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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Discovery of Absent Class Members Prior to Class Certification

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The named plaintiffs in a putative class action must offer affirmative evidence—beyond just the allegations in their complaint—sufficient to satisfy each of the elements of Federal Rule of Civil Procedure 23. Among other things, they must show that there are questions of law or fact common to the class, and the claims or defenses of the named plaintiffs are typical of the claims or defenses of the class. To gather evidence to make these showings, the named plaintiffs are entitled to conduct discovery of the defendant, and they also are subject to discovery by the defendant. Sometimes, however, a defendant seeks discovery not only of the named plaintiffs, but also of other members of the putative class—i.e., individuals who fall within the class definition, but who did not elect to join the lawsuit, may not even know about the lawsuit, and may not even know that they may have been wronged by the defendant. In such circumstances, courts must address the extent to which such absent class members should be subjected to discovery.

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Southern District Judge Lewis J. Liman recently addressed this issue in *Fishon v. Peloton Interactive,* 2020 WL 4284154 (S.D.N.Y. July 27, 2020). In *Fishon*, Liman concluded that, under the specific circumstances of this case, the defendant's need for discovery from absent class members outweighed the burden that the discovery would impose on the absent class members, and he therefore authorized it.

'Fishon v. Peloton Interactive'

To gather evidence for purposes of opposing class certification, Peloton sought to depose by video 21 absent class members. Those 21 individuals were among more than 2,700 Peloton customers who—before this action commenced—filed arbitration demands with the American Arbitration Association (the AAA) under Peloton's terms of service. When the 21 individuals made their demands to the AAA, they were represented by the same law firm that now represents the named plaintiffs, and they asserted claims similar to those

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asserted in this action. Upon the discontinuation of the AAA arbitration (because Peloton failed to pay arbitration fees to the AAA), the 21 plaintiffs were not named as plaintiffs in this action.

To justify its request to depose the absent class members, Peloton offered two arguments: first, Peloton asserted that the depositions would provide relevant factual support for its contention under Rule 23(b)(3) that individual issues as to causation and injury will overwhelm common issues; and second, Peloton stated that the depositions would provide factual support for its argument that the named plaintiffs lack typicality under Rule 23(a).

The Need to Balance Competing Considerations

In deciding whether to allow Peloton to depose the 21 absent class members, Liman observed that he had to "balance competing considerations." On the one hand, Liman noted that the "absent putative class members are strangers to the litigation," and as such, "enjoy at least those rights enjoyed by every stranger to a litigation." Such rights include not being subjected to "'undue burden or expense,'" and relatedly, not being asked for "information [that] can be obtained from the parties themselves." Aside from needing to protect those individualized rights, Liman also concluded that strong policy considerations counsel against allowing extensive discovery of absent class members. He noted, for example, that permitting extensive discovery of absent class members "could undercut the efficiency gains" of a class action "by implementing the very [type of] individualized approach that class actions are intended to avoid." Liman also observed that allowing extensive discovery could have "the in terrorem effect" of causing "absent class members [to] proactively choose to opt out of the class action for fear that if they do not do so, they will be subjected to vexatious or at least burdensome discovery practice."

On the other hand ,Liman recognized that "every defendant has a due process right to defend itself," including in connection with class certification. After noting that "class certification is a pivotal stage in civil litigation" during which "plaintiffs are allowed to conduct discovery in order to establish evidence necessary to make the showing[s required under Rule 23]," Liman concluded that "defendants should be entitled to no less." Because "no textual carve-out" exists in Rules 23, 26 or 45 "for persons who happen to be absent putative class members," Judge Liman held that a defendant should not be precluded from "developing its case [merely because] facts of the case may reside with the absent class members."

The Relevant Standard

Having concluded that a defendant should, in appropriate circumstances, be permitted to take discovery of absent class members, Liman next addressed what standard to apply to evaluate Peloton's specific request for discovery. Because Peloton was seeking to subpoena third parties to obtain information for use prior to trial, Judge Liman determined that "the most appropriate test" is "one that hews most closely to the language and caselaw under Rule 45."

Accordingly, Liman found that "a subpoena to putative absent class members will be permitted when the party seeking discovery makes a strong showing that: the discovery is not sought for any improper purposes, to harass, or to alter the membership of the class; it is narrowly tailored to subjects which are plainly relevant; and it does not impose an undue burden given the need for the discovery at issue and the availability of the same or similar discovery from a party." In describing this standard, Liman noted that "if there is no improper purpose ... and if the burden on the third party is not particularly great ..., the showing of necessity need not be particularly strong."

By contrast, "where the burden on the third party is great, the corresponding showing of need must also be great."

Peloton May Depose Absent Class Members

Applying the foregoing test, Liman found "no evidence" that Peloton was seeking to depose the 21 absent class members "to harass or alter membership of the class." Liman also found that he could not "conclude as a categorical matter that permitting the depositions will impose an undue burden on each of the 21 individuals," including because "each of the 21 individuals has already brought a claim against Peloton in arbitration based on the same allegations asserted here." Although "in an individual case, the burdens of sitting for even a short deposition might outweigh the benefits," Liman found that "that does not justify depriving Peloton of the right to serve subpoenas and to attempt to get the requested testimony." Liman noted that nothing will "preclude the individual deponents ... from availing themselves of the remedies available under Rule 45 [if] the subpoena is burdensome based on their particular facts."

Finally, Liman concluded that the deposition testimony of the absent class members "is plainly relevant to Peloton's defense, and cannot be obtained through other means." Liman reasoned that the named plaintiffs "represent only a subset of the class members proposed in this case" (i.e., the individuals who purchased Peloton hardware and a Peloton membership directly from Peloton), and in an effort to show that "individual issues as to causation and injury will overwhelm common issues," Peloton has the right to depose at least some of the individuals "who filed arbitration claims but who were not selected or did not select themselves to be class representatives ... [but] who have had relevant experiences that the named plaintiffs have not had." Accordingly, Liman authorized Peloton to conduct "depositions of absent putative class members."

In appropriate circumstances, a defendant in a putative class action may seek discovery of absent class members for purposes of developing its defense to class certification.

Peloton Was Limited to 10 Depositions of Absent Class Members

Although Liman found that Peloton was entitled to take depositions of absent class members, he also concluded that "21 [depositions] is too many." Based on "the presumption in Federal Rule of Civil Procedure 30 that parties are entitled to 10 depositions." Liman authorized Peloton to depose 10 absent class members. He noted, however, that "if, upon the conclusion of the 10 depositions ..., Peloton has a reasonable basis for believing that certain factors ... important at class certification have not been covered by the 10 depositions, then Peloton may move the court for leave to take additional depositions."

Conclusion

In appropriate circumstances, a defendant in a putative class action may seek discovery of absent class members for purposes of developing its defense to class certification. As *Fishon* demonstrates, a defendant seeking such discovery must establish, among other things, that the discovery is relevant to its arguments against class certification, and that the absent class members possess information that is different in kind from that possessed by the named plaintiffs.