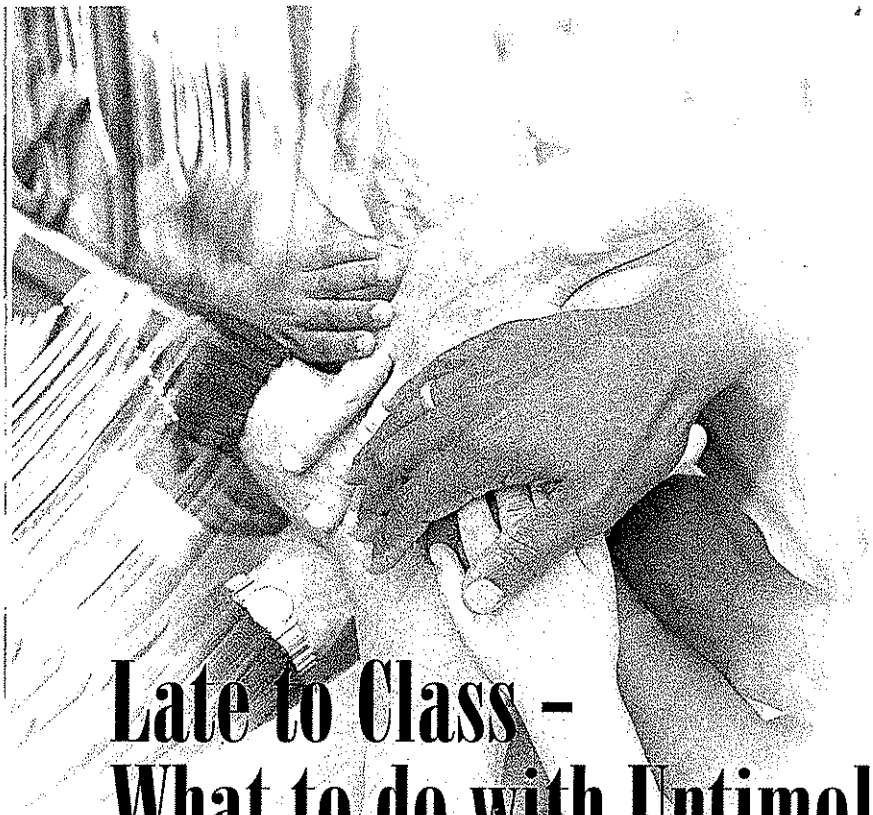

Late to Class – What to do with Untimely "Opt-In" Forms in Collective Class Actions?

By Aashish Y. Desai

One afternoon, Mr. Jones was going through his mail. Sorting through the usual garbage, he came across something a bit unusual – it was a formal notice of a class action for unpaid overtime wages. It was sent by someone he never heard of, and it came with a form. He put it in his office, along with a phone bill, a letter from some mortgage refinancing company, and a thank you card from his sister. Of course, you know the rest of the story: he forgot all about the formal notice, until one of his fellow co-workers called to ask him about it.

Mr. Jones thought about it for a while and remembered that "I received something" about the case; but like all the other "class actions" he figured he was "automatically included" unless he expressly told the lawyers that he didn't want to be included. He thought wrong.

If the lawsuit is filed under the federal Fair Labor Standards Act ("FLSA"), an employee must affirmatively consent to join or "opt-in" to the suit. (29 U.S.C. § 216(b).) This is in stark contrast to most class action lawsuits where the members are automatically included after class certification unless they "opt-out" of the class. (*See* Fed. R. Civ. P. 23 (b)(3).) Mr. Jones quickly dug-up the notice and called the lawyer representing the class. The lawyer told him it was too late – the deadline for joining the suit had passed. But this advice may not necessarily be correct.

Class counsel should keep a few things in mind before summarily rejecting late "opt-in" forms in FLSA overtime actions.

First, the court, in the sound exercise of its discretion, selects the deadline date based upon the practicalities of the case at the time of certification. Also, the liberal and broad policies of the FLSA support a "flexible standard" for untimely opt-ins, particularly if inclusion of such claims will not substantially prejudice the defendant.

Class Counsel should consider making the following arguments before dismissing untimely opt-in class members from the collective class action.

The Inclusion of the Untimely Opt-ins will not Substantially Prejudice the Defendant and Is Consistent with a Broad and Flexible Reading of the FLSA

The FLSA provides for the opt-in procedure, but does not specify *when* a person must opt-in to a case. (*See* 29 U.S.C. § 216(b), 255, 256.) The deadline for filing the "Consent-to-Join" forms is established by the court, based upon nothing more than its appraisal of the practicalities of the case at the time the case was certified. The obvious concern for the court is to balance the need to provide a sufficient period of time to adequately notify potential class members versus the case management need to move the case along by limiting the amount of time class members have to elect to participate in the case. Courts appear willing to allow late opt-in claimants to participate in order to avoid unfairly excluding those claimants as class members. The prejudice to the defendants is viewed as *de minimis*, particularly if only a relatively small percentage of claimants opt-in after the deadline has expired. Also, allowing late opt-ins is not likely to unduly delay court proceedings because liability and damage issues will have been identified if not resolved since the parties will have taken representative deposition testimony from many other class members by that time. (*See Robinson-Smith v. Government Employees Insurance Company*, 424 F.Supp.2d 117 (D.C. Columbia 2006) (allowing untimely opt-in claimants to join FLSA suit).)

Defendants will usually seek to strike untimely Consent-to-Join Forms, arguing that the court should "strictly enforce" its deadlines. But the addition of late "opt-ins" to a class that, very often, already includes, hundreds of class members, will not substantially prejudice the defendant and is consistent with the broad and flexible reading of the FLSA. (*See Kelly v. Alamo*, 964 F.2d 747, 749-50 (8th Cir. 1992) (holding that "[t]he FLSA should be given a broad reading, in favor or coverage"); *Raper v. State of Iowa*, 165 F.R.D. 89, 91 (S.D. Iowa 1996) (allowing seven additional prospective plaintiffs to opt-in even after the determination of liability).) Of course, if there are a large number of late "opt-in" class members as com-

pared to the existing class, the defendant will have a much stronger argument of prejudice because it may have substantially greater – and unexpected – exposure.

Discovery from the late opt-ins may not be necessary since the evidence presented at trial will likely be based upon representative testimony and a statistical sampling of the class members; so additional discovery from a few more class members is neither necessary nor appropriate. Indeed, courts routinely award back wages under the FLSA to non-testifying employees based upon the representative testimony of just a small percentage of the employees. (*McLaughlin v. Ho Fat Seto,* 850 F.2d 586, 589 (9th Cir. 1988) (five out of twenty-eight employees testified); *Reich v. Gateway Press, Inc.,* 13 F.3d 685, 701 (3d Cir. 1994) (twenty-two out of seventy employees testified); *Donovan v. New Floridian Hotel, Inc.,* 676 F.2d 468, 472 (11th Cir. 1982) (twenty-three employees testified out of 207 employees receiving award); *Donovan v. Burger King Corporation,* 672 F.2d 221, 224-225 (1st Cir. 1982) (twenty-six out of 246 employees testified).)

Defendant May Have Improperly Communicated with the Class Members Which May Have Discouraged Potential Opt-In Class Members from Timely Filing the Consent-To-Join Forms

Sometimes employers can't help themselves. After commanding enormous power over their employees, some employers feel that they can still communicate a "subtle" message of intimidation to their employees. It is not uncommon for the employer to send letters or e-mails to its employees "informing" them that, for example, the lawsuit is "frivolous" or was filed by "one disgruntled former" employee, or that it will "likely be dismissed" soon. Of course, by the time class counsel can correct these misrepresentations, the damage will have been done and precious time will have elapsed. (*See Bullock v. Automobile Club of Southern California,* 2002 U.S. Dist. LEXIS 7692 (C.D. Ca. Feb. 2, 2002) (ordering corrective notice and other remedies because defendant issued letter to class stating that the employer would "vigorously defend" the suit and that plaintiffs' counsel's prior statements were "grossly inaccurate").) A court should take such communications into account when ruling on the dismissal of untimely class members, particularly if there are legitimate overtime claims.

The Goals of Judicial Economy and Reducing Litigation Expense are Served by Allowing Additional Plaintiffs to Join the Main Action

Allowing the additional plaintiffs to join the main action will promote judicial economy and help to reduce litigation expense. If the court grants a defendant's request to dismiss these individuals, they would be compelled to file separate actions which, in all likelihood, would be consolidated with the original action. (*See* Fed.R.Civ.P. 42(a).)

Even if consolidation were not ordered, the court, having decided the dispositive legal issues in the main action, would be bound to the same result in the second action. There is no need to encourage multiple actions on the same subject. (*See Monrow v. United Air Lines, Inc.*, 94 F.R.D. 304, 305 (N.D. Ill. 1982) (delinquent consent forms allowed because forcing filing of additional lawsuits is "scarcely productive of economy either for the litigants or for the courts").)

Conclusion

The addition of late opt-ins into a class should be allowed if it will not substantially prejudice the defendant employer; this is particularly true where the amount of additional exposure these individuals represent is relatively small. Moreover, allowing these claims is consistent with both the broad reading of the FLSA in favor of coverage and the interests of judicial economy to encourage consolidation of similar claims into one action. At the end of the day, Mr. Jones may well be able to participate in the collective class action after all, if his lawyer keeps these principles in mind.

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