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DISCOVERY

CLASS MEMBERS

Class action plaintiffs should be required to produce their engagement letters and fee arrangements with counsel unless there is a compelling reason not to do so, attorneys Eric S. Mattson and Jen C. Won say in this BNA Insight. The authors say these agreements are relevant to the adequacy of both the representative plaintiff and class counsel.

Class Representatives' Engagement Letters With Class Counsel Are Discoverable

BY ERIC S. MATTSON AND JEN C. WON

Too often, plaintiffs in class actions are able to avoid producing their engagement letters and fee arrangements with class counsel. These agreements are relevant to the adequacy of both the representative plaintiff and class counsel, and they should be produced in discovery as a matter of course. In most cases the letters will be innocuous or even help prove the adequacy of the class representative—but in other cases they will help prove the opposite.

Perhaps because engagement letters involve the attorney-client relationship, some judges have declined to order the production of these agreements. In other cases, judges have required defendants to show that something smells fishy before ordering production. These rulings set too high a bar. The better rule, found in a better-reasoned line of cases, is to require plaintiffs in class actions to produce their engagement letters unless there is a good reason not to.

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The Critical Importance of the Adequacy Inquiry

The "adequacy" requirement of Rule 23 makes plaintiffs' engagement letters relevant in class actions. The named plaintiff in a class action owes a fiduciary duty to all other class members.[1] Indeed, more than two decades before Rule 23 was promulgated, the Supreme Court recognized that due process entitles absent class members to adequate representation.[2] Rule 23(a)(4) embodies this due process concept by requiring a showing that "the representative parties will fairly and adequately protect the interest of the class." Similarly, under Rule 23(g)(4), class counsel must "fairly and adequately represent the interests of the class."

Rule 23 thus contemplates that adequacy of representation will be judged through a two-part inquiry. The

[1] 5 James Wm. Moore, et al., Moore's Federal Practice, § 23.25 (3d ed. 1997).

[2] *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940).

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first part scrutinizes the proposed class representative. Courts look for conflicts of interest between the named plaintiff and the class, and consider more generally whether the named plaintiff is qualified to serve as a class representative.[3] The named plaintiff must be ready, willing and able to advocate the interests of absent class members, assess settlement opportunities, and oversee class counsel during the entire course of the case.[4]

The second part of the inquiry examines the adequacy of class counsel. Rule 23(g)(1) lists specific factors to consider in conducting this analysis, such as counsel's prior experience in class actions. But the list is not exhaustive, and courts can also consider counsel's conflicts of interest with the class and ethical character.[5]

The Relevance of the Engagement Letter

The class representative's relationship with class counsel is highly relevant to the adequacy inquiry, and the engagement letter may address at least two issues that bear on this relationship: (1) the division of power between the class representative and class counsel, and (2) the class representative's and class counsel's respective financial incentives.

For example, the engagement letter may reveal whether the representative plaintiff can make independent decisions about critical issues like settlement. If class counsel can veto any settlement, or insist on settling when the named representative wants to go to trial, then the named representative is arguably inadequate because he cannot make critical decisions about the litigation.[6]

An engagement letter may also memorialize financial incentives that create a conflict of interest. The Ninth Circuit analyzed this problem in detail in *Rodriguez v. West Publishing Corp.*[7] The district court, after preliminarily approving a classwide settlement, discovered an improper incentive agreement between class counsel and the class representatives—one that tied potential compensation for the class representatives to the total amount recovered for the class.[8] This created a disincentive for plaintiffs to go to trial once the defendants made a settlement offer that exceeded the highest threshold, thereby creating a conflict of interest between absent class members on the one hand and the class representatives and class counsel on the other.[9]

The Ninth Circuit went out of its way to observe that the offending agreement ''was not disclosed when it should have been and where it was plainly relevant, at the class certification stage.''[10] If it had been, ''the district court would certainly have considered its effect in determining whether the conflicted plaintiffs . . . could adequately represent the class.''[11]

Courts That Have Required Production of Engagement Letters

The courts are split on whether and when plaintiffs' engagement letters with class counsel should be produced. Those that have required production have found that these agreements can help identify conflicts of interest, the central aim of the adequacy inquiry.[12]

One example of a court that required production is *Klein v. Henry S. Miller Residential Service, Inc.* The court said that ''[t]he primary criterion for determining whether the class representative has adequately represented his class for purposes of res judicata is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class.''[13]

The court added that the fee arrangement can reveal plaintiffs' ability to fund the lawsuit and help the court assess the reasonableness of any request for attorneys' fees when the case concludes.[14] In response to the claim that fee agreements are privileged, the court responded that the privilege does not extend to information about an attorney's receipt of fees.[15] Finally, the court emphasized its own duty to maintain ''constant vigilance in overseeing the conduct of a self-appointed class representative.''[16]

Similarly, in *In re Sheffield*, the court held that the defendant was entitled to the production of fee agreements because they would help assess whether the class representative could exercise appropriate control

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[3] 1 Newberg on Class Actions § 3:54 (5th ed. 2011); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 314-15 (5th Cir. 2007) (stating that the adequacy inquiry encompasses both ''the class representatives' willingness and ability to serve'' and ''conflicts of interest between the named plaintiffs and the class they seek to represent'') (citation and quotation marks omitted); *Jamison v. First Credit Servs., Inc.*, No. 12 C 4415, ___ F.R.D. ___, 2013 BL 82323, at *13 (N.D. Ill. Mar. 28, 2013) (finding plaintiff inadequate based on his prior felony conviction for fraud-related offense).

[4] *See, e.g., Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726-28 (11th Cir. 1987).

[5] *Walter v. Palisades Collection, LLC*, Civ. No. 06-378, 2010 BL 133336, at *10 (E.D. Pa. Jan. 26, 2010) (''Prior unethical conduct is a relevant consideration pursuant to certification under Rule 23(a)(4).''); *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 248 (C.D. Cal. 2006) (attorney's ethics ''are relevant considerations in determining the adequacy of counsel''); *Rodriquez v. West Publ'g Corp.*, 563 F.3d 948, 959 (4th Cir., 2009) citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (''An absence of material conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy and, in turn, to due process for absent members of the class.''); *Sipper v. Capital One Bank*, No. CV 01-9547, 2002 BL 3149, at *2-5 (C.D. Cal. Feb. 28, 2002) (finding a ''raft of ethical issues'' for failure to disclose that class representative was a close business associate of counsel).

[6] *In re Ocean Bank*, No. 06 C 3515, 2007 BL 264879, at *4-5 (N.D. Ill. Apr. 9, 2007).

[7] 563 F.3d 948, 959 (9th Cir. 2009).

[8] *Id.* at 959-60.

[9] *Id.* at 960 (finding that the agreements ''created an unacceptable disconnect between the interests of the contracting representatives and class counsel, on the one hand, and members of the class on the other. We expect those interests to be congruent.'').

[10] *Id.* at 959.

[11] *Id.* Several years later, the Ninth Circuit affirmed the denial of attorneys' fees to the law firm that entered into the agreement. *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012).

[12] *See, e.g., Porter v. Nationscredit Consumer Disc. Co.*, No. Civ. A. 03-3768, 2004 BL 4755, at *2 (E.D. Pa. July 8, 2004).

[13] 82 F.R.D. 6, 8 (N.D. Tex. 1978) (quoting *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973)).

[14] *Id.* at 8-9.

[15] *Id.*

[16] *Id.* at 9.

  CLASS ISSN 1529-0115

over class counsel.[17] The court ruled that neither the attorney-client privilege nor the attorney work product doctrine generally protects fee arrangements.[18] The only remaining question was whether the agreement was relevant. The court concluded that it was because it might reveal ''potential conflicts or biases.''[19]

Courts That Have Denied Production Of Plaintiffs' Engagement Letters

Some courts have held that engagement letters were not discoverable, with one incorrectly claiming that this is the ''majority rule.''[20] These courts have contended that while the agreements were not privileged, they were not relevant to the adequacy inquiry unless the defendant could articulate a suspicion that class counsel and the plaintiff had entered into an unethical arrangement.[21]

In re Google Adwords Litigation illustrates this approach. The defendant, Google, moved to compel the production of engagement letters and other documents about the funding of the litigation.[22] Relying on the Ninth Circuit's opinion in *Rodriguez*, Google argued that these documents were relevant to adequacy.[23] Nonetheless, the court held that the arrangements were not discoverable unless there was ''reason to think there is a potential conflict.''[24]

In other cases, courts have declined to inquire into the arrangements between the named plaintiff and class counsel until after the entry of judgment. For example, in *In re Front Loading Washing Machine Class Action Litigation*, the court acknowledged that the engagement letter was ''not necessarily privileged,'' but found that disclosure was not necessary during the certification phase, and that the defendant ''can obtain the discovery by alternative means, such as through the depositions of individual Plaintiffs.''[25]

In General, Class Representatives Should Produce Engagement Letters

According to the Supreme Court, ''actual, not presumed, conformance with Rule 23(a)'' is ''indispensable.''[26] Rule 23 requires a ''rigorous analysis'' of each relevant element[27]—and adequacy is always a relevant element, falling as it does in Rule 23(a)'s list of four prerequisites to certification.

The rationale for denying discovery into class representatives' engagement letters is thin. As for the idea that engagement letters should not be produced unless there is ''reason to think there is a potential conflict,''[28] this is too high a hurdle. There was no reason to think there was a potential conflict in *Rodriguez* until the court had preliminarily approved the settlement and disgruntled class representatives revealed the conflict. No one can know whether an engagement letter creates adequacy issues without looking at it. And if the plaintiff and class counsel have agreed to a provision that raises doubts about adequacy, they are highly unlikely to volunteer that information.

The idea that the defendant can ''obtain the discovery by alternative means, such as through the depositions of individual Plaintiffs,''[29] is also unpersuasive. That argument actually tends to prove the opposite point: If asking about the engagement letter is fair game at a deposition, why is the letter itself protected from disclosure?

Perhaps these courts had a visceral reaction against exposing any aspect of the attorney-client relationship to outside scrutiny. Understandably so: Attorney-client engagement letters are usually irrelevant, and requesting them in discovery may fairly be viewed as harassment. But class litigation is different. Class counsel, not clients, drive the litigation,[30] and class representatives and class counsel have duties to absent class members that they do not always fulfill.

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[17] 280 B.R. 719, 722 (Bankr. S.D. Ala. 2001).

[18] *Id.* at 721-22.

[19] *Id.* at 722.

[20] *Stanich v. Travelers Indem. Co.*, 259 F.R.D. 294, 322 (N.D. Ohio 2009) (''[T]he majority rule is that pre-certification discovery of fee and retainer agreements is rarely appropriate.''). In fact, federal district courts are about evenly split on this question. Those that have denied discovery into the plaintiff's engagement letter include *Mitchell-Tracey v. United General Title Insurance Co.*, No. Civ. 05-1428, 2006 BL 40267, at *1-3 (D. Md. Jan. 9, 2006), *Piazza v. First American Title Insurance Co.*, No. 3:06-cv-765, 2007 BL 191943, at *1-3 (D. Conn. Dec. 5, 2007), *In re McDonnell Douglas Corp. Securities Litigation*, 92 F.R.D. 761, 763 (E.D. Mo. 1981), and *In re Nissan Motor Corp. Antitrust Litigation*, No. 74-cv-1652 (S.D. Fla. June 4, 1975). *See also* 7 Newberg on Class Actions § 22:79 (4th ed. 2005); Federal Judicial Center, *Manual for Complex Litigation* § 21.141 (4th ed. 2004) (''Precertification inquiries into the named parties' finances or the financial arrangements between the class representatives and their counsel are rarely appropriate, except to obtain information necessary to determine whether the parties and their counsel have the resources to represent the class adequately.''). Those that have allowed such discovery include *Jamison v. First Credit Services, Inc.*, No. 12 C 4415, Dkt. 55 (N.D. Ill. Nov. 30, 2012), *Porter*, 2004 BL 4755, at *2, *Gipson v. Southwestern Bell Telephone Co.*, Civ. No. 08-2017, 2009 BL 61271, at *12-13 (D. Kan. Mar. 24, 2009), *overruled in part on other grounds*, 2009 BL 253818 (D. Kan. Nov. 23, 2008), *Armour v. Network Associates, Inc.*, 171 F. Supp. 2d 1044, 1054-55 (N.D. Cal. 2001), and *In re Quintus Securities Litigation*, 148 F. Supp. 2d 967, 972-73 (N.D. Cal. 2001). *See also* 1 McLaughlin on Class Actions § 3:7 (8th ed.). Other examples are discussed in the text.

[21] *In re Front Loading Washing Mach. Class Action Litig.*, Civ. No. 08-51, 2010 BL 174961, at *2-4 (D.N.J. July 29, 2010). *See also Fort Worth Employees' Retirement Fund v. JP Morgan Chase & Co.*, 2013 BL 122126, at *2 (S.D.N.Y. May 7, 2013) (requiring plaintiffs to produce only dates on retainer agreements for statute of limitations purposes).

[22] *In re Google Adwords Litig.*, No. C08-3369, 2010 BL 269141, at *2-3 (N.D. Cal. Nov. 12, 2010).

[23] *Id.* at *3-4.

[24] *Id.* at *4.

[25] *Front Loading Washing Mach. Class Action Litig.*, 2010 BL 174961, at *4.

[26] *General Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160-61 (1982).

[27] *Id.* at 161.

[28] *In re Google Adwords Litig.*, 2010 BL 2691412, at *4-5.

[29] *Front Loading Washing Mach. Class Action Litig.*, 2010 BL 1749612, at *4.

[30] *See* Newberg on Class Actions § 3:52 (''Put simply, class action attorneys are the real principals and the class representative/clients their agents.''); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 Ariz. L. Rev. 923, 927 (1998) (''Adequacy of representation is measured first and foremost by the adequacy of counsel.'').

Some may object that allowing defense lawyers to review their opponents' engagement letters is ''a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.''[31] But this analogy is off the mark, at least in this context. Defendants in class actions may have no particular desire to protect the putative class, but on this issue the interests of the defendant and the class—the fox and the chickens—are aligned: Both share an interest in exposing any inadequacy on the part of the class representative or class counsel. That the defendant's interest in doing so is born of self-interest rather than altruism makes no difference.

Why, then, should class representatives be allowed to withhold their engagement letters? Discovery can encompass ''any nonprivileged matter that is relevant to any party's claim or defense.''[32] Because of Rule 23's adequacy requirement, engagement letters are relevant. As one court held, these agreements are ''relevant to the ability of named plaintiffs to protect the interest of potential class members and hence are a proper subject for discovery.''[33] Plaintiffs in class actions should produce them when asked, and—absent extraordinary circumstances—courts should require their production when plaintiffs refuse.

[31] *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981) (discussing defendants' challenges to class representatives' adequacy).

[32] Fed. R. Civ. P. 26(b)(1).

[33] *Epstein v. Am. Reserve Corp.*, No. 79 C 4767 (N.D. Ill. Sept. 18, 1985).

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