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The Scope of Discovery of Legal Ethics in Class Action Litigation

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INTRODUCTION

Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that in class action litigation "the representative parties will fairly and adequately protect the interests of the class." This requirement must be met before the merits of the class suit are considered.[1] Thus, it has become common practice for defense attorneys to raise ethical questions regarding adequate representation by the plaintiff, prior to reaching the substantive issues of the suit, as a defense tactic to the class action.[2] If a defendant can show inadequacy due to some unethical practice or circumstance the suit will not be certified as a class action and the case will be dismissed.[3]

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1. In Miller v. Mackey International, Inc., 452 F.2d 424, 427 (5th Cir. 1971) the court rejected a preliminary inquiry into the merits of a proposed class action, saying: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *See*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974); *see also*, Green v. Cauthen, 379 F. Supp. 361 (D. So. Carolina 1974).

2. *See*, HAUSMANN, LEGAL ETHICS AND LITIGATION TACTICS, 2 CLASS ACTION REPORTS 3 (1971).

3. *See* FED. R. CIV. P. 23(b) and 23 (c)(1), which states that: "As soon as practicable after commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained . . . ."

Both plaintiff and plaintiff's attorney must pass muster as adequate representatives. This applies to class actions under Rule 23 as well as to stockholder derivative suits pursuant to Rule 23.1. Plaintiff and counsel must be able to wage a real fight with "Forthrightness and vigor . . . to assert and defend the interests of the members of the class, so as to insure due process."[4]

The requirement of "adequate representation" of the class raises the question of whether the scope of discovery under Rule 26(b)[5] should deepen and expand in the area of legal ethics and attorney-client privileged communications. The ethical questions raised by defense counsel have involved three specific areas. The first has been directed toward the lead plaintiff's[6] ability to finance notice to the absent class members. The second area focuses upon the lead plaintiff's interest in the subject matter of the suit. The third area concerns itself with the conduct of plaintiff's attorney regarding solicitation and general misconduct.

It is important, therefore, to determine the scope of discovery as it relates to these three areas. How far we stretch the bounds of discovery practice must operate against the need for and the importance of class action litigation. Legitimate inquiry should not be cut off prematurely, yet indefinite expansion must be checked.

> A trial court has a duty of special significance in lengthy and complex cases where the possibility of abuse is always present to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense . . . The need for line drawing is particularly important in class actions where the court has supervised discovery and participated actively in development of the case to prevent abuse.[7]

PLAINTIFF AS AN ADEQUATE REPRESENTATIVE

1. *Plaintiff's Ability to Finance Notice*

Due process requires that notice be given to absent class members

4. Mersay v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968).

5. FED. R. CIV. P. 26(b)(1), provides in part that: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."

6. The plaintiff who actively brings the class action is referred to as the lead plaintiff.

7. Doglow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971). *See also,* MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION, § 1.7 (1969).

because of the *res judicata* effect of the judgment unless they "opt-out."[8] Thus, in order for a plaintiff to be an adequate representative, he must be able to notify all members of the class. This costs money. Consequently, defense counsel have sought to discover the financial assets of the plaintiff and his willingness to use these assets to finance notice to the class and other expenses of the suit.[9]

Rule 26(b) permits parties to discover matters which are "relevant to the subject matter involved in the pending action. . . ."[10] In *Stavrides v. Mellon National Bank & Trust Co.*,[11] the court held that discovery of plaintiff's ability to adequately represent the class is a question which may "make or break" the suit and therefore is within the 26(b) requirement of "subject matter involved in the pending action." The defendant sought answers to the following questions which the plaintiff refused to answer during oral deposition:

> Q. Have you agreed to pay your *attorney's legal fees* for the work that they perform for you?
> * * *
>
> Q. Dr. Stavrides, have you agreed to pay the *legal costs* involved in this suit if there should be any?
> * * *
>
> Q. Dr. Stavrides, have you agreed to *reimburse* your attorney any legal costs that might incur in the presentation of this action?[12]
> [emphasis supplied]

Without discussion the court granted defendant's motion to compel answers. The problem, however, is that the court did not delineate to what degree these questions had to be answered. What is required to meet the "adequate representative" standard? Does plaintiff have to show a willingness and ability to pay or merely an understanding that if the suit fails he will be responsible for the costs incurred?

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8. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

9. *See*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), wherein the U.S. Supreme Court held that plaintiff must bear the entire cost of notifying the class and that such costs could not be ordered to be paid by defendant even where it was probable that plaintiff would prevail. "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U.S. at 176.

10. *Supra* note 5.

11. Stavrides v. Mellon National Bank & Trust Co., 60 F.R.D. 634, 636 (W.D. Pa. 1973).

12. *Id.* at 638. *See also*, Canon 5, Disciplinary Rule 5-103(b) of the Code of Professional Responsibility provides that: ". . . a lawyer shall not advance or guarantee financial assistance to his client, except . . . [where] the client remains ultimately liable for such expenses."

These questions were answered in *Sayre v. Abraham Lincoln Federal Savings and Loan Association*[13]:

> *Stavrides* does not say that defendants are entitled to discover plaintiffs' financial assets in order to support an inference that the suit is being maintained. It merely states that defendants may discover what plaintiffs had been told concerning their liability for expenses . . . We also will allow questions as to plaintiffs' understanding of their liability for expenses, as long as these questions do not compel plaintiffs to divulge confidential communications with their counsel.[14]

The defense counsel in *Sayre* propounded questions to plaintiffs concerning their financial assets, their knowledge of the necessity of paying the expenses and their willingness to pay should they fail to win. The court held that answers were not required since plaintiffs' attorneys stated that they would advance amounts necessary to cover the costs. The court therefore reasoned that the answers sought were not relevant to the issue of adequate representation.

Defendant, however, argued that Canon 5, Disciplinary Rule 5-103 of the Code of Professional Responsibility,[15] which permits an attorney to advance costs only where the client remains ultimately liable, established the relevancy of plaintiff's assets and ability to pay. Albeit the attorney was advancing costs, if plaintiffs were unwilling or unable to reimburse counsel, the counsel would be breaching professional ethics by advancing costs without a reasonable expectation of reimbursement and thus would be unfit to represent the class.[16]

The *Sayre* court, however, disagreed and refused to compel answers regarding professional ethics. Instead, the court refused

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13. Sayre v. Abraham Lincoln Federal Savings and Loan Association, 65 F.R.D. 379 (E.D.Pa. 1974).

14. *Id.* at 386.

15. *Supra* note 12.

16. *See*, P.D.Q. Inc. of Miami v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973), wherein the party plaintiffs in a class action testified that they would not be willing and could not afford to pay the costs of the suit. The court held that plaintiff counsel's offer to advance costs was not acceptable because, if plaintiffs were not willing or able to pay the costs, there was no basis to assume that they would be willing to reimburse counsel. To avoid this problem the court narrowly defined the class such that the costs of notice would be within plaintiff's means.

to allow defendants' discovery when it was clear that the litigation could be financed to its end.

> [T]he question of the plaintiffs' ability to reimburse counsel will predictably reappear whenever counsel is advancing funds to plaintiffs. It is this Court's judgment—admittedly based on experience and hunch rather than any collected empirical data—that to deny a class whenever plaintiffs' counsel advances significant funds to plaintiffs of little or modest means would be to defeat the very purpose which class actions were designed to achieve. This is particularly true where, as here, the costs of litigating the suit would exceed the damages allegedly sustained by an individual plaintiff. In other words, in precisely those cases where the class action device is most appropriate the disparity between the costs of litigation and the resources of the individual plaintiffs will be most pronounced. As much as we are concerned with possible unethical conduct by counsel, we cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich . . . . [U]ntil some independent evidence is brought to this Court's attention we can see no purpose to be served by the costly and time consuming process of inquiring into plaintiff's financial status.[17]

In *Sanderson v. Winner*,[18] the Court of Appeals reversed the District Court's interlocutory decree[19] ordering the plaintiff to produce income tax returns for two years prior to initiating the suit along with any other writings or documents that would reflect plaintiff's ability to finance the litigation.

> Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, we address ourselves to the merits of the litigation. We recognize that the class action is unique and we see the necessity for the court to be satisfied that the plaintiff or plaintiffs can pay the notice costs, and we also agree fully with the Court's ruling in *Eisen* that due process requires decent notice. But, we do not read *Eisen* as creating a presumption against finding a class action. Nor does it approve oppressive discovery as a

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17. 65 F.R.D. at 385. *See also*, Bogosian v. Gulf Oil, 337 F. Supp. 1228, 1229 (E.D.Pa. 1971) where the court held that "questions concerning the circumstances surrounding the bringing of the present suit, including plaintiff's arrangement with his counsel for bearing costs of this litigation . . . are outside the scope of discovery . . . ."

18. Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974).

19. The District Court had refused to certify an interlocutory appeal. Plaintiff brought writs of mandamus and prohibition. With respect to appellate review of interlocutory decrees, *see* Eisen v. Carlisle & Jacquelin, 417 U.S. at 169-71. The Supreme Court held that appellate review under 28 U.S.C. § 1291 is not limited to final judgments which terminate an action. The court cited its decision in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949):

> This decision appears to fall in that small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

> means of discouraging a private antitrust action which, if meritorious, advances an important interest of the government.[20]

This holding goes a great deal further than *Sayre* in limiting discovery of the plaintiff's ability to finance the suit—perhaps too far. In *Sayre* the court was satisfied with a showing that the plaintiff had sufficient financial backing to follow the suit through to its end. The court in *Sanderson*, however, does not demand this assurance. Instead the court states that "[d]efendant will have ample opportunity for discovery under Rule 69 F. R. Civ. P. if it obtains judgment."[21]

Rule 69[22] aids a judgment creditor by permitting discovery of assets of the judgment debtor. Discovery under Rule 69, however, takes place only after a judgment in favor of defendant, long after the need for notice to absent class members would arise. Due process requires some guarantee to the absent class members that their rights will be adequately represented. In *Sayre*, these rights were considered. There, the court had plaintiff counsel's promise to advance costs. Moreover, the court held that it did not have to take counsel's promise on face value, but could require the posting of a bond to cover the costs of notice or, if counsel failed to pay the cost, could "decertify" the class in order to protect the members from the *res judicata* effect.[23]

2. *Plaintiff's Interest in the Subject of the Class Action*

Defense counsel have argued that plaintiff's lack of legitimate interest in the outcome of the suit renders him an inadequate representative of the class because it leaves the plaintiff's attorney who is not similarly situated vis á vis the cause of action of the class to act as a party plaintiff himself.

In *Graybeal v. American Savings and Loan Association*,[24] the

20. 507 F.2d at 479-80.
21. *Id.* at 480.
22. FED. R. CIV. P. 69, provides in part that: "In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held."
23. 65 F.R.D. at 384.
24. Graybeal v. American Savings and Loan Association, 59 F.R.D. 7 (D.D.C. 1973).

court found inherent conflicts of interest where the lead plaintiff was also the attorney representing the class. The court disqualified him as an adequate representative because of these conflicts:

> In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here . . . the potential recoveries by individual members, including representatives, of the class are likely to be very small in proportion to the total amount of recovery by the class as a whole. Thus Plaintiffs may stand to gain little as class representatives, but may gain very much as attorneys for the class.[25]

This position emphasizes that while plaintiff and counsel have representative responsibilities, their interests in the outcome of the suit may not be the same. The court in *Graybeal* speaks of a "temptation" on the part of the attorney to settle the case for a large fee while the class plaintiff might want to continue in order to vindicate his claim. Thus, the court requires a plaintiff with an interest in the claim of the action, and not an interest in attorney's fees, to properly represent the absent class members in deciding what course to take in the litigation, i.e., whether or not to settle. Discovery regarding family or economic ties between the lead plaintiff and attorney is appropriate, therefore, to insure that there are no conflicts of interest between the lead plaintiff and absent class members.[26]

In *Lieb v. 20th Century Corporation*,[27] it was held that:

> The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives . . . An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved.[28]

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25. *Id.* at 13-14.

26. *See*, Kriger v. European Health Spa Inc., of Milwaukee Wisconsin, 56 F.R.D. 104 (E.D. Wis. 1972), where plaintiff who was an attorney associated with the firm representing him was held an inadequate representative. Cf. Stull v. Pool, 18 F.R. Serv. 2d 1000 (S.D.N.Y. 1974); class action certification refused where plaintiff was the wife of attorney who was representing the class. *See also*, Shields v. First Nat'l Bank of Arizona, 56 F.R.D. 442 (D.Ariz. 1972). *But see*, Lamb v. United Sec. Life Co., 59 F.R.D. 25, 31 (S.D.Iowa 1972) where the court permitted an attorney representing the class and also a party plaintiff to continue "[A]ny fees Mr. Mead earns as an attorney in this cause will be for services rendered in the pursuit thereof, a wholly different proposition than recovery of some sum in redress."

27. Lieb v. 20th Century Corporation, 61 F.R.D. 592 (M.D.Pa. 1974).

28. *Id.* at 594-5.

In this case the party plaintiffs were a "housewife" and a "student"[29] who were shareholders in the defendant corporation. Neither had business experience, and the court found that they were relying solely upon their attorneys. But the court was not as troubled with the plaintiffs' lack of business experience as by their lack of interest. The court said that "[e]ven unknowledgeable and inexperienced plaintiffs might meet the requirements of Rule 23 by demonstrating a *keen interest* in the progress and outcome of the litigation."[30] [emphasis supplied]

Yet, the criteria of a "keen interest" by the plaintiff leaves the question of certification of the action to the subjective discretion of the trial judge. The reasons proffered by the court in *Lieb* do not lead to a conclusion of inadequacy. Being a "housewife" or a "student" without business experience should not prevent a plaintiff from representing those similarly situated.

The court in *Dorfman v. First Boston Corporation*[31] was faced with a similar argument from defense counsel. It was argued that because plaintiff had stated at her deposition that she was "satisfied" with her "good investment" and seemed confused over her representative status, and that because Juster, the other lead plaintiff, stated that he retained eight of the six hundred debentures "as a matter of principle . . . to see the action through," plaintiffs would not vigorously prosecute the action and were therefore inadequate representatives. The court disagreed:

> Neither the personality nor the motives of the plaintiffs is determinative of whether they will provide vigorous advocacy for the members of the class. Dorfman is obviously unschooled in the law and was flustered at her deposition but it can hardly be said that she, through her attorney, has been anything but a vigorous and tenacious plaintiff. The same may be said of Juster; principle, coupled with the hope of rectifying a claimed loss and the prospect of a substantial recovery, may be as strong a spur to vigorous prosecution as many other motivations.[32]

If the motives of the plaintiffs in bringing suit are not to be considered, what guarantee is there that plaintiff is a real party

29. These are the court's characterizations of the party plaintiffs. 61 F.R.D. at 595.
30. *Id.*
31. Dorfman v. First Boston Corporation, 62 F.R.D. 466 (E.D.Pa. 1974).
32. *Id.* at 473.

in interest and not a strawman who is merely supplying his name to enable the attorney to bring the action? The answer is that there is no such guarantee nor should one be required.[33] Unless there is evidence indicating unethical conduct, the scope of discovery should not extend into the area of plaintiff's motives because such is not within the relevancy requirement of Rule 26(b).[34]

Plaintiff's Attorney as Adequate Representative

Along with his normal duties to his client, the plaintiff's attorney in a class action has additional fiduciary obligations to the absentee plaintiffs whom the attorney is also representing.[35] Thus, the question has arisen whether these additional responsibilities enlarge the scope of discovery to include ethical considerations surrounding the manner in which counsel was retained and the general conduct of the attorney.

1. Pre-suit Communication (Solicitation)

In *Magida v. Continental Can Company*,[36] a 16(b) class action for "short-swing" profits, defendant argued that plaintiff's attorney had advised plaintiff to buy stock for the purpose of suing and that plaintiff's lawyer had agreed to absorb the costs in the event that the suit was unsuccessful. In describing defendant's allegations, the court stated that "defendant hints darkly that plaintiff is only a 'tool' or 'dummy' for his lawyers and suggests that there may be some sort of illicit agreement among them which would bar plaintiff in this equity suit."[37]

The court, however, held that questions regarding the fee agreement were within the attorney-client privilege; while the existence of a fee agreement was outside the scope of the privilege and thus discoverable, the terms of such an agreement were within its purview and immune from discovery.

Yet the attorney-client privilege cannot be effectively used to bar inquiry into areas of unethical solicitation.[38] The privilege protects

33. *But see*, Stella v. Kaiser, 87 F.Supp. 525 (S.D.N.Y. 1949). Plaintiff was directed to answer questions regarding his good faith in motivating the action.

34. *See*, Amherst Leasing v. Emhart Corp., 65 F.R.D. 121 (D.Conn. 1974).

35. *See*, Greenfield v. Villiger Industries, 483 F.2d 824, 832 (3rd Cir. 1973).

36. Magida v. Continental Can Company, 12 F.R.D. 74 (S.D.N.Y. 1951).

37. *Id.* at 75.

38. "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment

communications *from* the client *to* the attorney, not vice versa. Its purpose is to secure peace of mind and freedom of expression for the client in seeking legal advice.[39]

Due to the added burden of the costs of notice in class actions, as distinguished from the individual suit, a larger scope of discovery is warranted in order to ensure that such costs can be paid. But there is no added burden distinguishing class actions from individual suits on ethical questions regarding solicitation by plaintiff's attorney. Thus, there is no basis to expand the scope of discovery.

In *Formost Promotions, Inc. v. Pabst Brewing Company*,[40] an action brought under the Sherman Act, defendants propounded questions concerning discussions among plaintiffs which led to the filing of the complaint, the manner in which plaintiffs' participation in the suit was solicited and arrangements for attorney's fees. The court held such inquiry to be irrelevant and therefore non-discoverable.

> [I]t is difficult to see how an inquiry into the circumstances surrounding the instigation of the action could affect the substance of the claim. These responses might lead to embarrassing admissions of champerty or unconscionable arrangements as to fees and expenses, but these excesses are not in any way relevant to the trial of the particular issue.[41]

The Western District Court of Pennsylvania attempted to control solicitation by promulgating Local Rule 34(d)[42] which prohibited communication by plaintiff or plaintiff's counsel with any potential class member unless the court approved.[43] The Third Circuit

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resulting from that advice . . ." Code of Professional Responsibility, D.R. 2-104(A).

39. *See*, Giordani v. Hoffman, 278 F.Supp. 886 (E.D.Pa. 1968) wherein the court held that plaintiff's attorney could not refuse to answer questions regarding information he had obtained from a third party by merely relating it to the client and then claim it was within the attorney-client privilege.

40. Formost Promotions Inc. v. Pabst Brewing Company, 15 F.R.D. 128 (N.D.Ill. 1953); an antitrust suit, not a class action.

41. *Id.* at 130.

42. Local Rule 34(d): "No communication concerning such [class] actions shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the court approving the communication."

43. FED. R. CIV. P. 83 permits each District Court to make rules gov-

Court of Appeals, however, in *Rodgers v. United States Steel Corporation*,[44] held that Local Rule 34(d) was inconsistent with the policy of Rule 23.

> There is no federal common law offense of barratry, and the policy reflected in Rule 23 undoubtedly would prevent the Commonwealth of Pennsylvania from interfering, in the guise of preventing barratry, with its full implementation . . . . The limited issue before us, however, is whether the district court can *prior* to making a class action determination, insist on compliance with Local Rule 34(d) . . . . We hold that it may not.[45]

Without some independent and cogent evidence of unethical practice by plaintiff's counsel the tactic of using discovery to search out possible acts of solicitation is an expensive and time consuming practice which cannot be justified.

2. *Attorney Misconduct*

Courts have exhibited great hesitancy in withholding class certification because of misconduct of plaintiff's attorney. In *Korn v. Franchard*,[46] class certification was denied when counsel was found to have sent unauthorized letters under a pseudonym in an attempt to "stir up litigation" in violation of Canon 2 of the Code of Professional Responsibility. Yet the class was later certified by the Second Circuit Court of Appeals after substitution of new counsel for the plaintiff.[47]

In *Halverson v. Convenient Food Mart Incorporated*,[48] the Seventh Circuit Court of Appeals reversed the trial court's dismissal of the class for solicitation by the plaintiff's counsel: "Only the most egregious misconduct on the part of plaintiff's lawyer could ever arguably justify denial of class status. The ordinary

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erning its practice which are not inconsistent with the Federal Rules of Civil Procedure.

44. Rodgers v. United States Steel Corporation, 508 F.2d 152 (3rd Cir. 1975).

45. *Id.* at 163-64.

46. CCH FED. SEC. L. REP. ¶ 92,845, 90,169 (S.D.N.Y. 1970).

47. Korn v. Franchard Corporation, 456 F.2d 1206 (2nd Cir. 1972). Cf. Taub v. Glickman, 14 F.R. Serv. 2d 847 (S.D.N.Y. 1970) wherein a class action was dismissed when the plaintiff's attorney defaulted on two calendar calls and failed to appear in support of one of their own motions. Moreover, these were the same attorneys who were dismissed in Korn v. Franchard mentioned in text. The court considered all these factors in concluding that atorneys were inadequate representatives. *See also*, Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 16 F.R.Serv. 2d 1021 (D. N.D.Tex. 1972); Kronenberg v. Hotel Governor Clinton, Inc., 281 F.Supp. 622 (S.D.N.Y. 1968).

48. Halverson v. Convenient Food Mart Incorporated, 458 F.2d 927 (7th Cir. 1972).

remedy is disciplinary action against the lawyer. . . ."[49] Here the plaintiff's attorney had been retained by a group of franchisees to file a class antitrust action. The attorney sent a letter to other franchisees similarly situated informing them of the suit. The Court of Appeals found this to be a "slight breach of ethics,"[50] but one which should not prejudice the rights of the client. The case was remanded with instructions not to consider pre-suit communications.

CONCLUSION

Class actions have become one of the most socially useful tools of the law. Victims of consumer fraud and antitrust and securities violations can vindicate their claims through the class action device where no other remedy for the individual plaintiff is economically practicable. The cases discussed herein reflect the policy of the courts to favor class actions by their narrow construction of the Rule 23(a)(4) requirement of "adequate representation" of the class by plaintiff.

The major distinguishing characteristic between the class action and the individual suit is the need to account for the rights of the absent class members. Discovery, therefore, has been enlarged to encompass whether plaintiff can finance notice to absentee plaintiffs. Yet, in order to encourage class actions it is suggested that this inquiry be limited to any assurance of financial backing, either by plaintiff, plaintiff's counsel, or by some other source. For, to require the lead plaintiff to prove that he alone can finance the action would effectively limit the use of the class action to the rich.

Both plaintiff and plaintiff's counsel have representative responsibilities to the class, yet their interests in the outcome of the suit may be different. While the attorney may win a large fee in an early settlement of the case, the plaintiff's economic interest in the outcome of the class action is generally nominal, and his goal of vindicating the wrong perpetrated upon himself and those similarly situated may not be accomplished by settlement. It is therefore appropriate discovery practice for the defense counsel to determine whether any economic conflicts of interest exist between plaintiff and his attorney.

49. *Id.* at 932.
50. *Id.* at 931.

Inquiry into plaintiff's motives in instituting the suit, however, is not warranted. The fact that plaintiff has brought the action should sufficiently evidence his interest in correcting the alleged wrong against the class. The Federal Rules do not impose any requisite degree of interest or motive on a plaintiff bringing a class action.

As to ethical questions of solicitation, there is no basis for distinction between the class action and the individual suit. It is certainly proper for defense counsel to bring to the attention of the Court and Bar any cogent evidence of unethical practices on the part of plaintiff counsel. However, it is not the job of defense counsel to use discovery, under the guise of assuring an "adequate representative," to blindly search out possible acts of solicitation by plaintiff's attorney.

Finally, where some unethical conduct has been established the courts have not permitted such conduct to bar an otherwise meritorious class suit. It is suggested that the proper action of the court is to either reprimand the attorney or allow for the substitution of new counsel.

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