

**The Use of Representative Testimony and Bifurcation of Liability and Damages in FLSA  
Collective Actions**

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## INTRODUCTION

As the Supreme Court explained in *Hoffmann-La Roche, Inc. v. Sperling*, Congress authorized collective actions under 29 U.S.C. §216(b) (“Section 216”) of the Fair Labor Standards Act (“FLSA”) in order to lower individual litigation costs and to benefit the judicial system by providing “efficient resolution in one proceeding of common issues of law and fact.” 493 U.S. 165, 170 (1989); *Prickett v. DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003) (stating that “Congress' purpose in authorizing § 216(b) class actions was to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer.”). Consistent with these Congressional goals, nearly every court to consider the issue has concluded that in FLSA collective actions, plaintiff-by-plaintiff discovery and testimony is not required unless the use of representative evidence would result in an unfair trial in the particular circumstances presented. In *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982), for example, the Eleventh Circuit upheld an award of damages to 207 FLSA plaintiffs that followed a trial in which only 23 plaintiffs testified. The First Circuit, in *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-225 (1st Cir. 1982), affirmed a judgment in favor of plaintiffs on their FLSA overtime claims where only six out of 246 class members testified at trial. In *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), the Ninth Circuit Court upheld a verdict for over 800 FLSA plaintiffs that was based on testimony from fewer than 50 of those plaintiffs.

The use of representative testimony prevents judicial inefficiencies resulting from redundant testimony, or a multiplicity of similar actions arising out of the same law and facts. In addition, the use of representative testimony in FLSA cases permits plaintiffs with low dollar value claims to assert their rights. See *Hoffmann-La Roche, Inc.*, 493 U.S. at 170 (stating that

one of the purposes of a 216(b) collective action is to allow plaintiffs to vindicate otherwise uneconomical claims by pooling resources and lowering costs; *Prickett*, 349 F.3d at 1296 (noting that the FLSA is a remedial statute that is “construed liberally to apply to the furthest reaches consistent with congressional direction”) (quoting *Johnston v. Spacefone Corp.*, 706 F.2d 1178, 1182 (11th Cir.1983)).

Representative testimony is particularly appropriate when the policy or practice at issue is company-wide. For example, if a company makes the exempt/non-exempt status decision on a company-wide basis by job code without considering individual, or local, factors, it makes sense that representative testimony can be used to evaluate the correctness of the decision. As a district court recently noted:

Defendant's argument [requiring individualized inquiry into each employee's duties and hours] is unpersuasive because Defendant itself classifies all reporters and account executives as exempt. Defendant cannot, on the one hand, argue that all reporters and account executives are exempt from overtime wages and, on the other hand, argue that the Court must inquire into the job duties of each reporter and account executive in order to determine whether that individual is “exempt.”

*Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 613 (C.D. Cal. 2005).<sup>1</sup>

District courts have broad discretionary authority to manage FLSA collective actions. Federal Rule of Civil Procedure 26(b)(2), Federal Rule of Evidence 403, and Federal Rule of Evidence 611 permit district courts to limit unnecessary, duplicative, and unduly burdensome litigation tactics, whether in the context of discovery or the presentation of trial evidence. That discretion includes the discretion (1) to limit discovery by the employer to a sample of the

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<sup>1</sup> See also *Tierno v. Rite Aid Corp.*, 2006 WL 2535056, at \*9 (N.D. Cal. Aug. 31, 2006) (where defendant “always categorically classified all Store Managers as exempt employees without exception and without regard to store size, location, sales levels, staffing levels or customer base, and without making any individualized assessments to account for potential variation between individual Store Managers,” defendant’s contention “that each Store Manager position must now be individually assessed to determine whether the position can be categorized as exempt or non-exempt rings hollow”).

persons who have opted into the collective action; and (2) to permit representative testimony at trial, both as to the liability determination and as to damages.

In addition, trial courts have broad discretion under Federal Rule of Civil Procedure 42 to bifurcate issues for discovery and trial. Bifurcating wage/hour cases into a liability phase and a damages phase – both for the purposes of discovery and trial – saves substantial time and resources .

**A. Bifurcation of Liability and Damages for Discovery and Trial Saves Time and Cost.**

The scope of damages in a wage/hour collective action is heavily dependant on the issues to be decided in the liability phase. These issues include: (1) the time period during which class members were nonexempt employees entitled to recover overtime pay (including the applicable statutes of limitations); (2) whether liquidated or other enhanced damages need to be calculated for all or some of the class period, and, if so, for which class members, under what law, and at what rate; (3) entitlements to prejudgment interest;<sup>2</sup> and (4) for individuals who are in both the FLSA class and a state law class, whether overtime pay needs to be calculated under state law, and, if so, for what time period.

If the case is bifurcated into a liability phase and a damages phase, all of these variables will be determined *before* damages proceedings commence, allowing for discovery and proof relating to damages that are properly targeted and bounded – e.g., limited to eligible individuals, eligible time periods, applicable pay rates, and relevant remedies. Similarly, if the proceedings are bifurcated, expert witness discovery and expert testimony at trial relating to damages will be based on the proper variables. If the case is not bifurcated, the parties will be forced to make

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<sup>2</sup> See, e.g., *Ford v. Alfaro*, 785 F.2d 835, 843 (9th Cir. 1986) (FLSA); *Reich v. IBP, Inc.*, No. 88-2171 EEO, 1996 U.S. Dist. LEXIS, \*21 (D. Kan. Mar. 22, 1996) (FLSA); Minn. Stat. An. §549.09; Wis. State § 814.04(4).

various (and differing) assumptions about what the parameters for calculating damages will be, and will be forced to present different damages proofs at trial designated to address different contingencies and different scenarios.

*In re Farmers Insurance Exchange Claims Representatives' Overtime Pay Litigation*, 336 F. Supp. 2d 1077 (D. Or. 2004) (“*Farmers MDL*”), is instructive. The *Farmers MDL* court employed a bifurcated approach. In the liability phase, the *Farmers MDL* court held that all three tiers of Farmers automobile damage claim handlers, and other categories of claim handlers were nonexempt, and that liability/bodily injury claim adjusters and certain other types of claim handlers were exempt; that Farmers had a good faith defense to FLSA liability as to one time period but not as to another; that FLSA and state-law liquidated damages were available for one time period but not for another; and that certain state law remedies and limitations periods were applicable as to some categories of class members for certain time periods based on the exemption issue findings. *See* 336 F. Supp. 2d at 1112. The damages phase was then tailored to the first-phase findings, with individual class member claims and proofs limited to the time periods and remedies determined in the exemption phase.

**B. The Use of Representative Evidence at Trial Makes Trials of Collective Actions Manageable.**

Using representative testimony at trial avoids presentation of cumulative and repetitive testimony at trial. As a result, the trial is far shorter and more manageable.

The predicate for using representative evidence is the determination that class members are similarly situated for purposes of the exemption analysis. Assuming the Court makes a second stage similarly-situated determination (after a motion to decertify) in plaintiffs’ favor, or if no motion to decertify is made, the exemption issue can and should be tried on the basis of

representative evidence – i.e., testimony from a selection of class members and other percipient witnesses about the job duties of the class members.<sup>3</sup>

Representative evidence has been used in numerous FLSA actions to determine various liability issues, including exemption issues, on a classwide basis. *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 697-701 (3d Cir. 1994) (court determined on classwide basis that reporters were misclassified as exempt professional employees; 22 out of 70 employees testified); *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823, 828 (11th Cir. 1988) (court determined on classwide basis that 8 employees were misclassified as managers; at least one employee did not testify; “The fact that several employees do not testify does not penalize their claim; ‘it is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of just and reasonable inference.’”); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-25 (1st Cir. 1982) (court determined on classwide basis that 246 assistant managers working in 44 different restaurants were not exempt “executive” employees based on limited testimony from witnesses from six stores; court also limited number of witnesses after hearing substantially the same testimony from six witnesses); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (“[T]he plaintiffs correctly point out that not all employees need testify in order to prove FLSA violations or recoup back-wages, [but] the plaintiffs must present

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<sup>3</sup>The judgment from a trial based on representative testimony is binding on all members of the designated collective action who timely opted in. *See, e.g., Dolan v. Project Construction Corp.*, 725 F.2d 1263, 1266 (10th Cir. 1984) (“the principal difference between a Rule 23 class action and a §216(b) collective action is that the similarly situated employee must ‘opt-in’ to be bound by a judgment in a §216(b) suit”); *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 579-80 (7th Cir. 1982) (FLSA collective action judgment binds those individuals who opt in); *Shain v. Armour & Co.*, 40 F. Supp. 488, 489-90 (W.D. Ky. 1941) (purpose of FLSA class action is to provide one law suit in which claims of similarly situated employees can be adjudicated as to common questions such as “whether or not any of the existing exemptions apply;” judgment is “res judicata as to all members of the class,” provided that they have joined the suit so as “to bind them by the final judgment”).

sufficient evidence for the jury to make reasonable inference as to the number of hours worked by non-testifying employees.”); *Janowski v. Castaldi*, 2006 WL 118973, \*5 (E.D.N.Y. Jan. 13, 2006) (Plaintiffs ““need not present testimony from each underpaid employee; rather, it is well established that [they] may present the testimony of a representative sample of employees as part of [their] proof of the prima facie case under FLSA.”” (quoting *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997)) (alterations in original); *Theibes v. Wal-Mart Stores*, 2004 WL 1688544 at \*1 (D. Or. July 26, 2004) (“I decided to bifurcate the case for separate trials on liability and damages. I ruled that plaintiffs would be allowed to present ‘representative’ testimony regarding Wal-Mart’s alleged pattern or practice of suffering or permitting off-the-clock work.”); *Alvarez v. IBP, Inc.*, 2001 WL 34897841, \*6 (E.D. Wash. Sept. 14, 2001), *rev’d in part on other grounds* (“The use of representative evidence is well accepted for determining liability in FLSA cases.”); *Takacs v. Hahn Auto. Corp.*, 1999 WL 33127976, \*1 (S.D. Ohio Jan. 25, 1999) (“Based upon [*Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680 (1946)] courts including the Sixth Circuit, have uniformly held that damages in an FLSA overtime case can be proved with testimony from a representative group of plaintiffs and, thus, without requiring each plaintiff seeking same to testify.”); *Morgan v. Family Dollar Stores, Inc.*, No. 7:01-cv-0303-UWC, slip op. at 6-7 (N.D. Ala. Jan. 13, 2005) (denying motion to decertify) (“Because of the substantial similarities of their job duties, and because of Family Dollar’s company-wide policies and procedures relating to its store managers, the plaintiffs may rely on representative testimony to establish liability and obtain relief, if such is warranted under the FLSA. This scenario is similar to that in the trial of certified class actions under Rule 23(b)(3), where the testimony and evidence put forth by class representatives binds unnamed class members. . . . Thus, notions of due process and fairness are not offended by a collective trial in

these circumstances.”); *In re Farmers Ins. Exch. Claims Representatives’ Overtime Pay Litig.*, 336 F. Supp. 2d 1077 (D. Or. 2004), *rev’d in part on other grounds*, 481 F.3d 1119 (9th Cir. 2007) (court determined exempt/nonexempt status of insurance claims employees on classwide basis based on representative evidence); *see also Robinson-Smith v. Gov’t Employees Ins. Co.*, 323 F. Supp. 2d 12 (D.D.C. 2004) (court granted summary judgment for a plaintiffs on a collective action basis to FLSA collective action members comprised of two types of GEICO Auto Adjusters based on common evidence of job duties); *Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805 (2001) (court granted summary judgment under California law on classwide basis to class comprised of auto, property and liability claims employees based on common evidence of job duties). As the leading treatise on the FLSA states, “It is well settled that generally not all affected employees must testify in order to prove violations or to recoup back wages. Rather, in most cases, employees and the Secretary may rely on representative testimony.” *The Fair Labor Standards Act* 1333 (Ellen C. Kearns, et al., eds., 1999).

Representative evidence may also be used to establish a pattern and practice among class members of working uncompensated overtime. *See, e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946); *Martin v. Selker Bros. Inc.*, 949 F.2d at 1286, 1296-98 (3d Cir. 1991); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d at 825, 826-29 (5th Cir. 1973); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115-16 (4th Cir. 1985); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 746-50 (2004). When an employer has failed to keep accurate records of an employee’s work time, an employee need only establish “as a matter of just and reasonable inference” that work was performed for which the employee was improperly compensated. *Anderson*, 328 U.S. at 687-688. The employee is only required to provide a *reasonable approximation* of the number of hours worked for which overtime compensation is

owed. *Id.* Once an employee has provided that reasonable estimate, the burden switches to the employer to “pinpoint evidence of the precise amount of work performed or to negate the reasonableness of the inferences to be drawn from the [employees’] evidence.” *Dove v. Coupe*, 759 F.2d 167, 173-175 (D.C. Cir. 1985). The burden of disproving an employee’s approximation if “a significant one[.]” *Blake v. CMB Construction*, Civ. No. 90-388-M, 1993 WL 840278 at \*5 (D.N.H. Mar. 30, 1993).

Representative testimony is frequently admitted on damages issues. *See e.g., Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1296-98 3d Cir. 1991) (plaintiffs could use representative testimony to make prima facie case that non-testifying employees performed some work for which they were not properly compensated; *Murray v. Stuckey’s Inc.*, 939 F.2d 614 (8th Cir. 1991) (each side presented testimony regarding common issue of exempt/nonexempt status of store managers working at different stores; court decided issue on classwide basis); *Donavan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115-16 (4th Cir. 1985) (district court properly made classwide determinations regarding whether employees received uninterrupted 30-minute breaks based on representative testimony; approximately 30 out of 98 employees testified); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 826-29 (5th Cir. 1973) (no error in permitting representative evidence to establish prima facie case that non-testifying employees worked overtime for which they were not compensated).

**C. How Much Representative Testimony is Appropriate Will Depend on Whether the Testimony Presented is Representative of General Patterns and Practices.**

When deciding how much representative testimony is appropriate, a district court should consider the quality, not merely quantity, of the representative testimony. Anecdotal evidence is “offered not primarily for [its] quantity, but for [its] quality. The testimony . . . is valuable insofar as it could persuade a reasonable factfinder that a pattern or practice . . . exists.” *Velez v.*

*Novartis Pharms. Corp.*, \_\_ F.R.D. \_\_, 2007 WL 2377378, at \*20 (S.D.N.Y. Aug. 16, 2007).

Because the persuasive effect of representative testimony turns on its content rather than its volume, efforts to measure such testimony simply in terms of sample size are misguided. As the Ninth Circuit recently held, “we find no authority requiring or even suggesting that a plaintiff class submit a statistically significant number of declarations for such evidence to have any value.” *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1230 (9th Cir. 2007) (120 declarations sufficient to represent class of 1.5 million individuals).

“[T]here is no minimum number of statements that must be compiled in relation to the total number of similarly-situated employees. Rather the question is whether the statements submitted, in light of their persuasiveness and whether the incidents they describe appear to be isolated or generalized,” support the inference of the class-wide conduct alleged by plaintiffs. *Velez*, 2007 WL 2377378, at \*20.

The quantity of trial witnesses will vary according to the quality of their testimony, and the testimony of a relatively small subset of the class will sometimes be enough to find liability. As noted above, in *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982), the Court upheld an award of damages to 207 FLSA plaintiffs that followed a trial in which only 23 plaintiffs testified. Similarly, in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21, 126 S.Ct. 514 (2005), the Ninth Circuit upheld a verdict for over 800 FLSA plaintiffs that was based on testimony from fewer than 50 of those plaintiffs. The First Circuit affirmed an FLSA judgment in favor of plaintiffs where six out of 246 class members testified at trial. *Burger King Corp.*, 672 F.2d at 224-25.

Because the quality of representative testimony varies widely, a court should not set an arbitrary standard regarding the number of trial witnesses necessary to support a judgment based

on representative testimony. Instead, district courts, in their discretion, should determine how much representative testimony is necessary in light of the claims involved in a given case, the availability of other evidence, and the quality of the proffered testimony.

**D. The Legislative History of §216(b) Demonstrates That Representative Testimony is Proper in FLSA Collective Actions.**

Some have asserted that the 1947 Portal-to-Portal Act amendments to the FLSA reveal a Congressional intent to prohibit the use of representative evidence in collective actions. They argue that the addition of an “opt-in” requirement and the elimination of third-party representative actions is evidence of this intent. This argument, however, finds no support in either the Portal-to-Portal Act’s legislative history or in the case law interpreting the Act.

At all times since its inception in 1938, the FLSA has authorized employees to bring actions on “behalf of . . . other employees similarly situated.”<sup>4</sup> Prior to the 1947 amendments, courts debated whether this language required putative class members to consent to a representative action in order to be bound by its result. *See Pentland v. Dravo Corp.*, 152 F.2d 851, 853-56 (3d Cir. 1945) (discussing the controversy and surveying the various approaches to the issue). No judge, commentator or legislator, however, doubted that the statute authorized representative actions.<sup>5</sup> The contemporaneous case law demonstrates that representative evidence was both permissible and common, with liability determined on the basis of

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<sup>4</sup> Compare Fair Labor Standards Act of 1938, §16(b), 52 Stat.1060, 1069 (original version of §216(b)) with 29 U.S.C. § 216(b) (current version). Both allow suits to be maintained “in behalf of . . . other employees similarly situated.”

<sup>5</sup> “When Congress stated that action may be brought for ‘employees similarly situated,’ it employed the very words which give rise to an ordinary class suit when they are contained in the plaintiff’s pleadings.” James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 Ill. L. Rev. 119, 128 (1942), quoted in James M. Fraser, Note, *Opt-in Class Actions Under the FLSA, EPA, & ADEA*, 38 Suffolk U. L. Rev. 95, 95 (2004); *see also Saxton v. W. S. Askew Co.*, 35 F. Supp. 519, 521 (N.D. Ga. 1940) (noting that “similarly situated” had “a well defined meaning in equitable proceedings” and referred to class actions.).

representative evidence, and damages determined subsequently by some reasonable, efficient method short of individual testimony.<sup>6</sup>

In the 1947 Portal-to-Portal Act, Congress amended the FLSA by, among other things, introducing section 216(b)'s current "opt-in" requirement. This amendment ended the confusion over whether non-consenting class members could be bound by a judgment. However, it in no way affected an employee's right to bring representative actions under section 216(b). To the contrary, opt-in actions were, at the time, a well-established and common category of representative actions under the then-current version of Rule 23. Such actions were known as "spurious" class actions.<sup>7</sup> The current Rule 23(b)(3) class was intended to replace the spurious class action classification. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 n.20 (1999). That Section 216(b) was not similarly amended along with Rule 23 in 1966 may have simply been a

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<sup>6</sup> See, e.g., *McReynolds v. Louisville Taxicab & Transfer Co.*, 5 F.R.D. 61, 62 (W.D. Ky. 1942) ("The complaint alleges that [other plaintiffs] are similarly situated to McReynolds, and if the evidence sustains that allegations . . . they stand or fall along with McReynolds with respect to existence or nonexistence of liability on the part of the defendant. If liability exists the question of amount of recovery by plaintiffs other than McReynolds can probably be reach by agreement as it is largely a question of computation from documentary evidence, but if it can not be disposed of in that way it can be decided by supplemental proceedings in this action."); *Tolliver v. Cudahy Packing Co.*, 39 F. Supp. 337 (E.D. Tenn. 1941) ("If there is judgment for the defendant the litigation is ended. If there is judgment for the named plaintiff and all others similarly situated, then the names and amounts due the employees similarly situated can be ascertained by interrogatories or some other proper method.").

<sup>7</sup> "By eliminating the agency suit and requiring plaintiffs to opt in, Congress amended the FLSA in a manner that was consistent with the then-current version of Rule 23." James M. Fraser, *supra*, at 102; Brian R. Gates, Note, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) A Life of Its Own*, 80 Notre Dame L. Rev. 1519, 1545 ("[A]fter Congress enacted the Portal-to-Portal Act in 1947, section 16(b) and Rule 23 were alike in their common use of an 'opt-in' procedure . . . . [S]ection 16(b) and Rule 23 possessed a nearly identical mechanism to create a representative group of plaintiffs."); 5 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §24.03 (3d ed. 1992) ("This statutory class action [§216(b)] resembles the permissive intervention type of spurious class action under form Rule 23."). Indeed, the Seventh Circuit has expressly referred to the current version of §216(b) as "a so-called 'spurious' class action." *Woods*, 686 F.2d at 579; see also *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 267 (D. Colo. 1990) (noting that the opt-in requirement of §216(b) "was exactly how the old 'spurious' class action operated.").

by-product of the fact that Congress wrote Section 216(b) while the Supreme Court's Advisory Committee writes the Federal Rules of Civil Procedure, and the two are not necessarily amended in tandem. See Fraser, *supra*, at 102.

Spurious class actions required individuals to opt in order to be bound by a class action judgment. See 7A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d §1752 (discussing the nature of spurious class actions). Despite the opt-in requirement, however, spurious class actions were unquestionably treated as “representative” actions. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 549-50 (1974) (noting that, when construing rules of timeliness in spurious class actions, the majority of courts emphasized and were guided by the “representative nature” of such class actions); *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965) (emphasizing the “representative character” of a spurious class action); see, e.g., *Nat’l Hairdressers’ & Cosmetologists’ Ass’n v. Philad Co.*, 34 F.Supp. 264, 266 (D.Del. 1940) (“Fred . . . has the right to appear as a representative of the class of hairdressers composing the membership of National.”). The addition of the opt-in requirement to section 216(b) thus simply codified the common practice of treating FLSA class actions as spurious class actions and ended confusion over the need for consent in FLSA representative actions. See *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287 n.6 (5th Cir. 1975).<sup>8</sup>

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<sup>8</sup> As one commentator notes:

[C]ourts agreed that plaintiffs in a spurious suit were required to opt in, and regardless of whether courts expressly applied Rule 23, they consistently applied its opt-in requirement to collective actions under the FLSA. Congress eventually drafted this practice into the statute when it amended the FLSA in 1947.

Fraser, *supra*, at 100-01 (footnotes omitted); 7A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d §1752 (“The ‘spurious’ class action was used extensively in Fair Labor Standards Act litigation . . . .”); *Pentland v. Dravo Corp.*, 152 F.2d at 853-56 (analyzing how courts had treated §216(b) group actions prior to the 1947 amendments); see, e.g., *Barrett v.*

With respect to the purported ban on “representative actions,” prior to 1947, the former version of Section 216(b) permitted employees to designate a completely *uninterested third party*, such as a labor union that itself suffered no overtime injury, to bring and maintain the employees’ overtime suit. The Portal-to-Portal Act eliminated this right. Congress’s motivation for deleting this provision rested on its perception that unions and other entities were taking unfair advantage of this right to sue on behalf of affected workers, even without being the certified bargaining representative. As the Eleventh Circuit recently observed:

Congress amended the FLSA to limit the parties who could bring suit under that statute. Specifically, § 216(b) was amended to provide that standing to pursue an action for liability is statutorily limited to employees only. By identifying “employees” as the only proper parties in a § 216(b) action, the Portal to Portal Act aimed to ban representative actions that previously had been brought by unions on behalf of employees.

*Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003)

(citations and quotation marks omitted); *United Food & Commercial Workers Union, Local 1564 v. Albertson’s, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000) (amendment targeted the “fear that unions, as representatives, were concretely benefitting from participation in” FLSA actions (citation and quotation marks omitted)). By eliminating third party “representative” actions, Congress did not alter the right of employees to bring representative suits on behalf of others similarly situated.<sup>9</sup> Rather, it simply prevented employees from designating uninterested third

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*Nat’l Malleable & Steel Castings*, 68 F. Supp. 410, 416 (W.D. Pa. 1946); *Fink v. Oliver Iron Mining Co.*, 65 F. Supp. 316, 317 (D. Minn. 1941).

<sup>9</sup> As the Eleventh Circuit recently recognized in *De Leon-Granados v. Eller & Sons Trees, Inc.*, \_\_\_ F.3d \_\_\_, 2007 U.S. App. LEXIS 20961 (11th Cir. Aug. 31, 2007):

Section 16(b) of the Fair Labor Standards Act, as amended by section 5 of the Portal Act, no longer permits an employee or employees to designate an agent or representative (*other than a member of the affected group*) to maintain, an action for and in behalf of all employees similarly situated. *Collective actions brought by an employee or employees (a*

parties (i.e., “representatives”) to bring the suit on their behalf. *Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 172 (1989) (“the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added” (emphasis added; citation omitted)).<sup>10</sup>

**E. A Defendant Has No Due Process Right to Insist on Discovery and Trial Testimony from Every Individual Opt-in Plaintiff.**

Some have argued that a company’s due process rights would be violated if one company is prevented from taking individualized discovery and was limited to representative evidence at trial. A defendant, however, does not possess an absolute right to individualized discovery and testimony in large collective or class actions. Rather, courts must weigh a defendant’s rights against the competing due process interests of individual plaintiffs. *See Wilks v. Pep Boys*, 2006

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*real party in interest) for and in behalf of himself or themselves and other employees similarly situated may still be brought in accordance with the provisions of section 16(b).*

<sup>10</sup> Congressional testimony further supports this view:

It will be observed, Mr. President, that two types of action are permitted under this [then-current] sentence in section 16(b) of the [FLSA]: First a suit by one or more employees, for himself and all other employees similarly situated. That I shall call for the purpose of identification a collective action . . . . The second class of actions . . . embrace those in which an agent or a representative who may not be an employee of the company at all can be designated by the employee or employees to maintain an action on behalf of all employees similarly situated.

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*In the first case, an employee, a man who is working for the X steel company can sue for himself and other employees. We see no objection to that. But the second class of cases, namely, cases in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case, may result in very decidedly unwholesome champertous situations which we think should not be permitted under the law.*

92 Cong. Rec. 2182 (1947) (remarks of Senator Donnell) (emphasis added), quoted in *Arrington v. Nat'l Broad. Co.*, 531 F. Supp. 498, 501 (D.D.C. 1982).

WL 2821700 \*7 (M.D. Tenn. Sept. 26, 2006); *Glass v. IDS Fin. Servs, Inc.*, 778 F.Supp. 1029, 1082 (D. Minn. 1991). After performing this balancing, many courts have concluded that use of representative evidence protects the interests of plaintiffs without infringing on the due process rights of defendants.<sup>13</sup>

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<sup>13</sup> See *Wilks*, 2006 WL 2821700 at \*7 (certifying class action and holding that the due process rights of the plaintiffs, “many of whom likely would be unable to bear the costs of an individual trial,” outweighed the defendant’s interest in individualized defenses); *Glass*, 778 F.Supp. at 1081-82 (rejecting defendant’s argument that collective treatment would violate its due process rights and holding that a collective action was necessary to protect the due process rights of plaintiffs, who were “less able to bear the cost of separate trials because they ha[d] fewer resources than [the defendant]”).

Cases allowing representative discovery include: *Belcher v. Shoney’s, Inc.*, 30 F. Supp. 2d 1010, 1024 (M.D. Tenn. 1998) (concluding that there was no due process violation in limiting discovery to a representative sample of opt-in plaintiffs); *Geer v. Challenge Fin. Investors Corp.*, 2007 WL 1341774 (D. Kan. May 4, 2007) (refusing to allow defendant to take depositions from all 272 opt-in plaintiffs); *Barrus v. Dick’s Sporting Goods, Inc.*, 465 F.Supp. 2d 224, 231-32 (W.D.N.Y. 2006) (limiting discovery to representative sample); *Smith v. Lowes Home Ctrs.*, 236 F.R.D. 354, 356 (S.D. Ohio 2006) (limiting discovery to a representative sample); *Bradford v. Bed Bath & Beyond*, 184 F. Supp. 2d 1342 (N.D. Ga. 2002) 184 F. Supp. 2d 1342 (discovery from 25 of 300 plaintiffs); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 354 (D.N.J. 1987) (parties used 51-person sample of class of over 1,300 plaintiffs); *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185, 1187-88 (E.D. Va. 1991), *rev’d on other grounds sub nom. Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992) (discovery of opt-ins permitted but only until either side felt the record sufficiently developed to answer the “similarly situated” question); *McGrath v. City of Philadelphia, No. CIV A 92-4570*, 1994 WL 45162, at \*2 (E.D. Pa. 1994) (no discovery from opt-in plaintiffs); *Adkins v. Mid-Am. Growers, Inc.*, 143 F.R.D. 171, 174 (N.D. Ill. 1992) (depositions and interrogatories on a representative basis); *Adkins v. Mid-Am. Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992) (rejecting magistrate judge’s order for individualized discovery; “Whether prior to class certification or after, discovery, except in the rarest of cases, should be conducted on a class wide level.”); *Prentice v. Fund for Pub. Interest Research, Inc.* WL 2729187, at \*5 (N.D. Cal. Sept. 18, 2007) (“Individualized discovery is rarely appropriate in FLSA collective actions”).

Additional cases endorsing representative testimony at trial include: *Grochowski*, 318 F.3d at 88; *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 309-10 (4th Cir. 2006); *Smith*, 236 F.R.D. at 356; *Jankowsk v. Castaldi*, 2006 WL 118973, \*5 (E.D.N.Y. Jan. 13, 2006); *Torres v. Gristedes Operating Corp.*, 2006 WL 2819730 at \*11 (S.D.N.Y. Sept. 29, 2006); *Thiebes v. Wal-Mart Stores, Inc.*, 2004 WL 1688544, at \*1 (D. Or. July 26, 2006); *Alvarez*, 2001 WL 34897841, \*6, *rev’d in part on other grounds*, 339 F.3d 894 (9th Cir. 2003); *Takacs*, 1999 WL 33127976, \*1; *Dole v. Haulaway Inc.*, 723 F. Supp. 274, 286 (D.N.J. 1989); *cf. Summers v. Howard Univ.*, 374 F.3d 1188, 1195 (D.C. Cir. 2004) (in context of damages setoff issue arising out of a

**F. Damages in a FLSA Collective Action Can Be Determined Through the Use of an Aggregate Method, Even if Individual Damages Vary.**

In cases where there is little variation in the amount of damages suffered (such as a donning and doffing case), damages can be determined through representative testimony from, or observation of, a relatively small number of class members. Even in cases where there is substantial variation among class members as to their damages (such as cases involving insurance claim adjusters, some of which took much longer to perform their jobs than others), damages can be determined through the use of representative testimony. A statistician can compute the sample size needed to estimate overtime hours worked with a desired confidence interval.

There are two basic approaches to the damages phase of a wage/hour case where there is substantial variation in the time worked by the employees – an individualized approach, or an aggregate approach. Defendants frequently prefer an individualized approach and plaintiffs often prefer an aggregate approach. There is no question that the individualized approach is more time consuming and expensive. It also deters participation from current employees.

Under an individualized approach, each member answers written discovery. There are then individual hearings as to the damages each employee suffered. That was the approach taken in the *Farmers MDL* case.

In *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715 (2004) (“*Bell III*”), the California courts used an aggregate approach in an action involving the same company and largely the same issues as the *Farmers MDL* case. In *Bell*, the trial court used a statistical methodology of random sampling and extrapolation for the determination of aggregate classwide settlement in an FLSA case: special master permissibly used a random sample of 20% of the payroll data as the basis for the damages calculation).

damages. The Court of Appeals affirmed, finding that the trial court had acted within its discretion. The California Supreme Court cited the *Bell III* procedure approvingly in *Sav-On Drug Stores, Inc. v. Superior Court*, 17 Cal.Rptr.3d 906, 917-18 (2004). Courts have held that although individual damages might vary, the defendant only has a due process interest in the aggregate amount of the judgment. *See Bell III*.

**G. District Courts Have Considerable Discretion When Managing FLSA Collective Actions.**

A federal district court's control over the scope of discovery and the presenting of evidence at trial is bounded primarily by the principles underlying Federal Rule of Civil Procedure 26(b)(2), Federal Rule of Evidence 403, and Federal Rule of Evidence 611.<sup>14</sup> Courts use these rules to establish reasonable limitations on discovery and trial that protect all parties' statutory and due process rights while promoting efficiency and sound case management. *See Manual for Complex Litigation (Fourth)* §§11.422, 11.64, 12.35 (2004). Courts commonly employ these tools in FLSA collective actions.<sup>15</sup>

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<sup>14</sup> Fed. R. Civ. P. 26(b)(2) (requiring court to limit discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive" as well as discovery where "the burden or expense of the proposed discovery outweighs its likely benefit"); Fed. R. Evid. 403 (court may exclude evidence the probative value of which is outweighed by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); Fed. R. Evid. 611 (court shall control presentation of evidence so as to "make the interrogation and presentation effective for the ascertainment of the truth," to "avoid needless consumption of time," and to "protect witnesses from harassment").

<sup>15</sup> *See, e.g., Burger King Corp.*, 672 F.2d 221 at 225 (affirming district court's Rule 403 decision to limit testimony to six witnesses, despite defendant's desire to present 20 more); *S. New England Telecomms. Corp.*, 892 F. Supp. at 402 ("[T]he Court must balance the need in FLSA cases to meet the burden of demonstrating a prima facie case with Federal Rule of Evidence 403, which enables a trial judge to exclude needlessly cumulative evidence . . . ."); *Takacs*, 1999 WL 33127976, at \*3 n.4 (where representative testimony approved in private action, defendant's ability to call and cross-examine non-testifying plaintiffs would be limited by F.R. Evid. 403)

Through these tools, a district court can eliminate duplicative and unnecessary discovery and trial testimony. A district court can restrict discovery by an employer to a sample of the employees who opt in. Similarly, the trial court can impose time limits and other restrictions at trial that prevent the trial from becoming unmanageable.

### **CONCLUSION**

Bifurcating liability and damages issues, limiting discovery to a sample of opt ins, permitting representative evidence at trial, and ascertaining damages on an aggregate basis through the use of expert testimony are all tools that are within a district judge's discretion. All of these tools comport with due process. The use of these tools makes the trial of a collective action faster, cheaper, more efficient, and more manageable, without sacrificing fairness or accuracy. The use of these devices also permits persons with low dollar claims to vindicate otherwise uneconomical claims by pooling resources and lowering costs.