



**THE CLASS ACTION CONUNDRUM: DISCLOSURE
OF PRIVATE FINANCIAL OR MEDICAL RECORDS**

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Although by far still a field dominated by securities litigation, the use of class actions in consumer oriented cases has become more prevalent in recent years. More and more, advocates and consumer law attorneys seeking to bring "impact litigation" have chosen the class action as the vehicle to do so cost effectively. While such suits do present substantial opportunities for judicial economy and sharing of costs, they can also create conflicting obligations when it comes to the rights of the members of the represented class, particularly where the personal consumer information may be at the root of the case.

With increasing frequency, state and federal courts have upheld and expanded the privacy rights of individuals on the basis of state constitutional, statutory or common law grounds. For example, in California, it has been determined that medical and financial records, association membership records, and records relating to sexual orientation, among other things, are considered privileged on the grounds of privacy. Although those records may be maintained by a financial institution, doctor or hospital, they remain impressed with the right of privacy of the individuals to which they pertain. The right of privacy imposes upon the institution maintaining such records the independent obligation to preserve that confidentiality even when those records may be relevant to a pending lawsuit.

Of course, the individual whose privacy is at stake is entitled to waive his or her rights and he or she is often held to have implicitly done so in the ordinary lawsuit by merely putting his or her financial or medical condition at issue. However, in the class action context, it is far from clear that the right to privacy can be waived merely by the filing of the lawsuit. After all, in most cases, the persons entitled to waive their privacy rights very often are not even aware of the existence of the lawsuit during many of the critical stages of the class action during which the disclosure must be made. Thus, whether or not acting as a party to the class action, the institution charged with the custodial obligations of such records must be cognizant of its independent obligation to take steps to protect those privacy rights even when otherwise required to disclose the records under legal process.

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A. The Purpose of the Class Action

Class actions are designed to promote judicial economy while at the same time protecting the rights of those who would not as a practical matter be able to pursue their claims. Judicial economy is promoted by avoiding a multiplicity of suits, each independently working its way laboriously through the court system. Common issues of law or fact can be resolved and, in appropriate cases, key issues can be tried separately as a "test case." The use of class actions also provides a vehicle for raising claims which could not cost effectively be prosecuted independently.

Whatever the benefits of the class action, this approach has been subject to its share of abuses. Much of the success of this approach depends upon the approach adopted by the court in employing its supervisory powers. Yet, as one commentator has noted, "[t]he attitudes toward class actions differ not only from judge to judge, but also from year to year."

The inherent problem stems from the fact that the class action is essentially a fiction. The vast majority of the individual claims purportedly represented by the class form would never have been brought as independent lawsuits, whether due to the small amounts in controversy or the general lack of interest. Low consumer interest is probably also demonstrated by the generally statistically small response rates many class action notices receive. Rather, the action is filed and maintained by certain representatives (and their counsel) who must make all the strategic and substantive decisions on behalf of the class. The actual members of the class often are not even aware that an action has been brought on their behalf or that their claims are being litigated and settled. Opposition to the class certification is left to the opposing party, generally the defendants in the case, and members may not even be entitled to "opt out" of any settlement in some circumstances. Indeed, as a practical matter, many individuals never receive actual notice of the lawsuit at all.

B. Asserting Privacy Rights in Class Action Proceedings

Although class representatives generally take their role very seriously and courts make every effort to see that representation is fair and adequate, they may not be cognizant or solicitous of the privacy rights of the individual class members. After all, the objective of the class representative is to prosecute the claims at issue in the litigation. Often, privacy rights represent merely an obstacle to obtaining records which may be relevant to the case. However, whatever relevance these records may have to the dispute, the custodian of those records is not relieved of its obligation to safeguard its constituent's privacy.

The issue of privacy rights comes up in a variety of contexts, depending upon the nature of the class action and the issues presented. In some cases, the issue first arises during the earliest stage of the litigation, when the class is defined and certified. In order to maintain a class action, the putative class representative must demonstrate that there is indeed an identifiable class. The existence of the class may not be presumed by the ability of the class



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representative to prove his or her personal claim. Many courts and scholars have noted that the determination of the class requires, as a practical matter, a preliminary exploration of the merits (even though technically the court is barred from doing so) because some effort must be made to ensure that the class is appropriately defined. In order to do so the court must ascertain to some degree that some persons may have similar claims to those of the purported representatives.

Of course, class certification depends upon a class definition in which the common questions of law or fact predominate. The reason is that commonality of issues leads to judicial economy. If there are insufficient common issues to be tried, the class members may be better served by pursuing their claims individually. If there is insufficient "commonality," the class may not be certified. Similarly, the class representative must have claims or defenses that are typical of the claims of the class in order to insure that the class is adequately represented. Yet, commonality and typicality can be destroyed if the issues in the case impinge upon the privacy rights of some of the members of the class.

In some instances, the privacy rights of absent class members have prevented class certification. In such cases, the commonality of the class has been found not to exist because the nature of the lawsuit would jeopardize the individual right of privacy of the putative class members. For example, in the Seventh Circuit of the United States Court of Appeals, a putative class of hemophiliacs who allegedly had been infected by Human Immunodeficiency Virus (HIV) was denied class certification as a result of concerns for the privacy of the individual class members. Similarly, in Louisiana state court, it was held to be no abuse of discretion to deny class certification to certain borrowers asserting usuary because of the financial privacy concerns of the members of the class. Currently before the Ninth Circuit United States Court of Appeals is the issue of whether certification of a class of users of Baxter Healthcare Corp's Gammagard immune system therapy was proper in light of the medical privacy rights of those users. The appellants have argued that the company could be held liable to the users and their families if the disclosure of their records violates the user's rights to privacy.

Privacy problems also arise during the discovery phase of the litigation. Some jurisdictions have allowed discovery into the identity of class members even during this very preliminary stage of the litigation. In other cases, the discovery is initiated to prove liabilities or defenses relevant to the case. When discovery is taken, the custodian of the private records must determine what efforts it must undertake to discharge its confidentiality obligations.

In instances where certification has been granted and members have been notified of their right to "opt out" of the class, most courts treat any privilege claims of the class member as having been implicitly waived by having putting the member's status at issue. Still, this approach adheres to the fiction of the class action and ignores the fact that the individuals cannot really waive rights "implicitly" when they have no actual knowledge of the lawsuit.



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Recognizing that actual notice of the production of confidential information may not be practicable in a class action setting, the custodian would be well advised to seek a protective order insuring the least possible dissemination of any private information. Furthermore, as to those members who do "opt out," their confidential information should not be produced at all or, to the extent that it may still be relevant, it should only be produced subject to a protective order.

More vexing is discovery in the class action of records that contain confidential information of persons who are not members of the class. In such instances, the custodian would typically be justified in refusing to produce such information unless the owner of the confidential information was first notified. At the very least, every effort must be made to protect confidentiality, either by redaction of the identities of the persons to whom the information pertains or by obtaining a restrictive protective order.

C. Conclusion

The class action conundrum arises when the custodian of private financial, medical or personal records is called upon to disclose information relevant to the litigation. Unlike the typical lawsuit, the large size of the class and the frequent lack of identity of the members can make it difficult to honor the privacy rights of those whose records may be pertinent. Nevertheless, the custodian of those records must do what is necessary and practicable to protect that privacy. In almost every instance, a protective order will be necessary, but that alone may not be sufficient. The nature of the information, the notice (or lack thereof) to the holders of the privilege, and the practicability of maintaining confidentiality must all be weighed.

In some cases, the holder of the privilege may be justified in objecting to class certification entirely on the basis of the privacy rights at stake. In any event, the burden of preserving the privilege lays on the shoulders of the custodian of the records at issue. Whether or not a party to the suit, reasonable efforts must be made to discharge its obligations of confidentiality.