Material considerations when screening for a class representative

Special care should be given to screening potential class representatives because the failure to do so can have devastating effects on your case

By Abbas Kazerounian

A lot of class actions may have all the signs of being a good case – the liability looks good, and on the surface it appears that the class is very much certifiable. However, the lack of due diligence on the front end, can, and does defeat class actions on a more frequent basis than it should. Once the Rule 11 obligations have been fulfilled on the merits of the case, many lawyers rush to the courthouse to file their case. It is important to note that screening your class representative(s) thoroughly is crucial in bringing a class action and something that practitioners forget to do, or overlook in their haste to the courthouse.

Sitting down with your client and going through an in-depth intake process is a necessity in class action litigation because it is often where the defense tries to defeat your case first. Defense firms do in-depth background searches on class representatives and investigate their claims with a lot of scrutiny. It is therefore imperative that you have prepared your class representative very carefully and investigated the main areas where your client could be attacked by the defense. Below, I am outlining some of the main issues that should be investigated with your client and/or explained to your client (mainly the duties of a class representative). Though the contents of your communications are protected by attorney-client privilege, it is absolutely fair game for the defense to ask in discovery (usually in depositions) whether the duties of a class representative were explained to your client.

Screening the class representative

When you do an intake, it is important to go over some of the

fundamental issues of whether the potential client can act as a class representative in the first place. As a starting point you want to know that the client has the moral prerequisites to act as a class representative. So if the client has a felony which pertained to moral turpitude (like securities fraud or larceny) that would be an absolute impediment to the client acting as a class representative. Sometimes, this is something that attorneys shy away from because it is an awkward subject; but it is essential to have this candid talk at the outset of a case. Another way that this can get overlooked is where a case is referred, and it is *assumed* that the referring attorney has done a thorough screening. Having learned the hard way, I would never make assumptions. Always check this issue because it could (and usually will) come up when you are deep into a case.

A felony, however, is not a per se bar for a client to act as a class representative. If the felony is not deemed moral turpitude or over 10 years old (and you can show rehabilitation of the client) then it is possible for that individual to be a class representative. (*Stemple v. QC Holdings, Inc.*, 2014 U.S. Dist. LEXIS 125313 (S.D. Cal., September 5, 2014).) Having said that, if you have the option of picking between different potential class representatives, it is obviously better to choose a class representative with a clean criminal record than one where there is ambiguity.

Proof that client has standing

It is of paramount importance that the would-be class representative has standing to represent the class for the alleged harm. For example, in a Telephone Consumer Protection Act case, where the alleged harm is about unwanted robocalls to cell phones, you would need to show that the class representative had been harmed by that specific conduct. Only then would he/she have standing to represent the rest of the class members. In the screening process you would want to see screen shots of the calls and/or phone bills showing that the offender actually called your client (and the number that called your client's cell phone belonged to the defendant).

This can go even further and deeper; so in a labeling case, not only would you want to see proof of purchase of the product in question, but you would need to know if the client relied on the representation(s) that the lawsuit is based on. This standing requirement goes hand in hand with knowledge of the law and it falls directly on the attorney to screen for this.

Even if you have proof of purchase, you may want to investigate the method of payment. In jurisdictions where ascertainability is a required element in certifying a case, such as in an over-the-counter-product case, that is a massive challenge. So given the choice between two clients where one paid in cash and one with a debit card (or used a rewards card), you would look to the latter because it may carve out a way for the attorney to certify the case later. But again, this comes with intricate knowledge of the law in the underlying litigation. So if the case is being referred (because you are the expert in this area of law), do not assume that the referring attorney already screened the client for the intricate elements to show standing. As class counsel, that is *your* job.

Representing the interests of the class

One of the main duties of a class representative that should be explained is that they have the obligation to always consider the interests of the class just as the class representative would consider his or her own interests (throughout litigation). In essence, a class representative is volunteering to represent the interests of numerous (usually over 40 and sometimes millions) other people with very similar claims and/or damages. It should be explained that if they are to be the class representative, the client should be of the belief that he/she should benefit from the class action in an equal manner to the rest of the class members.

Furthermore, it is important to explain the fundamentals of a class action to your client; that the action is being brought for monetary and judicial efficiencies and that class actions are a mechanism to ensure the defendant's compliance with the specific law in question; so that the class members can all benefit from it in an equal and equitable manner. This is one of the most important things to explain to a client, because defendants systematically offer inflated premiums to class representatives before the class is certified to rid themselves of potential class liability on a case. If the class representative chooses to take that inflated offer to settle the case individually pre-certification, the case is finished without a class resolution. Not only does this potentially harm the putative class members, but it could have wasted a lot of litigation time and resources in your quest for class relief.

Claims are typical

You have to ensure that the claims of the class representative are *typical* of the claims of the putative class members. Though the claims do not have to be technically identical to those of claims of the class, they have to be substantially similar. "Typical" in this context means that the class representative shares common issues of fact and/or law. So, you would want the class representative to have experienced substantially the same harm as the rest of the class members or the class action could be defeated.

Don't forget that typicality is in fact an element of Rule 23 within the Federal Rules of Civil Procedure. This is an element that will be scrutinized at time of certification by the judge. But usually by that time, you would have expended a lot of time and resources getting the case to that procedural posture only to realize that you may fail on *typicality*. It is best to discover this pre-filing than at the certification stage!

Participation in lawsuit

It is not imperative that the class representative have intimate knowledge of the law or be an extremely sophisticated individual. It is, however, important that the class representative have a rudimentary understanding of what the lawsuit (roughly) is about. So, as an example, if you are bringing a lawsuit based on a misrepresentation on a product label in California, it is not important if the client does not know the law on Business and Professions Code sections 17200 and 17500 or the CLRA, but it would be important for the class representative to know that the lawsuit was brought because of an alleged misrepresentation on the label.

In discovery, the defense will also attack the class representative for his/her adequacy per Federal Rules of Civil Procedure, rule 23(a)(4). They will do this by asking at deposition the amount of involvement the class representative has had in litigation. For example, they will show the class representative a copy of the complaint and ask whether he/she reviewed it before it was filed. It is, therefore, important to explain to the client at the outset that they will need to be involved in the lawsuit by reviewing pleadings, assisting with discovery, sitting for a deposition, being available for mediations and so on. Again, it is unreasonable (and not required) that the class representative have legal knowledge, but their involvement in litigation will be fair game in discovery as it pertains to their adequacy as a class representative.

No conflict of interest

The class representative cannot have a conflict of interest with the rest of the putative class members. The way the defense usually attacks the class representative is to investigate whether the client has any business dealings with the plaintiffs' attorneys (including any referring attorneys) and/or can benefit (profit) in any manner apart from what they would be entitled to as a class member.

An example of this is if the referring attorney is getting a referral fee and the class representative is married to the referring attorney. That means that if the referring attorney would get a portion (as minimal as it may be) of the attorneys' fees, the class representative would benefit from that also; and that would put the class representative in direct conflict with the remainder of the class. In that situation, their interests cannot be deemed directly aligned; because it could be argued that the class representative would be trying to benefit from a deal that is diverse to how the remainder of the class can benefit from the said deal.

One of the direct consequences of this issue is that retainer agreements are discoverable in class actions (so that the defense can dig into such scenarios). (*Gusman v. Comcast Corp*., 298 FRD 592, (SD Cal. 2014).) This does not mean that an acquaintance or a friend cannot be a class representative; it just means that there cannot be any conflicts of interests (including financial ties) that will benefit the class representative in a way that the remainder of the class cannot benefit from.

Social media

As in any other case, as class action lawyers, we have to advise our clients about the way that their social media presence could affect their case and of course how it could harm the class. The ever-present theme with most of the issues covered in this article is that if the defense can harm the class representative, they can hurt the case as whole. And the manner in which the class representative portrays themselves (or the statements that they make) will almost always be looked at by the defense.

Preservation of evidence

As with any other type of case evidence, preservation is vital. But it is even more important to put this in writing in a class action setting. Class actions tend to take longer and the possibility to lose evidence is greater. It is important to really get into the weeds on this topic with a potential class representative because evidence may consist of more than what the client perceives to be evidence.

For example, in a labeling case, the client may deem the receipt for the product and/or their credit card statements and/or the product itself to be the evidence. But if they bought the product online on a specific computer or cell phone, those items can be deemed evidence also. People change their phones all the time and if the defense requests such evidence and it has been destroyed, it could result in a spoliation motion and sanctions (and again the adequacy of the class representative) can be attacked.

The takeaway here is that additional care should be given to screening potential class representatives because the failure to do so can have devastating effects on your case at a juncture when a considerable amount of resources have already been put into that matter. If you have the option, try to file cases with two or three class representatives (which is not always a possibility), so that the risk of that attack on the representatives is hedged.


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