JUDGE HAROLD BAER'S QUIXOTIC CRUSADE FOR CLASS COUNSEL DIVERSITY

MICHAEL H. HURWITZ*

INTRODUCTION

On September 20, 2010, U.S. District Court Judge Harold Baer, Jr.[1] issued an order in a class action lawsuit mandating that the co-lead counsel "make every effort to assign . . . this matter [to] at least one minority lawyer and one woman lawyer with requisite experience."[2] This is the third time in the past three years that Judge Baer has directed that proposed class counsel provide evidence of its racial and gender diversity.[3] Judge Baer based his directive on the grounds that, since the proposed class in each of these cases likely included both men and women from diverse racial and ethnic backgrounds, it was "important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint."[4]

While Judge Baer's push for counsel diversity is admirable, this Article will examine whether it is consistent with the legal requirements for appointing class counsel. This Article will argue that, notwithstanding Judge Baer's noble goal of encouraging legal diversity, the law itself does not impose this requirement. Rather, it appears that Judge Baer is using his judicial authority to pursue his own personal socio-political agenda.

---

* Senior Counsel, Office of the General Counsel, U.S. Securities and Exchange Commission ("the Commission"). The U.S. Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.

[1] Judge Harold Baer, Jr. has served as a federal district court judge for the Southern District of New York since 1994. In 2004, he assumed senior status. FJC.gov, Biographical Directory of Federal Judges: Baer, Harold Jr. http://www.fjc.gov/servlet/nGetInfo?jid=75&cid=999&ctype=na&instate=na (last visited Jan. 28, 2011).

[2] Class Action Order, *In re* Gildan Activewear Inc. Sec. Litig., No. 08 Civ. 5048 (S.D.N.Y. Sept. 20, 2010), *available at* http://amlawdaily.typepad.com/GildanOrder.pdf.

[3] *Id.*; Spagnola v. Chubb Corp., 264 F.R.D. 76, 96 n.23 (S.D.N.Y. 2010); *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007).

[4] *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. at 277.

I. APPOINTMENT OF CLASS COUNSEL UNDER RULE 23(G) OF FEDERAL RULES OF CIVIL PROCEDURE

"Class representatives and class counsel must adequately represent the members of a class. This principle forms the foundation for the modern American class action, and . . . [t]he absence of adequate representation dooms the certification of a class."[5] In light of criticism directed at the conduct of class counsel who were viewed as placing their own interests in collecting attorney fees over the interests of the class they represented, the Advisory Committee for the Federal Rules of Civil Procedure proposed, "and the United States Judicial Council adopted, amendments to Rule 23 in 2003."[6] "These amendments expanded judicial discretion and supervision over potential class counsel and added further protections for the proposed class members in settlement-only class actions."[7]

The requirements and procedures for appointing class counsel are now set out in Rule 23(g) of the Federal Rules of Civil Procedure.[8] Rule 23(g) sets out four factors that a judge must consider in appointing class counsel:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsels knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class.[9]

In addition to these four mandatory factors, the judge is permitted to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[10] This, by its terms, authorizes a court to examine other factors beyond those enumerated in the four mandatory factors.[11] Examples of "other factors" examined by district courts include: class counsel's

---

[5] Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1137 (2009).

[6] David J. Kahne, *Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers*, 19 GEO. J. LEGAL ETHICS 741, 750 (2006). *See* Mohsen Manesh, *The New Class Action Rule: Procedural Reforms in an Ethical Vacuum*, 18 GEO. J. LEGAL ETHICS 923 (2005). As one commentator noted, "[a]lthough individually these new provisions are hardly a radical break from the past, together they represent an important advance . . . [and] provide a nationwide framework for the federal courts to deal effectively with the problems raised by contemporary class action practice." Richard L. Marcus, *Assessing CAFA'S Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1795 (2008).

[7] Kahne, *supra* note 6, at 750. *See* Manesh, *supra* note 6, at 926.

[8] FED. R. CIV. P. 23(g). New Rule 23(g) replaced the old requirements for evaluating the adequacy of proposed counsel with more specific and clearly articulated standards. Kahne, *supra* note 6, at 750.

[9] FED. R. CIV. P. 23(g)(1)(A).

[10] FED. R. CIV. P. 23(g)(1)(B). The court's inquiry is further aided by the broad discretion to "order potential class counsel to provide information on any subject pertinent to the appointment" and to issue "further orders in connection with the appointment." FED R. CIV. P. 23(g)(1)(C) & (E).

[11] *See* James P. McDonald, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar*, 58 DUKE L.J. 507, 540 n.213 (2008) (noting that Rule 23(g)(1)(B), "by its language, vests the court with the discretion to investigate or abstain [from investigating]").

consideration of a co-lead counsel structure to share resources and expenses;[12] the quality of counsel's pleadings;[13] the vigorousness of counsel's prosecution of previous class action lawsuits;[14] "the capabilities of counsel";[15] whether counsel's charges will be reasonable;[16] counsel's pursuit of legal theories that could potentially adversely impact the interests of the class;[17] potential conflicts of interest with absent class members;[18] evidence demonstrating proposed class counsel's commitment to fairly and adequately represent the class;[19] and ability of counsel to represent various sub-classes among the class members.[20] When considering a prospective class counsel's application to represent the class, the court is only authorized to appoint that counsel if the court concludes that the applicant satisfies the requirements under Rule 23(g), including determining whether the applicant will "fairly and adequately represent the interests of the class."[21] The Advisory Committee Note to Rule 23(g) clarifies that a judge should weigh all of the enumerated factors in determining whether a prospective counsel

---

[12] *See* U.S. v. City of New York, 681 F. Supp. 2d 274, 307 n.43 (E.D.N.Y. 2010) (citing to its authority under Rule 23(g)(1)(b), the court requested that parties "discuss the adequacy of existing class counsel at the remedial phase, how to assess and ensure that adequacy, and any measures that can be taken to identify and appoint separate counsel for subclasses"); *In re* Bank of America Corp. Sec., Derivative, and ERISA Litig., 258 F.R.D. 260, 272-73 (S.D.N.Y. 2009) (finding, as an additional factor favoring proposed co-lead counsel's appointment, that "a co-lead counsel structure is appropriate, as [the two firms] will be able to share resources and expertise for the litigation of the case during the pre-certification stage").

[13] *In re* Bank of America Corp. Sec., Derivative and ERISA Litig., 258 F.R.D. at 272.

[14] *Id.*

[15] *Id.*

[16] *Id. See also In re* Bear Stearns Co., Inc. Sec., Derivatives, and ERISA Litig., No. 08-1963, 2009 WL 50132, at *11 (S.D.N.Y. 2009) (in addition to determining that counsel "are qualified and responsible . . . [and whether] they will fairly and adequately represent all of the parties on their side," the court should also examine whether "their charges will be reasonable") (quoting Manual for Complex Litigation § 10.22, 4th ed. 2004).

[17] *See* Stanich v. Travelers Indem. Co., 259 F.R.D. 294, 320-22 (N.D. Ohio 2009) (noting that proposed class counsel can be rejected by the court if it is shown that counsel had "abandon[ed] . . . a key claim or right to substantial damages for absent class members in a self-serving effort to promote class certification"); Colindres v. QuietFlex Mfg., 235 F.R.D. 347, 375-76 (S.D. Tex. 2006) (finding class representative inadequate for attempting to forego compensatory damages in order to obtain class certification).

[18] *See Stanich*, 259 F.R.D. at 322 (noting that courts have, on occasion, permitted defendants to engage in "discovery of fee and retainer agreements between class counsel and named plaintiffs where the information contained therein is clearly relevant to potential conflicts with absent class members").

[19] *See In re* United Artists Theatre Co., 410 B.R. 385, 395 (Bankr. D. Del. 2009) (noting as an additional reason for appointing proposed class counsel, counsel's refusal to accept defendant's offer of $100,000 to "abandon pursuit of the class action").

[20] *See, e.g.*, U.S. v. City of New York, 681 F. Supp. 2d 274, 307 n.43 (E.D.N.Y. 2010) (citing to its authority under Rule 23(g)(1)(b), the court requested that parties "discuss the adequacy of existing class counsel at the remedial phase, how to assess and ensure that adequacy, and any measures that can be taken to identify and appoint separate counsel for subclasses").

[21] FED. R. CIV. P. 23(g)(2) & (4). The rule further provides that "[i]f more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class." FED R. CIV. P. 23(g)(2).

can adequately represent the class and that "[n]o single factor should necessarily be determinative."[22]

None of the four mandatory factors require examination of the proposed class counsel's race, ethnicity, or gender. Rather, they focus on the counsel's specific qualifications for representing the class in the particular lawsuit. The final permissive factor—consideration of "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class"[23]—also does not address counsel's race, ethnic or gender. Indeed, as Judge Baer has himself acknowledged, the Rule 23(g) inquiry simply requires that a judge determine whether class counsel is "qualified, experienced and generally able to conduct the [] litigation."[24]

II. JUDGE BAER'S ANALYSIS

A. In re J.P. Morgan Chase Cash Balance Litigation

Judge Baer first imposed a class counsel diversity requirement in *In re J.P. Morgan Chase Cash Balance Litigation* ("*J.P. Morgan Litigation*").[25] This class action lawsuit was initiated by former employees of JPMorgan Chase & Co. and its various predecessor entities ("J.P. Morgan"), who brought action under the Employee Retirement Income Security Act ("ERISA") alleging that J.P. Morgan's cash balance retirement plan was age discriminatory in violation of benefit accrual requirements for defined benefit plans and that J.P. Morgan did not give adequate notice of changes in the plan.[26]

Judge Baer concluded that the proposed class counsel satisfied the four mandatory requirements of Rule 23(g).[27] Judge Baer then turned to the fifth permissive factor of "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[28] Noting that the "[a]ppointment of class counsel is an extraordinary practice with respect to dictating and limiting the class members' control over the attorney-client relationship," Judge Baer declared that it "thus requires a heightened level of scrutiny to ensure that the interests of the

---

[22] As an example of the balancing required, the Advisory Committee Note states that "the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources." FED. R. CIV. P. 23(g) advisory committee's note.

[23] *In re* J.P. Morgan Chase Cash Balance Litigation, 242 F.R.D. 265, 277 (S.D.N.Y. 2007).

[24] *Id.* at 276 (quoting *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992)).

[25] *Id.* at 277.

[26] *Id.* at 269.

[27] *Id.* at 276-77. "Class counsel must be 'qualified, experienced and generally able to conduct the [] litigation.' . . . Defendants do not dispute that Plaintiffs satisfy this requirement and I agree." *Id.* at 276. In this regard, Judge Baer emphasized that the proposed class counsel had "extensive experience in ERISA class action litigation" and had "undertaken significant work in litigating this case up to this point-drafting the consolidated complaint and defense of the motion to dismiss." *Id.* at 276-277.

[28] FED. R. CIV. P. 23(g)(1)(B).

class members are adequately represented and protected."[29] In stating this, Judge Baer was simply following the guidance of the Advisory Committee for the Federal Rules of Civil Procedure which emphasized the "critical[] importance" of the selection of class counsel "to the successful handling of a class action."[30]

However, Judge Baer then took a leap into a new frontier by stating that, since "[t]he proposed class includes thousands of Plan participants, both male and female, arguably from diverse racial and ethnic backgrounds, [it was, therefore] important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint."[31] Judge Baer noted that "a review of the firm biographies provides some information on this score [and that it] appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in the case."[32] Accordingly, he concluded that "counsel ha[d] met this Court's diversity requirement—*i.e.*, that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter."[33] Judge Baer did not cite to any precedent or support for this diversity requirement.

B. Spagnola v. Chubb Corp.

Judge Baer next mentioned the class counsel diversity requirement in *Spagnola v. Chubb Corp.*[34] This putative class action lawsuit was initiated by policyholders of three insurance companies "based on alleged wrongful conduct related to the putative class's homeowners' insurance policies."[35] Once again, Judge Baer held that plaintiffs were required to prove that the proposed class counsel is "qualified, experienced, and generally able to conduct the litigation."[36] In addition, Judge Baer stated that plaintiffs must show that counsel has "no interests that are antagonistic to the proposed class members."[37] Judge Baer conceded that the defendants did not challenge "the expertise or competence of . . . proposed class counsel . . . to litigate this case."[38] However, citing to his own opinion in the *J.P. Morgan Litigation*, Judge Baer emphasized that "because '[t]he

---

[29] *In re* J.P. Morgan Chase Cash Balance Litigation, 242 F.R.D. 265, 277 (S.D.N.Y. 2007). In support of the need for a heightened level scrutiny in selecting class counsel, Judge Baer cited the opinion of Judge Jack Weinstein of the Eastern District of New York that "the role of class counsel [was comparable] to that of 'a judicially appointed fiduciary, not that of a privately retained counsel.'" *Id.* (quoting Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1106-1107 (E.D.N.Y. 2006)).

[30] FED. R. CIV. P. 23(g) advisory committee's note (explaining that Rule 23(g) "responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action").

[31] *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. at 277.

[32] *Id.*

[33] *Id.*

[34] 264 F.R.D. 76, 96 n.23 (S.D.N.Y. 2010).

[35] *Id.* at 81.

[36] *Id.* at 95.

[37] *Id.*

[38] *Id.* at 96 n.23.

proposed class includes thousands of [policyholders], both male and female, arguably from diverse racial and ethnic backgrounds . . . it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel."'[39] Judge Baer pointed out that the proposed class counsel had "provided no information—firm resumé, attorney biographies, or otherwise—on this score."[40] Since Judge Baer concluded that the plaintiffs had failed to prove that class certification was proper in this case, he did not issue an order appointing class counsel or directing that counsel satisfy a diversity requirement.[41]

C. In re Gildan Activewear Inc. Securities Litigation

Finally, and most recently, on September 20, 2010, Judge Baer imposed his class counsel diversity requirement in *In re Gilden Activewear Inc. Securities Litigation*.[42] This class action lawsuit was brought by the administrators of several municipal police and firemen's retirement system.[43] In this lawsuit, the plaintiffs submitted an unopposed motion for preliminary approval of a proposed settlement.[44] While Judge Baer acted favorably on the plaintiffs' motion, he nevertheless ordered that co-lead counsel "make every effort to assign to this matter at least one minority lawyer and one woman lawyer with requisite experience."[45] Again, Judge Baer based his action on the fact that the "proposed class" includes thousands of plan participants, both male and female, arguably from racial and ethnic diverse backgrounds . . . [and it is therefore] important to all concerned that there is evidence of diversity, in terms of race and gender, [in the] class counsel [he] appoint[s]."[46] Judge Baer cited as support his opinion from *In re J.P. Morgan Litigation*.

Following the submission by co-lead counsel of letters "setting forth the staffing of the case, as well as information on the firms' well-established diversity and diversity mentorship programs and the firms' efforts to promote diversity in the legal profession,"[47] Judge Baer ruled on October 22, 2010 that counsel had "demonstrated their commitment to minority and diversity hiring."[48] In his order, Judge Baer acknowledged that his earlier September 20th Order requiring co-lead counsel to demonstrate their diversity commitment had caused counsel to be concerned that his order "may have been misconstrued to give the mistaken

---

[39] Spagnola v. Chubb Corp., 264 F.R.D. 76, 96 n.23 (S.D.N.Y. 2010) (quoting *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007)).

[40] *Id.*

[41] *Id.* at 99.

[42] Class Action Order, *In re* Gildan Activewear Inc. Sec. Litig., *supra* note 2.

[43] *Id.* at 1.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Class Action Order, *In re* Gildan Activewear Inc. Sec. Litig., No. 08 Civ. 5048 (S.D.N.Y. Oct. 22, 2010), *available at* http://www.nylj.com/nylawyer/adgifs/decisions/102810order2.pdf.

[48] *Id.*

impression that the Court was expressing a specific factual view" that counsel was deficient in its diversity efforts.[49] The judge emphasized that the September 20th Order "was not intended to be critical in any way of Co-Lead Counsel's prosecution of the case, its staffing of the case, or its diversity efforts."[50]

III. PROBLEMS WITH JUDGE BAER'S CLASS COUNSEL DIVERSITY REQUIREMENT

In all three cases in which Judge Baer imposed his diversity requirement, he did not contest class counsel's compliance with Rule 23(g)'s four mandatory requirements or its ability to adequately represent the proposed class. Rather, Judge Baer based his authority on the fifth permissive factor under Rule 23(g) that allows a judge to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[51] In concluding that class counsel should have racial and gender diversity, Judge Baer cited to the probable racial and gender diversity of the proposed class and the "importan[ce] to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint."[52]

Judge Baer stands alone among all the federal judges in adopting this requirement.[53] Instead, to the extent judges have separately examined the fifth permissive factor in their analyses, they have used it to consider specific evidence, beyond the four mandatory factors of Rule 23(g)(1)(A), that is directly related to proposed counsel's ability to represent the class.[54] The question then is, irrespective of Judge Baer's singular position, can his diversity order reasonably be said to be a "matter pertinent to counsel's ability to fairly and adequately represent the interests of the class"?[55]

---

[49] *Id.* An attorney for one of the co-lead counsel firms expressed his concern to Judge Baer at an October 7, 2010 hearing that some members of the press had interpreted the September 20th Order "as a criticism in suggesting that we were somehow lax in practices of equal opportunity and seeking to establish equal opportunity." Transcript of Hearing at 4, *In re* Gildan Activewear Inc. Sec. Litig., No. 08 Civ. 5048 (S.D.N.Y. Oct. 7, 2010), *available at* http://www.nylj.com/nylawyer/adgifs/decisions/102810transcript.pdf.

[50] Class Action Order, *In re* Gildan Activewear Inc. Sec. Litig., No. 08 Civ. 5048 (S.D.N.Y. Oct. 22, 2010), *available at* http://www.nylj.com/nylawyer/adgifs/decisions/102810order2.pdf.

[51] FED R. CIV. P. 23(g)(1)(B).

[52] *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007).

[53] Judge Baer has not cited to any other judicial opinions supporting his diversity requirement, other than his self-citation of *In re J.P. Morgan Chase Cash Balance Litig.*, and the author has not uncovered any such supporting opinions in his research. *See, e.g.*, King v. U.S., 93 Fed.Cl. 718, 719 (Fed. Cl. 2010); Menkes v. Stolt-Nielsen S.A., No. 3:03CV00409 (DJS), 2010 U.S. Dist. LEXIS 94184 at *9 (D. Conn. Sept. 10, 2010); Bd. of the Tr. of Aftra Ret. Fund v. JPMorgan Chase, N.A., Nos. 09 Civ. 3020, 09 Civ. 4408, 2010 WL 3063067 at *5 (S.D.N.Y. Aug. 4, 2010); *In re* Sadia, S.A. Sec. Litig., No. 08 Civ. 9528, 2010 WL 2884737 at *5 (S.D.N.Y. Jul. 20, 2010); County of Monroe, Fla. v. Priceline.com, Inc., 265 F.R.D. 659, 669 (S.D. Fla. 2010); Cuzco v. Orion Builders, Inc., 262 F.R.D. 325, 335 (S.D.N.Y. 2009); In re United Artists Theatre Co., 410 B.R. 385, 394-95 (Bkrtcy. D. Del. 2009); Fogarazzo v. Lehman Bros., Inc., 263 F.R.D. 90, 101 (S.D.N.Y. 2009); Taylor v. Housing Authority of New Haven, 257 F.R.D. 23, 32 (D. Conn. 2009), *vacated on other grounds*, 267 F.R.D. 36 (D. Conn. 2010); Stanich v. Travelers Indem. Co., 259 F.R.D. 294, 320-22 (N.D. Ohio 2009).

[54] *See supra* notes 13-21 and accompanying text therein.

[55] FED R. CIV. P. 23(g)(1)(B).

As an initial matter, it bears noting that, rather than actually finding that the appointment of a minority and a woman attorney was "pertinent to counsel's ability to fairly and adequately represent the interests of the class,"[56] Judge Baer simply assumed, with no supporting basis, that "evidence of diversity, in terms of race and gender" would facilitate class counsel's ability to represent the "arguably . . . diverse racial and ethnic backgrounds" of the proposed class.[57] It is unclear why Judge Baer believes that the counsel's racial and gender diversity would facilitate his or her ability to represent the class, but perhaps it is because Judge Baer believes that a minority or female counsel would be better able to empathize or communicate with class members who share his or her racial background or gender. But why should that be so? Does Judge Baer believe that only black attorneys can fairly and adequately represent black members of the class, that only Latino attorneys can similarly represent Latino class members, and that only female attorneys can represent female class members? Alternatively, does Judge Baer believe that a black attorney, because of his or her race, would have difficulty fairly and adequately representing Latino class members, or that a female attorney—by virtue of her gender—may not be able to fairly and adequately represent male class members?

Indeed, if Judge Baer's true concern is to ensure that counsel is able to fairly and adequately represent the interests of the class and, as seems the case, he believes that counsel should share similar characteristics to the class he or she will be representing, then should not the inquiry go beyond race or gender to the experiences and background that counsel shares with the class? For example, in the *J.P. Morgan Litigation*, why not require that class counsel include individuals who have worked in the financial services industry—to better empathize with the plaintiff class of former employees of JPMorgan Chase & Co.—or elderly attorneys—to better understand what it feels like to be discriminated against because of one's age? Obviously this can be carried to the point of absurdity and beyond. This could, for example, require that class counsel include an elderly Latino female attorney who had previously worked in the financial services industry.

There are also practical problems with Judge Baer's directive. Judge Baer has required that counsel "'make every effort to assign this matter [to] at least one minority lawyer and one woman lawyer with requisite experience.'"[58] Suppose a class truly mirrors the population of the country and has sizable numbers of African

---

[56] *Id.*

[57] *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007). *Cf.* Sheinberg v. Sorensen, 606 F .3d 130, 134 (3d Cir. 2010) (overturned the district court's denial of a motion to recertify the class, finding that the "District Court did not actually determine if the interests of the class would be harmed by recertification [but] instead assumed that the asserted errors by new counsel would lead to such harm without engaging in any analysis").

[58] Class Action Order, *In re Gildan Activewear Inc. Sec. Litig.*, No. 08 Civ. 5048 (S.D.N.Y. Sept. 20, 2010), *available at* http://amlawdaily.typepad.com/GildanOrder.pdf.

American, Latino, Asian, and Native American members.[59] Should class counsel then be required to have a lawyer from each minority group, or at least from the largest groups—African Americans and Latinos? Would a Latina, female attorney be sufficient to cover both the minority and gender requirements? Would a Native American lawyer qualify as a minority under Judge Baer's directive? Would a Jewish lawyer count as a minority? Should there also be a requirement for having a gay and lesbian attorney? The point is that if our courts were to follow Judge Baer's lead, it would open up a Pandora's box of difficult race and gender-based questions that would take us far afield from Rule 23(g)'s focus on determining that proposed counsel "fairly and adequately represent the interests of the class."[60]

This is not to say that judges should not exercise rigorous judicial scrutiny of proposed counsel or that class counsel diversity can never be appropriate. The plaintiff bears the burden of showing that class certification is appropriate, and this rightly should include demonstrating that both the named plaintiff and the proposed class counsel will fairly and adequately represent the interests of the class.[61] If the class is composed of members who, for any number of reasons, would have difficulty working with counsel who does not share some particular characteristic of the group, then perhaps ensuring that some members of the class counsel share that characteristic would be "pertinent to counsel's ability to fairly and adequately represent the interests of the class."[62] For example, if the class members had cultural or religious objections to working with female counsel, it would presumably aid counsel's ability to work with and represent the class if at least one member of the legal team were male, assuming that counsel is otherwise qualified to represent the class. But in that case, the need for class counsel diversity would be directly related to counsel's ability to represent that particular class and not based—as it is with Judge Baer—on generalized assumptions about the need for a diverse class to be represented by diverse counsel.[63]

---

[59] According to the 2000 census, African-Americans and Latinos each composed twelve point five percent of the country's total population, Asians represented three point six percent, and Native Americans about one percent. Table DP-1. *Profile of General Demographic Characteristics: 2000 - Profiles of General Demographic Characteristics*, 2000 Census of Population and Housing, http://www.census.gov/prod/cen2000/dp1/2kh00.pdf (last visited Jan. 19, 2011).

[60] FED. R. CIV. P. 23(g)(2) & (4). The rule further provides that "[i]f more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class." FED R. CIV. P. 23(g)(2).

[61] *See* Richard G. Stuhan & Sean P. Costello, *Robbing Peter to Pay Paul: The Conflict of Interest Problem in Sibling Class Actions*, 21 GEO. J. LEGAL ETHICS 1195, 1200 (2008) (noting that recent empirical analysis shows that "courts often do little more than go through the motions in assessing the adequacy of the class representatives and their counsel" (citing Robert H. Klonoff, *Multi-Jurisdictional and Cross-Border Class Actions: Symposium Issue: The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 673 (2004))).

[62] *Id.* at 1204.

[63] Consider though how far this principle should be extended. For example, would it be proper for a judge to exclude black attorneys if the class were members of white supremacy groups who were hostile to African Americans?

A more likely explanation for Judge Baer's diversity directive is his interest in providing opportunity and complex litigation work experience for minority and female attorneys in a profession where minorities and women have traditionally been underrepresented, particularly in the higher-compensated leadership positions of the profession.[64] This problem has been exacerbated by the severe layoffs in the legal profession during the current economic slowdown.[65] In an interview following his *In re Gildan Activewear Securities Litigation* Order, Judge Baer noted that in addition to fewer women and minorities in the ranks of firm partnerships, he was also concerned by the statistics showing a lack of minority students in law school.[66] In his view, one of the key reasons for the lack of diversity in partnership ranks "'is a lack of successful mentoring'" by the more senior attorneys in these law firms.[67] Judge Baer stated that he was hopeful that his orders encouraging firms to diversify their legal teams would lead to more women and minorities getting exposure in court.[68] The focus on diversity in the legal profession, however, should be directed toward the admissions policies of law schools and the hiring, promotion, and attorney development practices of law departments where it will serve to directly enhance the goal of increasing opportunities for minorities and women, and should not compete with a judge's duty under Rule 23(g) to ensure that counsel "fairly and adequately represent the interests of the class."[69]

---

[64] For example, according to the American Bar Association's Commission on Women in the Profession, "[m]en still hold the great majority of leadership positions in the profession and overwhelmingly surpass women lawyers in compensation." American Bar Association's Commission on Women in the Profession, *Charting Our Progress: The Status of Women in the Profession Today* (2006), 5, http://new.abanet.org/marketresearch/PublicDocuments/ChartingOurProgress.pdf. Similarly, as detailed by the American Bar Association's Commission on Racial and Ethnic Diversity in the Legal Profession in a 2005 report, "[m]inority representation in the legal profession is significantly lower than in most other professions" and "[m]inorities remain grossly underrepresented in top-level private sector jobs, such as law partner and corporate general counsel." Elizabeth Chambliss, A.B.A. Comm'n on Racial & Ethnic Diversity in the Legal Profession, *Executive Summary: Miles to Go: Progress of Minorities in the Legal Profession*, at 1, 3 (2005), *available at* https://www.abanet.org/abastore/index.cfm?fm=Product.AddToCart&pid=4520014.

[65] One recent study reports:

> The legal industry's wave of recession-induced layoffs appears to have hit African American associates particularly hard. At the 191 firms that took part in our survey this year and last, the absolute number of African American associates fell from 2,826 to 2,362. In 2008, African Americans made up 4.7 percent of the broader nonpartner pool; in 2009, they were down to 4.4 percent--a 16 percent decline that did not surprise some.

Drew Combs, *In Retreat: The Legal Industry's Wave of Recession Induced Layoffs Appears to have Hit African American Associates Particularly Hard*, AMERICAN LAWYER, Mar. 1, 2010, http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202444098771 (last visited Jan. 19, 2011).

[66] Nate Raymond, *Judge's Unusual Order Revives Law Firm Diversity Issue*, N.Y.L.J., Oct. 28, 2010, *available at* http://www.law.com/jsp/article.jsp?id=1202474038196&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=nw20101028&kw=Judge%27s%20Unusual%20Order%20Sparks%20Law%20Firm%20Diversity%20Debate.

[67] *Id.*

[68] *Id.*

[69] FED. R. CIV. P. 23(g)(1)(B).

CONCLUSION

It is not surprising that Judge Baer's crusade for class counsel diversity has attracted no support among his fellow federal district court judges and has faced criticism in the legal community.[70] The only authority ever cited by Judge Baer for his action is his own opinion in the *J.P. Morgan Litigation,* and in his precedent-setting *J.P. Morgan Litigation,* Judge Baer cited to no statute, regulation, judicial precedent, or any other authority to support his diversity requirement. Rather, Judge Baer's class counsel diversity requirement is a creation of the judge independent of any legal authority.

As Judge Baer himself has acknowledged, the appointment of class counsel is critically important in protecting the legal rights of class members and it "thus requires a heightened level of scrutiny to ensure that the interests of the class members are adequately represented and protected."[71] For that reason, Rule 23(g) requires that a judge focus on a set of narrowly drawn considerations that are designed to determine whether a particular counsel is able to adequately represent a particular class. While promoting diversity in the legal community is an important policy goal for the profession and its leadership, it is not a part of Rule 23(g)'s requirements for appointing class counsel and should not be pursued over the interests of class members attempting to assert their legal rights in our judicial system.

---

[70] *See, e.g.,* Posting of Michael Krauss to http://www.pointoflaw.com/archives/2010/09/judgemandated-r.php (Sept. 23, 2010) (criticizing Judge Baer for "making affirmative action a pre-requisite for appearances in his court" and questioning whether the judge "view[s] that only lawyers of the same race and sex as class members can 'represent'" the purported class). Even attorneys who are otherwise supportive of the need for greater diversity in the legal community have questioned the appropriateness of using a judge's authority in approving class counsel as a forum to push for expanded diversity. For example, Stuart Grant, founder of class action firm Grant & Eisenhofer, argued that, while he thought "the judge's heart is in the right spot," he did not believe that the judge has the authority to make diversity a requirement for appointing class counsel and, further, he doubted that the judge is going to be able "to accomplish the goal he's trying to achieve." Raymond, *supra* note 66.

[71] *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007).