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## Collective Action Wage-and-Hour Case Moves Forward

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Employers betting on the U.S. Supreme Court's [AT&T Mobility v. Concepcion](#) ruling to force class and collective action plaintiffs into arbitration have struck out again. On Nov. 22, Southern District Judge Robert Sweet ([See Profile](#)) denied a motion by Citigroup to dismiss a suit brought by loan officers seeking allegedly unpaid overtime wages and instead agreed to certify the case as a collective action.

Citi's lawyers at Morgan Lewis & Bockius had argued that the loan officers must arbitrate their claims individually, citing the Supreme Court's ruling in April that AT&T could enforce arbitration clauses that barred cellphone customers from bringing class claims. But the judge found that the *Concepcion* decision did not apply because the plaintiffs' claims were brought under federal employment law rather than under state law. Examining other cases, Judge Sweet held in [Ranieri v. Citigroup Inc.](#), 11 Civ. 2448, that the arbitration clauses were unenforceable and that the case could proceed under the Fair Labor Standards Act.

Douglas Wigdor of Thompson Wigdor, who represents the loan officers, called the ruling an important one that "hopefully will be a blueprint" for other wage-and-hour cases. The decision is the latest in a series of rulings allowing federal wage-and-hour, discrimination, and sexual harassment claims to move forward on a class or collective basis even when plaintiffs signed employment contracts mandating individual arbitrations. "It's not only a good decision for us but for all employees who are not paid overtime and their employers make them sign arbitration agreements," Mr. Wigdor said.

In his 81-page opinion, Judge Sweet concluded that the right to proceed collectively under the FLSA cannot be waived. He held that Citigroup was "incorrect" in its assertion that *Concepcion* overturned two prior decisions by the U.S. Court of Appeals for the Second Circuit on the enforceability of class action waivers. In *Concepcion*, the Supreme Court found that the Federal Arbitration Act preempts state law rules that can void class action waivers as unconscionable.

In contrast, Judge Sweet found that the Second Circuit rulings focused on suits alleging violations under federal statutes, "and *AT&T* in no way alters the relevance of those binding circuit holdings."

If Citigroup appeals, it would offer the Second Circuit an opportunity to weigh in directly on enforceability of arbitration agreements that require employees to waive their rights to bring collective actions under the FLSA. While the Second Circuit has not ruled on the issue, Judge Sweet cited opinions by five other appellate courts holding that, at least under some conditions, such waivers are enforceable.

Judge Sweet conditionally certified the opt-in collective action and allowed discovery to move forward. Mr. Wigdor said the case could eventually include claims on behalf of "hundreds, maybe thousands" of Citi employees nationally. Mr. Wigdor said he expects Citi to borrow a page from defendants in similar suits brought by loan officers over overtime pay. Mortgage banks have generally contended that loan officers are exempt from overtime provisions in the Fair Labor Standards Act, though Mr. Wigdor said his clients will be able to show they are not exempt.

Citi counsel Samuel Shaulson of Morgan Lewis did not respond to requests for comment. A spokesperson for the bank declined to comment.

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