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A Discovery Checklist for Defeating Certification on Adequacy Grounds

By Damian Santomauro, Melissa DeHonney, and Caroline E. Oks – June 3, 2014

In mapping out a case strategy to defeat class certification, Federal Rule of Civil Procedure 23(a)(4)'s adequacy requirement can take a backseat to the more traditional factors such as predominance, typicality, and commonality. The adequacy requirement, however, can have real teeth and should not be given short shrift. But to tee up an inadequacy argument sufficient to defeat certification, discovery on this subject must be more than an afterthought. By using the checklist below and giving due consideration to the facts relevant to the adequacy inquiry, defense counsel can rigorously test whether the named plaintiff and his or her counsel can "fairly and adequately" represent the putative class.

Identify Conflicts of Interests

The absence of conflicts is a central tenet of adequacy, and it applies to both representative plaintiffs and class counsel. *See, e.g.*, *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); *McCrary v. Elations Co.*, 2014 U.S. Dist. LEXIS 8443, at *36 (C.D. Cal. Jan. 13, 2014) ("The adequacy inquiry turns on . . . whether the named plaintiff and class counsel have any conflicts of interest with other class members[.]").

As a starting point, routinely seek retainer agreements between class counsel and the named plaintiffs. These agreements bear directly on the adequacy of both parties, and they are discoverable. *See, e.g.*, *Radcliffe v. Experian Info.*, 715 F.3d 1157, 1164–65 (9th Cir. 2013) (finding both class counsel and named plaintiffs inadequate where fee agreement created conflict between the named plaintiffs, who would receive incentive awards, and absent class members, who would not); *Porter v. Nationscredit Consumer Disc. Co.*, 2004 U.S. Dist. LEXIS 13641, at *6–8 (E.D. Pa. July 8, 2004) (compelling plaintiff to produce documents concerning fee arrangements because "issues relating to the creation, maintenance, and management of class action suits are discoverable"); *In re Sheffield*, 280 B.R. 719, 722 (Bankr. S.D. Ala. 2001) (holding that defendant was entitled to fee agreements because they might reveal "potential conflicts or biases").

Also, search dockets, legal research databases, and the Internet to identify "traditional" conflicts.*See, e.g.*, *Levias v. Pac. Mar. Ass'n*, 2010 U.S. Dist. LEXIS 11495, at *16–17 (W.D. Wash. Jan. 25, 2010) (denying certification where there was a risk that absent class members would be "sold out" by the named plaintiff, who was prosecuting a separate individual action

against the same defendant) ("The potential exists for a favorable settlement in the individual action that might undermine the loyalty of Mr. Levias to the putative class in this matter."); *Nat'l Air Traffic Controllers Ass'n v. Dental Plans*, 2006 U.S. Dist. LEXIS 12544, at *11–12 (N.D. Ga. Mar. 10, 2006) (denying certification where "the appearance of divided loyalties" existed because class counsel simultaneously represented a potentially liable party in a separate action).

Confirm the Class Representative's Credibility (or Lack Thereof)

Credibility also bears directly on adequacy. *See, e.g.*, *Jamison v. First Credit Servs.*, 290 F.R.D. 92, 104–5 (N.D. Ill. Mar. 28, 2013) (finding plaintiff inadequate based on his prior felony conviction for fraud-related offense). *But see* 3 Alba Conte & Herbert G. Newberg, *Newberg on Class Actions* § 7.8 (4th ed. 2005) ("[U]nsavory character or credibility problems will not justify a finding of inadequacy unless related to the issues in the litigation."). Of course, bookmark any inconsistent testimony. *See, e.g.*, *Jovel v. Boiron*, 2014 U.S. Dist. LEXIS 35908, at *4–13 (C.D. Cal. Feb. 27, 2014) (finding the would-be class representative inadequate where he gave inconsistent deposition testimony on a material issue and "relied on different justifications for why he changed his testimony[,]" including having his attorney "refresh his recollection" during a break). But also, do independent fact research to test the named plaintiff's integrity, even absent inconsistencies. Seek testimony in prior actions, review court dockets, and consider all repositories of potentially relevant information based on the facts of the case (e.g., social media, motor vehicle abstracts, property records). *See, e.g.*, *In re Hydroxycut Mktg. & Sales Practices Litig.*, 2013 U.S. Dist. LEXIS 133413, at *67–68 (S.D. Cal. Sept. 17, 2013) (finding that Facebook posts soliciting class action plaintiffs "bear upon the credibility" and call into question the motives of a would-be objector) ("Although Ms. McBean claims that she was joking when she said that she would 'throw down a grand' if her friend found a class member, the Court is not so sure."). In some cases, a private investigator may be a worthwhile expense. If the client's litigation budget permits it, videotaping depositions can be a good tool for exposing credibility problems.

Make Class Representatives Explain Their Role

Courts will find named plaintiffs inadequate where "the proposed representatives, on the whole, do not understand their duties and obligations as class members." *Burton v. Chrysler Grp.*, 2012 U.S. Dist. LEXIS 186720, at *23–24 (D.S.C. Dec. 21, 2012); *see also Scott v. N.Y. City Dist. Council of Carpenters Pension Plan*, 224 F.R.D. 353, 356 (S.D.N.Y. 2004) (finding representative inadequate where he did not know whether the litigation was a class action, what a class representative was, or what the lawsuit concerned). It is likely to be most fruitful to inquire into this area during the named plaintiff's deposition by asking the named plaintiff to articulate the difference between individual and class actions and to list the duties of class representatives.

In addition, questions regarding the named plaintiff's understanding of what a class representative is, whether there is one in this case, and what the named plaintiff understands his or her role to be in the case to date and going forward can provide valuable information demonstrating that the class representative lacks the requisite understanding of his or her

obligations. Determine how much time the named plaintiff has devoted to the case and intends to devote in the future. Answers to such questions, particularly by an ill-prepared plaintiff, can demonstrate that the class representative is inadequate. *See, e.g.*, *Price v. United Servs. Auto. Ass'n*, 2012 U.S. Dist. LEXIS 97179, at *23 (W.D. Ark. Mar. 16, 2012) ("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.").

Determine Whether the Class Representative Understands the Claims and Actively Participates in the Action

Courts have denied certification where the named plaintiff exhibited little to no knowledge of the claims asserted or the procedural history of the action. *See, e.g.*, *In re Monster Worldwide Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. 2008) (denying certification where the named plaintiff did not know an amended complaint had been filed or whether he ever saw the original complaint and did not know that defendant moved to dismiss the complaint and sought summary judgment);*Danielson v. DBM*, 2007 U.S. Dist. LEXIS 18609, at *22–23 (N.D. Ga. Mar. 15, 2007) (noting that named plaintiff's failure to read the complaint before it was filed may be sufficient to defeat class certification); *Jones v. CBE Grp.*, 215 F.R.D. 558, 568–69 (D. Minn. 2003) (finding named plaintiff inadequate because he believed he was asserting a claim that was not part of the complaint).

Find out how frequently the named plaintiff communicates with class counsel. If a named plaintiff professes to be an active participant, he or she must confer with counsel with some measure of regularity. Defense counsel must take care not to invade privileged territory here. To stay on the right side of the line, ask only how often counsel and the named plaintiff confer, by what method (phone, email, etc.), and for how long. The fact that communications occurred (as distinguished from their substance) is not privileged. *See, e.g.*, *ABC v. Aereo*, 2013 U.S. Dist. LEXIS 144851, at *17–19 (S.D.N.Y. Oct. 7, 2013) ("[T]he attorney-client privilege is not implicated in the absence of a question . . . seeking what they told their counsel or, perhaps, what their counsel told them."). Of course, be aware of opportunities for further questioning where the named plaintiff effectively waives the privilege. *See, e.g.*, *RA Invs. I v. Deutsche Bank AG*, 2005 U.S. Dist. LEXIS 10581, at *9 (N.D. Tex. June 1, 2005) ("Even if information is protected by the attorney-client privilege, the voluntary disclosure of that information waives the privilege.").

Ask the named plaintiff to outline what has transpired in the action to date—and press for particulars. *See In re Kosmos Energy Ltd. Secs. Litig.*, 2014 U.S. Dist. LEXIS 36365, at *44 (N.D. Tex. Mar. 19, 2014) ("[G]eneric detail is really no detail at all, for it provides naught by which to assess [the named plaintiff's] credibility, her knowledge about the underlying facts of the case, or how much of what she has stated may have been prompted by counsel."). For example, ask if the named plaintiff understands (1) the underlying facts of the case, (2) the asserted claims, (3) the identity of all defendants, (4) if and how each defendant allegedly caused the plaintiff and the class harm, and (5) the nature and amount of damages sought individually and on behalf of the class.

Don't be dismayed if opposing counsel objects to this line of inquiry on privilege grounds. This may only serve to underscore the named plaintiff's inadequacy. *See, e.g.*, *Karnes v. Fleming*, 2008 U.S. Dist. LEXIS 109518, at *7 (S.D. Tex. July 31, 2008) ("That the proposed class representative gained knowledge of the facts and issues from counsel is insufficient." (citation omitted)); *Middleton v. Arledge*, 2008 U.S. Dist. LEXIS 77352, at *32–34 (S.D. Miss. Mar. 31, 2008) (holding that plaintiff was inadequate where she testified that whether she would be a class representative was up to her attorney and her attorney refused to allow her to answer questions regarding the class she purportedly was representing); *Kelley v. Mid-Am. Racing Stables*, 139 F.R.D. 405, 409 (W.D. Okla. 1990) ("[T]he Court finds that these plaintiffs are inadequate representatives because of their almost total lack of familiarity with the facts of their case. Indeed, what the plaintiffs know appears to come entirely from their counsel.").

Expose "Puppet" Litigants

In addition to the requirements that a class representative must actively participate in the action and understand his or her role and the claims being asserted, an adequate class representative cannot abdicate his or her duties to class counsel. *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." (internal quotation marks and citation omitted)), *denial of class certification aff'd*, 2012 U.S. App. Lexis 14694 (9th Cir. July 18, 2012); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) ("Class representatives must satisfy the court that they, and not counsel, are directing the litigation."); *Baffa v. Donaldson*, 222 F.3d 52, 61 (2d Cir. 2000) (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" (internal quotation marks and citation omitted)). Here again, how frequently counsel and the supposed client confer is critically important, as is the named plaintiff's role in the decision-making process. *See, e.g.*, *Griffin v. GK Intelligent Sys.*, 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"). Ask the named plaintiff to explain his or her role and level of involvement in every step of the litigation, from pleadings and discovery responses through consideration of settlement offers and appeals, and every step in between.

Determine the Relationship Between Class Counsel and the Named Plaintiff

A close personal relationship "creates a present conflict of interest—an incentive for [the named plaintiff] to place the interests of [class counsel] above those of the class." *London v. Wal-Mart Stores*, 340 F.3d 1246, 1255 (11th Cir. 2003); *see also Sipper v. Capital One Bank*, 2002 U.S. Dist. LEXIS 3881, at *7–8 (C.D. Cal. Feb. 28, 2002) (denying certification where class counsel and the named plaintiff were business partners and had previously been joint defendants in a lawsuit). Close relationships must be scrutinized "because they pose the danger of champterty [sic]," i.e., improper fee-sharing, "especially when the attorney's fees will vastly exceed what any of the class members will receive." *Bohn v. Pharmavite*, 2013 U.S. Dist. LEXIS 125006, at

*12 (C.D. Cal. Aug. 7, 2013) (internal quotations and citations omitted); *but see In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 309 (S.D.N.Y. 2004) (holding that the close friendship between the class representative and class counsel is not a per se bar to class certification).

The opposite scenario—where the named plaintiff and class counsel are essentially strangers—can result in the denial of class certification, too. *See, e.g.*, *In re JPMorgan Chase & Co. S'holder Derivative Litig.*, 2008 U.S. Dist. LEXIS 71353, at *29 (S.D.N.Y. Sept. 19, 2008) (finding named plaintiff inadequate where, among other things, he met counsel for the first time the day before his deposition and either never signed a retainer agreement or did so the day of his deposition); *Bodner v. Oreck Direct*, 2007 U.S. Dist. LEXIS 30408, at *3 (N.D. Cal. Apr. 25, 2007) (denying certification because, among other things, "[p]laintiff met his attorney in person for the first time the day before his deposition").

Consider Class Counsel's Conduct

Defeating certification based on inadequate counsel is often a dead-end endeavor, as most practitioners are not vulnerable to such attacks. However, adequacy of class counsel should not be presumed. Search legal opinions and other available sources for any past misconduct by plaintiff's counsel to determine whether the adequacy of such counsel has ever been an issue.*See, e.g., Walter v. Palisades Collection*, 2010 U.S. Dist. LEXIS 7374, at *31 (E.D. Pa. Jan. 26, 2010) ("Prior unethical conduct is a relevant consideration pursuant to certification under Rule 23(a)(4)."). Certainly, where opposing counsel's conduct evinces a clear lack of competency, discovery on this subject must be pursued. *See, e.g.*, *Rothman v. Gen. Nutrition Corp.*, 2011 U.S. Dist. LEXIS 134515, at *19–20 (C.D. Cal. Nov. 17, 2011) (finding plaintiff's counsel inadequate where, following the Supreme Court's seminal decision in *Dukes v. Wal-Mart*, counsel cited the Ninth Circuit's ruling as supporting certification; stating that "[c]ounsel's unfamiliarity with "arguably the most influential Supreme Court decision of the past decade" meant either that counsel is not sufficiently up to speed on prevailing precedents or that the motion was "mere boilerplate").

Conclusion

Defense counsel should probe the plaintiff's adequacy during discovery early and often. If you neglect to do so, you will almost certainly come up empty-handed. But with some targeted effort, you may hit pay dirt, expose the inadequacy of the named plaintiff and/or his or her class counsel, and defeat class certification.

Damian Santomauro is a director and Caroline E. Oks is an associate at Gibbons, P.C., in Newark, New Jersey. Melissa DeHonney is formerly counsel at Gibbons.