CLASS ACTION DISCOVERY:

USES AND ABUSES*

I.
INTRODUCTION

Class certification carries with it enormous implications for all parties to the litigation. The monetary value of a case can go from a few dollars to many millions of dollars when those five magic words are entered into the record: "Class certification is hereby GRANTED."

Because class certification raises the stakes of litigation so dramatically, defense counsel pull out all the stops, sometimes without regard to the implications of those tactics. Left unchecked, defense counsel may overreach and use their discovery efforts more for the purpose of delaying the class certification hearing or intimidating the class representatives than for seeking information relevant to legitimate concerns.

Although defense counsel have a tendency to overdo class action discovery, plaintiffs' counsel often think of class certification as a purely legal issue, and pay

---

* By David J. Guin; DONALDSON, GUIN & SLATE, LLC; Birmingham, Alabama.

insufficient attention to discovery that would be beneficial, if not essential, to establishing the propriety of class certification.

Using a hypothetical case study, this paper will address the discovery issues that most commonly arise in class action litigation, how plaintiff and defense counsel can properly use these tools to their respective clients' benefit, and how to recognize and respond to abuses of these tools.

II.
OUR EXAMPLE:
ANGEL V. FORCES OF EVIL CORPORATION[1]

Lawyer Whitehat has a potential case. His client, Mr. Angel, fell through his roof while adjusting his TV antenna. He suffered only minor injuries, but upon inspection, Angel discovered that the plywood roof decking of his five year old house had deteriorated badly. Although the shingles were in good shape, and he had not experienced any roof leaks, the internal layers of the plywood roof decking had separated, causing the roof decking to soften and collapse beneath his weight.

The plywood panels had been manufactured by Forces of Evil Corporation ("Evil" or "Evil Corp."). Angel already had conducted some background investigation by talking to a friend who worked at Evil's headquarters, and learned

[1] This is a hypothetical example. Any similarity to actual cases or litigants is coincidental.

that Evil had pulled its FireStop® plywood from the market after the American Roof Decking Association determined that the chemical additive used in its FireStop® plywood to prevent fires could react with the resigns in the plywood if it got hotter than 120°, causing the wood to fall apart. Angel's friend told him that the company had been expecting a massive lawsuit.

Mr. Angel needed a new roof, but the expense to replace the roof on his modest home would not exceed $8,000. Whitehat knew that the expert witness fees and other litigation expenses would exceed many times that amount. However, Whitehat had recently attended a CLE seminar on class actions, and understood that one of the primary reasons for Rule 23 was to make litigation economically feasible on behalf of persons who have been harmed in a uniform manner, but whose individual claims are too small to justify the costs of litigation.

Using his seminar outline as a guide, Whitehat (with the help of experienced class counsel he associated for the case) crafted a complaint alleging that Evil Corp.'s FireStop® plywood was uniformly defective and unsuitable for its intended and foreseeable use. Whitehat researched the law of every state, and properly defined subclasses to address any material variations in state laws. With the filing of that complaint, Whitehat embarked on an epic journey.

III.
THE INITIAL SKIRMISH OVER
THE NEED FOR, AND SCOPE OF, DISCOVERY

As vigilant plaintiffs' counsel, Whitehat and his co-counsel served narrowly tailored, but nonetheless extensive, discovery requests with their complaint. See Newberg on Class Actions § 9.43 (3d ed. 1992)("A]lert counsel for the class representative will usually initiate pretrial discovery of the defendants with the filing of the complaint itself, or shortly thereafter.") Since Evil manufactured billions of board feet of FireStop® plywood, the enormous stakes of this litigation have encouraged defense counsel to embark on a "scorched earth" defense. Moreover, Whitehat's discovery requests seek production of Evil's 10,000+ warranty claim files, including related litigation files, for any other claims that Evil's FireStop® plywood was defective. Defense counsel recognize how damaging these records of similar claims, and especially the disclosure of how much they have paid these prior claimants, could be. They also are aware of the expense that will be necessary to gather, review and produce such records. Defense counsel accordingly have filed every one of these motions.

The only sure things in life are death, taxes, and a motion by defendants to limit discovery to class certification issues (sometimes referred to as a motion to "bifurcate" discovery between class and merits issues). Less frequently, defendants combine their bifurcation motion with a motion to stay discovery pending a ruling on their motion to dismiss. If the opportunity arises, defense counsel may also seek to stay discovery pending a *forum non conveniens* or MDL transfer, or pending the disposition of related proceedings.

A. MOTION TO STAY DISCOVERY PENDING MOTION TO DISMISS

Defendants sometimes seek a stay of discovery pending a ruling on their motion to dismiss. The mere pendency of a motion to dismiss, however, is ***not*** a valid reason to stay discovery. *See, e.g., Coca-Cola Bottling Co. V. Grol*, 1993 U.S. Dist. LEXIS 3734, *6 (E.D. Pa. 1993)("A court should not automatically stay discovery pending a motion to dismiss under Rule 12(b)."); *Moran v. Flaherty*, 1992 U.S. Dist. LEXIS 14568, *2 (S.D.N.Y. 1992)("discovery should not be routinely stayed simply on the basis that a motion to dismiss has been filed").

Courts are particularly hesitant to stay discovery if the dismissal would not dispose of the entire litigation, or if the deficiencies could be corrected by amendment. *See, e.g., Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D. N.C. 1988); *Kutilek v. Gannon*, 132 F.R.D. 296, 298 (D. Kan. 1990); *United States v. Board of Educ. of City of Chicago*, 636 F. Supp. 1046, 1047 (N.D. Ill. 1986).

A motion to stay discovery is simply a type of motion for protective order governed by Rule 26(c). Because the Rules of Civil Procedure do not contemplate stays of discovery as a matter of course, the defendant must establish "good cause" for its requested protective order under the stringent standards of Rule 26(c). To establish "good cause" for a protective order, courts insist on a "particular and

specific demonstration of fact, as distinguished from stereotyped and conclusory statements...." 8 Wright & Miller, *Federal Practice & Procedure*, § 2035 (1994). Simply claiming that discovery requests are "burdensome" is insufficient to satisfy the "good cause" requirement. *Campbell v. Regal Typewriter Co.*, 341 So. 2d 120, 124 (Ala. 1976). To establish "good cause," the moving party must show specifically how each interrogatory or request is burdensome and/or overly broad, with a detailed explanation as to the nature of the claimed burden. *Kutilek v. Gannon*, 132 F.R.D. 296, 300 (D. Kan. 1990).

Unless it appears that the case is patently frivolous, the great majority of courts refuse to stay discovery, particularly if the motion to dismiss is not directed to all claims of all potential class members. As concluded in *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990):

> The intention of a party to move for judgment on the pleadings is not ordinarily sufficient to justify a stay of discovery. 4 J. Moore, Federal Practice § 26.70[2], at 461. Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation. Under Rule 33, for instance, interrogatories may be served at the same time as the summons and complaint. Since motions to dismiss are a frequent part of federal practice, this provision only makes sense if discovery is not to be stayed pending resolution of such motions.
>
> Furthermore, a stay of the type requested by defendants, where a party asserts that dismissal is likely, would require the court to make a preliminary finding of the likelihood of success on the motion to dismiss. This would circumvent the procedures for resolution of such a motion.

A complete stay of discovery is appropriate only in the most unusual circumstances,[2] such as where the case is patently frivolous. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S. Ct. 1917, 1928, 44 L. Ed. 2d 539 (1975)(where the complaint was filed with no basis, but was intended as a "fishing expedition").

To summarize this topic, motions to stay discovery pending resolution of a motion to dismiss may be used or abused, as follows:

USE:	(i)	If case is ***patently*** frivolous; or
	(ii)	If the motion is premised on ***purely legal grounds*** and would resolve ***all*** claims.
ABUSE:	(i)	When sought in most cases; or
	(ii)	Particularly where the facts are in the control of the defendant, such that Plaintiff needs discovery in order to properly frame the complaint.

B. MOTION TO STAY DISCOVERY PENDING MDL TRANSFER

Since plaintiffs' counsel get to choose their forum, defense counsel often are not happy with that selection. They may seek a *forum non conveniens* transfer, or in federal court, a ruling by the Judicial Panel on Multidistrict Litigation that the case

[2]In federal securities fraud actions, however, the recently enacted Private Securities Legal Reform Act requires that discovery be stayed until the motions to dismiss are decided. PSLRA, § 21D(b)(3), codified at 15 U.S.C. § 78uD(b)(3)(B).

should be transferred to another venue and consolidated with other similar actions. *See* 28 U.S.C. § 1407.

Because such a motion only changes the location of the litigation, and does not affect is substance, there is little reason for a stay in these situations. *See, e.g., Philadelphia v. Emhart Corp.*, 317 F. Supp. 1320 (E.D. Pa. 1970)(*forum non conveniens* transfer). The MDL Panel has many times expressed its view that discovery should not be stayed pending their ruling. *See, e.g., In re Air Crash Disaster at Paris, France*, 376 F. Supp. 887, 888 (JPML 1974); *In re Four Seasons Securities Laws Litigation*, 362 F. Supp. 574, 575 n. 2 (JPML 1973); *In re Master Key Antitrust Litig.*, 320 F. Supp. 1404-07 (JPML 1971). *See also* Rule 18 of the Judicial Panel on Multidistrict Litigation, which provides that:

> The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court. A transfer or remand pursuant to 28 U.S.C. § 1407 shall be effective when the transfer or remand order is filed in the office of the clerk of the district court of the transferee district.

If there are multiple cases seeking class certification, however, it may be appropriate to stay discovery of the representative plaintiffs, and to withhold a ruling on class certification, in order to avoid inconsistent rulings. *See, e.g., In re Penn Central Securities Litig.*, 333 F. Supp. 382, 384 n. 4 (JPML 1971) ("The Panel's experience indicates that the use of stay orders by the district courts, particularly in

the area of discovery, is usually undesirable. Any discovery obtained prior to the Panel decisions will benefit the parties to the action if transfer is denied and will presumably be made available to all other parties if transfer is ordered. *Cf.* Manual for Complex and Multidistrict Litigation § 1.1. A stay of proceedings concerning questions common to all cases, such as class representation, may be appropriate to preserve the question for the transferee judge and to avoid inconsistent judicial rulings.").

USE:	(i)	If there are multiple class cases that would be transferred and consolidated; **and**
	(ii)	the case has not advanced very far procedurally.
ABUSE:	(i)	The case already has advanced, and stay is sought just to slow down the plaintiffs, or
	(ii)	Transfer is not sought for any other class cases, such that class discovery in this case will not prejudice other cases.

C. MOTION TO LIMIT DISCOVERY TO CLASS CERTIFICATION ISSUES

As an alternative to a complete stay of discovery, defendants often argue that discovery should be limited to class certification issues in order to avoid discovery of what happened to other class members in the event class certification is denied, and in the hope that the case will disappear if class certification is denied, thereby saving them from providing discovery regarding the merits of the plaintiffs' claims.

Although it can be beneficial for the parties to focus their efforts on class certification issues, particularly in view of Rule 23(c)'s mandate that class certification be determined "as soon as practicable," bifurcation of discovery is rarely, if ever, the way to accomplish that goal in an expeditious manner. To the contrary, broadly worded orders limiting discovery "to class certification issues" inevitably result in discovery squabbles, duplicative depositions and delay.

Many depositions have to conducted twice — once on class issues, and again on merits issues. Defense counsel will constantly interrupt deposition testimony, objecting that questions improperly go to the merits, rather than to class issues. Depositions may have to be adjourned to seek guidance from the court. Both sides will have to review all documents prior to production, not only to review the documents for privileged material, but to insure that the produced documents concern only class or merits issues, as the case may be. Defense counsel always seem to have a rather narrow view of what documents are relevant to the class determination, and err on the side of withholding materials that potentially may be relevant to class issues.

(1) Defendants' Arguments in Support of Bifurcation

To support their bifurcation motion, defendants often cite *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Eisen*, however, does not address bifurcation or any other discovery issue; it simply held that a court is not to consider the likelihood of the plaintiffs' success on the merits when deciding whether to certify a class. Just because the court cannot consider the likelihood of success when deciding class certification, does not mean that discovery should not proceed as to the merits.

Defendants also argue that the Eleventh Circuit and former Fifth Circuit spoke out in favor of bifurcation in *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992)("To make early class determination practicable and to best serve the ends of fairness and efficiency, courts may allow classwide discovery on the certification issue and postpone classwide discovery on the merits.") and in *Stewart v. Winter*, 660 F.2d 328 (5th Cir. 1982). In truth, those cases stand only for the proposition that it was not an abuse of discretion under the unique circumstances of those cases for the trial court to bifurcate discovery. They do not mandate bifurcation, nor do they address *how* a court might limit discovery to class certification issues.

Although these precedents do not support defendants' arguments in favor of bifurcation, many trial courts have issued such orders in varying forms. *See, e.g., Rodriquez v. Banco Central*, 102 F.R.D. 897, 903 (D. Puerto Rico 1984); *National Organization for Women v. Sperry Rand Corp.*, 88 F.R.D. 272, 277 (D. Conn. 1980).

It is doubtful that any of the judges who have issued those orders had ever actually participated as counsel in a similar case, and experienced the myriad of problems engendered by bifurcation orders.

(2) The Difficulty (Impossibility) of Distinguishing "Merits" from "Class" Issues

Bifurcation of discovery is based on the false premise that particular information falls exclusively in either the "class" or the "merits" category. Commentators agree that "merits" and "class" issues are not always distinguishable. The *Manual for Complex Litigation (Third)*, § 30.12 (1995), for example, notes that:

> [bifurcation] can result in duplication and unnecessary disputes among counsel over the scope of discovery.... Discovery relating to class issues may overlap substantially with merits discovery. A key question in class certification may be the similarity or dissimilarity between claims of the representative parties and those of the class members — an inquiry that may require discovery on the merits and development of basic issues.

Likewise, *Moore's Federal Practice* states,

> The merits are often intertwined with the Rule 23 elements, so that in some cases it may be fruitless to try to separate them, and, particularly in the case of depositions, it may be a costly duplication to repeat the process, once for the class question, and again for the merits.

3B Moore, *Federal Practice* (2d Ed. 1996), § 23.85 at p. 23-506.

> Discovery on the merits should not normally be stayed pending so-called "class discovery," because class discovery is frequently not distinguishable from merits discovery, and classwide discovery is often necessary as circumstantial evidence even when the class is denied. Such a discovery bifurcation will often be counterproductive in delaying the progress of the suit for orderly and efficient adjudication.

2 Newberg, Newberg on Class Actions, (3d ed. 1992), § 7.08, p. 7-26.

(3) An Example of the Interrelationship of Merits and Class Discovery

Let's assume that in *Angel v. Forces of Evil Corporation*, the Court grants the defendant's motion and orders that discovery be "limited to class certification issues." Angel seeks production of Evil's 10,000 warranty claim files. Evil objects, arguing that unless and until the class is certified, the claim files of other persons are not relevant to the litigation. Whitehat responds that he must prove that Angel is a proper class representative, and that he needs the warranty claim files to demonstrate the similarity of Angel's situation to those of the 10,000 prior warranty claimants.

While briefing Evil's motion for protective order, Whitehat deposes Mr. Woody — the head of Evil's plywood manufacturing division. Whitehat tries to ask Woody questions about the manufacturing process, including questions about the formulation of the product and identity of Evil's suppliers. Defense counsel objects vociferously that Whitehat is limited to asking class certification questions, and that these questions are addressed to the merits of his woefully inadequate claims. Whitehat responds that these issues *are* class certification questions, because he must demonstrate that the product defect is a uniform one, and he had assumed that Evil would argue that the defect was not uniform, and was impacted by a multitude of factors, including the manufacturing process, the quality control standards, the species of wood used, the humidity of the factory, the identity of the supplier of the

fire retardant chemical additive, and so on. Defense counsel responds that he does not have to disclose the arguments his client will make in opposition to class certification, at least not until they have seen Whitehat's class certification motion and brief. Whitehat thinks to himself that he doesn't know what to argue in his brief, nor can he know what information to seek in discovery, until he knows what objections Evil will assert to certification.

As this example demonstrates, although an order limiting discovery "to class certification issues" might seem fairly straightforward, such orders are unworkable in the real world. Judges who have been through this process recognize the practical problems associated with bifurcation. In *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 41 (N.D. Cal. 1990) the court noted:

> It is also important to bear in mind the nature of class action discovery. Discovery relating to class certification is closely enmeshed with merits discovery, and in fact cannot be meaningfully developed without inquiry into basic issues of the litigation. See Manual for Complex Litigation, 2d, sec. 30.12 (1985). An order staying discovery pending class certification would be unworkable, since Plaintiffs must be able to develop facts in support of their class certification motion. An order restricting discovery to class issues would be impracticable because of the closely linked issues, and inefficient because it would be certain to require ongoing supervision of discovery.

See also Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261 (M.D.N.C. 1988)("The mere filing of a complaint seeking class action treatment does not justify staying all discovery except that which strictly relates to the class action issue, thereby precluding discovery on the merits."); *Babbitt v. Albertson's, Inc.*, No. C-92-

1983 SBA (PJH), 1992 U.S. Dist. LEXIS 19091 at page 7 (N.D. Cal. 1992)(". . . the merits/certification distinction is not always clear. Facts relevant to the class action determination and definition may largely be the same as those relevant to the merits of the case.").

(4) Defendants' Arguments Generally Do Not Support Bifurcation

Not only does bifurcation lead to unnecessary discovery disputes, hearings and delays, it rarely promotes the benefits sought by defense counsel. Bifurcation does ***not*** avoid merits discovery in the event the class is not certified, because the case will continue on behalf of the individual plaintiffs. *See, e.g., General Motors Corp. v. City of New York*, 501 F.2d 639, 646 (2d Cir. 1974) ("Since the City's claim of nationwide monopolization will, even absent class action status, sustain broad discovery and evidentiary admissibility at trial as to alleged national predatory practices, the *incremental* cost of defending this action as a class action should not be significant.")(emphasis in original); *Bogosian v. Gulf Oil Corp.*, 1978-1 Trade Cas (CCH) ¶ 62,118 (E.D. Pa. 1978)(Plaintiff would have to prove conspiracy whether claim was brought individually or on behalf of a class; merits discovery permitted); *Canty v. Philip Morris USA*, 18 FEP Cas (BNA) 86 (E.D. Pa. 1978) (Statistical classwide information would be probative of individual plaintiff's case, even if class certification were denied; classwide discovery permitted).

Likewise, bifurcation does not avoid the need to provide discovery regarding similar claims in the event certification is denied, because such evidence usually is relevant to the individual plaintiffs' claims. For example, in *Ex parte Howell*, ___ So.2d ___, 1997 WL 7717 (Jan. 10, 1997), the plaintiffs in an insurance action sought discovery regarding the defendant insurance company's dealings with other policyholders. The trial court strictly limited the types of information plaintiffs could obtain, and the Alabama Supreme Court granted a petition for writ of mandamus directing the trial court to set aside its protective order. Thus, in any Alabama case alleging fraud, plaintiffs are entitled to "pattern and practice" evidence regardless of whether the class is certified. There is no sound reason to withhold such discovery from plaintiffs if they will be entitled to it whether or not class certification is granted.

(5) The Necessity for Discovery

Before embarking on extensive "class" discovery, whether or not discovery is bifurcated, counsel should consider what they hope to accomplish by taking such discovery. Defense counsel like to argue that discovery and an evidentiary hearing are mandatory prerequisites for class certification. Defense counsel hope that by mandating an evidentiary hearing and exhaustive discovery, the judge will begin to view the certification issues as being more involved than they really are. Even before the advent of the so-called *Voyager* ex parte "conditional" certification order that has become so prevalent in Alabama, plaintiffs' counsel often argued that neither

discovery nor an evidentiary hearing is necessary; class certification can be determined on the basis of the pleadings.

Cases can be cited supporting either position. Defendants will cite opinions with broad language suggesting the need for discovery and a hearing; Plaintiffs will respond with citations suggesting that discovery and a hearing are *not* necessary. *Compare, e.g., Lewis ex rel. Lewis v. Heckler*, 752 F.2d 555, 557 (11th Cir. 1985)(may deny certification without hearing where allegations are patently deficient), *Amason v. First State Bank of Lineville*, 369 So.2d 547 (Ala. 1979)(affidavits sufficient to demonstrate one representative plaintiff in a derivative suit was inadequate), and 7B Wright & Miller, Federal Practice and Procedure § 1785, at 111-13 (2d ed. 1986)(collecting cases where evidentiary hearing not required) with *Morrison v. Booth*, 730 F.2d 642 (11th Cir. 1984) (certification should not have been denied without an evidentiary hearing) and *Bradford v. Sears, Roebuck & Co.*, 673 F.2d 792, 792-93 (5th Cir. 1982).

Whether discovery and/or an evidentiary hearing is needed depends upon the facts of each case and the nature of the claims asserted. As reasoned in the *Manual for Complex Litigation (Third)* § 30.12 (1995), "[t]he determination whether the prerequisites of Rules 23(a) and (b) are satisfied can generally be made on the pleadings and declarations, with relatively little need for discovery," but the need for discovery and/or an evidentiary hearing depends upon the circumstances of each case:

> The nature and scope of the dispute over class certification determines the kind of [class certification] hearing to be held.... Although the rule does not specifically require a hearing, one will generally be desirable. . . When facts are not in dispute, oral argument will suffice. Potential disputes of fact may be narrowed or eliminated by the use of stipulations, requests for admission, uncontradicted affidavits. The parties may be directed to submit a statement of contested and uncontested facts relevant to Rule 23 issues....

Manual for Complex Litigation (Third), § 30.13 (1995).[3]

---

[3]If the nature of the case requires discovery and evidentiary submissions, counsel should not permit the hearing to develop into a mini-trial:

> When an evidentiary hearing on class certification is necessary, it should not be a mini-trial to adjudicate the merits of the class or individual claims.... To make the hearing more efficient, the court may limit the number of witnesses, require deposition to be summarized, call for the presentation of the direct evidence of witnesses by written statements, and use other techniques....

Manual, at 217.

(6) Alternatives to Bifurcation: (i) Early Certification Hearing; and (ii) Limit Discovery to Issues Raised by Defendants' Objections to Class Certification

Rather than entering an arbitrary order bifurcating discovery and leaving it to counsel to fight over whether every discovery request is directed toward merits or class issues, the Court need only establish an early date for the class certification hearing and let counsel take the discovery they deem necessary in advance of that hearing. If the court sets an early class certification hearing date and sticks to it, prudent counsel will focus their attention on the issues that will be important for proving or opposing class certification, but there will be no need for duplicative discovery, nor will counsel have to fight over whether a particular question relates to class or merits issues.

Alternatively, if the Court is determined to bifurcate discovery, the Court should at least address the expected disputes at the outset. Although plaintiffs' counsel sometimes know what discovery they will need to support class certification, more often, the nature and extent of the discovery that will be useful is a function of what arguments the defendant will make in opposition to class certification. The most efficient approach is to require that the defendants list their grounds for opposing class certification, and then limit discovery (if at all) to the listed issues.

This approach provides guidance on what issues are permissible areas of inquiry,[4] and is the type of approach contemplated by revised Rule 16 of the Federal Rules. As noted in the *Manual for Complex Litigation (Third)* § 30.12:

> To avoid [discovery disputes], the court should call for a specific discovery plan from the parties identifying the depositions and other discovery contemplated and the subject matter to be covered.

USE:	(i)	An early hearing focuses the parties on class certification, while avoiding the discovery disputes inherent in "bifurcation;"
	(ii)	Alternatively, requiring defendants to state their objections, and then limiting discovery to the listed issues, will prevent some, though not all, discovery disputes.
ABUSE:	(i)	Broad orders limiting discovery to "class certification issues;"
	(ii)	Any limitation of discovery that will be beneficial even if class certification is denied.

[4] A copy of an order requiring this approach, recently entered by Magistrate Judge Milling in Mobile, is attached hereto.

III.
DEPOSITIONS OF THE NAMED PLAINTIFF(S)

Having failed to stay or limit discovery, Evil has had to produce its voluminous, and very damaging, claim files to Whitehat. In a last ditch effort to forestall class certification, defense counsel decide to attack both Angel and Whitehat. If they cannot defeat class certification on the merits, perhaps they can at least knock out the lawyer and the plaintiff, and hope no one else steps in to take their place.

It once was the vogue for defendants to vigorously challenge the "adequacy" of the named plaintiffs and/or their counsel to represent the class. The defense lawyer would undertake extensive discovery into the plaintiffs' background and financial wherewithal, their genealogy, their relationship with plaintiff counsel, and their understanding of the legal intricacies of the litigation, all for the feigned goal of insuring that the named plaintiffs would be effective advocates against them. Of course, the defendants' real goal was not to insure adequate representation, but to prevent representation.

Defense counsel have gone to incredible lengths to argue that the representative plaintiffs would not be effective opponents. If the plaintiff in a case involving small amounts of individual damages testified at her deposition that she could not afford the anticipated expert witness fees, defense counsel would argue that the plaintiff could not adequately represent the class. *See, e.g., Sanderson v. Winner*, 507 F.2d 477, 479-80 (10th Cir. 1974); *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991). Defense counsel have been known to argue in cases involving defective

medical treatments or devices that the named plaintiffs were too sick (*as a result of using the defendants' product*) to adequately represent the class. *Cf. Barefield v. Chevron, USA*, 44 FEP Cas (BNA) 1885 (N.D. Cal. 1987)(plaintiffs in employment discrimination claimed job-induced stress; defendant lost argument that plaintiffs were in no shape to represent the class, due to their stress). Counsel in a race discrimination case have even inquired into the genealogy of the named plaintiff — not to determine whether the plaintiff had standing to bring a civil rights suit — but to see just how black he was. *See* Kirby, "A Proposal Regarding Rule 23(a)(4): Adequacy of Representation in Class Actions," 5 Class Action Reports 210 (July-August 1980).

Although a defendant may have some legitimate interest in insuring that any judgment will bind the class, that requires only that the plaintiff have standing to bring the claims and that he does not have any disabling conflicts of interest with the class. Successful collateral attacks on a class action judgment are rare. After years of experience with these issues, federal courts mostly see through defendants' purported concerns and scrutinize carefully defendants' discovery tactics. As the *Manual for Complex Litigation (Third)* recognizes:

> Courts are sharply curtailing inquiries into and attacks on the personal circumstances of plaintiffs who seek to represent a class. Precedents have now settled the law in many areas of common challenges raised to the plaintiffs' adequacy. There is also the very real potential for such discovery to be harassing and oppressive to representatives who seek to bring meritorious class litigation.

Id., at § 3.33.[5] Specific areas of inquiry at class representative depositions include the following:

(A) FINANCIAL WHEREWITHAL

> *Evil's lawyers have sought production of Angel's tax returns and personal financial statements. When challenged as to the relevance of such materials, Evil's counsel argued that Angel can be an adequate class representative only if he is both willing and financially capable of covering the costs of the notice and the litigation. Whitehat sought a protective order preventing discovery of Angel's personal financial condition. He supported his motion with an affidavit that he has agreed to advance the costs of the litigation, including the costs of the notice.*

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Supreme Court held that, under the circumstances of that case, the cost of notice could not be shifted to the defendant. Defendants use *Eisen* to argue that the individual plaintiff must be able to afford the costs of the class notice. That stretches *Eisen* a bit too far. The Supreme Court did not address itself to the allocation of the cost of notice between the plaintiff and her counsel. Nor did the Court address the adequacy of a class representative who could not ***personally*** afford the cost of notice.

Defendants (and a few courts) also have looked to the Disciplinary Rules, and concluded that since the old rules required the plaintiff to remain ultimately responsible for the litigation expenses, any named plaintiff who could not, or would not, pay for 100% of the litigation and notice costs would be an inappropriate

---

[5] *See generally* Newberg & Conte, *Newberg on Class Actions*, § 15.30 ("Discovery Abuses in Challenges to Adequacy").

plaintiff. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litig.*, 93 F.R.D. 485 (D. Md. 1982)(Agreement for counsel to advance costs with reimbursement contingent on recovery substitutes counsel for the named plaintiff). Most courts rejected that analysis. Judge Easterbrook of the Seventh Circuit (normally the defense lawyer's savior) went so far as to conclude in *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) that

> The very feature that makes class treatment appropriate — small individual stakes and large aggregate ones — ensures that the representative will be unwilling to vouch for the entire costs. Only a lunatic would do so. A madman is not a good representative of the class!

Most other opinions are in accord:

> Were the court to automatically deny class certification when counsel advances litigation costs to plaintiffs who possess little or no resources, the very purpose behind bringing a class action would be defeated.... In a case such as this, where injunctive relief is sought and plaintiffs' individual damages may be small, the extensive costs of class litigation could preclude many victims of racial discrimination from ever being able to vindicate their rights.... There is no indication that counsel's agreement to advance costs will compromise his representation of plaintiffs or unduly prejudice the class.

Harris v. General Dev. Corp., 127 F.R.D. 655, 662 (N.D. Ill. 1989).

> Courts "cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich."

Sayre v. Abraham Lincoln Fed. Sav. & Loan Assn., 65 F.R.D. 379, 385 (E.D. Pa. 1974).

> Nor do we see that the defendants have any legitimate concern as to whether plaintiffs will be able to pay their lawyers and will be able to

> pay a judgment for costs in the event that such a judgment is entered. In this respect we see no difference between the case at bar and any other lawsuit....

Sanderson v. Winner, 507 F.2d 477, 479-80 (10th Cir. 1974), *cert. denied*, 95 S.Ct. 1573.

> A strict requirement that a representative plaintiff be willing and able to finance the litigation would prevent accomplishment of this salutary purpose ("to permit aggregation of claims").

Abelson v. Strong, 1987 Fed. Sec. L. Rep. (CCH) ¶ 93,365, at 96,889 (D. Mass. 1987).

> It should also be noted that a number of courts have concluded that the proposed class representatives' personal finances are not relevant to the adequacy of representation question.

Biben v. Card, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,462, at 92, 282 (W.D. Mo. 1986).

> . . . courts do not normally examine the financial responsibility of class representatives.

Dirks v. Clayton Brokerage Co., 105 F.R.D. 125, 134 (D. Minn. 1985).

> Defendants contend that DeMilia is not an adequate class representative . . . [and] that his refusal to answer questions directed at his financial ability to prosecute the action indicate that he will be an inadequate class representative of the class . . .
>
> With regard to defendants' motion that a determination on the question of a class action be deferred and that the plaintiff be directed to answer certain questions . . ., we agree with the plaintiff, these questions are irrelevant. The specific questions in issue attempt to probe the plaintiffs' financial resources.... To permit the issue of plaintiff's financial status to defeat the plaintiff's motion for a class action would be contradictory to the very theory of the class action.

DeMilia v. Cybernetics Int'l Corp., [1971-72 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93, 386, at 91,978-79 (S.D.N.Y. 1972). *See also, e.g., Klein v. Checker Motors Corp.*, 87 F.R.D. 5 (N.D.Ill. 1979)(Motion to compel discovery of plaintiffs income and assets denied as irrelevant to the propriety of class certification); *Bogosian v. Gulf Oil Corp.*, 337 F. Supp. 1228 (E.D. Pa. 1971) (denying motions to compel plaintiff to testify about his net worth, his ability to pay costs, and personal financial situation, as irrelevant); *Ferraro v. General Motors Corp.*, 105 F.R.D. 429, 433-34 (D. N.J. 1984)(denying motion to compel plaintiff to produce his tax returns and financial statements); *Gordon v. Hunt,* 98 F.R.D. 573, 579 (S.D.N.Y. 1983); *Kamens v. Horizon Corp.*, 81 F.R.D. 444, 446 (S.D.N.Y. 1979)(denying motion to compel plaintiff to answer interrogatories regarding her personal finances, etc.); *Moll v. U.S. Life Ins. Co.*, 113 F.R.D. 625, 632 (S.D.N.Y. 1987)(same); *Greene v. Emersons, Ltd.*, 86 F.R.D. 47, 62-63 (S.D.N.Y. 1980)(the inquiry into plaintiffs' finances is "none of the class action defendants' business"); *Tanzer v. Sharon Steel Corp.*, 1979 Fed. Sec. L. Rep. (CCH) § 96,915, at 95,799 (S.D.N.Y. 1979)("weight of authority" finds financial issues irrelevant); *In re McDonnell Douglas Corp. Securities Litig.*, 92 F.R.D. 761, 762-63 (E.D. Mo. 1981)("After examining the cases discussed in the memoranda of the parties and other relevant authority, the Court concludes that the tax returns of plaintiffs are not relevant to plaintiffs' ability to represent the alleged class adequately.").

The Court in *Eggleston v. Chicago Journeyman Plumbers' Local Union*, 657 F.2d 890, 895 (7th Cir. 1981) summed up the problem with this defense tactic:

> . . . it is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interest of the class," or the plaintiffs' ability to finance the litigation, it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Most of the cases that have found financial issues relevant, have found them relevant only to the extent plaintiffs' counsel violated the old Disciplinary Rule that required the plaintiff to remain responsible for the costs. Alabama, however, has adopted the ABA Model Rule 1.8, which specifically allows counsel to advance the costs of litigation, with reimbursement contingent on the results of the litigation. This provision puts to rest any contention that the named plaintiffs' financial status has any relevance to their adequacy. *See Rand v. Monsanto Co.*, 926 F.2d, at 600; *Genden v. Merrill Lynch Pierce Finner & Smith*, 114 F.R.D. 48, 53 (S.D.N.Y. 1987); *Harris v. General Development Corp.*, 127 F.R.D. 655, 663 (N.D. Ill. 1989); *Haywood v. Barnes*, 109 F.R.D. 568 (E.D.N.C. 1986).

(B) FAMILIARITY WITH THE LITIGATION; *i.e.*, THE "LAWYER'S CASE" ISSUE

> *Evil's lawyer asks Angel at his deposition whether he read the complaint before it was filed. He then asks Angel a series of questions regarding amendments to the complaint, the addition of co-counsel, the definition of the various subclasses, and why the*

complaint says his damages are less than $75,000. Doesn't he want more than $75,000? Whitehat lets Angel answer a few of these questions, but cuts off defense counsel after a while.

Clearly, a named plaintiff must have a sufficient understanding of the litigation to exercise his or her obligations on behalf of the class. Thus, in *Elgin v. Alfa Corp.*, 598 So.2d 807 (Ala. 1992), the Alabama Supreme Court affirmed the trial court's decision that one of several derivative suit plaintiffs was inadequate, because he knew "virtually nothing about the subject matter of the complaint," and had not even read it. Similarly, in *Levine v. Berg*, 79 F.R.D. 95 (S.D.N.Y. 1978), the plaintiff had only glanced at the complaint. *See also, e.g., In re Goldchip Funding Co.*, 61 F.R.D. 592, 595 (M.D. Pa. 1974)(plaintiff must demonstrate a "keen interest" in the progress of the litigation); *Massengill v. Board of Educ.*, 88 F.R.D. 181, 186 (N.D. Ill. 1980); *Seiden v. Nicholson*, 69 F.R.D. 681, 688-89 (N.D. Ill. 1976).

That the named plaintiff should have some familiarity with the litigation does ***not*** mean that the plaintiff must understand all the intricacies of complex litigation. Otherwise, the plaintiff wouldn't need a lawyer. Thus, courts reject exhaustive interrogations of plaintiffs regarding the details of litigation, or their understanding of arcane legal questions. *See, e.g., Brown v. Cameron-Brown Co.*, 30 Fed. R. Serv.2d (Callaghan) 1181 (E.D. Va. 1980), *rev'd on other grounds*, 31 Fed. R. Serv.2d (Callaghan) 1362 (4th Cir. 1981)(lack of understanding of antitrust claims did not render plaintiff inadequate). The fact that plaintiffs cannot explain why a complaint was amended or why a particular law firm was added as co-counsel is not

a basis for rendering a class representative inadequate. *See Hoffman Elec., Inc. v. Emerson Elec. Co.*, 754 F. Supp. 1070 (W.D. Pa. 1991). A general knowledge of what the case is about is sufficient. *Nichols v. Poughkeepsie Sav. Bank*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,736 (S.D.N.Y. 1990).

For example, in *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019 (N.D. Miss. 1993), the court rejected the defendants' contention that the named plaintiffs were inadequate representatives because they were "in the dark" about the scope and objectives of this litigation and were "mere pawns in the hands of antitrust counsel." *Id.*, at 1037.

> An antitrust litigant is not expected to appreciate the finer points of the Sherman Act, Clayton Act, or the Federal Rules of Civil Procedure governing class certification.... Despite defendants' suggestion to the contrary, the court perceived nothing remarkable about the representatives' knowledge and understanding of their undertaking as class action representatives in this antitrust suit. Having stated that, the court hastens to add that the undersigned will be monitoring the adequacy of party representation for absent class members as the litigation progresses; and, the court will respond accordingly where it perceived instances where active judicial involvement is in the best interest of this litigation. This court is aware of the popular criticism and perception of class action litigation as being a lifeline for legal fees rather than a judicially feasible approach to vindicate multiple wrongs. Regardless of whether such criticism is fact or myth, it goes without saying that the client's interest is first and foremost in the advocacy of this case and in every case.

(C) UNDERSTANDING THE RESPONSIBILITIES OF A CLASS REPRESENTATIVE

Counsel for Evil next asks Angel if he would drop the lawsuit if he sold his house, or if he was personally made whole.

A class representative must understand the responsibilities and obligations of being a class representative; *i.e.*, that the plaintiff must seek the best interests of the class as a whole, rather than a personal recovery at the expense of the class. Thus, in *Epifano v. Boardroom Business Products*, 130 F.R.D. 295 (S.D.N.Y. 1990), the plaintiff was found inadequate when he testified that he would sacrifice the class for a personal recovery.

Like the previous issue, however, plaintiffs' counsel must be careful not to let the defendants overstate this issue. No plaintiff has to be Superman, but he does have to understand that he represents the entire class.

(D) STANDING

By agreement of counsel, Evil Corp. Inspected Angel's roof to determine that the plywood had been manufactured by Evil, had not been sold as "seconds," was installed properly, and to determine which of their plants had made the siding and when.

Clearly, the representative plaintiff must have standing to bring the class claims. Thus, in *In re Exide Corp.*, 678 So.2d 773 (Ala. 1996), the Alabama Supreme Court decertified a class because the plaintiffs could not demonstrate that they had bought the batteries they claimed had been fraudulently sold.

This is sometimes a fertile area for discovery in consumer credit, defective product, and insurance fraud cases. All too often it seems that lawsuits are being brought on behalf of plaintiffs who had purchased an entirely different insurance policy or product, or who checked the wrong box on the credit application.

(E) PLAINTIFF'S PHYSICAL CONDITION

Evil Corp. sought production of all of Angel's medical records, particularly those pertaining to the sprained ankle he suffered when he fell through his roof. Whitehat again challenged the relevance of these personal medical records, and Evil argued that Angel would be an inadequate representative if he had any health problems that might prevent him from attending trial. Because there was no indication of any such problems sufficient to justify an inquiry into the medical records, the Court limited Evil to asking simple questions, such as whether Angel was aware of any personal health problems that would hinder his ability to represent the class.

Most courts reject any argument that a physical ailment or disability renders a class representative inadequate. *See, e.g., Moskowitz v. Lopp*, 128 F.R.D. 624 (E.D. Pa. 1989)(81 year old plaintiff with heart trouble adequate); *Garfinkel v. Memory Metals, Inc.*, 695 F. Supp. 1397 (D. Conn. 1988)(Health concerns overridden by adequacy of counsel); *Steiner v. Ideal Basic Indus.*, 127 F.R.D. 192 (D. Colo. 1987)(although plaintiff was on dialysis and could not travel, deposition taken in hospital sufficed); *Fickinger v. CI Planning Corp.*, 103 F.R.D. 529 (E.D. Pa. 1984)(Advanced age and related infirmities not equivalent to interests antagonistic to the class).

(F) ETHICAL ISSUES

Defense counsel really honed in on Angel regarding his conversations with an Evil employee. Counsel wanted to know whether Whitehat had been involved in those discussions. Evil's counsel also wanted to know how Angel came to be a plaintiff; i.e., had he been "solicited" by Whitehat?

Some courts hold that ethical questions are better addressed to the Bar Association, and do not affect counsel's adequacy. *See, e.g., In re Nissan Motor Corp. Litig.*, 22 Fed. R. Serv. 2d (Callaghan) 63 (S.D. Fla. 1975)(allegations of solicitation did not suggest extremely offensive conduct; merely incidental solicitation). *Cf. Lefrak v. Arabian Am. Oil Co.*, 527 F.2d 1136 (2d Cir. 1975)(Unsupported charge that class members were solicited would not disqualify class counsel). Other courts are concerned that a class should not be represented by counsel who would violate the rules of ethics. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litig.*, 93 F.R.D. 485 (D. Md. 1982). The best advice is to comply with the rules of ethics.

USE:	(i)	Appropriate to seek discovery regarding potential conflicts of interest or standing issues that might affect binding nature of judgment.
ABUSE:	(i)	Discovery directed to plaintiff's financial status;
	(ii)	Extensive discovery regarding physical conditions;
	(iii)	Extensive interrogation regarding understanding of the legal nuances of the litigation.

IV.
DISCOVERY OF ABSENT CLASS MEMBERS

Having been compelled to produce its claim files, having lost its stay motions, having had a protective order preventing defense counsel from inquiring into various personal characteristics of the named plaintiffs, and facing an accelerated class certification date, defense counsel are getting antsy. They recognize they may have to settle, and decide to try to reduce the size of the class as much as possible. Evil's goal is to direct discovery to the thousands of class members. Hopefully, that discovery will demonstrate that many potential class members should be excluded from the class for various reasons. At a minimum, many potential class members will not want to be bothered by these interrogatories, and will be excluded from the class as a sanction.

It is uncommon, but not unheard of, for defendants to seek discovery from the absent class members. In a small case, they may serve interrogatories, deposition notices and document production requests on every class member in a not so thinly veiled attempt to scare any class members from participating in the case. In a larger case, they may seek to serve a sampling of class members with interrogatories or questionnaires, and may seek sanctions for failure to respond to these discovery requests.

A. THE SEVENTH CIRCUIT'S VIEW IN *BRENNAN* AND THEREAFTER

Defendants typically predicate their discovery efforts on *Brennan v. Midwestern Life Ins. Co.*, 450 F.2d 999 (7th Cir.), *cert. denied*, 405 U.S. 921 (1972). In *Brennan*, the Seventh Circuit held that a district court did not abuse its discretion in dismissing the claims of absent class members who refused or failed to answer

discovery requests as a Rule 37 sanction. But as the Eleventh Circuit has recognized, the *Brennan* analysis "has not been unswervingly followed in the Seventh Circuit, and it has arguably been narrowed by subsequent rulings." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1556 (11th Cir. 1986), citing *Clark v. Universal Builders*, 501 F.2d 324 (7th Cir. 1974).

In *Clark*, the Seventh Circuit readdressed the propriety of imposing discovery tools on passive class members and reversed a district court's allowance of interrogatories because the proponents of the interrogatories were unable to demonstrate sufficient grounds to overcome the presumption against allowing discovery. *Clark* demonstrates that a very strong showing is necessary even in the Seventh Circuit for the proponent of discovery to carry its burden of overcoming the presumption against discovery. In particular, the Court noted that "[t]he interrogatories sought answers to questions that would have required the assistance of technical and legal advice in understanding the questions and formulating responsive answers thereto" and they "sought information already known to defendants." *Id.*, at 340 n. 24, 340-41. Those two factors led the *Clark* court to conclude that the interrogatories were not necessary and they were designed in all likelihood as a means of reducing the number of class members.

The majority of cases following *Brennan* have refused to permit discovery, holding that no exceptional circumstances existed. *See, e.g., Bisgeier v. Fotomat Corp.*, 62 F.R.D. 118 (N.D. Ill. 1973); *Enterprise Wallpaper Mfg. Co. v. Bodman*, 85

F.R.D. 325 (S.D.N.Y. 1980). The court in *Gardner v. Awards Marketing Corporation*, 55 F.R.D. 460 (D. Utah 1972) made particularly apt comments on the issue:

> That the information disclosed by class members through replies to interrogatories might be of assistance to the defendants otherwise from an evidentiary standpoint or as a matter of tactics is not enough. The usual and reasonable discovery processes (not directed against class members as if they were parties and not requiring them to consult counsel and become acquainted with all of the ramifications of the case and in effect to intervene as parties) should be sufficient to fully develop the facts significant to the question of liability.
>
> . . .
>
> With respect to the burden imposed, cursory examination of the proposed interrogatories reveals a likely substantial burden on the small business man (or perhaps former business man) presumably functioning without assistance of counsel. The requested information would require respondents to recall or search out even minute details of old and obscure transactions and negotiations. And, while defendant represents to the court that answers would not be mandatory, i.e., no claims would be barred for failure to answer, the interrogated lay class member would be confronted with instructions that he "should answer" and to transmit his responses to the clerk of the court. To the layman the unmistakable impression of "no choice in the matter" would be conveyed. Indeed, it would be incongruous from the court's standpoint to give direction in such a form with the understanding that it could be disregarded with impunity. Irrespective of technical wording, I do not believe that answers to such interrogatories would be an essential or proper burden to be placed upon class members at this time.

In those very few cases when discovery has been allowed, the court exercised a great deal of control over the chosen discovery methods. Indeed, at least one court has required the defendant to pay a portion of the fees incurred by plaintiffs' counsel

in working with the class members to respond to the defendants' questions. *In re Airline Ticket Commission Antitrust Litig.*, 918 F. Supp. 283, 288 (D. Mich. 1996).

B. NO DISCOVERY IS PERMITTED; A BETTER REASONED LINE OF CASES

Recognizing the representative nature of class actions and the purposes of Rule 23, most courts have rejected the *Brennan* analysis and held that absent class members are not "parties" within the purview of Rules 33 and 34, and therefore will not be required to respond to such interrogatories and document requests.

In *Fischer v. Wolfinbarger*, 55 F.R.D. 129 (W.D. Ky. 1971), one of the defendants sought to serve interrogatories on the 3,000 member class, and the court rejected the attempt stating the following with respect to the nature of a class action:

> [T]he proposed interrogatories . . . are improper, directed as they are to members of the class who are not named plaintiffs. The class action is designed for the situation, as Rule 23(a)(1) specifically contemplates, where "the class is so numerous that joinder of all members is impracticable." It is designed to provide a fair and efficient procedure for handling claims where the claims or defenses of the represented parties are typical of the claims or defenses of the class, where there are questions of law or fact common to the class, and where it would be fair to conclude that the representative parties will fairly and adequately protect the interests of the class. It is not intended that members of the class should be treated as if they were parties plaintiff, subject to the normal discovery procedures, because if that were permitted, then the reason for the rule would fail.

Id., at 132 (emphasis added).

Similarly, in *Wainwright v. Kraftco*, 54 F.R.D. 532 (N.D. Ga. 1972), an antitrust action, the defendants served interrogatories on the class members, and the

plaintiffs, as in *Brennan*, did not object to the interrogatories. Of course, "many" of the class members failed to respond, and the defendants moved for dismissal of those class members' claims as a sanction.

The court in *Wainwright* noted that "if class members were automatically deemed parties, all class actions would be converted into massive joinders. Such a result would emasculate Rule 23." *Id.*, at 534. The court held that no discovery should be permitted in a class action against absent class members.

Other courts have agreed with *Fischer* and *Wainwright*, including the Eleventh Circuit. In *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), the Eleventh Circuit stated

> [W]e do not find *Brennan* compelling. It has not met with wide acceptance in this Circuit.

The court then disallowed the requested interrogatories to class members, and held that the threat of sanctions for noncompliance by class members with discovery requests amounts to an "opt in" device that is at odds with Rule 23. The Eleventh Circuit concluded that it was dubious of ever permitting discovery of class members, and it would not allow sanctions, or their threat, real or implied, to be used against class members for failing to comply with such discovery even if allowed. *See also, e.g., Hawkins v. Holiday Inns, Inc.*, 24 R.R. Serv. 2d 357, [1977] CCH Trade Cases ¶61,310 (W.D. Tenn. 1977)(holding that absent Class Members are not "parties" and are not subject to normal discovery rules); *In re Arizona Bakery Prods. Litig.*, [1975]

CCH Trade Cases ¶ 60,556 (D. Ariz. 1975); *Bucalo v. General Leisure Prods. Corp.*, 54 F.R.D. 483, 485 (S.D.N.Y. 1971)(noted in discussing whether to allow withdrawal of named plaintiff that if withdrawal was allowed, plaintiff would no longer be subject to discovery); *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969)(denying discovery until after common issues are determined, and then proof of claim process is available); *Bachman v. Collier*, 23 F. R. Serv. 2d 1461 (D.D.C. 1977). *Cf. Blackie v. Barrack*, 524 F.2d 891 , 906 n. 22 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976)(Defendant does not have "unlimited right" to take discovery of absent class members, and court may reasonably control discovery to prevent "fruitless fishing expeditions."); *Lamb v. United Security Life Co.*, [1972-73 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 93,764 (S.D. Iowa 1973)(absent class members who do not opt out and who remain in the case are <u>not</u> "parties" and therefore are not liable for costs of a class action, regardless of whether judgment is favorable or unfavorable for the Class because "[i]f Class Members were automatically deemed parties, all class actions would be converted into massive joinders. Such a result would emasculate Rule 23."); *B&B Investment Club v. Kelinert's*, [1973-74 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 94,451 (E.D. Pa. 1974)(denying Defendants' request to require absent Class Members to submit proofs of claim before trial).