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Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions

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Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions

Abstract

This article addresses the flood of litigation washing through United States federal courts on wage-and-hour group actions and the divergent corresponding district-court rulings. The rapidly growing split in authority relates to the fact that federal law requires that a group wage action be maintained as an opt-in "collective action" while state wage laws may be pursued through an opt-out "class action." With little circuit-court authority on the matter, the parties' arguments and courts' analysis fall all over the map. Despite the myriad of arguments in support of and in opposition to maintaining a state-law opt-out class action in the same suit as a federal opt-in collective action, this article posits that the proper view is through the lens of preemption and that a preemption analysis not only prevents the parties and courts from wasting time and financial resources litigating the propriety of a state-law class action but protects both absent claimants' federal wage claims and Congress's intent in requiring an opt-in action.

Keywords

Wage law, class action, Opt-out

ARTICLES

FEDERAL TAILS AND STATE PUPPY DOGS: PREEMPTING PARALLEL STATE WAGE CLAIMS TO PRESERVE THE INTEGRITY OF FEDERAL GROUP WAGE ACTIONS

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INTRODUCTION

Because many state wage laws parallel their federal counterpart, American wage-and-hour law can end up looking much like a ventriloquist's act. In the average ventriloquist's act, the puppet is usually the more colorful and flashy of the pair on stage, and the audience sees the puppet "talking." Thus, it can be easy to forget that the ventriloquist is in charge and that in the end, it is the same voice controlling both mouths. The same is true with wage law in the sense that when group-based actions are involved, judges and juries see the flashy and engaging state puppet talking and forget that the federal ventriloquist controls the show. This Article discusses how federal wage law preempts parallel state wage laws and demonstrates how imperative this analysis becomes when group-based actions, such as class actions under Rule 23 of the Federal Rules of Civil Procedure, are involved.

Congress enacted the primary federal wage law, the Fair Labor Standards Act¹ ("FLSA"), in 1938. It has been amended at various points, but still, at its foundation protects employees by prescribing the minimum wages that employers must pay and the maximum hours that employees may be required to work before receiving overtime compensation.² Many states have enacted wage laws, either statutorily or through the development of each state's common law, that may or may not parallel the scheme outlined in the FLSA. Although there may be substantive differences between the respective state and federal wage laws, for this Article's purposes, the primary

1. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2000).

2. *Id.* §§ 202, 206, 207. Congress recently raised the national minimum wage, which will incrementally reach \$7.25 per hour. *See* Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, 121 Stat. 112 (2007) (codified at 29 U.S.C. § 206).

difference involves how each body of law allows wage claims to be pursued in a group action.

Like most claims without a default group-action mechanism, group actions based on state wage laws are governed by Rule 23 of the Federal Rules of Civil Procedure or, if filed in state court, the state's applicable version of Rule 23.³ Rule 23 provides that suits may be filed as class actions on behalf of putative classes so long as certain prerequisites are met.⁴ At a certain point in the case's progression, the court provides notice to putative class members, informing them about the class action and allowing them an opportunity to exclude themselves or "opt-out" of the class.⁵ Unless individuals opt-out, the court's judgment binds all class members.⁶

The FLSA's group-action mechanism is different. Federal wage claims cannot be filed as class actions under Rule 23 but must instead be maintained as collective actions that involve participation on an opt-in-only basis.⁷ The FLSA's group-action mechanism is known as a "collective action" and is provided for in 29 U.S.C. § 216(b).⁸ The opt-in collective action within the FLSA has not always existed. At its enactment, the FLSA allowed individuals to sue for violations of its provisions, including minimum wage and overtime, on behalf of other employees in "representative actions."⁹ However, after the United States Supreme Court's 1946 decision in *Anderson v. Mount*

3. FED. R. CIV. P. 23.

4. FED. R. CIV. P. 23(a)–(b).

5. FED. R. CIV. P. 23(c)(2).

6. FED. R. CIV. P. 23(c)(3).

7. 29 U.S.C. § 216(b) (2000); *see also* *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 732–33 (M.D. Pa. 2007) ("Defendants' arguments would be well-taken if Plaintiff were attempting to bring a Rule 23 class action to enforce rights under the FLSA. Such a suit is clearly impermissible and a court would have no choice but to dismiss a complaint to that effect."); *Ellison v. Autozone Inc.*, No. C06-07522 MJJ, 2007 WL 2701923, at *2 (N.D. Cal. Sept. 13, 2007) (citing *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977), *overruled on other grounds*, *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)) ("However, this reliance is misplaced because *Kinney* merely stands for the proposition that Rule 23 procedures should not be used to certify an FLSA class. Plaintiff does not attempt to certify an FLSA collective class under Rule 23, but rather intends to prosecute both under their respective procedures.") (citation omitted); *Baas v. Dollar Tree Stores, Inc.*, No. C 07-03108 JSW, 2007 WL 2462150, at *3 n.3 (N.D. Cal. Aug. 29, 2007) (citing *Kinney*, 564 F.2d at 859) (noting distinguishability of *Kinney*'s Rule 23 FLSA class).

8. 29 U.S.C. § 216(b); *see Lehman*, 532 F. Supp. 2d at 732 (referring to an FLSA suit as a "collective action").

9. *See* Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938) (prior to 1947 amendment) (allowing a suit to be maintained by an employee on "behalf of himself . . . and other employees similarly situated" or, alternatively, allowing employees to "designate an agent or representative to maintain" an action in court on their behalf).

Clemens Pottery Co.,¹⁰ Congress amended the FLSA through the Portal-to-Portal Act of 1947¹¹ (“PPA”) and required that an employee must consent in writing prior to participating in the action.¹² In other words, employees wishing to participate in an FLSA collective action must “opt-in.”¹³

The varying opt-in and opt-out schemes for respective federal and state wage claims have recently troubled United States federal courts, especially in situations when the state wage claim parallels the federal claim.¹⁴ Historically, the FLSA’s opt-in mechanism has limited the size of the FLSA action, with estimates indicating that typically only between fifteen and thirty percent of potential plaintiff-employees opt-in.¹⁵ As a result, plaintiffs, or perhaps more aptly their counsel, attempt more and more to dual-file wage lawsuits to include both an FLSA collective action and a Rule 23 state class action.¹⁶ Group-based wage claims with a state-law component, whether dual-filed or independent of an FLSA claim, are particularly attractive to plaintiffs’ counsel because they provide an opportunity for much larger recoveries and, consequently, greater attorney’s fees.¹⁷ As such, there has been a “new phenomenon” or “explosion” of such lawsuits.¹⁸

10. 328 U.S. 680 (1946) (expanding the interpretation of compensable work under the Fair Labor Standards Act).

11. Pub. L. No. 80-49, 61 Stat. 84 (1947) (codified as amended at 29 U.S.C. § 216(b)).

12. *Id.* § 5(a).

13. See, e.g., *Warner v. Orleans Home Builders, Inc.*, 550 F. Supp. 2d 583, 588 (E.D. Pa. 2008) (contrasting the differences in FLSA collective action and Rule 23 class action procedures); *Salazar v. AgriProcessors, Inc.*, 527 F. Supp. 2d 873, 877 (N.D. Iowa 2007); *Sjoblom v. Charter Commc’ns, LLC*, No. 3:07-cv-0451-bbc, 2007 WL 4560541, at *4 (W.D. Wis. Dec. 19, 2007); *Silverman v. Smithkline Beecham Corp.*, No. CV 06-7272 DSF(CTx), 2007 WL 3072274, at *1 (C.D. Cal. Oct. 16, 2007).

14. See, e.g., *Sjoblom*, 2007 WL 4560541, at *4 (detailing the circuit split over whether plaintiffs can simultaneously bring FLSA and Rule 23 class actions).

15. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 313 (2005).

16. *Id.* at 315.

17. See Theodora R. Lee, *The Role of Human Resources as an Essential Partner in Building the Compliance and Ethics Program*, in No. B-1661 PRACTICING LAW INST., CORP. LAW & PRAC. COURSE HANDBOOK SERIES 497, 508 (2008) (calling the wage-and-hour class action the “plaintiff’s attorney’s best friend”); Mark A. Knueve, *Dollars, Details Behind Surge in Wage-and-Hour Class Actions*, 22 Emp. Litig. Rep. (Andrews Publ’g) No. 2, at 3 (Aug. 14, 2007) (“[A]s the number of cases has risen, so too has the trend of these cases being filed as putative class actions or putative collective actions. It is a relatively new phenomenon, fueled partly by large recoveries.”); Lampe & Rossman, *supra* note 15, at 314 (noting possibility of a larger class and larger aggregate damages with state-law claims, including higher attorney’s fees).

18. *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 459 n.19 (W.D. Pa. 2007); see Knueve, *supra* note 17 (calling filing of putative class actions “relatively new phenomenon”); Lampe & Rossman, *supra* note 15, at 311 (calling large-scale FLSA actions “the ‘claim du jour’ for the plaintiffs’ bar”).

Defendant-employers, plaintiff-employees, and courts have all set forth a variety of arguments regarding whether or not a state-law class claim should proceed parallel to a FLSA action.¹⁹ Despite the varying approaches used to evaluate dual-filed suits, courts reach only one of two outcomes. Either (1) the court agrees that the state class claim cannot appropriately exist in the same suit as a federal collective action and dismisses the state class claim without prejudice, or (2) the court maintains the state and federal claims together.²⁰ Neither outcome addresses the problems associated with allowing a state-law class action to proceed, including the elimination of individuals' future FLSA claims and of the FLSA's effectiveness.²¹ Nor does either outcome address that the FLSA preempts parallel state wage claims.²²

Thus, this Article reviews courts' recent analysis in evaluating the propriety of dual-filed wage suits and the limited available outcomes in Part I²³ and then discusses the problems associated with allowing a state-law wage class action to proceed, either in a dual-filed suit or independently,²⁴ in Part II. Finally, Part III concludes that most existing analysis on dual-filed suits is unnecessary because the FLSA preempts parallel state wage claims and consequently avoids the problems associated with state wage class actions.²⁵

19. See *infra* notes 136–138 and accompanying text.

20. See *infra* notes 134–136 and accompanying text (evidencing split between courts that have dismissed without prejudice parallel state-law claims in FLSA cases and those which have refused to dismiss such claims). For example, these two outcomes are evident in the two circuit court opinions on this matter, *De Asencio v. Tyson Foods, Inc.* and *Lindsay v. Government Employees Insurance Co.*, which are highlighted below. Compare *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 312 (3d Cir. 2003) (determining district court erroneously exercised supplemental jurisdiction over state Rule 23 claims), with *Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416, 425 (D.C. Cir. 2006) (reversing the district court's refusal to certify a state Rule 23 class).

21. See *infra* notes 138–188 and accompanying text (reviewing various ways that plaintiffs can include state-law claims, either as part of an FLSA suit or on independent grounds).

22. See *infra* notes 190–257 and accompanying text (concluding that the FLSA preempts directly parallel state-law claims but does not preempt state-law provisions that are more generous than those provided by the FLSA).

23. See *infra* notes 26–136 and accompanying text (broadly discussing the differences between Rule 23's class opt-out and the FLSA's opt-in procedures).

24. See *infra* notes 138–188 and accompanying text (reviewing various ways that plaintiffs can include state-law claims, either as part of an FLSA suit or on independent grounds).

25. See *infra* notes 190–257 and accompanying text (concluding that the FLSA preempts directly parallel state-law claims but does not preempt state-law provisions that are more generous than those provided by the FLSA).

I. BACKGROUND ON DUAL-FILED WAGE CLAIMS

A. *FLSA Opt-In Versus Rule 23 Opt-Out*

As originally enacted, § 216(b) provided that actions could be maintained “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.”²⁶ There was no opt-in provision. Following the 1946 *Anderson v. Mount Clemens Pottery Co.*²⁷ decision that expanded the interpretation of wage law, wage suits involving an estimated five billion dollars in damages were filed in court, many of which were representative actions.²⁸ According to the House Committee’s Report on the PPA amendment:

The procedure in these suits follows a general pattern. A petition is filed under section 16 (b) by one or two employees in behalf of many others. To this is [sic] attached interrogatories calling upon the employer to furnish specific information regarding each employee during the entire period of employment. The furnishing of this data alone is a tremendous financial burden to the employer.²⁹

As such, Congress amended the FLSA with the PPA in 1947, disallowing representative actions and forbidding an employee’s participation in a collective 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.”³⁰ The opt-in provision, however, still remains in force.³¹

On the other hand, Rule 23 allows “[o]ne or more members of a class [to] sue or be sued as representative parties on behalf of all [members].”³² The rule requires notice to class members, and those who do not exclude themselves from the class are subject to the

26. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1947) (prior to 1947 amendment).

27. 328 U.S. 680 (1946). Employees sued under the Fair Labor Standards Act for compensation for time spent walking to workstations and performing preparatory tasks outside of official working hours. *Id.* at 682–83.

28. BUREAU OF NAT’L AFFAIRS, THE PORTAL TO PORTAL ACT OF 1947: WHAT IT DOES, HOW IT APPLIES, WHAT IT MEANS 2 (1947).

29. H.R. REP. NO. 80-71 (1947), as reprinted in BUREAU OF NAT’L AFFAIRS, *supra* note 28, at D-3.

30. Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (1947) (codified as amended at 29 U.S.C. § 216(b)).

31. 29 U.S.C. § 216(b) (2000).

32. FED. R. CIV. P. 23(a).

court's judgment, whether favorable or not.³³ Thus arises the opt-in/opt-out paradox that several courts have recognized as an inherent incompatibility that "essentially nullif[ies] Congress's intent in crafting Section 216(b) and eviscerate[s] the purpose of Section 216(b)'s opt-in requirement,"³⁴ and "circumvent[s] the opt-in requirement."³⁵

B. Recent Divided Authority on Handling Dual-Filed FLSA Collective and State-Law Class Actions

The impact of including a state-law class in a wage dispute is significant because it will include, by its very nature, all individuals who meet the class definition and do not opt-out.³⁶ This body of individuals can include an extra seventy to eighty-five percent of potential participants.³⁷ The consequence of the larger class is, of course, a potentially larger adverse judgment.³⁸ As the class increases in size with each individual, that individual's allegedly lost wages are put at risk. However, the inclusion of a state-law class is also significant because there may be preclusion issues with regard to the legal claims involved³⁹ and because it can effectively eliminate the FLSA.⁴⁰ As such, defendant-employers frequently seek to eliminate the state-law class claims, including seeking dismissal, seeking summary judgment, or opposing Rule 23 class certification.⁴¹

Two United States courts of appeals have addressed the compatibility between opt-in and opt-out actions within a dual-filed suit, but reached opposite results. In *De Asencio v. Tyson Foods, Inc.*,⁴² the U.S. Court of Appeals for the Third Circuit reversed the district court's certification of a Rule 23 state class.⁴³ The plaintiff-employees

33. FED. R. CIV. P. 23(c).

34. *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006).

35. *Evancho v. Sanofi-Aventis U.S. Inc.*, No. 07-2266 (MLC), 2007 WL 4546100, at *5 (D.N.J. Dec. 19, 2007).

36. FED. R. CIV. P. 23(c).

37. See *Lampe & Rossman*, *supra* note 15, at 313–14 (noting that opt-in rate of a typical FLSA collective action is only fifteen to thirty percent of eligible persons).

38. *Id.* at 314.

39. See *infra* notes 138–165 and accompanying text (examining the grounds under which plaintiffs can include parallel state-law claims in an FLSA suit and the extreme lengths to which plaintiffs' counsel will go to obtain class certification).

40. See *infra* notes 166–188 and accompanying text (reviewing various reasons why the opt-in provision is appropriate and indicating ways by which plaintiffs can avoid implicating the FLSA).

41. See, e.g., *Sjoblom v. Charter Commc'ns, LLC*, No. 3:07-cv-0451-bbc, 2007 WL 4560541, at *1, *3–4 (W.D. Wis. Dec. 19, 2007) (detailing Defendant's motion to dismiss the state-law claim).

42. 342 F.3d 301 (3d Cir. 2003).

43. *Id.* at 304, 313.

in *De Asencio* were current and former employees who had worked or were working at Tyson Foods's chicken-processing facility.⁴⁴ The plaintiff-employees sought to recover wages under the FLSA and the Pennsylvania Wage Payment and Collection Law for those employees' unpaid "donning, doffing, and sanitizing activities."⁴⁵ At issue was whether the district court properly exercised supplemental jurisdiction over the state-law class claim.⁴⁶

The *De Asencio* court determined that the district court erroneously exercised supplemental jurisdiction over the state-law claim as a result of the opt-in/opt-out distinction in § 216(b) and Rule 23.⁴⁷ Indeed, it recognized that distinction as "crucial."⁴⁸ The *De Asencio* court considered the possibility that the state-law class claims would substantially predominate the federal claim, based on the disparate sizes of the opt-in and opt-out groups and the nature of the state-law claim.⁴⁹ It also recognized that Pennsylvania's overtime law presented "two novel and complex questions of state law."⁵⁰ In reaching its decision, the *De Asencio* court was concerned with dual-filed cases in which "a state claim constitutes the real body of [the] case, to which the federal claim is only an appendage: only where permitting litigation of all claims in the district court can accurately be described as allowing a federal tail to wag what is in substance a state dog."⁵¹

Conversely, in *Lindsay v. Government Employees Insurance Co.*⁵² the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's refusal to certify a state-law Rule 23 class.⁵³ In *Lindsay*, the plaintiff-employees were auto-damage adjusters for GEICO seeking unpaid overtime pay under the FLSA and the New York Minimum Wage Act.⁵⁴ The plaintiffs claimed that GEICO had wrongfully classified them as exempt from overtime laws.⁵⁵ The district court had denied the plaintiff-employees' motion for state-law class certification on the ground that the FLSA's opt-in mechanism

44. *Id.* at 304.

45. *Id.* (internal quotations omitted).

46. *Id.* at 304.

47. *Id.* at 312.

48. *Id.* at 310.

49. *Id.* at 309–12.

50. *Id.* at 311.

51. *Id.* at 309 (quoting *Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 789 (3d Cir. 1995)) (internal quotations omitted).

52. 448 F.3d 416 (D.C. Cir. 2006).

53. *Id.* at 416, 425.

54. *Id.* at 418.

55. *Id.*

precluded it from exercising supplemental jurisdiction over individuals' claims who had not opted in to the FLSA group.⁵⁶

In evaluating the district court's ruling, the D.C. Circuit first concluded that the district court's opinion was based upon 28 U.S.C. § 1367(a), the provision that provides courts with "mandatory" supplemental jurisdiction over cases forming "part of the same case or controversy under Article III of the United States Constitution," rather than 28 U.S.C. § 1367(c), the provision that allows courts discretion to decline supplemental jurisdiction under certain circumstances.⁵⁷ In reversing the district court's decision, the D.C. Circuit emphasized that the district court "remain[ed] free to consider whether it 'may decline to exercise' supplemental jurisdiction under 28 U.S.C. § 1367(c)."⁵⁸ The *Lindsay* court directed the district court on remand to examine whether the state-law claims presented "exceptional circumstances" and whether there existed "other compelling reasons" to decline supplemental jurisdiction.⁵⁹ However, the court specifically instructed that the district court could not conclude that § 216(b)'s opt-in provision divested the court of supplemental jurisdiction under § 1367(c) because it did not see the difference between § 216(b) and Rule 23 as "fitting the 'exceptional circumstances'/'other compelling reasons' language" of that provision.⁶⁰

Since *De Asencio* and *Lindsay*, district courts across the country have likewise split in deciding, both in outcome and reasoning, what difference § 216(b)'s opt-in provision and Rule 23's opt-out provision makes.⁶¹ Recently, courts have issued inconsistent rulings on a weekly basis or better.⁶² In looking at the issue of whether a state class-based

56. *Id.*

57. *Id.* at 420–21 (quoting 28 U.S.C. § 1367(a), (c) (2000)).

58. *Id.* at 424 (quoting § 1367(c)).

59. *Id.* at 425 (quoting § 1367(c)(4)) (internal quotation marks omitted).

60. *Id.* (quoting § 1367(c)(4)).

61. See *infra* notes 62–133 and accompanying text (using a hypothetical case to explore the different ways in which federal courts have analyzed the propriety of dual-filed wage claims).

62. See, e.g., *Helderman v. Renee's Trucking*, No. 08-cv-141-JPG, 2008 WL 2229762 (S.D. Ill. May 29, 2008); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152 (S.D.N.Y. 2008); *Wineland v. Casey's Gen. Stores, Inc.*, 554 F. Supp. 2d 915 (S.D. Iowa 2008); *Osby v. Citigroup, Inc.*, No. 07-cv-06085-NKL, 2008 WL 2074102 (W.D. Mo. May 14, 2008); *Warner v. Orleans Home Builders, Inc.*, 550 F. Supp. 2d 583 (E.D. Pa. 2008); *Kuhl v. Guitar Ctr. Stores, Inc.*, No. 07 C 214, 2008 WL 656049 (N.D. Ill. Mar. 5, 2008); *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG) (RER), 2008 WL 597186 (E.D.N.Y. Mar. 2, 2008); *Di Nardo v. Ned Stevens Gutter Cleaning & Installation, Inc.*, No. 07-5529 (SRC), 2008 WL 565765 (D.N.J. Feb. 28, 2008); *Jackson v. Alpharma Inc.*, Civ. No. 07-3250 (GEB), 2008 WL 508664 (D.N.J. Feb. 21, 2008); *Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178 (M.D. Pa. 2008); *Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d 1120 (N.D. Cal. 2008); *Evancho v. Sanofi-Aventis U.S.*

wage claim may proceed in the same action as a federal collective wage claim, courts have considered everything from when to properly evaluate the propriety of the state claim to whether such claims can be settled on a class basis.⁶³

1. *The hypothetical dual-filed case: Edwards v. ABC Corporation*

In examining the “explosion” of recent decisions considering the propriety of dual-filed wage claims,⁶⁴ a hypothetical dual-filed claim is helpful to elucidate the differing approaches federal courts have taken in reviewing these actions. In *Edwards v. ABC Corp.*,⁶⁵ a purely hypothetical action used for illustrative purposes only, a group of current and former ABC employees sue the company in federal district court for alleged violations of state and federal overtime-compensation laws. The *Edwards* complaint alleges that approximately 1500 current and former employees were affected by ABC’s wage-payment practices. At its commencement, ten plaintiff-employees are named in the suit. State wage law in the *Edwards* case’s jurisdiction parallels the FLSA, providing the same minimum-wage rate and maximum workweek, but state law provides for a four-year statute of limitations rather than the FLSA’s two- or three-year statute of limitations.⁶⁶

Inc., No. 07-2266 (MLC), 2007 WL 4546100 (D.N.J. Dec. 19, 2007); *Sjoblom v. Charter Commc’ns, LLC*, No. 3:07-cv-0451-bbc, 2007 WL 4560541 (W.D. Wis. Dec. 19, 2007); *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439 (W.D. Pa. 2007); *Freeman v. Hoffmann-LaRoche, Inc.*, No. 07-1503 (JLL), 2007 WL 4440875 (D.N.J. Dec. 18, 2007).

63. See, e.g., *Damassia*, 250 F.R.D. at 154, 161–64 (granting motion to certify class after defendant-employer’s attack on state-law class claim under superiority element of Rule 23); *Warner*, 550 F. Supp. 2d at 587 (granting Rule 12(b)(6) motion on incompatibility of opt-in and opt-out mechanisms as well as declining to exercise supplemental jurisdiction over state-law class claims); *Ellis*, 527 F. Supp. 2d at 442, 452 (dismissing plaintiff-employees’ parallel state class claims despite parties’ settlement and joint motion to approve settlement on Rule 23 state-law class); *Riddle v. Nat’l Sec. Agency, Inc.*, No. 05 C 5880, 2007 WL 2746597, at *1, *3, *4 (N.D. Ill. Sept. 13, 2007) (upholding magistrate judge’s report and recommendation denying state-law class certification, including on incompatibility and supplemental jurisdiction grounds associated with Rule 23); *Williams v. Trendwest Resorts, Inc.*, No. 2:05-CV-0605-RCJ-LRL, 2007 WL 2429149, at *1 (D. Nev. Aug. 20, 2007) (granting motion for judgment on the pleadings).

64. See *Ellis*, 527 F. Supp. 2d at 459 n.19 (describing “[t]he ‘explosion’ of hybrid lawsuits involving both state and FLSA claims” as a “recent phenomenon”); Knueve, *supra* note 17, at 3 (calling the filing of putative class actions a “relatively new phenomenon”); Lampe & Rossman, *supra* note 15, at 311 (calling large-scale FLSA actions “the ‘claim du jour’ for the plaintiffs’ bar”).

65. The fictional lead plaintiff is named for Linda H. Edwards, whose idea it was to demonstrate how a dual-filed case might proceed through a hypothetical. Although this author litigated dual-filed wage claims during her legal practice, *Edwards* is not intended to, nor does it, resemble any actual cases.

66. Fair Labor Standards Act, 29 U.S.C. § 255(a) (2000). A two-year statute of limitations governs claims for unpaid minimum wage or overtime compensation

The *Edwards* plaintiff-employees commence their action in a jurisdiction that had not previously addressed the propriety of a dual-filed lawsuit containing a state-law wage claim that paralleled the FLSA. Thus, the court will look at *De Asencio*, *Lindsay*, and a sample of the numerous recently decided district court cases⁶⁷ in evaluating whether the plaintiff-employees' state-law class claims may proceed with their FLSA claim.

a. The progressing Edwards case: ABC's pre-discovery motion to dismiss

In response to the *Edwards* complaint, ABC files a motion to dismiss the state-law class claims on numerous bases. Procedurally, ABC argues that the court should dismiss the plaintiff-employees' state-law class claims pursuant to:

- (1) Rule 12(b)(6) of the Federal Rules of Civil Procedure, claiming that the state-law class claim failed to state a claim upon which relief could be granted;
- (2) Rule 12(b)(1), claiming that the court should decline to exercise supplemental jurisdiction over the state-law claim;
- (3) Rule 12(c) for judgment on the pleadings;
- (4) Rule 12(f) to strike the state-law class allegations; and,
- (5) Rule 23 for failure to establish class-action prerequisites.⁶⁸

under the FLSA, but if the violation is "willful," the limitations period is three years. *Id.*

67. See, e.g., *Gardner v. W. Beef Props., Inc.*, No. 07-CV-2345, 2008 WL 2446681 (E.D.N.Y. June 17, 2008); *Helderman*, 2008 WL 2229762; *Damassia*, 250 F.R.D. 152; *Wineland*, 554 F. Supp. 2d 915; *Osby*, 2008 WL 2074102; *Warner*, 550 F. Supp. 2d 583; *Kuhl*, 2008 WL 656049; *Guzman*, 2008 WL 597186; *Di Nardo*, 2008 WL 565765; *Jackson*, 2008 WL 508664; *Woodard*, 250 F.R.D. 178; *Thorpe*, 534 F. Supp. 2d 1120; *Evancho*, 2007 WL 4546100; *Sjoblom*, 2007 WL 4560541; *Ellis*, 527 F. Supp. 2d 439; *Freeman*, 2007 WL 4440875; *Salazar v. AgriProcessors, Inc.*, 527 F. Supp. 2d 873 (N.D. Iowa 2007); *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726 (M.D. Pa. 2007); *Ellison v. Autozone Inc.*, No. C06-07522 MJJ, 2007 WL 2701923 (N.D. Cal. Sept. 13, 2007); *Riddle*, 2007 WL 2746597; *Baas v. Dollar Tree Stores, Inc.*, No. C 07-03108 JSW, 2007 WL 2462150 (N.D. Cal. Aug. 29, 2007); *Brickey v. Dolencorp, Inc.*, 244 F.R.D. 176 (W.D.N.Y. 2007); *Marquez v. Partylite Worldwide, Inc.*, No. 07 C 2024, 2007 WL 2461667 (N.D. Ill. Aug. 27, 2007); *Williams*, 2007 WL 2429149; *Ramsey v. Ryan Beck & Co.*, No. 07-635, 2007 WL 2234567 (E.D. Pa. Aug. 1, 2007); *Bamonte v. City of Mesa*, No. CV 06-01860-PHX-NVW, 2007 WL 2022011 (D. Ariz. July 10, 2007).

68. See, e.g., *Helderman*, 2008 WL 2229762, at *3 (motion to dismiss or strike); *Wineland*, 554 F. Supp. 2d at 917 (motion to dismiss under Rule 12(b)(6)); *Osby*, 2008 WL 2074102, at *1 (motion for judgment on the pleadings or to strike); *Warner*, 550 F. Supp. 2d at 584 (motion to dismiss under Rule 12(b)(6)); *Kuhl*, 2008 WL 656049, at *1 (motion to dismiss); *Woodard*, 250 F.R.D. at 179 (motion to strike pursuant to Rule 12(f) and Rule 23(d)); *Thorpe*, 534 F. Supp. 2d at 1122 (motion to dismiss or strike); *Sjoblom*, 2007 WL 4560541, at *1 (motion to dismiss under Rule 12(b)(6), motion to strike under Rule 12(f), and Rule 23(d) (4) motion).

ABC provides these Rules as alternative bases for dismissal because courts have divided on the proper procedural approach for handling dismissal of the state-law class claim.⁶⁹ For example, some courts have agreed that dismissal is appropriate on a motion to dismiss or similar prediscovery motion.⁷⁰ In *Warner v. Orleans Home Builders, Inc.*,⁷¹ the U.S. District Court for the Eastern District of Pennsylvania granted the defendant-employer's motion to dismiss pursuant to Rule 12(b)(6) on the basis that the opt-in and opt-out provisions were incompatible and further declined to exercise supplemental jurisdiction.⁷² Other courts have refused to rule on the propriety of state-law class claims on a motion to dismiss or similar motion, reserving ruling on the matter until the proceedings have progressed further.⁷³ Still other courts have refused to dismiss state-law class

69. See, e.g., *Helderman*, 2008 WL 2229762, at *3 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Osby*, 2008 WL 2074102, at *3 (same); *Warner*, 550 F. Supp. 2d at 587 (granting Rule 12(b)(6) motion on incompatibility of opt-in and opt-out mechanisms as well as declining to exercise supplemental jurisdiction over state-law class claims); *Kuhl*, 2008 WL 656049, at *4 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Woodard*, 250 F.R.D. at 182–83 (granting motion to strike state-law class claims on numerous bases); *Thorpe*, 534 F. Supp. 2d at 1122, 1124 (refusing to dismiss state-law class claims on a motion to dismiss); *Sjoblom*, 2007 WL 4560541, at *1 (same); *Freeman*, 2007 WL 4440875, at *3 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Salazar*, 527 F. Supp. 2d at 885 (refusing to dismiss state-law class claims on a motion to dismiss); *Lehman*, 532 F. Supp. 2d at 732 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Ellison*, 2007 WL 2701923, at *2 (same); *Baas*, 2007 WL 2462150, at *1 (refusing to dismiss state-law class claims on a motion to dismiss); *Williams*, 2007 WL 2429149, at *1 (granting motion for judgment on the pleadings); *Ramsey*, 2007 WL 2234567, at *4 (granting Rule 12(b)(6) motion on incompatibility and supplemental jurisdiction).

70. See, e.g., *Warner*, 550 F. Supp. 2d at 587 (granting Rule 12(b)(6) motion on incompatibility of opt-in and opt-out mechanisms as well as declining to exercise supplemental jurisdiction over state-law class claims); *Woodard*, 250 F.R.D. at 182–83 (granting motion to strike state-law class claims on numerous bases); *Williams*, 2007 WL 2429149, at *1 (granting motion for judgment on the pleadings); *Ramsey*, 2007 WL 2234567, at *4 (granting Rule 12(b)(6) motion on incompatibility and supplemental jurisdiction).

71. 550 F. Supp. 2d 583 (E.D. Pa. 2008).

72. *Id.* at 587.

73. See, e.g., *Helderman*, 2008 WL 2229762, at *3 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Osby*, 2008 WL 2074102, at *3 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Kuhl*, 2008 WL 656049, at *4 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Freeman*, 2007 WL 4440875, at *3 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Lehman*, 532 F. Supp. 2d at 732 (determining dismissal premature on motion to dismiss and reserving ruling for further development); *Ellison*, 2007 WL 2701923, at *2 (determining dismissal premature on motion to dismiss and reserving ruling for further development).

claims outrightly on a motion to dismiss rather than saving the matter for a later date.⁷⁴

Substantively, ABC focuses its arguments on Congress's amendment⁷⁵ of the FLSA to require an opt-in group action and the inherent incompatibility between the opt-in and opt-out mechanisms for respective federal and state claims. ABC also argues that the court should decline supplemental jurisdiction and dismiss the state-law class claim pursuant to Rule 12(b)(1) because the state-law class claims predominate the federal claim.

In existing case law on the matter, many defendant-employers have argued, and some courts have agreed, that a state-law class cannot coexist with a § 216(b) collective action based on the inherent incompatibility of the two mechanisms. These cases look generally at dismissals under Rules 12(b)(6), 12(c), or 12(f).⁷⁶ For example, in *Warner*, the Eastern District of Pennsylvania dismissed the state-law class claim in the plaintiff-employees' complaint based on the FLSA collective action's incompatibility with the Rule 23 state-law class action.⁷⁷ The court determined that "allowing the two types of actions to proceed in federal court in single suit would undermine Congress's intent in implementing an opt-in requirement."⁷⁸ The Western District of Pennsylvania has also determined that allowing the two groups to proceed simultaneously would "circumvent the [FLSA] opt-in requirement" and "essentially nullify Congress's intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)'s opt-in requirement."⁷⁹ Other courts have agreed, thus severing state-law class claims based on incompatibility alone.⁸⁰

74. See, e.g., *Thorpe*, 534 F. Supp. 2d at 1122, 1124 (refusing to dismiss state-law class claims on a motion to dismiss); *Sjoblom*, 2007 WL 4560541, at *1 (refusing to dismiss state-law class claims on a motion to dismiss); *Salazar*, 527 F. Supp. 2d at 885 (refusing to dismiss state-law class claims on a motion to dismiss); *Baas*, 2007 WL 2462150, at *4 (refusing to dismiss state-law class claims on a motion to dismiss).

75. See *supra* note 30 and accompanying text (discussing the opt-in provision added to the FLSA by the Portal-to-Portal Act).

76. See *supra* note 68 and accompanying text (discussing the various independent grounds under Rule 12 by which ABC would move to dismiss the plaintiffs' claims in the hypothetical *Edwards* case).

77. *Warner v. Orleans Home Builders, Inc.*, 550 F. Supp. 2d 583, 587 (E.D. Pa. 2008).

78. *Id.* at 588.

79. *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 451–52 (W.D. Pa. 2007) (quoting *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006)) (internal quotations omitted).

80. See, e.g., *Evancho v. Sanofi-Aventis U.S. Inc.*, No. 07-2266 (MLC), 2007 WL 4546100, at *1, *5 (D.N.J. Dec. 19, 2007) (granting motion to strike on basis that state-law class circumvented § 216(b) opt-in provision and undermined Congress's intent in enacting the PPA); *Williams v. Trendwest Resorts, Inc.*, No. 2:05-CV-0605-RCJ-LRL, 2007 WL 2429149, at *1, *4 (D. Nev. Aug. 20, 2007) (granting motion for

Indeed, the court in *Ellis v. Edward D. Jones & Co.*⁸¹ determined that this was neither an “unusual” nor a “new” result.⁸²

Meanwhile, still other courts have determined that inherent incompatibility does not eliminate state-law class claims, either at all or as the sole reason for dismissal. For example, numerous courts, even subsequent to cases determining that dismissal through a Rule 12(b)(6) motion was proper on inherent incompatibility alone,⁸³ have determined that there is no legal doctrine that allows state-law class claims to be dismissed on the basis of inherent compatibility alone and that the analysis must include something more.⁸⁴ Likewise, some courts have simply rejected defendant-employers’ arguments and determined that § 216(b) and Rule 23 actions may properly coexist.⁸⁵

Although the *Edwards* court could rely on the authorities stating that inherent compatibility is not itself a doctrine justifying dismissal and thus deny ABC’s motion to dismiss as it pertains to dismissal based “solely” on inherent incompatibility,⁸⁶ the compatibility analysis does not end with Rules 12(b)(6), 12(c), or 12(f). Whether the opt-in and opt-out mechanisms are inherently incompatible is also relevant to ABC’s motion to dismiss pursuant to Rules 12(b)(1) and whether the court should decline to exercise supplemental

judgment on the pleadings because state-law class would thwart PPA amendment’s purposes by permitting plaintiffs to “back door the shoehorning in” of additional plaintiffs absent opting in (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004)); *Ramsey v. Ryan Beck & Co.*, No. 07-635, 2007 WL 2234567, at *1, *2 (E.D. Pa. Aug. 1, 2007) (granting Rule 12(b)(6) motion on basis of incompatibility).

81. 527 F. Supp. 2d 439 (W.D. Pa. 2007).

82. *Id.* at 448–49 (citations omitted).

83. See, e.g., *Williams v. Trendwest Resorts, Inc.*, No. 2:05-CV-0605-RCJ-LRL, 2007 WL 2429149, at *4 (D. Nev. Aug. 20, 2007) (“[This] Court follows the latter line of cases and finds that the class action mechanisms of the FLSA and Rule 23 are incompatible.”); *Ramsey v. Ryan Beck & Co.*, No. 07-635, 2007 WL 2234567, at *4 (E.D. Pa. Aug. 1, 2007) (finding the district court erred in not dismissing the state-law claims because the claims touched on “novel and complex questions of state law” in addition to inherent compatibility reasons).

84. See, e.g., *Gardner v. W. Beef Props., Inc.*, No. 07-CV-2345, 2008 WL 2446681, at *2 (E.D.N.Y. June 17, 2008) (stating that “‘inherent incompatibility,’ standing alone, is not a ‘doctrine’ or rule of law” that requires dismissal of state-law class claims) (quoting *Westerfield v. Wash. Mut. Bank*, No. 06-CV-2817, 2007 WL 2162989, at *2 (E.D.N.Y. July 26, 2007); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 162 (S.D.N.Y. 2008) (determining no legal doctrine allowed dismissal on the basis on incompatibility alone); *Salazar v. AgriProcessors, Inc.*, 527 F. Supp. 2d 873, 879 (N.D. Iowa 2007) (same)).

85. See, e.g., *Sjblom v. Charter Commc’ns, LLC*, No. 3:07-cv-0451-bbc, 2007 WL 4560541, at *1 (W.D. Wis. Dec. 19, 2007) (finding state-law claims compatible with federal collective-action claims and denying motion to dismiss); *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 731 (M.D. Pa. 2007) (same).

86. See *supra* note 84 (citing cases that support the proposition that incompatibility between an FLSA § 216(b) collective action and a Rule 23 state-law wage claim does not justify dismissal).

jurisdiction over the state-law class claims. Because the federal collective action is founded on the FLSA, a federal court has jurisdiction over such claims by virtue of federal question jurisdiction.⁸⁷ A court with federal question jurisdiction may also have supplemental jurisdiction over related state-law claims, assuming the claims are based upon “the same case or controversy,” meaning that they derive from a common nucleus of fact.⁸⁸

Even if a court has supplemental jurisdiction over state-law claims, it may decline to exercise supplemental jurisdiction under certain circumstances.⁸⁹ Those circumstances are outlined in 28 U.S.C. § 1367(c) and include the presence of (1) “novel or complex” state-law claims,

(2) state-law claims that “substantially predominate[]” over the federal-law claims, (3) a dismissal of all claims over which the court had original jurisdiction, or (4) another “compelling reason[] for declining jurisdiction.”⁹⁰ In terms of the inherent-incompatibility issue, courts have split on whether the tension between Congress’s intent in requiring an opt-in action for federal wage claims and the availability of a Rule 23 opt-out class action on state wage law constitutes a “compelling reason” to decline jurisdiction in itself. Some courts have determined that none of the circumstances in § 1367(c) existed and therefore exercised supplemental jurisdiction.⁹¹

87. 28 U.S.C. § 1331 (2000); *see also* Kuhl v. Guitar Ctr. Stores, Inc., No. 07 C 214, 2008 WL 656049, at *4 (N.D. Ill. Mar. 5, 2008) (noting federal question jurisdiction over FLSA claim); Ellison v. Autozone Inc., No. C06-07522 MJJ, 2007 WL 2701923, at *1 (N.D. Cal. Sept. 13, 2007) (same).

88. 28 U.S.C. § 1367(a) (2000); *see, e.g.,* Kuhl, 2008 WL 656049, at *4 (discussing the legal standard for exercising supplemental jurisdiction over the plaintiff-employees’ state-law claim pursuant to 28 U.S.C. § 1367 (2000)).

89. § 1367(c).

90. *Id.* As noted above, the supplemental jurisdiction analysis was a key issue in *Lindsay*, the District of Columbia Circuit case on this issue. *Lindsay v. Gov’t Employees Ins. Co.*, 448 F.3d 416, 420–21 (D.C. Cir. 2006). However, the D.C. Circuit determined in its analysis that the district court had not based its holding on any of the reasons to decline supplemental jurisdiction under § 1367(c). *Id.* (quoting § 1367(a)). Instead, the D.C. Circuit determined that the district court’s holding had been limited to mandatory jurisdiction under § 1367(a). *Lindsay*, 448 F.3d at 420–21 (quoting § 1367(c)).

91. *See, e.g.,* Salazar v. AgriProcessors, Inc., 527 F. Supp. 2d 873, 884–85 (N.D. Iowa 2007) (determining that state-law claims were not novel or complex and did not present different terms of proof and that the PPA amendment did not constitute a compelling reason to decline jurisdiction); Brickey v. Dolencorp, Inc., 244 F.R.D. 176, 178–79 (W.D.N.Y. 2007) (refusing to decline supplemental jurisdiction because the existence of four states’ laws did not allow the state-law claims to substantially predominate and because there were no other compelling reasons to decline jurisdiction); Bamonte v. City of Mesa, No. CV 06-01860-PHX-NVW, 2007 WL 2022011, at *3-5 (D. Ariz. July 10, 2007) (determining that state-law claims did not predominate as a result of the identical nature of the state and federal claims, that

Other courts have determined that the inherent incompatibility between the opt-in and opt-out mechanisms was itself a compelling reason to decline jurisdiction pursuant to § 1367(c)(4).⁹² Still other courts have looked at the state laws specifically and determined either that they presented novel or complex issues of state law that warranted dismissal⁹³ or substantially predominated the federal claims pleaded.⁹⁴

In addition to outright dismissal under Rules 12(b)(6), 12(c), and/or 12(f), and dismissal related to supplemental jurisdiction under Rule 12(b)(1), inherent incompatibility is also relevant to ABC's motion to dismiss in the *Edwards* case under Rule 23. Although defendant-employers have disputed plaintiff-employees' ability to establish many or all of the prerequisites and other elements of a class action under Rule 23, inherent-incompatibility is often part of an attack on whether the "class action is superior to other available methods for the fair and efficient adjudication of the controversy."⁹⁵ In these situations, the "other available method" is, of course, the FLSA collective action.

Courts have also reached mixed results on this issue. For example, in *Damassia v. Duane Reade, Inc.*,⁹⁶ the United States District Court for the Southern District of New York analyzed whether the plaintiff-employees could establish each element of a class action under Rule 23, including whether it was superior to a collective action under the

the number of opt-out claims was not dispositive, and that other values were met by exercising jurisdiction).

92. See, e.g., *Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178, 182 (M.D. Pa. 2008) (concluding that incompatibility between opt-in and opt-out mechanisms was compelling reason to decline jurisdiction under § 1367(c)(4)).

93. See, e.g., *Warner v. Orleans Home Builders, Inc.*, 550 F. Supp. 2d 583, 590 (E.D. Pa. 2008) (deciding that state-law claims were "novel and complex" and were thus "better left to the Pennsylvania state courts") (quoting *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003); *Ramsey v. Ryan Beck & Co.*, No. 07-635, 2007 WL 2234567, at *4 (E.D. Pa. Aug. 1, 2007) (same)).

94. See, e.g., *Warner*, 550 F. Supp. 2d at 589 (determining that the terms of proof underlying the state-law claims made them substantially predominant); *Ramsey*, 2007 WL 2234567, at *4 (noting that state-law claims were broader in scope and presented different remedies, making them substantially predominant).

95. See, e.g., *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 161-64 (S.D.N.Y. 2008) (addressing superiority issue at state-law class certification stage); *Ellison v. Autozone Inc.*, No. C06-07522 MJJ, 2007 WL 2701923, at *1, *3 (N.D. Cal. Sept. 13, 2007) (addressing superiority on Rule 12(f) motion to strike and determining examination premature at that stage); *Riddle v. Nat'l Sec. Agency, Inc.*, No. 05 C 5880, 2007 WL 2746597, at *1, *3 (N.D. Ill. Sept. 13, 2007) (same); *Marquez v. Partylite Worldwide, Inc.*, No. 07 C 2024, 2007 WL 2461667, at *1 (N.D. Ill. Aug. 27, 2007) (same, except also noting that "any class that does not follow the procedures set forth in § 216(b) of the FLSA is not likely to meet Rule 23's superiority requirement").

96. 250 F.R.D. 152 (S.D.N.Y. 2008).

FLSA.⁹⁷ In determining the superiority issue, the *Damassia* court incorporated the same lines of analysis as those discussed above, including inherent incompatibility; substantial predominance and supplemental jurisdiction; and judicial economy, fairness, convenience, and comity.⁹⁸ The court determined that none of these issues indicated that the federal collective action was superior and that a class action provided “a more cost-efficient and fair litigation of common disputes.”⁹⁹

In *Riddle v. National Security Agency, Inc.*,¹⁰⁰ the United States District Court for the Northern District of Illinois also used inherent incompatibility and elements of supplemental jurisdiction to determine whether an FLSA collective action was superior to a Rule 23 state-law class action.¹⁰¹ However, the *Riddle* court, in applying similar elements of analysis, reached a conclusion that opposed the *Damassia* court’s view of whether a state class was superior to a federal collective action.¹⁰² In *Riddle*, the court determined that a Rule 23 class action was not superior because creating such a state-law class would thwart Congress’s goals in enacting § 216(b)’s opt-in requirement.¹⁰³ Likewise, the court emphasized (despite explicitly declining to analyze supplemental jurisdiction) that the size disparity between a potential opt-out class and an opt-in collective action would put the court in “the rather incongruous situation of an FLSA ‘class’ including only a tiny number of employees who are interested in seeking back wages, with a state-law class that nonetheless includes all or nearly all of the companies” current or former employees.¹⁰⁴

97. See *id.* at 155–64 (discussing the “rigorous analysis” that the court must perform in order to judge whether Rule 23’s requirements are satisfied, and listing those requirements as numerosity, commonality, typicality, adequacy, predominance, and superiority). Although *Damassia* and *Riddle* involved motions to certify state-law classes, the analysis is still relevant to ABC’s motion to dismiss in the *Edwards* case. Parties have also disputed the superiority of a class action over an FLSA collective action in a pre-discovery motion, such as a motion to strike. See *Ellison*, 2007 WL 2701923, at *1 (considering the defendant’s reasons for moving to strike the plaintiff’s state-law claims, but nevertheless denying the motion); *Marquez*, 2007 WL 2461667, at *1 (explaining that the defendant was moving to strike the plaintiff’s state-law claims pursuant to Rules 12(b)(6) and 12(f)).

98. *Damassia*, 250 F.R.D. at 161–64.

99. *Id.* at 164.

100. No. 05 C 5880, 2007 WL 2746597, at *1 (N.D. Ill. Sept. 13, 2007).

101. *Id.* at *3 (emphasizing Congress’s choice to amend FLSA and add an opt-in provision, and recognizing that establishing a Rule 23 class would conflict with Congress’s intent).

102. *Id.* at *4 (overruling the plaintiffs’ motion for class certification in all aspects except its FLSA minimum wage claim).

103. See *id.* at *3 (validating the magistrate judge’s preoccupation with combining a state class and a federal collective action).

104. *Id.* at *9 n.3, *10 (quoting *Muecke v. A-Reliable Auto Parts & Wreckers, Inc.*, No. 01 C 2361, 2002 WL 1359411, at *2 (N.D. Ill. June 21, 2002)).

The court determined, therefore, that certifying a state-law class “would effectively allow[] a federal tail to wag what is in substance a state dog.”¹⁰⁵ Thus, the court adopted the magistrate judge’s report and recommendation denying the plaintiff-employees’ motion for Rule 23 class certification on the basis that the Rule 23 class action was not superior to an FLSA collective action.¹⁰⁶

The final theory ABC advances in support of its motion to dismiss in the *Edwards* case involves the Rules Enabling Act (“REA”).¹⁰⁷ The REA provides that the “Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”¹⁰⁸ However, those rules may not “abridge, enlarge or modify any substantive right.”¹⁰⁹ The substance/procedure distinction—that determines whether a Supreme Court rule abridges, enlarges, or modifies a substantive right, thus making that rule invalid—has been raised as an issue in dual-filed FLSA collective and state-law Rule 23 class actions.¹¹⁰

ABC would argue, for example, that in *Ellis*, the U.S. District Court for the Western District of Pennsylvania reviewed the substance/procedure distinction and determined that rights provided in the PPA amendment are “clearly substantive rights,”¹¹¹ including an employer’s right to be free from “the burden of representative actions”¹¹² and an employee’s right to have his or her FLSA claims included in a collective action “only with his or her

105. *Id.* at *10 (quoting *McClain v. Leona’s Pizzeria, Inc.*, 222 F.R.D. 574, 577 (N.D. Ill. 2004)) (alteration in original).

106. *Id.* at *1. Other courts have suggested that plaintiff-employees will not likely be able to meet Rule 23’s superiority requirement as the cases progress, despite denying defendant-employers’ Rule 12(f) motions to strike. *See Ellison v. Autozone Inc.*, No. C06-07522 MJJ, 2007 WL 2701923, at *2 (N.D. Cal. Sept. 13, 2007) (“While [d]efendant may ultimately be able to demonstrate that having concurrent opt-in and opt-out proceedings is unworkable or would unduly confuse potential plaintiffs, this is a fact-specific and case management issue that the Court finds inappropriate to resolve at the Rule 12(f) stage.”); *Marquez v. Partylite Worldwide, Inc.*, No. 07 C 2024, 2007 WL 2461667, at *1 (N.D. Ill. Aug. 27, 2007) (“[G]iven the history of the FLSA and Rule 23, any class that does not follow the procedures set forth in § 216(b) of the FLSA is not likely to meet Rule 23’s superiority requirement.”).

107. Rules Enabling Act, 28 U.S.C. § 2072 (2000).

108. *Id.* § 2072(a).

109. *Id.* § 2072(b).

110. *See infra* notes 113–115 and accompanying text.

111. *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 455 (W.D. Pa. 2007).

112. *Id.* at 457 (quoting *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989)).

express written consent.”¹¹³ The court highlighted the “perfunctory” nature of existing cases’ analysis of the REA issue and determined that the REA forbade “[t]he use of Rule 23 to create a combined opt-in/opt-out action.”¹¹⁴ The Edwards plaintiff-employees, however, would rebut by showing that other courts, both prior and subsequent to the court’s decision in *Ellis*, have rejected the REA argument out of hand.¹¹⁵

As described above, the court evaluating ABC’s motion to dismiss in *Edwards* would be able to support its position with precedent whether it grants or denies the motion. In order to continue the analysis for purposes of this Article, let us assume that the court in *Edwards* denies ABC’s motion in all respects but specifically determines that these issues are simply prematurely raised in a motion to dismiss.¹¹⁶ As such, ABC would be free to attack each of these issues at later stages during the litigation.

113. *Id.* at 454–55 (quoting Brief for the Sec’y of Labor as Amicus Curiae Supporting Appellants at *18, *Long John Silver’s Rests., Inc. v. Cole*, 514 F.3d 345 (4th Cir. 2008) (No. 06-1259), *available at* 2006 WL 1911678. Again, although the context in *Ellis* was the court’s refusal to certify a state-law class after the parties’ mutual settlement and joint motion to certify the class rather than on a motion to dismiss, defendant-employers have also raised the REA issue in pre-discovery motions to dismiss. *See Osby v. Citigroup, Inc.*, No. 07-cv-06085-NKL, 2008 WL 2074102, at *1, *4 (W.D. Mo. May 14, 2008) (denying defendant’s motion for judgment on the pleadings and motion to strike Rule 23 allegations); *Sjoblom v. Charter Commc’ns, LLC*, No. 3:07-cv-0451-bbc, 2007 WL 4560541, at *1, *5 (W.D. Wis. Dec. 19, 2007) (denying defendants’ motion to dismiss plaintiff’s state-law class claims); *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 728, 732 (M.D. Pa. 2007) (addressing defendants’ motions to dismiss).

114. *Ellis*, 527 F. Supp. 2d at 456–57.

115. *See Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 165 (S.D.N.Y. 2008) (claiming that the REA does not block the certification of a state class); *Osby*, 2008 WL 2074102, at *4 (declaring that no rights are altered by having federal collective class actions and state-law classes coincide); *Sjoblom*, 2007 WL 4560541, at *5 (concluding that the FLSA does not preempt Wisconsin state law); *Lehman*, 532 F. Supp. 2d at 732 (distinguishing from precedent that rejected dual-filed claims).

116. A ruling that the various issues have been prematurely raised in a motion to dismiss and that the defendant-employer may dispute the same matters at a later stage is consistent with many decisions on the dual-filing issue. *See Helderman v. Renee’s Trucking*, No. 08-cv-141-JPG, 2008 WL 2229762, at *3 (S.D. Ill. May 29, 2008) (citing the need for additional findings of fact); *Osby*, 2008 WL 2074102, at *3 (delaying the dismissal because there is no evidence to suggest that adjudicating the federal and state-law claims together would be unfair); *Kuhl v. Guitar Ctr. Stores, Inc.*, No. 07 C 214, 2008 WL 656049, at *4 (N.D. Ill. Mar. 5, 2008) (noting that, at this point in the proceedings, the court only has the power to decide whether it can hear the state and federal law claims); *Freeman v. Hoffmann-La Roche Inc.*, No. 07-1503 (JLL), 2007 WL 4440875, at *3 (D.N.J. Dec. 18, 2007) (explaining that since discovery and a motion for certification had not occurred yet, it was too early to examine the federal and state issues in the action); *Lehman*, 532 F. Supp. 2d at 732 (articulating that defendant’s arguments against plaintiff’s “eventual” motion for class certification were too “speculative” at this point); *Ellison v. Autozone Inc.*, No. C06-07522 MJJ, 2007 WL 2701923, at *2 (N.D. Cal. Sept. 13, 2007) (ruling that the

b. The progressing Edwards case: Attacking state-law certification

Because the judge in *Edwards* determines that ABC's arguments on the propriety of including a state-law class action with the plaintiff-employees' FLSA collective action are premature, ABC is free to raise the same issues at the next available stage. In many cases, defendant-employers next attack Rule 23 state classes in opposition to the plaintiff-employees' motion to certify the state-law class.¹¹⁷ While FLSA preliminary collective-action certification and notice are often sought early in litigation, the Rule 23 class-certification motion often comes late, after the plaintiffs have had an opportunity to establish Rule 23's prerequisites through discovery.¹¹⁸ At the class-certification stage, ABC argues that the court in *Edwards* should not certify a state-law class under Rule 23 for the same reasons ABC moved to dismiss the state-law class claims: inherent incompatibility, supplemental jurisdiction, the REA, and a failure to establish each of Rule 23's prerequisites to class certification. The legal analysis is largely the same, except that it follows discovery on the state-law claims. Throughout discovery, ABC produced perhaps tens of thousands of documents, including payroll and other documents spanning four years prior to the case's commencement (the state-law limitations period) and pertaining to all 1500 potential class members.

Because the *Edwards* case has progressed through discovery, ABC's argument as to whether the state-law claim substantially predominates the federal-law claim has developed significantly. Since the case's commencement, only 225 individuals have opted in to the FLSA collective action, which amounts to fifteen percent of the estimated 1500 possible collective-action members. In looking at substantial predomination only from the perspective of class versus collective action size, precedent guides the *Edwards* court in a number of directions.

decision was premature, particularly because the court had independent jurisdiction over these claims under CAFA).

117. See, e.g., *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 213 (5th Cir. 2003) (stating that the defendants opposed the plaintiff's Rule 23 motion for class certification and arguing that the plaintiff had not satisfied its requirements).

118. See Noah H. Finkel, *The Fair Labor Standards Act, State Wage-and-Hour Law Class Actions: The Real Wave of "FLSA" Litigation?*, 4 EMP. RTS. & EMP. POL'Y J. 159, 176 (2003) (stating that "plaintiffs' counsel often asks for permission to send a FLSA opt-in notice to potential class members very early in a case" and that they "often will move for class certification at a slightly later stage in the case, possibly because the more difficult burden of showing the necessity of class certification under Rule 23 than under section 16(b) can require extensive discovery and briefing").

For example, in *De Asencio*, the size of the opt-in group in comparison to the size of the opt-out class action was a significant factor in the supplemental-jurisdiction analysis.¹¹⁹ The Third Circuit recognized that the two groups contained 447 FLSA opt-in members and 4100 possible state-law opt-out class members.¹²⁰ In analyzing the matter, the *De Asencio* court noted that “aggregation of claims, particularly as class actions . . . affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants.”¹²¹ The court reasoned that the disparity between the FLSA group and the state-law class could be “dispositive by transforming the action to a substantial degree, by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog.”¹²² The Third Circuit determined, “[h]ere, the inordinate size of the state-law class, the different terms of proof required by the implied contract state-law claim, and the general federal interest in opt-in wage actions suggest the federal action is an appendage to the more comprehensive state action.”¹²³ On the other hand, despite the language in *De Asencio* suggesting that the differing size of the classes could be dispositive, other courts have determined that substantial predominance relates to “the type of claim, not the number of claimants.”¹²⁴

Again, for purposes of advancing the analysis, let us assume that the *Edwards* court grants the plaintiff-employees’ motion to certify the state-law class.

c. The progressing Edwards case: Towards settlement

Within a short period of time following the court’s certification of the state-law class in *Edwards*, the parties engage in settlement talks. Perhaps the *Edwards* court is in a jurisdiction that requires a pretrial settlement conference or other attempt at alternative dispute resolution.¹²⁵ Or, perhaps the parties voluntarily engage in mediation or another type of alternative dispute resolution. In either case, let us assume that the parties mutually resolve the matter entirely. They execute a settlement agreement, which provides that all claims

119. See *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 310–12 (3d Cir. 2003) (articulating multiple reasons for why the size of a class is important).

120. *Id.* at 305.

121. *Id.* at 310.

122. *Id.* at 311.

123. *Id.* at 312.

124. *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 162 (S.D.N.Y. 2008) (citing *Lindsay v. Gov’t Employees Ins. Co.*, 448 F.3d 416, 425 n.12 (D.C. Cir. 2006)).

125. See, e.g., D. MINN. R. 16.5(a) (requiring each civil case be set for a mediated settlement conference within forty-five days prior to trial).

(including state-law class claims) will be released, and file a joint motion asking the court to approve the settlement. At the time the parties reach their settlement, there are still 225 FLSA opt-ins and 1500 possible state-law class members.

Although the court previously rebuffed ABC's efforts to eliminate the state-law claims from the action, in reviewing the settlement-approval motion, the *Edwards* court now finds the *Ellis* court's analysis on settlement instructive and refuses to approve settlement on a classwide basis. In *Ellis*, the parties had reached a global settlement, including settlement and release of both state and federal claims on a classwide basis, and the court was faced with the parties' joint motion for preliminary approval of the settlement.¹²⁶ The *Ellis* court began its analysis with a discussion of the differences between the opt-in and opt-out provisions and how "inertia" fostered low opt-in rates in FLSA collective actions as well as low opt-out rates in class actions, meaning that state-law classes "may even be 'exponentially greater'" than FLSA collection actions.¹²⁷

The court also pointed out that parties to an opt-in action could not be bound by a settlement they did not consent to and, therefore, that § 216(b) "militated" against a global settlement.¹²⁸ The court reasoned that dual-filed or "hybrid actions . . . cause[d] . . . FLSA claims to be 'swept into the case if class certification is granted,'" and cited views that a state-law class was "a nice way to wrap around the opt-in process to get the extra plaintiffs who fall through the cracks."¹²⁹

The *Ellis* court continued its analysis by noting that there was at least the potential that adjudication of the state-law claims, including through settlement, precluded later adjudication of FLSA claims.¹³⁰ The court's reasoning in this respect was bolstered by the parties' admission that class members failing to opt out of the state-law class would be precluded from later pursuing FLSA claims, despite also having failed to opt in to the FLSA collective action.¹³¹ Although dissimilar state and federal claims could coexist, "[a]llowing [p]laintiffs to 'circumvent the [FLSA] opt-in requirement and bring unnamed parties into federal court by calling upon state statutes similar to the FLSA would undermine Congress's intent to limit these

126. *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 441–42 (W.D. Pa. 2007).

127. *Id.* at 445 (quoting *De Asencio*, 342 F.3d at 310).

128. *Id.* at 446.

129. *Id.* (quoting *Lampe & Rossman*, *supra* note 15, at 315) (internal quotations omitted).

130. *Id.*

131. *Id.*

types of claims to collective actions.”¹³² As a result, despite the parties’ joint motion to approve settlement and the absence of any objection to a state-law class, the court dismissed the plaintiff-employees’ parallel state claims and allowed notice only to federal opt-in plaintiffs.¹³³

Like the court in *Ellis*, the *Edwards* court dismisses the state-law class claims and allows the parties to provide notice of settlement only to the 225 FLSA opt-ins. The court allows release of both state and federal claims as to those 225 individuals only.

2. *The dilemma: The two possible outcomes of an attack on a state-law class*

Without regard to the accuracy of the *Edwards* court’s decision and the potential appealability thereof, the *Edwards* case demonstrates the dilemma that parties face in dual-filed wage suits. Regardless of the myriad of arguments the parties make in support of and in opposition to the inclusion of a state-law class, there exists, at least in the authorities outlined above, only two possible outcomes: either (1) the court sides with the plaintiff-employees and maintains the Rule 23 action within the FLSA collective action or (2) the court sides with the defendant-employer and strikes or dismisses the state-law class allegations without prejudice.¹³⁴ Even when courts sever the Rule 23 class from the action, the state-law class claims are still available within a state forum and the plaintiff-employees need only re-file.¹³⁵ In those cases, allegations are merely stricken or dismissed with prejudice; the state-law claims are not affected in any substantive

132. *Id.* at 451–52 (quoting *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 523 (M.D. Pa. 2006)).

133. *Id.* at 442, 452.

134. See, e.g., *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 154 (S.D.N.Y. 2008) (certifying Rule 23 class); *Osby v. Citigroup, Inc.*, No. 07-cv-06085-NKL, 2008 WL 2074102, at *1 (W.D. Mo. May 14, 2008) (denying motion to strike or for judgment on the pleadings); *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG)(RER), 2008 WL 597186, at *1 (E.D.N.Y. Mar. 2, 2008) (granting Rule 23 class notice); *Di Nardo v. Ned Stevens Gutter Cleaning & Installation, Inc.*, No. 07-5529 (SRC), 2008 WL 565765, at *1 (D.N.J. Feb. 28, 2008) (denying Rule 12(b)(6) motion); *Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d 1120, 1122 (N.D. Cal. 2008) (denying motion to dismiss or strike); *Sjoblom v. Charter Commc’ns, LLC*, No. 3:07-cv-0451-bbc, 2007 WL 4560541, at *1 (W.D. Wis. Dec. 19, 2007) (denying Rules 12(b)(6) and 12(f) motion). For cases striking or dismissing state-law class allegations, see *infra* note 136 and accompanying text.

135. See *Warner v. Orleans Home Builders, Inc.*, 550 F. Supp. 2d 583, 590 (E.D. Pa. 2008) (discussing appropriateness of eliminating state-law class allegations on basis that court could dismiss without prejudice and plaintiffs could refile); see also *Ramsey v. Ryan Beck & Co.*, No. 07-635, 2007 WL 2234567, at *4 (E.D. Pa. Aug. 1, 2007) (same).

way.¹³⁶ The issue resolved is only that the opt-in and opt-out groups cannot proceed together in a single action.

II. ALLOWING PARALLEL STATE WAGE CLAIMS RESULTS IN THE LOSS OF FEDERAL CLAIMS FOR NON-OPT-IN INDIVIDUALS AND EFFECTIVELY ELIMINATES THE FLSA

The problems that arise in a dual-filed wage lawsuit, or in any suit including a state-law wage claim that parallels the FLSA, stem from the fact that all class members are automatically included in the class, unless they opt out.¹³⁷ This is problematic (1) because individuals who fail to opt in to the FLSA collective action and fail to opt out of the state-law class action, either through lacking notice or apathy, may be precluded from bringing those claims in the future; and, (2) because allowing an opt-out class to proceed on a parallel state claim effectively eliminates the FLSA.

A. *Precluding Potential Claimants' Future FLSA Claims Despite Not Opting In to the FLSA Collective Action*

Besides thwarting Congress's intent in amending the FLSA and circumventing the opt-in provision, as discussed both above and further below, a primary concern in allowing state-law wage claims that parallel the FLSA is that any settlement or judgment may preclude claimants who did not opt in to the FLSA group from pursuing those FLSA claims at a later date. A number of courts examining the propriety of dual-filed § 216(b)/Rule 23 actions have addressed preclusion of an individual's FLSA claims even when he or she does not opt in to the collective action.¹³⁸ Many of these courts have determined that when

136. See *Warner*, 550 F. Supp. 2d at 590 (granting Rule 12(b)(6) motion and dismissing Rule 23 claims without prejudice); *Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178, 190, 190 n.10 (M.D. Pa. 2008) (striking class allegations but noting availability of individual state-law claims within FLSA collective action); *Evancho v. Sanofi-Aventis U.S. Inc.*, No. 07-2266 (MLC), 2007 WL 4546100, at *1 (D.N.J. Dec. 19, 2007) (granting motion to strike); *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 452, 462 (W.D. Pa. 2007) (dismissing parallel state claims without reference to "with prejudice"); *Riddle v. Nat'l Sec. Agency, Inc.*, No. 05 C 5880, 2007 WL 2746597, at *4 (N.D. Ill. Sept. 13, 2007) (denying certification of Rule 23 class); *Williams v. Trendwest Resorts, Inc.*, No. 2:05-cv-0605-RCJ-LRL, 2007 WL 2429149, at *1, *9 (D. Nev. Aug. 20, 2007) (granting judgment on the pleadings and dismissing state class claims without reference to "with prejudice"); *Ramsey*, 2007 WL 2234567, at *1 (dismissing state-law class claims without prejudice).

137. Compare 29 U.S.C. § 216(b) (2000) (providing inclusion in the collective action only upon the filing of an individual's written consent), with FED. R. CIV. P. 23(c)(3)(B) (requiring judgment, whether favorable or not, to encompass all class members "who have not requested exclusion").

138. See *infra* notes 139–141 and accompanying text.

there exists a Rule 23 class on a state-law wage issue parallel to the FLSA, an individual who does not opt out of the state-law class will automatically have his or her FLSA claims adjudicated even if (1) he or she does not opt in to the FLSA class or (2) the action does not contain an FLSA claim.¹³⁹ At least one court has determined specifically that “[t]he Supreme Court has recently reaffirmed the legitimate preclusive effect of properly conducted class actions, such as those brought under Federal Rule 23 and its attendant procedural safeguards.”¹⁴⁰ Additionally, as the *Damassia* court explained “as in any Rule 23(b)(3) class action, potential class members who want to control their own litigation—and to avoid being bound by the judgment in the class action—are free to opt out of the class.”¹⁴¹ This is problematic not only because of the inequities involved in adjudicating individuals’ claims without their knowledge or consent, but also because the specific purpose of § 216(b)’s opt-in requirement is to ensure that only individuals who opt in to the collective action will be bound by the judgment.¹⁴²

Perhaps the *Edwards* court’s concern, from our hypothetical dual-filed case above, in approving a global settlement releasing all class members’ claims stemmed from this preclusion issue. In the hypothetical, only 225 individuals opted in to the FLSA collective

139. See, e.g., *Damassia*, 250 F.R.D. at 163 (quoting *Guzman*, 2008 WL 597186, at *10 n.11) (noting that “concerns about class plaintiffs being bound by *res judicata* . . . are misplaced” but recognizing that “[i]t is true that potential class members who do not opt out of the class action could have ‘all claims that could have been brought in that action, including any FLSA claim, resolved by *res judicata* without opting in to the FLSA action’”); *Woodard*, 250 F.R.D. at 186 (recognizing that “the maintenance of the FLSA claim and parallel state law claim in the same action, where both claims are predicated on the same conduct of the defendant,” produces a substantial risk that “employees, who neither opt in to the FLSA collective action nor opt out of the state-law class action, will be collaterally estopped from asserting FLSA claims in their own right”); *Ellis*, 527 F. Supp. 2d at 446 (commenting that “there is authority for the proposition that adjudication of similar state law claims precludes adjudication of claims under FLSA at a later date”).

Indeed, even plaintiffs’ counsel have conceded that potential collective action members who neither opt in to the FLSA collective action nor opt out of the Rule 23 class will have their FLSA claims adjudicated through the judgment on the Rule 23 class claim. See *Woodard*, 250 F.R.D. at 187 n.7 (specifying that it was Mr. Woodard’s counsel who conceded this point and that it was the “individual’s choice” to have this happen); *Ellis*, 527 F. Supp. 2d at 446 (emphasizing that members are “forever bound” by this judgment).

140. *Gardner v. W. Beef Props., Inc.*, No. 07-CV-2345, 2008 WL 2446681, at *3 (E.D.N.Y. June 17, 2008) (citing *Taylor v. Sturgell*, 128 S. Ct. 2161, 2174 (2008)).

141. *Id.* at *3 (quoting *Damassia*, 250 F.R.D. at 163).

142. See, e.g., *Woodard*, 250 F.R.D. at 185, 188 (noting Congress’s intent in ensuring that “only employees who affirmatively opt in will be bound by the judgment” and in protecting “employees—who may have no desire at the present moment to file a lawsuit under the FLSA—from having their FLSA rights adjudicated without their knowledge by purported class representatives whose interest may not be aligned with those whom they purport to represent”).

action, but there were 1500 potential state-law class members. Thus, if none of the remaining 1275 individuals who neither opted in to the FLSA collective action nor opted out of the state-law class action exclude themselves from the settlement, all 1275 individuals would lose their FLSA claims. Those individuals would otherwise be able to raise their FLSA claims individually, had the lead plaintiffs and their counsel not attempted to include an opt-out state-law class action.

In addition to the general inequities involved in having one's federal wage claim precluded from later adjudication, despite not having consented to participate in the FLSA collective action, the preclusion of future claims is significant in at least two other contexts as well.¹⁴³ First, in circumstances when they are unable to certify a Rule 23 class in a particular suit, especially with regard to Rule 23's numerosity requirement,¹⁴⁴ plaintiff-employees have sometimes simply re-filed their suit in other jurisdictions until they hit upon a court willing to certify the class.¹⁴⁵ Some attorneys have "adopted a strategy of filing in as many courts as necessary until" they are able to have a Rule 23 class certified.¹⁴⁶ And, although some commentators have determined that there is "hope that plaintiffs may be precluded from taking 'multiple bites' at the same certification 'apple'"¹⁴⁷ in this manner, some courts have determined otherwise.¹⁴⁸

For example, in *Davidson v. RGIS Inventory Specialists*,¹⁴⁹ the U.S. District Court for the Eastern District of Texas determined that a court's order denying conditional Rule 23 class certification in a previous case was not a final decision that would preclude relitigation in a similar and later case against the same defendant.¹⁵⁰ Rather, the

143. See *infra* notes 144–165 and accompanying text (discussing the lack of finality of a denial of claim certification and successful plaintiffs' attorneys' tactics in re-filing claim certifications in different venues until finding a court willing to grant certification).

144. See FED. R. CIV. P. 23(a)(1) (stating that a class can potentially be so large that joining all members of that class would be impractical).

145. See Lampe & Rossman, *supra* note 15, at 335 (citing *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 764 (7th Cir. 2003)) (describing the *Bridgestone/Firestone* plaintiffs' counsel's determination to find a court that would hear their case, resulting in five filings of nationwide class actions).

146. *Id.* (quoting *Bridgestone/Firestone*, 333 F.3d at 764).

147. *Id.*

148. See *infra* notes 149–152 and accompanying text (discussing the decision in *Davidson v. RGIS Inventory Specialists*, which exemplifies that a class certification is not a final order, thus providing plaintiffs' opportunity to re-file class certification in different court).

149. 553 F. Supp. 2d 703 (E.D. Tex. 2007).

150. See *id.* at 706–07 (rejecting defendant's argument that class certification is barred by the doctrine of collateral estoppel because class certification had been denied in a previous case).

court determined that an order denying class certification “lack[ed] sufficient finality to be entitled to preclusive effect while the underlying litigation remains pending.”¹⁵¹ Thus, defendant-employers may be required to suffer defending numerous lawsuits in which courts repeatedly deny Rule 23 class certification until one judge grants class certification because “[a] single positive trumps all the negatives.”¹⁵²

Furthermore, preclusion is another issue for cases where plaintiff-employees and defendant-employers reach a settlement that includes the state-law class. As at least one commentator has posited, a settlement including an opt-out class claim “enables plaintiffs’ lawyers and defendants to settle class lawsuits on mutually beneficial terms that exploit class members.”¹⁵³ Such a settlement would benefit the defendant-employer because if the state-law class were included, the settlement would bind all potential class members and include a release that would insulate them from future lawsuits by every individual in the class who did not opt out.¹⁵⁴

In order to address the issues related to preclusion of plaintiffs’ claims in a dual-filed action, courts frequently authorize sending an early court-facilitated notice to all potential FLSA collective action members.¹⁵⁵ This notice “can create settlement pressure early in the action, before plaintiffs’ counsel expends significant resources, because it signals the potential expansion of the case and the need for significant and expensive class-wide discovery.”¹⁵⁶ These dual settlements, where both an FLSA and state-law wage claims are released, sweep all potential FLSA collective action members into the release for the same reasons that FLSA claims are precluded when an

151. *Id.* at 706 (citation omitted).

152. *See* Lampe & Rossman, *supra* note 15, at 335 (emphasizing that when one nationwide class is certified, all the previous noncertification decisions fade into insignificance (citing *In re Bridgestone/Firestone, Inc.*, 333 F.3d 763, 766–67 (7th Cir. 2003))).

153. *See* John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 903 (2005) (noting that in such a settlement the class members lose their right to bring their own suit, while plaintiffs’ lawyers receive a hefty fee for their work and defendants insulate themselves from future lawsuits by every class member).

154. *See id.* at 904–05 (explaining that defendant-employers prefer to settle such claims, instead of litigating them and running the risk of a large damages award to the plaintiffs).

155. *See* Lampe & Rossman, *supra* note 15, at 315 (explaining that notice is a low-cost method of identifying persons who are likely to have case-related information and who are willing to work with plaintiffs’ counsel as witnesses).

156. *Id.* (citing *Attorneys Discuss Strategies for Bringing, Defending FLSA Collective Action Lawsuits*, 156 DAILY LAB. REP. (BNA), at C-1 (Aug. 13, 2002)).

individual neither opts in to the FLSA class nor opts out of the state-law class.¹⁵⁷

Similarly, preclusion of possible claimants' future FLSA claims is also troublesome from a practical perspective. Generally, it has been the role of defendant-employers to alert the court to the problems associated with preclusion in conjunction with their various arguments against including a state-law class.¹⁵⁸ However, courts evaluating the preclusion issue have rebuked defendant-employers for raising the issue and questioned defendant-employers' seemingly inconsistent concern for absent employees' rights.¹⁵⁹ It also makes sense that employers would not truly be concerned with their employees' freedom to sue them in the future, especially after they have suffered through one round of litigation on the issue already. Rather, as is the case when the parties reach a settlement, employers are more likely to argue in favor of a global release of all claims against them.

Despite the potential for insincerity in defendant-employers' "concern" for absent individuals' rights, the reality is that if the preclusion issue is not raised by the defendant-employers or on a court's own accord, the issue may not be raised at all. As described earlier, it is the opportunity for a large state-law class that drives plaintiffs' counsel to pursue wage claims and has made suits featuring a state-law claim the action "du jour" for the plaintiffs' bar.¹⁶⁰ Individual wage claims and opt-in FLSA claims are unattractive because those actions result in substantially lower damage awards, in part because the FLSA has a shorter statute of limitations and because the FLSA does not allow the limitations period to be tolled until individuals opt in.¹⁶¹ Damage awards are also substantially

157. *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 446 (W.D. Pa. 2007).

158. *See, e.g., Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 889 (N.D. Iowa 2008) (rejecting the defendant-employer's argument that allowing both actions to proceed would have serious legal ramifications for the potential plaintiffs who did not opt-in); *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG)(RER), 2008 WL 597186, at *10 (E.D.N.Y. Mar. 2, 2008) (rejecting defendant-employers' argument that those individuals who fail to opt-out of the state-law class action will be precluded from opting-in to the FLSA action).

159. *See Bouaphakeo*, 564 F. Supp. 2d at 889 n.11 (stating that the court did not believe that Tyson was genuinely concerned about preclusion of absent individuals' claims); *Guzman*, 2008 WL 597186, at *10 n.11 ("The defendants, apparently in an abundance of concern for the rights of absent Rule 23 class members, are worried that someone who fails to opt out of the Rule 23 class action will have all claims that could have been brought in that action, including any FLSA claim, resolved by *res judicata* without opting in to the FLSA action.").

160. *See supra* note 17 (explaining why plaintiffs' counsel prefer state-law claims).

161. *See* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1330 (2008)

limited because, in a Rule 23 claim, the court can award damages based on the entire class's alleged injury, resulting in full, class-wide damages.¹⁶² Thus, the potential for a lower aggregate recovery makes individual wage claims or FLSA opt-in claims less attractive to plaintiffs' counsel because the attorney's fees they recover, for example in settlement, are substantially lower.

The combination of these factors, low participation and limited recovery ability, make it "hard to find a lawyer who will take" an individual wage claim or an opt-in class action.¹⁶³ In the words of one commentator, the class action is "perhaps the most powerful tool that plaintiffs can wield."¹⁶⁴ The incentives for plaintiffs' counsel to pursue state wage claims, either in a dual-filed action with the FLSA or in lieu of an FLSA claim, are therefore numerous.¹⁶⁵

The consequential reality, then, is that there are likely no circumstances under which a plaintiffs' attorney will raise concern about preclusion and absent potential claimants' ability to file FLSA claims in the future. Rather, plaintiffs' counsel will seek the higher paying state-law class cases which may result in preclusion of some potential plaintiffs' claims. Protection of these precluded claims must come, as a result, through defendant-employers' potentially insincere arguments about preclusion, the court's own evaluation of the preclusion issue, or elimination of the parallel state-law claim altogether.

(noting that defendant-employers can reduce their damage exposure if they delay the opt-in process because every day that passes before consents are filed is a day less of potential liability).

162. See *id.* at 1331–32 (noting that these full, class-wide damages can be made to an appropriate, alternative recipient when there are unlocatable class members to ensure that the defendant-employer does not improperly avoid paying damages just because some class members cannot be located).

163. *Id.* at 1333.

164. Bronsteen, *supra* note 153, at 903.

165. Some commentators, as well as some district courts, have even suggested that Congress should amend the FLSA to eliminate the opt-in requirement because these opt-in claims are so unattractive and have otherwise touted the benefits of an opt-out action. See *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 163 (S.D.N.Y. 2008) (stating that "the opt-out nature of a class action is a valuable feature lacking in an FLSA collective action" (quoting *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG)(RER), 2008 WL 597186, at *8 (E.D.N.Y. Mar. 2, 2008))); Becker & Strauss, *supra* note 161, at 1319 (theorizing that the FLSA's opt-in requirement is unjust, unwise public policy, and incoherent as implemented by courts). However, to allow an FLSA opt-out action would be to override a congressional mandate that has existed since it enacted the PPA amendment in 1947.

*B. Side-Stepping or Eliminating the FLSA through Pursuit
of a Parallel State Claim*

The unattractiveness of an individual state wage claim or FLSA opt-in collective action has led to an “explosion” of lawsuits either (1) including both state and federal wage claims to take advantage of the availability of Rule 23, or (2) foregoing or shunning the FLSA altogether.¹⁶⁶ As noted above, the opt-in requirement substantially limits the size of the group action, generating participation between only fifteen and thirty percent.¹⁶⁷ One commentator reasons that this low participation is caused by complications inherent in the notice process, including that (1) many potential collective-action members never receive the notice; (2) potential collective-action members throw away notices; and (3) even when potential collective-action members actually receive, read, and understand notices, they are unlikely to participate because they realize they are being solicited to join a lawsuit.¹⁶⁸ However, these notice process difficulties are ultimately indicative of why parallel state-law claims should not proceed as a Rule 23 class either.

Although the FLSA does not require notice to potential collective action members, many courts have determined that providing notice is appropriate.¹⁶⁹ Likewise, when a court certifies a Rule 23 class, it will authorize notice to putative class members in much the same form as an FLSA opt-in notice.¹⁷⁰ However, the same problems that

166. See *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 459 n.19 (W.D. Pa. 2007) (describing the “recent phenomenon” of an “explosion” of hybrid lawsuits involving both state and FLSA claims”) (internal citation omitted); Lampe & Rossman, *supra* note 15, at 314 (noting that “some plaintiffs’ counsel shun the FLSA altogether in favor of analogous state statutes or state common law claims”).

167. See Becker & Strauss, *supra* note 161, at 1325–26, 1326 n.56 (noting an even lower opt-in participation rate and emphasizing a 2.7% opt-in rate in *another* case (citing *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 310 (3d Cir. 2003))); Lampe & Rossman, *supra* note 15, at 313–14 (estimating that opt-in participation in non-union-backed cases is fifteen to thirty percent).

168. See Becker & Strauss, *supra* note 161, at 1326–28 (noting that because mailed notice yields a low number of opt-in plaintiffs, courts have approved additional forms of notice, such as radio, newspaper, or postings in gathering spots in neighborhoods where employees are likely to live).

169. See, e.g., *Laroque v. Domino’s Pizza, LLC*, 557 F. Supp. 2d 346, 351 (E.D.N.Y. 2008) (stating that “[d]istrict courts have discretion under [§ 216(b)] to direct a defendant employer to disclose the names and addresses of similarly situated potential plaintiffs and to authorize the sending of notice to these individuals, so that they may ‘opt in’ to the collective action”); *Tremblay v. Chevron Stations Inc.*, No. C-07-06009 EDL, 2008 WL 2020514, at *1 (N.D. Cal. May 8, 2008) (“If the Court decides to certify a collective action, the Court may authorize and facilitate notice to potential plaintiffs under *Hoffman-La Roche Inc. v. Sperling*.”); *Ellis*, 527 F. Supp. 2d at 462 (authorizing FLSA notice).

170. See FED. R. CIV. P. 23(c)(2) (allowing a court to direct appropriate notice to a class certified under Rule 23(b)(1) and Rule 23(b)(2), while requiring the court give

result in low participation in an opt-in action also affect the Rule 23 action. If individuals do not receive notice in opt-in actions because of issues such as high job turnover and frequent changes of address, those same individuals will not receive notice in an opt-out class action.¹⁷¹ Individuals who do not understand an opt-in notice are no more likely to understand an opt-out notice, or in dual-filed cases, to understand two notices.¹⁷² Many individuals will not respond as a result of what courts term the “inertia . . . promot[ing] low response rates.”¹⁷³

The problem, again, is that all class members are automatically included in the class unless they opt out.¹⁷⁴ Because Congress’s concern in enacting the PPA amendment to the FLSA was to “make certain that every employee named as a plaintiff in a wage suit will be fully aware of such suit and in agreement with its objectives,” allowing participation in a class action based on parallel state wage laws is tantamount to overriding Congress’s purpose in requiring opt-in participation.¹⁷⁵ Individuals who do not care enough in the outcome of their wage claim to opt in to the FLSA suit and who, through similar apathy, do not bother to opt out of the state-law claim, lack the “personal interest in the outcome” Congress envisioned.¹⁷⁶

individual notice to all members who can be identified through reasonable effort for a class certified under Rule 23(b)(3)).

171. See Becker & Strauss, *supra* note 161, at 1326 (outlining the various problems associated with potential class members not receiving notice in opt-in cases as a result of various factors, including high turnover in low-wage jobs and frequent changes of address among low-wage workers).

172. See, e.g., *Riddle v. Nat’l Sec. Agency, Inc.*, No. 05 C 5880, 2007 WL 2746597, at *4 (N.D. Ill. Sept. 13, 2007) (recognizing the “substantial” risk of confusion with opt-in and opt-out notice); *Salazar v. AgriProcessors, Inc.*, 527 F. Supp. 2d 873, 885 (N.D. Iowa 2007) (recognizing that “the class notices may be confusing to potential class members if care is not taken in crafting the notice language”); Becker & Strauss, *supra* note 161, at 1327 (noting the likelihood of potential class members not understanding the notice as a result of finding the language “confusing, intimidating, or threatening”).

173. See *Ellis*, 527 F. Supp. 2d at 445 (“The same inertia that promotes low response rates in opt-in collective actions fosters low *opt-out* rates in class actions maintained under Fed. R. Civ. P. 23(b)(3).” (citing *Finkel*, *supra* note 118, at 162)).

174. Compare 29 U.S.C. § 216(b) (2000) (allowing inclusion in the collective action only upon an individual’s written consent), with FED. R. CIV. P. 23(c)(3)(b) (requiring judgment, whether favorable or not, to encompass all class members “who have not requested exclusion”).

175. BUREAU OF NAT’L AFFAIRS, *supra* note 28, at 49; see also *Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178, 186 (M.D. Pa. 2008) (stating that Congress’s intent in enacting the PPA amendment was to “ensure that ‘absent individuals would not have their rights litigated without their input or knowledge’” (quoting *Ellis*, 527 F. Supp. 2d at 450)).

176. See, e.g., *Warner v. Orleans Home Builders, Inc.*, 550 F. Supp. 2d 583, 588 (E.D. Pa. 2008) (explaining Congress’s intent in enacting the PPA amendment as being to “curb the ‘excessive litigation spawned by plaintiffs lacking a personal

However, when state claims parallel their federal counterpart, whether in a Rule 23 action or as an individual claim, those state claims effectively supplant or eliminate the FLSA claim altogether. When plaintiffs' counsel "shun"¹⁷⁷ the FLSA claim in order to "wrap around the opt-in [requirement] to get to the extra plaintiffs,"¹⁷⁸ the result is that the parties' and the court's focus is on the state-law class claim rather than the FLSA claim.¹⁷⁹ However, this is in direct contravention of Congress's intention in regulating wage-and-hour law.¹⁸⁰ Indeed, many courts looking at the practical effect that a large opt-out class has on a dual-filed FLSA action have determined that to allow the state-law class to proceed would be effectively "allowing a federal tail to wag what is in substance a state dog."¹⁸¹ Allowing a state-law class in a case in which the state claims pleaded parallel the FLSA has exactly that effect: letting employees seek what is really just federal relief under the guise of a state statute or state common-law claim solely to avoid the limitations in a federal opt-in action.¹⁸²

interest in the outcome" (quoting *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989))).

177. Lampe & Rossman, *supra* note 15, at 314 (noting that "some plaintiffs' counsel shun the FLSA altogether in favor of analogous state statutes or state common law claims").

178. *Ellis*, 527 F. Supp. 2d at 446 (quoting Lampe & Rossman, *supra* note 15, at 315).

179. *See id.* (noting that FLSA claims get "swept into" the Rule 23 claims in a hybrid action).

180. *See, e.g., Warner*, 550 F. Supp. 2d at 588 (describing Congress's intent in enacting the PPA amendment as being to "limit[] private FLSA plaintiffs to employees who asserted claims in their own right," and thus curb the "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome" (quoting *Hoffman-La Roche*, 493 U.S. at 173)); *Woodard*, 250 F.R.D. at 182-83 (concluding that when state and FLSA claims are predicated on identical facts and statutory rights, simultaneous prosecution of the state claim undermines Congress's objectives in enacting the PPA amendment); *Ellis*, 527 F. Supp. 2d at 451-52 (emphasizing that "[a]llowing [p]laintiffs to 'circumvent the [FLSA] opt-in requirement and bring unnamed parties into federal court by calling on state statutes similar to the FLSA would undermine Congress's intent'" (quoting *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 523 (M.D. Pa. 2006))); *Evancho v. Sanofi-Aventis U.S. Inc.*, No. 07-2266 (MLC), 2007 WL 4546100, at *5 (D.N.J. Dec. 19, 2007) (determining that plaintiffs cannot "circumvent the opt-in requirement... by calling upon state statutes similar to the FLSA" (quoting *Moeck v. Gray Supply Corp.*, No. 03-1950 (WGB), 2006 WL 42368, at *5 (D.N.J. Jan. 6, 2006))).

181. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 309 (3d Cir. 2003) (explaining that a court will generally dismiss the state claim when it constitutes the real body of the case, to which the federal case is only an appendage); *see Riddle v. Nat'l Sec. Agency, Inc.*, No. 05 C 5880, 2007 WL 2746597, at *10 (N.D. Ill. Sept. 13, 2007) (refusing to grant class certification on the state-law claim because of the fundamentally conflicting nature of a large opt-out state-law class and a much smaller opt-in FLSA class).

182. *See cases cited supra* note 180 (describing Congress's intent in enacting the FLSA opt-in requirement); *supra* sources cited note 165 (highlighting the arguments in favor of an amendment to the FLSA eliminating the opt-in requirement).

Consequently, numerous courts have determined that plaintiff-employees cannot seek Rule 23 class certification in an FLSA claim, that is, bring a “Rule 23 FLSA class” rather than a state-law Rule 23 class.¹⁸³ However, when the state-law claim underlying the Rule 23 class is parallel to the FLSA claim, the result is a de facto Rule 23 FLSA class. To allow a state-law class based upon state law would be to allow plaintiffs to avoid the parallel federal opt-in requirement entirely.¹⁸⁴

There are several ways plaintiff-employees can avoid pleading an FLSA claim and, instead, rely solely upon parallel state claims in order to avoid the opt-in requirement. For instance, if the plaintiffs want a federal court to hear their case, they can plead a single federal claim, such as for minimum wage, overtime, retaliation, or recordkeeping violations (or even, perhaps, discrimination), and plead the remaining claims under parallel state laws using supplemental jurisdiction.¹⁸⁵ Similarly, plaintiff-employees could maintain a state-law-only action in federal court using the Class Action Fairness Act (“CAFA”),¹⁸⁶ which provides for original jurisdiction over state-law claims if certain circumstances exist.¹⁸⁷ Plaintiff-employees may also proceed with a state-law wage claim in state court.¹⁸⁸ Under any of these circumstances, if the plaintiff-

183. See, e.g., *Ellison v. Autozone Inc.*, No. C06-07522 MJJ, 2007 WL 2701923, at *2 (N.D. Cal. Sept. 13, 2007) (rejecting defendant’s reliance on *Kinney* and concluding that certification schemes under Rule 23 and FLSA are irreconcilable by stating, “this reliance is misplaced because *Kinney* merely stands for the proposition that Rule 23 procedures should not be used to certify an FLSA class. Plaintiff does not attempt to certify a FLSA collective class under Rule 23, but rather intends to prosecute both under their respective procedures.” (citing *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977), *overruled on other grounds by Hoffmann-La Roche*, 493 U.S. at 170)); *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 732 (M.D. Pa. 2007) (“Defendants’ arguments would be well-taken if Plaintiff were attempting to bring a Rule 23 class action to enforce rights under the FLSA. Such a suit is clearly impermissible and a court would have no choice but to dismiss a complaint to that effect.”).

184. See *supra* note 180 (describing Congress’s intent in enacting the FLSA opt-in requirement).

185. See 28 U.S.C. § 1367 (2000) (allowing a federal court to exercise jurisdiction over all other claims that form part of the same case or controversy).

186. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

187. See 28 U.S.C. § 1332(d) (Supp. V 2005) (granting original federal jurisdiction over any civil action where the amount in controversy exceeds \$5,000,000 and certain diversity of citizenship circumstances are met); see also *Jackson v. Alpharma Inc.*, Civ. No. 07-3250 (GEB), 2008 WL 508664, at *5 (D.N.J. Feb. 21, 2008) (determining that it is premature to rule on a Rule 23 attack when plaintiffs have pleaded CAFA jurisdiction); *Ellison*, 2007 WL 2701923, at *2 (refusing to strike the plaintiffs’ state-law claims because the court had independent jurisdiction over the claims under CAFA).

188. See, e.g., *Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d 1120, 1124 (N.D. Cal. 2008) (“[T]he court is unpersuaded that permitting a separate suit to go forward on

employees were seeking redress under state laws that are parallel to the FLSA, they could maintain a Rule 23 opt-out class based on the same legal principles as the FLSA, despite Congress's intent to limit wage claims under the FLSA's terms to opt-in actions.

III. SALVAGING INDIVIDUALS' FLSA CLAIMS AND THE FLSA'S OVERALL INTEGRITY AND EFFECTIVENESS THROUGH PREEMPTION

In order to avoid the problems associated with allowing Rule 23 classes to litigate state statutory or common-law claims that parallel the FLSA, the state claims must somehow be eliminated from the equation. As outlined above, defendant-employers across the country have argued for the exclusion of state-law class claims.¹⁸⁹ However, the result is always one of only two outcomes: either the court maintains the state-law class with the FLSA collective action or it dismisses the state-law class claims without prejudice, leaving the plaintiff-employees to refile in state court.¹⁹⁰ Thus, the solution must include a mechanism that allows for dismissal of the state-law claims with prejudice, preferably, as soon after commencement as possible to avoid expensive and arduous discovery.

In actuality, courts addressing dual-filed FLSA and Rule 23 state class claims need not look to issues of inherent incompatibility, supplemental jurisdiction, Rule 23 prerequisites, the Rules Enabling Act ("REA"), or any of the other positions outlined above. Rather, the FLSA preempts state-law claims (whether class based or individualized) to the extent that those state laws are parallel to the FLSA. Therefore, in the context of the hypothetical *Edwards* case discussed above, the defendant employer, ABC Corporation, could have successfully moved to dismiss the state-law class as preempted. This would have saved the briefing, argument, and analysis on Rules 12(b)(1), 12(b)(6), 12(c), 12(f), and 23 with regard to inherent incompatibility, supplemental jurisdiction, superiority of a class

state law claims somehow undermines the congressional intent in providing an opt-in class action format under the FLSA.").

189. See *supra* Part II.B (detailing the various theories under which defendant-employers seek to have the state-law claims excluded, including Rule 12(b)(6), Rule 12(b)(1), Rule 12(c), Rule 12(f), and Rule 23)); see also *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 312 (3d Cir. 2003) (concluding that the district court erroneously exercised supplemental jurisdiction over the state-law claim); *Warner v. Orleans Home Builders, Inc.*, 550 F. Supp. 2d 583, 590 (E.D. Pa. 2008) (granting the defendant-employer's motion to dismiss the state-law claims pursuant to Rule 12(b)(6)); *Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178, 186 (M.D. Pa. 2008) (granting motion to strike pursuant to Rule 12(f) and Rule 23(f)).

190. See *supra* Part II.B (explaining that, despite the many arguments made by defendants, courts ultimately reach one of two decisions: dismiss the state claims or allow the action to go forward with both state and federal claims).

action, and the REA. It would also have prevented both parties from conducting discovery on state class claims with multiple depositions and document production in the tens of thousands of pages. The *Edwards* court would not have needed to evaluate, and the parties would not have needed to brief and argue, the plaintiff-employees' motion for class certification. Rather, the court would have evaluated the nature of the state-law claims as being more generous than, parallel to, or less generous than the FLSA and assessed whether the FLSA preempted the state-law claims.

Numerous courts have analyzed the issue of whether and to what extent the FLSA preempts state-law claims.¹⁹¹ The most common types of preemption include express preemption, field preemption, and obstacle preemption.¹⁹² For example, in *Anderson v. Sara Lee Corp.*,¹⁹³ the U.S. Court of Appeals for the Fourth Circuit examined whether the FLSA preempted state-law claims for breach of contract, negligence, and fraud related to violations of the FLSA.¹⁹⁴ In *Anderson*, the plaintiff-employees did not actually plead a cause of action under the FLSA.¹⁹⁵

In reversing the district court's ruling that the FLSA did not preempt the state-law claims, the *Anderson* court began by stating that it was "guided by longstanding principles of preemption in our assessment of whether the FLSA invalidates the Class Members' remaining claims."¹⁹⁶ The court then stated that the Constitution's Supremacy Clause "render[ed] federal law the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the

191. See, e.g., *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194–95 (4th Cir. 2007) (remanding the state-law claims for contract, negligence, and fraud for dismissal without prejudice as preempted by the FLSA); *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1154 (9th Cir. 2000) (determining that fraud claims are not preempted but that claims "that are directly covered by the FLSA (such as overtime and retaliation disputes) must be brought under the FLSA"); *Lopez v. Flight Servs. & Sys., Inc.*, No. 07-CV-6186 CJS, 2008 WL 203028, at *7 (W.D.N.Y. Jan. 23, 2008) (determining that state common-law claims for fraud, breach of contract, breach of good faith, tortious interference with contract, and unjust enrichment were preempted by the FLSA); *Nimmons v. RBC Ins. Holdings (USA) Inc.*, No. 6:07-cv-2637, 2007 WL 4571179, at *2 (D.S.C. Dec. 27, 2007) (dismissing claims for breach of contract, wrongful termination, and wrongful retention of overtime pay because they "are not viable and . . . [are] duplicative of the rights and remedies available under the FLSA").

192. See, e.g., *Anderson*, 508 F.3d at 191–92 (outlining preemption rules); *Williamson*, 208 F.3d at 1149–50 (same); *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 449–50 (W.D. Pa. 2007) (same).

193. 508 F.3d 181 (4th Cir. 2007).

194. See *id.* at 191–95 (concluding that the plaintiffs' state-law claims were preempted by the FLSA).

195. See *id.* at 184 (noting that the five claims pleaded include state claims for breach of contract, negligence, fraud, conversion, and unfair trade practices).

196. *Id.* at 191.

Contrary notwithstanding As a result, federal statutes and regulations properly enacted and promulgated can nullify conflicting state or local actions.”¹⁹⁷ Continuing its analysis, the court then outlined the three main types of preemption: “express preemption,” “field preemption,” and “conflict preemption.”¹⁹⁸

The Fourth Circuit noted in *Anderson* that Sara Lee, the defendant-employer, had argued that conflict preemption was in play and that conflict preemption occurred when “state law ‘actually conflicts with federal law.’”¹⁹⁹ The court continued by outlining that the assessment of whether federal and state law actually conflicted included analysis of “whether ‘it is impossible to comply with both state and federal law’ or ‘whether the state law stands as an obstacle to the accomplishment of the full purposes and objectives’ of federal law.”²⁰⁰ The court noted that it was “obstacle preemption”²⁰¹ that Sara Lee asserted was at issue.

After defining the analytical framework, the *Anderson* court turned to Congress’s purpose in enacting the FLSA, stating that “Congress enacted the FLSA to eliminate ‘labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers’”²⁰² and that “the FLSA provides an unusually elaborate enforcement scheme.”²⁰³ According to the court, the plaintiffs did not rely on North Carolina state law to recover unpaid wages but, instead, invoked state law as a source of remedies, including a longer statute of limitations and the availability of punitive damages.²⁰⁴ The court further reasoned that as a result of the FLSA’s “unusually elaborate enforcement scheme, there cannot be the exceptionally strong presumption against preemption of such

197. *Id.* (citations omitted).

198. *Id.* (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Pinney v. Nokia, Inc.*, 402 F.3d 430, 453 (4th Cir. 2005); *S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 590 (4th Cir. 2002)). Express preemption exists when “‘Congress expressly declares its intent to preempt state law,’ . . . and field preemption occurs when Congress ‘occup[ies] the field’ by regulating so pervasively that there is no room left for the states to supplement federal law.” *Anderson*, 508 F.3d at 191 n.10 (quoting *Pinney*, 402 F.3d at 453; *Cox v. Shalala*, 112 F.3d 151, 154 (4th Cir. 1997)).

199. *Anderson*, 508 F.3d at 191 (quoting *S. Blasting*, 288 F.3d at 590).

200. *Id.* at 191–92 (quoting *Worm v. Am. Cyanamid Co.*, 970 F.2d 1301, 1305 (4th Cir. 1992)).

201. *Id.* at 192.

202. *Id.* (quoting 29 U.S.C. § 202(a) (2000)).

203. *Id.* (quoting *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999)).

204. *Id.* at 193 (contrasting North Carolina’s three year statute of limitations on contract claims and provision of punitive damages upon a showing of “fraud, malice, or willful or wanton conduct” with FLSA’s more limited enforcement mechanisms) (quoting N.C. GEN. STAT. § 1D-15(a) (2007)).

state remedies that would be warranted if the FLSA did not provide federal remedies.”²⁰⁵ Thus, the court concluded that the plaintiff-employees’ state-law claims were preempted under the obstacle-preemption theory because the FLSA’s enforcement scheme was “an exclusive one.”²⁰⁶

Although the claims in *Anderson* were common-law claims that depended on the FLSA rather than state statutory wage claims to establish a violation, the *Anderson* court also noted, in dictum, that at least one other circuit court had determined that “[c]laims that are directly covered by the FLSA (such as overtime and retaliation disputes) must be brought under the FLSA.”²⁰⁷ Furthermore, preemption of parallel state-law claims really only affects plaintiff-employees’ (and, maybe more accurately, their counsel’s) ability to use Rule 23 to effect a class action rather than being relegated to a smaller opt-out collective action. It does not affect recovery rights, as numerous courts have recognized that there is no right to double recovery even when plaintiffs are allowed to plead FLSA and parallel state wage claims.²⁰⁸ That is to say, if employees were successful on a dual-filed wage claim, they would not recover twice the minimum wage or two helpings of overtime compensation. Rather, the “exclusive”²⁰⁹ remedial structure the FLSA provides entitles employees to a single recovery, making the state claim superfluous.²¹⁰ The state-law claim’s only purpose, then, is to trigger the plaintiff-employees’ ability, or that of their counsel, to seek greater gains through a Rule 23 class action.

Part of the preemption analysis, in addition to the examination of whether a state law stands as an obstacle to the accomplishment of

205. *Id.*

206. *Id.* at 194.

207. *Id.* at 195 n.12 (quoting *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1154 (9th Cir. 2000)).

208. See, e.g., *Avery v. City of Talladega*, 24 F.3d 1337, 1348 (11th Cir. 1994) (“Of course, the plaintiffs may not recover twice for the same violation; the breach of contract claim survives merely as an alternative legal theory to redress any wrong that may have been done them.”); *Davis v. Lenox Hill Hosp.*, No. 03 Civ.3746 DLC, 2004 WL 1926087, at *7 (S.D.N.Y. Aug. 31, 2004) (“Insofar as the defendants’ argument is about overtime compensation, they correctly note that Davis cannot recover under both federal and state law for the enforcement of the same right.”) (emphasis omitted); *Bolduc v. Nat’l Semiconductor Corp.*, 35 F. Supp. 2d 106, 117 (D. Me. 1998) (“Thus, the *Roman* court held that a plaintiff is not entitled to a double recovery when he pleads both federal and state claims for the same overtime pay.”).

209. *Anderson*, 508 F.3d at 194.

210. See *id.* at 193 (noting that employees did not seek unpaid wages through state claims but instead sought remedies not provided for in the FLSA, including a longer statute of limitations and punitive damages).

the federal law's full purposes, involves the FLSA's "savings clause," which provides:

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter²¹¹

The court in *Ellis v. Edward D. Jones & Co.*,²¹² while declining to evaluate specifically whether parallel state-law claims were preempted, relied upon preemption analysis and the savings clause to determine whether a state-law class could coexist with an FLSA collective action.²¹³ Specifically, the court noted that,

The terms of the saving clause are clear and narrowly drawn: they merely establish a wage and hour "floor" above which the states are free to rise, and "leave undisturbed 'the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards.'"²¹⁴

Ellis emphasized that "[a] saving clause is a 'statutory provision exempting from coverage something that would otherwise be included,'"²¹⁵ and that despite the savings clause's limited language, some courts refused to preempt parallel state-law claims."²¹⁶ This decision thus determined that "[t]he language of the saving clause simply [could not] be stretched so far."²¹⁷

In other words, the existence of the FLSA's savings clause demonstrates Congress's intent, without respect to § 216(b)²¹⁸ specifically, to preempt state-law claims that were equal to or less generous than the FLSA's terms.²¹⁹ The savings clause thus provides

211. 29 U.S.C. § 218(a) (2000).

212. 527 F. Supp. 2d 439 (W.D. Pa. 2007).

213. *Id.* at 449–52 (examining the policies supporting the FLSA, such as reduction of minimum wage litigation, in order to infer that Congress intended the FLSA to preempt certain state-law provisions).

214. *Id.* at 450 (quoting *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 731 (M.D. Pa. 2007)) (emphasis omitted).

215. *Id.* at 450 n.14 (quoting BLACK'S LAW DICTIONARY 1371 (8th ed. 2004)).

216. *Id.* at 450–51 (citing *Lehman* and *Beltran-Benitez v. Sea Safari, Ltd.*, 180 F. Supp. 2d 772 (E.D.N.C. 2001), as examples of courts that found the FLSA savings clause did not preempt state statutory remedies on overtime and minimum wage claims)).

217. *Id.* at 451.

218. 29 U.S.C. § 216(b) (2000) (stating types of damages allowed for a successful FLSA claimant, including monetary compensation for wages withheld and reasonable attorney's fees).

219. *See* 29 U.S.C. § 218(a) (2000) (allowing states to set greater minimum wage, maximum hour and child labor protections than the FLSA provides); *Ellis*, 527 F. Supp. 2d at 450 (noting Congress's intent "leave undisturbed 'the traditional exercise of the states' police powers with respect to wages and hours more generous

that only claims that are more generous are “exempt[ed] from coverage . . . that would otherwise be” preempted, to use the definition.²²⁰ As a result, there are two primary categories of state-law claims that can exist, those that are more generous than the FLSA and those that are not. There does not seem to be any dispute that state laws that are more generous are not preempted based on the savings clause’s language.²²¹ The debate, rather, is on what constitutes a parallel claim and what constitutes a more generous claim.²²² If a state law is more generous than the FLSA, a court would not review the law for preemption but would instead proceed with the lines of analysis described above, including for example, whether the more-generous state-law claim substantially predominated the FLSA claim and/or presented novel or complex legal issues.²²³

The issue, then, is what constitutes a parallel claim, including within both statutory wage laws and common-law claims. Within this category, there are also two types of potential claims, including (1) those that are “directly covered”²²⁴ by the FLSA, such as state statutory claims for unpaid overtime compensation and minimum wages; and, (2) those that provide another legal theory for recovery or different remedies, such as common-law claims for contribution or indemnification, breach of contract, fraud, and unjust enrichment.²²⁵

With regard to state statutory wage claims specifically, several courts at the circuit- and district-court level have determined that

than the federal standards” (emphasis omitted) (quoting *Lehman*, 532 F. Supp. 2d at 731)); *Morrow v. Green Tree Servicing, L.L.C.*, 360 F. Supp. 2d 1246, 1252 (M.D. Ala. 2005) (recognizing that “the FLSA does not preempt state law contract provisions that are more generous than the FLSA demands” (quoting *Freeman v. City of Mobile*, 146 F.3d 1292, 1298 (11th Cir. 1998))); *Cranford v. City of Slidell*, 25 F. Supp. 2d 727, 728 (E.D. La. 1998) (stating that “the FLSA permits states to adopt higher standards than those established in the Act”).

220. *Ellis*, 527 F. Supp. 2d at 450 n.14 (quoting BLACK’S LAW DICTIONARY 1371 (8th ed. 2004)).

221. See § 218(a); *Pac. Merch. Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1421 (9th Cir. 1990) (explaining that FLSA § 218 demonstrates congressional intent to leave undisturbed state police power to enforce wage and hour restrictions more generous than those granted by the FLSA); *Keeley v. Loomis Fargo & Co.*, 11 F. Supp. 2d 517, 520 (D.N.J. 1998), *rev’d on other grounds*, 183 F.3d 257 (3d Cir. 1999) (explaining that FLSA § 218 “expressly contemplates that workers covered by state law as well as FLSA shall have any additional benefits provided by the state law” (quoting *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258, 1261 (D.C. Cir. 1972))).

222. *E.g.*, *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1154 (9th Cir. 2000) (analyzing whether the state law is parallel by applying a conflict preemption analysis).

223. See *supra* Parts I.B and I.C (discussing defenses and counterarguments to parallel state-law claims in FLSA cases).

224. *Williamson*, 208 F.3d at 1154.

225. See *infra* notes 228, 229, 231 and accompanying text (discussing when parallel state-law claims are preempted by the FLSA).

claims “directly covered by the FLSA (such as overtime and retaliation disputes) must be brought under the FLSA.”²²⁶ Moreover, the *Anderson* decision noted this Ninth Circuit assertion at the end of its preemption analysis of certain state common-law claims.²²⁷ Other courts have also determined that claims are preempted when they are “duplicative of”²²⁸ the FLSA claims, “based on the same facts”²²⁹ as the FLSA claims, “equivalent to”²³⁰ the FLSA claims or that are “premised on a failure to pay overtime,”²³¹ “mirror[]” FLSA damages,²³² or have the same remedies as the FLSA.²³³

On the other hand, some courts have determined that the FLSA does not preempt state wage law.²³⁴ However, those cases are much

226. *Williamson*, 208 F.3d at 1154 (asserting this claim in dicta within a discussion of FLSA purposes); see, e.g., *Frey v. Spokane County Fire Dist. No. 8*, No. CV-05-289-RHW, 2006 WL 2597956, at *11 (E.D. Wash. Sept. 11, 2006) (citing the “directly covered” language in *Williamson*, 208 F.3d at 1154); *Moeck v. Gray Supply Corp.*, No. 03-1950 (WGB), 2006 WL 42368, at *2 (D.N.J. Jan. 6, 2006) (recognizing that “[a]lthough the law is unsettled as to whether the FLSA preempts state common law causes of action, most courts have held” directly covered claims “must be brought under the FLSA”); *Flores v. Albertson’s, Inc.*, No. CV 01-0515 PA(SHX), 2003 WL 24216269, at *5 (C.D. Cal. Dec. 9, 2003) (same). But see *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1117 (S.D. Cal. 2006) (recognizing that the *Williamson* “directly covered” language is dictum).

227. *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 195 n.12 (4th Cir. 2007) (noting in *Williamson* the Ninth Circuit suggested claims covered by FLSA had to be brought under FLSA without “deciding” the issue (quoting *Williamson*, 208 F.3d at 1154)). Although the cases addressing the preemption of state wage claims “directly covered by the FLSA,” *Williamson*, 208 F.3d at 1154, have said so in dictum, the principle and especially the language “overtime and retaliation disputes,” *id.*, goes to show courts’ willingness to preempt parallel state wage claims. E.g., *Anderson*, 508 F.3d at 194, 195 n.12.

228. *Lopez v. Flight Servs. & Sys., Inc.*, No. 07-CV-6186 CJS, 2008 WL 203028, at *5 (W.D.N.Y. Jan. 23, 2008) (stating that state claims are preempted when “essentially duplicative of FLSA claims”).

229. *Roble v. Celestica Corp.*, No. 06-2934 (JRT/FLN), 2006 WL 3858396, at *3 (D. Minn. Dec. 29, 2006) (“Common law claims based on the same facts and circumstances as an FLSA claim may be preempted under the FLSA.”).

230. *Choimbol v. Fairfield Resorts, Inc.*, No. 2:05cv463, 2006 WL 2631791, at *5-6 (E.D. Va. Sept. 11, 2006) (“[D]istrict courts examining the issue of preemption have repeatedly focused on whether the factual basis for claims essentially duplicate or are equivalent to the plaintiffs’ respective FLSA claims.”).

231. *Nimmons v. RBC Ins. Holdings (USA) Inc.*, No. 6:07-cv-2637, 2007 WL 4571179, at *1 (D.S.C. Dec. 27, 2007) (stating that “[p]laintiff’s state law claims related to alleged overtime must be dismissed because they assert rights that are duplicative of those protected by the FLSA” and that “the FLSA preempts all state law causes of action premised upon failure to pay overtime”).

232. *Morrow v. Green Tree Servicing, L.L.C.*, 360 F. Supp. 2d 1246, 1253 (M.D. Ala. 2005) (determining that plaintiffs’ claim that “mirrors the damages available under the FLSA” may be preempted).

233. *Hammond v. Lowe’s Home Ctrs., Inc.*, 316 F. Supp. 2d 975, 979 (D. Kan. 2004) (“[S]tate law claims that merely seek to enforce the defined remedies of the FLSA are preempted.” (citing *Conner v. Schnuck Mkts, Inc.*, 121 F.3d 1390, 1399 (10th Cir. 1997))).

234. E.g., *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir. 1991) (stating that every circuit having addressed the issue concluded that “state overtime wage law

more limited in scope than they appear at first blush because (1) they often do not independently assess preemption, and (2) they rely on distinguishable cases featuring facts that save the plaintiffs' claims from preemption with the FLSA's savings clause.²³⁵ Several courts, especially within the Second Circuit, have determined that "the FLSA does not preempt state wage and hour statutes."²³⁶ However, none of the cases looking at state statutory wage preemption recently have actually analyzed the issue.²³⁷ Instead, courts say merely that the issue

is not preempted by the MCA or the FLSA" (citing *Agsalud v. Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987)).

235. See *infra* notes 236–241 and accompanying text (discussing and discounting cases where the FLSA has not preempted directly parallel state-law claims).

236. *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1417 (9th Cir. 1990) (holding "that section 213(b)(6) does not preempt California from applying the state's overtime pay laws to FLSA-exempt seamen working off the California coast"); *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258, 1261 (D.C. Cir. 1972) (explaining that FLSA's § 218 "expressly contemplates that workers covered by state law as well as FLSA shall have any additional benefits provided by the state law—higher minimum wages; or lower maximum workweek"); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 162 (S.D.N.Y. 2008) ("It is 'settled in the Second Circuit that the FLSA does not preempt state wage and hour laws' . . ." (quoting *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG)(RER), 2008 WL 597186, at *10 (E.D.N.Y. Mar. 2, 2008))); *Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d 1120, 1124 (N.D. Cal. 2008) (stating, "[t]he court in *Neary* noted that 'the FLSA does not preempt state wage and hour statutes'" (quoting *Neary v. Metro. Prop. & Cas. Ins. Co.*, 472 F. Supp. 2d 247, 251 (D. Conn. 2007))); *Neary*, 472 F. Supp. 2d at 251 (noting that "the Second Circuit has explicitly held" the FLSA does not preempt such state statutes (citing *Overnite*, 926 F.2d at 222)); *Brothers v. Portage Nat'l Bank*, No. 3:06-94, 2007 WL 965835, at *4 (W.D. Pa. Mar. 29, 2007) (stating that because the FLSA "does not preempt state wage and hour laws" the better course was to examine supplemental jurisdiction (quoting *Neary*, 472 F. Supp. 2d at 251)); *Keeley v. Loomis Fargo & Co.*, 11 F. Supp. 2d 517, 520 (D.N.J. 1998), *rev'd on other grounds*, 183 F.3d 257 (3d Cir. 1999) (asserting that "every Circuit that has considered the issue has held that states may require employers to pay overtime wages to employees who are subject to the Motor Carrier Act and thus exempt under . . . the FLSA" (citing *Overnite*, 926 F.2d at 222)); *Cent. Delivery Serv. v. Burch*, 355 F. Supp. 954, 958 (D. Md.), *aff'd mem.*, 486 F.2d 1399 (4th Cir. 1973) (noting that the principle to apply in a preemption analysis is that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons" (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963))).

237. See *Campbell v. PricewaterhouseCoopers*, No. CIV. S-06-2376 LKK/GGH, 2008 WL 3836972, at *8 (E.D. Cal. Aug. 14, 2008) (stating, "the Ninth Circuit has held that the FLSA does not preempt state overtime law," without further analysis of the issue (citing *Pac. Merch.*, 918 F.2d at 1418)); *Gardner v. W. Beef Props., Inc.*, No. 07-CV-2345, 2008 WL 2446681, at *2 (E.D.N.Y. June 17, 2008) (stating, "[t]he only doctrine of which this Court is aware that would authorize the reach defendant attributes to Section 16(b) is preemption, but defendant concedes, in light of settled Second Circuit authority, that it has no preemption argument to assert on this motion" (citing *Overnite*, 926 F.2d at 222)); *Damassia*, 250 F.R.D. at 162 (stating only that it is "settled in the Second Circuit that the FLSA does not preempt state wage and hour laws" without analyzing the issue (quoting *Guzman*, 2008 WL 597186, at *10)); *Guzman*, 2008 WL 597186, at *10 (noting contrary cases but finding "it is settled in the Second Circuit that the FLSA does not preempt state wage and hour laws" without further analysis of preemption (citing *Overnite*, 926 F.2d at 222)); *Thorpe*, 534 F. Supp. 2d at 1124 (stating only that "[t]he court in *Neary* noted that

is “settled” and cite back to a handful of cases determining that state wage laws are not preempted.²³⁸ The problem, though, is that all of the precedent upon which these decisions rely involves the exemption of certain employees from FLSA overtime and minimum wage requirements.²³⁹ These underlying cases, then, involve states’ ability to allow overtime compensation and minimum wage rates to employees who would otherwise be exempt under the FLSA.²⁴⁰ In other words, they are cases that would provide greater rights to employees, or more generous coverage, than the FLSA would.²⁴¹ For these reasons, none of the cases purportedly rejecting preemption of state wage laws are instructive because they are all based upon state laws that are more generous than the FLSA and thus fit within the savings clause’s scope.

For example, in *Overnite Transportation Co. v. Tianti*,²⁴² a case cited in several recent decisions analyzing preemption of state wage claims and the interplay between § 216(b)²⁴³ and Rule 23,²⁴⁴ the U.S. Court of Appeals for the Second Circuit evaluated whether the Motor Carrier Act (MCA)²⁴⁵ or the exemptions for drivers in the FLSA²⁴⁶ preempted Connecticut state wage laws that did not provide the same

“the FLSA does not preempt state wage and hour statutes” without analyzing preemption (quoting *Neary*, 472 F. Supp. 2d at 251)); *Brothers*, 2007 WL 965835, at *4 (concluding that because the FLSA “does not preempt state wage and hour laws” the better course was to examine supplemental jurisdiction).

238. See *supra* note 236 and accompanying text (discussing Second Circuit precedent on FLSA preemption cases and noting that the court routinely indicates that the lack of preemption is “well-settled” without further support).

239. See *Overnite*, 926 F.2d at 221 (involving exemption under FLSA and Motor Carrier Act but not Connecticut state law); *Pac. Merch.*, 918 F.2d at 1417 (involving exemption of seamen under FLSA but not California state law); *Agsalud*, 833 F.2d at 810 (involving exemption under FLSA and Motor Carrier Act but not Hawaii state law); *W.M.A. Transit*, 472 F.2d at 1261 (involving exemption under FLSA and Motor Carrier Act but not District of Columbia law); *Keeley*, 11 F. Supp. 2d at 519 (involving exemption under FLSA and Motor Carrier Act but not New Jersey state law); *Burch*, 355 F. Supp. at 955 (involving exemption under FLSA and Motor Carrier Act but not Maryland state law).

240. See *supra* notes 236–239 and accompanying text.

241. E.g., *Keeley*, 11 F. Supp. 2d at 520 (determining specifically that the savings clause’s provision “permits state laws to operate even as to workers exempt from FLSA,” and thus state law provided more generous coverage (quoting *W.M.A. Transit*, 472 F.2d at 1261)).

242. 926 F.2d 220 (2d Cir. 1991).

243. 29 U.S.C. § 216(b) (2000).

244. FED. R. CIV. P. 23; see *Gardner*, 2008 WL 2446681 at *2 (citing *Overnite*, 926 F.2d at 222); *Damassia*, 250 F.R.D. at 162 (quoting *Guzman*, 2008 WL 597186, at *10) (citing *Overnite*, 926 F.2d at 222); *Guzman*, 2008 WL 597186, at *10 (citing *Overnite*, 926 F.2d at 222); *Brothers*, 2007 WL 965835, at *4 (citing *Overnite*, 926 F.2d at 222).

245. 49 U.S.C. §§ 31501–31504 (2000) (originally codified at 49 U.S.C. §§ 3101–3104 (1988)).

246. 29 U.S.C. § 213(b)(1) (2000).

exemptions.²⁴⁷ The Second Circuit in *Overnite* relied on exemption cases to determine that “every Circuit that has considered the issue has reached the same conclusion—state overtime wage law is not preempted by the MCA or the FLSA.”²⁴⁸ However, because state laws that do not exempt employees from overtime compensation and minimum wage payments are more generous than the FLSA, those laws fit within the savings clause and cannot be preempted.²⁴⁹ As a result, these cases cannot be used as support for the proposition that the FLSA does not preempt any state wage claim. Rather, courts must look to the nature of the state claims involved.²⁵⁰

In addition, many courts have determined that state-law claims outside wage laws, including other statutory and common-law claims, are also parallel claims for purposes of preemption when they are duplicative of, depend on the same facts of, or depend on a violation of the FLSA in order to trigger relief.²⁵¹ Non-wage state-law claims have also been determined preempted to the extent that they have longer statutes of limitations or provide other remedies beyond what is provided for in the FLSA.²⁵² As some courts have noted, “the FLSA

247. *Overnite*, 926 F.2d at 221–22 (noting that to find the FLSA preempted Connecticut wage law, the court would need to overturn *Pettis Moving Co. v. Roberts*, 784 F.2d 439 (2d Cir. 1986)).

248. *Id.* at 222. A variety of circuits has ruled on this issue. See, e.g., *Agsalud v. Pony Express Courier Corp.*, 833 F.2d 809, 810 (9th Cir. 1987) (involving exemption under FLSA and Motor Carrier Act but not Hawaii state law); *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258, 1261 (D.C. Cir. 1972) (involving exemption under FLSA and Motor Carrier Act but not District of Columbia law); *Cent. Delivery Serv. v. Burch*, 355 F. Supp. 954, 955 (D. Md.), *aff’d mem.*, 486 F.2d 1399 (4th Cir. 1973) (involving exemption under FLSA and Motor Carrier Act but not Maryland state law).

249. E.g., *W.M.A. Transit*, 472 F.2d at 1261 (stating that the FLSA “expressly contemplates that workers covered by state law as well as FLSA shall have any additional benefits provided by the state law” and thus state law provided more generous coverage).

250. See, e.g., *Morrow v. Green Tree Servicing, L.L.C.*, 360 F. Supp. 2d 1246, 1252 (M.D. Ala. 2005) (“Whether Morrow’s breach-of-contract and unjust-enrichment claims can co-exist with her FLSA claims or are preempted by the FLSA depends on the nature of her state-law claims.”).

251. See *supra* notes 227, 228, 230 and accompanying text (discussing when parallel state-law claims are preempted by the FLSA).

252. See *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 192–194 (4th Cir. 2007) (preempting state-law contract claim with longer limitations period and opportunity for punitive damages as a result of FLSA’s exclusive definition of remedies); *Nimmons v. RBC Ins. Holdings (USA) Inc.*, No. 6:07-cv-2637, 2007 WL 4571179, at *2 (D.S.C. Dec. 27, 2007) (determining that “the exclusive remedies available to an employee to enforce legal rights created by the FLSA are the statutory remedies provided therein”); *Lucht v. Encompass Corp.*, 491 F. Supp. 2d 856, 867 (S.D. Iowa 2007) (determining, “[a]ccordingly, a claim for wrongful discharge in violation of public policy is preempted when the public policy asserted is one underlying the Fair Labor Standards Act, as the FLSA provides a comprehensive remedy”); *Chaimbol v. Fairfield Resorts, Inc.*, No. 2:05cv463, 2006 WL 2631791, at *6 (E.D. Va. Sept. 11, 2006) (determining FLSA’s “exclusive remedial scheme” preempted plaintiffs’ state-

provides an unusually elaborate enforcement scheme,”²⁵³ such that it “does not explicitly authorize states to create alternative remedies for FLSA violations.”²⁵⁴ Other courts have determined that “a clearer case of implied intent to exclude other alternative remedies by the provision of one would be difficult to conceive.”²⁵⁵

Under these terms, courts have determined that the FLSA preempts claims such as those for indemnity or contribution, breach of contract, fraud, tortious interference, and unjust enrichment.²⁵⁶ They have also determined that the FLSA limits the recovery period under statute of limitations to that set out in the FLSA rather than a longer state period.²⁵⁷

CONCLUSION

When examining state-law claims, courts should analyze whether the claim is parallel to or provides greater coverage than the FLSA. If the result is the former, the FLSA preempts the state claim and, by implication, removes the plaintiff-employees’ ability to certify a Rule 23 class on that state claim. In looking at the state-claim issue from a preemption perspective, courts can save the analysis on the compatibility of the state-law class with the § 216(b) collective action for only those claims that are saved from preemption by the FLSA’s savings clause. This alleviates the burden of examining these issues and, instead, allows the court to determine preemption on a

law claims that “stem[med] directly from their minimum wage and overtime claims under the FLSA”).

253. *Anderson*, 508 F.3d at 192 (quoting *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999)).

254. *Id.* at 193.

255. *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 450 (W.D. Pa. 2007) (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027, 1028–29 (D. Cal. 1972)).

256. See, e.g., *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992) (determining FLSA preempted indemnity claim); *Lopez v. Flight Servs. & Sys., Inc.*, No. 07-CV-6186 CJS, 2008 WL 203028, at *7 (W.D.N.Y. Jan. 23, 2008) (determining that all plaintiffs’ state-law claims, including fraud, breach of contract, breach of implied covenants of good faith, tortious interference with contract, and unjust enrichment, “pertain to Defendants’ alleged failure to pay Plaintiffs in accordance with the FLSA” and were consequently preempted); *Choimbol*, 2006 WL 2631791, at *1, *6 (dismissing plaintiffs’ claims for unjust enrichment, conspiracy, and fraud as preempted because they “stem[med] directly from their minimum wage and overtime claims under the FLSA” and “merely recast[] the central claim in this case: violation of the FLSA”). But see *Huang v. Gateway Hotel Holdings*, 520 F. Supp. 2d 1137, 1139, 1141–42 (E.D. Mo. 2007) (allowing common-law retaliation claim); *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1118 (S.D. Cal. 2006) (allowing California Unfair Competition Law claim that borrows from FLSA).

257. See *Anderson*, 508 F.3d at 192–93 (noting that evidence of a “willful violation” will extend FLSA’s two year statute of limitation to three years (citing 29 U.S.C. § 255(a) (2000))).

prediscovery motion to dismiss rather than after protracted and expensive discovery. In doing so, courts can both save these resources and avoid the problems associated with including a parallel state-law Rule 23 class, including issues with preclusion and circumvention of Congress's intent to require an opt-in class.

Let us, in conclusion, look back to the hypothetical *Edwards* case for an illustration of how examining preemption on a motion to dismiss and dismissing preempted state-law claims at the start of litigation save time and financial resources for all those involved, including both parties, their attorneys, and the court. Admittedly, while time invested in a motion to dismiss can be significant, with successive rounds of briefing, oral argument (if permitted), and the court's ruling, it pales in comparison to the time invested in class-based discovery, class-certification motions, and pretrial preparations for a class action.

Let us assume that three attorneys and two paralegals worked on ABC's defense of the *Edwards* case, while the same number of individuals (three attorneys and two paralegals) worked on the plaintiff-employees' case.²⁵⁸ Let us also assume that the attorneys involved have a range of experience, with each side staffed by an equity partner with more than twenty years' experience, a junior partner with eight-ten years' experience, and a newer associate with one-three years' experience. According to the *Laffey* Matrix,²⁵⁹ the equity partners' rates for 2008–2009 would be \$465 per hour, the junior partners' rates would be \$330 per hour, and the associates' rates would be \$225 per hour.²⁶⁰ The paralegals would bill at a rate of \$130 per hour.²⁶¹ Let us assume that the equity partners each spend five hours working on the prediscovery dismissal issue, the junior

258. Although many attorneys handling plaintiff's employment matters do so on a contingent fee, if the plaintiff obtains a judgment, the FLSA provides for an award of attorney's fees. 29 U.S.C. § 216(b).

259. United States Attorney's Office for the District of Columbia, *Laffey* Matrix, http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html [hereinafter *Laffey* Matrix] (last visited Nov. 21, 2008). The *Laffey* Matrix is prepared by the Civil Division of the United States Attorney's Office for the District of Columbia and provides hourly rates for attorneys of varying experience levels, paralegals and law clerks. *Id.* (citing the case that formed the basis for the *Matrix*, *Laffey v. Nw. Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984)). Numerous courts, especially in the areas surrounding Washington, D.C., have approved the *Laffey* Matrix in their analysis of fee awards in federal employment-law cases. *See, e.g.*, *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 351 (6th Cir. 2000) (applying the *Matrix* to achieve a rate reasonably in line with lawyer rates in the Washington area for Washington-based work done by the plaintiff's Washington-based attorneys); *Does I, II, III v. District of Columbia*, 448 F. Supp. 2d 137, 141 (D.D.C. 2006) (same).

260. *Laffey* Matrix.

261. *Id.*

partners spend 10 hours, the associates spend 40 hours, and the paralegals spend 5 hours each. At the end of the dismissal proceeding, whether granted or denied, each party has invested approximately \$16,000.²⁶²

If the case progresses into discovery and the plaintiff-employees move for state-law class certification, to the extent that one can apportion time spent on the state-law or class-based issues specifically, let us assume that the equity partners spend 40 hours, the junior partners spend 80 hours, the associates spend 320 hours, and the paralegals each spend 200 hours. By the resolution of the class-certification motion, each party has invested almost an additional \$170,000 that could have been avoided through a successful preemption analysis.

Therefore, analyzing preemption early in the case and correctly determining that the FLSA preempts parallel state-law wage claims not only saves financial and time-related resources, but it also protects individuals who neither opt in to the collective action nor opt out of the class action from having their FLSA claims precluded. This outcome better protects all parties involved and effectuates Congress's intent in amending the FLSA to provide for an opt-in-only collective action.

262. The hours-worked estimate is just an estimate and is not intended to show anything other than a range of fees that could be invested on certain projects.