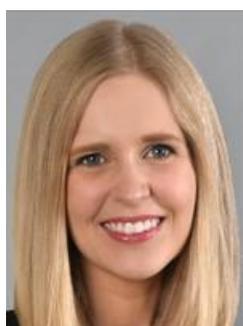


Summary Judgment Strategies In Class, Collective Actions

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A well-timed summary judgment motion is one of the most important tools available to a defendant litigating a wage-and-hour Rule 23 class action or a Fair Labor Standards Act collective action under Section 216(b). While summary judgment *before* class certification does not resolve claims on a classwide basis, it nevertheless can be an expeditious and cost-effective way to dispose of a class or collective action. Strategically, you can also use this motion to educate the judge about the various individualized issues that the case presents in advance of class certification briefing. Summary judgment *after* class certification, on the other hand, may provide an effective way for a defendant to resolve a legal issue across the entire certified class, “pick off” individual or subcategories of class members before trial or demonstrate the individualized issues that may support a request for decertification of the class.

This practice note addresses strategic considerations when filing and drafting summary judgment motions in both Rule 23 wage-and-hour class actions and FLSA Section 216(b) collective actions.

For checklists on drafting and filing summary judgment motions in wage-and-hour class and collective action and in employment litigation generally, see the Lexis Practice Advisor Labor & Employment module’s Employment Litigation topic.

Initial Considerations

If you intend to move for summary judgment, either before or after class or collective action certification, you should first check the local rules of the court as well as the judge’s individual practices to ascertain the complete procedural landscape. Under the Federal Rules of Civil Procedure, you will need to inform the court of your intentions at the initial case management conference. See FRCP

16(c)(2)(E). It is also good practice to apprise the court of your anticipated grounds for seeking summary judgment and the reasons you believe summary judgment should precede or follow class certification, as courts will often form their own opinions about the order in which the case should proceed. See, e.g., *Cash v. Conn Appliances*, 2 F. Supp. 2d 884, 903 (E.D. Tex. 1997) (“After reviewing all of the materials relating to the summary judgment motion and the collective action question, the court determined that resolution of the former should precede a decision on the latter.”). As part of the Rule 16 scheduling order, the court will generally set a schedule for summary judgment and class certification discovery and briefing.

Permissible Timing of Summary Judgment Motions in Wage-and-Hour Class and Collective Actions

Rule 23 Wage-and-Hour Class Actions

While Rule 23 provides that the court should “determine by order whether to certify the action as a class action” at “an early practicable time after a person sues or is sued as a class representative” (Fed. R. Civ. Proc. 23, subd. (c)(1)(A)), federal courts will generally entertain summary judgment motions by a defendant before motions for class certification. See, e.g., *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1211 n.1 (11th Cir. 2005) (“[I]t is within the court’s discretion to consider the merits of the claims before their amenability to class certification.”); *Evans v. Taco Bell Corp.*, 2005 U.S. Dist. LEXIS 20997, at *11 n.6 (D.N.H. Sept. 23, 2005) (“It is well-settled that, absent prejudice to the plaintiff, a court may decide a defendant’s motion for summary judgment in a putative class action before taking up the issue of class certification.”). Because courts adjudicate such pre-certification summary judgment motions separately from any motion for class certification, they do not run afoul of the so-called *Eisen* rule, which requires that a court separately analyze Rule 23 certification and the merits of a case. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Schweizer v. Trans Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998) (“*Eisen* makes clear that the determination of whether a class meets the requirements of Rule 23 must be performed separately from the determination of the merits, but it does not require that class certification be addressed first.”).

As discussed in more detail below (see section entitled “Summary Judgment After Rule 23 Certification”), courts may also entertain (and in some cases may prefer to hear) summary judgment motions after they certify a Rule 23 class. See *Curtin v. United Airlines Inc.*, 275 F.3d 88, 92 (D.C. Cir. 2001) (“[I]t is often more efficient and fairer to the parties to decide the class questions first,” before reaching the merits through a summary judgment motion.); *Thomas v. UBS AG*, 706 F.3d 846, 849 (7th Cir. Ill. 2013) (“Normally the issue of certification should be resolved first.”).

FLSA Section 216(b) Collective Actions

A defendant may file for summary judgment against a named plaintiff or named plaintiffs prior to conditional certification in an FLSA collective action. See, e.g., *Scott v. SSP Am. Inc.*, 2011 U.S. Dist. LEXIS 32819 (E.D.N.Y. Mar. 29, 2011) (granting summary judgment against named plaintiff alleging FLSA misclassification claims on behalf of herself and others similarly situated).

Courts may also entertain summary judgment motions after they conditionally certify a class in an FLSA collective action. See *Bouaphakeo v. Tyson Foods Inc.*, 564 F. Supp. 2d 870, 900 (N.D. Iowa 2008) (noting that courts often hear summary judgment motions on individualized FLSA defenses after conditional certification).

As discussed in more detail below, a defendant also may choose to file for summary judgment when it

files a motion to decertify the FLSA collective action class. Alternatively, subject to local rules and the preference of the court, a defendant can file for summary judgment after an unsuccessful motion to decertify the collective action class.

Strategic Timing of Summary Judgment Motions in Wage-and-Hour Class and Collective Actions

When to bring a summary judgment motion in a wage-and-hour class or collective action will depend in large part on what you want to achieve through the motion. If you have a strong case against an individual plaintiff, or if you seek to avoid certification of a class, you may consider moving for summary judgment before class certification is briefed — even though it may result only in a final judgment as to the named plaintiff(s), i.e., a *stare decisis* effect on other putative class members.

On the other hand, if you have a very strong classwide defense, you may wish to wait until after class or collective action certification (or even stipulate to class or collective action certification) to seek summary judgment. This latter course will ensure that the judgment applies to all class members, i.e., that it has a *res judicata* effect on those who did not opt out of the Rule 23 class or on those who opted in to the FLSA collective action. Below we address practical considerations for filing summary judgment motions at all stages of both Rule 23 wage-and-hour class actions and FLSA Section 216(b) collective actions.

Rule 23 Wage-and-Hour Class Actions

Summary Judgment Before Rule 23 Class Certification

A defendant's successful summary judgment motion brought before Rule 23 class certification will generally only resolve the claims as to the named plaintiffs. Thus, at best, it will serve as *stare decisis* in the litigation of similar claims alleged by later plaintiffs. See, e.g., *Schwarzschild v. Tse*, 69 F.3d 293, 297 (9th Cir. 1995) ("By obtaining summary judgment before notice had been sent to the class, the defendants waived their right to have such notice given and to obtain a judgment that was binding upon the class."); *Mendez v. Radec Corp.*, 260 F.R.D. 38, 47 (W.D.N.Y. 2009) ("[A]n individual's claims will not be barred by a judgment in favor of the defendant in an action brought under Rule 23, if no class was ever certified.").

Nevertheless, a successful motion for summary judgment against a particular named plaintiff may effectively ward off future class claims by:

- forcing plaintiff's counsel to either abandon the case or find a new named plaintiff, which can be quite difficult, especially if discovery has not revealed the identities and contact information of putative class members;
- sending a strong message to plaintiff's counsel that you will fight such claims (and have good evidence and/or arguments to do so); and

- demonstrating to the court overseeing this or any future putative class action that it should not certify a class because at least one such putative class member's claims were not viable and/or that the claims are riddled with individualized issues.

A successful early summary judgment motion may also save the cost of class certification briefing and often classwide discovery, as courts will generally limit classwide merits discovery until after certification. See, e.g., *Stewart v. Winter*, 669 F.2d 328, 332 (5th Cir. 1982) (extensive discovery into the merits of the putative class' claims before certification improperly "impose[s] on defendants one of the major burdens of defending [an] omnibus class action prior to any determination that the action [is] maintainable as such").

In addition, even if the motion ultimately does not succeed, moving for summary judgment before class certification may generate good ammunition for your eventual opposition to class certification. In an effort to generate triable issues of material facts to overcome your motion, the plaintiff will often be forced to rely on individualized evidence relating to the specific employment issues of the individual plaintiff. You may later be able to exploit such evidence to argue that class treatment is inappropriate.

Note, however, that the preclusive effect of an early summary judgment motion may differ when the *plaintiff* moves before or simultaneously with a motion for class certification. The one-way intervention rule generally precludes plaintiffs from seeking a merits determination before a class is certified, and then later seeking to certify a class and to impute the merits determination as to the entire class. See, e.g., *In re Cablevision Consumer Litig.*, 2014 U.S. Dist. LEXIS 44983 (E.D.N.Y. Mar. 31, 2014) (denying plaintiffs' pre-certification motion for summary judgment without prejudice; encouraging plaintiffs to refile motion after the class received Rule 23 notice and opportunity to opt out of suit). Thus, when plaintiffs seek summary judgment as to classwide claims, they usually do so after class certification.

Summary Judgment After Rule 23 Certification

In practice, defendants — even those with very strong cases on the merits — often do not wait to bring summary judgment motions until after certification. Typically, defendants are loathe to engage in unnecessary certification briefing or, even more undesirable, stipulate to a certified class. Thus, many defendants who anticipate bringing a summary judgment motion choose to do so before the court rules on class certification.

Of course, many defendants will either decide that they do not have sufficient evidence to move for summary judgment before class certification, or move for early summary judgment and lose, and accordingly find themselves facing a certified class. Once a Rule 23 class is certified, the defendant may move for summary judgment of the classwide claims or of the claims of individual class members.

Whether to move for summary judgment on the classwide claims or only on the claims of particular class members will depend in large part on the nature of the claims and defenses. Thus, a defendant may wish to move for summary judgment on a classwide basis where a strong basis exists to contest liability for the entire class, such as where the plaintiffs assert, for example, that a particular bonus plan, on its face and as applied to the class as a whole, does not comply with state or federal law. The advantage of such a classwide motion is obvious: It eliminates the claim or claims against the defendant, and may even dispose of the case in its entirety.

On the other hand, the employer may wish to use targeted summary judgment motions to “pick off” particular class members either individually or in a group. This may be done to eliminate certain discrete allegations or issues in the case, or to highlight individualized issues and defenses — such as where a particular subset of the class is subject to unique defenses such as judicial estoppel (e.g., from an undisclosed claim in bankruptcy proceedings) or the signing of a prior release. These latter, individualized summary judgment motions may provide fodder for a motion for decertification of the class. They may also position the case better for trial or settlement.

FLSA Section 216(b) Collective Actions

Summary Judgment Before Collective Action Conditional Certification

As with a summary judgment motion brought before Rule 23 class certification, a summary judgment motion brought in an FLSA Section 216(b) collective action before conditional certification will only ensure resolution of the individual plaintiff’s claim. See *Scott*, 2011 U.S. Dist. LEXIS 32819 at *52 (finding that “[n]o reasonable fact-finder could find that Plaintiff was not an exempt employee under the FLSA” and granting summary judgment on named defendant’s individual claims). For this reason, the strategic timing considerations for summary judgment motions in the collective action context align closely with the Rule 23 class action context. Specifically, early summary judgment may be an appropriate strategy where the defendant believes that other individuals will not likely bring subsequent actions. It may even be an appropriate strategy where the defendant expects follow-up actions, if the defendant wants to send a message to would-be plaintiffs that it will strongly defend against these actions.

Summary Judgment After Collective Action Conditional Certification

If the defendant aims to achieve conclusive resolution of the claims of the entire class, it may be better served by moving for summary judgment after conditional certification as to the entire class. Alternatively, if the court conditionally certifies a class, a defendant may use targeted summary judgment motions to “pick off” individual class members. See *Bouaphakeo*, 564 F. Supp. 2d at 900 (observing that courts often address “supposed [FLSA] individualized defenses ... after [conditional] collective action certification is granted, such as on summary judgment”).

Note that plaintiffs who move for summary judgment most often do so after the court decides certification issues. That is because a successful post-certification summary judgment motion brought as to the classwide claims resolves the claims with respect to the entire collective action class (i.e., all individuals who have affirmatively opted in to the FLSA collective action). Accordingly, such a motion will generally have a *res judicata* effect with respect to any and all such collective action class members. See, e.g., *Rindfleisch v. Gentiva Health Servs.*, 962 F. Supp. 2d 1310, 1324 (N.D. Ga. 2013) (granting plaintiff clinicians’ motion for partial summary judgment, finding as a matter of law that defendant’s pay-per-visit plan, as applied to the conditionally certified class, violated the FLSA).

Summary Judgment Paired With a Decertification Motion

Defendants facing a conditionally certified FLSA Section 216(b) collective action class also have the option to simultaneously seek decertification and summary judgment as to the claims of certain class members. If a defendant can use a summary judgment motion to establish that certain individuals truly do not have viable claims, the motion can serve to convince the court that either: (1) the claims of the other class members are similarly barred by virtue of the commonality of claims established through certification or (2) the claims of the conditionally certified class actually are *not* sufficiently common to

support collective action certification.

Moreover, if a defendant can convince the court to grant summary judgment of the lead plaintiff's claims, it may be presumptively entitled to decertification. See, e.g., *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 878 (6th Cir. 2012) (“[W]ithout a viable claim, White cannot represent others whom she alleged were similarly situated. ... Since White cannot meet her burden that she is similarly situated to the opt-in plaintiffs because her FLSA claims were dismissed, decertification was proper.”) (citing *In re Family Dollar FLSA Litigation*, 637 F.3d 508, 519 (4th Cir. 2011)). However, a defendant should carefully consider the strength of such individual motions when filing them with a decertification motion; if they are weak and ultimately denied, the court may use this as evidence that certification is, in fact, appropriate.

Drafting Tips for Summary Judgment Motions in Rule 23 Wage-and-Hour Class Actions

Drafting a summary judgment motion in a Rule 23 wage-and-hour class action is a highly case-specific endeavor. However, some overarching principles apply to most actions.

Defendants often benefit from taking the named plaintiff's deposition early in the case to determine what, if any, admissions they can use to support a dispositive motion. This is especially true in cases containing off-the-clock and misclassification claims, where the factual inquiry centers on how the plaintiff spends his or her time.

For those cases where the primary issue is a legal one (e.g., whether a vacation pay policy complies with state law), the defendant should focus the briefing on the legal questions and distill the factual inquiries to as few as possible, leaving little room for the plaintiff to create disputed issues of fact.

On the other hand, where the defendant only brings a summary judgment motion as to an individual plaintiff's claims — especially before certification — it may benefit from a fully developed factual analysis, which may show the court how individualized and complicated (and thus not suitable for class treatment) the issues are.

Drafting Tips for Summary Judgment Motions in FLSA Section 216(b) Collective Actions

The considerations in drafting a summary judgment motion in a Rule 23 class action also apply in an FLSA Section 216(b) collective action. In addition, in some instances, the FLSA may provide unique opportunities to focus the court on mostly legal issues, thereby reducing the possibility that the plaintiff can create triable issues of material facts.

For example, the mere fact that the employer failed to compensate the employee for an hour here or there will not establish an FLSA violation; instead, the employee must prove that “the total wage paid to [the] employee in any given workweek divided by the total hours worked that week equals or exceeds the applicable minimum wage.” *Sullivan v. Riviera Holdings Corp.*, 2014 U.S. Dist. LEXIS 90380, at *5 (D. Nev. June 30, 2014). Because this “averaging” test is an easier hurdle to overcome than many state minimum wage and overtime counterparts, it allows the employer to put forth minimal evidence. In some cases, the employer can even accept the plaintiff's allegations as true — if, for example, the plaintiff alleges working five overtime hours per week, and those extra hours do not, on average, put the employee below the minimum wage — in successfully moving for summary judgment.

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