

Defending Class Actions Using Absent Class Member Discovery

Evaluating Whether to Seek Discovery of Class Members; Leveraging Evidence at Certification, Settlement, and Trial

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Discovery of Absent Class Members: Governing Law

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The Stakes

- Need for complete discovery
- VERSUS
- Burden on non-parties to litigation.

So type of case matters.

- Absent class member discovery tends to be **limited** in **employment cases**. (Risk of coercion/chilling high.)
- Tends to be **more acceptable** in **consumer cases**. (Risk of coercion/chilling low.)

Formal discovery is subset of communications

- Each side has the right to communicate with putative class members.
- *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (bans on communication with class members disfavored).
- *EEOC v. Mitsubishi Motor Mfg. of Am.*, 102 F.3d 869 (7th Cir. 1996) (Easterbrook, J.) (referring to each party's "right" to communicate with absent class members).

Standard for communication with absent class members

- Court may not restrict communications “without a **specific record** showing by the moving party of the **particular abuses** by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the **narrowest possible relief** which would protect the respective parties.”
- *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (quoting *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977) (emphasis added)).
- See also *Adair v. EQT Production Co.*, 2011 U.S. Dist. LEXIS 110512 (W.D. Va. Sep. 28, 2011) (reversing MJ order regulating communication where no specific showing).

General standard for formal discovery

- Proponent must show
 - (1) No improper motive
 - (2) Necessity
 - (3) Minimal burden/need for counsel
- *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340-41 (7th Cir. 1974).
- *Arrendondo v. Delano Farms Co.*, 1:09-cv-01247, 2014 U.S. Dist. LEXIS 145562, *12-13 (E.D. Cal. Oct. 10, 2014).
- *Nitsch v. Dreamworks Animation SKG, Inc.*, 2016 U.S. Dist. LEXIS 142790 (N.D. Cal. 2016) (defendant did not make necessity showing).

Formal discovery - Burden varies depending on discovery type

- Interrogatories → lesser burden
- Depositions → greater burden
- Requests for admission → greater burden
- *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974) (“the burden confronting the party seeking deposition testimony should be more severe than that imposed on the party requesting permission to use interrogatories”).
- *McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514 (S.D. Cal. 2008) (RFAs would require assistance of counsel).

Formal discovery more likely if class member “injected” into debate

- *Roberts v. C.R. England, Inc.*, 2017 WL 5312116 (D. Utah. Nov. 13, 2017) (allows depositions of absent class members where plaintiffs indicated they might rely on class members as witnesses); see also *Brown v. Wal-Mart Store, Inc.*, 2018 WL 339080 (N.D. Cal. Jan. 9, 2018) (same).
- *Antoninetti v. Chipotle, Inc.*, 2011 U.S. Dist. LEXIS 54854 (S.D. Cal. May 23, 2011) (allowing depositions of class members who “injected themselves” into litigation by submitting declarations in support of class certification).
- *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority*, 234 F.R.D. 4, (D.D.C. 2006) (allowing depositions of 20 class members who offered declarations in support of discovery motion).

Formal discovery more likely if more limited - 1

- “Unlike other cases where Defendants sought discovery from significantly larger numbers of (and at times, all) absent class members, here Defendants have limited their request to roughly 200 - less than one percent of the 25,000 total class members.”
- *Arrendondo v. Delano Farms Co.*, 1:09-cv-01247, 2014 U.S. Dist. LEXIS 145562, *24 (E.D. Cal. Oct. 10, 2014).

Formal discovery more likely if more limited - 1

- Depositions allowed where “each deposition is limited to one hour and is appropriately focused.”
- *Antoninetti v. Chipotle, Inc.*, 2011 U.S. Dist. LEXIS 54854, *6 (S.D. Cal. May 23, 2011).

Privilege

- Under certain circumstances, some absent class member discovery might be **privileged**.
- E.g., draft declarations taken by plaintiffs' counsel considered work product.
- *Tierno v. Rite Aid Corp.*, No. C 05-02520, 2008 U.S. Dist. LEXIS 112461, *9-10, 13 (N.D. Cal. Jul. 8, 2008).

Informal discovery – Identifying class members

- Defendants can usually just look at their records.
 - Plaintiffs may have to serve discovery on defendants.
 - Class member IDs generally not discoverable.
- *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 352 (1978).
 - See also, e.g., *Swelns v. Universal Fidelity L.P.*, 2014 U.S. Dist. LEXIS 53058, *6 (N.D. Ind. Apr. 17, 2014) (following *Oppenheimer*);
 - *Godson v. Eltman, Eltman & Cooper, PC*, 2013 U.S. Dist. LEXIS 129988, *6 (W.D.N.Y. Sep. 11, 2013) (refusing to compel production of contact information where “no basis to believe” communication would assist “in determining the appropriateness of certifying a class action”)

Exceptions to *Oppenheimer*

- Generally in employment cases.
- See, e.g., *Wellens v. Daiichi Sankyo Inc.*, 2014 U.S. Dist. LEXIS 29794, *6 (N.D. Cal. Mar. 5, 2014) (compelling production of contact information for absent class members in employment class action where “Plaintiffs have demonstrated that discovery from putative class members may lead to anecdotal evidence not captured in the pay and benefits data produced by Defendants”) (emphasis in original);
- *Quintana v. Claire’s Boutiques, Inc.*, 2014 U.S. Dist. LEXIS 7973 (N.D. Cal. Jan. 21, 2014) (compelling access to statistical sample of class members’ contact information in wage-and-hour case).

Solicitation concern

- “in a class action lawsuit, "case development" necessarily includes efforts by the plaintiff "to inform potential class members of the existence of [the] lawsuit," and "to obtain information about the merits of the case from the persons they [seek] to represent." Gulf Oil, 452 U.S. at 101. By Defendant's logic, nearly all class action litigation violates the RPCs.”
- *Rinky Dink, Inc. v. World Business Lenders, LLC*, No. C14-0268-JCC, 2014 U.S. Dist. LEXIS 150624 (W.D. Wash. Oct. 23, 2014).

What can you ask an absent class member?

- Details of incident in an incident-based class action.
- Understanding of content of any declaration or sworn statement. (*Antoninetti v. Chipotle, Inc.*, 2011 U.S. Dist. LEXIS 54854 (S.D. Cal. May 23, 2011).)
- Expectations of lawsuit. (*Antoninetti v. Chipotle, Inc.*, 2011 U.S. Dist. LEXIS 54854 (S.D. Cal. May 23, 2011).)



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When to Seek Discovery

- Before class certification
- After class certification, before trial

Types of Discovery

- Surveys/Questionnaires
- Interrogatories
- Document Requests/Subpoenas
- Depositions
- Interviews (if ethical rules permit)
- Inspection of Property / Product

Amount of Discovery / Selection Process

- Statistical significance
- Anecdotal evidence
- Selection process (random / each side selects)

Preparation

- Experts – e.g., statistics / consumer behavior
- Focus groups / surveys to test approaches?
- Pre-deposition interviews? (if ethical rules permit)

Case Law

“(1) the discovery is not designed to take undue advantage of class members or to reduce the size of the class, (2) the discovery is necessary, (3) responding to the discovery requests would not require the assistance of counsel, and (4) the discovery seeks information that is not already known by the proponent.”

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

Case Law

“where a strong showing is made that the information sought (1) is not sought with the purpose or effect of harassment or altering membership of the class; (2) is directly relevant to common questions and unavailable from the representative parties; and (3) is necessary at trial of issues common to the class.”

McCarthy v. Paine Webber Group, Inc., 164 F.R.D. 309, 313 (D. Conn. 1995)

Case Law

“1. That the information sought is necessary to a trial of issues affected the class as a whole, rather than issues relating to individual claims; 2. That the information sought must not be readily obtainable from other sources; and 3. That the discovery must not be unduly burdensome, and must not have been demanded for an improper purpose (e.g., to harass absent class members, or to force them to opt out of the class.)”

In re Qwest Communs. Int'l, Inc., 283 F.R.D. 623, 625-26 (D. Colo. 2005).

Case Law

- *Glickenhous & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (securities class action – single interrogatory formulated by judge; written discovery to approx. 100 class members; 12 large institutional investors deposed)
- *Cabot E. Broward 2 LLC v. Cabot*, 2017 U.S. Dist. LEXIS 181583, *6-7 (S.D. Fla. Oct. 27, 2017) (permitting subpoenas to 25 randomly-selected class members re: statute of limitations issue)
- *Roberts v. C.R. Eng., Inc.*, 2017 U.S. Dist. LEXIS 187432, *15-16 (D. Utah Nov. 13, 2017) (permitting absent class member depositions on causation and reliance, with number to be based on statistically-significant sample)

Case Law

- *Carlin v. DairyAmerica, Inc.*, 2017 U.S. Dist. LEXIS 164790, *14-15 (E.D. Cal. Oct. 4, 2017) (only subpoenas could be served on absent class members pre-certification because not yet parties)
- *In re Blue Cross Blue Shield Antitrust Litig.*, 2016 U.S. Dist. LEXIS 170945 (N.D. Ala. Oct. 18, 2016) (subpoenas to absent class members permitted, with meet and confer procedure before serving)
- *Nitsch v. Dreamworks Animation SKG, Inc.*, 2016 U.S. Dist. LEXIS 142790 (N.D. Cal. Oct. 14, 2016) (denying request for interrogatories and doc. requests to 500 class members (5% of class) on statute of limitations issues)

Case Law

- *In re Petrobras Sec. Litig.*, 2016 U.S. Dist. LEXIS 21028 (S.D.N.Y. Feb. 21, 2016) (Rakoff, J.) (denying post-certification request for interrogatories to all absent class members because it would convert opt-out classes to opt-in classes and would not be relevant to common issues)
- *Indergit v. Rite Aid Corp.*, 2015 U.S. Dist. LEXIS 160355 (S.D.N.Y. Nov. 30, 2015) (granting request for 8 depositions, with deponents selected randomly from approx. 1700 member class)

Case Law

- *Antoninetti v. Chipotle, Inc.*, 2011 U.S. Dist. LEXIS 54854 (S.D. Cal. May 23, 2011) (class members who signed declarations could be deposed for 1 hour)
- *Arredondo v. Delano Farms Co.*, 2014 U.S. Dist. LEXIS 145562, *25 (E.D. Cal. Oct. 10, 2014) (approving 196 depositions of absent class members after certification because “given the complexities of this case and the population being questioned, depositions will ultimately prove to be a more efficient and reliable method of obtaining detailed information regarding absent class members' experiences”).

Case Law

- *Aldapa v. Fowler Packing Co., Inc.*, 2019 WL 2635947, at *5 (E.D. Cal. June 27, 2019) (“many courts have permitted defendants to depose absent class members who, either by submitting declarations in support of the motion for class certification or in other ways, have “injected” themselves into class action litigation”; court allowed depositions of 15 absent class members limited to 4 hours, post-certification)
- *Vasquez v. Leprino Foods Co.*, 2019 WL 4670871, at *4 (E.D. Cal. Sept. 25, 2019) (plaintiffs sought to take 56 depositions of absent class members pre-certification; court allowed 7 depositions limited to 4 hours each)

Case Law

- *Roberts v. C.R. England, Inc.*, 2018 WL 3586562, at *2 (D. Utah May 22, 2018) (upholding magistrate judge's order allowing absent class member depositions focused on causation and reliance issues, in sufficient number to "achieve a 'statistically significant sample size'")
- *Mendez v. Avis Budget Grp., Inc.*, 2019 WL 1487258, at *3 (D.N.J. Apr. 3, 2019) (magistrate judge did not abuse discretion in declining to permit interrogatories to absent class members where anticipated response rate was low, value of information sought unclear)
- *Alvarez v. YRC, Inc.*, 2018 WL 8642478, at *2 (C.D. Cal. Sept. 19, 2018) (court declined to consider in deciding class certification declarations of absent class members who were not allowed to be deposed)

Case Law

- *In re Nassau County Strip Search Cases*, 2009 U.S. Dist. LEXIS 42769 (E.D.N.Y. May 20, 2009) (approving 25 depositions of absent class members post-certification)
- *Boynton v. Headwaters, Inc.*, 2009 U.S. Dist. LEXIS 94949 (W.D. Tenn. Jan. 30, 2009) (denying request for depositions but allowing defendant to serve non-mandatory questionnaire on absent class members)
- *Cornn v. United Parcel Service, Inc.*, 2006 U.S. Dist. LEXIS 69196 (N.D. Cal. Sept. 14, 2006) (denying request for depositions but allowing interrogatories or questionnaire)