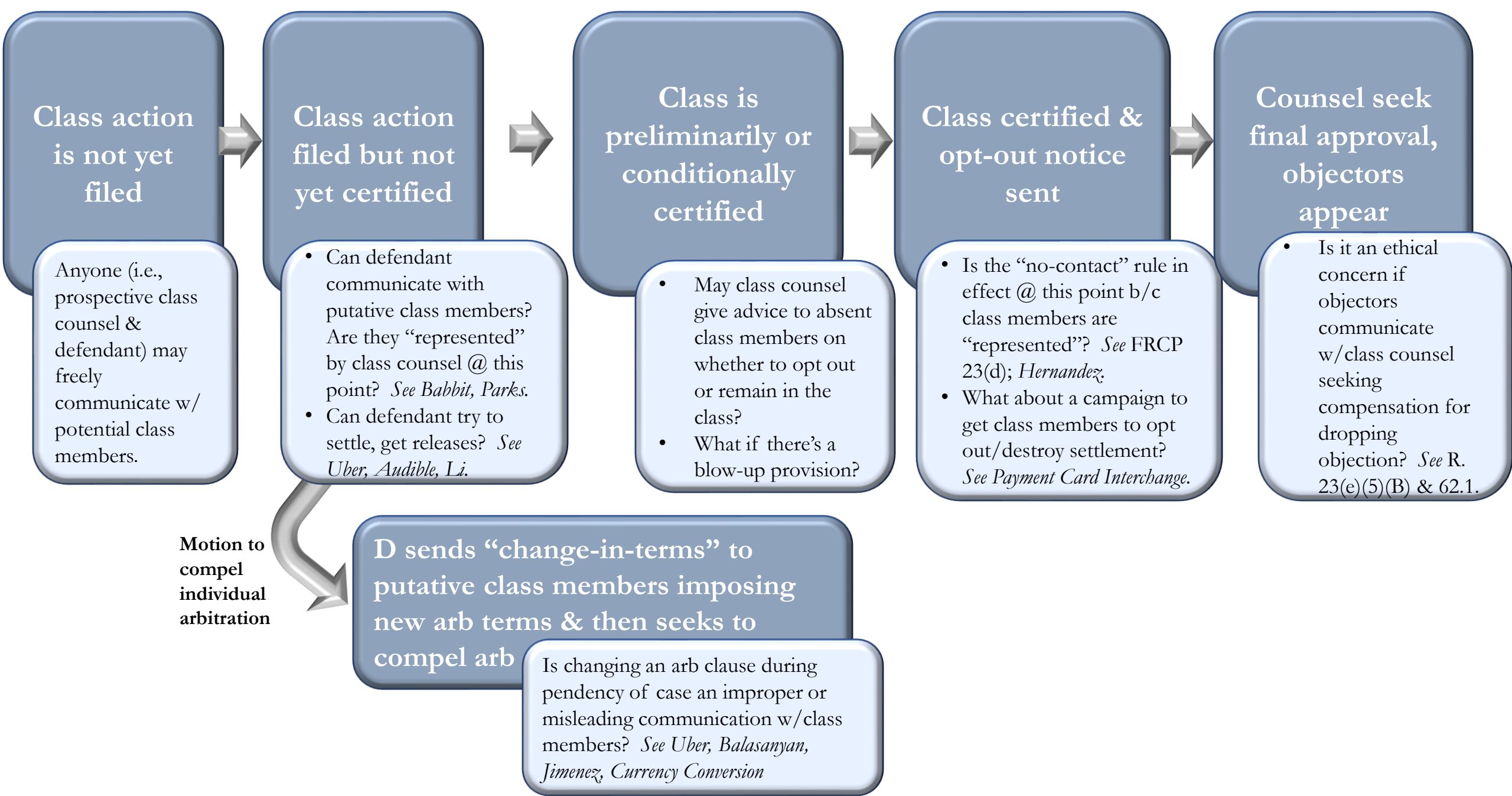


Panel 4: Communications with Absent Class Members



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Hypo #1

Class action
filed but not
yet certified

- Can defendant communicate with putative class members? Are they “represented” by class counsel @ this point? *See Babbit, Parks.*
- Can defendant try to settle, get releases? *See Uber, Audible, Li.*

- Plaintiffs file Title VII class action alleging gender and race discrimination.
- Defendant employer’s lawyers interview class representatives in order to evaluate and defend against the lawsuit.
- Plaintiffs argue these ex parte communications are unethical b/c they discourage putative class members from participating in the lawsuit for fear of losing their jobs. Plaintiffs seek a protective order enjoining communications.
- Defendant argues these are legitimate communications that may not be enjoined pre-certification.
- What result?

Hypo #2

Motion to
compel
individual
arbitration

D sends “change-in-terms”
to putative class members
imposing new arb terms &
then seeks to compel arb

Is changing an arb clause
during pendency of case an
improper or misleading
communication w/class
members? *See Uber,*
Balasanyan, Jimenez, Currency
Conversion

- 2 months after an employment class action is filed, defendant employer mails all employees an updated version of the class action-banning arbitration provision in its employment contract that requires claims be arbitrated.
- Defendant employer then moves to compel individual arbitration of plaintiffs’ claims.
- Is sending an updated arbitration agreement after the commencement of suit an improper communication with class members?

Hypo #3

After preliminary
settlement
approval

- May class counsel give advice to absent class members on whether to opt out or remain in the class?
- What if there's a blow-up provision?

- A class action is preliminarily certified and counsel establish a “hotline” for class members to call with questions.
- A class member calls the hotline seeking advice on whether to opt out of the class.
- How should counsel respond? Can counsel offer an analysis or refer the class member to another lawyer?
- What if there's a blow-up provision in the settlement agreement?

Hypo #4

Class certified
& opt-out
notice sent

- Is the “no-contact” rule in effect @ this point b/c class members are “represented”?
See FRCP 23(d); *Hernandez*.
- What about a campaign to get class members to opt out/destroy settlement? *See Payment Card Interchange*.

- Plaintiffs file an employment class action (Lawsuit #2) that is similar to another pending case against the same defendant-employer (Lawsuit #1).
- Lawsuit #1 is certified and notice of proposed settlement is approved.
- Class counsel in Lawsuit #2 send letters urging class members of Lawsuit #1 to opt out.
- Class and defense counsel in Lawsuit #1 jointly seek exp parte order enjoining class counsel in Lawsuit #2 from communications with class members.
- What result?

Hypo #4 (take 2)

Class certified
& opt-out
notice sent

- Is the “no-contact” rule in effect @ this point b/c class members are “represented”?
See FRCP 23(d); *Hernandez*.
- What about a campaign to get class members to opt out/destroy settlement? *See Payment Card Interchange*.

- Plaintiffs file an employment class action (Lawsuit #2) that is similar to another pending case against the same defendant-employer (Lawsuit #1).
- Lawsuit #1 is *preliminarily* certified and notice of proposed settlement is approved.
- Class counsel in Lawsuit #2 send letters urging class members of Lawsuit #1 to opt out.
- Class and defense counsel in Lawsuit #1 jointly seek ex parte order enjoining class counsel in Lawsuit #2 from communications with class members.
- What result?

Hypo #5

Counsel seek final approval of class settlement, objectors appear

Is it an ethical concern if objectors communicate with class counsel seeking compensation for dropping objection?
See R. 23(e)(5)(B) & 62.1.

- Counsel seeks final approval of a class action settlement under Rule 23(e).
- “Professional” objector objects to the settlement under Rule 23(e)(5)(A) on the grounds that class counsel fees are too high relative to the relief secured for class members.
- Objector approaches class counsel and offers to drop the objection and any appeal in exchange for a “walk-away” fee.
- Is it unethical for class counsel to pay this fee without notifying the court? *See* Rules 23(e)(5)(B) & 62.1.

Cases referenced

- Gulf Oil v. Bernard, 452 U.S. 89 (1981);
- Babbit v. Albertson's, 1993 U.S. Dist. LEXIS 18801 (N.D. Ca. 1993);
- Parks v. Eastwood Insurance Services Inc., 235 F. Supp. 2d 1082 (C.D. Cal. 2002);
- O'Connor v. Uber, 2014 WL 1760314 (N.D. 2014);
- McKee v. Audible, 2018 WL 2422582 (C.D. Ca. 2018);
- Guifu Li v. A Perfect Day, 270 F.R.D. 509 (N.D. Ca. 2018);
- Balasanyan v. Nordstrom, 2012 WL 760566 (S.D. Ca. 2021);
- Jimenez v. Menzies Aviation Inc., 2015 WL 4914727 (N.D. Cal. 2015);
- In re Currency Conversion Fee Antitrust Litig., 224 F.R.D. 555, 569 (S.D.N.Y. 2004);
- Hernandez v. Vitamin Shoppe Industries Inc., 174 Cal. App. 4th 1441 (2009);
- In re Payment Card Interchange Antitrust Litigation, 2014 LEXIS 142213 (E.D.N.Y.).