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TOP STORY

Discovery Cannot Be Used to Find a Class Action Plaintiff

By Erik A. Christiansen – June 8, 2020

A U.S. court of appeals refused to permit discovery prior to class certification to find a replacement plaintiff, finding that the discovery is not relevant to an issue in the case. Relying on Rule 26(b)(1) of the Federal Rules of Civil Procedure, the Court of Appeals for the Ninth Circuit in *In Re Williams-Sonoma, Inc.* granted a rare writ of mandamus and held that discovery to find a potential plaintiff is beyond the scope of the Federal Rules of Civil Procedure.

Rule 23 Does Not Permit a Backdoor Discovery Device to Find a Class Plaintiff

The plaintiff, William Rushing, a Kentucky resident, filed a purported class action lawsuit in California seeking to recover damages that he and a proposed class allegedly suffered due to the defendant Williams-Sonoma's representations about sheet thread count. The U.S. District Court for the Northern District of California held that Kentucky law applied and barred consumer class actions. The plaintiff gave notice that he would pursue his own Kentucky claims but sought discovery from the defendant to find a lead California class plaintiff. The district court permitted the discovery and ordered the defendant to produce a list of California customers. The defendant then filed a writ of mandamus, arguing that the district court committed clear error.

Relying on *Oppenheimer Fund, Inc. v. Sanders*, the court of appeals granted the extraordinary writ and reversed the district court. Quoting from *Oppenheimer*, the court of appeals held that "[r]espondents' attempt to obtain the class members' names and addresses cannot be forced into the concept of 'relevancy' described above."

The plaintiff attempted to argue that the discovery was relevant under Rule 23 of the Federal Rules of Civil Procedure because it was necessary for class certification issues like commonality, typicality, ascertainability, and reliance. The court of appeals disagreed and held that "using discovery to find a client to be the named plaintiff before a class action is certified is not within the scope of Rule 26(b)(1)."

ABA Litigation Section Leaders Applaud the Decision

"The court got it right," states Adam Polk, San Francisco, CA, cochair of the Litigation Section's Class Action & Derivative Suits Committee. The case is "not controversial. All the plaintiff's counsel had to do was advertise on Facebook or Google or get a referral from another local California lawyer to discover a substitute class plaintiff," he states.

"The plaintiff made improper use of discovery to shop for clients," agrees Jennifer L. Mesko, Cleveland, OH, cochair of the Consumer Law Subcommittee of the Section's Class Action and Derivative Suits Committee. "It was surprising that plaintiff's counsel was not more diligent in finding a plaintiff for the case. It would pretty easy to find someone who bought the sheets in California," explains Mesko.

The key to understanding the decision is that "until there is a certified class, there can be no class discovery. You cannot file a lawsuit to find someone to bring a lawsuit," comments Fred B. Burnside, Seattle, WA, cochair of the National Institute on Class Actions Subcommittee of the Section's Class Actions & Derivative Suits Committee.

"Ultimately, it doesn't much matter whether *Williams-Sonoma* was a Rule 26 or a Rule 23 case," opines Daniel R. Karon, Cleveland, OH, cochair of the National Institute on Class Actions Subcommittee of the Section's Class Actions & Derivative Suits Committee. "The plaintiff," Karon notes, "only had a personal, non-class claim, so class discovery had nothing to do with his case whether considered under Rule 26 or Rule 23."

Dissent Relies on Rule 23 and the Fiduciary Duties of Class Counsel

Writing in dissent, court of appeals Judge Richard Paez read *Oppenheimer* more narrowly to apply only once a class is certified, after which "class counsel must rely on the class action procedures outlined in Federal Rule of Civil Procedure 23—and not the federal discovery rules contained in Rules 26 through 37—to notify absent class members of certification."

The dissent also noted that class counsel owes a fiduciary duty to unnamed class members. "[S]ince identification simply is another task that must be performed in order to communicate to potential plaintiffs their rights and encourage their involvement in a class suit, it was reasonable for the district court to require [the defendant's] cooperation to cull that list."

The dissent opined that Rule 23(d)(1)(B)(i) authorizes district courts to order that class members be notified of "any step in the action" to "protect class members." A decision that the

named plaintiff no longer has standing under California law, the dissent reasoned, is "certainly, a 'step in the action.'"

Burnside disagrees. "The fiduciary duty of class counsel does not exist before there has been a certified class. There also are privacy concerns at issue here," he says. "Customers may or may not want their information provided to class counsel, and may not want to participate in the lawsuit," he adds.

Mesko offers a slightly different take. "Ultimately, the decision is somewhat fact driven," she explains. "It will be interesting to find out whether the decision is an outlier driven by the facts, or a sign of things to come," she says.

Erik A. Christiansen is an associate editor for Litigation News.

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- *In re Hyundai & Kia Fuel Economy Litig.*, 897 F.3d 1003 (9th Cir. 2018).
- *Mazza v. American Honda*, 666 F.3d 581 (9th Cir. 2012).
- *Bauman v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1997).