

Abdicating
Responsibility Has
Consequences

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Use of the adequacy requirement of Federal Rule 23(a)(4) to defeat class certification when the class representative has abdicated responsibility to the attorneys.

Cutting the Strings Pulling the Puppet Class Representative

Federal courts and practitioners alike have grappled with the importance and scope of the Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), which focused new attention on the

commonality requirement of Federal Rule of Civil Procedure 23(a)(2). More recently, in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013), the Court addressed the predominance requirement of Rule 23(b)(3) and the importance of evaluating expert testimony in determining whether common questions predominate. Likewise, the Court considered predominance in *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013), in the context of proving materiality in a securities class action. While commonality and predominance lately have rightly engendered significant discussion and undoubtedly will continue to do so given *Comcast* and *Amgen*, defense counsel should not give short shrift to other requirements of Federal Rule 23 that they can use to defeat class certification, including the often overlooked 23(a)(4) adequacy requirement.

Because a class action is by definition a representative action, Federal Rule of Civil Procedure 23 ensures that the proposed class has adequate representation both in

terms of class counsel and a putative class representative plaintiff. Indeed, the adequacy requirement has an integral role in assuring that the proceedings protect the due process rights of the absent class members. *See, e.g., Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir. 1986) (stating that the adequacy “requirement is particularly important because the due process rights of absentee class members may be implicated if they are bound by a final judgment in a suit where they were inadequately represented by the named plaintiff”).

While various factors affect a named plaintiff’s adequacy to represent a class and can inform the analysis that courts must conduct under Federal Rule of Civil Procedure 23(a)(4), including concerns regarding class representative’s credibility and conflicts between the class representative and the putative class, one important issue that all class action defendants should explore and test during the discovery and the class certification stages is who is really acting as the class representative. In some instances, class representatives prosecute class actions even though they have little to no involvement in the litigation or the decisions that attorneys and judges make on behalf of the putative class because these class representatives have ceded control of the case



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to their attorneys. When class representatives abdicate their role to their attorneys, making them the de facto plaintiffs in class actions, class certification would seem to diverge from Rule 23(a)(4)'s adequacy requirement. Because such circumstances are not always apparent, defense attorneys can and should explore issues relating to the respective roles and responsibilities of the class representatives and their counsel during the discovery stage.

A Class Representative Must Prove Adequacy

A party seeking to maintain a class action must demonstrate that it has met the Federal Rule 23(a) numerosity, commonality, typicality, and adequacy of representation requirements, and the party must satisfy through evidentiary proof at least one of the Federal Rule 23(b) subprovisions' elements, usually that common legal questions or facts predominate and a class action offers a means superior to others to resolve the dispute. *Amgen Inc.*, 133 S. Ct. at 316. The adequacy of representation requirement specifies that the representative parties must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

The standard for establishing adequacy can differ among the jurisdictions. *Compare Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295, 300 (N.D. Ill. 2005) ("The burden in demonstrating that the class representative meets this standard is not difficult.") (quotation marks and citation omitted), and *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004) ("The threshold of knowledge required to qualify a class representative is low."), with *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 484 (5th Cir. 1982) ("The adequacy requirement mandates an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees."). Further, some courts considering class certification applications have gone as far as stating that Federal Rule 24(a)(4) is satisfied when the party opposing class certification does not offer evidence that the class representative is inadequate. *See, e.g., Zeno v. Ford Motor Co.*, 238 F.R.D. 173, 188 (W.D. Pa. 2006) ("As to adequacy, how-

ever, in most cases, adequate representation presumptions are usually invoked in the absence of contrary evidence by the party opposing the class.") (internal quotation marks and citation omitted); *Barton v. Corr. Corp. of Am.*, 2005 U.S. Dist. Lexis 44895, at *16 (N.D. Okla. Sept. 1, 2005).

Supreme Court jurisprudence, however, flatly contradicts the notions that courts can presume adequacy or that a defendant bears the burden of proving that a class representative is inadequate, and they should not create obstacles to class action defendants vigorously testing class representatives' adequacy. Indeed, as the Supreme Court observed in *Dukes*, "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2252, 180 L. Ed. 2d at 390. To obtain certification of a class action, a plaintiff "must affirmatively demonstrate his compliance with Rule 23" and "prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Comcast*, 2013 U.S. Lexis 2544, at *12. Thus, during the class certification stage a class representative must produce evidence demonstrating that he or she can adequately represent the class. *See, e.g., Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) ("The district court unquestionably adopted an incorrect legal standard by stating that the adequacy of the putative representatives and of plaintiffs' counsel is presumed in the absence of specific proof to the contrary. This is error; the party seeking certification bears the burden of establishing that all requirements of rule 23(a) have been satisfied.") (quotation marks omitted).

Courts Should Explore the Roles of a Class Representative and Counsel Before Certifying a Class

The majority of courts have held that the Federal Rule 23(a)(4) analysis involves inquiring into the adequacy of both class counsel and the named plaintiff, specifically "whether class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another." *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000). *See also Baffa v. Donaldson*, 222 F.3d 52, 60

(2d Cir. 2000) ("Generally, adequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation."). Other courts, however, have focused the inquiry only on the class representative. *See, e.g., Valley Drug Co. v. Geneva Pharms.*,

Supreme Court

jurisprudence . . . flatly contradicts the notions that courts can presume adequacy or that a defendant bears the burden of proving that a class representative is inadequate.

Inc., 350 F.3d 1181, 1189 (11th Cir. 2003) (noting that the "analysis encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action").

Federal Rule 23 was amended in 2003 to add subsection (g), which addresses class counsel. The relevant part provides:

- In appointing class counsel, the court:
- (A) must consider:
 - (i) the work counsel has done in identifying or investigating potential claims in the action;
 - (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
 - (iii) counsel's knowledge of the applicable law; and
 - (iv) the resources that counsel will commit to representing the class;
 - (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;...

Fed. R. Civ. P. 23(g). As the Advisory Committee Notes makes clear:

Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience

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While a potential conflict between the named plaintiff and the class that he or she purports to represent would certainly offer a court a sufficient basis to find that the named plaintiff is inadequate, courts have focused on other considerations.

rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision.

See 2003 Advisory Comm. Notes to Fed. R. Civ. P. 23.

This note strongly suggests that Federal Rule 23(a)(4) adequacy of representation involves independently assessing the class representative and assessing the class counsel's adequacy as a separate inquiry under Federal Rule 23(g). Some courts have acknowledged this point. See, e.g., *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668, 673 (D. Kan. 2007) (noting that "Rule 23 was amended to add subparagraph (g) which governs the manner in which courts should supervise the appointment of class counsel" and "[t]hus, the court will analyze separately the adequacy of

counsel and of...the named plaintiff"). But the federal courts have not reached a consensus on the interplay between Federal Rules 23(a)(4) and 23(g).

Whether Federal Rule 23(a)(4) requires a discrete inquiry into the adequacy of the class representative alone, while Federal Rule 23(g) requires a separate inquiry into class counsel's adequacy, or whether courts should analyze both counsel and the class representative under 23(a)(4) but also apply the 23(g) factors to the 23(a)(4) analysis of the class counsel, should not make a significant difference for the purposes of determining adequacy. Because Federal Rule of Civil Procedure 23(g) requires that "a court that certifies a class must appoint class counsel," to certify the class, the court should consider the nature, role, and qualifications of *both* the class representative and counsel for the putative class. See, e.g., *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011) ("This adequate representation inquiry consists of two parts: (1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel."); *Unger v. Amadisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) ("To meet Rule 23 requirements, the court must find that class representatives, their counsel, and the relationship between the two are adequate to protect the interests of absent class members.").

Courts Should Consider Many Factors When Assessing Adequacy

Courts have used different language to describe the adequacy inquiry under Federal Rule 23(a)(4). The Supreme Court has noted that "Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent," *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 2250 (1997). But nothing in either the Federal Rule 23(a)(4) language or the *Amchem Products* decision suggests that analyzing the adequacy of the class representative is *limited* to identifying conflicts. Thus, while a potential conflict between the named plaintiff and the class that he or she purports to represent would certainly offer a court a sufficient basis to find that the named plaintiff is inadequate, courts have focused on other considerations. Indeed,

courts have also characterized the analysis as involving inquiries into (1) whether the class representative has abdicated his or her role as class representative to his or her attorney or attorneys, see, e.g., *Kassover v. Computer Depot, Inc.*, 691 F. Supp. 1205, 1213-14 (D. Minn. 1987), *aff'd*, 902 F.2d 1571 (8th Cir. 1990); (2) whether the class representative would vigorously prosecute claims on behalf of the class, see, e.g., *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006); and (3) whether a unique defense would apply to the class representative, see, e.g., *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006).

Because a variety of factors can inform whether a named plaintiff "will fairly and adequately protect the interests of the class," the Federal Rule 23(a)(4) inquiry should not be constrained. Thus, "[i]n determining adequacy of representation, a district court is not confined to specific procedures, and it is proper for the district court to consider all available additional circumstances and facts of a case." *In re FleetBoston Fin. Corp. Secs. Litig.*, 253 F.R.D. 315, 330 (D.N.J. 2008). Importantly, as *Wright, Miller, & Kane* have observed:

In order to assess the adequacy of the named representatives, courts have looked to factors such as their honesty, conscientiousness, and other affirmative personal qualities. If the representative displays a lack of credibility regarding the allegations being made or a lack of knowledge or understanding concerning what the suit is about, then the court may conclude that Rule 23(a)(4) is not satisfied.

7A *Wright, Miller & Kane, Federal Practice and Procedure*, §1766 (2005 ed.). See also *Robinson v. Gillespie*, 219 F.R.D. 179, 186 (D. Kan. 2003) ("Determining whether the named plaintiffs will be vigorous advocates for the class makes inquiry into various arenas appropriate.").

A Class Representative Must Retain Representation Responsibility

The U.S. Court of Appeals for the Seventh Circuit stated in *Culver v. City of Milwaukee*:

The class action is an awkward device, requiring careful judicial supervision, because the fate of the class members is to a considerable extent in the hands

of a single plaintiff (or handful of plaintiffs, when, as is not the case here, there is more than one class representative) whom the other members of the class may not know and who may not be able or willing to be an adequate fiduciary of their interests. Often the class representative has a merely nominal stake..., and the real plaintiff in interest is then the lawyer for the class, who may have interests that diverge from those of the class members. The lawyer for the class is not hired by the members of the class and his fee will be determined by the court rather than by contract with paying clients. The cases have remarked the danger that the lawyer will sell out the class in exchange for the defendant's tacit agreement not to challenge the lawyer's fee request. Rule 23 tries to minimize the potential abuses of the class action device... by insisting that the class representative be shown to be an adequate representative of the class.

277 F.3d 908, 910 (7th Cir. 2002). See also *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594-95 (M.D. Pa. 1974) ("Because absent members of the class would be conclusively bound by the results obtained by these representatives and their attorneys, due process requires that they be more than pro forma representatives.... An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved.").

In *Culver*, the court appeared to bemoan the fact that "the courts and Congress have balked at taking" the step of allowing class actions to proceed with the attorneys acting as the class representatives, stating: "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry." 277 F.3d at 913 (quotation marks and citation omitted).

Notwithstanding the *Culver* court's view of class action "realities," Congress has not changed Federal Rule 23, and so courts must consider whether class representatives are truly acting in a representative capacity or whether they have impermissibly ceded that role to the attorneys. See, e.g., *Alberghetti v. Corbis Corp.*, 263 F.R.D.

571, 580 (C.D. Cal. 2010) ("One of this Court's duties is to ensure that the parties are not simply lending their names to a suit controlled entirely by the class attorney.") (quotation marks and citation omitted), *denial of class cert. aff'd*, 2012 U.S. App. Lexis 14694 (9th Cir. Jul. 18, 2012); *Unger*, 401 F.3d at 321 ("Class representatives must satisfy the court that they, and not counsel, are directing the litigation."); *Baffa*, 222 F.3d at 61 (concluding that class representatives are inadequate if they "have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys"). Indeed, parties to a class action, as well as the court considering whether to certify the class, should remember that Federal Rule 23 "is not intended to substitute the lawyer for the client and turn an individual's suit for vindication of his personal rights into a lawyer's suit for vindication of the rights of a class," *Greene v. Brown*, 451 F. Supp. 1266, 1275 (E.D. Va. 1978), and that "a potential class is entitled to more than blind reliance upon even competent counsel by interested and inexperienced representatives." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726-28 (11th Cir. 1987).

Defense attorneys can uncover facts to develop during the discovery stage that could strongly indicate that a class representative has impermissibly abdicated his or her role to counsel, which would render him or her inadequate and could lead a court to decide not to certify a class. Issues to develop during the discovery stage that could result in a court viewing a class representative as inadequate include whether the class representative (1) has insufficient basic knowledge about the litigation, (2) does not understand his or her role as the class representative, (3) has not participated actively in prosecuting the litigation, and/or (4) has split claims.

Insufficient Basic Knowledge About the Litigation

A class representative must have some knowledge regarding the class action lawsuit to be an adequate class representative. Indeed, certifying a class with "an essentially unknowledgeable" class representative would mean that the counsel would act on behalf of the class, which would "risk a de-

nial of due process to the absent class members." *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 153-54 (N.D. Cal. 1991). The courts do disagree regarding the extent of the knowledge that a class member must have to satisfy Federal Rule 23(a) (4). Compare *Latuga v. Hooters, Inc.*, 1996 U.S. Dist. Lexis 4169, at * 14 (N.D. Ill. Mar. 29, 1996) ("[A] representative plaintiff need

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not immerse himself in the case. The modern trend is to require little in the way of factual knowledge on the part of the class representative. Generally, where a proposed representative demonstrates a familiarity with the action's outlines, he or she will be deemed adequate.", *with Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 129 (5th Cir. 2005) ("We have identified a generic standard for the adequacy requirement, noting that the class representatives [must] possess a sufficient level of knowledge and understanding to be capable of controlling or prosecuting the litigation.") (quotation marks and citation omitted). But most courts require a class representative to have at least some "minimal" knowledge regarding the litigation and the claims asserted on behalf of the class. See, e.g., *Stuart v. Radioshack Corp.*, 2009 U.S. Dist. Lexis 12337 at *26 (N.D. Cal. Feb. 5, 2009) (noting that to satisfy the adequacy



requirement, “the class representative must possess at least a minimal degree of knowledge regarding the class action”).

The extent of knowledge required to satisfy the adequacy standard may vary among and even within jurisdictions and can also depend on the type of claims at issue. For example, courts have held that in “securities actions, a plaintiff need not have

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expert knowledge of all aspects of the case to qualify as class representative.” *Wagner v. Barrick Gold Corp.*, 251 F.R.D. 112, 118 (S.D.N.Y. 2008). Similarly, in lawsuits involving complex claims and issues, some courts have held that a class representative does not need to have complete knowledge of all aspects of the case. *See, e.g., Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (“in a complex lawsuit, such as one in which the defendant’s liability can be established only after a great deal of investigation and discovery by counsel against a background of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative”).

Significantly, however, regardless of the type of case, the class representative must have a sufficient level of knowledge regarding the litigation and the claims asserted to provide the appropriate “check on the otherwise unfettered discretion of counsel in prosecuting the suit,” *Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D. Cal. 1994). A demonstrable lack of knowledge strongly indicates that counsel may control the litigation to an impermissible extent. Thus, in a variety of circumstances courts have held that class representatives were inadequate when their lack of knowledge impeded the ability to perform this necessary function.

Typically, a deposition will reveal a class representative’s lack of knowledge when he or she cannot answer or respond to basic questions regarding the nature of the claims in the case, the facts supporting those claims, why the class representative has sued the defendants, the damages sought in the litigation, or a combination of these. For example, in *Rolex Employees Retirement Trust v. Mentor Graphics Corp.*, the court ruled that the named plaintiff was inadequate when he was “unfamiliar with the basic elements of the case, including what the allegations of the complaint are and which allegations of the complaint pertain to which defendants.” 136 F.R.D. 658, 666 (D. Or. 1991). *See also Kassover*, 691 F. Supp. at 1214 (finding a class representative inadequate when the “plaintiff admitted at several points he possesses ‘no facts’ to support essential allegations in his complaint”); *Wein v. Master Collectors*, 1995 U.S. Dist. Lexis 21622, at *11–12 (N.D. Ga. Aug. 15, 1995) (“Plaintiff became confused and her memory became fuzzy only when discussing the facts relating to her debt which is the springboard for this action.... [T]he court simply finds that she has not fulfilled the role of class representative, in that she does not understand even her own claim, much less that of the putative class as a whole, and she has abandoned the prosecution of this claim entirely to her attorneys.”).

As the decision in *Jones v. CBE Group, Inc.* demonstrates, inadequacy can also arise when the plaintiff purports to have an understanding of the case but that understanding is simply incorrect. 215 F.R.D. 558, 568–69 (D. Minn. 2003). There, the court determined that the named plaintiff was inadequate when the class representative believed that he was asserting a claim against the defendants that was not even part of the class action complaint. *Id.* (“Jones stated that he filed suit to recover funds he believed were improperly garnished by defendants, although there is no such allegation in his complaint.... [He] was repeatedly confused by, and unable to respond to, straightforward questions about critical elements of the action.”). *See also Hillis v. Equifax Consumer Servs.*, 237 F.R.D. 491, 502 (N.D. Ga. 2006) (holding that the plaintiff was not an adequate class representative because his “deposition testimony establishes that he has never seen or cannot recall having seen

virtually any of the representations that are enumerated in his Complaint and that form the basis of the claims”). Such a fundamental misunderstanding of the asserted claims provides strong evidence that the attorney, rather than the class representative, is the driving force behind the class action.

Further, although class representatives may seem to have some knowledge regarding the litigation, courts may find the class representatives inadequate when they did not derive that knowledge independently, but, instead, admit that the knowledge came from their attorneys. In *Kelley v. Mid-America Racing Stables, Inc.*, for example, the court concluded that the named plaintiff was inadequate when he “testified that he has no personal knowledge” regarding the allegations in the complaint and stated “no basis for his involvement in the lawsuit other than what has been told him by counsel.” 139 F.R.D. 405, 409–10 (W.D. Okla. 1990), *reconsideration denied*, 139 F.R.D. 405 (W.D. Okla. 1990). Similarly, in *Karnes v. Fleming*, the class representative revealed that her “knowledge of the facts and issues in th[e] case were derived almost exclusively from counsel,” causing the court to conclude that she was inadequate. 2008 U.S. Dist. Lexis 109518, at *8–10 (S.D. Tex. July 31, 2008). *See also Ogden v. AmeriCredit Corp.*, 225 F.R.D. 529, 535 (N.D. Tex. 2005) (“Furthermore, it is apparent that much of her knowledge is derived from counsel. While this is acceptable to some degree, the extent to which it is present in this case renders Ogden’s adequacy arguments unpersuasive. She is unable to describe whole portions of her complaint. She has no factual knowledge, beyond knowing that money was lost, to support the allegations in her complaint. And it is apparent that counsel has provided the vast majority of the knowledge that she does possess.”). Simply parroting the knowledge and understanding of an attorney does not demonstrate that a class representative is sufficiently knowledgeable to satisfy the adequacy requirement.

Finally, not only can a named plaintiff actively demonstrate inadequacy by revealing that he or she insufficiently or incorrectly understands a case, but refusing to offer information regarding his or her knowledge can also lead to a determination of inadequacy. In *Middleton v. Arledge*, for example,

the class representative was found inadequate because her attorney refused to allow her to answer any questions regarding “the facts underlying any of the claims alleged in the complaint, the reason she was suing the [defendants], or the damages she sustained as a result of the defendant’s alleged conduct. 2008 U.S. Dist. Lexis 77352, at *35 (S.D. Miss. Mar. 31, 2008). As a result the court concluded that the named plaintiff was “simply lending her name to a suit controlled entirely by the class attorney” and, as such, she could not “fulfill the role of class representative.” *Id.*

Failing to Understand a Class Representative’s Role

It seems axiomatic that a class representative would minimally understand what a class action is, the responsibilities that he or she has as a class representative, and who he or she purports to represent in the class. Certainly, if a class representative does not know that he or she has that role or does not understand that role, it is difficult to fathom how the representative could fairly and adequately represent the putative class. Indeed these circumstances offer strong evidence that the class representative’s attorney controls and directs the class action rather than an informed representative. Under such circumstances, the class representative should not satisfy the Federal Rule 23(a)(4) requirement.

Certainly, many courts have determined that a class representative is inadequate when the class representative is entirely unfamiliar with the class action litigation and his or her role in it. For example, in *Price v. United Servs. Auto. Ass’n*, the court found that the named plaintiff was not adequate because

when asked whether he agreed to be a class representative, Plaintiff stated that he was ‘not sure exactly what that means’ and he also testified that “he had no understanding of the responsibilities of a class representative to the unnamed class members; that he did not know the class definition or who was in the class; that he was not going to ‘study the class thing,’ as he did not feel like he needed to understand it.

2012 U.S. Dist. Lexis 97179, at *21–22 (W.D. Ark. Mar. 16, 2012), *adopted by* 2012 U.S. Dist. Lexis 95659 (W.D. Ark. July 11, 2012).

As the court stated, the “Plaintiff’s own testimony demonstrates that he does not understand or appear to care about his duty as a class representative to vigorously pursue the interests of potential class members.” *Id.* See also *Burton v. Chrysler Group LLC*, 2012 U.S. Dist. Lexis 186720, at *24 (D.S.C. Dec. 21, 2012) (“The court finds that the proposed class representatives are inadequate for the additional reason that the proposed representatives, on the whole, do not understand their duties and obligations as class members. By way of example, Plaintiff Kay testified that he did not understand that he represents other people in this case and was not looking for anyone else to get any money out of his pocket because of his problems. Plaintiff Ochoa testified that no one has ever explained to him the cost and benefits of a class action versus an individual action, he did not understand that this case is a class action, and he did not know whether he had any duties as a class representative.”); *Middleton*, 2008 U.S. Dist. Lexis 77352, at *35–36 (noting, as support for ruling that the named plaintiff was an inadequate representative, that she testified that whether she would be a class representative was up to her attorney and that her attorney refused to allow her to answer questions regarding the class she purportedly was representing); *Danielson v. DBM, Inc.*, 2007 U.S. Dist. Lexis 18609, at *22 (N.D. Ga. Mar. 15, 2007) (finding the class representative inadequate because he testified that prior to his deposition “he did not know he was a class representative, that no one had explained to him his duties as a class representative, and that he did not know what his duties were”); *Scott v. N.Y. City Dist. Council of Carpenters Pension Plan*, 224 F.R.D. 353, 356 (S.D.N.Y. 2004) (“Both Scott and Spillers’ alarming lack of familiarity with the suit, as well as little or nonexistent knowledge of their role as class representatives is manifest. Scott at his deposition stated he did not know what allegations were contained in the complaint.... He did not know for sure whether this was a class action suit. He did he know what a class representative was (or even that he was one). He has ‘not the slightest idea’ of how many people are in the class.... Spillers’ deposition makes equally clear that he is unsuited to be a class representative. He did not know

what a class action is, nor that his case was such an action.”).

Nevertheless, some courts have found that even when a named plaintiff does not understand his or her role in the class action, the plaintiff can adequately represent the class. In *Alba v. Papa John’s USA*, for example, the court found the named plaintiffs adequate even though they did

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not understand their role in the class action simply because they knew the facts relating to their claims. 2007 U.S. Dist. Lexis 28079, at *27–28 (C.D. Cal. Feb. 7, 2007). Similarly, in *In re Trans Union Corp. Privacy Litig.*, the court found that plaintiffs who did not know “what classes have been proposed, and which classes they represent[ed]” were adequate representatives, stating: “[T]he class representative’s knowledge is not generally the proper focus. Instead, the court should focus on the competency of plaintiffs’ counsel and any conflicts between the named class representatives and other class members.” 2005 U.S. Dist. Lexis 17548, at *6–8 (N.D. Ill. Aug. 17, 2005).

These decisions, however, appear to miss the point. In *any litigation* a named plaintiff must understand the facts of his or her claim, and the plaintiff must have competent counsel to prosecute the claim. Accordingly, in and of themselves these circumstances do not demonstrate adequacy to represent a class of other individuals in a *class action*. The law requires something more as sufficient assurance that an informed class representative will prose-

cute a class action, will monitor the class action, and will ensure that counsel will not high-jack it. Thus, discovery must involve critical inquiries into the class representative's knowledge not only of the facts and asserted claims, but also of the representative's understanding of the class that he or she purports to represent and the responsibilities involved in doing so.

Some courts have suggested that claim splitting does not prohibit class certification when the abandoned claims would otherwise have made obtaining class certification more challenging.

Failing to Participate Actively in Prosecuting the Class Action

A class representative must be willing and able to pursue claims vigorously on behalf of the class that the representative purports to represent. A failure to demonstrate sufficient advocacy on behalf of the class should render the class representative inadequate. Thus, defense counsel and courts must examine closely not only what a class representative knows, but also the extent of his or her involvement in the litigation.

While the plaintiff's counsel will understandably have a large role in prosecuting the claims, a class representative is obligated to assist and to monitor counsel to ensure that counsel does not have unfettered reign over the litigation. Courts have noted various factors that can indicate that a class representative has not undertaken these responsibilities, although court decisions are not uniform in viewing these factors as signaling inadequate class representation. These factors include:

1. When the class representatives had minimal meetings and communications with the attorneys. *See, e.g., Bodner v. Oreck*

Direct, LLC, 2007 U.S. Dist. Lexis 30408, at *3 (N.D. Cal. Apr. 25, 2007) ("Plaintiff met his attorney in person for the first time the day before his deposition in this action."); *In re AEP ERISA Litig.*, 2008 U.S. Dist. Lexis 77165, at *10-12 (S.D. Ohio Sept. 8, 2008) ("The deposition transcript is replete with startling admissions about Bridges's lack of overall involvement in the case and calls into question his understanding of the nature of the claims asserted. Moreover, his testimony instills little confidence in the Court that he views his role as anything other than a tool of class counsel. To begin with, except for his deposition, Bridges has had almost no involvement with his case whatsoever. He explained that until he was contacted about scheduling his deposition, he had not spoken with his lawyers since he initially contacted them three years earlier."). *But see Francisco v. Doctors and Merchants Credit Service, Inc.*, 1998 U.S. Dist. Lexis 12234, at *9 (N.D. Ill. Aug. 3, 1998) (finding that the fact that class representative met with his attorneys in person only once was "insubstantial and [had] little to do with [his] ability to represent the proposed class adequately").

2. When the class representatives had not read or reviewed the class action complaints. *See, e.g., Danielson*, 2007 U.S. Dist. Lexis 18609, at *22 (finding class representatives inadequate when they had either not read the complaint before it was filed or never read the complaint); *Koenig v. Benson*, 117 F.R.D. 330, 337 (E.D.N.Y. 1987) (finding one named plaintiff inadequate partly because he revealed during a deposition that he had not read the complaint before it was filed); *Levine v. Berg*, 79 F.R.D. 95, 97 (S.D.N.Y. 1978) (finding a class representative inadequate where "[s]he testified that although she glanced briefly through the complaint before it was filed, she did not consider it thoroughly until the day prior to the deposition" and her "deposition testimony reveals an alarming adversity to unearthing the facts relevant to her claim, as well as a total reliance on her counsel, to whom she 'gave...the case and...figured whatever he had to do, he did'"). *But see Schilling v. Transcor Am., LLC*, 2010 U.S.

Dist. Lexis 20786, at * 25 (N.D. Cal. Feb. 16, 2010) (finding the fact that the class representative had not read complaint prior to it being filed did not make him inadequate).

3. When the class representatives did not participate in discovery. *See, e.g., In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 367-68 (E.D. La. 1997) (finding certain named plaintiffs inadequate class representatives when they "failed to cooperate in discovery"); *Strykers Bay Neighborhood Council, Inc. v. New York*, 695 F. Supp. 1531, 1537 (S.D.N.Y. 1988) ("In failing to respond to defendants' discovery requests, these plaintiffs have shown that they will not adequately and fairly represent the class as required by Rule 23(a) (4)."). *But see Lackowski v. Twin Lab Corp.*, 2002 U.S. Dist. Lexis 27095, at *3-4 (E.D. Mich. Apr. 12, 2002) (finding the fact that "counsel, rather than Plaintiff himself, answered/verified the interrogatories...because each answer began with a reservation of protection from discovery due to the work product privilege" was not sufficient evidence to conclude that the plaintiff was an inadequate class representative).

4. When the class representatives did not take part in making significant litigation decisions. *See, e.g., Ballan v. Upjohn Co.*, 159 F.R.D. 473, 486 (W.D. Mich. 1994) ("The record is silent on Mr. Acito's participation in any of the crucial decisions which could affect the rights of the hundreds, if not thousands, of shareholders in this potential class."); *In re Quarterdeck Office Sys. Sec. Litig.*, 1993 U.S. Dist. Lexis 19806, at *17 (C.D. Cal. Sept. 30, 1993) (finding the named plaintiffs inadequate when they "were not familiar with the changes in the various amended complaints filed on behalf of the class" including being "unaware that [certain] defendants...were dropped as defendants").

5. When the plaintiffs' attorneys did not notify the class representatives about significant litigation events before they occurred. *See, e.g., In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. 2008) (finding the class representative inadequate when the designated witness for representative testified that "he did not know if an amended complaint had been filed, did not know

whether he had ever seen any complaint in the action, did not know that defendant McKelvey had moved to dismiss the complaint, and did not know that STA-ILA had moved for prediscovery summary judgment”); *Griffin v. GK Intelligent Sys., Inc.*, 196 F.R.D. 298, 302 (S.D. Tex. 2000) (finding class representatives inadequate when “[t]hey do not participate in litigation decisions, do not receive regular cost/expense information, and they learn of activity in the case when they are copied on matters already completed” indicating that it is “clear that they are lending their names to a purported class action solely at the suggestion of lead counsel”); *Byes v. Telephone Recovery Servs.*, 173 F.R.D. 421, 428–29 (E.D. La. 1997) (finding that a class representative was inadequate where, among other things, the plaintiff’s counsel had not communicated a settlement offer to the plaintiff).

One of these circumstances alone may or may not cause a court to conclude that a class has inadequate representation, depending on the jurisdiction and the representative’s detachment. However, when a class representative has ceded all control of the litigation to counsel, a class representative’s failure to participate in the litigation will likely be pervasive. Thus, defense attorneys should explore the degree to which class representatives have participated in all aspects of the litigation thoroughly during the discovery stage.

Engaging in Claim Splitting

“Claim splitting” arises when a class representative only pursues some potentially available claims against a defendant but not others. As the U.S. Court of Appeals for the Third Circuit recognized in *Nafar v. Hollywood Tanning Sys.*, claim splitting is a “very important issue in assessing the adequacy of representation requirement” because the res judicata doctrine may bar absent class members from pursuing the claims in subsequent litigation that the class representative does not pursue. 339 Fed. Appx. 216, 224 (3d Cir. 2009). Many courts that have considered claim splitting have at a minimum, identified it as a factor that supports denying class certification on inadequacy grounds. See, e.g., *Pearl v. Allied Corp.*, 102 F.R.D. 921, 923–24 (E.D. Pa. 1984)

(“In addition, it appears that the plaintiffs’ efforts to certify a class by abandoning some of the claims of their fellow class members have rendered them inadequate class representatives...[C]lass members whose claims would be abandoned by the plaintiffs may find themselves precluded by the doctrine of *res judicata* from asserting those claims in subsequent actions. For this reason, the plaintiffs cannot properly serve as class representatives.”); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982) (“a serious question of adequacy of representation arises when the class representatives profess themselves willing, as they do here, to assert on behalf of the class only such claims as arise from breach of an implied warranty” while foregoing “other claims, such as those for death, injury, accident-related property damage, or other consequential damage”). See also *Beal v. Lifetouch, Inc.*, 2012 U.S. Dist. Lexis 122350, at *10–11 (C.D. Cal. Aug. 27, 2012); *Rader v. Teva Parenteral Meds., Inc.*, 276 F.R.D. 524, 530 (D. Nev. 2011); *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 635 (W.D. Wash. 2011); *Kelecseny v. Chevron, U.S.A., Inc.*, 262 F.R.D. 660, 673 (S.D. Fla. 2009). But see *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 432 (4th Cir. 2005) (stating that a “class action, of course, is one of the recognized exceptions to the rule against claim-splitting” and that “Rule 23(c)(2) permits members of a class maintained under section (b)(3) to opt out of the class”). Importantly, when a class representative engages in claim splitting, the potential that the claim splitting could prevent absent class members from pursuing claims subsequently could lead a court to find that the class has inadequate representation. See, e.g., *In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354, 368 (S.D. Iowa 2008) (“[A]ny possibility that a subsequent court could determine that claims for personal injury and medical monitoring were barred by res judicata prevents the named plaintiffs’ interests from being fully aligned with those of the class. The Court therefore concludes plaintiffs are unable to establish the ‘adequacy of representation’ requirement set forth in Rule 23(a)(4).”).

Some courts have suggested that claim splitting does not prohibit class certification when the abandoned claims would otherwise have made obtaining class cer-

tification more challenging. See, e.g., *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 669 (D. Kan. 2004) (“[I]n this case the court is satisfied that the interests of the named plaintiffs are aligned with the interests of the absent class members. Although the named plaintiffs abandoned their common law fraud claim, they continue to pursue all of their other claims

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During a deposition,
defense counsel should ask
the class representative how
actively the representative
has monitored counsel
during the course of
the class action.

for compensatory damages, treble damages (a remedy akin to the punitive damage claim plaintiffs elected to forego when they abandoned their fraud claim), attorneys’ fees and costs, and a judgment enjoining defendants from continuing their allegedly unlawful combination or conspiracy. This is not a case where the class representatives are pursuing relatively insignificant claims while jeopardizing the ability of class members to pursue far more substantial, meaningful claims. Rather, here the named plaintiffs simply decided to pursue certain claims while abandoning a fraud claim that probably was not certifiable.”).

While an argument may exist that abandoning duplicative claims or claims that do not affect the potentially recoverable damages should not determine whether a class has an adequate representative, the idea that class representatives and their counsel can sacrifice claims strategically simply to increase the likelihood of class certification at the expense of absent class members contradicts the concept of adequate representation. Indeed, such circumstances often indicate that plaintiffs’ attorneys have impermissibly directed a class action, perhaps for their own benefit, but, at the very

least, without properly accounting for the interests of the absent class members. Thus, many courts have rejected the assertion that class representatives and their attorneys can abandon claims or choose not to assert them simply because they present obstacles to class certification. For example, in *Thompson v. American Tobacco Co.*, the court rejected the named plaintiffs' efforts to reserve personal injury and damages claims to make class certification more likely, stating "Representatives who tailored the class claims in an effort to improve the possibility of demonstrating commonality obtained this essentially cosmetic benefit only by presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action." 189 F.R.D. 544, 551 (D. Minn. 1999) (quotation marks and citation omitted). See also *Clark v. Experian Info. Solutions, Inc.*, 2001 U.S. Dist. Lexis 20024, at *13 (D.S.C. Mar. 19, 2001) ("Plaintiffs' efforts to limit their relief to only statutory damages in this case, may, in fact, jeopardize the remaining class members' rights to seek alternative grounds of relief in a subsequent case.... Thus, the court finds that Plaintiffs do not adequately represent the proposed class members.").

While claim splitting's impact on class certification has received disparate treatment by the courts, its presence, and the attendant potential preclusive effect on claims by absent class members, should, at a minimum, raise the concern that the plaintiff's counsel may be making significant decisions that do not necessarily protect the named plaintiff's or the absent class members' interests.

Defense Attorneys Should Test a Named Plaintiff's Adequacy Aggressively During the Discovery Stage

While a named plaintiff bears the burden of demonstrating that he or she is an adequate class representative during the class certification stage, class action defendants should not wait until class certification to address adequacy. Rather, prudent defendants and their counsel should aggressively explore issues relating to a class representative's adequacy throughout discovery using all available tools. In the event that

such discovery is fruitful, when the class certification application is ripe the defense can, in addition to arguing that the named plaintiff failed to meet his or her burden, provide affirmative evidence demonstrating inadequacy.

Deposing the class representative will certainly be critical to testing adequacy, but class action defendants can also investigate issues relating to adequacy and lay the groundwork for exploring issues further during the deposition with targeted interrogatories and documents requests related to the factual basis for the asserted claims, investigation that the plaintiff has performed of the claims, and when and how the plaintiff began the relationship with counsel. During the deposition, then, defense counsel should follow up on these issues and explore the role that the plaintiff had in responding to the written discovery and any inconsistencies between the discovery responses and deposition testimony that could demonstrate that the plaintiff had a limited role in responding to discovery, or none at all, because the plaintiff's counsel unduly controlled the litigation.

It is essential to find out whether a class representative actually comprehends the nature of a class action, as well as the role and responsibilities of a class representative acting on behalf of a class, when deposing a class representative. Asking a class representative questions to uncover his or her understanding of the class that he or she purports to represent, how much he or she or their counsel have consulted the absent class members, or have taken their interests into account can reveal potentially valuable information about whether the named plaintiff appreciates his or her formal role and can and will act in the interests of the entire class.

Certainly, depositions should focus significant inquiry on a class representative's knowledge of the claims in the class action, including on the class representative's understanding of the facts of the case, the asserted claims, the identity of all defendants, if and how each defendant caused the plaintiff and the class harm, and the nature and amount of damages sought individually and on behalf of the class. The potential likelihood that a defense attorney can convince a court to find a class representative inadequate will depend on

how much information the witness can offer and its accuracy. In addition, when a class representative can supply information in response to questions, it is important to know whether its source is personal or is derived solely from counsel. Lacking personal knowledge would support an argument that the class representative has simply lent his or her name to a class action controlled by counsel.

Finally, during a deposition, defense counsel should ask the class representative how actively the representative has monitored counsel during the course of the class action. Defense counsel will want to ask a class representative questions that will reveal the following facts:

How many times and when have the representative and the plaintiffs' attorney communicated;

What does the representative know and understand about significant litigation events ranging from pleading amending to settlement offers;

How has the plaintiffs' attorney involved the class representative in the litigation, asking, for example, if the plaintiff reviewed the complaint, reviewed discovery responses, or provided information to the attorney; and

Has the class representative played a role in making decisions about prosecuting the class action; for example, did he or she help decide which claims to assert or not to assert, which defendant or defendants to sue.

The answers to these questions will likely reveal whether or not a named plaintiff truly represents the putative class or has abdicated responsibility to counsel.

The decision in *Simon v. Ashworth, Inc.* demonstrates how diligently pursuing discovery regarding adequacy can create a wealth of valuable information that defense attorneys ultimately can use to defeat class certification because the representative plaintiff is so inadequate that the plaintiff's attorney has taken on the class representative role. 2007 U.S. Dist. Lexis 96131 (C.D. Cal. Sept. 28, 2007). There, the named plaintiff filed a class action alleging that the defendant violated the Fair Credit Reporting Act as amended by the Fair and Accurate Credit Transaction Act of 2003, which provided the opportunity for actual damages or statutory penalty damages. 15 U.S.C. §1681n(a)(1)(A). The record evidence

established during discovery demonstrated that the plaintiff

1. Did not know what his role was as a class representative or what his duties were to the class, 2007 U.S. Dist. Lexis 96131, at *6;
2. Never saw the complaint before he gave his deposition, did not know when it was filed, did not review any documents relating to the case, did not know that the court had dismissed one of his claims, and testified that his attorneys made the decisions in the case, *id.* at *6–7;
3. Testified that the only time that he had spent on the litigation was speaking with his attorney for 20 minutes the day before giving his deposition, *id.* at *7–8;
4. Provided inconsistent answers explaining why he decided to file the lawsuit, *id.* at *8–9;
5. Was unaware of a motion for class certification even though he had signed a certification in support of such a motion, *id.* at *9;
6. Testified that he had never seen the responses to the defendant’s document requests even though he had signed those responses, *id.* at *10;
7. Testified that he did not know whose answers were contained in his responses to the defendant’s interrogatories and that he did not provide information for those responses even though he had signed them, *id.*;
8. Testified that he simply signed documents for his attorneys without knowing what they were, *id.* at *10–11;
9. Testified that he did not expect class members to receive any money from the lawsuit even though it was sought in the complaint on behalf of the class, *id.* at *11–12; and
10. Testified, upon learning that statutory damages were available under the statute, that he was not interested in pursuing such damages for the class, *id.* at *12–13.

Based on these facts, the court concluded that the plaintiff was not an adequate representative because he had “essentially abdicated his role to his attorneys” and was “essentially prosecuting this action solely for attorneys’ fees.” *Id.* at *8, 13. As the court stated: “We find that Plaintiff’s failure to take even minimal interest in the progress of

his case thus far is overwhelming evidence that he cannot adequately represent the interests of the class members.” *Id.* at *8–9.

Conclusion

Defeating class certification on adequacy grounds by demonstrating that an attorney impermissibly has acted as the class representative is not necessarily easy. Certainly, attorneys have taken the commonality factor in Federal Rule 23(a) and the predominance requirement of Federal Rule 23(b)(3) as the more traditional avenues of attack, and they have received more substantial treatment by the courts. Nevertheless, as the class action plaintiffs’ bar continues to become more creative in developing class actions that seek to circumvent recent Supreme Court rulings on commonality and predominance, defense attorneys should become prepared to avail themselves of *all* the potential arguments available to defeat class certification.

Defense attorneys should not only hold class action plaintiffs and their attorneys to their burden of presenting sufficient evidence to prove that they are adequate representatives, but they can and should vigorously test claims of adequate representation throughout the litigation, attempt to develop a record of the class representative’s inadequacy, and forcefully challenge the class representative’s adequacy during the class certification phase. While some courts have shown reluctance to embrace attacks on a class representative’s knowledge of and participation in the class action lawsuit, the Federal Rule 23(a)(4) directive that a class representative “fairly and adequately protect the interests of the class” is not a pro forma requirement that courts can simply rubberstamp. Indeed, Federal Rule 23(a)(4) would become meaningless if courts permitted uninformed class representatives to lend their name to class action lawsuits prosecuted by and for their attorneys. 