



# **CLASS ACTION ROUNDTABLE: COMMUNICATIONS WITH ABSENT CLASS MEMBERS**

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# **OVERVIEW AND AGENDA**

# OVERVIEW & AGENDA

- Why It Matters
- Methods/Pros & Cons
- Before Class Certification
  - Legal standards
  - Ethical rules
- Eight Rules of Declaration Gathering & Deps
- After Class Certification
- Plaintiff Attempts at Absent Class Discovery

# Class Actions – Some Basics

- Class actions are filed by a named plaintiff(s) “individually and on behalf of all similarly situated persons”
- Allege there is a group of people injured by the same conduct, who we call the “putative class.”
- The case is really not a class action until plaintiff moves and wins for “class certification” under Rule 23, proving that requirements for common issues, typicality, adequacy etc., are met.
- IF the court grants “class certification,” the putative class members become actual class members represented by class counsel.

Case 1:18-cv-24180-JEM Document 1 Entered on FLSD Docket 10/10/2018 Page 1 of 8	
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA	
MANUEL GONZALEZ, individually and on behalf of all others similarly situated,	Case No.
<i>Plaintiff,</i>	
v.	
PF HOMESTEAD, LLC, a Delaware limited liability company,	
<i>Defendant.</i>	

messages’ commercial and generic content, that substantively identical texts were sent to multiple recipients, and that they were sent from a short code, which is consistent with the use of an automatic telephone dialing system to send text messages.

15. Accordingly, Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23(b)(2) and Rule 23(b)(3) on behalf of himself and all others similarly situated and seeks certification of the following Class:

All persons who, on or after four years prior to the filing of the initial complaint in this action, (1) were sent a text message to their cellular phone number by Planet Fitness or its agent, (2) using the same equipment used to send the text messages to Plaintiff, (3) for the purpose of soliciting their gym membership, (4) without their prior express written consent or with the same purported consent Planet Fitness claims to have obtained from Plaintiff, if any.

16. The following individuals are excluded from the Class: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendant, its

## Why It Matters

- Absent class members often have critical and valuable information about a case.
- The named plaintiff is likely “hand-picked,” so it will parrot the lawyers’ theory.
- Absent class members (a) may not support merits of the case; (b) have unique issues that can help defeat class certification; and (c) may demonstrate that the case cannot be tried on a class basis.
- The prospect of class member discovery can help turn the discovery-cost tables on plaintiffs.
- Although this is mostly about a defendant’s desire to communicate, where plaintiffs’ lawyers are communicating, that may be a problem (e.g., recruiting).

# Methods of Absent Class Member Discovery

- The potential for absent class member discovery can arise:
  - Where absent class members are identified by plaintiffs in discovery
  - Where defendant affirmatively identifies them as “friendly” or randomly
  - Where plaintiffs submit declaration in support of class certification
  - Where plaintiffs prepare a study in support of class certification or class trial
- Tools of absent class member discovery:
  - Subpoena for documents/deposition
  - Interviews and declaration gathering
  - Interrogatories
  - Requests for admission
  - Voluntary depositions
- Pros and cons to these approaches

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**BEFORE CLASS  
CERTIFICATION**

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## Communication is Allowed

- **General Rule**: Each side has the right to communicate with putative class members – bans on communications are disfavored.
- *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981)
  - District Court abused discretion in “imposing a complete ban on all communications concerning the class action between parties or their counsel and any actual or potential class member . . . without the court’s prior approval.”
  - “[A] district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties. But this discretion is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules.”

## It's Allowed, But Courts Can Limit

- *Austen v. Catterton Partners V, LP*, 831 F.Supp.2d 559 (D. Conn. 2011)
  - An “order limiting communications between parties and potential class members [must] be based on a clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties.”
  - An order must limit speech “as little as possible, consistent with the rights of the parties under the circumstances.”
  - Court must pay attention to “whether restraint is justified by a likelihood of serious abuses.”
- *Ralph Oldsmobile Inc. v. Gen. Motors Corp.*, No. 99 Civ 4567, 2001 WL 1035132 (S.D.N.Y. 2001)
  - “[A] court's power to restrict communications between parties and potential class members [ ] appl[ies] **even before a class is certified.**”

## Ethical Rules

- American Bar Association, Formal Opinion 07-445: “The key to evaluating the propriety of contacting putative class members is whether they are deemed to be represented by the lawyer or lawyers seeking to certify a class.”
- Under the Model Rules, “[a] client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.” *ABA Committee on Ethics & Prof’l Responsibility*, Formal Op. 07-445, at 3 (2007).

## Ethical Rules—Local Requirements

- **ALSO**, need to assess relevant ethical rules in local jurisdiction before communicating with putative class members
  - *Gates v. Rohm & Haas Co.*, No. CIV.A. 06-1743, 2006 WL 3420591, at \*2 (E.D. Pa. Nov. 22, 2006) (prior to denial of certification, Rule 4.2 prohibited defense counsel from contacting or interviewing potential witnesses who are putative class members)
  - *Braun v. Wal-Mart Stores, Inc.*, 60 Pa. D. & C.4th 13, 19 (Phila. Ct. Com. Pl. 2003) (court denied the defendant's request to interview and obtain affidavit testimony from putative class members, finding that "under Pennsylvania law putative class members are parties to the action until the court declines to certify the action" and they should therefore be "afforded the protections of Rule 4.2 of the Rules of Professional Conduct")

## Ethical Rules—No Legal Advice

**Do not provide legal advice:** ABA Model Rule 4.3 prohibits providing legal advice to unrepresented parties other than advice to retain counsel, if appropriate, if there is a reasonable possibility of a conflict of interest between the unrepresented party and the lawyer's client.

## Ethical Rules—Accurate Communication

Do not engage in communications that are **inaccurate, unbalanced, misleading, or coercive, or which improperly attempt to encourage class members not to participate in the suit**

- *Wright v. Adventures Rolling Cross Country, Inc.*, No. C-12-0982, 2012 WL 2239797, at \*5 (N.D. Cal. June 15, 2012) (finding that comments by the defendant about how “Plaintiffs’ lives will be subject to public scrutiny” as a result of participation in the putative class action would have a “chilling effect” on participating in the class action)
- *Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003) (holding letters from the defendant to potential class members were misleading where they mischaracterized the damages available to the potential class and misrepresented how the plaintiffs’ attorneys would be compensated if successful in the class action)
- *Moore v. Club Exploria*, No. 19-cv-2504, 2021 WL 260227 (N.D. Ill. Jan. 26, 2021) (sanctions against Katten after defense lawyer called named plaintiff in TCPA case to test who would answer; gave fake name)

# Discovery of Potential Class Members

- Formal discovery typically requires that the defendant: (1) must not have an improper motive; (2) have a need for the discovery under Rule 23 or otherwise; and (3) that the burden on absent class members is minimal.
- *Antoninetti v. Chipotle*, 2011 WL 2003292 (C.D. Cal. May 23, 2011):
  - Allowing defendant to take one-hour depositions of 20 individuals who had submitted declarations in support of class certification.
- *Burd v. Ford Motor Co.*, 2015 WL 3540900 (S.D.W.V. June 4, 2015):
  - Allowing defendant to take depositions of four absent class members where: “(1) the discovery is not designed to take advantage of class members or reduce the size of the class; (2) the discovery is necessary; (3) responding to discovery requests would not require the assistance of counsel; and (4) the discovery seeks information that is not already known to the proponent.”

# Discovery of Potential Class Members (cont.)

## ***Fishon v. Peloton Interactive, Inc.*, 336 F.R.D. 67 (S.D.N.Y. 2020)**

- Subscribers filed putative class action alleging that Peloton engaged in deceptive business practice and false advertising by removing majority of its on-demand library of fitness classes.
- Peloton moved to depose 21 putative class members who were among over 2,700 consumers who originally filed arbitration.
- Peloton argued the depositions would provide relevant support that individual issues as to causation and injury would overwhelm common issues and would also provide relevant support that Plaintiffs lack typicality under Rule 23(a).
- Court permitted Peloton to take up to ten depositions under Rule 30 because “the evidence is plainly relevant to Peloton's Defense” under Rule 26(b)(1) “and cannot be obtained through other means.”
  - No evidence that the discovery was sought to harass or alter membership of the class.
  - No evidence the requested depositions would impermissibly alter the class membership or undermine the class action efficiencies.
  - Little risk the depositions would send a message to absent class members that they should opt out in order to avoid discovery.
- The *Peloton* court held that “this is not a case in which discovery is sought of true strangers to the litigation—persons who had no knowledge of the lawsuit, no access to a lawyer, and even no idea that a potential claim existed. Each of the 21 individuals has already brought a claim against Peloton in arbitration based on the same allegations asserted here.”



## What About Trying to Settle?

- *Jenifer v. Delaware Solid Waste Auth.*, No. Civ. A. 98-270, 1999 WL 117762, at\*3 (D. Del. Feb. 25, 1999) (“[B]efore a class action is certified, it will ordinarily not be deemed inappropriate for a defendant to seek to settle individual claims.”).
- *The Kay Co. v. Equitable Prod. Co.*, 246 F.R.D. 260 (S.D.W.Va. 2007) (“Courts have recognized that, generally, a defendant may discuss settlement offers with putative class members prior to class certification.”)
- *Matarazzo v. Friendly Ice Cream Corp.*, 62 F.R.D. 65 (E.D.N.Y. 1974) (“[I]ts [sic] is a better practice to have releases from potential class members pre-approved by court but not requiring approval nor precluding defendant from communicating with potential class members.”)

## Relationship Matters

- *Bublitz v. E.I. DuPont de Nemours & Co.*, 196 F.R.D. 545, 547 (S.D. Iowa 2000) (rejecting plaintiffs attempts to prohibit communication of settlement offers to employee putative class members, but holding that the danger of coercion justified certain “minimal protections”)
- *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 561 (S.D. Fla. 2008) (“[I]f the class and class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive.”)

# Eight Rules of Declaration Gathering

1. Clearly identify yourself as the attorney for the client
2. Describe the lawsuit and the basis for the plaintiff's claims, and identify the case as a class/collective action
  - Explain that you are calling to investigate the facts as part of defending the client
  - It is acceptable to state that the client denies the plaintiff's claims, but it is important to provide a neutral and fair description of the lawsuit and claims
3. Identify the plaintiff's attorneys and confirm that the individual is not represented for purposes of the case/matter (by the plaintiff's attorneys or anyone else)
  - If there is any indication he or she is represented, end the communication immediately

## **Eight Rules of Declaration Gathering**

4. Clarify that you do not represent the individual.
  - Inform them that no attorney-client relationship exists and that your communications are not privileged
5. Explain what it means that the case is a class/collective action, including that the individual could become part of the class and could be entitled to monetary or other relief
  - Make sure the individual understand that information they provide may be used in the company's defense, and, if they become a class member, could be contrary to their interests as a class member.

## Eight Rules of Declaration Gathering

6. Clarify that participating in the interview and providing a declaration are both voluntary
  - If speaking to a current employee, (a) inform the individual that they will not be subjected to any retaliation for speaking with us and/or providing a declaration; and (b) with client approval, advise the individual on how to report any perceived retaliation
7. After making these disclosures, confirm that the individual is comfortable proceeding with the interview
8. Have the individual sign an Acknowledgement of Disclosure (template available)

# Drafting Declarations

- Include disclosures in signed declaration
- Always include “under penalty of perjury” language
- Consider how declarations are drafted
  - Templates filled in during interview v. drafted in declarant’s own words
- Make sure declarant understands the words used in the declaration – context matters!

# Declarant Depositions

- In cases where we submit declarations from putative class/collective action members, plaintiffs will often depose the declarant
  - Consider whether declarant will sit for deposition and how they will perform before obtaining declaration
- You may participate in the deposition as an attorney for our client (i.e., the company) but it is imperative to avoid identifying yourself as the attorney for the putative class/collective member, either expressly or implicitly

# Declarant Depositions

- You may meet with the deponent prior to the deposition, but, if you do so, take steps to clarify that no attorney-client relationship exists
  - This should include telling the deponent you are not his or her lawyer, that you are the company's lawyer, and that you are defending the company against the plaintiff's claims
  - Do not coach or provide legal advice to the deponent
  - At most, ask questions to understand what his or her testimony will be
  - Remember that communications with the putative class member are not privileged, so the opposing party will be able to explore what took place in any meeting with the declarant/deponent



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# **AFTER CLASS CERTIFICATION**

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## When Do Limits on Communication Arise?

- Need to assess authority in jurisdiction to determine when you must stop communicating with putative class members
- Upon date class is certified:
  - *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629, 2010 WL 1879922, at \*2 (E.D.N.Y. May 10, 2010) (“A number of courts have held that this relationship arises once the class has been certified and not only at the end of the opt-out phase.”)

## When Do Limits on Communication Arise? (cont.)

- After opt-out period has expired:
  - ABA Committee on Ethics & Prof'l Responsibility, Formal Op. 07-445, at 3 (2007) ("A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.")
  - *In re Katrina Canal Breaches Consol. Litig.*, Civil Action No. 05-4182, 2008 WL 4401970, at \*3 (E.D. La. Sept. 22, 2008) (citing ABA Formal Opinion 07-445)
  - *The Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260 (S.D.W. Va. 2007) (citing ABA Formal Opinion 07-445)

## Post-Certification Discovery of Class Members?

- Can be done, but typically will have a fight and need Court approval.
  - *Arredondo v. Delano Farms Co.*, No. 09-cv-1247, 2014 WL 5106401 (E.D. Cal., Oct. 10, 2014):
    - “As a general rule, discovery from absent class members may be conducted when reasonably necessary, not conducted for an improper purpose [such as reducing the class size or revisiting issues of certification] and not unduly burdensome in the context of the case and its issues.”
    - Denied plaintiffs’ motion for a protective order to prevent defendants from taking 196 depositions of absent class members in response to plaintiff’s survey designed to prove liability across the class.

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**PLAINTIFF ATTEMPTS AT  
ABSENT CLASS MEMBER  
DISCOVERY**

# Discovery to Identify Potential Class Representatives?

- *In re Williams-Sonoma, Inc.*, 947 F.3d 535 (9<sup>th</sup> Cir. 2020)
  - District court determined that Kentucky law applied to plaintiff's claim and that it prohibited consumer class actions
  - District court then ordered Williams-Sonoma to produce a list of all California purchasers for the sole purpose of aiding counsel's attempt to find a California purchaser who might be willing to sue as class representative.
  - Ninth Circuit vacated the pre-class certification discovery order finding that discovery of "the name of a class member (here an unknown person, who could sue Williams-Sonoma) is not relevant . . . ." and that using discovery to find a named plaintiff for class certification "is not within the scope of Rule 26(b)(1)."
- *See also*
  - *First Am. Title Ins. Co. v. Superior Court*, 146 Cal. App. 4th 1564, 1577 (2007) ("We cannot permit attorneys to . . . [file] class actions in the name of private individuals who are not members of the classes they seek to represent and then us[e] precertification discovery to obtain more appropriate plaintiffs.")
- *But see*
  - *CashCall, Inc. v. Superior Court*, 159 Cal.App.4th 273, 285 (2008) (permitting discovery in suit alleging secretly monitoring of customer telephone calls after plaintiff's counsel had already substituted several new named plaintiffs whose calls then turned out not to have been monitored, finding pre-certification discovery in this circumstance was appropriate "shortcut the process")

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# **ABSENT CLASS DISCOVERY CHECKLIST**

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# Absent Class Discovery Checklist

- Determine the right method of discovery (e.g., subpoena, deposition, informal interview, etc.)
- Check local ethical rules and case law
- Be sure you can articulate (a) proper motive; (b) need for discovery under Rules 23 and 26; and (c) keep burden on absent class members minimal.
- Ensure communications are accurate and not misleading.
- Don't offer legal advice.
- Consider context (bigger concerns with employees and where you have business relationship).
- Consider raising w/ plaintiffs' counsel and getting court approval.
- Stop communicating once class is certified/opt-out deadline is passed.



# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at [www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



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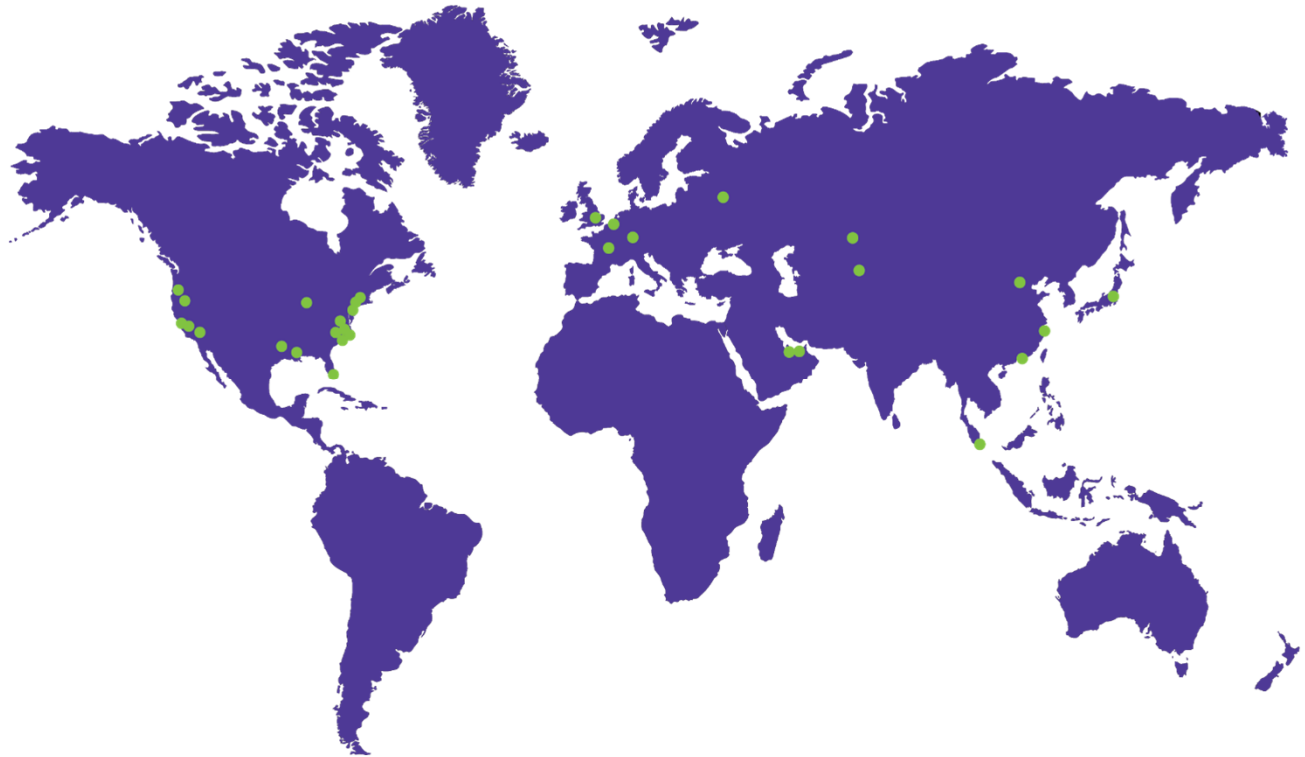
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Kayla Clark focuses her practice on complex commercial litigation, as well as securities-related litigation and investigations. She represents a wide range of clients, with a focus on matters relating to financial institutions and technology. While in law school, Kayla served as an editor on the Journal of International and Comparative Law and competed as an oralist on the Notre Dame Moot Court Board.

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