APPEALS AND SETTLEMENTS IN WAGE-AND-HOUR CLASS/COLLECTIVE ACTION CASES

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In this country, the payment of overtime is regulated by the Fair Labor Standards Act ("FLSA") and, in many cases, state law. Federal and state rules pertaining to overtime are not always identical, however. Some states, for example, impose higher minimum wage rates than the FLSA, and, in some cases, the exemptions from overtime requirements are more narrow under state law than they are under federal law. In addition, the procedural rules associated with federal and state overtime claims vary in many respects.

For instance, where a plaintiff seeks to institute a state-law wage class action, Federal Rule of Civil Procedure 23 (or a state-law analogue if the matter is proceeding in state court) provides the mechanism for determining whether certification is appropriate. Under Rule 23, the plaintiff must meet a stringent, multi-pronged test. The plaintiff may obtain class certification of a wage claim only by demonstrating, for example, that joinder is impractical, that there are questions of law and fact common to the class, that the plaintiff's claims are typical of those of the class, that the plaintiff and his or her counsel will be adequate class representatives, and that class proceedings are superior to all other methods of resolving the matter at issue.[2] This test is largely designed to protect the due process rights of absent class members.[3] Rule 23 class actions are opt-out cases, meaning that, where such a class is certified, a class member will become bound by any judgment in the case unless he or she affirmatively declines to participate

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[2] *See* Fed.R.Civ.P. 23(a) & (b)(3). Wage claims are typically not certifiable under Fed.R.Civ.P. 23(b)(1) or (b)(2). *See, e.g., Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229 (C.D.Cal. 2006).

[3] *See Pritchard v. Dent Wizard Intern. Corp.*, 210 F.R.D. 591, 594 (S.D. Ohio 2002).

in the matter.[4] As a constitutional matter, then, Rule 23's requirements seek to ensure that persons who are not active participants in the matter are "afforded adequate representation before entry of a judgment which binds them."[5]

Where a plaintiff seeks to pursue an FLSA claim on a group basis, Rule 23 has no application. Rather, an FLSA matter may be certified only under 29 U.S.C. § 216(b) ("Section 216(b)"). In a Section 216(b) "collective action," however, there are no absent class members. Collective actions proceed on an opt-in basis only, meaning that a putative class member is bound by the judgment only if he or she affirmatively elects to be part of the case.[6] Correspondingly, Section 216(b) does not set forth the type of multi-pronged test established in Rule 23; rather, a Section 216(b) action may be certified if the plaintiff presents sufficient evidence that he or she is "similarly situated" to putative class members.[7]

The differences between Rule 23 and Section 216(b) have caused some courts to label the two "mutually exclusive and irreconcilable."[8] But these differences are not limited to certification standards. Rather, there is notable variation in the settlement procedures applicable to Rule 23 cases and to Section 216(b) cases, as well as in the appeal rights associated with certification decisions under the two provisions. This paper explores such differences.

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[4] *See Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 989 (C.D. Cal. 2006). In an opt

[5] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)).

[6] *Edwards*, 467 F. Supp. 2d at 992.

[7] *See* 29 U.S.C. § 216(b).

[8] *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975).

I. SETTLEMENTS IN WAGE –AND-HOUR ACTIONS

A. Settlements Under Rule 23

Under Rule 23(e), settlement of a class action may be accomplished only with approval of the court.[9] In this regard, courts do not "simply rubber stamp stipulated settlements," but apply a detailed, multi-step analysis.[10] This process includes notice to class members, the opportunity for them to opt out of the settlement,[11] and a fairness hearing to ensure that the settlement is "fair, reasonable, and adequate."[12]

1. Preliminary Approval

"Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable."[13] Relevant considerations include:

> [1] the strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement.[14]

In Rule 23 cases, courts make this fairness determination in two stages. At the preliminary approval stage, the court analyzes whether the settlement is "*potentially* fair."[15] If

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[9] *See* Fed. R. Civ. Pro. 23(e) (2007).

[10] *Kakani v. Oracle Corp.*, 2007 WL 1793774, at *1 (N.D. Cal. June 19, 2007).

[11] The opt-out requirement applies in settlements of Rule 23(b)(3) classes. *See* Fed.R.Civ.P. 23(e)(3) (noting that, in such actions, the court "may refuse to approve a settlement unless it affords a new opportunity to request exclusion").

[12] *Kakan.*, 2007 WL 1793774, at *1.

[13] *Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982).

[14] *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993)

[15] *Acosta v. Trans Union*, LLC, 243 F.R.D. 377, 376 (C.D.Cal. 2007).

the settlement meets this standard, the court must then issue notice to absent class members, advising them of their rights to object to the settlement. Indeed, the very purpose of preliminary review "is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing."[16]

If the parties reach a settlement in a wage action before the court makes a decision on class certification, the court's "threshold task" at the preliminary approval stage "is to ascertain whether the proposed settlement class satisfies the [certification] requirements" of Rule 23(a) and (b)(3).[17] And some courts have suggested that particular attention to class certification requirements may be warranted in this context. For instance, in *Hanlon v. Chrysler Corp.*, the Ninth Circuit noted that "District courts must be skeptical of some settlement agreements put before them because they are presented with a 'bargain proffered for ... approval without benefit of an adversarial investigation.'"[18] This concern, the court noted, "warrant[s] special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded."[19]

2. Notice and Opt-Out Rights

Where preliminary approval of a class settlement is granted, Rule 23(e)(1)(B) provides that a court must direct notice to class members who will be bound by the settlement. Notice

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[16] *Geautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (citing the Manual for Complex Litigation § 1.46, at 53-55); *In re Vitamins Antitrust Litig.*, 2001 WL 856292, at *4 (D.D.C. July 25, 2001) (noting that courts will grant preliminary approval in the absence of collusion or obvious defects in the proposal) (citation omitted).

[17] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)

[18] *Id.* at 1021 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

[19] *Id.*

must be reasonably calculated to apprise class members of the settlement and their related rights.[20] These rights include class members' right to opt-out of the class.[21]

Under Rule 23(e), the notice afforded absent class members must be "adequate."[22] In this regard, "[b]est notice practicable, rather than actual notice, is the proper standard for providing notice of proposed settlement to absent class members."[23] Thus, courts have largely rejected the position that an absent class member is bound by a settlement only if he or she receives actual notice of the settlement or submits a claim form.[24] Further, although the adequacy of notice must be determined on a case-by-case basis, courts have largely held that notice by first-class mail satisfies Rule 23, particularly if accompanied by some form of publication.[25]

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[20] *See DeJulius v. New England Health Care Employees Pension Fund*, 429 F. 3d 935, 943-45 (10th Cir. 2005); *Hanlon*, 150 F.3d at 1025-26; Fed. R. Civ. Pro. 23(c)(2)(B) (2007). *See also Kakani v. Oracle Corp.*, 2007 WL 1793774, at *10-11 (N.D. Cal. June 19, 2007) (finding the proposed notice deficient because it was confusing and did not provide information regarding what claims plaintiffs would be releasing upon settlement).

[21] *See* Fed. R. Civ. Pro. 23(c)(2)(B) (2007).

[22] *Hanlon.*, 150 F.3d at 1025.

[23] *Silber v. Mabon*, 18 F. 3d 1449 (9th Cir. 1994).

[24] *See, e.g.*, *DeJulius*, 429 F. 3d at 943-45 ("due process right to notice of settlement of class action does not require actual notice to each party intended to be bound by the adjudication of the representative action; notice sufficient where some plaintiffs received two weeks after deadline for filing objections, especially if before fairness hearing, because question is whether class as a whole received adequate notice); *In re General Am. Life Ins. Co. Sales Prac. Litig.*, 357 F. 3d 800 (8th Cir. 2004) (where plaintiff did receive proper notice, could have opted out, and chose not to do so, she was barred from arguing that she was not included in class action settlement, and thus, she could not bring independent claim); *White v. National Football League*, 41 F. 3d 402 (8th Cir. 1994) (class members received adequate notice of a proposed settlement when the district court required direct mailing of notice to all class members' last known address approximately one month prior to the first settlement hearing as well as publication of notice in a national newspaper, and the proposed settlement agreement received extensive coverage in the national press).

[25] *See, e.g., White*, 41 F. 3d at 402 (direct mailing of notice to all class members' last known address and publication of notice in a national newspaper); *Zimmer Paper Prod., Inc. v. Berger & Montague*, 758 F. 2d 86, 90 (3d Cir. 1985) (first-class mail and publication) (collecting cases); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94 (E.D. Pa. 2002) (first class mail and summary of settlement notice in national newspaper); *In re Nat. Life Ins. Co.*, 247 F. Supp. 2d 486 (D. Vt. 2002) (first-class mail); *In re Microstrategy, Inc. Sec. Litig.*, 150 F. Supp. 2d 896 (E.D. Va. 2001) (mail and publication); *Mangone v. First USA Bank*, 2001 WL 1801231 (S.D. Ill. 2001) (mail and publication in a nationally published newspaper).

That said, the decision to opt-out belongs to the individual class members exclusively, and a purported class representative cannot speak for them in this regard.[26] In *Hanlon*, for example, a putative class member opted out of a class action pending in the Northern District of California, choosing instead to pursue a class action in Georgia.[27] The Ninth Circuit rejected the plaintiff's argument that he opted out of the district court action on behalf of all Georgia residents, holding that due process dictated each individual shall have the right to choose whether to continue as a class member.[28] In addition, the Court noted that allowing a party involved in multiple class actions to opt out on behalf of others would cause difficulties in managing the proceeding (*i.e.*, ensuring that individuals were properly notified of the alternative class action and intelligently elected to participate or to decline).[29]

3. Final Approval: The Fair, Reasonable and Adequate Standard

Following the notice and opt-out period, the court makes an ultimate determination as to whether the settlement will be final and binding on the class.[30] Here, in consideration of any objections to the settlement that have been filed, the court again considers the factors noted above: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range at which a settlement is fair; (4) the complexity, expense and duration of litigation; (5) substance of and opposition to the settlement; and (6) the stage of the proceedings at the time of settlement.[31]

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[26] *See Hanlon*, 150 F.3d at 1024.

[27] *See id.* at 1018-19.

[28] *See id.* at 1024.

[29] *See id.*

[30] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-13 (permitting a forum state to exercise jurisdiction over absent class members in issuing monetary judgments as long as the absent members were provided with notice and given the opportunity to opt-out of the proceeding).

[31] *Ingram*, 200 F.R.D. at 688 (citing *Bennett v. Behring*, 737 F.2d 982, 986 (11th Cir. 1984)

In wage cases, a key factor in evaluating likelihood of success and the overall fairness of individual settlement amounts is often the state in which various class members worked. There are some significant variations in the substantive requirements of state wage laws, as well as variations in the remedies available and the applicable statutes of limitations.[32] In light of such distinctions, it may be reasonable for class members from certain states to receive a greater portion of a settlement than those from other states. To this end, some wage settlements have incorporated state multipliers in formulas used to allocate settlements among class members.[33]

Another factor that often influences courts in evaluating a settlement is the experience of class counsel. If counsel has a record of fairly representing plaintiffs in complex litigation and similar class disputes, the court may be more inclined to conclude that the settlement reached in the litigation before it was a fair and reasonable compromise.[34] On the other hand, any objections to the settlement from class members would factor against the approval of the settlement. However, the strength of individual objections may vary substantially, and courts tend to place more value on objections that illustrate particular deficiencies in the settlement terms rather than simply arguing that the settlement could have been negotiated differently.[35]

4. Class Action Fairness Act

In 2005, the Class Action Fairness Act ("CAFA") was signed into law.[36] As was widely reported at the time, CAFA expanded federal jurisdiction over class actions in which the amount

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[32] *Compare, e.g.,* Cal. Lab. Code §§ 201-203, 226.7, 515; Cal. Code Regs., tit. 8, §§ 11010-11040(2006) *with* 820 ILCS 105/4a *et seq.*

[33] *But see Kakani v. Oracle Corp.*, 2007 WL 1793774 at *6 (N.D. Cal. June 19, 2007) (disapproving of an allocation scheme wherein Californian plaintiffs received more than non-Californian plaintiffs and counsel failed to explain their rationale).

[34] *Ingram*, 200 F.R.D. at 691 (noting that its confidence in the class counsel).

[35] *Id.* at 692.

[36] *See* 28 U.S.C. §§ 1332(d), 1453, and 1711-1715 (2007).

in controversy exceeds $5 million.[37] Less widely reported, however, were CAFA's settlement provisions, which significantly impact Rule 23 settlements.

In particular, under CAFA, defendants must issue certain notices when a class action settlement is reached.[38] Specifically, within ten days of filing a *proposed* settlement with the court, defendants must provide notice to appropriate State and Federal officials, typically the State and U.S. Attorney Generals.[39] This notice must include several items, including:

- A copy of the complaint;
- Notice of scheduled hearings;
- Any proposed class notice;
- Any proposed or final settlement;
- Any other contemporaneous agreements between class counsel and defense counsel;
- Any final judgment or notice of dismissal;
- The names of class members (or reasonable estimate of the number of class members) in each State;
- The proportionate share of the entire settlement for such members;
- Any written judicial opinion relating to the settlement.

The requirements that the notice include, by state, the names of class members (or a reasonable estimate of their numbers) and each state's proportionate share of the settlement is likely to be particularly burdensome.

Failure to give the required CAFA notices can have serious consequences. Under CAFA, a court's final approval of a Rule 23 settlement may not issue until ninety days after both the Federal and State officials are served with notice.[40] Moreover, a class plaintiff may elect not to be bound by a settlement where the defendant did not issue the required CAFA notices.[41]

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[37] *See generally* 28 U.S.C. § 1332(d)(2) & (5) (2007).

[38] *See* 28 U.S.C. § 1715 (2007)

[39] *See* 28 U.S.C. § 1715(a)(2) & (b) (2007).

[40] *See id.* at § 1715(d).

[41] *See* 28 U.S.C. § 1715(e).

B. Settlements Under Section 216(b)

The settlement structure in Section 216(b) collective actions is somewhat similar to the structure in Rule 23 actions, but it is quite different in one key aspect. On the one hand, FLSA settlements are subject to approval. In this regard, the Eleventh Circuit has stated:

> There are only two ways in which back wage claims arising under the FLSA can be settled or compromised by employees. First, under section 216(c), the Secretary of Labor is authorized to supervise payment to employees of unpaid wages owed to them. An employee who accepts such a payment supervised by the Secretary thereby waives his right to bring suit for both the unpaid wages and for liquidated damages, provided the employer pays in full the back wages.
>
> The only other route for compromise of FLSA claims is provided in the context of suits brought directly by employees against their employer under section 216(b) to recover back wages for FLSA violations. When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness.[42]

In considering FLSA settlements, courts generally consider whether a proposed agreement "is more likely to reflect a reasonable compromise of disputed issues than the mere waiver of statutory rights brought about by an overreaching employer."[43]

However, in FLSA settlements, there is no formalized notice and opt-out process. This is because there are no absent class members in such cases. Rather, each plaintiff in an FLSA case – both in an individual action and in a collective action – is an active participant, and such a plaintiff can be bound by a settlement only if he or she individually enters one.

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[42] *Lynn's Food, Inc. v. U.S.*, 679 F.2d 1350, 1352 (11th Cir. 1982). Note that FLSA claims are subject to the doctrine of claim preclusion, however. *See McConnell v. Applied Performance Techs., Inc.*, 98 Fed.Appx. 397, 398-99 (6th Cir. 2004).

[43] *Lynn's Food Stores*, 679 F.2d at 1352-53; s*ee also*, *e.g.*, *Manning v. New York Univ.*, 2001 WL 963982, at *11 (S.D.N.Y. 2001), *aff'd* 299 F.3d 156 (2d Cir. 2002) (same)

II. APPEAL OF CERTIFICATION DECISIONS

A. Rule 23

Certification decisions in Rule 23 actions are immediately appealable, although the appeals court has the discretion to disallow the appeal:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[44]

Note that any such appeal must be filed within 10 days of the order granting or denying class certification.[45]

The drafter's comments to Rule 23(f), which was enacted in 1998, make clear that permission to appeal a Rule 23 certification decision "may be granted or denied on the basis of any consideration that the court of appeals finds persuasive."[46] The drafters continued that "[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation."[47] The drafters also provided the following as illustrations as to situations in which permitting an appeal may be desirable:

[44] Fed. R. Civ. Pro. 23(f).

[45] Appellate review under Rule 23(f) is limited to the certification decision itself. *See, e.g., In Re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107 (D.C. Cir. 2002).

[46] Fed.R.Civ.P. 23 (1998 Comments to Rule 23(f)).

[47] *Id.*

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.[48]

B. § 216(b)

Unlike Rule 23, Section 216(b) does not provide an avenue for immediate appeal of FLSA certification decisions, nor does any other rule. As such, in recent decisions, a number of appellate courts have refused to consider appeals from first-stage Section 216(b) certification orders.[49]

For instance, in *Baldridge v. SBC Communications*,[50] the 5th Circuit determined that it did not have jurisdiction over an appeal of an order conditionally certifying a class action under § 216(b). The court noted that, as an initial matter, the order conditionally certifying the class and authorizing notice was not appealable as a final order, because it did not terminate the litigation.[51] Further, while the court noted that *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), created certain exemptions to the so-called final judgment rule, such exceptions are exceedingly narrow:

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[48] *Id.*

[49] In Section 216(b) cases, courts make a preliminary determination of whether the plaintiffs are similarly situated early in the litigation when ruling upon plaintiffs' request that the court facilitate notice of the action to potential opt-ins. *See, e.g.*, *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 264 (D. Conn. 2002). Then, after discovery has been completed or at least sufficiently progressed, the court revisits the issue (making a "merits-stage" determination). *See id.* at 264-65.

[50] 404 F.3d 930 (5th Cir. 2005).

[51] *See* 28 U.S.C. § 1291.

> As a threshold matter, an order conditionally certifying a class and authorizing notice is not a final decision, terminating the litigation and allowing appeal under [28 U.S.C.] § 1291. "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, (1978). Only "serious and unsettled question(s)" come within the meaning of the Cohen rule, and it is a strictly construed doctrine.[52]

Further, the Fifth Circuit noted that in *Coopers & Lybrand* – which the court decided before congress enacted the present Rule 23(f) – the Supreme Court had "refused to extend the *Cohen* collateral order doctrine to cover class certification questions, finding inter alia that a Federal Rule of Civil Procedure 23 class certification decision does not conclusively determine the disputed question, because the order is subject to revision in the district court."[53] The Fifth Circuit found it highly significant that, in reacting to *Coopers & Lybrant*, Congress enacted Rule 23(f) to permit appeals of Rule 23 certification orders. But it did not enact anything providing for appeals from Section 216(b) certification orders:

> The defendants correctly point out that the holding in *Coopers & Lybrand* is abrogated to the extent that the subsequently enacted Federal Rule of Civil Procedure 23(f) specifically allows for interlocutory review of class certification decisions at the discretion of the respective courts of appeals under rule 23. But, as the district court observed, this case involves a "garden-variety" § 216(b) FLSA action and is not a rule 23 class action, so rule 23(f) is inapplicable.[54]

As such, the court found that it was without jurisdiction to hear the appeal before it.

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[52] *Baldridge*, 404 F.3d at 931.

[53] *Id.* at 932

[54] *Id.; see also Wyre v. St. Helena Parish Sch. Bd.*, 2007 WL 1704942 (5th Cir. June 08, 2007) (following *Baldridge)*.

The Sixth Circuit and, more recently, the Ninth Circuit have followed the Fifth Circuit's reasoning in this area.[55] Indeed, the Ninth Circuit extended *Baldridge*, rejecting both an argument that it should entertain an appeal pursuant to 28 U.S.C. § 1291 (the *Baldridge* argument) and an argument that it should issue a writ of mandamus in the case.[56]

Note that the *Baldridge* line – which involves cases in which parties attempted to appeal as a matter of right under 29 U.S.C. § 1291 – does not necessarily foreclose the possibility of an interlocutory appeal under 29 U.S.C. § 1292(b). That section provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order

An interlocutory appeal under Section 1292(b), however, involves multiple levels of discretion, and it is not clear, particularly in light of cases such as *Baldridg*e, whether an appeals court would be inclined to accept an interlocutory appeal involving a Section 216(b) certification question.

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[55] *See McElmurry v. U.S. Bank Nat. Ass'n.*, 495 F.3d 1136 (9th Cir. 2007); *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544 (6th Cir. 2006).

[56] *See McElmurry*, 495 F.3d at 1142.