

Attorneys Can Send Notices to Possible Class-Action Plaintiffs

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Focus Column

Litigation

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Class-action counsel now may communicate freely with proposed class members before class certification without court approval. The 2nd District Court of Appeal, in *Parris v. Superior Court (Lowe's H.I.W. Inc.)*, 2003 DJDAR 5759 (Cal. App. May 29, 2003), ruled that pre-certification communications with potential class members, including dissemination of written notices, constitutes speech protected by the First Amendment for which no prior court approval is necessary.

According to *Parris*, pre-certification notices to potential class members previously were permitted under *Atari Inc. v. Superior Court*, 166 Cal.App.3d 867 (1986), if the trial court examined their content and determined that the notices contained no specific improprieties.

Cynthia Parris and Willie Lopez were Lowe's Home Improvement Store employees classified as "nonexempt" from state and federal wage and overtime laws. They brought a proposed class action under the Labor Code on behalf of themselves and similarly situated co-workers for failure to pay overtime compensation for hours worked "off the clock" and compensation owed at termination.

They moved for orders permitting pre-certification notice to potential class members and for approval of the notice and method of dissemination. Concurrently, they moved to compel responses to interrogatories seeking names and addresses of current and former Lowe's employees, the potential class members to receive the notice.

The purpose of the motions was to enable the plaintiffs, with the court's approval, to contact employees and gather corroborating information to confirm that other employees were affected by Lowe's "off the clock" practices, establishing the uniformity sufficient to support a class-certification motion. The trial court denied the motions.

The Court of Appeal granted the plaintiffs' petition for a writ of mandate. It held that pre-certification communication with potential class members is speech protected by the First Amendment and the California Constitution, requiring no judicial approval. Consequently, the motion to approve the notice of the action was unnecessary and should have been denied on that ground.

Parris held that a court may impose restrictions on such communications only when the opposing party seeks an injunction, protective order or other relief and demonstrates "direct, immediate, and irreparable harm." Nonspecific assertions that communications are "unfair," "inaccurate" or "misleading" are insufficient to justify limitations on protected speech in the form of a prior restraint. "A generalized and abstract interest in the proper administration of justice or fear of *potential* abuse, however, does not warrant imposition of a blanket requirement of prior judicial approval for pre-certification communications with potential class members."

The court noted that attorneys engaging in pre-certification communications must abide by Rule of Professional Conduct 1-400, which prohibits solicitation of clients by communications delivered in person or by telephone. Rule 1-400 does not prohibit notices sent by mail and Web sites prepared by plaintiffs' counsel. *Parris* held that any restrictions must be narrowly drawn and cannot be upheld if reasonable alternatives with a lesser impact on free speech are available. Restrictions also must contain procedural safeguards that reduce the danger of suppressing constitutionally protected speech. See *Bernard v. Gulf Oil Co.*, 619 F.2d

469 (5th Cir. 1983).

Parris expressly rejected a rule, established in two earlier Court of Appeal decisions, that required the trial court to screen communications.

Atari upheld the role of the trial court to monitor the content of notices to proposed class members and to authorize the communications only if the court determines that "there is no specific impropriety." *Atari* expressly declined to consider whether class-action parties have a First Amendment right to communicate with potential class members. *Howard Guntz Profit Sharing Plan v. Superior Court*, 88 Cal.App.4th 572 (2001), rejected a free-speech justification for unrestricted pre-certification notice.

The *Parris* court disagreed with another panel of the 2nd District Court of Appeal in *Howard Guntz*. Citing *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), the *Parris* court stated that "we respectfully disagree with the free speech analysis of our colleagues in Division Four. The requirement of court approval for pre-certification communications is a classic example of prior restraint on speech."

Parris also provides, for the first time, direct guidelines for courts to follow in ruling on motions to compel pre-certification production of names and addresses of potential class members. This information often is the primary means of identifying and contacting absent class members to establish that the violation or practice at issue is affecting others on a widespread basis.

After *Parris*, a trial court ruling on a motion to compel production of names and addresses of potential class members must identify expressly any potential abuses of the class-action procedure that may be created if the discovery is permitted and must weigh the danger of such abuses against the rights of the parties. The court noted, "Although parties are free to communicate with potential class members before class certification, when they seek to enlist the aid of the court in doing so, it is appropriate for the court to consider 'the possibility of abuses in class action litigation.'"

Parris did not delineate any specific "abuses." It did, however, cite *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), which quoted from *Waldo v. Lakeshore Estates Inc.*, 433 F.Supp. 782 (E.D. La. 1977). *Waldo* describes abuses such as "heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding." Although the *Gulf Oil Co.* court neglected to define "barratry," the American Heritage Dictionary of the English Language (4th ed. 2000), defines it as "the offense of persistently instigating lawsuits, typically groundless ones." The *Parris* court noted that "[unapproved] communications to class members that misrepresent the status or effect of the pending action also have an obvious potential for confusion and/or adversely affecting the administration of justice."

These types of abuses typically would not be implicated where the plaintiffs' goal is compiling an accurate history of employment practices or other experiential information rather than "drumming up" participants for the action.

The only previous guidance on compelling production of names and addresses of potential class members is *Union Mutual Life Ins. Co. v. Superior Court*, 80 Cal.App.3d 1 (1978). That opinion recited without comment - but in apparent approval - the trial court history. The trial court had granted a motion to compel names and addresses of one category of class members. The defendant first had petitioned for a writ of prohibition, but then agreed to the production.

The *Parris* court remanded the employees' motion for further analysis by the trial court to determine whether revealing the employees' identities and contact information might create abuses that would outweigh the rights to develop the case through class-certification discovery.

As a practical matter, *Parris* reasonably facilitates the class-action process. The parties have an absolute right to discovery prior to class certification. *Carabini v. Superior Court*, 26 Cal.App.4th 239 (1994). Such discovery generally is limited to the certification issues of whether there is an ascertainable class and a community of interest in the questions of law and fact.

Ascertainability issues concern the definition and size of the class and the means of identifying class members. *Miller v. Woods*, 148 Cal.App.3d 862 (1983). The existence of a community of interest turns on whether common questions of law and fact are sufficiently pervasive to permit class adjudication.

The community-of-interest requirement is satisfied if there are predominate questions of law or fact common to the class, the plaintiff's claims are typical of those of the class and the plaintiff is an adequate representative. *Richmond v. Dart Industries Inc.*, 29 Cal.3d 462 (1981). The adequacy issue also concerns the competency of counsel to litigate class claims.

It can be challenging for a party moving for class certification to document class-wide common conduct by locating and verifying the experiences of others who similarly are affected. The right to communicate

without prior approval provides counsel ready access to proposed class members for the purposes of collecting the evidence necessary either to support a class certification motion or to determine that disparities among potential class members indicate that common questions do not predominate.

Parris' language, requiring a showing of "direct, immediate, and irreparable harm" to support a protective order, should prevent parties opposing communications from disrupting investigative efforts absent true circumstances justifying an interference with free speech.

Information obtained through contact with proposed class members is particularly useful in certifying wage-and-hour class actions. In *Parris*, for example, the employees brought an action on behalf of all nonexempt managers and customer-service personnel against an employer, Lowe's, with multiple outlets in California.

In order to obtain certification to proceed with an overtime claim on behalf of employees of all stores, the plaintiffs must demonstrate that these types of employees are, or have been, similarly treated companywide. Motions to compel production of names and addresses often are the key to this process.

Once the plaintiffs have obtained contact information - through cooperative discovery, by an order compelling production of names, addresses and telephone numbers or through independent means - they can support a certification motion with declarations or deposition testimony documenting the employer's practices at other stores.

Parris' lifting of restrictions on pre-certification communications makes it easier to locate potential class members through dissemination of a pre-certification notice of a pending action, thus obtaining vital information supporting class certification.

This is essential, particularly in light of the pending state Supreme Court review in *Sav-On v. Superior Court (Rocher)*, 97 Cal.App.4th 1070 (2002), which involves denial of a class certification based on conflicting declarations regarding the similarities and disparities in job duties of employees classified as exempt managers throughout the Sav-On drugstore chain.

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