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The Limitations Of 5th Circ. FLSA Class Cert. Ruling

By **Christine Webber and Stacy Cammarano** (April 20, 2021, 2:52 PM EDT)

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Swales v. KLLM Transport Services LLC has recently received considerable attention for directing district courts in the Fifth Circuit to abandon the two-step certification process for Fair Labor Standards Act collective actions that has been widely followed in every circuit for over two decades.

While the U.S. Court of Appeals for the Fifth Circuit adopted a one-step process in Swales, it did not alter the interpretation of the "similarly situated" certification standard required by Title 29 of the U.S. Code, Section 216(b), nor add other requirements to the standard. Moreover, courts outside the Fifth Circuit have not been adopting the Swales analysis, nor do they seem likely to do so.

Swales is unlikely to have far-reaching effects outside of the Fifth Circuit. The cases in other circuits that have addressed whether Swales impacts their use of the two-step approach have all decided that it does not.

For example, in February in McCoy v. Elkhart Products Corp., the U.S. District Court for the Western District of Arkansas rejected the defendant's entreaty to follow Swales, stating: "The court will follow the historical, two-stage approach, which has proven to be an efficient means of resolution of this issue."[1]

Similarly, in Piazza v. New Albertsons LP the U.S. District Court for the Northern District of Illinois in February declined to follow Swales where — unlike Swales — there was no threshold merits questions intertwined with the determination of whether the opt-in plaintiffs were similarly situated.[2]

In March, in Moreau v. Medicus HealthCare Solutions LLC, the U.S. District Court for the District of New Hampshire followed the two-step approach and rejected the defendant's request to allow merits discovery before deciding the plaintiffs' motion for conditional certification.[3]

In Wright v. Waste Pro USA Inc., the U.S. District Court for the Southern District of Florida in April refused to grant reconsideration of its prior conditional certification because of extensive support from the U.S. Court of Appeals for the Eleventh Circuit for the two-step process, and the rejection of Swales by all courts outside the Fifth Circuit.[4] The U.S. District Court for the Eastern District of Kentucky also declined in April to abandon the traditional two-step process in favor of Swales with its decision in

Brewer v. Alliance Coal LLC.[5]

Parties should not expect Swales to broadly change the two-step process, which has been widely endorsed among the circuits[6] and implemented at the district court level.[7] However, FLSA plaintiffs should be vigilant in identifying and resisting attempts to apply Swales on the margins, a tactic to which some courts have been receptive.

For example, while in McColley v. Casey's General Stores Inc. the U.S. District Court for the Northern District of Indiana explained in March that the "FLSA certification two-step remains the dance of this circuit" post-Swales, it questioned whether there should be more than a modest showing that plaintiffs are similarly situated at the conditional certification stage.[8]

Similarly, in Loomis v. Unum Group Corp., the U.S. District Court for the Eastern District of Tennessee in January relied on Swales to grant precertification discovery over the plaintiffs' objection, but was careful to clarify that its method did "not undermine the two-step approach of FLSA cases in the Sixth Circuit."[9] Even pre-Swales courts had discretion to permit precertification discovery, so this does not represent significant change.

Parties addressing Swales arguments outside the Fifth Circuit should be prepared to grapple with the timing issue, which was completely ignored by the Fifth Circuit in issuing Swales. In opt-in cases governed by Section 216(b), the statute of limitations continues to run for each potential plaintiff until they opt in to the litigation.

In Hoffmann-La Roche Inc. v. Sperling, the U.S. Supreme Court in 1989 identified the importance of timely notice as one reason the district court should be involved in the notice process.[10] One reason courts have widely adopted the two-step process is so that notice can be issued early in the litigation, before potential plaintiffs' statute of limitations expires; proceeding with discovery prior to ruling on issuance of notice, as Swales advocates, would interfere with timely notice.[11]

When there are delays in issuing notice — which engaging in discovery before deciding on notice would certainly cause — then plaintiffs should seek tolling of the statute of limitations until the notice issue is resolved. Many courts have tolled the running of the statute of limitations in collective actions where there was delay in ruling on certification, including delay caused by discovery.[12]

One would expect to see plaintiffs in the Fifth Circuit, or in any other jurisdiction imposing discovery prior to ruling on certification, ask for tolling of the statute of limitations. Otherwise, defendants would be incentivized to drag their feet on discovery to run out the clock on claims.

Another point that courts confronting efforts to expand Swales should consider is one that Swales purports to answer: how best to ascertain "whether putative plaintiffs are similarly situated — not abstractly but actually."[13] Until notice is issued, and opt-in forms received, any analysis of whether the group of plaintiffs seeking to proceed collectively are similarly situated is abstract and theoretical. Whether plaintiffs are similarly situated should be decided based on the specific individuals who opt in, not all those who theoretically might have been able to do so.

For example, in a case like Swales where independent contractor agreements were at issue, it is possible that 80% of the potential opt-ins worked under identical agreements, while the remaining 20% worked under a dozen differing agreements. While anticipating the need to analyze a baker's dozen of different agreements may make it appear the group is not similarly situated, if notice is issued and the only

people who opt in are from the 80% with an identical agreement, then the plaintiffs are actually similarly situated.

So, if as Swales asserts, the goal is determining whether opt-ins are actually similarly situated, not theoretically or abstractly similar, then issuing notice and evaluating who opts in is necessary to reach that determination — a process that the traditional two-step certification process facilitates better than the Swales method.

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[1] McCoy v. Elkhart Prod. Corp., No. 5:20-CV-05176, 2021 WL 510626, at *2 (W.D. Ark. Feb. 11, 2021).

[2] Piazza v. New Albertsons, LP, No. 20-CV-03187, 2021 WL 365771, at *5 n.6 (N.D. Ill. Feb. 3, 2021).

[3] Moreau v. Medicus HealthCare Sols., LLC, No. 20-CV-1107-JD, 2021 WL 919869, at *2 (D.N.H. Mar. 10, 2021).

[4] Wright v. Waste Pro USA, Inc., No. 0:19-cv-62051-KMM, 2021 WL 1290299, at *2-3 (S.D. Fla. April 6, 2021).

[5] Brewer v. Alliance Coal, LLC, No. 7:20-cv-0041-DLB-EBA, 2021 WL 1307721 (E.D. Ky. April 6, 2021).

[6] E.g., Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 516 (2d Cir. 2020); Zavala v. Wal-Mart Stores Inc., 691 F.3d 527, 536 (3d Cir. 2012); Monroe v. FTS USA, LLC, 860 F.3d 389, 397 (6th Cir. 2017); Campbell v. City of Los Angeles, 903 F.3d 1090, 1100 (9th Cir. 2018); Thiessen v. Gen. Electric Cap. Corp., 267 F.3d 1095, 1105 (10th Cir. 2001), cert. denied, 536 U.S. 934, 122 S.Ct. 2614, 153 L.Ed.2d 799 (2002); Mickles v. Country Club, Inc., 887 F.3d 1270, 1276 (11th Cir. 2018) ("Our Court has suggested a two-tiered approach in making a similarly-situated determination in opt-in collective actions."); Morgan v. Fam. Dollar Stores, Inc., 551 F.3d 1233, 1262–63 (11th Cir. 2008); Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1217 (11th Cir. 2001) ("The two-tiered approach to certification of § 216(b) opt-in classes described above appears to be an effective tool for district courts to use in managing these often complex cases, and we suggest that district courts in this circuit adopt it in future cases.").

[7] E.g., Camp v. Bimbo Bakeries USA, Inc., No. 18-CV-378-SM, 2019 WL 440567, at *2 (D.N.H. Feb. 4, 2019) (collecting cases in the First Circuit); Butler v. DirectSAT USA, LLC, 876 F. Supp. 2d 560, 566 (D. Md. 2012) ("When deciding whether to certify a collective action pursuant to the FLSA, courts generally follow a two-stage process"); Beeson v. C-Cat, Inc., No. 120CV00252JPHMPB, 2020 WL 7425339, at *2 (S.D. Ind. Dec. 18, 2020) (describing the two-step process that district courts "commonly apply"); McCoy, 2021 WL 510626, at *2 (district courts within the Eighth Circuit have historically utilized a two-stage approach for collective action certification under § 216(b)); Galloway v. Chugach Gov't Servs., Inc., 263 F. Supp. 3d 151, 155 (D.D.C. 2017) (explaining that Courts in the D.C. Circuit "have settled on a two-stage inquiry" for certification of FLSA collective actions). See also Dominick v. United States, 139 Fed. Cl. 694, 697 (2018) ("Many courts, including the United States Court of Federal Claims, have instituted a two-

step process in determining whether a motion to certify a collective action should be granted under the FLSA.").

[8] McColley v. Casey's Gen. Stores, Inc., No. 2:18-CV-72 DRL-JEM, 2021 WL 1207564, at *3 (N.D. Ind. Mar. 31, 2021).

[9] Loomis v. Unum Grp. Corp., No. 1:20-CV-251, 2021 WL 1206416, at *4 (E.D. Tenn. Jan. 21, 2021).

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

[11] See, e.g., Patton v. Thomson Corp., 364 F. Supp. 2d 263, 268 (E.D.N.Y. 2005) (explaining that "early notice will help to preserve and effectuate the rights of potential plaintiffs whose claims might otherwise become time-barred during the discovery phase of the case").

[12] See, e.g., Curless v. Great Am. Real Food Fast, Inc., 280 F.R.D. 429 (S.D. Ill. 2012) (tolling the limitations period for the time between defendant objecting to discovery requests and the court's resolution of same); Misra v. Decision One Mortg. Co., LLC, 673 F. Supp. 2d 987, 999 (C.D. Cal. 2008) (granting tolling to cover delay caused by need for additional discovery, and extending until defendant produced class list for notice to issue). Many other courts have granted tolling when there has been delay in ruling on a motion for notice. See, e.g., Struck v. PNC Bank N.A., 931 F. Supp. 2d 842, 848 (S.D. Ohio 2013); Depalma v. Scotts Co., No. CV137740KMJAD, 2017 WL 1243134, at *8 (D.N.J. Jan. 20, 2017); Thompson v. Direct Gen. Consumer Prods., Inc., No. 3:12–cv–1093, 2014 WL 884494, at *8–9 (M.D. Tenn. Mar. 5, 2014); Bergman v. Kindred Healthcare, Inc., 949 F. Supp. 2d 852, 860–61 (N.D. Ill. June 11, 2013); Kutzback v. LMS Intellibound, LLC, 233 F. Supp. 3d 623, 632 (W.D. Tenn. 2017); McGlone v. Cont. Callers, Inc., 867 F. Supp. 2d 438, 445 (S.D.N.Y. 2012).

[13] Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 433 (5th Cir. 2021).
