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PERSPECTIVE

Using Declarations to Obtain Or Defeat Class Certification

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It seems almost daily a California court issues a decision on class certification. Frequently, the decision turns on whether common questions of fact and law predominate over individualized issues of putative class members. While each case is fact-specific and courts come out on both sides of this question, in many cases courts rely in large part on evidence from putative class members other than the class representative.

Regardless what type of class action you are handling or whether you represent plaintiff or defendant, evidence from putative class members may be critical at the class certification stage. For defendants, the evidence may be readily available to marshal for class certification briefing. For plaintiffs, discovery may be necessary to gather the evidence. The challenge is identifying what evidence will be helpful to your position and pursuing the right avenues to obtain it.

The highly publicized *Cohen v. DirectTV, Inc.*, 178 Cal. App. 4th 966 (2009), is an example of a case where the defendant successfully offered putative class member evidence to defeat class certification. In this consumer class action, the plaintiff alleged that defendant made false representations in its print advertising and promotional materials to induce the plaintiff class to purchase its upgraded HD package. The defendant opposed certification with a number of declarations of putative class members explaining that their individualized reasons for buying the defendant's upgraded service were not impacted by any printed advertising or other promotional materials. Based on these declarations, the court denied class certification, holding that common issues did not predominate over individualized claims "because the members of the class stand in a myriad of different positions" as to whether the alleged false advertising "induced" them to purchase the product at issue. *Cohen* is, at bottom, a misrepresentation case, and may be applied broadly to false advertising and investment cases.

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In *Ali v. USA Cab Limited*, 176 Cal. App. 4th 1333 (2009), the court denied class certification in a wage and hour lawsuit based in large part on 20 declarations of putative class members filed by the defendant. Plaintiff alleged that the defendant improperly classified its drivers as independent contractors, and on class certification, he submitted a copy of the standard cab lease agreement and training manual to show common issues of law and fact. However, the court was persuaded by defendant's putative class member declarations demonstrating that class members set their own schedules, provided some of their own supplies, accepted fares other than through the central dispatch, and many of the putative class members prepared their own advertisements, set their own rates

and used their taxis for personal reasons. In denying class certification, the trial court judge explained: "the trial [of a class action] I would expect would be a parade of drivers [presenting individual issues]." The Court of Appeal affirmed on the grounds that the plaintiff did not meet his burden to show common issues of fact and law; a class action was unmanageable and not a superior way to try the case; and the evidence showed a lack of class damages.

In these cases, the defendants had access to the putative class members to marshal evidence regarding individualized issues. In a consumer class action, defendants may have names and contact information of consumers who purchased or registered the product at issue. Similarly, in an employment class action, the defendant will have the names and contact information for its current and former employees. Since putative class members are not considered parties to a litigation prior to class certification, ethical rules do not prohibit a defendant from contacting putative class members to marshal evidence needed to oppose class certification. Of course, the defendant may be reluctant for business reasons to contact customers or employees to seek declarations in connection with litigation.



It may also be critical for a plaintiff to offer evidence from putative class members on class certification. For example, in another recent wage and hour class action, *Jaimez v. Daijhs Inc.*, 181 Cal. App. 4th 1286 (2010), the court relied on nine putative class member declarations submitted by plaintiff in holding that class certification was proper. In *Jaimez*, the class plaintiff alleged several wage and hour violations on behalf of a class of delivery drivers, including overtime, meal break and rest period violations. The plaintiff submitted declarations showing, among other things, that the putative class members performed the same duties, were subject to the same uniform pay and meal break policies, were subject to delivery schedules that made it difficult to complete deliveries and take all required meal and rest breaks, were not paid overtime, and were required to sign a manifest indicating that they took a meal break. Despite 25 opposing putative class member declarations submitted by defendant, the court held that common legal and factual issues relating to the defendant's policies and practices predominated and the alleged violations were more amenable to class rather than individual treatment.

When a plaintiff believes that evidence from putative class members will demonstrate the predominance of common issues, the problem may be how to obtain the evidence. While a class plaintiff in an employment matter will have some information about current and former co-workers, the information may be limited. In other types of class action litigation, the plaintiff may have no access to information about the putative class members. The plaintiff must seek this information from defendant through discovery.

Generally, California courts permit plaintiffs to discover the identity of potential class members from defendant, so that the lead plaintiff can learn the names of other persons who might assist in prosecuting the case. But this right to discovery is not absolute, and guidelines are still evolving. In deciding whether to permit a class action plaintiff to obtain information about putative class members through precertification discovery, courts identify potential abuses of the class action procedure if the discovery is permitted, and then weigh the danger of these abuses against the rights of the parties.

Because this discovery typically impacts a putative class member's privacy rights, California courts balance the public need for the discovery of the information against the weight of that right. This requires a balancing of the privacy right asserted, the magnitude of the imposition on that right, and the interests militating for and against intrusion on privacy. This balancing often results in a court order permitting discovery of some contact information for putative class members. However, the balance of equities may shift when the information sought about putative class members is exceptionally private, such as medical information or financial information.

In addition, courts commonly provide for the right of putative class members to "opt out" of disclosure of their contact information. Typically, under the supervision of the court, a third party administrator

sends notice of the litigation and the disclosure of the putative class member's contact information and the right to "opt out" of disclosure. In cases involving exceptionally private information, courts have required that putative class members "opt in" to disclosure of their contact information before disclosure.

When a party does not have access to putative class member information, navigating through the process to discover it can be time-intensive and expensive. The decision to pursue this discovery may be particularly difficult where the party does not know if contacting class members will lead to evidence that will assist on class certification. Whether it makes sense to initiate the discovery will of course depend on the allegations (including whether they implicate particularly private matters) and the facts needed to support or oppose class certification.

Because whether or not a class is certified often has a substantial impact on the final resolution of a class action, marshalling evidence from putative class members and submitting class member declarations should be considered by both plaintiff and defense counsel. When faced with a contentious battle on class certification, recent decisions by California courts demonstrate that this evidence may be critical to demonstrate whether common questions of fact or individualized issues predominate.



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