

LITIGATION

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The Importance of Discovery From 'Absent' Class Members

It can make all the difference on the motion to certify.

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THE DECISION OF whether to certify a class is often the most important issue in a class action. Often, too, the stakes are extremely high at this stage, because the expense of preparing and trying a class action (and the risks of an unfavorable outcome) are generally magnified greatly as compared to an individual case.

Pre-certification discovery from so-called absent class members (that is, members of the putative class who are not named plaintiffs), and particularly depositions of such individuals who would be members of the proposed class, can be an extremely useful device in helping a court determine whether a class should be certified.

Plaintiffs proposing a class bear the burden of proving that certification is appropriate by demonstrating they meet the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation, as well as one of the requirements of Rule 23(b). The form of class action that generates the most litigation is the Rule 23(b)(3) class, which may be certified if:

the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.¹

With the publication of *In re Initial Public Offering Securities Litigation* (*In re IPO*), the Second Circuit has now come into line with most other circuits (and other states) in holding, with clarity, that:

(1) a district judge may not certify a class without making a ruling that each Rule 23 requirement is met and that a lesser standard such as "some showing" for satisfying each requirement will not suffice, (2) that all of the evidence must be assessed as with any other threshold issue, [and] (3) that the fact that a Rule 23 requirement might overlap with an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met, although such a circumstance might appropriately limit the scope of the court's inquiry at the class certification stage.²

Discovery from members of the putative class can be useful in evaluating whether the class meets this standard.

Some plaintiffs contend that discovery from the defendant and the named plaintiffs is sufficient to determine whether a class should be certified; that if the case raises individual issues, those issues should be evident from the files of the defendant and from the evidence gathered from the plaintiffs themselves; and that discovery at the class certification stage necessarily implicates the merits and delays the progress of the case.

Many defendants complain, however, that the named plaintiffs were hand-picked by counsel; that they may not at all be typical of the members of the putative class; that indeed many members of the putative class have very different factual circumstances than the named plaintiffs; and that the defense should have an opportunity to

persuade the court that this is so.

From the perspective of a defendant, the opportunity to select and obtain discovery from members of the putative class can be extremely meaningful in providing a fair opportunity to oppose class certification. From the perspective of a plaintiff, a relatively modest "up front" investment in time and resources at an early stage can provide a more robust record for carrying the burden of showing that the case satisfies the rigorous requirements of Rule 23.

Discovery Is Just Necessary

It seems clear enough that discovery will often be necessary before the court can make the required inquiry—as a practical matter, some evidence is needed for the court to comply with the standard that "all of the evidence must be assessed as with any other threshold issue." *Id.*

As the Second Circuit elaborated, "there are often factual disputes in connection with Rule 23 requirements, and such disputes must be resolved with findings." *Id.* at 40. On the other hand, a Rule 23 hearing should not "extend into a protracted mini-trial of substantial portions of the underlying litigation," and the district judge has discretion "to limit both discovery and the extent of the hearing on Rule 23 requirements. But even with some limits on discovery and the extent of the hearing, the district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." *Id.* at 41.

Similarly, the Manual on Complex Litigation advises that discovery "may not be necessary when claims for relief rest on readily available and undisputed facts," but that "[s]ome discovery may

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be necessary, however, when the facts relevant to any of the certification requirements are disputed, or when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues.”³ As one court has observed, the court’s role “in the midst of the procedural complexities of class certification is to assure that all relevant data necessary for the fashioning of an informed decision be laid before the bench.”⁴

In this context, the Second Circuit’s guidance is particularly relevant to practitioners in New York: In ruling on the Rule 23 requirements, “the judge often resolves underlying factual disputes.... For example, in considering whether the numerosity requirement is met, a judge might need to resolve a factual dispute as to how many members are in a proposed class. Any dispute about the size of the proposed class must be resolved, and a finding of the size of the class...must be made.”⁵

The same is true for Rule 23(b)(3) requirements. “Precertification discovery may be needed to assist the judge in distinguishing the individual from the common elements of the class, issues, and defenses, and in deciding the extent to which the need for individual proof outweighs the economy of receiving common proof.”⁶

Defendants will seek to show that issues such as reliance, causation, injury and statutes of limitations raise individualized issues that predominate.

Absent class member discovery may reveal that class members learned about the basis of their claims at very different times, so that some members are subject to a statute of limitations defense.⁷ Similarly, absent class member discovery may reveal that causation is an individual matter that needs to be proved on an individual basis. One court has held: “An action for physical injury presents a causation element. To determine if the class representatives’ claims—including the causation issue—are typical of the claims or defenses of the rest of the class more than [the three named] claimants need to be deposed.”⁸

In fraud and misrepresentation cases, for example, a plaintiff may not prevail without showing that she relied on misrepresentations, and that this reliance caused injury. Absent class member discovery may reveal that class members differ on what representations they actually relied on, if any.⁹ Such issues might not arise in a case concerning an efficient market, in which proof of reliance may be permitted through the device of fraud on the market.¹⁰

Absent Class Members Benefit Too

While the parties’ interest in developing an adequate record are obvious, the interests of the plaintiff and the defendant are not the only ones at stake in this analysis. The absent class members themselves merit protection, and

the courts have often given them heightened protection—more than that provided to ordinary third-party witnesses.

Absent class members are not represented by counsel for the named plaintiff and typically do not retain counsel. Unrepresented non-party witnesses, particularly individuals, are often the object of special protection in any event by a court. All the more so here, when such persons presumably have the opportunity to join as named plaintiffs and choose not to participate in the litigation. In such cases, the courts may be particularly solicitous of protecting the rights of such persons.

Courts’ Three-Part Test

Courts have developed a three-part test in assessing whether to permit discovery from absent class members: (1) discovery is “necessary” to determine commonality, typicality, predominance, or some other relevant issue; (2) defendant seeks the discovery in good faith; and (3) discovery will not impose an undue burden on the absent class member.

Subject to these guidelines, “the overwhelming majority of courts which have considered the scope of discovery against absentees have concluded that such discovery is available.”¹¹ For example, in one case in the Eastern District of Pennsylvania, the court ordered the depositions of 35 absent class members rather than try to determine whether to certify the class based on evidence obtained from the named plaintiffs:

Plaintiffs argue that based on the depositions of just three plaintiffs this court can conclude that: (1) there are questions of law or fact common to claimants’ allegations and (2) the claims of these three plaintiffs are typical of the claims of the class. I do not find this position reasonable. An action for physical injury presents a causation element. To determine if the class representatives’ claims—including the causation issue—are typical of the claims or defenses of the rest of the class more than three claimants need to be deposed. There is no way to tell exactly what number of depositions is needed in order to make this determination. However, in this case, thirty-five (35) depositions appears to this court closer to the mark than three.¹²

Thus, the court and counsel can often make good use of pre-certification discovery. A court should be more comfortable deciding the issues with a full record, rather than based solely on evidence relating to individuals hand-picked by only one side.

If the court decides to permit absent-class member discovery, depositions are often the least intrusive means of gathering the evidence. They do not require anyone to fill out forms or gather documents.

Whatever device is selected, “[i]t is often useful under Rule 26(f) to require a specific and detailed precertification discovery plan from the parties.”¹³ Once the court sets general parameters—e.g., a certain number of depositions of absent class members selected in equal numbers by plaintiffs and by defendants—counsel for the parties should be encouraged to work out a procedure for locating and deposing the witnesses.

A case management order should provide balanced procedures. These might include a period during which counsel for both sides may contact prospective witnesses, at the end of which the parties exchange the witnesses’ names.

In order to protect the witnesses, the case management order should limit the time of the depositions and might require that counsel for neither side speak directly to the witnesses once they have been identified.

The side that selected a witness should issue a subpoena to that individual and arrange for a legal assistant to confirm the date and time a few days before the deposition.

The order may limit the time for questioning each witness and allocate the time between plaintiffs and defendants. The order should provide that the witnesses are compensated a reasonable amount for their time, compensation that the parties should evenly divide, and it should be made clear to the witnesses that the compensation is by order of the court and its source not otherwise be identified.

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1. Fed. R. Civ. P. 23(b)(3). See *Marisol v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997).

2. 471 F.3d 24, 27 (2006).

3. Manual for Complex Litig. §21.14 at p. 341 (4th ed. 2007).

4. *Folding Cartons, Inc. v. Am. Can Co.*, 79 F.R.D. 698, 700 (N.D. Ill. 1978).

5. *In re IPO*, 471 F.3d at 40.

6. Manual for Complex Litig., §21.142 at p. 348.

7. See, e.g., *Weiss v. La Suisse*, No. 01 CIV. 1006 (CM), 2005 WL 589331 at *9 (S.D.N.Y. March 13, 2005) (“[i]ndividualized questions concerning the statute of limitations...will require the court to review the transactions of each plaintiff individually”); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (“when the defendant’s affirmative defenses (such as...the statute of limitations) may depend on facts peculiar to each plaintiff’s case, class certification is erroneous”).

8. *Davenport v. Gerber Products Co.*, No. 87-3198, 1988 WL 52098, *2 (E.D. Pa. May 20, 1988).

9. See, e.g., *Piscetta v. Philip Morris USA, Inc.*, No. 03VS048475, slip op. (July 14, 2005, Fulton Cty. Ga. Ct.) (granting absent class member depositions in a fraud case).

10. See *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

11. *Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977); see also *Krueger v. N.Y. Tel. Co.*, 163 F.R.D. 446, 450 (S.D.N.Y. 1995) (discovery from absent class members is proper when in good faith and not unduly burdensome); *Robertson v. Nat’l Basketball Ass’n*, 67 F.R.D. 691, 699 (S.D.N.Y. 1975).

12. *Davenport v. Gerber Products Co.*, No. 87-3198, 1988 WL 52098, *2 (E.D. Pa. May 20, 1988).

13. Manual for Complex Litig., §21.14 at p. 343.