COMMUNICATIONS WITH ABSENT CLASS MEMBERS

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A. Before Class Certification

1. Some courts have adopted local rules prohibiting or limiting communications with class members. See, e.g., Local Rule 23 (N.D. Ga. 2004); Local Rule 23.1 (E.D., M.D., W.D. La. 2002).

2. Before class certification, communications with putative class members generally are not prohibited. 5 Alba Conte & Herbert Newberg, Newberg on Class Actions §15:14, at 55 (4th ed. 2002); Restatement (Third) of the Law Governing Lawyers §99 cmt. 1 (2000).

3. However, any communication regarding the litigation with the named class representative should go through class counsel. Blanchard v. EdgeMark Fin. Corp., 175 F.R.D. 293, 301-02 (N.D. Ill. 1997) (holding that defendants' counsel violated ethical rule prohibiting contact with a represented party when he negotiated with class representative's personal counsel to settle named plaintiff's individual claims, without permission of class counsel or court approval).

4. Defendants may communicate with absent class members in the ordinary course of business and negotiate individual settlement agreements with putative class members prior to class certification. Jenifer v. Delaware Solid Waste Auth., No. 98-270, 1999 WL 117762, at *3 (D. Del. Feb. 25, 1999); Harris v. Green Tree Financial Corp., No. 97-1128, 1997 WL 805254 (E.D. Pa. Dec. 17, 1997), rev'd on other grounds, 183 F.3d 173 (3d Cir. 1999); Christensen v. Kiewit-Murdock Inv. Corp., 815 F.2d 206, 213 (2d Cir.), cert. denied, 484 U.S. 908 (1987); Shelton v. Pargo, Inc., 582 F.2d 1298, 1303-05 (4th Cir. 1978); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972).

5. Fed. R. Civ. P. 23(d) empowers the court to prohibit improper communications with potential class members even before class certification. Manual for Complex Litigation § 21:12, at 247 (4th ed. 2004).

6. The Supreme Court has recognized the potential for abuse that may occur when there are unsupervised communications to members of a putative class. Gulf Oil v. Bernard, 452 U.S. 89, 100 (1981). An order limiting communications between parties and potential class members "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." Id. at 101. Thus, any order should be "carefully drawn" so as to limit speech as little as possible, consistent with the rights of the parties under the circumstances. Id. at 102.

7. Misleading communications to putative class members concerning the litigation can be prohibited by the court.

   a. Hampton Hardware, Inc. v. Cotter & Co., 156 F.R.D. 630 (N.D. Tex. 1994). After the filing of the class action, defendant sent letters to putative class members advising them not to participate in the lawsuit and specifying the negative business consequences that would result if they chose to join the suit. Id. at 631-32. The defendant argued that its letter campaign was "part of a routine dissemination of information to its members" and was protected by the First Amendment. Id. at 632. The court rejected the defendant's arguments and found that the letters constituted "the type of misleading communications justifying court intervention" and that they "attempt[ed] to reduce the class members participation in the lawsuit based on threats to their pocketbooks." Id. at 632-33. Thus, the defendant's aggressive approach, combined with the putative class members' vulnerability, necessitated a Rule 23(d) restrictive order. Id. at 633-34.

   b. Abdallah v. Coca-Cola Company, 186 F.R.D. 672 (N.D. Ga. 1999). In a race discrimination class action, the plaintiffs moved for leave to interview prospective class members and to limit defendant's communications with prospective class members. The court found that plaintiffs and their counsel were "entitled to speak freely" about the lawsuit with any potential class member who contacted them. Id. at 677. With respect to employees "deemed to be represented by the Company's counsel," those employees who desired to file employment claims could communicate with plaintiffs and their counsel. Plaintiffs' counsel, however, could not communicate with those employees on any other matters relevant to the lawsuit, including privileged information. Id. The court prohibited Coca-Cola from discussing the lawsuit directly with potential class members, except to the extent it needed to speak with managerial employees to investigate the claims against it. Id. at 679. While the court allowed Coca-Cola to share its views about the lawsuit with its employees, it required that all such communications include a statement that Coca-Cola could not retaliate against employees who chose to participate in the litigation. Id. at 679.

   c. Rankin v. Board of Education, 174 F.R.D. 695, 697 (D. Kan. 1997). The court prohibited defendants and their counsel from making any contact or communication with prospective class members which expressly referred to the litigation.

8. In addition to relying on Rule 23(d), several courts have relied on Model Rule of Professional Conduct 4.2, as enacted by states, to prohibit contacts between defense counsel and putative class members.

   a. Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662 (E.D. Pa. 2001). Plaintiffs filed a personal injury action in federal court, alleging they were hurt by exposure to beryllium from a manufacturing facility near plaintiffs' homes. Defense counsel wanted to informally interview potential witnesses in that action, who were also putative class members in a state court class action relating to the same manufacturing facility. The court prohibited defense counsel from doing so. The court noted that "the purpose of Rule 4.2 is to prevent lawyers from taking advantage of uncounselled lay persons and to preserve the efficacy and sametity of the lawyer-client relationship." Id. at 666. It observed that extending the reach of Rule 4.2 to unnamed class members furthered the Rule's purpose. Id. The court also prohibited defense counsel from communicating with former management employees of the defendant who were putative class members in the state court action. Dondore v. NGK Metals Corp., No. 00-1966, 2001 WL 516635, at *2 (E.D. Pa. May 16, 2001).

   b. See also Braun v. Wal-Mart Stores, Inc., 60 Pa. D.&C. 4th 13, 18-19 (Phila. C.P. 2003). Defense counsel were prohibited from contacting current employees about the lawsuit, other than through formal discovery. The court noted that Rule 4.2 applies to putative class members regardless of whether they are classified as current or former employees.

9. Courts have prohibited defendants from utilizing a retroactive arbitration clause to affect the rights of putative class members:

   a. Carnegie v. H&R Block, Inc., 180 Misc. 2d 67, 687 N.Y.S.2d 528 (N.Y. Co., Jan. 7, 1999). Plaintiffs filed a class action that challenged the legality of tax refund anticipation loans offered by Block to its customers. After the class action was filed but before class certification, H&R Block revised its loan application form to include a retroactive arbitration clause which purported to require absent class members to arbitrate the claims that were already being asserted on their behalf in the class action. The court strongly condemned Block's actions, concluding that the retroactive arbitration clause was "patently deceptive." 180 Misc.2d at 72. It held that the retroactive arbitration clause was ineffective to the extent it purported to preclude class members from participating in the class action, and ordered that a "corrective notice" be sent, at the defendants' expense, to class members who had signed the retroactive arbitration clause. Id. at 72-74.

b. Likewise, in Navarro-Rice v. First U.S.A. Bank, CV 970009-06901 (Multnomah Co. Ore. Cir. Ct. April 17, 1998), the court entered an order restraining the bank from enforcing a post-complaint retroactive arbitration provision. In Navarro, the plaintiffs alleged that a bank's credit card agreement entitled consumers to a certain low interest rate, which was later increased by the bank. After the class action was filed, but before class certification, the bank sent consumers a notice stating that unless they closed their accounts by a certain date, the cardholder agreements would be amended to require arbitration of all claims "now in existence or that may arise in the future." In order to protect class members, the court prohibited the bank from seeking to change the *status quo* of the litigation by utilizing a retroactive arbitration clause, stating that such a clause would affect the ability of putative class members to participate in the class action before the court had even had an opportunity to determine whether there should or should not be a class.

c. Long v. Fidelity Water Systems, Inc., No. C-97-20118, 2000 WL 989914, *3 (N.D. Cal. May 26, 2000). Defendants sent putative class members a notice with respect to their account agreement which incorporated a retroactive arbitration clause as part of the existing contract. Defendants required class members to take affirmative steps if they wished to reject the arbitration clause. Defendants then moved to compel arbitration of one of the named plaintiffs. The district court found that the defendants failed to notify the putative class member of the pending class action and further found that the retroactive arbitration clause had not been agreed to by the class member. The motion to compel arbitration was denied.

10. Attempts by defendants to persuade class members to opt-out of the class action before the court has determined that the case may proceed as a class action have also been rejected. "Courts are concerned that such communications [by defendants] may prevent class members from making informed decisions about exclusion." 5 Newberg on Class Actions, supra, §15:19, at 67. "The solicitation of exclusions from a pending class action by a defendant before the court has determined that the case may proceed as a class action constitutes a serious challenge to the authority of the court to have some control over communications with class members." Id. at 66. See also:

a. Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985). In Kleiner, defense counsel embarked on a massive telephone and mailing campaign to solicit exclusion requests from potential class members, contacting approximately 3000 potential class members before the court-approved class notice was mailed. Nearly 2800 of the class members contacted by the defendant opted out. Id. at 1198. The district court imposed sanctions against the defendant and its counsel for soliciting class

members to opt-out of the class in bad faith. Id. at 1198-99. On appeal, the Eleventh Circuit found that the unsupervised "unilateral communications scheme" was "rife with potential for coercion." Id. at 1202. This was particularly true where there was "an on-going business relationship" with the putative class customers who may have been "dependent on the [defendant] for future financing" and "who did not have convenient access to other credit sources." Id. The Eleventh Circuit found that the defense campaign "constituted an intolerable affront to the authority of the district court to police class member contacts," and that the district court had ample discretion to prohibit the bank's communications with the class. Id. at 1203. The court of appeals affirmed the district court's disqualification of the lead trial counsel from further participation in the case, as well as the imposition of a $50,000 fine on the attorney and his law firm. Id. at 1210.

b. Ralph Oldsmobile, Inc. v. General Motors Corp., No. 99 Civ. 4567, 2001 WL 1035132 (S.D.N.Y. Sept. 7, 2001). A class action was filed by a GM dealer on behalf of all franchised General Motors dealers in New York State claiming that GM had failed to reimburse properly the franchised dealers for warranty violations. Prior to class certification, GM entered into termination agreements with its dealers that contained a release of the claims asserted in the class action. Finding that defendant's failure to inform the dealers about the pending class actions was misleading, the district court ordered GM to send corrective notices containing information about the lawsuit to putative class members and to inform dealers who had already signed termination agreements of their ability to petition the court to void the releases. Id. at *7-8.

c. Ladegaard v. Hard Rock Concrete Cutters, Inc., No. 00-C-5755, 2000 WL 1774091 (N.D. Ill. Dec. 1, 2000). Plaintiff filed a class action for violations of the Illinois Minimum Wage Law and Payment and Collection Act and the Fair Labor Standards Act. In its motion for class certification, plaintiff challenged the defendants' provision of a release to members of the putative class, which could be exchanged for a check. Id. at *1. Finding that the releases obtained through defendants' pre-certification contacts with class members may have intruded on the court's authority to oversee notice in a fair manner, the court rejected defendant's challenge to numerosity. Id. at *3.

d. See also Fraley v. Williams Ford Tractor and Equip. Co., 339 Ark. 322, 340, 5 S.W. 3d 423, 434-35 (1999). "Pre-certification communications with potential class members which attempt to substantially reduce member participation in the class action . . . should be restricted or prohibited when brought to the attention of the trial court."

11. Courts often require the party which has made misleading communications to class members to pay the costs of corrective notice. See, e.g., Erhardt v. Prudential Group, Inc., 629 F.2d 843, 845-46 (2d Cir. 1980) (defendant required to send corrective notice after its chief executive officer sent letters to class members during opt-out period); Ralph Oldsmobile, Inc. v. General Motors Corp., No. 99 Civ. 4567, 2001 WL 1035132, at *5 (S.D.N.Y. Sept. 7, 2001) (requiring defendant to send corrective notices containing information about the lawsuit to putative class members); In re McKesson HBOC, Inc. Securities Litigation, 126 F. Supp. 2d 1239, 1246 (N.D. Cal. 2000) (requiring law firm which sent misleading solicitation urging class members to opt out to distribute corrective notice explaining class certification and its benefits as well as shortcomings, and presenting solicited shareholders with option of voiding any retention agreement); In re Lease Oil Antitrust Litigation,186 F.R.D. 403, 440-43 (S.D. Tex. 1999), aff'd, 200 F.3d 317 (5th Cir. 2000) (court invalidated opt-outs and ordered corrective supplemental notice where opt-outs were procured through misleading solicitation efforts by a competing plaintiffs' class action attorney).

12. Use of Rule 68 offers of judgment to moot a class action has also been rejected. See, e.g., Colbert v. Dymacol, Inc., 344 F.3d 334 (3d Cir. 2003). In Colbert, plaintiff brought an action under the Fair Debt Collection Act. Utilizing a Rule 68 offer of judgment, the defendant offered the named plaintiff the maximum relief he could have received under a judgment in his favor as an individual. The trial court struck the offer and the defendant appealed claiming that the Rule 68 offer rendered moot the lead plaintiffs' claims, thereby foreclosing certification of the proposed class. The Third Circuit found that the offer of judgment did not meet all the relief requested in the complaint – because the plaintiff had asked for relief on behalf of a class -- and dismissed the appeal.

13. Courts have also utilized Rule 23(d) to prohibit pre-certification contacts by plaintiffs' counsel with putative class members.

    a. Gulf Oil v. Bernard, 452 U.S. 89 (1981). The Supreme Court reviewed the scope of a district court's authority under Rule 23(d) to limit communications by class counsel to prospective class members during the pendency of a class action lawsuit. The Supreme Court, observing that such orders can be impermissible restraints on free speech, held that the district court's blanket order against communications to class members interfered with their ability to inform class members about the lawsuit and to obtain information about the merits of the case from class members. Id. at 101-04.

    b. Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997). The Eleventh Circuit found that the district court abused its discretion by allowing plaintiffs' counsel in a race discrimination case against a hotel

chain to notify putative class members of the case and to establish a toll-free telephone number for potential class members to call plaintiffs' counsel about incidents of discrimination. Id. at 1003. The court observed such pre-certification communications would prove misleading and could be a disguised attempt to coerce defendant into settling. Id. at 1004.

c. Hammond v. Junction City, 167 F. Supp. 2d 1271 (D. Kan. 2001). In a race discrimination case against a city, the defendant's current director of human relations contacted plaintiff's attorney about the class action and filing an individual discrimination suit against the city. After concluding that the employee was not really a manager, the attorney and others in his firm met with and were retained by the employee. The court found that the employee was enough of a manager to be a represented "party" and that neither the fact that he was a potential member of the putative class nor the fact that he had initiated contact with the attorneys constituted an exception to Kansas Rule of Professional Conduct 4.2 prohibiting *ex parte* contacts with represented parties. Id. at 1284, 1286-87. The court disqualified the lawyers and their firm from representing any class member in the pending or any other class action based on the same allegations. Id. at 1291. The attorneys also were required to produce to the court for *in camera* inspection all documents relating to their discussions with the manager/employee so the court could determine whether they should be produced to the defendant and/or excluded from evidence. Id. at 1292-93.

d. Guichard v. State Farm Fire & Cas. Co., No. 95-2963, 1995 WL 702510, at *3 (E.D. La. Nov. 28, 1995). The court allowed plaintiffs' counsel to communicate with putative class members, subject to certain restrictions.

B. After Class Certification

1. Once a class is certified "the rules governing communications apply as though each class member is a client of the class counsel." Manual for Complex Litigation, supra, §21.33, at 300.

2. If there are improper communications, the court can prohibit future communications, as well as require other curative action. See, e.g.:

a. Cobell v. Norton, 212 F.R.D. 14 (D.D.C. 2002). After the class was certified, the U.S. Secretary of the Interior and other government agents proposed to send historical statements of account to Native American account holders, who were members of the class. The cover letters sent with the statement of account informed the class members that unless they

challenged the statement of account, the statements would be deemed final and could not be appealed. The plaintiffs sought a Rule 23(d) order to prohibit the defendants' communications with the class members. The court found that defendants' communications were an improper attempt to extinguish the rights of class members that were at issue in the ongoing class action. Moreover, the court criticized the defendants because the statements failed to inform the class of the ongoing class litigation or to suggest that they could obtain the advice of class counsel before making any decision regarding the statements. Id. at 19. Not only did the court enter a Rule 23(d) order prohibiting future communications with class members concerning the litigation, it also referred defendants' attorneys to the Committee on Grievances of the U.S. District Court for the District of Columbia for a potential violation of the ethical rules. Id. at 24.

b. Haffer v. Temple Univ., 115 F.R.D. 506 (E.D. Pa. 1987). In a class action regarding alleged discrimination in the university's intercollegiate athletic program, the court ordered corrective notice and imposed sanctions after university officials made comments to staff and potential class members about institutional loyalty and distributed a memo to class members that contained false and misleading statements, both of which were designed to discourage class members from meeting with class counsel. Id. at 510-12.

c. Tedesco v. Mishkin, 629 F. Supp. 1474 (S.D.N.Y. 1986). The court issued an order prohibiting a defendant from further communicating about the suit with class members after finding that a letter that the defendant sent to class members after class certification contained materially false and misleading statements. The defendant also had to bear the cost of mailing the court's opinion, with an explanatory letter from plaintiff's counsel, to all recipients of his letter.

d. Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981). Communications by a defendant during the opt-out period, which advised class members that participation in the suit would require them to submit to onerous legal proceedings, and which resulted in an "extraordinary percentage" of opt-outs, were prohibited and the court required corrective notice and a new opt-out period.

e. Georgine v. Amchem Products, Inc., 160 F.R.D. 478 (E.D. Pa. 1995). The court found that objectors' communications to class members encouraging them to opt out of the settlement agreement were misleading. The court voided the exclusions and required that curative notice with a new opt-out deadline be sent to all persons who had opted out. Id. at 502.

3. Communications with class members in the ordinary course of business may be permissible even after class certification, but defendants should proceed carefully. See, e.g., High v. Braniff Airways, Inc., 20 Fed. R. Serv. 2d 439 (W.D. Tex. 1975) (court entered a protective order after class certification allowing employers to send personnel questionnaire relating to day-to-day operations, but prohibiting defendant's counsel from reviewing the responses); Cobell v. Norton, 212 F.R.D. at 20 ("Defendants will be permitted to continue engaging in the regular sorts of business communications with class members that occur in the ordinary course of business.")