable matter, we find it suffices to say that the discovery was relevant to the subject matter of the action and that there were no grounds to limit the discovery under the facts and circumstances of this case.[145]

Although the majority's ruling on the discovery question was a point of contention for Justice Scalia in his dissenting opinion,[146] the Court's

142. 347 F.3d 1240, 1249 (11th Cir. 2003).

143. Ho, *supra* note 139, at 431–32.

144. *See, e.g.*, Bailey v. Ameriquest Mortgage Co., No. 01-545, U.S. Dist. LEXIS 1363, at *6–7 (D. Minn. Jan. 23, 2002) (granting discovery of the names and contact information of potential class members and holding that such pre-certification discovery does not require as a condition precedent a finding that plaintiffs are "similarly situated" and that such disclosure does not "constitute unwarranted or unreasonable invasion of privacy").

145. 493 U.S. 165, 170 (1989).

146. Justice Scalia urged,

holding on this issue appears bound by the facts and procedural posture presented in that case.[147] Further, as subsequent district court decisions on similar discovery questions have noted, the *Hoffmann-La Roche* Court ultimately left the determination of whether discovery of the names and addresses of putative plaintiffs is appropriate in the sound discretion of district courts.[148]

Hence, plaintiffs seeking to proceed collectively may not be entitled to discovery of the names and last available addresses of employees falling within the proposed class until the collective action has been conditionally certified or until the court orders such discovery. In this situation, when combined with the requirement that the plaintiff seeking conditional certification successfully engage the defendant's affidavits in opposition, plaintiffs are set up to lose. Courts imposing such requirements are basically creating a "Catch-22"[149] for individuals seek-

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> [T]he discovery order, was invalid because the purpose for which it was issued was not a purpose permitted by Rule 26. . . .
>
> The discovery order here had nothing to do with "the subject matter involved in the pending action," in the plainly intended sense of constituting, or "lead[ing] to the discovery of," admissible evidence. To the contrary, it was entered by the District Court solely to "facilitate notice of an ADEA suit to absent class members," and was sustained by the Third Circuit as an exercise of "the authority of the district court in an ADEA action to facilitate joinder of the putative class members." Discovery for that purpose is simply not authorized.

Id. at 179–80 (last alteration in original) (citations omitted).

147. Specifically, the Court stated that the discovery was "relevant to the *subject matter* of the action." *Id.* at 170 (emphasis added). However, under Federal Rule of Civil Procedure 26(b)(1) the scope of discovery is limited to matters relevant to the claim or defense of any party unless the court "[f]or *good cause*" exercises its discretion to extend the scope of discovery to include "any matter relevant to the subject matter involved in the action." FED. R. CIV. P. 26(b)(1) (emphasis added). The district court in *Hoffmann-La Roche* had exercised its discretion to expand the scope of discovery to include those matters relevant to the subject matter involved in the action.

148. *See, e.g.*, Whitworth v. Chiles Offshore Corp., No. 92-1504, 1992 U.S. Dist. LEXIS 17844, at *2–3 (E.D. La. Nov. 25, 1992) ("Unfortunately, the [*Hoffmann-La Roche*] Court provided little guidance to future courts faced with the same issues. The Court's only criteria were that 'the discovery was relevant to the subject matter of the action and that there were no grounds to limit the discovery under the facts and circumstances of this case.' In fact, the Court was careful to emphasize that the main issue was 'the existence of the trial court's discretion, not the details of its exercise.'" (quoting *Hoffmann-La Roche*, 493 U.S. at 170)) (citations omitted).

149. A "Catch-22" describes an illogical or paradoxical situation in which one is trapped by contradictory requirements. As author Joseph Heller described in his novel, *Catch-22*,

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.

JOSEPH HELLER, CATCH-22, 46 (Simon & Schuster 2004) (1955).

ing to proceed collectively: If plaintiffs want to obtain conditional certification, they must have access to discovery of the names and contact information of those who may desire to opt in, but in order to obtain discovery of this information, plaintiffs are obligated to satisfy the requirements of conditional certification.

Even where courts exercise their discretion in granting discovery of the names and addresses of employees falling within the proposed class definition prior to conditional certification,[150] the plaintiff is left to contact employees without the aid of the court (i.e., court-authorized notice). This may pose additional barriers for plaintiffs seeking to proceed collectively and may not result in a response that is representative of those truly desiring to participate in the collective action. The *Hoffmann-La Roche* Court, in acknowledging the power of district courts to authorize notice to putative plaintiffs under appropriate circumstances, noted,

> By monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative. Both the parties and the court benefit from settling disputes about the content of the notice before it is distributed. This procedure may avoid the need to cancel consents obtained in an improper manner.[151]

Communications made directly by the plaintiff's attorney, without authority of the court, may not contain accurate information and may not yield a response that is truly representative of those employees who desire to opt in to the litigation. Putative plaintiffs may dismiss communications directly from the plaintiff's attorney as solicitations, while communications from the court are likely to be deemed more trustworthy, more urgent, and more accurate.[152]

Further, plaintiffs' attorneys must proceed with caution in engaging in pre-certification communications with putative plaintiffs, as courts may limit such communications or even sanction certain communications. For instance, in *Maddox v. Knowledge Learning Corp.*, the

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150. Indeed, some courts have permitted limited discovery to allow a plaintiff to gather evidence necessary to support a motion for conditional certification. *See, e.g.*, Wombles v. Title Max of Ala., Inc., No. 3:03cv1158-C, 2005 U.S. Dist. LEXIS 34733, at *3 (M.D. Ala. Dec. 7, 2005) (noting the court's previous grant of limited discovery on the issues of regional class notice and collective-action status).

151. *Hoffmann-La Roche*, 493 U.S. at 172.

152. *See id.* at 171. The *Hoffmann-La Roche* Court noted,

> We have recognized that a trial court has a substantial interest in communications that are mailed for single actions involving multiple parties. . . . Observing that class actions serve important goals but also present opportunities for abuse, we [have] 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.

Id. (internal quotation marks and citation omitted).

United States District Court for the Northern District of Georgia ordered that the plaintiff-employees correct precertification statements that were factually inaccurate, unbalanced, or misleading.[153] The court held that "it would be an abuse of discretion to totally proscribe plaintiffs in a Section 216(b) collective action from communicating with potential class members . . . prior to conditional certification. . . . [But] it *is* within the court's discretion to prohibit the plaintiffs from issuing pre-certification statements that are factually inaccurate, unbalanced, or misleading."[154] Hence, plaintiffs may not only face the potential risk that many putative plaintiffs will summarily disregard communications lacking court approval, but also the risk that the court may find such communications to be misleading, inaccurate, or unbalanced and hence subject to limitation.

Finally, although the potential effects are relatively minimal, ethical rules may limit the ability of plaintiffs' attorneys to communicate directly with putative plaintiffs.[155] Most jurisdictions do not prohibit mere communication with putative plaintiffs to a class action where the communication does not constitute solicitation for pecuniary gain.[156]

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153. 499 F. Supp. 2d 1338, 1344 (N.D. Ga. 2007).

154. *Id.*; *see also* Taylor v. CompUSA, Inc., No. 1:04-CV-718-WBH, 2004 U.S. Dist. LEXIS 14520, at *12 (N.D. Ga. June 29, 2004) (holding that until the court ruled on conditional certification and approved official notice, the plaintiffs were prohibited from making "unqualified, misleading statements" to potential class members).

155. *See, e.g.*, FLA. RULES OF PROF'L CONDUCT R. 4-7.4 (a) (2007), which provides the following:

> Except as provided in subdivision (b) of this rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6.

Similarly, Rule 7.3(a) of the ABA Model Rules of Professional Conduct provides,

> (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
>
> (1) is a lawyer; or
>
> (2) has a family, close personal, or prior professional relationship with the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 7.3 (2004).

156. *See, e.g.*, GA. RULES OF PROF'L CONDUCT R. 7.3 cmt. 6 (2007) ("This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action

Nevertheless, even where the ethical rules of the jurisdiction in which the action is pending do not restrict the ability of the plaintiff's attorney to send notice to putative plaintiffs informing them of their right to opt in to the action, plaintiffs' attorneys must be very careful regarding the contents of any communication with putative plaintiffs in this context, as much of the determination of what constitutes an ethical violation is left to the discretion of the court.

Ultimately, placing a requirement on plaintiffs seeking to proceed on behalf of themselves and others similarly situated, at least at the "notice stage," to overcome a sort of "numerosity" requirement and "successfully engage defendants' affidavits" is not only internally inconsistent, but is inconsistent with the purpose and procedure of the two-tiered approach to collective-action certification. As the Fifth Circuit stated in *Mooney v. Aramco Services Co.*, in describing the "notice stage" of the two-tiered approach, "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."[157] The rationale underlying the more lenient standard identified in *Mooney*, as well as Eleventh Circuit cases examined above, stems, at least in part, from the two-tiered nature of the certification process and, in turn, the limited information available at the notice stage.[158] District

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litigation"); Fla. Comm. on Prof'l Ethics and Grievances, Formal Op. 71-22 (1971) ("As pointed out in the Disciplinary Rule, any contact with a member of a 'class' should not seek employment in behalf of an attorney. Thus, at all events, whatever the direction of the court, any contact would have to be dignified and to the end of advising of the pendency of a cause of action which may affect the right of the person being contacted, but in no event should the contact seek to have such person employ the original attorney in the litigation.").

It is particularly noteworthy in light of these ethical rules that even the mere sending of notice to putative plaintiffs without leave of court may be interpreted as solicitation in violation of ethical rules where putative plaintiffs are instructed to send consents to the plaintiff's attorney.

157. 54 F.3d 1207, 1214 (5th Cir. 1995) (footnote omitted). A sample of rulings on motions for conditional certification available on LexisNexis reveals that, within the Eleventh Circuit, not only is the "typical result" not a grant of conditional certification, but over twice as many motions were denied as were granted. Running a LexisNexis terms and connectors search on six phrases (motion for conditional certification of collective action or motion to certify collective action or motion to facilitate nationwide class notice or motion to facilitate class notice or motion for certification of collective action or motion for court ordered notification) for cases between 2004 and 2007 revealed that only three motions for conditional certification were granted, while ten were denied. Of course, it is possible that a disproportionate number of those motions for conditional certification that were denied are published on LexisNexis. However, there is no alternative means available by which to obtain comparative data on these rulings.

158. As Judge Stearn eloquently described the rationale underlying the relatively minimal standard at the conditional certification stage during the hearing on class certification which lead to conditional certification in *Lusardi v. Xerox Corp.*,

> [D]own the road there will come a time when [the plaintiffs are] going to have to show that for this case to go forward, that from all these notifications, and all this investigation, and all this discovery, they have got an honest to goodness case. But I have a pretty good idea where a cart is and where a horse is. I think the best way to

courts outside of the Eleventh Circuit have readily accepted this notion. For example, the United States District Court for the Northern District of New York, in *Schwed v. General Electric Co.*, noted that "even where later discovery proves the putative class members to be dissimilarly situated, notice to those preliminarily identified as potential plaintiffs prior to full discovery is appropriate as it may further the remedial purpose of the [FLSA]."[159]

In sum, at the notice stage of certification of collective actions under the two-tiered approach, a "numerosity" requirement for overcoming the first prong of *Dybach*, in conjunction with a requirement that plaintiffs successfully engage defendant's affidavits in opposition, places too stringent of a burden on plaintiffs seeking to proceed collectively. While it is consistent with the competing goals of the FLSA that plaintiffs seeking to proceed collectively overcome some evidentiary burden, these more stringent requirements, which are most often seen in the context of nationwide and international collective actions, ultimately undermine the goals of the collective-action provision as well as the broader goals of the FLSA. Where plaintiffs are presented with the "Catch-22" situation described above, the ability of plaintiffs to proceed collectively effectively disappears, and this statutory provision of the FLSA becomes meaningless. The inability to proceed collectively has wider effects than merely to eliminate this procedural litigation strategy. The ills of retaliation that underlie the existence of the collective-action mechanism are greatly exacerbated where plaintiffs are set up to lose. Defendant-employers may thus desire to retaliate by firing such an employee not only for his personal involvement in litigation against the employer, but for his attempts at subjecting the employer to the extensive costs and potential liability of a collective action.

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find out if you have a cart from the horse is to let these people communicate in a meaningful way with that group of people that they say they can prove were wronged.

118 F.R.D. 351, 354 (D.N.J. 1987).

159. 159 F.R.D. 373, 375 (N.D.N.Y. 1995); *see also* Downer v. Franklin Co., No. 7:02-CV-0157, 2002 U.S. Dist. LEXIS 16252, at *3 (N.D.N.Y. July 31, 2002) ("[T]he Court may authorize notice to such potential plaintiffs at an early stage in the litigation, prior to completion of the discovery period, in order to further the remedial goals of the FLSA and to promote efficient case management."). On the remedial purpose of the FLSA, see *Prickett v. DeKalb County*, 349 F.3d 1294 (11th Cir. 2003). There, the court noted that "FLSA is a remedial statute that has been construed liberally to apply to the furthest reaches consistent with congressional direction." *Id.* at 1286 (internal quotation marks omitted); *see also* Bureerong v. Uvawas, 922 F. Supp. 1450, 1466 (C.D. Cal. 1996) ("Because the FLSA is a remedial statute, it should be construed in order to further Congress' goal of providing broad federal employment protection.") (internal quotation marks omitted).

B. *Employees Who Desire To Opt In Are "Similarly Situated"*

Many district courts within the Eleventh Circuit have also denied motions for conditional certification and court-authorized notice on the ground that the plaintiff seeking conditional certification failed to satisfy the second prong of *Dybach*: that other employees are "similarly situated."[160] With respect to this second requirement, the Eleventh Circuit in *Dybach* stated only that "the district court should satisfy itself that there are other employees . . . who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions."[161] The requisite level of similarity between employees in order to satisfy this second prong has differed greatly from case to case and court to court, and district courts, left with little direction from the Eleventh Circuit, have failed to state any uniform expression of factors relevant to the "similarly situated" inquiry. Similar to the disconnect between the stated requirement and application of that requirement regarding the first *Dybach* prong discussed above, many of the district court decisions denying conditional certification for failure to satisfy the second *Dybach* prong have seemed to impose a more stringent burden than the language expressed in *Dybach* and subsequent Eleventh Circuit cases would require.

In some cases, denial of conditional certification appears rational and in conformity with the requirements set forth in *Dybach* and subsequent Eleventh Circuit cases. For instance, in *Brooks v. A Rainaldi Plumbing Inc.*, the United States District Court for the Middle District of Florida denied the plaintiffs' motion for conditional certification for failure to satisfy the second prong of *Dybach*.[162] The *Brooks* court noted that, "[w]hile it is clear that, at this stage, Plaintiffs' burden is not heavy, it is not invisible. Plaintiffs still must show that the class members are similar for purposes of this FLSA action."[163] Although the plaintiffs filed affidavits, the court found that the evidence submitted did not support a finding that putative plaintiffs were similarly situated with respect to the company they worked for, the positions they held, or their compensation structure.[164] These factors are entirely consistent with the requirement set forth in *Dybach* and establish a readily ascertainable standard to which plaintiffs seeking to proceed collectively may look in attempting to meet their burden.

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160. Dybach v. Fla. Dep't of Corr., 942 F.2d 1562, 1567 (11th Cir. 1991).

161. *Id.* at 1567–68.

162. No. 6:06-cv-631-Orl-31DAB, 2006 U.S. Dist. LEXIS 89417, at *7 (M.D. Fla. Dec. 8, 2006).

163. *Id.* at *6.

164. *Id.* at *6–7.

Similarly, in *Coots v. AFA Protective Systems, Inc.*, the United States District Court for the Middle District of Florida denied the plaintiff's motion for conditional certification, discovery of names and addresses of putative plaintiff class members, and permission to send court-supervised notice on the grounds that the plaintiff had failed to show that the individuals to whom notice would be sent had similar job requirements and were subject to similar pay provisions.[165] Specifically, the court found that "Plaintiff failed to make even a minimal showing that the potential plaintiffs are similarly situated employees. In the complaint, Plaintiff never states his job title or duties or the potential plaintiffs' job titles or duties."[166]

In *Smith v. Tradesman International, Inc.*, the United States District Court for the Southern District of Florida denied the plaintiff's motion for court-supervised notice on the ground that "an insufficient amount of discovery has taken place to enable [the court] to make an informed decision on the issue of whether similarly situated employees exist."[167] The court, while denying the plaintiff's request for court-supervised notice, granted the plaintiff's request for discovery of the names and contact information of individuals falling within the proposed class so that the plaintiff could obtain the evidence necessary to meet his burden. The court stated, concerning the "similarly situated" inquiry at the notice stage, that a number of relevant factors should be considered, including the following:

> 1) whether the plaintiffs all held the same job title; 2) whether they worked in the same geographic location; 3) whether the alleged violations occurred during the same time period; 4) whether the plaintiffs were subjected to the same policies and practices and whether these policies and practices were established in the same manner and by the same decision maker; 5) the extent to which the actions which constitute the violations claimed by Plaintiffs are similar.[168]

The *Smith* court's grant of limited discovery in favor of the plaintiff gives the plaintiff an opportunity to meet his evidentiary burden, if evidence sufficient to meet that burden indeed exists. Further, to some extent, the factors laid out by the *Smith* court serve to define and interpret the requirement set forth in *Dybach*, that plaintiffs be similar with "respect to job requirements and with regard to their pay provisions." Nevertheless, these factors seem also to impose requirements beyond

165. No. 6:06-cv-129-Orl-28JGG, 2006 U.S. Dist. LEXIS 71321, at *2, *10 (M.D. Fla. 2006 Oct. 2, 2006).

166. *Id.* at *7.

167. 289 F. Supp. 2d 1369, 1372 (S.D. Fla. 2003).

168. *Id.*

those anticipated by the Eleventh Circuit in *Dybach*, creating a higher burden for plaintiffs to show they are "similarly situated."

Other rulings by district courts that rest on the second prong of *Dybach* similarly appear to impose a more stringent requirement than the language of *Dybach* and subsequent Eleventh Circuit cases would seem to require. For instance, in *Holt v. Rite Aid Corp.*, the United States District Court for the Middle District of Alabama denied the plaintiffs' motion to facilitate notice for failure to satisfy the second prong of *Dybach*.[169] The court noted that "although the Eleventh Circuit has made it clear that . . . a plaintiff may establish that others are 'similarly situated' without pointing to a particular plan or policy, a plaintiff must make some rudimentary showing of commonality . . . beyond the mere facts of job duties and pay provisions."[170] Rather than looking to the requirements set forth by the Eleventh Circuit in *Dybach*, the *Holt* court looked to the policy of judicial economy underlying the collective-action mechanism. The court reasoned that, "[w]ithout such a requirement, it is doubtful that § 216(b) would further the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse."[171] While judicial economy is certainly one of the recognized goals of the collective-action mechanism under the FLSA, it is not the sole objective. Where numerous conflicting goals are present, it is disingenuous for the court to base its ultimate decision on only one of those goals.

Similarly, in *Wombles v. Title Max of Alabama, Inc.*, the United States District Court for the Middle District of Alabama denied the plaintiff's motion to facilitate class notice or, in the alternative, to issue partial notice based on the plaintiff's failure to provide evidence that any employees who desired to opt in were similarly situated.[172] The court noted that the plaintiff had the burden of making "some rudimentary showing of commonality between the basis for his claims and that of the potential claims of the proposed class, beyond the mere facts of job duties and pay provisions."[173] Because the court found that the plaintiff and the employees comprising the class sought to be certified were not similarly situated, the court denied certification and authorization to

169. 333 F. Supp. 2d 1265, 1275 (M.D. Ala. 2004).

170. *Id.* at 1270.

171. *Id.*

172. No. 3:03cv1158-C, 2005 U.S. Dist. LEXIS 34733, at *18 (M.D. Ala. Dec. 7, 2005).

173. *Id.* at *10 (quoting *Holt*, 353 F. Supp. 2d at 1270). It is noteworthy that the two factors identified by the *Wombles* court (i.e. job duties and pay provisions) were the same factors identified by the Eleventh Circuit in *Dybach v. Florida Department of Corrections*, 942 F.2d 1562, 1567 (11th Cir. 1991). Also see *supra* text accompanying notes 160–61.

send notice.[174]

In imposing a requirement beyond that prescribed by the Eleventh Circuit in *Dybach*, the *Holt* and *Wombles* courts relied specifically on the policy of judicial economy said to underlie the collective-action provision. While the *Wombles* court recognized the broad remedial purposes intended to be served by the FLSA, it quickly dismissed any concerns associated with undermining these remedial goals, stating, "[C]ourts, as well as practicing attorneys, have a responsibility to avoid the 'stirring up' of litigation through unwarranted solicitation."[175] By relying exclusively on the goal of judicial economy, however, these courts create a danger of undermining the remedial goals intended to be served by the FLSA as well as the ability of plaintiff-employees to proceed collectively, thereby pooling resources and deterring retaliation on the part of employers. Further, dismissal of the requirements as stated by the Eleventh Circuit in favor of more stringent requirements severely undermines predictability in this area of the law. Plaintiffs looking to the standards set forth by the Eleventh Circuit may find their motions for conditional certification denied, in spite of meeting the apparent requirements set forth by the Eleventh Circuit. This has the potential to create a situation whereby plaintiffs are unable to meet their burden because, as soon as plaintiffs provide evidence sufficient to overcome the burden expected to be imposed, the bar is raised.

Similar concerns for the promotion of predictability, the pursuit of the goals of the collective-action provision, and the remedial goals of the FLSA generally have arisen from cases such as *Marsh v. Butler County School System*.[176] In *Marsh*, the United States District Court for the Middle District of Alabama denied the plaintiffs' motion for conditional certification and permission to send court-supervised notice to all others similarly situated for failure to satisfy the second prong of *Dybach*.[177] The plaintiffs in *Marsh* "indicated an intention to proceed on a theory that similarity is met without the presence of a policy or plan, based simply on the fact that there are FLSA violations involving employees

174. *Wombles*, 2005 U.S. Dist. LEXIS 34733, at *10–11.

175. *Id.* at *18 (quoting Brooks v. Bellsouth Telecomms., Inc., 164 F.R.D. 561, 567 (N.D. Ala. 1995)); *see also* Horne v. United Servs. Auto. Ass'n, 279 F. Supp. 2d 1231 (M.D. Fla. 2003). The *Horne* court stated,

> The competing considerations of the economy of scale envisioned by the FLSA collective action procedure and the caution that courts as well as practicing attorneys have a responsibility to avoid the stirring up of litigation through unwarranted solicitation, require that this court determine that similarly situated persons exist before certifying, even preliminarily, a case as a collective action.

279 F. Supp. 2d at 1237 (internal quotation marks and citations omitted).

176. 242 F. Supp. 2d 1086 (M.D. Ala. 2003).

177. *Id.* at 1095.

of the Defendant."[178] The *Marsh* court first noted that, "while a unified policy is not required in all cases [under Eleventh Circuit precedent], it may be needed in a particular case to serve the policy of judicial economy."[179] The court concluded that,

> [w]here, as here, however, a plaintiff seeks certification of an FLSA case . . . on a theory that similarity is established by virtue of the presence of other FLSA violations, rather than by job duties, there must be at least some commonality among employment actions to establish a pattern. The Plaintiffs have failed to present evidence to support a finding that such a pattern exists in this case.
>
> . . . Therefore, the court is not satisfied that conditionally certifying a collective action will achieve an economy of scale envisioned by the FLSA collective action procedure.[180]

By imposing more stringent requirements than those set forth by the Eleventh Circuit and relying solely on the objective of judicial economy, the *Marsh* court and courts establishing similarly high burdens undermine predictability in the area of collective-action certification and ultimately undermine the availability of the collective-action mechanism as a means of FLSA enforcement. Similar problems to those discussed in the preceding section on district courts' analysis of the first prong of *Dybach* are also raised where a requirement of evidence showing a common scheme, plan, or policy is placed on plaintiffs. Specifically, where plaintiffs are made to introduce evidence of a common scheme, plan, or policy, without opportunity for extensive discovery, plaintiffs seeking to proceed collectively are set up to lose.[181]

VI. CONCLUSION

The Eleventh Circuit's suggested approach to collective-action certification establishes, at least in theory, a seemingly low standard for certification of collective actions at the notice stage. However, upon examination of district court rulings on motions for certification of col-

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178. *Id.* at 1092.

179. *Id.* The *Marsh* court further noted:

> In addition to the policy of judicial economy noted by the Supreme Court [in *Hoffmann-La Roche*], one court concluded that the remedy in § 216(b) is an attempt by Congress to balance the competing policies of strict enforcement of the statutory objective of insuring minimally acceptable pay levels and the avoidance of economic disruption of unanticipated liabilities.

Id. at 1092 n.4 (citation omitted).

180. *Id.* at 1095–96 (citation omitted).

181. *See supra* text accompanying notes 130–46. The "Catch-22" described *supra* may also exist in the context of the second prong of *Dybach* where courts impose a heightened requirement upon plaintiffs to provide evidence of the existence of a common scheme, plan, or policy of FLSA violations.

lective actions, it becomes increasingly apparent that this approach is not as easy to satisfy as its stated terms would purport. In fact, in the majority of cases, motions for conditional certification are denied.[182] The amalgamation of vague statutory language, competing policy goals, and enormous grants of judicial discretion to trial courts has the potential to severely undermine the goals of the collective-action mechanism, the remedial goals of the FLSA, and the general goal of predictability. Under the current state of law of collective-action certification within the Eleventh Circuit, district courts appear entirely free to operate on the basis of unbounded ad hoc determinations ("I know it when I see it"), using empty language to provide some illusion that a determinate set of standards exists. The fact that the "similarly situated" standard is applied to both motions for certification of collective action and motions for court-authorized notice to putative plaintiffs tends only to widen the gap, not only between the theoretical framework and actual rulings but between the broad remedial purposes intended to be served by that framework and the outcomes actually reached.

To date, district courts have been given a great deal of discretion and very limited direction both as to the standards and the procedures to be applied in making collective-action certification decisions. While the majority of district courts have uniformly adopted the two-tiered procedural approach suggested by the Eleventh Circuit, the standards used at each stage have been far from uniform. Ambiguous language such as "lenient," "less lenient," and "more stringent" has been used to define the statutory requirements placed on plaintiffs seeking to proceed collectively. More concerning, as described above, the standards that have been applied by some district courts appear to leave plaintiffs set up to lose. Although not all district courts have used standards effectively creating a "Catch-22," the few have the potential to swallow up the many as the imposition of inconsistent standards reduces predictability and faith in the judicial system. Where plaintiffs seeking to proceed collectively are set up to lose (or, even where they merely believe they are set up to lose), the statutory collective-action mechanism is effectively eviscerated, and plaintiffs may be unable to pool resources or effectively curb retaliation by employers. The collective-action mechanism has played an important role in FLSA enforcement, and any reduction in the availability of this mechanism serves to severely undermine the FLSA as a remedial statute.

182. *See supra* note 157.