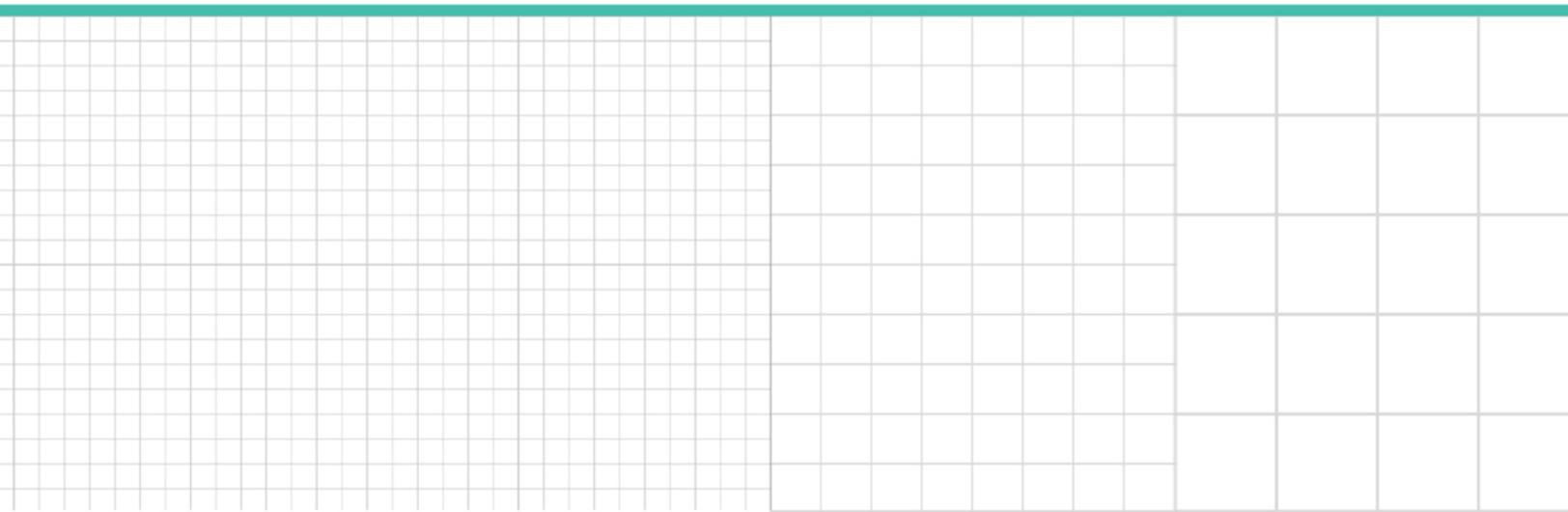


Professional Perspective

Obtaining Depositions of Absent Members in Class Action Litigation

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Obtaining Depositions of Absent Members in Class Action Litigations

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Depositions of absent class members can be a critical tool for defending class actions on the merits, challenging class certification, or moving for decertification. However, defendants may face significant legal challenges in obtaining such discovery. The Federal Rules of Civil Procedure do not specify the scope of permissible discovery from absent class members. Nor have most federal appellate courts or the U.S. Supreme Court directly addressed the issue.

This leaves district courts with significant discretion to determine the scope of discovery from absent class members in [Rule 23](#) class actions. This article discusses the legal framework for obtaining class member depositions in Rule 23 class actions, and then analyzes some factors that might influence courts to grant depositions.

Legal Framework

General Principles

Courts resist discovery from absent class members under the principle that “an absent class-action plaintiff is not required to do anything.” *Phillips Petroleum Co. v. Shutts*, [472 U.S. 797](#), [810](#) (1985). Consistent with that principle, courts have raised the concern that, in some circumstances, discovery from absent class members could chill class participation or turn an opt-out class into a de facto opt-in class. E.g., *McPhail v. First Command Fin. Planning, Inc.*, [251 F.R.D. 514](#), [517](#) (S.D. Cal. 2008).

On the other hand, the Federal Rules favor discovery to advance the goals of transparency in the judicial process and prevent unfair surprise. See *Brandon v. Mare-Bear, Inc.*, [225 F.3d 661](#) (9th Cir. 2000). Under [Rule 26\(b\)\(1\)](#), “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense,” and the information “need not be admissible in evidence to be discoverable.”

In addition, defendants have a due process right to defend themselves in a class action, including the right to raise individual challenges and defenses to claims. *Roberts v. C.R. England, Inc.*, No. 2:12-CV-0302, [2017 BL 532879](#) (D. Utah Nov. 13, 2017), *objections overruled*, [2018 BL 514456](#) (D. Utah May 22, 2018).

Notable Standards

Against this backdrop of competing policy considerations, many courts have applied a standard derived from the Seventh Circuit decision in *Clark v. Universal Builders, Inc.*, [501 F.2d 324](#), [340-42](#) (7th Cir. 1974), to weigh the benefits and burdens of class discovery. *Holman v. Experian Info. Sols., Inc.*, No. C 11-00180 CW DMR, [2012 BL 421302](#) (N.D. Cal. July 2, 2012). Under this standard, courts put the burden on the defense to show that the discovery is not designed to take undue advantage of class members or to reduce the size of the class, the discovery of class members is necessary, responding to the discovery requests would not require the assistance of counsel, and the discovery seeks information that is not already known by the proponent. *McPhail v. First Command Fin. Planning, Inc.*, [251 F.R.D. 514](#), [517](#) (S.D. Cal. 2008).

Other courts have applied different but overlapping standards that similarly weigh the benefits and burdens of the proposed discovery. For example, the court in *Arredondo v. Delano Farms Co.* concluded that, as a general rule, discovery from absent class members may be permitted when reasonably necessary, not conducted for an improper purpose, and not unduly burdensome in the context of the case and its issues. [2014 BL 284979](#) (E.D. Cal. Oct. 10, 2014).

Similarly, in *Tierno v. Rite Aid Corp.*, [2008 BL 367805](#) (N.D. Cal. July 8, 2008), the court required a showing of three factors: the information sought is relevant, the information is not readily obtainable from the representative parties or other sources, and the request is not unduly burdensome and made in good faith. And, in *McCarthy v. Paine Webber Group, Inc.*, [164 F.R.D. 309](#) (D. Conn. 1995), the court required a “strong showing” that the information was not sought with the purpose or

effect of harassment or altering membership of the class, directly relevant to common questions and unavailable from the representative parties, and necessary at trial of issues common to the class.”

Factors in Allowing Class Member Depositions

Although courts have applied a number of considerations when weighing the competing policy interests and benefits versus burdens of class member discovery, some particular factors can tip the scales in favor of allowing class member depositions. These factors include class members having already injected themselves into the litigation, the representativeness of the testimony, defendants’ efforts to reduce the burden of the deposition, and the relatively large size of the case in terms of class size and award sought.

Class Members Already Injected

Courts have been more inclined to grant depositions of class members who have injected themselves into the litigation by, for example, providing a declaration or agreeing to be a witness.

In *Antoninetti v. Chipotle, Inc.*, No. 06cv2671-BTM (WMC), [2011 BL 135889](#) (S.D. Cal. May 23, 2011), the court granted Chipotle’s motion to compel one-hour depositions of 20 of 41 putative class members who were identified in plaintiffs’ disclosures and who signed declarations in support of plaintiffs’ motion for class certification. The court explained that while courts usually do not permit discovery from class members, the rules are flexible, “especially where the proposed deponents have been identified as potential witnesses or have otherwise ‘injected’ themselves into the litigation.”

The court found that because the absent class members submitted declarations in support of the motion for class certification and were identified in the supplemental disclosures, the absent members had “injected themselves into the litigation on two fronts and cannot claim noninvolvement as a means of avoiding discovery,” and additionally, the court was satisfied Chipotle was not taking the proposed depositions in order to take undue advantage of the class members or to harass class members, and the discovery was clearly relevant.

Likewise, the court in *Moreno v. Autozone, Inc.*, No. C-05-4432 MJJ EMC, [2007 BL 306751](#) (N.D. Cal. Aug. 3, 2007), granted defendant’s request to depose putative class members who had “injected themselves into the class certification motion by filing factual declarations.” And in *Brown v. Wal-Mart Store, Inc.*, No. 09CV03339EJDSVK, [2018 BL 514457](#) (N.D. Cal. Jan. 9, 2018), the court permitted defendants to depose eight class members named as potential witnesses in plaintiffs’ amended Rule 26 disclosures.

Representativeness of Information Sought

Courts have also allowed depositions of absent class members where defendants could show through expert analysis that the depositions would give rise to evidence that was representative of some or all of the class. For example, in *Arredondo v. Delano Farms Co.*, No. 1:09-cv-01247 MJS, [2014 BL 284979](#) (E.D. Cal. Oct. 10, 2014), the court allowed defendants to take 196 depositions of absent class members as part of a pilot study to gather statistical data informing the reliability of plaintiffs’ proposed written survey of a random sample of class members.

Similarly, in *Roberts v. C.R. England, Inc.*, No. 2:12-CV-0302, [2017 BL 532879](#) (D. Utah Nov. 13, 2017), *objections overruled*, [2018 BL 514456](#) (D. Utah May 22, 2018), the court partially granted defendants’ motion to depose 100 class members, holding that the request was proportional to the needs of the case, but that defendants needed to propose, using expert analysis, the number of depositions that would be representative of the class. In so holding, the court reasoned that class member depositions sought for obtaining information representative of the class (as opposed to testing the individual testimony and credibility of plaintiffs’ witnesses) could be a waste of time and resources if defendants do not show ahead of time that the number of deponents is a representative sample of the class. In response to the court’s order, defendants filed an expert declaration showing that 96 depositions would constitute a representative sample of the class. *Roberts v. C.R. England, Inc.*, 2:12-CV-0302, Dkt. No. 432-1 (D. Utah Jan. 12, 2018).

Lessening the Burden

Courts have looked more favorably at depositions of absent class members where defendants have proposed measures to lessen the burden to class members. One way to lessen the burden is to depose only a small percentage of class members. For example, the *Arredondo* court found that the proposed 196 depositions was not unduly burdensome in part because they involved less than one percent of the 25,000 total class members. And in *Roberts*, the court found that the defendants' request for 100 class member depositions was proportional to the needs of the case in part because the class consisted of approximately 14,708 class members, meaning the depositions would involve less than one percent of the class.

Another way defendants can lessen the burden is to reduce the length of the deposition. For example, the *Chipotle* court in granting Chipotle's motion to compel 20 class member depositions considered that the proposed depositions would last only one hour each. Similarly, the *Arredondo* court commented that defendants' proposed two to four hours per deposition was a "relatively small time investment relative to a case this size." The *Roberts* court found that defendants' proposal to limit depositions to three hours reduced the burden. And the *Moreno* court noted that the defendant's agreement to limit the depositions to two hours lessened the burden.

Defendants can also lessen the burden to class members by offering reasonable compensation to deponents for their time expended in the deposition. For example, in *Aldapa v. Fowler Packing Co. Inc.*, No. 115CV00420DADSAB, [2019 BL 74218](#) (E.D. Cal. Mar. 5, 2019), the court, in permitting defendants to depose 15 class members, noted defendants' offer to reasonably compensate the deponents.

Size and Complexity

Courts have also been more likely to allow a larger number of absent class member depositions where the size and complexity of the case is significant. One consideration within this category is the size of the potential recovery for each class member. Class members typically do not want to participate in litigation with small potential monetary recovery, and, thus, courts generally find that class members should not be inconvenienced by being forced to appear for a deposition. However, those considerations can be overcome where defendants show that class members' individual monetary claims are significant such that class members have a sufficient stake in the outcome of the litigation to warrant appearing for deposition. For example, in permitting class member depositions, the *Roberts* court considered that the class consisted of approximately 14,708 class members seeking approximately \$25,000 each.

Courts have found other facts regarding the size and complexity of the case to support class member depositions. For example, the *Roberts* court considered that plaintiffs themselves had acknowledged the need for a significant amount of class member testimony, noting that the plaintiffs had listed more than 160 class members as witnesses likely to have discoverable information in their supplemental Rule 26 disclosures, and that plaintiffs in response to interrogatories had identified 415 class members with information relevant to certain class claims. In *Arredondo*, the court found that the "extraordinary characteristics of [the] case, including the large class size, the large amount in controversy, the issues with regard to credibility and reliability of the evidence provided to the Court during the certification phase, and the fact that it will be difficult, if not impossible, to locate and contact many of the absent class members," helped the benefits outweigh the burden of the 196 depositions.

Suggestions for Obtaining Depositions

Class member depositions can be critical to defending a class action, whether on the merits, challenging class certification, or moving for decertification. Although courts are generally skeptical about allowing class member depositions, defendants have certainly had some success in obtaining them. Defendants should design depositions that maximize the potential to gather relevant information and lessen the burden to class members. This may include proposing depositions that:

- Last less than four hours
- Occur in locations convenient to the witnesses

- Involve a small percentage of the total class
- Compensate witnesses for their time
- Do not exclude from the class those who decline to appear for deposition
- Would produce information representative of the class
- Would involve only those class members who have already injected themselves into the litigation, such as by submitting a declaration or agreeing to be listed as a potential trial witness

Defendants should also highlight their due process right to obtain discovery to defend themselves and the proportionality of their requested discovery to the needs of the case. This may include raising factors such as:

- The size of the class
- The potential size of the total class recovery and individual class member recovery
- The plaintiffs' intended use of class member testimony as indicated in their discovery responses or disclosures (whether to support the overall importance of class discovery to the litigation, the need to test the credibility and testimony of class member witnesses, or to avoid unfair surprise at trial from class member testimony)
- The defendants' inability to obtain the information from other sources
- The importance of the information sought in order to mount a meaningful defense

The more of these factors that exist, the better chances a defendant has of obtaining class member discovery.