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Enforcing absent class member discovery

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When faced with a class action, propounding discovery on unnamed class members can be a powerful tool for defending against certification, moving to decertify and contesting classwide liability. This type of discovery is typically described as "absent class member discovery."

However, the law governing it is fairly limited and varies by jurisdiction. The Federal Rules of Civil Procedure do not mention such discovery, the U.S. Supreme Court has not addressed the issue, and most federal appellate courts have been silent on the subject.

Courts that have weighed in have analyzed different factors to determine whether to permit absent class member discovery.

UNDERLYING POLICY TENSION

The current framework for absent class discovery results largely from competing legal principles. On one hand, courts are reluctant to enforce such discovery due to the long-standing notion that "an absent class-action plaintiff is not required to do anything."[1]

> Forcing individual class members to participate in discovery could negate the practical benefits of Rule 23's representative system and bog down the case with individualized discovery issues.

As some courts have noted, propounding discovery on absent class members "requires those members to take some affirmative action to remain in the class," effectively creating an "opt in" requirement that is inconsistent with the "opt out" provisions in Federal Rule of Civil Procedure 23.[2]

Further, forcing individual class members to participate in discovery could negate the practical benefits of Rule 23's representative system and bog down the case with individualized discovery issues.

As one court explained, "If joinder of all parties is impracticable, propounding discovery like interrogatories, depositions and requests to produce on an individual basis is even more impracticable."[3]

On the other hand, a class-action defendant has a due process right to assert individualized defenses to each claim, which presupposes some opportunity to collect evidence concerning the individual claimants.[4]

Moreover, the Federal Rules of Civil Procedure favor broad discovery and wide access to the relevant facts because such discovery promotes the search for truth.[5]

STANDARDS FOR ABSENT CLASS DISCOVERY

Faced with this tension, courts have adopted various tests for determining whether to enforce the requested absent class member discovery. The most frequently cited standard derives from the decision of the 7th U.S. Circuit Court of Appeals in *Clark v. Universal Builders Inc*.

Under that test, the defendant must establish that:

- The discovery is not designed to take undue advantage of class members or to reduce the size of the class.
- The discovery is necessary.
- Responding to discovery requests would not require the assistance of counsel.
- The discovery seeks information that is not already known by the proponent.[6]

Other courts have adopted similar, but less demanding, standards.

For example, under the standard announced in *McCarthy v. Paine Webber Group,* the defendant must make a "strong showing" that "the information sought:

- Is not sought with the purpose or effect of harassment or altering membership of the class.
- Is directly relevant to common questions and unavailable from the representative parties.
- Is necessary at trial of issues common to the class."[7]

The court in *Tierno v. Rite Aid* adopted a less stringent standard, requiring defendants to establish that:

- The information sought is relevant.

- The information is not readily obtainable from the representative parties or other sources.
- The request is not unduly burdensome and made in good faith.[8]

More recently, the court in *Arredondo v. Delano Farms Co.* attempted to consolidate each of these standards into a single test, holding that the discovery must be:

- "Reasonably necessary."
- "Not conducted for an improper purpose."
- "Not unduly burdensome in the context of the case and its issues."[9]

APPLICATION OF THE KEY FACTORS

Several of the factors in these tests overlap, and some are self-explanatory, but several of them warrant further examination.

Will the discovery require the assistance of counsel?

Under the popular *Clark* test, courts must find that the discovery will not require the assistance of counsel.

> Courts are more likely to allow written questionnaires or interrogatories and less likely to allow depositions or requests for admission because the latter are more likely to require the class member to retain counsel for strategic guidance.

Applying this factor, courts are more likely to allow written questionnaires or interrogatories and less likely to allow depositions or requests for admission because the latter are more likely to require the class member to retain counsel for strategic guidance.[10]

Under this standard, straightforward and factual questionnaires seem to have the highest likelihood of gaining court approval.

Is the discovery designed to reduce the class size?

Under the class-size-reduction factor, courts are wary of any effort to discourage class membership with mandatory discovery that is (1) unduly burdensome or (2) served on more members than necessary.

However, a defendant can negate this concern by agreeing that it will not seek to exclude non-responders.

For example, the defendant in *Arredondo* sought to depose 196 class members but assured the court that it would not seek to exclude any members who failed to attend. Relying on that assurance, the court ultimately allowed all 196 depositions to go forward.[11]

Is the discovery unduly burdensome?

With the undue-burden factor, courts are more likely to enforce the absent class member discovery where the defendant shows that the type and amount of discovery requested (1) is narrowly tailored to the demonstrated necessity; and (2) will burden only a limited portion of the class.

In *Arredondo*, for example, the defendant argued that the 196 depositions were part of a necessary step in developing a reliable method of representative sampling and that they would burden less than 1% of the 25,000 class members.

When the court allowed the depositions, it emphasized that more than 99% of absent class members would suffer no imposition whatsoever.

Further, the court reasoned that the burden of the proposed discovery should be considered in context by weighing it against the size and the complexity of the case.

The court explained that "[t]he two to four hours of time 196 deponents will be asked to devote to the deposition is a relatively small time investment relative to a case of this size and one which should help provide clarity on the issue of liability to class members."[12]

Limiting the length of the proposed depositions or the scope of written discovery is another way to lighten the perceived burden on the absent class members.

For example, the defendant in *Antoninetti v. Chipotle Inc.* sought to take 20 depositions limited to one hour each, and the court granted its motion to compel.[13] Similarly, courts in other cases have looked favorably on promises to limit depositions to periods of two to four hours.[14]

Could the discovery be obtained by other means?

Where courts ask whether discovery could be obtained by other means, the *McPhail v. First Command Financial Planning Inc.* decision is insightful.[15] There, the defendant in a securities fraud case sought interrogatory responses from all 178,527 class members on whether they relied on alleged marketing misrepresentations.

After concluding that the discovery was unduly burdensome and an improper attempt to reduce the class size, the court also found that the defendant could rebut the issue of marketplace reliance without imposing on the entire class.

For example, the court explained, the defendant could show that its marketing materials lacked misrepresentations or that its sales pitches were not identical.

Thus, courts applying *McPhail* may be less likely to allow absent class discovery in fraud-on-the-market cases or

other cases where the alleged harm is uniformly caused by a widespread wrongdoing.

In contrast, where each instance of wrongdoing or injury is factually diverse — such as where a class of employees claims that its individual members were not adequately compensated for the hours they worked — courts may be more likely to allow absent class member discovery.[16]

Will the discovery result in representative evidence?

Beyond the enumerated factors, some courts have recently considered whether the proposed discovery is designed to provide reliable, representative evidence. That is, courts look favorably on discovery that is tailored to produce evidence representative of some or all the class.

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For example, in *Arredondo*, the defendant used an expert affidavit to show that it needed all 196 depositions in order to collect the statistical data necessary to develop a reliable method for gathering representative evidence.

Moreover, it demonstrated that the plaintiff's proposed sampling method was likely to yield unrepresentative, or even biased, results. Recognizing the force of these arguments, the court noted that "concerns regarding reliability of such survey evidence are not taken lightly."[17]

The court in *Roberts* similarly focused on the representativeness of the proposed discovery. There, the defendant sought to take 100 depositions, and the court agreed that at least some depositions should go forward.

However, as the court noted, the defendant failed to offer any evidence — expert or otherwise — that 100 deponents would be a statistically significant sample. Instead, it appeared to pull the number out of "thin air."

The court found this inadequate, explaining that it would be a "waste of time and resources to engage in 100 depositions without support that such a number is statistically significant."

Accordingly, the court stated that it would permit some depositions, but it ordered the defendant to "propose a statistically significant sample size based on the work of an expert in [the] case, not conjecture."[18]

These recent cases signal that courts may be increasingly receptive to arguments concerning the representativeness of the requested discovery.

PRACTICAL CONSIDERATIONS

Read together, the various cases and standards reveal that defendants pursuing absent class member discovery should consider the following suggestions, to the extent practical and appropriate, in each case:

- Limiting discovery to a small but representative percentage of absent class members.
- Formulating a clear approach to gathering reliable representative evidence and supporting it with expert analysis.
- Analyzing the burden on absent class members in relation to the size of the class, the total amount at stake, the total amount each class member stands to recover, the complexity of the case and the estimated time required from each class member to respond.
- Assuring the court that the defendant will not seek to exclude nonresponsive individuals from the class.
- Starting with a written questionnaire.
- If depositions are necessary, articulating why and limiting the duration or scope of each deposition.
- Offering to compensate absent class members for their time at depositions.
- Determining whether any class members have already inserted themselves into the litigation — for example, by submitting a declaration in support of a motion to certify — such that they are no longer truly "absent."
- Emphasizing the need for discovery to explore the alleged harm resulting from individual, factually diverse acts — as opposed to a single wrongdoing that resulted in widespread, uniform harm.

Absent class member discovery is a critical tool in evaluating and defending against class action liability. With these considerations in mind, defendants can utilize such discovery in a manner courts are more likely to enforce.

Notes

[1] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (noting that burdens, including discovery, "are rarely imposed upon plaintiff class members"); *accord Doe v. Arizona Hosp. & Healthcare Ass'n*, No. 07-cv-1292, 2009 WL 1423378, at *14 (D. Ariz. Mar. 19, 2009) (collecting cases).

[2] *McPhail v. First Command Fin. Planning Inc.*, 251 F.R.D. 514, 517 (S.D. Cal. 2008).

[3] *Id.*

[4] *Roberts v. C.R. England Inc.*, No. 12-cv-302, 2017 WL 5312116, at *3 (D. Utah Nov. 13 2017) (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *In re St. Jude Med. Inc.*, 522 F.3d 836, 840, (8th Cir. 2008)); *see also Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (class defendants have a right to litigate defenses to individual claims).

[5] *See, e.g., Arredondo v. Delano Farms Co.*, No. 09-cv-1247, 2014 WL 5106401, at *4 (E.D. Cal. Oct. 10, 2014).

[6] *McPhail*, 251 F.R.D. at 517 (quoting *Clark v. Universal Builders Inc.*, 501 F.2d 324, 340 (7th Cir. 1974)).

[7] 164 F.R.D. 309, 313 (D. Conn. 1995).

[8] No. 05-cv-2520, 2008 WL 2705089, at *6 (N.D. Cal. July 8, 2008).

[9] No. 09-cv-01247, 2014 WL 5106401, at *4–5 (E.D. Cal. Oct. 10, 2014).

[10] *McPhail*, 251 F.R.D. at 519 (discussing the need for counsel in responding to requests for admission); *Clark*, 501 F.2d 324, 341 (7th Cir. 1974) (discussing the need for counsel in a deposition).

[11] *Arredondo*, 2014 WL 5106401, at *4.

[12] *Id.*

[13] No. 06-cv-2671, 2011 WL 2003292, at *2 (S.D. Cal. May 23, 2011).

[14] *See, e.g., Arredondo*, 2014 WL 5106401, at *4; Roberts, 2017 WL 5312116, at *3; *Moreno v. AutoZone, Inc.*, No. 05-cv-4432, 2007 WL 2288165, at *1 (N.D. Cal. Aug. 3, 2007).

[15] *McPhail*, 251 F.R.D. at 517.

[16] *See, e.g., Arredondo*, 2014 WL 5106401, at *4.

[17] *Id.*

[18] *Roberts*, 2017 WL 5312116, at *3.

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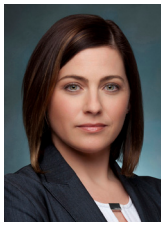

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