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Third Circuit forbids "one-way intervention" in cases combining FLSA opt-in collective claims with Rule 23 opt-out claims

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Takeaway: In theory, class litigation should be fair. Class members should not be permitted to see how a case will play out at trial before deciding whether to opt out of a damages class – a practice known as "one-way intervention." Congress even amended Rule 23 to eliminate this practice, because it gives class members the ability to benefit from a favorable merits determination without subjecting themselves to the binding effect of an unfavorable one. In a recent case combining opt-in claims under the Fair Labor Standards Act (FLSA) and putative class claims under Rule 23, however, a district court enabled one-way intervention by the putative class members. The Third Circuit analyzed the district court's mismanagement of the case in explaining its decision to stay proceedings pending disposition of a petition for writ of mandamus, in an opinion discussing the practice of one-way intervention and the differences between FLSA opt-in collective actions and Rule 23 opt-out class actions. *In re: Citizens Bank, N.A.*, --- F.4th ----, No. 19-3046, 2021 WL 4538647 (3d Cir. Oct. 5, 2021) ("*Citizens Bank*").

As initially enacted, Rule 23 presented only "an invitation to joinder" – it did not provide a means for adjudicating the claims of absent class members. 2021 WL 4538647, at *7 (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546 (1974)). As the U.S. Supreme Court explained in *American Pipe*, Rule 23 originally gave class members an unfair procedural advantage that came to be known as "one-way intervention": "[M]embers of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment." *Id*. (quoting *American Pipe*, 414 U.S. at 547). This gave class members the opportunity "to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Id.*

To address this issue, Congress amended Rule 23 in 1966 to require district courts to resolve the class certification issue "[a]s soon as practicable after the commencement of [the] action." *Id*. (quoting Fed. R. Civ. P. 23(c)(1) (amended 2003)). This amendment served, at least in part, "to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *Id*. (quoting *American Pipe*, 414 U.S. at 547).

In 2003, Congress modified Rule 23 to require class certification "at an early practicable time," but the amendment simply reflected the practical realities of class litigation and in no way "restore[d] the

practice of 'one-way intervention' that was rejected by the 1966 revision." *Id*. (quoting Fed. R. Civ. P. 23(c)(1)(A) and advisory committee's note to 2003 amendment).

It has become commonplace in employment litigation for plaintiffs to combine in one suit a collective action under the Fair Labor Standards Act (FLSA) and parallel state-law class action claims under Rule 23. The plaintiffs employed this tactic in the *Citizens Bank* case. There, twelve current and former loan officers of Citizens Bank sued the bank in the Western District of Pennsylvania, alleging a collective action under the FLSA and putative class claims under state law. The FLSA and state law claims all alleged that the bank imposed on plaintiffs and thousands of other loan officers a policy requiring them to work off-the-clock, thereby denying them overtime pay due under federal and state law.

The FLSA provides a private cause of action to an employee for an employer's failure to pay overtime for hours worked in excess of 40 hours for any workweek. 29 U.S.C. § 207(a). Such a case may be brought "by any one or more employees for and [on] behalf of himself or themselves and other employees similarly situated." 2021 WL 4538647, at *1 (quoting 29 U.S.C. § 216(b)). So long as a plaintiff makes a "modest factual showing" of being "similarly situated" to the proposed collective action plaintiffs, a district court *must* conditionally certify the collective action. *Id*. at *2. Conditional certification authorizes the transmission of court-approved notices to the proposed collective action plaintiffs, giving them the opportunity to *opt-in* to the litigation.

In a damages class action, on the other hand, Rule 23 requires that a district court first certify a class, so that class members can be identified and notice provided authorizing the class members to opt out of the litigation. "This *opt-out* opportunity under Rule 23 stands in sharp contrast to the FLSA's opt-in requirement, and 'is the most conspicuous difference between the FLSA collective action device and a class action under Rule 23.'" *Id*. (quoting *Halle v. W. Penn Allegheny Health Sys., Inc*., 842 F.3d 215, 225 (3d Cir. 2016)).

The district court certified the collective action under the FLSA and then scheduled the trial of the FLSA claims, while at the same time declining to resolve the class certification motions for the state law claims. Given that the FLSA and state law claims involved the same "off-the-clock" policies and claims for overtime pay, this created the classic "one-way intervention" scenario: if the FLSA plaintiffs prevailed at trial, putative class members could decide to "opt-in" to what in all likelihood would be successful damages classes. But if the bank defeated the FLSA plaintiffs' claims at trial, the putative class members could decide to "opt-out" and pursue individual litigation.

The Third Circuit addressed and strongly disapproved this approach in a decision explaining its decision to stay the district court proceedings pending its determination of the mandamus issues on the merits. Because the original district court judge agreed to be taken off the case as soon as the Third Circuit issued its stay order, however, the panel did not need to resolve the mandamus petition in its entirety. *Id*. at *12. Instead, the panel made it clear that the new district judge should manage the combined FLSA and state law claims to avoid any possibility of one-way intervention.