American Bar Association Section of Litigation Committee on

Class Actions & Derivative Suits

Spring 2007 Vol. 17, No. 2

In This Issue

Co-Chair's Corner

By Gregg A. Farley

Welcome to the latest issue of the Class Actions & Derivative Suits Committee Newsletter. Each quarter this Newsletter publishes articles regarding the most recent developments in the field of class actions and derivative suits authored by some of the leading academics, jurists and legal practitioners in the United States. Current and back issues of the Newsletter can be found on the Committee's website, www.abanet.org/litigation/committees/classactions. Over 1000 Committee members from law firms and in-house legal departments receive this Newsletter on a regular basis. We hope you, our readers, treat this Newsletter – and our Committee website – as a resource from which to learn the latest news and legal analysis regarding class actions and derivative suits.

Recent history has been witness to some important class action decisions handed down by courts around the country. In the last months of 2006, the Second Circuit Court of Appeals issued a potentially ground-breaking decision in *In re Initial Public Offering Securities Litigation,* 471 F.3d 24 (2d Cir. 2006), in which this influential circuit rejected a lenient standard for determining class certification based on "some showing" that Rule 23 requirements have been met. And in February 2007, a three-judge panel of the Ninth Circuit issued a landmark decision in *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007), upholding certification of the largest employment class action in United States history, consisting of 1.5 million female current and former Wal-Mart employees nationwide.

Both of these important decisions are the subject of insightful commentary in this issue. Professor Melissa Hart from the University of Colorado Law School has authored an article arguing that the sheer size and nationwide scope of the Wal-Mart class is not a sufficient reason by itself to deny class action treatment. On the other hand, Professor John C. Coffee from Columbia University Law School warns in a companion article that the historic size and

Class Actions & Derivative Suits is published quarterly by the Class Action & Derivative Suits Committee, Section of Litigation, American Bar Association, 321 N. Clark Street, Chicago, IL 60610. The views contained within do not necessarily reflect the views of the American Bar Association, the Section of Litigation, or the Committee. Issue: Vol. 17, No. 2, Spring 2007.

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sprawling nature of the Wal-Mart class and the presence of punitive damages in the case test the extreme limits of what should be an appropriate class action under Rule 23.

This issue also contains articles debating the differing perspectives of plaintiff and defense counsel with respect to the Second Circuit's *IPO* decision. Michael Donovan argues in his article that courts should adopt a "substantial evidence" burden of proof standard to govern class certification decisions, while Donald Frederico concludes that the Second Circuit's decision will result in closer judicial scrutiny of class certification motions.

This issue also includes fascinating articles regarding class actions under the Truth in Lending Act and in the data privacy area. Rounding out the issue is an article that will be of special interest to young lawyers concerning the circumstances in which discovery is and is not available from absent class members. We trust you will enjoy this latest issue.

Upcoming Committee Activities:

Mark your calendars for the 2007 ABA Annual Meeting which will take place this year in San Francisco from August 9-14. Our Committee will hold an informal dinner during the Annual Meeting for our members to socialize and get to know each other better. Stay tuned for further details as to the exact date, time, and place for our Committee dinner.

Additionally, our Committee will put on a fascinating program during the ABA Annual Meeting regarding recent developments under the Class Action Fairness Act. This program, entitled "Is This CAFA or Kafka? Multi-State Class Actions in a Time of Metamorphosis," will take place on Sunday, August 12, from 8:00 to 9:30 a.m., and will feature a panel of leading class action practitioners from across the country.

Please also save the date for the 11th Annual National Institute on Class Actions. Each year our Committee helps sponsor this all-day program, which brings together the foremost experts on class action law in the nation. This year's program will be held at the Fairmont Hotel in Chicago on October 19, 2007. This year, as in years past, our Committee will be soliciting volunteers to act as "table moderators" to lead discussions among audience members during the lunch hour. If you are interested in serving as a table moderator, please contact our Committee co-chair, Amy Longo (alongo@omm.com), to volunteer.

As always, further details regarding these events can be found by referring to our Committee's Website mentioned above.

The Fat Lady Sings:

This issue marks the last issue of the Newsletter in which I will appear as co-chair of the Class Actions & Derivative Suits Committee. During the last four years, I have been privileged to work with some of the most talented and dedicated lawyers in the profession, all of whom have given generously of their time to make the Committee a better, stronger, and more inclusive organization. I also owe a deep debt of gratitude to countless members of the ABA staff who, through their tireless and uncomplaining efforts, have made possible the important work of the Committee. Starting August 1, a new co-chair will join Amy Longo to help lead the Committee for the next three years.

However, to paraphrase General MacArthur, old co-chairs never die; they just fade away. I look forward to working with the Committee, behind-the-scenes, for many years to come.

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DUKES V. WAL-MART: SIZE IS NOT AN ARGUMENT AGAINST CLASS LITIGATION

By Professor Melissa Hart[*]

The Ninth Circuit recently affirmed class certification in *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007), the largest employment discrimination class action in United States history. The class, potentially representing as many as two million current and former female employees of Wal-Mart, is uniquely large because the defendant is uniquely large. The retail giant is the largest private employer in the world, with a workforce representing almost one percent of total employment in the United States. Wal-Mart has argued, throughout the litigation, that the historic size of the class renders certification impossible. But, as both the district court and the Ninth Circuit recognized, "Title VII contains no special exception for large employers." *Dukes v. Wal-Mart Stores, Inc*., 222 F.R.D. 137, 142 (N.D. Cal. 2004). In fact, class resolution is especially appropriate for the claims the *Dukes* plaintiffs are pursuing in no small part because of the historic number of employees affected by the company-wide policies of an employer the size of Wal-Mart.

Dukes v. Wal-Mart is part of a growing trend of "glass ceiling" litigation. Claims like those made by the *Dukes* plaintiffs are fundamentally class claims, as they challenge the company-wide effects of centralized company policies and practices. The plaintiffs alleged that women at Wal-Mart stores had been paid less than their male counterparts every year and in every Wal-Mart region. *See id.* at 141. This inequity had developed despite the fact that the women had, on average, greater seniority and higher performance ratings. *See id.* The plaintiffs further alleged that Wal-Mart's female employees had been promoted to management less often than comparable male employees, and that those women who were promoted had to wait longer for promotion than their male peers. *See id.* at 141, 146. Thus, two-thirds of hourly employees, but only one-third of managers at Wal-Mart, were women. *See id.* at 146. As the Ninth Circuit explained in affirming class certification, the "[p]laintiffs contend that Wal-Mart's strong, centralized structure fosters or facilitates gender stereotyping and discrimination, that the policies and practices underlying this discriminatory treatment are consistent throughout Wal-Mart stores, and that this discrimination is common to all women who work or have worked in Wal-Mart stores." *Dukes*, 474 F.3d at 1222. Thus, while the class covers millions of women in thousands of Wal-Mart stores throughout the country, the district court did not abuse its discretion in determining that the class members are "united by a complex of company-wide discriminatory policies against women." *Id.* at 1224.

In one way or another, almost all of Wal-Mart's arguments to the Ninth Circuit boiled down to an assertion that this class was just too big. The court appropriately rejected these arguments, recognizing that size – at least large size – should not generally be an argument against class certification. *See id.* at 1235. The class action device was created precisely to permit litigation of large groups of common claims. As Judge Richard Posner recently wrote for the Seventh Circuit, the fact that there are "millions of class members . . . . is no argument at all" against the manageability of a class. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661-62 (7th Cir. 2004). "The more claimants there are, the more likely a class action is to yield substantial economies in litigation. [A] class action

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has to be unwieldy indeed before it can be pronounced an inferior alternative – no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied – to no litigation at all." *Id.* at 662.

In another context, Wal-Mart has, somewhat ironically, demonstrated its approval of million-member class actions; the retail giant recently acted as the lead named plaintiff representing a class of five million plaintiffs in antitrust litigation. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 101, 119 (2d Cir. 2005). In that case, as in *Dukes*, it is precisely the existence of vast numbers of plaintiffs with common claims that makes class litigation particularly appropriate. Some, including Judge Kleinfeld, who dissented from the Ninth Circuit's *Dukes* opinion, argue that employment discrimination suits are different because employment discrimination plaintiffs could pursue individual litigation. *See Dukes*, 474 F.3d at 1244 (Kleinfeld, J., dissenting). These critics argue that the damages potential in employment discrimination suits, together with statutory attorneys' fees, make single-plaintiff litigation economically viable. This argument misses the mark in several important respects.

> ***"[I]t is precisely the existence of vast numbers of plaintiffs with common claims that makes class litigation particularly appropriate."***

First, while it may be true that some employment litigation has damages potential that avoids the small-claims argument for class certification, that may well not be the case for the low-wage employees at Wal-Mart. For these employees, finding counsel to bring a single plaintiff suit would likely be quite difficult, and class action litigation presents the same kind of benefit here that it does in other actions that aggregate numerous claims that would otherwise not be pressed. Moreover, this argument entirely ignores the substantial personal costs associated with acting as a plaintiff in employment discrimination litigation. Class litigation offers employees a vehicle for challenging civil rights violations that is less likely to lead to retaliation (except against named plaintiffs), less likely to limit work opportunities in the future, and less likely to lead to the kind of disruption of personal and professional relationships that an individual suit often brings. Class action suits therefore provide an absolutely essential tool for vindication of both employees' civil rights and society's interest in the elimination of discrimination.

While size was not, as Wal-Mart had hoped it might be, dispositive in the Ninth Circuit's judgment, arguments about size framed the pivotal issues in the opinion. Wal-Mart argued that the size of the class and, in particular, its nationwide scope made satisfaction of Federal Rule of Civil Procedure 23(a)'s requirement of commonality impossible. The company also asserted that the district court had erred in certifying the class as a Rule 23(b)(2) class for injunctive relief because the size of the class made the suit impossible to characterize as one seeking predominantly injunctive relief. In rejecting these arguments, the Ninth Circuit weighed in on the two issues that have received the most sustained judicial attention in recent employment discrimination class litigation.

A. Certification Under Rule 23(b)(2).

Wal-Mart made a host of arguments to support its assertion that money damages were the predominant relief sought by the *Dukes* plaintiffs and that the class could therefore not be certified as a Rule 23(b)(2) injunctive class. Most of the arguments centered on the notion that, in a class this big, the money damages would be so substantial that they simply had to be the predominant relief the plaintiffs were seeking. Framing the argument in terms of the size of the class was a novel approach, but the underlying question is one that has been debated in the courts for quite a while. There is a several-year-old split among the circuits as to what impact the punitive and compensatory damages authorized by the Civil Rights Act of 1991 should have on certification of an employment class. Some courts have concluded that Rule 23 does not permit certification of employment classes seeking compensatory or punitive damages because the

money damages take precedence over equitable relief, making the claims inappropriate for certification under (b)(2) and rendering them too individual for resolution under (b)(3). *See Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001); *Jefferson v. Ingersoll Int'l Inc*., 195 F.3d 894 (7th Cir. 1999); *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402 (5th Cir. 1998). Others (including the Ninth Circuit) have reasoned that so long as the primary purpose of the plaintiffs' suit is to achieve equitable relief – workplace reform – the inclusion of a request for monetary damages should not defeat certification under 23(b)(2). *See Molski v. Gleitch*, 318 F.3d 937 (9th Cir. 2003); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001).

"Perhaps size does change everything, but not in ways that defeat the arguments supporting class certification."

From the earliest days of this litigation, the *Dukes* plaintiffs and their attorneys have emphasized that they brought this suit primarily to change the workplace policies at Wal-Mart that were disadvantaging women. The plaintiffs did not request compensatory damages for individual class members but they did request punitive damages, which are, of course, one of the most effective mechanisms for punishing a defendant for illegal conduct and deterring the same conduct in other workplaces. *See Dukes*, 222 F.R.D. at 171. Wal-Mart argued that even without a request for compensatory damages, the plaintiffs' potential entitlement to backpay and punitive damages could amount to billions of dollars simply because of the size of the class and the size of Wal-Mart itself. When that amount of money is a stake, the company asserted, it must be the predominant issue in the litigation. The Ninth Circuit rejected this argument, noting that in civil rights actions, where "stopping the illegal behavior is vital to the interests of the class as a whole," certification under Rule 23's provision for injunctive classes is appropriate. *Dukes*, 474 F.3d at 1234.

In fact, employment discrimination litigation is exactly the type of civil rights litigation that the Rule 23(b)(2) injunctive class was designed to allow. *See* advisory committee notes to Fed. R. Civ. P. 23(b)(2). Wal-Mart's arguments against certification sweep so broadly that they would make class litigation of employment claims virtually impossible, even in cases with smaller classes, but especially in any case challenging the policies of a large employer. While remedies like backpay and punitive damages will inevitably be large in a class against an employer the size of Wal-Mart, the workplace reform sought by the *Dukes* plaintiffs will also have a scope and effect more sweeping than in a smaller employer. Perhaps size does change everything, but not in ways that defeat the arguments supporting class certification.

B. The 23(a) Commonality Question.

The other central issue in the *Dukes* opinion – whether the plaintiffs' claims shared a common question of law or fact as required by Rule 23(a) – is also fundamentally linked to the question of how big and how geographically dispersed a class can be. Wal-Mart argued, as many employers have in other cases, that the plaintiffs represented by the proposed class shared no common question because they worked in different facilities and dealt with different decisionmakers, and each of their claims of pay or promotion discrimination stemmed from individual circumstances. In *Dukes*, however, where the plaintiffs challenged a strong centralized corporate culture, tightly managed personnel policies, and corporate failure to monitor the results of relatively unguided subjective decisionmaking in pay and promotion decisions, the policies that emanated from central headquarters presented precisely the kind of common question that Rule 23(a) requires.

This is perhaps the hardest issue in litigation like *Dukes*: Where is the line between claims that simply call into question many individual employment decisions and claims that challenge company-wide policies and their effects? Some courts have declined to certify proposed employee class claims like those made in *Dukes* because they have taken the view that the claims are best characterized not as a challenge to any common policy, but as multiple individual challenges to

discrete employment decisions. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 787 & n.248 (2005). But numerous other courts have looked at systems like Wal-Mart's and have focused their attention on the plaintiffs' challenges to the cohesiveness of a centralized corporate culture; the ways in which personnel structures and policies are tied to central headquarters; and the use or availability of corporate review of employment decisions individually or in the aggregate. *See, e.g. Caridad v. Metro-N. Commuter R.R. Co.,* 191 F.3d 283, 286 (2d Cir. 1999); *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428, 440 (D.D.C. 2002); *Robinson v. Sears, Roebuck & Co.*, 111 F. Supp. 2d 1101, 1130 (E.D. Ark. 2000); *Shores v. Publix Super Mkts., Inc.*, No. 951162CIVT25(E), 1996 WL 407850, at *5-7 (M.D. Fla. Mar. 12, 1996); *Morgan v. United Parcel Serv. of Am., Inc.*, 169 F.R.D. 349, 354-57 (E.D. Mo. 1996). These courts have concluded, as both the district court and the Ninth Circuit correctly did in *Dukes*, that the common questions reflected in these central corporate policies and practices provide the kind of connections among the class that Rule 23 requires.

Lurking behind these different approaches is a problem that arises regularly in employment discrimination class litigation: the difficulty of separating the merits inquiry from the certification evaluation. While it is well settled law that a class certification decision is not supposed to decide the merits of a case, *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), the distinction between the two is often hard to draw. Particularly in cases like *Dukes*, the question of whether the employees are affected by a common policy – the certification question – can look very similar to the question of whether the employer's policies are discriminatory – the merits question. The Ninth Circuit's decision, however, noted repeatedly the need to maintain the distinction between certification and the merits. Where the common question the plaintiffs point to is the existence of company-wide policies or practices that encourage or permit discrimination, class certification is not the appropriate time to argue over whether the alleged practices do in fact encourage or permit discrimination. Instead, courts should do exactly what the district court and the Ninth Circuit did: evaluate whether the plaintiffs' claims include the requisite common questions of law or fact and leave the matter of whether the challenged policies violate federal antidiscrimination law to a later evaluation.

C. Conclusion.

Wal-Mart has already announced that it will seek rehearing in this case, and it is, of course, impossible to predict whether the class will survive en banc review or, if it gets this far, Supreme Court consideration. But it should. This is exactly the type of employment discrimination claim that is most appropriate for nationwide class resolution. The *Dukes* plaintiffs allege a common, company-wide policy at Wal-Mart of "excessively subjective decision-making in a corporate culture of uniformity and gender stereotyping." *Dukes*, 474 F.3d at 1232. They claim that the policy operates in every store, in every Wal-Mart region in the United States. The same law – Title VII of the Civil Rights Act of 1964 – would apply the same way to all women represented in the class. The fact that the class is the largest in United States history is a consequence of the fact that the defendant is the largest private employer in United States history. As multi-state, and even multinational, companies become commonplace, the need for class actions on the Wal-Mart scale is likely to grow. When large companies have discriminatory policies, large numbers of employees are hurt. As companies seek the advantages that come with size, and the benefits of central control, they may well have to face the perceived disadvantages that come with that size.

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DUKES V. WAL-MART: SEVERAL BRIDGES TOO FAR

By Professor John C. Coffee, Jr.*

At the outset, let me start with a concession: Credible evidence suggests that Wal-Mart discriminated against some women. Two thirds of its employees are female, but only about one third of its managers,[1] and plaintiffs' regression analyses revealed "statistically significant disparities between men and women at Wal-Mart in terms of compensation and promotion" that were "wide-spread."[2] That Wal-Mart could, and perhaps should, be sued does not mean, however, that the Ninth Circuit's decision on class certification is defensible. Of the many problems with this decision, two deserve special emphasis.[3]

A. The Sprawling Class.

In *Dukes v. Wal-Mart, Inc.*, the Ninth Circuit certified a record nationwide class covering as many as 2 million present or former Wal-Mart female employees, ranging from part-time or entry-level hourly employees to salaried managers, and employed in 3400 stores in 41 regions. The all-inclusive nature of the Wal-Mart class is further aggravated by plaintiffs' central claim: that Wal-Mart delegated excessive discretion to individual store managers to make pay and promotion decisions. If the individual store manager made discriminatory decisions, the class logically might have been fragmented into a series of smaller class actions, each involving the several hundred employees at a store with the "common" issue being the behavior of the store manager. To knit together these individual decisions into a nationwide class, plaintiffs argued that, although individual store managers had a "substantial range of discretion," Wal-Mart nonetheless had a "strong corporate culture" which facilitated gender stereotyping and discrimination.[4] Plaintiffs' expert sociologist opined, based on a "social framework analysis," that "Wal-Mart's centralized coordination, reinforced by a strong organizational culture, sustains uniformity in personnel policy and practice" and made "pay and promotional decision vulnerable to gender bias." Both the District Court and the Ninth Circuit relied heavily on this testimony about Wal-Mart's "vulnerability," even though the Ninth Circuit implicitly acknowledged that the plaintiffs had "failed to identify a specific discriminatory policy at Wal-Mart."[5] Indeed, the District Court specifically focused on the central flaw in plaintiffs' reasoning, noting "that there is an inherent tension in characterizing a system as having both excessive subjectivity at the local level and centralized control."[6] In other, blunter-speaking Circuits, this might have been called not a "tension," but a "contradiction."

The larger problem with identifying only a system-wide vulnerability to discrimination, instead of a traditional common practice, rule or standard, is that there is little reason to believe that "excessive subjectivity" resulted in discriminatory decisions evenly and across-the-board in all 3400 Wal-Mart stores. If store managers possessed excessive discretion, some may have misused it, and some not. Some, including Wal-Mart's numerous female store managers, might even have favored female employees.

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[1] *Dukes v. Wal-Mart, Inc.,* 474 F.3d 1214, 1246 (9th Cir. 2007) (Kleinfeld, J. dissenting).

[2] *Id*. at 1228.

[3] Space does not permit discussion of the extremely deferential standard of review of class certification used by the *Wal-Mart* panel. The decision describes this standard as "very limited" and "highly deferential" and as requiring even greater deference when the district court certifies a class than when it declines to certify. *Id.* at 1223. In contrast, see *In re IPO Sec. Litig*., 471 F.3d 24 (2d Cir. 2006) (court must conduct "rigorous analysis" of all the prerequisites to certification and a standard of "some showing" is an insufficient evidentiary basis).

[4] *See Dukes v. Wal-Mart Stores, Inc.,* 222 F.R.D. 137, 152 (N.D. Cal. 2004).

[5] *Dukes v. Wal-Mart, Inc.,* 474 F.3d at 1226.

[6] *Dukes v. Wal-Mart Stores, Inc.,* 222 F.R.D. 137, 152.

The point here is not that Wal-Mart is innocent of discrimination, but that any nationwide class (and, by extension, any nationwide remedy that follows from the certification of such a class) will be overbroad. Given broad delegation to store managers, it is plausible to believe that some discriminated, but implausible to believe that all 3400 did. If so, why should female employees in non-discriminatory stores receive a backpay remedy or injunctive relief that will probably entitle them to preferential consideration for future promotions? Almost inevitably, such a settlement with de facto quotas will be the consequence if nationwide certification is upheld.

In this light, both plaintiffs and defendants in *Wal-Mart* overstate. Defendants (and the dissenting judge on the Ninth Circuit panel) argue that employment discrimination cases should be decided only on an individualized basis. This overlooks the high costs of employment discrimination litigation, where expert witnesses and regression studies are virtually mandatory. Plaintiffs in turn argue that a nationwide class is necessary, even though it places Wal-Mart under extremely coercive pressure to settle. But in virtually every other Circuit, employment discrimination litigation is resolved in terms of classes that are limited to a single plant or a limited number of similar job categories.[7] In general, courts will not allow a class to include both hourly workers and salaried managers, believing that these job categories are simply too factually heterogeneous to be grouped into one class.[8] To be sure, the Ninth Circuit has previously certified mega-employment classes,[9] but it stands virtually alone.

The sheer numerical size of the class is also beside the point. Two million class members might be acceptable in an antitrust price-fixing class action or in a securities fraud class action, because the ultimate issue is a relatively simple issue involving the defendant's conduct. Did it misstate a material fact or collude to fix prices? In such a case, the size of the plaintiff class adds little complexity.[10] Nor would a large class size be an insurmountable barrier in an employment discrimination class action if the challenged practice (for example, the use of an allegedly discriminatory standardized test) could be easily identified and objectively assessed. But where excessive subjectivity in personnel decisions is the claim, the status of the plaintiffs must also be considered: Were they promotion worthy? Were there problems in their employment record? At this point, the factual complexity mounts with the class size. Ultimately, even if hundreds of the plaintiff class members were to testify at trial, we would still never know what happened at the several thousand stores about which no testimony will be heard.

Elsewhere, some courts reject multi-plant or multi-job category cases because of manageability problems; some decline to certify because they see conflicts between the interests of hourly employees and salaried supervisors; still others impose a "coherence" requirement on the Rule 23(b)(2) class, which effectively requires that the class members' interests be closely aligned. But whatever the reason given, all other circuits disfavor nationwide, multi-plant, multi-job category class actions.

B. Rule 23(b)(2) Certification and Punitive Damages.

Rule 23(b)(2), which was the basis for class certification in the *Wal-Mart* case and in most employment discrimination litigation, applies if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

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[7] *See Bacon v. Honda of Am. Mfg. Inc.,* 370 F.3d 565, 571 (6th Cir. 2004: *Bradford v. Sears Roebuck & Co.,* 673 F.2d 792, 796 n.4 (5th Cir. 1982); *Doninger v. Pacific Nw. Bell, Inc.,* 564 F.2d 1304, 1311 (9th Cir. 1977); *Morgan v. Metro. Dist. Comm'n*, 222 F.R.D. 220 (D. Conn. 2004).

[8] *Bacon v. Honda of Am. Mfg. Inc.,* 370 F.3d at 571.

[9] *See Stanton v. Boeing Co.,* 327 F.3d 938, 953 (9th Cir. 2003).

[10] Thus, unlike Professor Hart, I do not see any element of estoppel in the fact that Wal-Mart, itself, served as the named plaintiff in a very large antitrust class action. *See Wal-Mart Stores Inc. v. Vis U.S.A., Inc.,* 396 F.3d 96, 101 (2d Cir. 2005).

Because the above language does not refer to money damages (whereas Rule 23(b)(3) clearly applies to such an action), the majority of the Circuits that have considered the question have said that only "incidental" monetary damages can be obtained in a Rule 23(b)(2) class.[11] Although all Circuits appear to agree that "back pay" or "lost pay" can be recovered under Rule 23(b)(2), because it is deemed a form of equitable remedy,[12] only the Second and Ninth Circuits have recently held compensatory damages to be available under Rule 23(b)(2).[13] The Second and the Ninth Circuits permit monetary damages in a Rule 23(b)(2) case so long as such damages are not the "predominant" relief but are "secondary to the primary claim for injunctive or declaratory relief."[14] Understandably, both Circuits seem intent on preserving the availability of compensatory damages in employment discrimination class actions under Rule 23(b)(2) because they understand that such damages will be generally barred under Rule 23(b)(3) by its rigorous "predominance" requirement. But in *Dukes v. Wal-Mart*, plaintiffs did not seek compensatory damages; instead, they sought punitive damages.

Can punitive damages be considered "incidental" or "secondary" in character? Let's do the math. If there are 2 million women in the *Wal-Mart* class and if we assume the back pay owed to each class member averaged a modest $1,000, the aggregate lost pay would come to $2 billion. Under a recent Supreme Court ruling, punitive damages must be limited to a "single digit" ratio to the compensatory damages. Thus, plaintiffs could seek nine times $2 billion, or $18 billion as punitive damages. To be sure, no court (even in the Ninth Circuit) will impose damages[15] in this amount, but clearly plaintiffs can seek a punitive award much greater than the back pay award.

How can such greater damages be called "incidental" or "secondary"? The sleight-of-hand used by Ninth Circuit in *Wal-Mart* was to focus on the "intent of the plaintiffs in bringing suit."[16] If injunctive relief is the primary goal of the plaintiffs, then even much larger monetary damages can be deemed "secondary" or "incidental." In assessing the plaintiffs' primary goal, the district court in *Wal-Mart* relied on the written declarations of the class representatives.[17] One does not have to be a cynic to recognize that such declarations can be self-serving (and that they do not in any event express the relative desires of the other two million class members). Indeed, because the *Wal-Mart* class includes former employees, it strains credulity to believe that a former employee cares more about the promotion and pay practices at a former employer than a large cash award.

C. Conclusion.

In her companion piece, Professor Hart suggests that *Wal-Mart* should go to the Supreme Court. Ironically, I believe feminists and other proponents of Title VII should hope that the Supreme Court does not take this case. If the *Wal-Mart* decision were to be reversed by the Ninth Circuit *en banc*, their reversal would likely be limited to the narrower question of the overarching size of the class and/or its lack of "cohesion." But if the case goes to the Supreme Court, the Court may well find more broadly that Rule 23(b)(2) can only be used to certify a class in which any monetary damages are truly "incidental." Frankly, both *Robinson v. Metro-North* in the Second Circuit and *Molski v.* Gleich in the Ninth Circuit are vulnerable precedents, and the *Wal*-Mart case presents the worst imaginable context in which to

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[11] *See Reeb v. Ohio Dept. of Rehabilitation and Corrections*, 435 F.3d 369 (6th Cir. 2006); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Jefferson v. Ingersoll Int'l Inc*., 195 F.3d 894, 897 (7th Cir. 1999); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

[12] *See Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997).

[13] *Robinson v. Metro-North Commuter R.R. Co*., 267 F.3d 147 (2d Cir. 2001); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003).

[14] *See Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

[15] *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). The Court may have backed away from this single digit ratio test in its latest decision. *See infra* at note 18.

[16] *See Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

[17] *Dukes v. Wal-Mart Stores,* 222 F.R.D. 137, at 171.

place this critical Rule 23(b)(2) issue before the Supreme Court. Because the case combines a mega-size class with punitive damages, it will raise the hackles of justices who might have upheld the compensatory damages permitted in *Robinson* or *Molski*. Possibly, the Court could rule just that punitive damages were inappropriate in a Rule 23(b)(2) class action, on the grounds that its purposes are remedial, not punitive.[18] But equally likely, the Court could define "incidental damages" so narrowly as to render Rule 23(b)(2) incapable of providing compensatory damages, with the result that Title VII would become enforceable only in individual suits.

The lesson here is that when the rubber band is stretched too far and too enthusiastically, it can snap back painfully. More generally, a "Goldilocks Rule" probably needs to be recognized: *i.e.*, litigation units should be neither too big nor too little. Rather, there is an optimal size to the class action, which allows both sides to litigate undeterred by economic barriers that make litigation unacceptably costly. Hopefully, smaller scale employment discrimination class actions will survive, but they may not if *Wal-Mart* reaches the Supreme Court.

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[18] In light of *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), it is now also uncertain whether punitive damages can be awarded in a class action absent individualized hearings. That decision seemingly requires detailed procedures to assure that the jury is not confused or punishing the defendant for harm done to others. To the extent that persons within the class are not injured by defendant's behavior (because, for example, they did not qualify for higher pay or promotion), they seemingly cannot receive punitive damages.

RIGOROUS ANALYSIS OF THE CLASS ACTION BURDEN OF PROOF

By Michael D. Donovan[*]

Two recent appellate decisions highlight an issue that has received scant attention in class action jurisprudence: What is the burden of proof for class certification? Acknowledging that it "has been less than clear as to the applicable standard," the Second Circuit has now rejected the "some showing" standard. *In re Initial Public Offering Sec. Litig.,* 471 F.3d 24, 32 (2d Cir. 2006). In doing so, however, the court left unclear whether the proper standard is (i) "rigorous analysis;" (ii) "preponderance of the evidence;" (iii) "substantial evidence;" or (iv) some combination of the three. By contrast, in *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007), a 2-1 majority of the Ninth Circuit appeared to utilize a "substantial evidence" standard without directly addressing some vague criticisms by the dissent.

The issue is significant for at least two reasons. First, before an appellate court can determine whether a trial court abused its discretion on the certification issue, one would ordinarily want to know what standard applies to that exercise of discretion. Second, district courts and litigants have an obvious interest in knowing the exact standard before the class hearing so they can marshal their discovery, facts and arguments, particularly where there may be a close call on one or more of the Rule 23 requirements. This article argues that a precise definition of the burden of proof standard is required so trial courts and litigants have fair warning of the quantum of proof.

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The absence of a definitive standard can be explained by (or blamed on) two Supreme Court decisions. In *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), the Court hinted at a standard: "A class action [] may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161. In *Falcon*, the trial court certified the class based primarily on the complaint's allegation that the defendant had an "across-the-board" policy and practice of discriminating against Mexican-Americans. *See id*. Given that context, the Court apparently thought that something more than the complaint's allegation needed to be presented to support class certification. Beyond that, the Court did not elaborate on the "rigorous analysis" language.

Based on *Falcon*, some courts and most defense counsel have adopted the "rigorous analysis" test as if it were a burden of proof standard. But it is not clear what "rigorous analysis" means. Does it mean an evidentiary hearing is always required? Does it mean the district judge should accept an expert from Yale over an expert from Harvard? Where do MIT, Stanford, and the University of Chicago fit in if the experts disagree? Is "rigorous analysis" less demanding than a preponderance of the evidence? Is it more demanding? Is it conceivable that The Honorable Shira A. Scheindlin – a very highly regarded and careful jurist – failed to conduct a "rigorous analysis" in *In re Initial Public Offering Securities Litigation*? These real life questions arise repeatedly because the "rigorous analysis" standard describes the effort and care a district judge should bring to his or her decision-making in all matters. The standard does not describe, as it should, the quantum or the nature of the proof required.

The other Supreme Court opinion that has impeded the explication of a definitive standard is *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). In *Eisen*, the Court said, "We find nothing either in the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. The Second Circuit has observed that "this statement has led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits." *In re IPO*, 471 F.3d at 33. But, in the Second Circuit's view, that interpretation is incorrect, because the Court in *Eisen* was concerned with looking at the merits to apportion the costs of notice, not with determining predominance or how a class action trial could be managed. *See id.* at 34. In the Second Circuit's view, *Eisen* does not prohibit all examinations of the merits at class certification; it prohibits only an examination that has no relevance to any of the class certification requirements. *See id*. at 41.

While clearly rejecting a "some evidence" standard of proof for class certification in *In re IPO*, the Second Circuit was less than definitive in stating whether a "preponderance of the evidence" standard applies instead. In footnote 8, the court observed that "a judge could rule that predominance is shown by [a] lesser standard without going further and ruling that individual issues predominate. The evidence might be in equipoise, or the judge might simply not have considered whether the defendant's contrary evidence is persuasive." *Id.* at 37 n.8. The court compared the situation to the denial of summary judgment for the plaintiff on undisputed facts without granting summary judgment to the defendant. *See id.* But the court then cautioned against "a Rule 23 hearing . . . extend[ing] into a protracted mini-trial of substantial portions of the underlying litigation." *Id.* at 41. In other words, "'the choice for a district court must be somewhere between the pleadings and the fruits of discovery,'" *id*. at 35 (quoting *Professional Adjusting Sys., Inc. v. General Adjustment Bureau, Inc.*, 64 F.R.D. 35, 38 (S.D.N.Y. 1974)), but the discovery should be limited. Yet, the standards governing these exercises of discretion by the district court (*e.g.*, how much discovery should be permitted?; what are the limits on the class hearing?) still remain unclear.

Apart from opening up the possibility of full-blown merits discovery and protracted class certification proceedings, the preponderance standard poses other problems. Most jury instructions describe the standard by the classic balance scale analogy, with the proponent required to tip the scale ever so slightly in his or her favor to satisfy the more-likely-than-not test. With mixed

questions of law and fact, that analogy is not particularly apt, because the scale can easily be tipped by the merits even though the merits present a common predominating question – albeit one that may be decided in the defendant's favor. The greater-weight standard can also invite objections to class settlements, because the Supreme Court has insisted that the class certification requirements (apart from manageability) must still be satisfied even for settlement classes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-621 (1997). In addition, the courts have recognized repeatedly that a district court's ability to revisit class certification at any time indicates that close calls should be resolved in favor of certification. *See Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968) ("in a doubtful case . . . any error should be committed in favor of allowing the class action"). Therefore, the preponderance burden does not accurately describe the balancing process a district court should use when it exercises its class certification discretion.

If the "rigorous analysis" standard is too vague and misdirected, and the preponderance standard too demanding for abbreviated discovery and evidentiary hearings, could it be that the substantial evidence quantum is the most appropriate test? At least one benefit of that test would be that all courts and litigants would have a settled standard at both the trial and appellate levels. In actual practice, it would also appear that most courts are, in fact, already applying that test without expressly saying so. *See, e.g., In re Salomon Analyst Metromedia Litig.,* 236 F.R.D. 208 (S.D.N.Y. 2006) (applying a combination of "some showing" and preponderance of the evidence standards). But perhaps the most critical benefit from this established standard is that it provides a principled basis for limiting discovery and confining the class certification hearing while enabling appellate review of the eventual certification decision.

The substantial evidence burden of proof has a long and well-established track record in both preliminary hearing contexts and administrative proceedings. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). "Substantial evidence" has been defined as evidence which a reasonable mind might accept as adequate to support a conclusion. *See id.* at 477-78, 490-91. It is more than "a mere scintilla" of evidence. *Id.* at 477. If there is an actual conflict on an essential fact, the proponent bears the risk of non-persuasion. *See id*. at 490-91. But, if the proponent's evidence is unrebutted or is disputed based only on speculation or supposition, the fact must be accepted. *See id*. Where experts conflict, credibility and weight ordinarily will have little bearing unless a reasonable person would not accept one of the opinions as supporting the conclusion advanced. *See id.* In short, Harvard versus Yale is irrelevant, but if each is reasonable, the evidence is in equipoise and substantial evidence will support a class certification decision.

At class certification, the question is not whether the class proponent's evidence outweighs or is more credible than the opposing party's. Instead, the issue is whether the evidence, coupled with common sense inferences and informed trial management techniques, demonstrates that class-wide liability or impact many be determined primarily by common evidence. In other words, would some or all of the class members generally rely on an important piece of common evidence if they proceeded individually? For securities cases, that important piece might be price inflation in an efficient market. For consumer cases, it might be a uniform marketing plan or contract term. For employment cases, it could be a company-wide system or practice. For antitrust cases, the important piece of evidence could be a common agreement or conspiracy. Whatever the particular theory, the burden of proof standard should ask whether the evidence and reasonable inferences are generalized enough to proceed on a class basis, not whether they are more credible and weighty.

In sum, the courts, after a rigorous analysis, should articulate a qualitative substantial evidence burden of proof standard to govern class certification.

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IN RE INITIAL PUBLIC OFFERING SECURITIES LITIGATION: THE SECOND CIRCUIT CLARIFIES THE STANDARDS FOR RESOLVING CLASS CERTIFICATION MOTIONS

By Donald R. Frederico*

A. Introduction.

No decision caused more of a stir among class action lawyers in 2006 than the Second Circuit's decision in *In re Initial Public Offering Securities Litigation,* 471 F.3d 24 (2d Cir. 2006). In *IPO*, the court provided clear guidance concerning the standards that judges must apply in deciding motions for class certification under Rule 23 of the Federal Rules of Civil Procedure. The court adopted the reasoning of several other circuits that require district courts to resolve factual disputes (including disputes that relate to merits issues) for purposes of assessing whether the requirements for class certification have been met, and disavowed earlier Second Circuit precedent that supported a lower standard. Because the Second Circuit occupies a prominent place in American jurisprudence, and more class actions are filed there than in any other federal circuit, the *IPO* decision will have a significant impact on class action practice.

B. The District Court Decision.

IPO began in 2001 as thousands of putative investor class actions alleged that numerous underwriters, issuing companies, and officers of issuers had engaged in a scheme to defraud the investing public in violation of the federal securities laws. The cases were consolidated into over 300 actions, from which six "focus cases" proceeded to motion practice.

In October 2004, the district court granted in part and denied in part the plaintiffs' motions for class certification in the six focus cases. In deciding what standard governs motions for class certification, the district court declined to follow the decisions of the Fourth and Seventh Circuits in *Gariety v. Grant Thornton LLP*, 368 F.3d 356 (4th Cir. 2004) and *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672 (7th Cir. 2001). Those cases held that parties moving for class certification must establish the requirements of Rule 23 by a preponderance of the evidence, even if application of that standard would require courts to resolve factual issues that overlap with the merits issues in the case. The district court concluded that an approach that included findings on merits issues would conflict with the United States Supreme Court's holding in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that a district court at the class certification stage cannot "conduct a preliminary inquiry into the merits of a suit."

In rejecting the preponderance of the evidence standard, the district court required only that plaintiffs make "some showing" that the Rule 23 requirements had been met. The court explained that this "showing may take the form of, for example, expert opinions, evidence (by document, affidavit, live testimony, or otherwise), or the uncontested allegations of the complaint." *In re IPO Sec. Litig.,* 227 F.R.D. 65, 93 (S.D.N.Y. 2004). In applying this standard, the district court also held that it would be inappropriate to weigh the parties' competing expert reports, citing the Second Circuit's decision in *In re Visa Check / MasterMoney Antitrust Litigation*, 280 F.3d 124 (2d Cir. 2001). It was sufficient, the district court held, that plaintiffs had articulated a theory (of loss causation) that was "not fatally flawed." *In re IPO*, 227 F.R.D. at 115.

Applying the "some showing" and "not fatally flawed" standards, the district court found that each of the requirements for class certification had been met, and granted the motion for class certification, subject to minor modification. Thereafter most, but not all, of the issuer and officer cases settled.

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C. The Second Circuit Decision.

With respect to the remaining litigation, the court of appeals granted defendants' petition for permission to appeal pursuant to Federal Rule of Civil Procedure 23(f). The court described one of the two issues for review as "[w]hether the Second Circuit's 'some showing' standard, *see In re Visa Check / MasterMoney Antitrust Litigation*, 280 F.3d 124, 134-35 (2d Cir. 2001); *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 293 (2d Cir. 1999), is consistent with the 2003 amendments to Fed. R. Civ. P. 23." *IPO*, 471 F.3d at 31. Based on an extensive review of Supreme Court precedent, Second Circuit precedent, case law from other circuits, and the text of the 2003 amendments, the court held that the district court erred in applying a "some showing" standard.

The Second Circuit began its analysis with a discussion of the two leading Supreme Court cases, *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), and *Eisen*. Reciting the familiar *Falcon* standard requiring "a rigorous analysis" of whether Rule 23's prerequisites are met and insisting on "actual, not presumed, conformance with" the Rule,[1] the *IPO* court focused on the statement in *Falcon* that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," which the Second Circuit regarded as "especially important" in light of courts' interpretations of *Eisen*. 471 F.3d at 33.

The court then turned its discussion to *Eisen*. In *Eisen*, the Supreme Court held: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to frequently cited by lawyers and courts alike, Circuit, however, rejected such a literal action." whether it may be maintained as a class *Eisen*, 417 U.S. at 177. This language is determine interpretation of the *Eisen* language. The court including the district court in *IPO*, as forbidding any examination of the merits of a case when deciding whether to certify a class. The Second pointed out that *Eisen's* "oft-quoted statement" was not made in the context of the class certification decision, but rather applied to a determination of which side should bear the cost of notice to class members. *See IPO*, 471 F.3d at 33. The *Eisen* Court held that plaintiffs should bear the cost of notice, and that the district court had erred when it imposed ninety percent of the cost on defendants based on a determination that plaintiffs had shown a probability of success on the merits. As the Second Circuit explained: "Unfortunately, the statement in *Eisen* that a court considering certification must not consider the merits has sometimes been taken out of context and applied in cases where a merits inquiry either concerns a Rule 23 requirement or overlaps with such a requirement." *Id.* at 34.

The Second Circuit next reviewed its own precedents, explaining the evolution of its standard for class certification from the more lenient language of *Caridad* and *Visa Check* on which the district court had relied, to the stricter standard articulated in *Heerwagen v. Clear Channel Communications*, 435 F.3d 219 (2d Cir. 2006). As the court explained, *Heerwagen* permitted district courts to weigh the evidence with respect to Rule 23 requirements "that somewhat overlap with the merits," and also supported a predominance of the evidence standard in determining whether Rule 23's requirements had been met. However, it interpreted *Eisen* as prohibiting findings of fact on issues that *completely* overlap merits issues. *See IPO*, 471 F.3d at 37.

From there, the court embarked on a discussion of case law from other circuits. It identified six federal appellate decisions, beginning with the Seventh Circuit's decision in *Szabo*, that require district courts to resolve factual disputes and make findings of fact as to whether the prerequisites

[1] In *Falcon*, The Supreme Court was specifically referring to Rule 23(a), but the Second Circuit saw "no reason to doubt" that the *Falcon* standards applied equally to all Rule 23 requirements. *IPO*, 471 F.3d at 33.

for class certification have been met, even when such factual disputes overlap with the merits.[2] It also discussed the First Circuit's decision in *In re PolyMedica Corp. Securities Litigation*, 432 F.3d 1 (1st Cir. 2005), as expressing "mild disagreement with this strong line of authority." *IPO*, 471 F.3d at 39.[3]

Veering from its discussion of case law, the court then reviewed the text of the 2003 amendments to Rule 23. The court pointed out that the amendments eliminated the provision that permitted conditional class certification, and relaxed the timing requirement for the class certification decision. Also, the court noted the Advisory Committee's language that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23(c)(1)(C) Adv. Comm. notes (2003).

After discussing the seeming inconsistencies in its prior rulings, and choosing to align itself with the Fourth and Seventh Circuit decisions in *Gariety* and *Szabo*, and with the other circuits that have adopted similar standards, the Second Circuit in *IPO* reached the following five conclusions:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.

IPO, 471 F.3d at 41.

The court also expressly rejected the lenient "some showing" standard, disavowed the suggestion in *Visa Check* that an expert's testimony may be sufficient to "establish a component of a Rule 23 requirement simply by being not fatally flawed," and declined "to follow the dictum in *Heerwagen* suggesting that a district judge may not weigh conflicting evidence and determine the

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[2] In addition to *Szabo* and *Gariety*, the court cited *Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.,* 259 F.3d 154, 166 (3d Cir. 2001), *Blades v. Monsanto Co.,* 400 F.3d 562, 575 (8th Cir. 2005), *Unger v. Amedisys, Inc.,* 401 F.3d 316, 319 (5th Cir. 2005), and *Love v. Turlington,* 733 F.2d 1562, 1564 (11th Cir. 1984). *See IPO*, 471 F.3d at 38.

[3] In *PolyMedica*, the district court had considered extensive evidence, including conflicting expert testimony, concerning whether the market for shares of the defendant company's stock was efficient, thereby giving rise to a presumption of reliance. The First Circuit expressed agreement with "the majority view," represented by *Gariety* and other cases, that permits district courts to look beyond the pleadings and resolve factual disputes relevant to the class certification inquiry. The court vacated the district court's decision, however, on the grounds that the district court applied an incorrect definition of market efficiency. On remand, the district court, again reviewing conflicting expert testimony, held that plaintiffs had failed to establish an efficient market, and denied their motion for class certification. *In re PolyMedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260 (D. Mass. 2006).

existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits." *Id.* at 42.

Applying this standard, the court reversed the district court's decision certifying the plaintiff class. It held that individual issues of reliance, knowledge of the alleged fraud, and each class member's inclusion (or not) within the class definition, precluded a finding that common issues predominated over individual issues under Rule 23(b)(3). *See id.* at 42-45.

D. The Likely Impact.

To the extent that it adopts the decisions of other circuits, *IPO* does not break new ground. However, because it was decided by the Second Circuit, includes extensive analysis of complex issues, and tackles *Eisen* head-on, *IPO* will have a major impact on class certification both within the Second Circuit and elsewhere.

In most cases, there is no dispute that the party seeking class certification bears the burden of establishing that each of the Rule 23 requirements has been met. Nevertheless, parties continue to dispute the appropriate standard for satisfying that burden. Often, plaintiffs' counsel cite *Eisen* as removing any merits-related inquiry from the certification calculus. Some lawyers argue that courts should apply a standard similar to that which governs motions to dismiss – *i.e.*, that courts deciding whether to certify should accept the allegations of the complaint as true. Others propose that courts apply something closer to a summary judgment standard – *i.e.*, that the court should draw all inferences in favor of the moving party with respect to any facts in dispute. After all, the argument goes, if the court erroneously certifies a class early in the proceedings, it can always decertify later, while an erroneous refusal to certify, as a practical matter, carries the sting of finality.[4]

IPO, like *Szabo*, *Gariety*, and their progeny, silences such arguments in those federal courts in which it applies. It also will be, and already has been, cited by defense counsel in other jurisdictions as persuasive authority for a higher threshold. It raises the class certification bar by requiring that district courts resolve factual disputes relevant to whether the requirements of Rule 23(a) and (b) are met, even where the disputes also concern merits issues. At the same time, the court tempered the effects of its ruling by also adopting the Fourth Circuit's observation that, where such overlap exists, "the determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge." *IPO*, 471 F.3d at 41 (citing *Gariety*, 368 F.3d at 366).

Plaintiffs' and defendants' attorneys undoubtedly will continue to debate the soundness of the *IPO* decision. However, in those courts that apply the *IPO* standard, counsel for both sides need to be prepared to play by its rules. The procedures trial courts adopt in any given case for applying those rules are not inflexible; the Second Circuit emphasized that "a district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements." *Id.* at 41. But the court went on to caution: "[E]ven 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*.

In light of *IPO*, lawyers who seek or oppose class certification should be careful to prepare a strong evidentiary record with respect to each Rule 23 prerequisite in dispute. In most cases, that will entail substantial pre-certification discovery, including expert discovery. Objections to discovery on the grounds that it addresses merits issues will need to differentiate between that discovery that has no bearing on class certification (still potentially off limits for certification purposes), and that discovery that pertains both to certification and merits issues (presumably fair game under *IPO*). Counsel also need to consider whether to request an evidentiary hearing on the class certification motions, and whether any such hearing should include testimony from expert witnesses. Counsel representing defendants in pending cases that have been certified

[4] This is precisely the argument that the 2003 amendments cited by the Second Circuit in *IPO* were designed to eliminate.

should also consider whether the new decision provides a basis for revisiting the issue through the vehicle of a motion to decertify. Whatever strategies plaintiffs' and defendants' counsel pursue, there can be little doubt that the Second Circuit's decision in *IPO* will result in closer judicial scrutiny of motions for class certification, and that it demands the parties' careful attention to the development of the class certification record.

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CLASS ACTIONS SEEKING RESCISSION UNDER THE TRUTH IN LENDING ACT: IS ONE SIDE OF THE DEBATE ON CERTIFICATION NOW WINNING?

By Christopher A. Riley[*]

A. Introduction.

The Truth in Lending Act ("TILA"), 15 U.S.C. § 1631 *et seq.*, requires that creditors clearly and accurately disclose the material terms of consumer credit transactions. *See* 15 U.S.C. §§ 1631, 1632. The TILA is designed to "assure a meaningful disclosure of credit terms" and "to protect the consumer against inaccurate and unfair credit . . . practices." 15 U.S.C. § 1601(a). The TILA provides consumers with rights to both damages and rescission if creditors fail to make the requisite disclosures. *See* 15 U.S.C. §§ 1640, 1635.

A consumer's right to damages under the TILA is set forth in § 1640(a), whereby a consumer has a right to recover actual damages, statutory damages, and reasonable attorney's fees and costs. In § 1640(a)(2)(B), the TILA specifically contemplates class actions, and sets a cap on recovery for violations:

> [I]n the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor.

While this provision refers to class actions, TILA class actions may not be certified unless the action otherwise satisfies the requirements of Federal Rule of Civil Procedure 23.

In addition to damages, a consumer has a right to rescind a consumer credit transaction under § 1635(a) for violations of TILA:

> [T]he obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board of his intention to do so . . . .

This provision, unlike § 1640 on damages, does not mention class actions, and has remained silent as to class actions during various amendments of the TILA throughout the years, including amendments to the class action portion of § 1640(a) on damages. As a result, courts over the years have wrestled with the propriety of a TILA class action seeking rescission that may otherwise satisfy Rule 23.

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B. The Inconsistent Evolution of Cases Addressing TILA Rescission Class Actions.

The first decision addressing the validity of TILA putative class actions seeking rescission was *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54 (E.D. La. 1978). The court squarely addressed the "novel question" of whether the rescission remedy under § 1635 could be pursued as a class action, and held that a class action was not appropriate. First, the court observed that the damages provision of the TILA (§ 1640(a)) specifically referenced class actions, but the rescission provision of the TILA (§ 1635) did not. Second, the court noted the conflict of interest among class members where, as in that case, the members would all be seeking rescission from an insolvent company. Third, the court believed that the availability of attorneys' fees to an individual pursuing rescission minimized the burdens associated with individual actions, and thus undermined the benefits of a class action. As a result, the court stated "that the propriety of ever pursuing rescission under the Truth-in-Lending Act through a class action is open to serious doubt."

Two years later, the Fifth Circuit in *James v. Home Construction Co. of Mobile, Inc.*, 621 F.2d 727 (5th Cir. 1980), reached the same conclusion albeit on a slightly different basis. In *James*, the Fifth Circuit affirmed the district court's dismissal of the case on the grounds that the rescission remedy under the TILA was a "purely personal remedy" and not susceptible to class treatment. The court primarily based its decision on the creditor's right under § 1635(b) to act on a claim for rescission before the obligor could file suit. *See* 15 U.S.C. § 1635(b) ("Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.").

That same year, however, the Fifth Circuit in *Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980), affirmed the settlement of a TILA class action previously certified by the district court. The Fifth Circuit did not discuss the propriety of class certification, but instead simply noted that the district court certified a plaintiff class and approved a settlement that allowed each of the 145 class members the option of opting out, recovering damages equal to a fifteen percent reduction in the amount owed to the creditor, or rescinding the mortgage and note. Forty of the plaintiffs opted to rescind the mortgage.

In *Elliott v. ITT Corp.*, 150 F.R.D. 569 (N.D. Ill. 1992), the first of several TILA rescission class actions in the Northern District of Illinois, the court bypassed the issue and held that the putative class action seeking "the option to rescind" on behalf of class members did not satisfy the predominance of questions of law or fact requirement of Rule 23(b)(3). However, in citing *Nelson* and *James*, the court held that such prevailing authority "militates against certification of a class action under 15 U.S.C. § 1635."

In *Mayo v. Sears, Roebuck & Co.*, 148 F.R.D. 576 (S.D. Ohio 1993), the plaintiff moved for class certification under Rule 23(b)(3). In denying the motion for class certification, the district court noted the paucity of case law on the subject, and cited *Elliott*, *James*, and *Nelson* as support for its refusal to certify the class. The primary basis for its decision was the availability of attorney's fees for individual actions seeking rescission. Therefore, according to the court, a class action would not necessarily be superior to other available methods for adjudicating the case.

In *Hickey v. Great Western Mortgage Corp.*, 158 F.R.D. 603 (N.D. Ill. 1994), the district court reached the opposite conclusion from *Elliott* two years earlier, in a putative class certification under Rule 23(b)(3) seeking a declaration that the plaintiff class had the continuing right to rescind the transactions. The defendant in *Hickey* cited *Nelson*, *James*, and *Elliott* in its opposition to class certification. The court distinguished *Nelson* on the basis that that decision relied on the fact that the plaintiff was not an adequate class representative because it had already rescinded its contract, whereas the plaintiff in *Hickey* had not yet obtained any relief from the creditor. The court discounted the availability of attorney's fees as a means to justify denying class certification because

§ 1640(a), which specifically allows for class actions, contains a similar attorney's fees provision. While the court recognized the potential conflict created by concurrent class claims for damages and rescission, it held that such conflict was "too speculative" at the class certification stage, and could be dealt with properly later in the proceedings if such a conflict developed.

The next year, the Northern District of Illinois discounted *Hickey*, and expressly followed *Elliott*. In *Jefferson v. Security Pacific Financial Services, Inc.*, 161 F.R.D. 63 (N.D. Ill. 1995), the court held that the plaintiff failed to satisfy Rule 23(b)(3), and "definitively resolve[d] the question left open by *Elliott*, namely, that an action seeking rescission under TILA § 1635 should not be certified." The court initially noted the lack of support in the statute itself for class actions seeking rescission, specifically that § 1635 does not expressly provide for class actions, while § 1640 governing damages was amended in 1970 to expressly include class actions. To the court, this evidenced Congressional intent to limit TILA class actions to damages claims.

The court also relied heavily on *James* and the "personal remedy" rationale. As stated in *James*, § 1635(b) expressly provides that a creditor has the right to act on an obligor's request to rescind before the obligor can file suit. In the court's view, "[t]his requirement cuts strongly in favor of treating rescission as a personal, rather than class, remedy." The individual issues associated with the obligor's decision to rescind, on an individual basis and within individual time frames, demonstrated to the court that the case could be managed better as an individual action than as a class action. Moreover, the court was motivated by the fact a class action for rescission could turn § 1635(b) into a "penal provision" when, as in that case, the cost of recovery associated with class-wide rescission would exceed the harm caused by a technical TILA violation. Finally, the court recognized the additional grounds to reject class certification set forth in *James* and the cases cited therein, namely the potential conflict of interest among class members seeking rescission from a creditor with limited solvency and the availability of attorney's fees to a prevailing individual plaintiff.

In *Williams v. Empire Funding Corp.*, 183 F.R.D. 428 (E.D. Pa. 1998), the plaintiff sought to certify a class under Rule 23(b)(2) for purposes of a declaration that each member of the class was entitled to rescission. The court initially observed that the issue of class certification for complaints seeking rescission "is a matter of debate." In fact, the court cited *Nelson*, *James*, *Elliott*, and *Jefferson*, but distinguished those cases because they "sought rescission as a remedy," whereas the plaintiff in *Williams* only sought "a declaration that the notices of rescission in the sales and financing contracts violate TILA, and thus that each member of the class is entitled to seek rescission." The application of the remedy in the court's view made it appropriate for class treatment because, if there were TILA violations entitling the class members to rescission, "each class member, individually, and not as a member of the class, would have the option to exercise his or her right to seek rescission." If a class member exercised such right, the creditor could then exercise its statutory right to cure under § 1635(b). Therefore, nothing in the language of the TILA precluded a class action seeking a "declaration" that each class member was entitled to rescission.

Continuing the conflict of authority, the court in *Gibbons v. Interbank Funding Group*, 208 F.R.D. 278 (N.D. Cal. 2002), refused to certify a class seeking rescission under TILA because the plaintiff failed to satisfy the Rule 23(a) requirements of commonality and typicality. Relying heavily on the rationale from *James* and *Jefferson*, the court held that class treatment is not appropriate where the plaintiff seeks rescission. This was true even where – as in *Williams* – the plaintiff did not seek "actual rescission" but instead sought "only a declaration that class members may seek rescission if they so desire." Such a distinction was, in the court's view, "one of form more than substance."

In *McIntosh v. Irwin Union Bank and Trust, Co.*, 215 F.R.D. 26 (D. Mass. 2003), the first of at least three TILA rescission class actions in the District of Massachusetts, the court certified a class under Rule 23(b)(3). The court recognized the split of authority as set forth in *James*, *Jefferson*, and *Gibbons* on the one hand, and *Williams* and *Tower*

on the other hand. The primary basis upon which the court distinguished *James* and *Jefferson* was whether an obligor must file a notice of rescission, abide through a waiting period, and only then file suit. The court rejected the holdings in *James* and *Jefferson* that this was indeed a requirement, and instead held that the filing of the complaint itself can constitute notice for purposes of the TILA. The court followed the reasoning in *Williams* that class certification was especially proper when the plaintiff merely sought a declaration that class members were entitled to relief, rather than actual rescission itself. Moreover, the court observed that the TILA is supposed to be penal in nature to achieve its remedial purposes, thereby sweeping aside any concern from *Jefferson* that class certification would be inconsistent with the purposes of the statute. As discussed *infra*, *McIntosh* is no longer good law on this topic in light of subsequent authority from the First Circuit.

"[C]ourt[s] recognize[] the split of authority as set forth in James, Jefferson, and Gibbons on the one hand, and Williams and Tower on the other hand."

In *Latham v. Residential Loan Centers of America, Inc.*, No. 03-C-7094, 2004 WL 1093315 (N.D. Ill. May 6, 2004), another case before the Northern District of Illinois, the defendant moved to dismiss a putative class action seeking rescission prior to the motion for class certification. The defendant sought dismissal of the class claims asserting that a TILA claim seeking rescission could not be certified as a class as a matter of law. In denying the motion to dismiss, the court recognized the split of authority, but sided with the line of authority holding that a class action could be maintained seeking a declaration that class members had a right to rescission. The court, however, expressly reserved the class certification question until a motion to certify was filed. (The case was ultimately dismissed prior to the issue of class certification being addressed.)

In *Rodrigues v. Members Mortgage Co., Inc.*, 226 F.R.D. 147 (D. Mass. 2005), the plaintiff filed a putative class action under Rule 23(b)(3) seeking a declaration that class members had a right to rescission under TILA. The court certified a class by rejecting the line of cases refusing to certify rescission classes, and instead agreed with *McIntosh* and other cases holding that class treatment was appropriate for claims seeking a declaration of the right to rescind. In particular, the court was persuaded by the small class at issue (approximately 40) and the fact that, as the defendant acknowledged, few obligors would ultimately elect rescission because of the hassle associated with it, as well as the likelihood of higher interest rates on a subsequent loan. Like *McIntosh*, *Rodrigues* is no longer good law on this topic.

In *Murry v. America's Mortgage Banc, Inc.*, Nos. 03-C-5811, 03-C-6186, 2005 WL 1323364 (N.D. Ill. May 5, 2005), the court continued the inconsistent decisions from the Northern District of Illinois by denying class certification for failure to satisfy Rule 23(a)(2), (a)(3) and (b)(3). The court relied on the lack of congressional intent for such class actions, as well as the penal nature of such actions where the cost of recovery would exceed the harm, as described in *Jefferson*. The court, however, went on to identify another consideration justifying the refusal to certify a class – assignments of loans from original lenders. The court believed such issues would be difficult to address on a class-wide basis. Notably, the court in *Murry* specifically acknowledged the contrary authority inside and outside that district, but chose to follow the cases rejecting class certification.

In *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291 (D. Mass 2006), the district court certified a class action seeking rescission under the Massachusetts Consumer Credit Cost Disclosure Act ("MCCCDA"), a state law similar to the TILA, based on TILA precedent. (Because the putative class consisted of Massachusetts borrowers whose loans were secured by Massachusetts residences, the class' rescission claims were governed by MCCCDA only, not TILA, pursuant to Mass. Gen. Laws ch. 140D, § 10, while their damages claims could be pursued under both MCCCDA and TILA.) The court rejected the argument that the inclusion of class actions in 15 U.S.C. § 1640 and the omission of class actions in

15 U.S.C. § 1635 demonstrated that Congress did not intend to permit class actions seeking rescission. In the court's view, this was the "compar[ison] of apples with oranges" because Congress, in amending § 1640 to specifically refer to class actions simply did not perceive that rescission claims under § 1635 posed the same economic threat to the credit industry (*i.e.*, staggering damages awards for technical violations) as damages claims. Therefore, class actions seeking rescission that otherwise satisfied Rule 23 were proper. As discussed below, the First Circuit recently reversed this decision.

In 2007, three additional courts addressed the issue, only to reach varying results. In *Andrews v. Chevy Chase Bank, FSB*, No. 05C0454, 2007 WL 112568 (D. Wis. Jan. 16, 2007), the plaintiffs sought class certification for, among other remedies, a declaration that members of the class could rescind their mortgages. The court certified the class, notwithstanding the defendant's arguments that class certification is improper for rescission claims. The court rejected the line of authority that focused on the absence of a reference to class actions in the amendments to § 1635, noting that "[i]t is just as likely that Congress did not intend to limit rescission claims in any way." In addition, and without differentiating between damages and rescission, the court held that precluding a class action in this context would reward defendants who committed wrongs and leave plaintiffs without compensation. The case has been stayed pending appeal.

"In 2007, three additional courts addressed the issue, only to reach varying results."

Next, in *Laliberte v. Pacific Mercantile Bank*, 53 Cal. Rptr. 3d 745 (Cal. App. 2007), the appellate court affirmed the trial court's order sustaining a demurrer to class allegations without leave to amend a class action rescission claim. The court recognized the "sharp debate" among the courts on the issue of whether a right to rescind under the TILA can be asserted on a class-wide basis. In reaching its decision, the court found persuasive the fact that Congress expressly provided for class actions under § 1640 on damages, but never amended § 1635 on rescission to expressly allow for class actions. The court also found it problematic that plaintiffs did not assert that any of the putative class members served a notice of rescission, thereby making it doubtful that a justiciable controversy existed. In holding that the rescission remedy is a "personal remedy," the court was not persuaded that the filing of the class action complaint constituted a notice of rescission.

Most recently, the First Circuit addressed the issue in *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007). In reaching its decision, the First Circuit was faced with three previous decisions from the District Court of Massachusetts certifying rescission class actions: *Rodrigues*, *McIntosh*, and the underlying order in *McKenna* (429 F. Supp. 2d 291). Nonetheless, in reversing the district court and effectively abrogating the decisions in *Rodrigues* and *McIntosh*, the First Circuit held as a matter of law that class certification is not available for rescission claims under the TILA. The holding was based primarily on the conclusion that Congress did not intend rescission claims to proceed as class actions because the class action mechanism was addressed in § 1640 on damages, but not § 1635 on rescission, and the belief that rescission is a "highly personal" remedy.

The court noted that the express mention of class actions in § 1640 and silence in § 1635 leads to "two conflicting conclusions," namely, Congress either intended rescission to be unavailable in class actions or it intended rescission class actions to proceed "unrestrainedly" and not subject to any special limiting conditions, like those that exist in § 1640. In adopting the former conclusion, the court stated that it was "nose-on-the-face plain" that unrestricted rescission class actions could subject defendants to vast liability. And, given the moratorium on class actions for the short period of time prior to the Truth in Lending Class Action Relief Act of 1995 and the associated legislative history, the court believed that Congress intended to "keep at bay the ominous prospect of large-scale liability that would be inherent in rescission class actions."

The court also characterized the rescission remedy as "personal" and "highly individualized" with a wide range of variations, thereby making rescission "largely incompatible" with the class action mechanism. Instead, the court believed that the TILA includes significant incentives for lenders to comply with the statute, such as the enforcement rights of various federal agencies, and plaintiffs have sufficient private remedies, including rescission on an individual basis that could result in a sizeable monetary recover.

C. Conclusion.

As discussed above, the precedent for the propriety of TILA class actions seeking rescission is anything but uniform. From a substantive perspective and in the author's opinion, the cases rejecting rescission class actions appear to be more persuasive in terms of congressional intent. Specifically, the absence of a reference to class actions in § 1635 in the face of express recognition of class actions in § 1640 (and later amendments of § 1640) seems most consistent with an intent not to allow rescission class actions. Conversely, the interpretation of congressional intent offered by courts allowing rescission class actions – that it is just as likely Congress did not intend to limit rescission class actions – conflicts with congressional action taken to limit the liability of creditors with respect to damages.

From a practical perspective, the most recent decision of the First Circuit in *McKenna* rejecting class treatment for rescission claims is likely to be found persuasive by future courts addressing the issue because it is the first circuit court decision on the issue since *James* in 1980, thereby establishing precedent in two federal circuits, and it is consistent with at least eight other decisions on the issue. Opponents of rescission class actions now have the clear weight of authority on the issue to support their position.

Nonetheless, the cases on both sides of the question focus on the perceived intent of Congress in drafting the TILA and the issues (or lack thereof) associated with whether rescission claims are susceptible to class treatment. While a statutory amendment to TILA would undoubtedly solve the problem, the more likely result is that parties will continue to see the issue decided on an ad hoc, case-by-case basis, with both the plaintiffs and defendants armed with credible arguments in support of their respective positions.

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DEFENDING DATA PRIVACY CLASS ACTIONS

By Gregory T. Parks[*]

There is a new breed of consumer oriented class actions that focus not on the products consumers buy, the fees they pay, or anything else traditionally associated with consumer issues. Rather, these new lawsuits focus on the very intangible element of "personally identifying information," and seek to recover against those who disclose a consumer's information without consent. In a digital age, defending this new style of consumer class action requires a solid understanding of the ways data is gathered and maintained as well as the application of old and established legal doctrines to cutting edge technology. This article discusses the strategies that are likely to be successful in defending against such actions. Frequently, data privacy class actions can be defeated because: (1) most of the time, the consumers do not suffer any legally recognizable harm and therefore either have no standing to sue or lack the damages element of any cause of action; (2) issues pertaining to an individual consumer's actions or the disparate results of the data disclosure are likely to be individual in nature and not susceptible to class-wide treatment; (3) there are

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generally no established causes of action that impose liability for disclosing personally identifying information; and/or (4) contracts executed by the consumers contain arbitration clauses or provisions that require disputes to be resolved individually rather than as a class action.

A. Scope of this Article.

This article addresses class actions that raise issues about the disclosure of consumer data, meaning information about a person's activities as a purchaser of goods or services. It would include information such as name, address, telephone number, buying habits, social security number, credit card numbers, bank account numbers, or other information unique to an individual and associated with the individual's commercial activities. Common scenarios that arise in such lawsuits are:

- A retailer maintains a database of customer names and credit card numbers in a point of sale system that is then "hacked" by an outsider, giving the data thief access to the information.
- The laptop computer of an insurance company employee with data about the company's insureds in unencrypted form is stolen out of his or her hotel room.
- A trucking company inadvertently faxes a list of its employees' social security numbers to a number of its customers.
- A movie theater patron has the patron's full credit card number and expiration date printed on a receipt provided at the point of purchase, thereby allegedly violating a statute that prohibits such.
- A marketing company sells a database with names, addresses, and buying habits to advertisers, who use that information to target certain sales materials to certain consumers.
- A package containing personal financial information of a number of people is placed in the care of an overnight courier service, and is lost.

In circumstances just like these, and many others, courts have rejected efforts to impose liability on those allegedly responsible for the exposure of personal information.

Obviously, "privacy law" in general is a much broader subject, and this article does not purport to cover it all. For example, excluded are issues related to medical records (covered by HIPAA, 42 U.S.C. § 1320d) or information maintained by financial institutions (addressed by the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801). Rather, this article focuses on consumer data privacy.

B. Lack of Standing or Damages.

In many of the examples listed above, information about a number of consumers is exposed to outsiders. Obviously, the critical issue is what the outsiders do with that information. In many instances, they do nothing. For example, the thief who steals a laptop computer may have had no intention to get the data on that laptop, and is likely to believe that it has greater value for its parts or on the black market than for the information on it. That information therefore may be erased and never viewed. In other instances, "hackers" penetrate computer networks not for access to information, but simply to prove that they can, or to vandalize the system without taking or using any information. As a result, not every data security breach will actually result in the unauthorized *use* of information. But, the main theory of data privacy class actions is that data breaches can lead to an increased risk of "identity theft," where the stolen information is used to impersonate the victim and make purchases or establish credit benefiting the thief, while sticking the victim with the bill or adverse credit reputation. Other creative plaintiffs' lawyers have articulated the concern as the need to purchase credit monitoring services to detect potential identity theft, or even a simple increase in unwanted solicitations by mail or telephone.

Courts tend to find that these nebulous concerns are not legally cognizable injuries giving rise to standing. Generally speaking, courts are only empowered to hear matters that are "cases" or "controversies." U.S. Constitution, Art. III, § 1.

The main test federal courts have applied to determine whether there is an actual case or controversy is whether the plaintiff has "standing," which consists of three elements: (1) injury in fact – an actual or imminent invasion of a concrete and legally protected interest; (2) a causal connection that is fairly traceable to the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Most significantly, the determination of these issues must not be based on speculation or the potential for future harm, but rather an "actual or imminent" cognizable injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563-64 (1992). In the federal courts, as well as most state courts, standing is a constitutional mandate that cannot be overridden by a statutory framework. *See, e.g.*, *Allen v. Wright,* 468 U.S. 737, 751 (1984).

"[T]he clear trend is for courts to find that exposed personal data does not cause a legally cognizable injury in fact sufficient to confer standing."

In the realm of data privacy class actions, the clear trend is for courts to find that exposed personal data does not cause a legally cognizable injury in fact sufficient to confer standing. *See, e.g.*, *Bell v. Axiom Corp.*, 2006 WL 2850042, at *2-3 (E.D. Ark. Oct. 3, 2006); *Key v. DSW Inc.*, 454 F. Supp. 2d 684, 688-690 (S.D. Ohio 2006); *Giordano v. Wachovia Sec., LLC*, 2006 WL 2177036, at *3-4 (D.N.J. July 31, 2006); *Burdge v. Kerasotes Showplace Theatres, LLC*, 2006 WL 2535762, at *7-8 (Ohio App. Sep. 5, 2006); *Smith v. Chase Manhattan Bank*, 293 A.D.2d 598, 599 (N.Y. App. Div. 2002). In particular, courts have specifically rejected the argument that a plaintiff's "increased risk of identity theft" is a harm that gives rise to standing. *See, e.g.*, *Bell*, 2006 WL 2850042, at *2-3; *Key*, 454 F. Supp. 2d at 686-89; *Giordano*, 2006 WL 2177036, at *3-4. In *Key*, a retailer maintained the credit card numbers and other information of approximately 1.5 million consumers in a point of sale database that was accessed by unauthorized persons. Plaintiffs brought a purported class action on behalf of all 1.5 million people, claiming "a substantially increased risk of identity theft." In granting a motion to dismiss, the court held that "in the identity theft context, courts have embraced the general rule that an alleged increase in risk of future injury is not an 'actual or imminent' injury. Consequently, courts have held that plaintiffs do not have standing [in] cases involving identity theft or claims of negligence and breach of confidentiality in response to a third party theft or unlawful access to financial information." *Key*, 454 F. Supp. 2d at 689. This holding was based on two basic precepts from the United States Supreme Court's teachings on standing: (1) "conjectural or hypothetical" future harm is not an "actual or imminent" injury sufficient to confer standing; and (2) a plaintiff lacks standing when the alleged injury is dependent upon the perceived risk of future actions of third parties not before the court, *e.g.*, in this case the data thieves. *Id.* at 688-89 (citing *Lujan*, 504 U.S. at 560); *Whitmore*, 495 U.S. 155; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976). Similarly, in *Bell*, a computer hacker illegally accessed the defendant's computer system, gaining access to personal, financial, and buying history information about a number of people. The court granted a defense motion to dismiss, citing the Supreme Court's decision in *Lujan* and holding that assertions of an "increased risk of identity theft" were "speculative" and "do not satisfy the injury-in-fact test." *Id.* at *2-3.

Courts have also rejected efforts to claim that the costs of "credit monitoring" services supposedly necessary to detect and prevent identity theft were sufficient to show injury. *See, e.g.*, *Stollenwerk v. Tri-West Healthcare Alliance*, 2005 WL 2465906, *4-5 (D. Ariz. Sept. 6, 2005). In *Stollenwerk*, plaintiffs attempted to analogize to the "medical monitoring" context, arguing that the exposure of their personally identifying information was similar to exposure to toxic chemicals, and that they required credit monitoring services to prevent identity theft, just like those exposed to toxic chemicals require medical monitoring to treat potential disease. *See Stollenwork*, 2006 WL 2465906, at *2. The court disagreed, starting with an acknowledgment of "the important distinction between toxic tort and products liability cases, which necessarily and directly involve human

health and safety, and credit monitoring cases, which do not." *Id.* at *4. Finding that "the Court has been unable to identify a single instance where damages for the cost of monitoring were awarded absent increased risk of injury to human health or well being," the court went on to hold that "as a matter of law, identity theft and credit monitoring must still be differentiated from toxic tort and medical monitoring." *Id.* As an alternative holding, the court found that even if credit monitoring services could be awarded in a data privacy action, the plaintiffs in that case were unable to provide evidence sufficient to survive summary judgment that would establish a "significantly increased risk" of fraud or identity theft. *Id.* at *4-5. This will be the case in many data privacy actions.

"[I]t is widely acknowledged that a theoretical increase in the amount of unwanted solicitations or junk mail is no injury at all."

Similarly, it is widely acknowledged that a theoretical increase in the amount of unwanted solicitations or "junk mail" is no injury at all. *See, e.g.*, *Bell*, 2006 WL 2850042, at *2; *Smith*, 293 A.D.2d at 599. As one court succinctly put it long ago, "the short, though regular, journey from mail box to trash can is an acceptable burden, at least so far as the Constitution is concerned." *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967); *see also Smith*, 293 A.D.2d at 599 ("Thus, the 'harm' at the heart of this purported class action is that class members were merely offered products and services which they were free to decline. This does not qualify as actual harm.").

Some plaintiffs' lawyers have tried to overcome this challenge by seeking to use laws that would appear to have statutory damages associated with them. For example, there are federal and state laws about how much information can be printed on a credit card receipt, sometimes referred to as "truncation laws" because they require the truncation or shortening of credit card numbers or expiration dates. *See, e.g.*, 15 U.S.C. § 1681c(g); Ohio Rev. Code § 1349.18. Sometimes, these laws fall within general statutory frameworks that provide for statutory damages. *See, e.g.*, 15 U.S.C. § 1681n; Ohio Rev. Code 1345.05. Plaintiffs have therefore brought class actions on behalf of customers of establishments that have printed receipts with more than the legally allowed information, relying on the statutory fees provision in an effort to overcome the fact that many members of the class suffered absolutely no damages. *See, e.g.*, *Burdge v. Kerasotes Showplace Theaters, LLC*, 2006 WL 2535762 (Ohio App. Sep. 5, 2006). But, because standing requirements are constitutionally based, these efforts should be unsuccessful. For example, in *Burdge*, the Ohio Court of Appeals found that *actual injury* is required to bring an action under the Ohio version of the law. *Id.* at *8-9. In fact, the court went so far as to hold that "finding that consumers can collect $200 in damages, without suffering injury, every time they visit any merchant in Ohio who has not yet upgraded his or her electronic transaction equipment to comply with current law would lead to seemingly absurd results." *Id.* at *8. Thus, even where there are statutory damages, a consumer must have suffered *some harm* in order to maintain an action. Put differently, while statutory provisions may provide grounds for *measuring* damages where actual damages are difficult to determine, they cannot substitute for the fundamental requirement that a plaintiff suffer some actual harm before gaining the right to prosecute a lawsuit.

Even where a lawsuit can pass constitutional tests of standing, courts are likely to find that the lack of actual injury to a consumer is fatal to any claim. *See, e.g.*, *Guin v. Brazos Higher Educ. Serv. Corp.*, 2006 WL 288483 (D. Minn. Feb. 7, 2006); *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1020-21 (D. Minn. 2006). In *Guin*, a company's employee kept unencrypted personal data on a laptop computer that was stolen from the employee's home. The plaintiff alleged that his personal information was on that computer and that he personally suffered identity theft as a result of the exposure of that information and sought to recover damages in a negligence action. Yet, at the summary judgment phase, the court found that there was no evidence that the plaintiff's information was actually on the computer or was actually accessed

by the thieves who stole the laptop. Thus, the court held that the plaintiff had not suffered injury, which is a crucial element of any negligence cause of action. *See id.* at *5.

Thus, because so few people whose personal information is exposed actually suffer any harm or legally cognizable injury, this should be a primary area of defense, and is often a ripe opportunity for an early motion to dismiss. *See, e.g.*, *Bell*, 2006 WL 2850042, at *2-3; *Key*, 454 F. Supp. 2d at 691; *Giordano*, 2006 WL 2177036, at *3-4.

C. Challenges to Class Certification.

The familiar prerequisites of Federal Rule of Civil Procedure 23 and its state analogues are particularly difficult to meet in data privacy class actions. To some degree, this is rooted in the fact discussed above that a great many consumers whose private information is exposed suffer no actual injury. Thus, to the extent any individual consumers *do* suffer some form of identity theft harm that can be proven to be directly caused by the illegal actions of the defendant, they present a much more compelling case. While it has long been held that differences in the *amount* of damages may not preclude class certification, different types of damages can be the kind of discrepancy among class members that precludes class certification. This presents itself most forcefully when the named plaintiff has not suffered the same types of injuries as certain members of the plaintiff class. *See, e.g.*, *General Telephone v. Falcon*, 457 U.S. 147, 156 (1982). In *Falcon* and many other cases, the Supreme Court and Courts of Appeal have held that "a representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* (citations and internal quotation marks omitted); *see also, e.g.*, *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 303-05 (5th Cir. 2003) (holding class certification inappropriate where fact of damages and amount of damages required individual determinations and were not readily provable on a classwide basis). This presents a challenge to certification in many data privacy class actions, where the named plaintiff often has suffered no damages or injury attributable to actual "identity theft," but claims that others in the class have. In these types of cases, class certification should be denied. *See Smith v. First Century Bank*, 2005 WL 1840251 (E.D. Tenn. Aug. 3, 2005). In *First Century*, employees of a bank allegedly accessed a number of customers' personal financial information and used it to open accounts and obtain credit for the employees' benefit. In a class action on behalf of all the bank's customers, plaintiffs alleged that there was damage to some of the customers' credit reputation, and that other customers had loans opened in their names that they were then forced to repay. But, the court found that the named plaintiffs had lost no actual money, had all of their erroneous credit information corrected, and had any unauthorized loans expunged. On this basis, the court declined to certify a class action because the named plaintiffs did not meet the requirements of typicality or adequacy of representation. *Id.* at *10. In yet other data privacy class actions, questions as to the individual damages suffered by each class member may predominate sufficiently to preclude class certification, as reflected in *Bell Atlantic*, 393 F.3d at 303-05.

"The familiar prerequisites of Federal Rule of Civil Procedure 23 and its state analogues are particularly difficult to meet in data privacy class actions."

In another vein, class certification of nationwide data privacy class actions can also be defeated because of the lack of a unified federal law protecting consumer data privacy. Putative class plaintiffs often attempt to rely on common law theories of negligence, breach of contract (often some form of "privacy policy"), or invasion of privacy. Obviously, these doctrines are creatures of state law, and the applicable law will vary from state to state. This variance in state law, in turn, creates the types of issues that can make a class action unmanageable. *See, e.g.*, *In re Bridgestone/Firestone, Inc. Tires Prods. Liability Litig.*, 288 F.3d 1012 (7th Cir. 2002); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.") (citations omitted).

Although there have been relatively few reported decisions applying these principles to data privacy class actions, they should operate to preclude class certification in a lot of instances. In at least one case, for example, a court has found that distinctions between class members often found in data privacy class actions precluded class certification.

D. Arbitration Clauses.

In many cases, the members of a purported plaintiff class in a data privacy class action have signed or received a document that contains some form of arbitration clause or other provision that limits the procedural options available. By their terms, some such arbitration clauses prohibit class action treatment of any disputes between the parties to the agreement. Courts throughout the country are split on whether these "class action killer" types of clauses are enforceable. *See, e.g.*, *Jenkins v. First American Cash Advance*, 400 F.3d 868 (11th Cir. 2005) (enforcing class action waiver under Georgia and South Dakota law); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (upholding arbitration clause barring class actions under Louisiana law); *Walther v. Sovereign Bank*, 386 Md. 412 (Md. App. 2005); *Tilman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865 (N.C. App. 2006). *But see, e.g.*, *Discover Bank v. Boehr*, 113 P.3d 1100 (Cal. 2005) (finding class arbitration waiver unconscionable); *Muhammad v. County Bank*, 2006 WL 2273448 (N.J. 2006 (striking down class arbitration waiver); *Kinkel v. Cingular Wireless LLC*, 2006 WL 2828664 (Ill. 2006) (finding arbitration waiver unenforceable).

In at least one instance, a court has enforced an arbitration clause in a data privacy class action. *See Cunningham v. Citigroup*, 2005 WL 3454312 (D.N.J. Dec. 16, 2005). In *Cunningham*, the defendant informed a number of customers that computer tapes containing personal account and payment history were lost while in the possession of a third party carrier. In a class action purportedly on behalf of all customers whose data was lost, the court held that an arbitration clause in the customer agreement signed by the purported class members required arbitration. *See id.* at *8.

E. Conclusion.

Data privacy class actions are likely to continue to proliferate. As outlined herein, however, those defending data privacy class actions have a number of theories and tools at their disposal to defeat such actions.

ABSENT CLASS MEMBERS AND DISCOVERY: WHAT TO EXPECT

By Shona B. Glink*

Is an absent class member a "party" for purposes of the Federal Rules of Civil Procedure? To the frustration of practitioners new to class litigation, this deceptively simple question defies a simple answer. This article addresses one aspect of this quandary: what discovery can be obtained from or about absent class members. While not an exhaustive survey, it touches on the most common formal discovery methods.

A. Written Discovery Under Federal Rules of Civil Procedure 33 and 34.

It is well settled that absent class members are subject to the same discovery procedures available for non-party witnesses, such as subpoenas. *See* Newberg on Class Actions § 16.3 (4th ed. 2002). But, are absent class members subject to Rules 33 and 34 of the Federal Rules of Civil Procedure? In general, absent class members are not parties for purposes of discovery, and discovery regarding absent class members is disfavored by the courts. *See Teachers Ret. Sys. of La. v. ACLN Ltd.*, No. 01-11814, 2004 WL 2997957, at *10 (S.D.N.Y. Dec. 27, 2004) ("[C]ourts are extremely reluctant to permit discovery of absent class members."); *Kline v. First Western Gov't Sec. Inc.*, No. 83-1076, 1996 WL 122717, at *2, 3 (E.D. Pa. Mar. 11, 1996) ("[U]pon survey of the cases, it is safe to state that discovery

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of absent class members is disfavored."); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 & n.2 (1985).

That being said, discovery may be taken of absent class members during the course of class litigation in certain circumstances. In *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971), the court explained, "If discovery from the absent class members is necessary or helpful to the proper presentation and correct adjudication of the principal lawsuit, [there is] no reason why it should not be allowed so long as adequate precautionary measures are taken to insure that the absent class member is not misled or confused."

"The party seeking discovery of absent class members bears the burden of demonstrating its propriety. This burden is heavier where the party is seeking deposition testimony rather than interrogatories or responses to questionnaires."

Since *Brennan*, the majority of the courts considering the scope of discovery against absent class members have granted discovery via interrogatories or document requests: (1) where the information requested is relevant to the decision of common issues, (2) when the discovery requests are tendered in good faith and are not unduly burdensome, (3) when the information is not available from the class representative parties and (4) where the information is not in the possession and control of the defendant. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1556 (11th Cir. 1986); *Clark v. Universal Builders*, 501 F.2d 324, 340-41 & n.24 (7th Cir. 1974); *Easton & Co. v. Mutual Benefit Life Ins. Co.*, Nos. 91-4102, 92-2095, 1994 WL 248172, at *3 (D.N.J. May 18, 1994); *Transamerican Refining Corp. v. Dravo*, 139 F.R.D. 619, 621 (S.D. Tex. 1991); *see also Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320, 1326 n.5 (N.D. Ill. 1991).

Other factors courts consider in determining whether to allow discovery of absent class members and/or the scope of that discovery are whether the interrogatory or production request was necessary; whether the interrogatory sought answers to questions that would have required legal advice to understand the questions and formulate responsive answers; and whether the discovery was designed to reduce the number of claimants or take undue advantage of absent class members. *See*, *e.g.*, *Cox*, 784 F.2d at 1556.

Not surprisingly, most courts hold that discovery made in bad faith or for the purpose of annoying or harassing putative class members is impermissible under Rule 23. *See Kline*, 1996 WL 122717, at *5. Courts also have concluded that discovery of absent class members is not warranted when its purpose is only to determine the extent of damages, holding that this type of discovery should be postponed until after the common questions have been determined. *See Town of New Castle v. Yonkers Contracting Co.*, No. 88-2954, 1991 WL 159848, at *2 (S.D.N.Y. Aug. 13, 1991).

The party seeking discovery of absent class members bears the burden of demonstrating its propriety. This burden is heavier where the party is seeking deposition testimony rather than interrogatories or responses to questionnaires. *See Cornn v. United Parcel Servs., Inc.*, No. C03-2001, 2006 WL 2642540, at *2 (N.D. Cal. Sep. 14, 2006) (citing *Clark*, 501 F.2d at 341).

From the plaintiffs' perspective, discovery designed to elicit the names and addresses of class members may be permissible. *See Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (plaintiffs entitled to obtain names and addresses of discharged employees from the defendant employer); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 n.20 (1978) ("We do not hold that class members' names and addresses never can be obtained under the discovery rules. There may be instances where the information could be relevant to issues that arise under Rule 23, or where a party has reason to believe that communication with some members of the class could yield information bearing on these or other issues.").

What about the ability of defendants' counsel to inquire, through discovery, into the

nature of class counsel's pre-certification communications with putative class members or to otherwise seek information from absent class members through written interrogatories? Consider, for example, the following scenario. Plaintiffs and class counsel hold an open informational meeting for all potential class members. During that meeting, some of the putative class members fill out questionnaires prepared by class counsel. Are these questionnaires discoverable or can class counsel assert some sort of privilege over the documents – either work product, attorney-client privilege, or both?

The courts that have examined this question have reached different conclusions depending on the facts and circumstances of each case. The dispositive factor usually is whether the putative class members were seeking advice or representation at the time they filled out the questionnaires or surveys. If so, the questionnaires are protected from production by the attorney-client privilege. *See Gates v. Rohm & Hass Co.*, No. 06-1743, 2006 WL 3420591, at *2-4 (E.D. Pa. Nov. 22, 2006) (summarizing the standards of law that apply to the discovery of completed questionnaires).

In *Vodak v. City of Chicago*, No. 03-2463, 2004 WL 783051 (N.D. Ill. Jan. 16, 2004), the magistrate judge held that questionnaires completed by putative class members were not discoverable because they were completed for the purpose of obtaining legal advice and, therefore, protected by the attorney-client privilege. In reaching this conclusion, the court considered such factors as (1) whether the attorneys instructed only those individuals attending the meeting who were "seeking legal representation or specific legal advice" to complete the questionnaire; (2) whether the case had been filed at the time the questionnaire was completed; (3) whether the location of the meeting was open to the public or only to potential class members; (4) whether the attorneys distributed the questionnaires or whether the questionnaires were distributed by other individuals, and (5) whether the questionnaires contained fact inquiries that have nothing to do with legal representation. *See id*. at *4.

If the purpose of the questionnaires was to solicit potential clients or to obtain witness statements or declarations, the questionnaires are less likely to be protected by the attorney-client privilege. *See Hudson v. General Dynamics Corp.*, 186 F.R.D. 271, 275-77 (D. Conn. 1999) (holding questionnaire privileged if individuals completing the questionnaires were seeking legal advice, but not privileged if the questionnaires were completed in response to a solicitations for witness statements even if witnesses subsequently retain class counsel).

In *Morisky v. Public Service Electric and Gas Co.*, 191 F.R.D. 419 (D.N.J. 2000), the court held that the questionnaires were not protected by the attorney-client privilege and should be produced where interrogatories and/or depositions would have been overly burdensome. In that case, class counsel created questionnaires and distributed them at a public meeting organized by plaintiffs and other employees as distinct from attorneys. Attorneys also gave out additional copies of the questionnaires to be distributed by attendees to other employees. More telling was the fact that the named plaintiff in that case testified that "he had not even considered suing [the defendant] before he received and completed the questionnaire." *Id*. at 422 Since it was clear to the court that no attorney-client relationship existed at the time the questionnaires were completed, the court compelled production of the completed forms even though the employees who completed the questionnaires ultimately became "clients" of the class counsel. *Id*. at 424; *see also Vallone v. CNA Fin. Corp.*, No. 98-7108, 2002 WL 1726524 (N.D. Ill. 2002) (questionnaire not protected by the attorney-client privilege because based on improper solicitation).

Even if putative class members are considered "clients" or "represented parties" at the time the questionnaires are completed, the attorney-client privilege does not protect against discovery of "'factual information conveyed to the attorney by a party/client.'" *See Gates*, 2006 WL 3420591, at *2 (quoting *Penk v. Oregon State Bd. of Higher Educ.*, 99 F.R.D. 511, 516 (E.D. Or. 1983) (factual information disclosed in completed questionnaire is discoverable from the party/client through interrogatories served directly on the party/client even if questionnaire was protected by work

product and attorney-client privileges)). Thus, if discovery sought is limited to factual information contained in questionnaires, then the issue of whether a putative class member is a "client" or "represented" party does not come into play.

As a final note, plaintiffs' counsel may be able to assert a work-product privilege over the questionnaire itself, blocking the questionnaire from being turned over in response to a Rule 34 request provided that plaintiffs' counsel has not waived that privilege and there is some other means of obtaining the same or similar information.

B. Depositions Under Federal Rule of Civil Procedure 30.

In *Cornn v. United Parcel Services, Inc.*, 2006 WL 2642540 (N.D. Cal. Sep. 14, 2006), the court recently summarized the standards that apply when a party seeks to depose an absent class member either before or after the class has been certified:

> Where such discovery has been allowed, courts have required the proponent to demonstrate that (1) the discovery is not sought to take undue advantage of class members or with the purpose or effect of harassing or altering membership in the class; (2) the discovery is necessary at trial of issues common to the class; (3) responding to the discovery requests would not require the assistance of counsel; and (4) the discovery seeks information not already known by the proponent.

Id. at *2; *see also On the House Syndication, Inc., v. Federal Express Corp.*, 203 F.R.D. 452, 455 (S.D. Cal. 2001); *Collings v. Int'l Dairy Queen*, 190 F.R.D. 629, 630-31 (M.D. Ga. 1999); *McCarthy v. Paine Webber Group, Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995). In addition, courts consider the need for efficiency and economy before ordering discovery. *See Klein v. King*, 132 F.R.D. 525, 533 (N.D. Cal. 1990). Courts also examine whether there are other means of obtaining the same information prior to authorizing depositions of absent class members who have not otherwise inserted themselves into the litigation by submitting a witness statement, declaration, or affidavit. Applying these principles, courts have found the burden on the defendant to justify discovery of absent class members by means of deposition to be particularly heavy. *See Baldwin & Flynn v. National Safety Assocs.*, 149 F.R.D. 598, 600 (N.D. Cal. 1991).

Courts, however, have been more willing to allow depositions in cases involving the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and the Age Discrimination and Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 *et. seq*., which incorporates the enforcement provisions of the FLSA. Both of these statutes require a putative class member to affirmatively "opt in" to the class to become a member as opposed to a traditional 23(b) class which requires a putative class member to opt out. By affirmatively electing to opt in, class members under § 216(b) have agreed to participate in the litigation to an extent that class members under Rule 23 have not. *See Kaas v. Pratt & Whitney*, No. 89-8343, 1991 WL 158943, at *5 (S.D. Fla. Mar. 18, 1991) (court allowed entire class of approximately 100 class members to be deposed); *Rosen v. Reckitt & Colman, Inc.*, 1994 WL 652534, at *3 (S.D.N.Y. Nov. 17, 1994) (entire class of 50 could be deposed); *Krueger v. New York Tel. Co.*, 163 F.R.D. 446, 449-51 (S.D.N.Y. 1995) (33 of 165 class members could be deposed).

C. Conclusion.

Courts use their inherent power under Rule 23 to efficiently manage class litigation and to place careful limits on the scope of discovery of absent class members. Discovery is generally allowed when it will expeditiously move the discovery process forward without placing undue burden on absent class members to get involved in the litigation, particularly if the information sought is unavailable from any other source. When drafting discovery requests, it is best to keep is simple – ask for only what you need and no more.

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