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Class Action Communications

Guidance on reaching out to prospective members.

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Unlike discovery in other types of litigation, the urgency and necessity of conducting comprehensive formal and informal discovery at the outset of a class action is critical.[1]

When faced with a class action an employer must do two things: (1) perform due diligence to isolate the truth or falsity of allegations made in the lawsuit and (2) prepare a defense to the class claims. Interviewing members of the putative class accomplishes both these goals. When parties and counsel prepare to reach out to putative class members, there are certain parameters that they must observe. This article discusses those parameters.[2]

Communications

Generally, district courts have held that pre-certification communications with putative class action members are permitted unless such communications are misleading. However, a court has authority to step in and regulate contact between counsel and putative members pursuant to Federal Rule of Civil Procedure 23(d).[3] The cases decided on this point involve the intersection of the rights of free speech and the court's ability to control proceedings.

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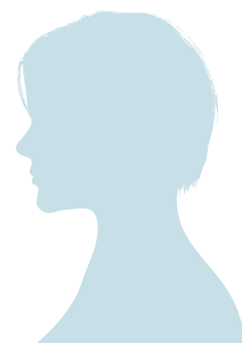
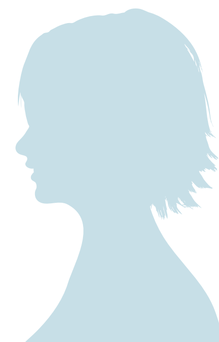
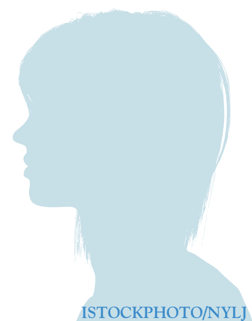
The seminal case in class action suits concerning communication between attorneys and prospective class members is *Gulf Oil Co. v. Bernard*.[4] In that case Gulf Oil Co. and the Equal Employment Opportunity Commission (EEOC) entered into a conciliation agreement resolving alleged discrimination against African-American and female employees.[5] Under this agreement, Gulf Oil offered back pay to alleged victims of discrimination and sent notices to employees eligible for back pay, stating the amount available in return for the execution of a full release.

Employees of Gulf Oil filed a class action against the company on behalf of all African-American, current and former employees and applicants rejected for employment. The suit alleged similar claims as those raised before the EEOC.[6] Gulf Oil filed a motion seeking to limit the communications made to prospective class members from the named plaintiffs and their counsel. The district court ordered a complete ban on all communications concerning the class action between the named plaintiffs and their counsel and any actual or potential class member without the court's prior approval.[7]

The U.S. Supreme Court held that the district court's order was inconsistent with the policies embodied in Federal Rule of Civil Procedure 23, which governs class actions in federal courts,[8] because it interfered with the plaintiffs' efforts to inform potential class members of the existence of the lawsuit.[9] In addition, the order made it more difficult for the plaintiffs to obtain information about the merits of the case from the persons they sought to represent. Because of these problems, the Court held that an order







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prohibiting communications should be based on a clear record and specific findings that reflected the district court's balancing of the need for a limitation against the potential interference with the parties' rights. Moreover, the Court noted that such a weighing should result in a carefully drawn order that limits speech as little as possible, consistent with the parties' rights.[10]

While *Gulf Oil* made clear that broad judicial limitations on pre-certification communications were not permissible absent a clear and convincing need, it did little to establish clear boundaries that apply in class action litigation.

Pre-Certification Settlements

In *Weight Watchers of Philadelphia Inc. v. Weight Watchers International Inc.*,[11] the U.S. Court of Appeals for the Second Circuit established that pre-certification settlements are generally permissible.[12] This case was decided prior to the Supreme Court's decision in *Gulf Oil*, but it remains good law. In *Weight Watchers*, plaintiff, a Weight Watchers franchisee, sued the company over franchise fees.[13] Shortly thereafter, the Weight Watchers executives sent letters to all franchisees stating that the company would "vigorously" defend the lawsuit and that in its view, "[w]idespread publicity that any franchisees claim that [the company] preferred to charge more money to a highly sensitive obese population would surely have a detrimental effect on the image of Weight Watchers."[14]

Plaintiff sought a court order restraining defendant from communicating with any member or potential member of the class concerning the action without prior court approval.[15] In addition, it sought an order directing defendant to send a letter of retraction and to require defendant to file a report of any prior communications with the franchisees.[16] The judge denied plaintiff's request for letters of retraction,[17] and permitted defendant to communicate with franchisees concerning the action.[18] Specifically, the court held that defendant "might conduct discussions with franchisees…and incorporate any conclusion in any agreement resulting therefrom" so long as counsel for the franchisee was permitted to be present at each negotiation session, and would receive at least five days advance notice.[19] Plaintiff appealed the order and moved for a stay, and defendant moved to dismiss the appeal for lack of appellate jurisdiction.[20]

The Second Circuit granted defendant's motion to dismiss the appeal on the ground that the order was unappealable or in the alternate, well within the "wide range of discretion" granted to district judges in managing class actions.[21] The court noted that it is "unable to perceive any legal theory that would endow a plaintiff who has brought what would have been a 'spurious' class action under former Rule 23 with a right to prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do this."[22] It further opined that "plaintiff has no legally protected right to sue on behalf of other franchisees who prefer to settle."[23]

In *Christensen v. Kiewit-Murdock Investment Corp.*,[24] another seminal case in this circuit, a shareholder sued on behalf of shareholders claiming that the corporate defendant fraudulently devalued stock. The defendant made a tender offer to shareholders to purchase their stock at a value that exceeded the relief sought in the complaint.[25] Defendant did not seek court approval in making the tender offer, and provided full disclosure of the litigation.[26] Thereafter, defendant successfully sought a dismissal of the class claims as moot.

Plaintiff argued that the defendant's conduct in "settling the suit without consulting plaintiff, his counsel or the court" violated Rule 23.[27] The court rejected this argument, and held that "at least prior to class certification, defendants do not violate Rule 23(e) by negotiating settlements with potential members of the class."[28] Therefore, because "[a]t the time of the tender offer, the class had not been certified," there was no violation of the Federal Rules, and no finding of bad faith on the part of the defendant.[29]

Pre-Certification Releases

Pre-certification releases with putative class members are permissible if knowing and uncoerced. In *Ralph Oldsmobile Inc. v. General Motors Corp.*,[30] plaintiff motor dealer filed a purported class action on behalf of all franchised dealers in New York alleging that General Motors reimburses the dealers less than the statutory rate for parts used in warranty repairs.[31] Subsequently, defendant chose to discontinue its Oldsmobile line of cars and sent all dealers a termination and release agreement, in which the dealer would release all claims against defendant.[32] Plaintiff moved for an order requiring that defendant "cease and desist its practice of obtaining ex parte releases from putative class members, voiding those releases already obtained, and requiring defendant to send a court-approved corrective notice that any such releases have been voided."[33]

The court, citing the Second Circuit decision in *Weight Watchers*, noted that defendants may negotiate individual settlements prior to certification of a class.[34] The court found that the releases at issue were supported by adequate consideration because they were part of a broader agreement for which the dealers received extra payment.[35] However, it did note that the record supported a finding of potential coercion because the dealers depended on the good will of defendant for their "continued success."[36] The court also found the potential for "unknowing waivers" where the releases signed did not mention the present action.[37]

Although the court refused to void the releases that had already been executed, it ordered that a notice be sent at defendant's expense to potential members of the putative class, providing them with information regarding the action.[38] It also ordered that those potential members of the putative class who signed a release be afforded an opportunity to apply to the court to have the release voided.[39]

In *MAT Five Securities Litigation*,[40] a recent case brought in the Southern District of New York, plaintiff brought a putative class action alleging violations of federal securities laws for the sales of shares in a hedge fund targeted at high net worth individuals.[41] Subsequently, defendant initiated "tender and exchange offers" with potential class members for the fund at issue.[42] In response, plaintiff filed another class action seeking to enjoin the tender offer in Delaware Chancery Court on the ground that investors were forced to "accept the terms of an extremely broad general release that covers any conceivable claim that could be brought against the defendants or their affiliates."[43]

The New York magistrate judge found the tender offer to be misleading and ordered that any amended order be met with the court's approval.[44] Subsequently, plaintiff asked for a partial lifting of the automatic stay to obtain access to communications regarding releases already obtained from putative class members.

The federal court denied plaintiff's request. The court held that the Southern District had no separate interest to prevent a putative class member from accepting a tender offer so long as it met fair disclosure standards.[45] In support of its finding, the court noted that the plaintiffs were "not unsophisticated," and that the plaintiffs were "high net worth individu-

als" who have access to advisers who can assist them in deciding whether to join a class action.[46]

The court also refuted plaintiff's argument that Rule 23 prevents defendants from "settling" the case without court approval and reiterated that court approval is not required for settlements of cases commenced as class actions until after the class has been certified.[47]

Current Employees

Obtaining discovery from putative class members who are current employees is proper if carefully conducted. Putative class members, several of whom may still be employed by the defendant, may be an important source of facts. Courts, however, have been especially diligent in looking for signs of coercion when the putative class members are defendant's current employees.

The Southern District in *Ralph Oldsmobile* observed, "[c]oercion of potential class members by the class opponent may exist if both parties are 'involved in an ongoing business relationship.'"[48] Moreover, the court in *Bublitz v. E.I. duPont de Nemours and Co.* went so far as to suggest that a unilateral communications scheme involving an employer-employee relationship is inherently coercive and "justifies certain minimal protections."[49]

In *Bublitz*, an employer-defendant sought permission to contact and settle with putative class members who were its at-will employees. The court found that "there may in fact be some inherent coercion in such a situation" because of the employer-employee relationship.[50] The court pointed out that "in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."[51]

In response to the danger of coercion in the management-labor relations context, the National Labor Relations Board has created safeguards for when an employer needs to question employees on matters involving their Section 7 rights, 29 USC §157. In *Johnnie's Poultry v. District Union 99*, the board set the following standard:[52]

> The employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

The Second Circuit has upheld the use of these safeguards in the course of employer-employee communications during labor disputes.[53]

In addition, the Southern District in New York has created safeguards outlining the parameters of contact with putative class members in litigation. In *EEOC v. Morgan Stanley*,[54] the court, applying the *Gulf Oil* analysis (and citing *Bublitz*), balanced the employer's need to have "access to potential witnesses" with the need of class members to be protected "from the potential influences inherent in their employment status." The court permitted the employer to contact the currently employed potential class members under the following circumstances:

> Employees must be told that there is a pending lawsuit which they may join, and that it is unlawful for Morgan Stanley to retaliate against them if they do. In addition to informing the employees of the right to non-retaliation, the notice must also provide a short summary of the claims in the…lawsuit so that employees can make an informed decision concerning their interest in the case…. Such notice must be in writing and in a form approved by the Court.[55]

Consequently so long as any communications and declarations obtained meet "fair disclosure standards,"[56] case law makes clear that simply obtaining sworn statements from employees who are putative class members is also entirely proper so long as carefully conducted.[57]

1. Excerpts in this article were taken from "Littler Mendelson on Employment Law Class Actions," a treatise by the attorneys of Littler's Class Action Practice Group (2007).
2. This article outlines the posture of the law in the Second Circuit and may not be applicable in other jurisdictions.
3. FED. R. CIV. P. 23(d) provides:
(1) In General. [T]he court may issue orders that:
(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
(B) require—to protect class members and fairly conduct the action—giving appropriate notice of some or all class members of:
(i) any step in the action;
(ii) the proposed extent of the judgment; or
(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;
(C) impose conditions on the representative parties or on interveners;
(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or
(E) deal with procedural matters.
4. 452 U.S. 89 (1981).
5. Id. at 91.
6. Id. at 92.
7. Id. at 93.
8. Id. at 100.
9. Id. at 101.
10. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 91 (1981).
11. *Weight Watchers of Philadelphia Inc. v. Weight Watchers Int'l Inc.*, 455 F.2d 770 (2d. Cir. 1972).
12. Id. at 775.
13. Id. at 771.
14. Id. at 772.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id. at 774.
20. Id.
21. Id. at 775.
22. Id. at 773.
23. Id. at 775.
24. *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 213 (2d Cir. 1987).
25. Id.
26. Id.
27. Id. at 209.
28. Id.
29. Id.
30. *Ralph Oldsmobile Inc. v. General Motors Corp.*, 99 Civ. 4567 (AGS), 2001 U.S. Dist. LEXIS 13893 (SDNY Sept. 7, 2001).
31. Id. at *2.
32. Id. at *3.
33. Id. at *1.
34. Id. at *19.
35. Id. at *14.
36. Id. at *12.
37. Id. at *12.
38. Id. at *20.
39. Id. at *21.
40. *In re: MAT Five Securities Litigation*, 08 Civ. 4152, 2008 U.S. Dist. LEXIS 63008 (SDNY Aug. 12, 2008).
41. Id. at *1.
42. Id.
43. Id. at *2.
44. Id.
45. Id. at *4.
46. Id. at *4.
47. Id. at *3.
48. *Ralph Oldsmobile Inc. v. General Motors Corp.*, 99 Civ. 4567 (AGS), 2001 U.S. Dist. LEXIS 13893, at *3 (SDNY Sept. 7, 2001).
49. *Bublitz v. E.I. duPont de Nemours and Co.*, 196 FRD 545, 548 (S.D. Iowa 2000).
50. Id. at 548.
51. Id. at 449.
52. *Johnnie's Poultry v. Dist. Union 99*, 146 NLRB 770, 775 (1964).
53. See *NLRB v. Monroe Tube Co.*, 545 F.2d 1320, 1328 (2d Cir. 1976),
54. *EEOC v. Morgan Stanley*, 206 F.Supp.2d 559, 563 (SDNY 2002).
55. Id.
56. See *In re: MAT Five Securities Litigation*, 2008 U.S. Dist. LEXIS 63008 (SDNY Aug. 12, 2008).
57. See *Pruitt v. City of Chicago*, 2004 WL 1146110 (N.D. Ill. May 20, 2004) (refusing to strike affidavits obtained by employer from members of the putative class); *Bell v. Addus Healthcare Inc.*, 2007 WL 2752893, at * 3 (W.D. Wash. Sept. 19, 2007) (nothing improper about interviewing employees on a voluntary basis as the employer has the "right to fully investigate the case"); *Basco v. Wal-Mart Stores Inc.*, 2002 WL 272384, *3 (E.D. La. Feb. 25, 2002).

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