Pre-Certification Communication With Putative Class Members

By Michael D. Singer

INTRODUCTION

This article discusses the scope and purpose of pre-certification communications between counsel and putative class members (PCMs) under California law, focusing primarily on wage and hour cases. Such communication between plaintiffs' counsel and PCMs is a matter of First Amendment right and is vital to gathering evidence to support a class certification motion. Contact between defense counsel and employees of a corporate defendant, also essential for defending a certification motion, is governed by Rules of Professional Conduct, Rule 3-600.

BACKGROUND

Before class certification has taken place, all parties are entitled to "equal access to persons who potentially have an interest in or relevant knowledge of the subject of the action, but who are not yet parties." (*Atari, Inc. v. Superior Court* (1985) 166 Cal.App.3d 867, 869.)

Typically, plaintiffs' counsel propounds immediate discovery in the form of special interrogatories seeking names, addresses, and phone numbers for all current and former PCM employees. Once obtained, counsel may conduct a mass mailing of an informational letter to PCMs asking that they contact counsel by phone or prepare and mail a questionnaire seeking information related to the claims in the suit. *Tien v. Superior Court* (2006) 139 Cal.App.4th 528, held on privacy grounds that the identities of class members who contact plaintiff's counsel must remain anonymous. Some courts, however, have compelled production of completed PCM questionnaires over work-product and attorney-client privilege objections.

The ultimate objective of this process is to obtain declarations containing admissible evidence sufficient to establish company-wide policies, practices, or procedures that are out of compliance with California labor law, sufficient to satisfy the moving parties' evidentiary burden for certification under Rule 3.764, California Rules of Court or F.R.C.P. 23. The defense will have its own offering of declarations. To the extent a particular judge's scheduling preferences permit time to do so, the parties inevitably depose some or all of the declarants. Since the concept of the declarations is to present a representative sample of the evidence establishing class-wide conduct or a pattern and practice of non-compliance affecting a large group of employees, plaintiffs' counsel is generally advised to seek an order limiting the number of depositions to 10% of the number of declarations, either through a simple ex parte application or formal motion for protective order.

THE DEFENSE THEORIES

The conflict around discovery of class member contact information is driven by defendants who want to control and limit information and do not want plaintiffs' counsel to have access to information to assist in the preparation of their case. Defendants historically refuse production of their employees' contact information under two theories. Initially, defendants claimed plaintiffs had to affirmatively establish "legitimate need" before a court should order production. After this theory lost traction in the courts, defendants fabricated the theory that disclosure violates PCMs' privacy rights. Often, these same champions of privacy use the time during which they are resisting discovery of contact information to conduct interviews in the workplace observing no concern for privacy and perform their own evidence-gathering in defense of an expected certification motion.

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In ensuing motions to compel production, defendants claim contact information is completely protected from discovery under privacy grounds. Alternatively, they propose that a neutral privacy notice be mailed and response required on an "opt-in" basis requiring PCMs to mail in their consent to be contacted by plaintiffs' counsel. The intention is clearly to limit the number of PCMs whose information is disclosed. Plaintiffs argue they have a right to discover the identity of potential witnesses under Code of Civil Procedure section 2017.010 ["discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter"] and that privacy interests are really not triggered in the case of employees whose rights to back pay from wrongfully withheld wages are at issue. Alternatively, plaintiffs suggest consent to be contacted be effectuated on an "opt-out" basis such that disclosure of contact information will be ordered as to all PCMs who receive notice and do not affirmatively request exclusion. This "opt-out" procedure matches that applicable to service of class notice and class composition following certification.

Ultimately, the courts have sided with

the rights of plaintiffs to obtain contact information with which to engage in pre-certification communications with PCMs, generally on an opt-out basis. The courts find that the right to conduct certification discovery outweighs PCMs' privacy rights in having contact information disclosed.

In cases alleging that companies improperly classified managerial employees as exempt from overtime pay, defendants also commonly assert that pre-certification communications violate Rule 2-100, Rules of Professional Conduct. Rule 2-100 prohibits attorneys from contacting parties represented by counsel. "Parties," the argument goes, include managerial employees as "managing agents" of the corporation whose statements may be binding upon or imputed to the organization for liability purposes or may constitute an admission. This argument is countered by the fact that it presupposes that PCMs were properly classified as managerial exempt employees and that they have authority to bind the corporation. A stipulation that statements from PCMs will not be asserted as admissions binding the company also dispels this defense argument. Courts typically find such communications will not violate Rule 2-100. (See, generally, *La Jolla Cove Hotel and Motel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773, 787; *Koo v. Rubio's Restaurants, Inc* (2003) 109 Cal.App.4th 719; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187; *Saunders v. U-Haul Corporation*, 1st App. Dist. Div. 3, San Francisco Superior Court Case. No. 171057 (unpublished); *Shahkokhshahi v. Round Table Pizza, Inc.*, Alameda Superior Court Case No. RG05194700, Sept. 30, 2005.)

GENERAL RIGHT TO PRE-CERTIFICATION CONTRACT

The history of published cases involving the need to contact absent class members dates back to the Supreme Court decision in *La Sala v. American Savings & Loan Association* (1971) 5 Cal.3d 864. Defense firms often take aim at the class representative under the mistaken belief that a ruling of inadequacy will effectively end the case. In *La Sala*, the class representative had been deemed inadequate, but the Supreme Court found in such circumstances that plaintiff's counsel must be permitted to cure the defect by locating new class representatives. (*La Sala*, *supra*, 5 Cal.3d at p. 872.) Where there is a large group of individuals suffering harm, the class action should continue with substitute class representatives. Two later cases specifically confirm the right to pre-certification communications in connection with efforts to locate substitute class representatives. (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572; *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772.) But this right is not without limitations. Courts will generally deny plaintiffs discovery where the class representative plainly has not suffered the same injuries alleged on behalf of the class. (*First American Title Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1566.)

However, in *CashCall, Inc. v. Superior Court* (Jan. 24, 2008) ___ Cal.App.4th ___, 2008 Cal.App. LEXIS 121, named plaintiffs who were not part of the class they sought to certify were nonetheless afforded the opportunity to obtain pre-certification contact information of 551 people whose telephone communications were monitored without their knowledge or consent in order to locate a suitable class representative. The court found the dangers of abuse that precluded disclosure in *First American Title Co.* were not present.

But even though *La Sala* provided an important foundation to the right to add class representatives, it was silent on the method to do so; namely, that discovery of PCM contact information be allowed to permit plaintiff's counsel to pre-certification communication. Piece by piece, however, the courts have granted this right to discovery over the last few decades.

In *Budget Finance Plan v. Superior Court* (1973) 34 Cal.App.3d 794, the court authorized discovery of class member contact information, stating plaintiffs were entitled to discovery of the names of potential plaintiffs who might be of assistance in the presentation of the case.

In *Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 Cal.App.3d 1, an Auto Club employee disability claimant sought to certify a class of claimants whose benefits were improperly reduced due to Social Security increases. Plaintiffs propounded the following interrogatory:

> What is the name and last known address (and telephone number, if known) of each person covered by the certificates issued pursuant to the master agreement with the Auto Club?

(*Id.* at 7-8.) This question pertained to a state-wide class cause of action. Union Mutual refused to produce the information on the grounds that it was only relevant if the court certified the case as a class action and that it would be unduly burdensome and oppressive to locate the information in computer records and individual claims files. Similar interrogatories were propounded seeking information to support an amendment for a nationwide class, to which Union Mutual objected on relevancy grounds absent a pending nationwide class cause of action. The lower court directed the defendant to answer the interrogatories.

On appeal, the parties "worked out their differences" as to the interrogatories pertaining to the State class cause of action, and the Court of Appeal affirmed the trial court order compelling the defendant to produce the names, addresses and telephone numbers of all employee disability recipients (that is, the proposed class members), as well as the amounts being received. The Court of Appeal also ordered the defendant to respond to interrogatories concerning potential, non-resident class members, so that plaintiff could obtain information to amend the complaint to state a nationwide class claim.

In *Colonial Life & Accident Ins. Co. v. Superior Court* (*Perry*) (1982) 31 Cal.3d 785, a non-class case, the plaintiff (an administratrix acting on behalf of the deceased insured) brought a lawsuit against an insurance company for breach of contract and breach of the duty of fair dealing and good faith. Plaintiff served discovery seeking "all documents pertaining to cases handled" by the defendants. Plaintiff sought to establish that defendants denied valid claims with such frequency as to indicate a general business practice. (See, *Colonial Life*, *supra*, 31 Cal.3d at p. 790; Ins. Code, § 790.03, subd. (h).) Further, plaintiffs moved to compel discovery of the names and addresses of other insureds. The court granted the motion and also approved a letter sent by plaintiffs to request permission from the insureds to view their records. Finally, "no restraint was placed on any party regarding claimants who responded to the letter." The Su-

preme Court confirmed the order. (See *Colonial Life, supra*, 31 Cal.3d at p. 789.)

In *Atari v. Superior Court, supra*, 166 Cal.App.3d 867, the court considered a trial court's order granting class counsel permission to contact class members, while simultaneously denying the defendant to do so. The court upheld the plaintiffs' right to communicate with the putative class members but denied the trial court's restriction placed on the defendant: "We conclude that the evidence of record does not justify denying any party equal access to persons who potentially have an interest in or relevant knowledge of the subject of the action, but who are not yet parties." (*Id*. at p 869.)

The reasoning behind this holding is simple and profound: neither party should have an unfair advantage by monopolizing access to class members – who often serve as the primary witnesses. As case law concerning pre-certification communications has developed, this policy has served as the central touchstone in disputes over class member contact information.

The first in-depth discussion of pre-certification contact with PCMs in the wage and hour context appears in *Parris v. Superior Court* (*Lowe's H.I.W., Inc*.) (2003) 109 Cal.App.4th 285. In *Parris*, a case by hourly warehouse workers alleging claims for unpaid time worked off-the-clock, plaintiffs' counsel had three objectives: 1) communicate with putative class members prior to class certification; 2) obtain court approval of the communications to be sent to the class members; and 3) compel discovery of the class members' contact information. The defendant, Lowe's, argued that plaintiffs did not establish a "legitimate precertification need to communicate with potential class members or to discover their identities and personal information." (*Id*. at p. 291.) Lowe's relied on *Howard Gunty, supra*, arguing that plaintiffs needed leave of court before communicating with putative class members.

The Court of Appeal requested that the parties submit briefing on the role the general free speech principles of the First Amendment in the context of pre-certification communication with putative class members. After reviewing the arguments, the court expressly rejected the leave of court requirement outlined in *Howard Gunty* as an impermissible prior restraint of protected speech. Instead, the court outlined the requirement of "specific evidence of abuse," including a "showing of direct, immediate and irreparable harm" before court intervention is authorized in pre-certification communications (*Id*. at pp. 298-300.) The mere potential for abuse is not enough to suppress the plaintiff attorneys' First Amendment rights to free speech. And finally, the burden is on the party resisting discovery to show evidence of actual abuse.

PRIVACY OBJECTIONS

Seeing that they were being outflanked on the pre-certification arguments, corporate defendants developed a new strategy. They found it in asserting the class members' privacy rights as a bar to disclosing class member contact information. Defendants asserted themselves as the class members' privacy-guardians. Defendants argued that they did not have the authority to waive the class members' privacy interest in their contact information and that only the class member – by affirmative act – could do so.

Defendants began to have success with this strategy. Noting that privacy is an explicit right under the California Constitution, and that one's home address and telephone number are also explicitly listed as private information, courts bought into defendant's suddenly altruistic position. But with solid case law supporting the plaintiffs' right to equal access to putative class members, those courts who bought into this argument couldn't bring themselves to deny access to putative class members outright.

Two cases, both consumer class actions, served briefly as the only published authority to address the compromise some courts sought. The first case, *Pioneer Electronics (USA), Inc. v. Superior Court*, previously reported at (2005) 128 Cal.App.4th 246, held that class representatives could obtain the putative class members' contact information only through an opt-in method.

The second case, published after the Supreme Court granted review in *Pioneer Electronics*, is *Best Buy Stores, L.P. v. Superior Court, supra*, 137 Cal.App.4th 772. Similar to *Pioneer Electronics*, *Best Buy* held that the plaintiffs seeking information to locate replacement class representatives were only entitled to an opt-in mailing to a small sample of class members. Both of these cases were victories for the defendants since it is expected that an opt-in requirement results in a significant non-response rate, often as high as 90%. An opt-in requirement generally means the bulk of class members will not be made available to plaintiffs' counsel, while an opt-out means just the opposite.

The Supreme Court in *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360 decided the issue definitively in favor of an opt-out procedure. The court recognized that class members do have a privacy interest. But the court also stated that an opt-in method was too over-protective of the class members' privacy rights. The court held that plaintiffs are entitled to the class members' contact information and that an opt-out mailing prior to providing the contact information to the plaintiffs' counsel offered sufficient constitutional protections. Predictably, defendants refused to follow *Pioneer Electronics* in wage and hour cases, claiming that privacy rights for employees outweighed those of consumers. *Bel-Aire West Landscaping Inc v. Superior Court* (2007) 149 Cal.App.4th 554 put this argument to rest, conclusively extending *Pioneer Electronics* to permit discovery of PCM contact information in wage and hour cases using an opt-out privacy notice procedure.

More recently, in *Puerto v. Superior Court (Wild Oats)* (Jan. 15, 2008) ___ Cal.App.4th ____, 2008 Cal.App. LEXIS 48, the defense resisted discovery of the identities of class members listed as witnesses in response to Judicial Council Form Interrogatory 12.1. The trial court ordered an opt-in procedure as a prerequisite to production of contact information. The Court of Appeal issued a writ reversing the decision and ordering an opt-out procedure. The court found that an opt-in procedure unduly hampers discovery and erects obstacles that not only exceed the protections necessary to adequately guard the privacy rights of the employees involved but also exceed the discovery protections given by law to far more sensitive personal information. The court finally acknowledged what plaintiffs have been arguing for years, that only under the most unusual circumstances will the courts re-

strict discovery of nonparty witnesses' residential contact information.

Some courts conducting privacy balancing find disclosure authorized with no privacy notice procedure required at all, opt in or opt out. In *Wiegele v. Fedex Ground Package System* (S.D. Cal. 2007) 2007 U.S. Dist. LEXIS 9444, the court found that plaintiff's need and due process right to conduct what it deemed to be minimally invasive discovery on class action issues per his right under *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 827, outweighed the asserted privacy concerns. The court specifically distinguished rights protecting disclosure of contact information from "more intimate" privacy interests as to medical records or personal histories. FedEx Ground was ordered to directly produce names, addresses, and phone numbers without an opt in or opt out procedure, with further proceedings ordered as to production of email addresses.

In *Putnam v. Eli Lilly & Co.* (C.D. Cal. 2007) 508 F.Supp.2d 812, the District Court ordered direct production of contact information for 348 allegedly misclassified pharmaceutical representatives, in the context of a looming deadline for filing a motion for class certification without an opt-in or opt-out procedure. The court balanced defendant's asserted right to privacy against the relevance and necessity of the information being sought by plaintiff and found the information could lead to the discovery of admissible evidence relevant to class certification.

ETHICAL CONSIDERATIONS FOR THE DEFENSE

Communications between defense counsel and PCMs present entirely different issues. Defense counsel is well advised to disclose to corporate employees they interview that they represent the company defendant in a class action, that communications will not be kept confidential, and that information may be used to further the interests of the organization which might be adverse to their own personal interests, or those of their co-workers, as employees in a class action to recover wages. (See *Shahkokhshahi v. Round Table Pizza, Inc., supra* [defense counsel Carlton, DiSante & Freudenberger reprimanded for failing to observe Rule 3-600 in obtaining declarations opposing certification].) Rule 3-600 (D), Rules of Professional Conduct, provides:

> In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

In addition to being governed by the Rules of Professional Conduct, communications between defense counsel and PCMs that result in declarations opposing certification may be subject to additional scrutiny. The Supreme Court has noted that "the trial court will be in a better position to assess the true feelings of the class after court-approved, objectively worded notice is sent to the entire class and the absent members are given an opportunity to elect nonparticipation in this lawsuit." (*Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 475, fn. 10.) In other words, courts recognize the suspect nature of declarations the defense obtains from workers based on the inherent pressure in the workplace relationship and the likelihood they were not fully or accurately advised of the nature of the suit. This language indicates the Court's inclinations against a defense tactic of encouraging PCMs to sign declarations antagonistic to the class action or resisting any change in wage and hour policies.

The propriety under Labor Code section 206.5 of the defense tactic of buying off PCMs and having them sign releases is an undefined area of the law currently under review in the courts of appeal.

Finally, once a class is certified, all class members are represented by class counsel. Defense counsel is subject to disqualification for communication with class member employees. (See, e.g., *Williams v. Dollar Financial Group,* Alameda Superior Court Case No. RG 03 099375, December 29, 2005 [order disqualifying Paul Hastings Janofsky & Walker].) ■