BNA, INC.

CLASS ACTION LITIGATION

BNA Employee-Owned Since 1947

REPORT

DISCOVERY

Class action practitioners often assume that they cannot engage in discovery with unnamed class members. However, as defense attorney Mitchell E. Zamoff notes in this article, both informal and formal discovery from absent class members can be conducted.

Prior to certification, cooperative discovery from members of the proposed class is generally always available, so long as such communications are not deceptive or coercive, Zamoff says. And nonparty subpoenas—if used where the cost is warranted—or a request for permission to treat class members as parties for discovery purposes can provide valuable information in appropriate cases.

Discovery From Absent Class Members: Available for the Taking

BY MITCHELL E. ZAMOFF

Mitchell E. Zamoff is a litigation partner at Hogan & Hartson in Washington, D.C. His trial practice focuses on complex civil and white collar criminal litigation, with an emphasis on class action defense. Prior to joining Hogan & Hartson, Mr. Zamoff was a federal prosecutor and deputy chief in the United States Attorney's Office in Philadelphia. He can be reached at mezamoff@hhlaw.com.

A common mistake among class action practitioners is their assumption that merits discovery must be limited to the class representatives. In fact, discovery is available from *absent* class members so long as the party seeking discovery can make an appropriate showing of necessity and relevance. Where the discovery goes to classwide issues of liability and damages, and the information is not available from the class representatives, there is a strong argument that absent class member discovery should be allowed. Indeed, in view of the fact that hand-picked class ''representatives'' often are *not* truly representative of the class, the need for discovery from absent class members has be-

 ISSN 1529-0115

come increasingly important to effective class action defense.

There are three principal options available to a party seeking discovery from absent class members: (1) cooperative requests; (2) third-party subpoenas; and (3) party discovery requests.

Cooperative Discovery

It is not uncommon for a defendant to find itself in a class action where at least some absent class members do *not* support the suit. Plaintiffs' lawyers routinely file class actions on behalf of clients, customers, competitors, franchisees, and other persons or entities who have prior (often good) relationships with a defendant. To the extent those absent class members believe the suit is not in their interests or that their relationship with the defendant is more important than any potential recovery, defendants should consider seeking informal, cooperative discovery from those absent class members, either to defeat class certification or to prevail on the merits.

Communications aimed at obtaining such informal discovery will almost always be permissible prior to class certification. Indeed, so long as the communications are not deceptive or coercive and expressly acknowledge the existence of the lawsuit, the class representatives should have no basis for challenging the communications. See, e.g., *Manual for Complex Litigation* (3d ed.) ¶ 30.24 (1995) (''Defendants ordinarily are not precluded from communications with putative class members, including discussions of settlement with individual class members before certification.''); *Payne v. Goodyear Tire & Rubber,* 207 F.R.D. 16 (D. Mass. 2002) (pre-certification communications were permissible even where they discouraged putative class members about prospects for recovery); *Babbitt v. Albertson's*, No. C-92-1883 SBA, 1993 WL 150300 at *3-4 (N.D. Cal. 1993) (partisan pre-certification contacts with absent class members were allowable; no requirement that such communications be ''objective and/or neutral'').

Of course, in the event absent class members are represented by separate counsel, the defendant must be mindful of the rules governing contacts with represented parties. And the rules change after class certification, when the law imposes a quasi-attorney-client relationship on class counsel and absent class members.

Thus, there is a window of opportunity in certain cases prior to class certification in which defendants can obtain valuable information from absent class members without the risk of interference by class counsel. However, in other cases, a defendant seeking such information must resort to formal discovery procedures.

Third-Party Subpoenas

Except for the potential costs involved in serving separate subpoenas on absent class members (which may be well worth incurring in appropriate cases), the issuance of third-party subpoenas under Federal Rule of Civil Procedure 45 or its state counterparts is, in many ways, the mechanism for absent class member discovery that is most likely to succeed.

It is, or should be, settled by now that ''[c]lass members are subject to discovery procedures available for nonparty witnesses, such as subpoenas.'' 3 *Newberg on Class Actions* § 16.03 (3d ed. 1992). So long as the subpoena does not impose an undue burden on the absent class member, and otherwise complies with Rule 45 or its state equivalent, the subpoena should pass muster. At most, a court may require that the subpoenas (1) seek information that is relevant to the decision of common questions; (2) are tendered in good faith and are not unduly burdensome; and (3) seek information that is not available from the class representatives. See, e.g., *Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977).

Of course, in view of the burdensomeness inquiry, subpoenas are more likely to be approved where the absent class members are entities rather than individuals, although there is no reason that a narrowly tailored subpoena to an individual class member could not also satisfy the applicable standards.

From the defendant's perspective, the principal advantage of subpoenas is that class counsel's ability to interfere with them is severely limited. This is because class representatives lack standing to quash a subpoena issued to absent class members. E.g., Mem. Op., *In re Lorazepam and Clorazepate Antitrust Litig*., MDL No. 1290 (TFH) (Aug. 21, 2002) (*Lorazepam*) at 7-8; *see also Smith v. Midland Brake Inc.*, 162 F.R.D. 683, 685 (D. Kan. 1995) (''A motion to quash or modify a subpoena *duces tecum* may only be made by the party to whom the subpoena is directed except where the party seeking to challenge the subpoena has a personal right or privilege with respect to the subject matter.''); *In re Seagate Tech. II Sec. Litig.*, No. C-89-2493 (A)-VRW, 1993 WL 293008, at *1 (N.D. Cal. June 10, 1993) (''According to FRCP 45, which governs the procedure by which a non-party may be compelled to produce documents, the right to challenge such subpoenas is limited to the person to whom the subpoena is directed.'').

Thus, the only remedy available to class counsel seeking to block an absent class member subpoena is a protective order. See Fed. R. Civ. P. 26(c) (party must demonstrate ''good cause'' to obtain protective order). The District of Columbia Circuit, like many other jurisdictions, imposes a ''heavy burden'' on a party seeking a protective order (*Lorazepam* at 10 n.2), which requires the party to demonstrate ''extraordinary circumstances based on specific facts that would justify such an order.'' *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998). In most circumstances, this will be difficult for class counsel to do.

Party Discovery

A defendant also may request permission to treat absent class members, or some subset of them, as *parties* for purposes of discovery. There are at least three advantages to this approach. First, it provides for the discovery of more types of information than a subpoena. While subpoenas typically can provide only documents and deposition testimony, a defendant also can propound interrogatories and requests for admission under the party discovery rules.

Second, sanctions, including a default judgment, are available when an absent class member fails to respond to party discovery requests and a resulting motion to compel. See Fed. R. Civ. P. 37; *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971). Third, it is less expensive to serve party discovery requests, such as a set of form interrogatories, than it is to issue, serve, and enforce a group of subpoenas.

A defendant seeking to serve party discovery requests on an absent class member will have to satisfy the *Dellums* test or a substantially similar test from an-

  CLASS ISSN 1529-0115

other jurisdiction. But there are several cases where defendants have done so, and where courts treated absent class members as parties for discovery purposes. See, e.g., *Brennan*, 450 F.2d at 1004 (Rule 23 permits direct discovery from absent class members); *Airline Ticket Comm'n Antitrust Litig*., 918 F. Supp. 283, 285 (D. Minn. 1996) (allowing party discovery of absent class members; holding that ''[d]iscovery of absent class members is permissible when the desired information is relevant to an issue in the case''); *Enterprise Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y. 1980) (absent class members may be treated as parties for discovery purposes); *United States v. Trucking Employers Inc.*, 72 F.R.D. 101, 104 (D.D.C. 1976) (''[T]he court has the power . . . under Rule 23(d) to permit reasonable discovery by way of interrogatories of absent class members when the circumstances of the case justify such action.'').

Indeed, ''[i]t is fairly well-settled that, where warranted, discovery may be taken of absent class members during the course of class action litigation under Rule 23.'' *Easton v. Mutual Benefit Life Ins.*, No. 91-4012 (HLS), 1994 WL 248172 at *3 (D.N.J. 1994).

Thus, far from being off limits, discovery from absent class members may well be available to a class action defendant depending upon the circumstances of the case. Knowing when such discovery is likely to be available, the showing necessary to trigger such discovery, and the right vehicle for obtaining the discovery is essential to the effective defense of class action lawsuits.

Correction

In the June 27 issue of *Class Action Litigation Report*, one of the authors of the Analysis & Perspective was listed incorrectly. His name is Olivier Debouzy.