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Lawyer Insights

July 9, 2018

Collective Action Defendants, Don't Count Out Early Opt-Ins

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Published in Law360


In April 2014, Andrea Mickles filed a complaint against her employer, Country Club Inc., alleging it had violated the Fair Labor Standards Act by improperly classifying her and other employees as independent contractors and failing to pay them minimum wage and overtime.[1] She filed her case as a collective action and others opted into the case before any ruling on conditional certification.[2] Those opt-ins eventually provided the U.S. Court of Appeals for the Eleventh Circuit with an opportunity to address an issue of first impression in any circuit: What is the status of individuals who opt into a case that is never conditionally certified?

The FLSA at 29 U.S.C. Section 216(b) allows a plaintiff to file a collective action, that is, a lawsuit on behalf of herself and all others similarly situated.[3] Unlike a class action, in which similarly situated individuals are bound by the judgment unless they opt out, a collective action only binds individuals who affirmatively opt in.[4] Typically, collective actions follow a two-step process.[5] First, the plaintiff moves for conditional certification, which is not subject to a very high standard and is usually granted.[6] At that point, notice goes out to other potential class members, advising them of the opportunity to opt in.[7] Then, after discovery, the defendant files a motion to decertify the class.[8] At the decertification phase, the court decides whether the original plaintiff and opt-in plaintiffs are similarly situated.[9] If they are, then the case proceeds as a representative action.[10] If they are not, the opt-ins' claims are dismissed without prejudice, so that they may later file individual claims.[11]

In *Mickles v. Country Club Inc.,* other employees opted in before conditional certification. The motion for conditional certification was ultimately denied because it was untimely, but the order made no mention of the opt-in plaintiffs' being dismissed from the case.[12] Country Club later filed a motion for clarification of the district court's conditional certification order, inquiring about which plaintiffs remained parties in the action.[13] The opt-ins felt they were party plaintiffs because the court had never dismissed their claims, while Country Club believed they had never officially become plaintiffs because there was no conditional certification.[14] The district court agreed with Country Club, stating that the opt-ins had never been adjudicated to be similarly situated to Mickles, so when the motion for conditional certification was denied, they effectively dropped out of the case.[15]

Shortly thereafter, Mickles and Country Club reached a settlement, which was approved by the district court.[16] The opt-ins, who were not parties to the settlement, then filed a notice of appeal concerning the district court's conditional certification order, clarification order, and order approving the settlement.[17] As a threshold matter, the Eleventh Circuit had to decide whether these plaintiffs had appellate standing, a question that was inseparable from the primary issue in the case: were the opt-ins parties to the litigation

even though there had been no ruling on whether they were similarly situated?[18] If so, any decisions the district court made with respect to Mickles would also apply to them. If not, they would have to bring their own individual cases, an option that may have been foreclosed by the statute of limitations.

The Eleventh Circuit addressed this question of first impression and ultimately held — in a published (precedential) opinion — that the opt-in plaintiffs were, in fact, parties to the litigation.[19] This meant they could appeal any of the district court's decisions with respect to Mickles, including approval of her settlement.

The court first looked to the FLSA collective action statute to find two requirements for employees to become parties to litigation.[20] First, the named plaintiff must file on behalf of herself and other similarly situated employees.[21] Second, and not in dispute in the Mickles case, the opt-in employees must give written consent to become parties to the litigation.[22] Country Club maintained that the first requirement was not met because the opt-ins were never adjudicated to be similarly situated to Mickles.[23] In a footnote, the court cited the Third Circuit's articulation of the issue:

Section 216(b) is written in the negative, providing 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." Thus, the statute establishes that it is, at a minimum, necessary to file a written consent in order to become a party-plaintiff, but it is silent as to whether filing such a consent, without more, is sufficient to confer that status.[24]

The court examined both the plain language of the statute and purpose of conditional certification in other contexts and determined that the purpose of the conditional certification step was merely to disseminate notice of the action and was not necessary to obtain party plaintiff status.[25] The court found: "Although Section 216(b) also requires an opt-in plaintiff be similarly situated to the named plaintiff, the opt-in plaintiffs remain party plaintiffs until the district court determines they are not similarly situated and dismisses them."[26] This means that the filing of a consent, and nothing further, is necessary for those who opt-in to become party plaintiffs.

Consequently, on April 18, 2018, the Eleventh Circuit vacated the district court's clarification order and remanded with instructions for the district court to either dismiss the opt-in plaintiffs from the case without prejudice so that they could refile or to go forward with their individual cases because discovery had already been completed.[27] Additionally, the court found that due to the running of the statute of limitations, the dismissal without prejudice would have the effect of precluding the plaintiffs from filing their claims — tantamount to a dismissal with prejudice.[28] The court held that opt-in plaintiffs were entitled to statutory tolling of their claims beginning on the dates they filed their written consents.[29]

Following Mickles, defeating conditional certification will not result in automatic dismissal without prejudice of early opt-ins. Employers will have to continue to defend against opt-in plaintiffs (or move to sever their claims), even if the opt-ins are not at all similarly situated to the named plaintiff.

Notes

[1] See *Mickles v. Country Club Inc.,* 887 F.3d 1270, 1273 (11th Cir. 2018).

[2] See id. at 1274.

[3] See Fair Labor Standards Act of 1938 § 16, 29 U.S.C.A. § 216(b).

[4] See id. at 1275–76.

[5] See id. at 1276.

[6] See id.

[7] See id.

[8] See id.

[9] See id.

[10] See id.

[11] See id.

[12] See id. at 1274.

[13] See id. at 1274–75.

[14] See id.

[15] See id. at 1275.

[16] See id.

[17] See id.

[18] See id.

[19] See id. at 1273.

[20] See id. at 1276.

[21] See id.

[22] See id.

[23] See id.

[24] See id. at n. 7 (quoting *Halle v. W. Penn Allegheny Health Ssy. Inc.*, 842 F.3d 215, 225 n. 10 (3rd Cir. 2016).

[25] See id. at 1277–78.

[26] Id. at 1278.

[27] See id. at 1281.

[28] See id. at 1280.

[29] See id. at 1281.

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