Who's Afraid of the Big Wage Suit?
How Courts Have Butchered the 29 U.S.C. § 216(b) “Collective Action”
by Ignoring its Historic Roots and Textual Uniqueness
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There are three devices for plaintiffs to band together in one aggregate lawsuit. First, and simplest, is permissive joinder, under Rule 20, of two or more plaintiffs who sue about the same transaction or occurrence and present at least one common fact issue. Second is class action status under Rule 23, which merges automatically, without each plaintiff opting in affirmatively, groups with sufficiently common claims whose numbers make joinder impractical. Third, and least well-known, is collective action status under 29 U.S.C. § 216(b) for similarly situated labor claims -- minimum or overtime wage, age discrimination, or equal pay claims -- which, unlike Rule 23, requires each plaintiff affirmatively to file an opt-in consent in order to participate in the aggregate lawsuit.

Courts apply no unified theory of aggregate litigation that relates the three devices. To the extent they have, courts analyze § 216(b) as an analogue of Rule 23 with a stricter opt-in process. They refuse to allow a wage case to proceed as a collective action unless the plaintiffs meet a burden of proving sufficient “commonality” -- a word that appears in Rule 23, not § 216(b). And this commonality threshold is high, yielding holdings such as that collective actions are “only appropriate where those in the pool of potential claimants perform the same duties.”

Troubling consequences flow from courts’ high threshold for 216(b) collective actions -- starting, but not ending, with improper rejections of collective actions by even workers claiming the same wage violation in the same workplace. Even when courts allow collective actions, the prevailing interpretation hinders vindication of workers’ rights with cost and delay -- due to not only the evidentiarily complex motion for collective action certification, but also the bifurcation of discovery. The longer-delayed the case, the more vulnerability plaintiffs have to defense tactics like Rule 68 offers, to the “disappearing plaintiffs” problem of transient workers moving away, to the running of statutes of limitations before some workers opt in, etc. The extra cost and delay, moreover, means some claims will never be brought, and large claims can be prosecuted only by a handful of major class action firms rather than by a broader range of small firms and nonprofit organizations -- who may be closer to the workers, both geographically and in ideological mission.

But the problem is not just that this cramped interpretation of § 216(b) burdens plaintiffs; the more fundamental problem is that the interpretation is legally incorrect. Section 216(b) was enacted in 1938 not as a tighter version of Rule 23 -- which would not exist for another three decades -- but as a liberalized version of the joinder that existed under Rule 20 and prior common law. By allowing any “similarly situated” plaintiff to opt in without a Rule 20 motion for each, § 216(b) facilitated joinder of wage claims by coworkers, which are presumptively similar enough to warrant joint adjudication.

In short, courts have unduly restricted collective actions by interpreting § 216(b) as a Rule 23 analogue requiring high-threshold commonality inquiry, rather than as a Rule 20 liberalization requiring only enough basic similarity to warrant joint litigation. Thus, all the caselaw making plaintiffs prove “commonality” or “the same duties” is incorrect. Under section 216(b), certain labor claims are presumptively properly litigated collectively.

Properly interpreting § 216(b), labor claims of the specified types (wage, age, and equal pay) should proceed as collective actions presumptively, as long as the plaintiffs meet a prima facie showing of qualifying under the statutory terms: pressing (a) the same statutory claim (e.g., all claim a minimum wage violation, not some a minimum wage violation but others an overtime or a discrimination claim) by (b) the same employer. The inquiry into these factors, and into whether the plaintiffs truly are “similarly situated” enough, should occur upon a motion by defendants (not plaintiffs) challenging any of these requirements as (a) a Rule 21 motion redressing “mis-joinder” of claims, or (later in the case) (b) a Rule 42 motion to sever plaintiffs’ claims into separate trials.

This Article ends by discussing two reasons courts have come to this incorrect interpretation of § 216(b). First is the honest error that occurs when courts’ understandably narrow case-by-case focus neglects the perspective that history would provide. Second, and less understandable, is courts’ hostility to civil litigation -- especially employment claims, which district and appellate courts have misinterpreted so narrowly that even the Rehnquist and Roberts Courts repeatedly have reversed them unanimously.