Consumer Attorneys of California

47th Annual Convention
November 7, 2008 – San Francisco, CA

Discovery Techniques in Class Action Cases

by

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Overview

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Right to conduct pre-certification discovery

- The right to conduct pre-certification discovery has been well established for many years. *See*, *e.g.*, *Union Mut. Life Ins. Co. v. Superior Court*, 80 Cal.App.3d 1 (1978); *Budget Finance Plan v. Superior Court*, 34 Cal.App.3d 794 (1973).

- Such discovery serves a variety of purposes:
  - gather evidence to prove the elements of class certification;
  - develop proof of the defendant's liability on the merits;
  - identify a new class representative who might be substituted, by amending the complaint, in place of one who becomes disqualified or withdraws from the case

Bifurcation of “Class” Discovery from “Merits” Discovery

Federal Judicial Center, *Manual for Complex Litigation* (4th ed. 2004) :

- “The court should ascertain what discovery on class questions is needed for a certification ruling and how to conduct it efficiently and economically. Consider also staying other discovery if resolution of the certification issue may obviate some or all further proceedings. *Discovery may proceed concurrently if bifurcating class discovery from merits discovery would result in significant duplication of effort and expense to the parties*.” *Id.* §11.213 (emphasis added).
- “There is not always a bright line between the two. Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification. *Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.” Id.* §21.14 (emphasis added).

Bifurcation of “Class” Discovery from “Merits” Discovery

California Judicial Council, *Deskbook on the Management of Complex Litigation* (LexisNexis 2003):

- “Bifurcating class and merits discovery can at times be more efficient and economical (particularly when the merits discovery would not be used if certification were denied), but it can result in duplication and unnecessary disputes among counsel over the scope of discovery. Even limited discovery relating to class issues may overlap with merits discovery.” *Id.* §3.72.
- “Discovery relating to class issues may overlap substantially with merits discovery.” *Id.*

Bifurcation of “Class” Discovery from “Merits” Discovery

Best arguments against bifurcation:

- The parties will never be able to agree on whether proposed discovery relates to “merits” or “class” issues.
- The parties will be constantly bothering the court for rulings on the issue.
- Postponing merits discovery will delay resolution of the case and result in duplication of effort.
- *Caveat*: If bifurcation is ordered, plaintiffs will be better positioned to resist merits determinations at the class certification stage. *See*, *e.g.*, *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 443 (2000) (merits issues not to be decided at class certification stage unless “*enmeshed* with class action requirements” (emphasis added)).

Discovery of Class Member Contact Information

Why so many recent decisions?

- Defendants became the champions of class members' privacy rights;
- Prop. 64: Changes to standing rules for UCL cases led to wave of motions seeking discovery to identify substitute class representatives.

Case law balances right to discovery against privacy rights:

- *Best Buy Stores, L.P. v. Superior Court*, 137 Cal.App.4th 772 (2006) (approving use of pre-certification discovery to identify a new class representative, so long as such discovery could be conducted in a manner consistent with the putative class members' privacy rights)
- *Parris v. Superior Court*, 109 Cal.App.4th 285 (2003) (adopting balancing test)

Discovery of Class Member Contact Information

Supreme Court approves "opt-out" notices:

- *Pioneer Electronics (USA), Inc. v. Superior Court (Olmstead)*, 40 Cal.4th 360 (2007) (trial court did not abuse discretion in requiring "opt-out" notice)
  - "Contact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case. Such disclosure involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass-marketing efforts or unsolicited sales pitches." *Id.* at 373.
  - "Opt-in" notices are "overprotective of … privacy rights," could "prevent[] or substantially delay[] identification of witnesses and potential class members," and "could make it more difficult to obtain class certification, thereby reducing the effectiveness of class actions as a means to provide relief in consumer protection cases." *Id.* at 364, 374.

Discovery of Class Member Contact Information

Opt-out vs. opt-in notices after *Pioneer Electronics*:

- *Puerto v. Superior Court (Wild Oats Markets, Inc.)*, 158 Cal.App.4th 1242 (2008) (trial court abused its discretion by requiring "opt-in" notice; even “opt-out” notice would be improper)
  - “This is basic civil discovery. .... Nothing could be more ordinary in discovery than finding out the location of identified witnesses so that they may be contacted and additional investigation performed.”
  - “[W]itnesses may be compelled to appear and testify whether they want to or not” (distinguishing *Pioneer Electronics*).
- *Salazar v. Avis Budget Group, Inc.*, 2007 WL 2990281, *2 (S.D. Cal. Oct. 10, 2007) (granting motion to compel defendant to disclose class member contact information after “opt-out” notice)
  - “[T]he minimal information Plaintiff requests is indeed contemplated under the Federal Rules of Civil Procedure … as basic to the discovery process.”

Discovery of Class Member Contact Information

Employment class actions:

- *Belaire-West Landscape, Inc. v. Superior Court (Rodriguez)*, 149 Cal.App.4th 554 (2007) ("[C]urrent and former … employees [can] reasonably be expected to want their information disclosed to a class action plaintiff who may ultimately recover for them unpaid wages that they are owed."; applying *Pioneer* and approving "opt-out" notice)
- *Tien v. Superior Court (Tenet Healthcare Corp.)*, 139 Cal.App.4th 528 (2006) (trial court erred by ordering plaintiffs to identify employees of defendant who contacted class counsel in response to pre-certification notice letter; "the privacy rights of the class members who contacted plaintiffs' counsel outweigh any interest [defendant] may have in learning their identity")
- *Alch v. Superior Court*, 165 Cal.App.4th 1412 (2008) (discovery of class member contact information and other demographic data ordered over objection of some class members because relevant to the merits of the case)

Discovery of Class Member Contact Information

"Standing" to seek discovery of class member contact information:

- *First American Title Ins. Co. v. Superior Court (Sjobring)*, 146 Cal.App.4th 1564 (2007) (trial court correctly denied request for precertification discovery to identify new class representative because plaintiff "was never a member" of the class he sought to represent)
- *Cyroport Systems v. CNA Ins. Cos.*, 149 Cal.App.4th 627 (2007) (a "plaintiff with no interest in the action" may not seek "discovery to keep the action alive" if the "potential for abuse … is great")
- *CashCall, Inc. v. Superior Court (Cole)*, 159 Cal.App.4th 273 (2008) (permitting plaintiffs to obtain discovery to identify substitute class representatives, finding potential for abuse "not significant in this case")

Discovery of Class Member Contact Information

Impact on class certification:

- *Lee v. Dynamex, Inc.*, ___ Cal.App.4th ___, 83 Cal.Rptr.3d 241 (Aug. 26, 2008)
  - "After first denying [plaintiff]'s motion to compel [defendant] to identify and provide contact information for potential putative class members, the trial court denied [plaintiff]'s motion for class certification. Because the trial court's discovery ruling directly conflicts with the Supreme Court's subsequent decision in *Pioneer Electronics* …, as well as our decisions in *Belaire-West* … and *Puerto* …, and that ruling improperly interfered with [plaintiff]'s ability to establish the necessary elements for class certification, we reverse both orders and remand for further proceedings regarding class certification."

Discovery from Unnamed Class Members – California

Discovery from unnamed class members is limited:

- *National Solar Equip. Owners' Assn. v. Grumman Corp.*, 235 Cal.App.3d 1273, 1283 (1991) ("If adverse parties were allowed full discovery of every unnamed class member, there would probably be no class actions.").

Cal. Rule of Court 3.768(a) (adopted eff. Jan. 1, 2002) treats unnamed class members as non-parties:

- Unnamed class members may be deposed, and their "business records and things" obtained, by subpoena. Rule 3.768(a)(1)-(3).
- Interrogatories may not be propounded on unnamed class members (absent a court order). Rule 3.768(c).
- Named class representatives have standing to seek a protective order limiting discovery directed to unnamed class members. Rule 3.768(b).

Discovery from Unnamed Class Members – Federal

Federal law also limits discovery from unnamed class members:

- *Cornn v. United Parcel Service, Inc.*, 2006 WL 2642540, *2 (N.D. Cal. Sep. 14, 2006) ("the burden on the defendant to justify discovery of absent class members by means of deposition is particularly heavy") (citing *Baldwin & Flynn v. National Safety Associates*, 149 F.R.D. 598, 600 (N.D. Cal. 1993)).

Practice tip:

- When unnamed class members sign declarations in support of or in opposition to class certification, the parties generally seek to depose some or all of them. "Since the concept of the declarations is to present a representative sample of the evidence establishing class-wide conduct or a pattern and practice of non-compliance affecting a large group of employees, plaintiff's counsel is generally advised to seek an order limiting the number of depositions to 10% of the number of declarations, either through a simple ex parte application or formal motion for protective order." Michael D. Singer, "Pre-Certification Communication with Putative Class Members," *Forum* (January/February 2008) at 13.

Electronic Discovery in Class Actions

Federal and California law both authorize the use of electronic discovery techniques in class actions:

- Code Civ. Proc. §§2107.710-.740 ("Use of Technology in Conducting Discovery in a Complex Case")
  - On noticed motion, trial court may "enter an order authorizing the use of technology in conducting discovery" in cases designated complex, coordinated actions, and other "extraordinary" cases (§2017.730 (a)(1)-(4)).
  - Judicial Council may adopt "rules, standards, and guidelines relating to electronic discovery" (§2017.730 (e)).
- Proposed amendments to Discovery Act and Rules of Court have been promulgated.
  - Judicial Council approved proposed amendments on April 16, 2008. http://www.courtinfo.ca.gov/invitationstocomment/documents/w08-01.pdf http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf
  - Governor Schwarzenegger vetoed AB 926 on September 27, 2008. The bill is expected to be re-introduced next year.

Electronic Discovery in Class Actions

- Amendments to Federal Rules of Civil Procedure (eff. Dec. 1, 2006)
  - Text of amendments: http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf
  - Resources:
    - Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 Yale L.J. Pocket Part 167 (2006), http://thepocketpart.org/2006/11/30/rosenthal.html
    - K&L Gates Electronic Discovery Case Database, https://extranet1.klgates.com/ediscovery/
    - *Electronic Discovery Law Blog*, http://www.ediscoverylaw.com/

Discovery Hurdles Presented by CAFA Removal

Discovery following removal under the Class Action Fairness Act ("CAFA"):

- A defendant can remove under CAFA if: (1) the proposed class consists of at least 100 class members; (2) the combined claims of class members exceeds $5 million, exclusive of interests and costs; and (3) any class member is a citizen of a different state than any defendant (only minimal diversity is required). 28 U.S.C. §§1332(d)(2), 1332(d)(5)(B), 1453(a).
  - Party seeking removal bears burden of proving these elements. *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007).
- Exceptions: (1) "local controversy" exception; (2) "home state controversy" exception. 28 U.S.C. §§ 1332(d)(4)(A), 1332(d)(4)(B).
  - Party seeking remand bears burden of proving that an exception applies. *Serrano*, 478 F.3d at 1021-24.

Discovery Hurdles Presented by CAFA Removal

May the parties conduct discovery on these jurisdictional questions to determine whether remand is appropriate?

- Whether you need to push for discovery may depend on who bears the burden of proof on the disputed jurisdictional question.
- Sometimes, denial of discovery results in remand.
- Courts are split on the right to conduct discovery:

Ninth Circuit – discovery is <u>discretionary</u>:

- *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 691 (9th Cir. 2006) (district court has <u>*discretion*</u> to permit or deny jurisdictional discovery; CAFA does not require that discovery be permitted)

Discovery Hurdles Presented by CAFA Removal

Discovery not permitted:

- *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1215-16 (11th Cir. 2007) ("Certainly, the power to grant discovery generally is conferred to the sound discretion of the district court, and post-removal jurisdictional discovery may appear to present a viable option for a court examining its jurisdiction. …. Sound policy and notions of judicial economy and fairness, however, dictate that we not follow this course.")

Discovery permitted:

- *Hart v. FedEx Ground Package System, Inc.*, 457 F.3d 675, 682 (7th Cir. 2006) ("plaintiffs have the right, through appropriate discovery, to explore the facts relevant to the court's jurisdiction as the case progresses")
- *Cram v. Electronic Data Systems Corp.*, 2007 WL 2904250 (S.D. Cal. Oct. 3, 2007) (allowing parties to "conduct expedited, limited discovery on the single issue" of jurisdictional amount)

Thank you

Presentation available online at:

http://www.17200blog.com/seminars/DiscoveryTechniquesInClassActionCases11-07-08.pdf