No, You Can't Use Discovery to Find a New Class Representative

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In a consumer class action pending in California, the Ninth Circuit recently vacated a discovery order that would have forced Williams-Sonoma?prior to class certification?to identify all of its California customers who had purchased specific bedding products since January 2012.[1] Plaintiff William Rushing, a Kentucky resident, had filed a class action in California alleging that he purchased bedding from Williams-Sonoma that fell far below its advertised thread count. After the federal district court concluded that Kentucky law, not California law, governed and prevented Rushing from pursuing a class action, it nonetheless agreed that Rushing should be entitled to discover the identities of California residents who had purchased specific Williams-Sonoma bedding products so that his attorneys could locate a new lead plaintiff with standing to pursue claims under California law.

In response, Williams-Sonoma filed a petition for a writ of mandamus asking the Ninth Circuit to vacate the district court?s order. In deciding whether to issue the writ, which is considered a ?drastic and extraordinary? remedy, a panel of the Ninth Circuit first analyzed whether the district court had committed ?clear error as a matter of law.?[2] Writing for the majority, Judge Ferdinand Fernandez did find clear error based on the Supreme Court?s decision in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). In *Oppenheimer*, class certification had already been granted, but the Court nonetheless held that the names and addresses of class members were outside the scope of relevant discovery permitted under Rule 26(b)(1). Given that Rushing sought the discovery prior to class certification for the express purpose of finding a new lead plaintiff, the Ninth Circuit found that the district court clearly erred in entering its discovery order.[3]

In a dissent, Judge Richard A. Paez argued that Rule 23(d) authorizes the identification of absent class members prior to class certification, but he did not address how class members can be said to exist prior to class certification. This point has not been lost on several district courts that have refused to allow discovery of the identities of *putative* class members prior to class certification because the information is not relevant to Rule 23?s class certification requirements and because the information could be used to develop new clients and new claims that the *putative* class representative may not currently possess.[4]

Ideally, the Ninth Circuit?s decision in *In re Williams-Sonoma* will encourage district courts to continue to examine the real purpose behind a pre-class certification attempt to discover the identities of putative class members.

[1] *In re Williams-Sonoma, Inc.*, 947 F.3d 535 (9th Cir. 2020).
[2] *Id.* at 538.
[3] *Id*. at 540.
[4] *See, e.g.*, *Duffy v. Illinois Tool Works Inc.*, 2018 WL 1335357 (E.D.N.Y. Mar. 15, 2018); *Hankinson v. Class Action R.T.G. Furniture Corp.*, 2016 WL 1182768 (S.D. Fla. Mar. 28, 2016); *McDonald v. Cotton States Mut. Ins. Co.*, 2015 WL 1138026 (M.D. Ala. Mar. 13, 2015).

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