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CLASS ACTION LITIGATION

REPORT

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CONSUMER

CLASS REPRESENTATIVES

At issue in the Florida case, *Roberts v. Angelfish Swim School Inc.*, is the critical question of whether individual class representatives must demonstrate that they can *personally* finance the entire cost of the litigation for all class members, says attorney Melanie Hirsch in this BNA Insight.

The author warns that applying a financial resources test to the adequacy of representation standard would bar the courthouse doors to all but the wealthiest individuals, as others will be unable to shoulder the burden of paying for the entire litigation themselves, rather than merely a *pro rata* share. ''This rule amounts to discrimination against the nonwealthy and contradicts the core purpose of the class action mechanism,'' Hirsch says.

Is Access to Justice for Everyone, or Only the Wealthy? *Browning v. Angelfish* And the Danger of a 'Financial Resources' Test for Class Representatives

By Melanie Hirsch

When most consumers get their cellphone bills every month, they don't go through them line-by-line to see if the company has added any extra charges. As a result, chances are that they wouldn't notice if the company added one or two dollars in improper fees. And even if they did notice, they—along with the company's thousands or millions of other customers—probably would decide that it's not worth the trouble to take legal action over sums of that size. Meanwhile, the company has made a substantial profit at the collective expense of its customers.

Fact patterns like this occur frequently, and they present a prime example of a wrong that cannot be remedied without the class action mechanism.[1] Without

[1] *See, e.g.*, *McKee v. AT&T Corp.*, 191 P.3d 845, 852 (Wash. 2008) (class action necessary to remedy harm where AT&T charged customers improper tax of no more than $2 per month).

class actions, a defendant ''might get away with piecemeal highway robbery by committing many small violations that were not worth the time and effort of individual plaintiffs to redress or were beyond their ability or resources to remedy.''[2] The U.S. Supreme Court has recognized this valuable function of class actions again and again; as it stated in *Deposit Guaranty National Bank v. Roper*, ''[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.''[3]

Over the years, defendants have constructed numerous barriers to prevent plaintiffs from joining together in class actions. One such obstacle is the use of ''class action bans'' in which the fine print of a contract both requires consumers to proceed in arbitration and prohibits them from proceeding as a class.[4] Another tactic is that defendants may also attempt to moot the class by settling with the named plaintiffs on an individual basis before the class has been certified.[5]

Now, in Florida, one defendant—Florida's secretary of state—has managed to revive yet another barrier to plaintiffs' ability to obtain justice using class actions. In *Browning v. Angelfish Swim School Inc.*, Florida's Third District Court of Appeal accepted, in a three-paragraph per curiam opinion that appears to conflict with other decisions from Florida's appellate courts, the argument raised by the defendant that individual class representatives are inadequate to represent the class—and, accordingly, that a class action cannot proceed—unless they demonstrate that they can *personally* finance the entire cost of the litigation for all of the class members.[6] These costs include the cost of notifying class members, which can easily amount to tens of thousands of dollars. But in *Angelfish*, as in most class actions, the class plaintiffs' individual damages are so small that they would not justify the costs of pursuing a case on their own behalf, let alone on behalf of all the other members of the class as well. The general argument, which defendants have been attempting to raise for years, is that ''the ability and willingness of the plaintiffs to bear the expenses of this action is essential to their fair representation of the class.''[7]

Financial Resources Test Contradicts Core Purpose of Class Actions

The *Angelfish* court, with essentially no reasoning, appeared to accept this argument—even though it contravenes the purpose of the class action mechanism. Its financial resource test bars the courthouse doors to all but the wealthiest individuals, as others will be unable to shoulder the burden of paying for the entire litigation themselves, rather than merely a *pro rata* share. This rule amounts to discrimination against the non-wealthy. As stated by the U.S. Court of Appeals for the Seventh Circuit in *Rand v. Monsanto*, an opinion written by Judge Easterbrook, the ''very feature that makes class treatment appropriate—small individual stakes and large aggregate ones—ensures that the representative would be unwilling to vouch for the entire costs. Only a lunatic would do so. A madman is not a good representative of the class.''[8]

For this reason, the majority rule in courts around the country is *not* the argument accepted by *Angelfish* but is instead the rule enunciated in *Rand*: a class representative need not be able to personally finance the entire costs of the litigation.[9] As explained by another court, denying a class when plaintiffs ''of little or modest means'' cannot personally fund the litigation would ''defeat the very purpose which class actions were designed to achieve . . . . [W]e cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich.''[10]

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[2] *Van Jackson v. Check 'N Go of Ill. Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000).

[3] 445 U.S. 326, 339 (1980).

[4] *See, e.g.*, *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (''[T]he class action ban violates New Mexico public policy. By preventing customers with small claims from attempting class relief and thereby circumscribing their only economically efficient means for redress, Defendant's class action ban exculpates the company from wrongdoing.''). In *AT&T Mobility v. Concepcion*, No. 09-893 (Apr. 27, 2011), the Supreme Court recently held that California's *Discover Bank* rule, which prohibited class action bans in certain situations, is preempted by the Federal Arbitration Act.

[5] *See, e.g.*, *Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir. 2004) (''[A]llowing the defendants here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure.''); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 127 (D. Conn. 2005) (''[I]t appears that nothing prevents a defendant from attempting to settle a putative class action by making a pre-class-certification offer to the named plaintiff under Rule 68. If the only-named-plaintiff's claim is mooted by an offer giving the plaintiff all relief to which she could legally be entitled, the mooting of the named representative's claim before the filing of a motion for class certification may require dismissal of the case.'') (citations omitted).

[6] *Browning v. Angelfish Swim Sch., Inc.*, —- So. 3d ——, 3D10-1611, 2011 WL 1262144 (Fla. Dist. Ct. App. Apr. 6, 2011).

[7] *Fulk v. Bagley*, 88 F.R.D. 153, 168 (M.D.N.C. 1980); *see also, e.g.*, *Sandlin v. Shapiro & Fishman*, 168 F.R.D. 662, 668 (M.D. Fla. 1996) (''It is Plaintiffs' responsibility to provide adequate financing.''); *Rolex Employees Ret. Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 666 (D. Or. 1991) (named plaintiff was inadequate in part because he could not ''independently fund this litigation'').

[8] 926 F.2d 596, 599 (7th Cir. 1991).

[9] *See, e.g.*, *Peterson v. H.R. Block Tax Servs.*, 174 F.R.D. 78, 87 (N.D. Ill. 1997). (''Indeed, most courts concur with *Rand*.''); Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent*, 22 Rev. Litig. 557, 586 (2003) (''*Monsanto* has gained wide acceptance among the federal courts.'').

[10] *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1414 (E.D.N.Y. 1989) (citing *Sayre v. Abraham Lincoln Fed. Savings & Loan Ass'n*, 65 F.R.D. 379, 385 (E.D. Pa. 1974). *See also, e.g.*, *Carnegie v. Mut. Sav. Life Ins. Co.*, No. CV 99-S-3292-NE, 2002 WL 32989594, at *10 (N.D. Ala. Nov. 1, 2002) (''[T]here is no requirement that plaintiff demonstrate that she personally is able to fund the litigation—indeed, one of the central purposes of Rule 23 is 'the prospect of reducing . . . costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery.' '') (citing *Deposit Guar. Nat'l Bank*, 445 U.S. at 338 n.9 (1980)); *Brink v. First Credit Resources*, 185 F.R.D. 567, 571 (D. Ariz. 1999) (class representative's financial commitment is sufficient where he pays his *pro rata* share; ''a proposed class representative is not responsible for the entire costs of a class action largely benefitting strangers''); *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 329 (D.S.C. 1991) (''[T]he named plaintiff's willingness, or lack thereof, to advance the

Not only is *Angelfish*'s financial resources test for named plaintiffs inconsistent with the very purpose of class actions, but it is not even consonant with the rules governing class certification and with cases applying those rules. Under the Florida law at issue in *Angelfish*, a named plaintiff can represent the class so long as "the representative party can *fairly and adequately protect the interests* of each member of the class."[11] The federal rule's requirements are the same.[12] It is clear from Florida caselaw that this inquiry entails only considering (1) whether class counsel are qualified, and (2) whether class representatives' interests align with those of the class.[13] The *Angelfish* court did not discuss these central requirements.

Adequacy does require the existence of financial means to prosecute the case, but nothing suggests that a named plaintiff must be *personally* able to bankroll the entire litigation as long as he is otherwise conscientious and committed. As a result, courts in Florida and elsewhere have held that representative plaintiffs can adequately represent the class when their attorneys will fund the action—and *Angelfish*'s implied rejection of that principle appears to create a conflict among Florida courts that would need to be resolved by the Florida Supreme Court. In *Turner Greenberg Assocs. Inc. v. Pathman*, for example, Florida's Fourth District Court of Appeal held that class representatives meet the adequacy requirement if "the named representatives have interests in common with the proposed class members and the representatives *and their qualified attorneys* will properly prosecute the class action."[14]

Numerous courts adopt the *Turner* view and allow for attorneys to advance class expenses. For example, one Florida federal district court noted that "the adequacy requirement is met in financial terms" where an attorney made a sworn statement that his firm was "able and willing to advance the class notification costs in this matter."[15] Another court observed that "it is not unusual for a plaintiff's attorney to agree to advance the costs of litigation, and that this practice is often necessary for plaintiffs who could not otherwise afford to bring suit."[16] The ethical rules of many states, too, demonstrate that attorneys may finance the costs of litigation.[17] As explained by one commentator, courts have generally found the traditional "prohibition against advancing costs on behalf of clients inapplicable if it serves as an impediment to prosecuting the case as a class action."[18]

Class Actions of Great Public Import Could Never Have Proceeded

Furthermore, a named plaintiff who did fund the entire litigation would have interests very different than those of the other class members by virtue of his enormous personal investment in the case, which would create an incentive to settle the case individually, for little or no benefit to the class. Requiring a plaintiff to personally finance the litigation would thus have the effect of manufacturing an unnecessary conflict between the class representative and the remainder of the class. And it is a conflict between the representative and the remainder of the class—not the representative's financial status—that is at the heart of the adequacy requirement.[19] As stated by the Supreme Court, the purpose of the adequacy inquiry is to "uncover conflicts of interest between named parties and the class they seek to represent."[20]

Class actions of great public import could never have proceeded if class representatives had been forced to demonstrate their ability to fund the entire litigation themselves.

The argument accepted by the *Angelfish* court is troubling because, in innumerable instances, class actions of great public import could never have proceeded if class representatives had been forced to demonstrate their ability to fund the entire litigation themselves; in many circumstances, a "test based upon the possession of deep financial reserves doubtless would render [the] class without any representative."[21] For example, a class challenging the wrongful actions of predatory lenders would almost never be able to go forward, since by definition, people who take out loans with staggeringly high interest rates rarely have the means neces-

full costs of the litigation or of class notice is irrelevant."); *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 460 (Pa. Super. Ct. 1982) ("Overly strict financing requirements would limit the class action to wealthy litigants, contrary to its purposes. A lack of funding by the representative plaintiff, without more, is not sufficient to warrant denial of class certification.").

[11] Fla. R. Civ. P. 1.220(a)(4) (emphasis added).

[12] Fed. R. Civ. P. 23(a)(4) (class action can proceed if, *inter alia*, "the representative parties will fairly and adequately protect the interests of the class").

[13] *City of Tampa v. Addison*, 979 So. 2d 246, 253-54 (Fla. Dist. Ct. App. 2007).

[14] 885 So. 2d 1004, 1008 (Fla. Dist. Ct. App. 2004). *See also, e.g.*, *Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I, Ltd.*, 694 So. 2d 852, 854 (Fla. Dist. Ct. App. 1997) (same).

[15] *Spinelli v. Capital One Bank*, 265 F.R.D. 598, 616 (M.D. Fla. 2009).

[16] *Spark v. MBNA Corp.*, 178 F.R.D. 431, 437 (D. Del. 1998); *see also, e.g.*, *In re Mego Fin. Corp. Secs. Litig.* 213 F.3d 454, 462 (9th Cir. 2000) (adequacy inquiry "requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs *and their counsel* prosecute the action vigorously on behalf of the class?") (emphasis added); *In re U.S. Healthcare, Inc. Secs. Litig.*, No. 88-0559, 1988 WL 102671, at *5 n.6 (E.D. Pa. Sept. 29, 1988) (plaintiff was not inadequate to be a class representative, despite his unwillingness to bear the full costs of litigation, because his counsel "will undoubtedly advance some, if not all, of the litigation expenses").

[17] Fla. R. Prof. Conduct 4-1.8(e)(1) ("[A] lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."); Model Rules of Prof'l Conduct 1.8(e)(1) (same).

[18] Comm. on Prof'l Responsibility, Assoc. of the Bar of the City of New York, *Financial Arrangements in Class Actions and the Code of Professional Responsibility*, 20 Fordham Urb. L.J. 831, 833 (1993).

[19] *See City of Tampa v. Addison*, 979 So. 2d 246, 253-54 (Fla. Dist. Ct. App. 2007).

[20] *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

[21] *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 556 (E.D. Va. 2000).

sary to even pay for a lawyer, let alone pay for the costs of the entire class.[22] Similarly, any class action on behalf of such persons as children, prisoners, or recipients of government aid—who likely also lack the means to hire a lawyer—would be barred by a financial resources test, regardless of the social importance of such actions.[23]

[22] *See, e.g.*, *Fla. Title Loans v. Christie*, 770 So. 2d 750 (Fla. Dist. Ct. App. 2000) (class of borrowers, represented by legal services attorneys, sued title loan company that charged the named plaintiff 264% interest on a $500 loan); *Reuter v. Davis*, No., 502001CA001164, 2006 WL 3743016 (Fla. Cir. Ct. Dec. 12, 2006) (class action by low-income borrowers against payday lender charging interest rates of up to 615.95%).

[23] *See, e.g.*, *Perdue v. Kenny A. ex rel. Winn*, —- U.S. ——, 130 S. Ct. 1662, 1669 (2010) (class action on behalf of 3,000 children in foster care claiming that deficiencies in foster-care system violated federal and state constitutional and statutory rights); *Schwarzenegger v. Plata*, No. 09-1233 (U.S. 2010) (pending case before Supreme Court; class of prisoners alleged that severe prison overcrowding was violating their constitutional rights); *Hutchinson ex rel. Julien v. Patrick*, —- F.3d ——, 2011 WL 540538, at *1 (1st Cir. Feb. 17, 2011) (class action on behalf of brain-injured adults receiving Medicare to compel state officials to provide services and programs required by law).

As the Supreme Court has recognized, a class action enables plaintiffs ''to bring cases that for economic reasons might not be brought otherwise,'' and therefore ''vindicate[s] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.''[24] The *Angelfish* court therefore should not have limited the right to bring a class action to the wealthy, who have the least need of it.

Melanie Hirsch is the Brayton-Thornton Attorney at Public Justice PC. She represents consumers in a range of litigation matters in state and federal courts and was a co-author of an *amici* brief to the Florida Third District Court of Appeal in Roberts v. Angelfish Swim School Inc., along with Brian Warwick and Janet Varnell of Varnell & Warwick PA in The Villages, Fla. Hirsch can be reached at mhirsch@publicjustice.net.

[24] *Deposit Guar. Nat'l Bank*, 445 U.S. at 338.

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