

## Criticizing Lower Court, Third Circuit Reverses Class Certification in Suit Alleging Pay Violations

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A three-judge panel of the Third Circuit has struck down U.S. District Judge Arthur J. Schwab's decision granting class certification in a suit brought by mortgage loan officers claiming they were denied overtime pay by their employer. *Reinig v. RBS Citizens, NA*, No. 17-3464 (3d Cir. Dec. 31, 2018).

In reversing the lower court's Rule 23 certification, the panel criticized Judge Schwab for doing a substandard job of outlining the classes and claims at issue, forcing the appeals court "to comb through and cross-reference multiple documents in an attempt to cobble together the parameters defining the class and a complete list of the claims, issues, and defenses to be treated on a class basis." Even "wading through" all of those documents still did not provide the Court a clear picture of the suit's classes and claims. The Third Circuit noted that, while it does not impose a "strict format" for compliance with Rule 23, it has explicitly rejected orders that force it to "cobble together various statements" and "comb the entirety of its text" in search of "isolated statements that may add up to a partial list of class claims, issues, or defenses."

The Third Circuit found the District Court's ruling wanting in other aspects, as well. The panel concluded that there was not enough evidence to determine whether the loan officers had sufficiently shown the employer had an unofficial policy that contradicted its official policy on off-the-clock work to satisfy the commonality and predominance prongs of Rule 23. It found the District Court's "barebones analysis" did not permit it to conclude that the lower court undertook the "rigorous review" required for Rule 23 certification. For example, the panel said it was unclear how Judge Schwab reconciled contradictory testimony and other evidence cited by the defendant that undermined the plaintiffs' claim of a companywide "policy to violate the policy." These and other concerns left the Third Circuit with serious doubts about the lower court's conclusions, forcing it to vacate the District Court's order and remand the case with instructions to conduct a "rigorous" examination of the factual and legal allegations underpinning the plaintiffs' claims before deciding if class certification was warranted.

Despite that, though, the Third Circuit declined to review Judge Schwab's decision to grant Fair Labor Standards Act (FLSA) collective action certification. The panel reasoned that it could not

exercise pendent appellate jurisdiction over the issue because, while related, the Rule 23 class certification and FLSA collective action certification issue were still “fundamentally different creatures.” Thus, it reasoned that it did not have jurisdiction to disturb the lower court’s ruling on that separate issue.

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