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BofA Can't Get 4th Circ. To Look At Collective Cert. Process

By Irene Spezzamonte

Law360 (August 5, 2024, 7:41 PM EDT) -- A collective of mortgage loan officers seeking unpaid overtime won't land in front of the Fourth Circuit, a North Carolina federal judge ruled Monday, turning down Bank of America's bid to sort out which method to use for certifying collectives.

U.S. District Judge Kenneth D. Bell **denied** Bank of America's motion for an interlocutory appeal on a July decision conditionally certifying the collective, saying that the Fourth Circuit and the U.S. Supreme Court already provided the guidance for courts to follow on whether to certify collectives under the Fair Labor Standards Act.

Courts have long used a two-step certification process to greenlight collectives under the FLSA under which courts give at first a conditional certification for notice purposes if a "modest factual showing" is met and then give a final certification to the collective.

That process, however, has been challenged in several venues and at least two appellate courts decided to nix it, "widening [the] circuit split" and leaving unanswered a question that could decide "the life of this and other cases" in courts within the Fourth Circuit, Bank of America said in its motion for interlocutory appeal filed Friday.

The Fifth Circuit, for example, ruled in [Swales v. KLLM Transport Services](#) in 2021 that **highly individualized claims** could preclude collective certification. The panel instructed district courts to look at certain factors to identify similarly situated workers and then authorize limited discovery to determine whether there are others who qualify. If there are, then the district court may authorize notices so that the lead plaintiff can send notices to possible opt-in workers.

Bank of America had pointed to Swales in its motion for interlocutory appeal, as well as the Sixth Circuit's 2023 [Clark v. A&L Homecare & Training Ctr.](#) decision, in which the panel there **also scrapped the two-step certification** process. In Clark, the Sixth Circuit introduced a more rigorous test directing courts to evaluate whether there is a "strong likelihood" that other employees are similarly situated in order to receive notice of a suit.

But Judge Bell said that the Fourth Circuit **already gave guidance** on whether to move to a different collective certification process in 2022 when it ruled that there was "no compelling reason to deviate from twenty years of established precedent."

The employer in that case then turned to the Supreme Court, which in 2022 **declined to step in**, Judge Bell said.

"The court will accordingly deny defendants' request to certify this question for interlocutory appeal," Judge Bell said. "It will also deny the requests for a stay pending appeal and stay pending review of this motion as moot."

Representatives of the parties did not immediately respond to requests for comment Monday.

The workers are represented by Jacob H. Wellman of Teague Campbell Dennis & Gorham LLP and by Barry R. Lax of Lax & Neville LLP.

Bank of America is represented by Meredith A. Pinson and Rebecca W. Lineberry of McGuireWoods

LLP.

The case is Pfeffer v. Bank of America Corp. et al., case number 3:23-cv-00813, in the U.S. District Court for the Western District of North Carolina.

--Editing by Leah Bennett.

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