

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

LISA KRAGNES, et. al.,)	
)	Law No. CE 49273
Plaintiff,)	
)	
vs.)	
)	BRIEF REGARDING OPT OUT
CITY OF DES MOINES, IOWA,)	AND DUE PROCESS AND
)	CLASS COUNSEL CONFLICT
Defendant.)	

FACTS

The class seeks money damages in this case. (See court file). The order certifying the class in this case anticipates that class members will be afforded the opportunity to opt out of the litigation. (See court file). However, the Iowa Rules of Civil Procedure provide that because of how the class was certified, opting out is not a viable alternative. (See court file and I.R.Civ.P. 1.267(1)(b)).

ARGUMENT

I. FAILURE TO ALLOW ABSENT CLASS MEMBERS THE OPPORTUNITY TO OPT OUT OF A CASE WHERE MONEY DAMAGES HAVE BEEN REQUESTED IS A VIOLATION OF THEIR DUE PROCESS RIGHTS.

The U.S. Supreme Court has said in no uncertain terms that an absent class member must be given the opportunity to opt out of any class when money damages are sought.

If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, (FN3) it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane, 339 U.S., at 314-15, 70 S.Ct., at 657; cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-175, 94 S.Ct. 2140, 2151, 40 L.Ed.2d 732 (1974). The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Hansberry*, 311 U.S., at 42-43, 45, 61 S.Ct., at 118-119, 120.

(FN3) Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a *defendant* class.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-812, 105 S.Ct. 2965, 2974 (1985).

Our Supreme Court has cited the above with approval. Kramersmeier v. R. G. Dickinson, Co., 440 N.W.2d 873, 875 (Iowa 1989).

Because this class action seeks (potentially) tens of millions of dollars in damages from the City, the absent class members must be given the opportunity to opt out of the class to protect their state and federal due process rights. Denial of an opportunity to opt out is an abuse of discretion.

St. Louis Southwestern Railway Company v. Voluntary Purchasing Groups, Inc., 929 S.W.2d 25, 31 (Tex. App. 1996).

II. CLASS COUNSEL CANNOT REPRESENT CLASS MEMBERS WITH COMPETING INTERESTS.

If there is no opt out provision, then there is a big problem for class counsel. The problem is one of conflict of interest. The Mayor and Council of Des Moines, and the undersigned, all have

submitted affidavits detailing their objections to being compelled to participate in this litigation as members of the plaintiff class. Thus, there are competing interests within the class. When this occurs, the law is clear. Counsel cannot represent class members where there exists actual or potential conflict between the class members. Ortiz v. Fibreboard Corp., 527 U.S. 815, 856, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). *See also*: Moore v. Margiotta, 581 F.Supp. 649, 651-53 (E.D. N.Y. 1984); McLaughlin On Class Actions, (3d ed.) § 4.39.

CONCLUSION

If an opt out is not provided, then the class members will have their constitutional rights violated and class counsel may be placed in a precarious ethical situation.



Mark Godwin
Deputy City Attorney
City Hall
400 Robert D. Ray Drive
Des Moines, IA 50309-1891
Telephone: 283-4564
Fax: (515) 237-1748
ATTORNEY FOR DEFENDANT
CITY OF DES MOINES

Original to:

Hon. Joel D. Novak, Judge, 5th Judicial District

Copies to:

Mr. Brad Schroeder
Hartung & Schroeder LLP
Equitable Building, Suite 100
608 Locust Street
Des Moines, IA 50309
ATTORNEY FOR PLAINTIFF

Bruce H. Stoltze
Stoltze & Updegraff, P.C.
P.O. Box 93295
Des Moines, IA 50393
ATTORNEY FOR PLAINTIFF

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses

disclosed on the pleadings on Aug. 17, 2008

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express Other:

Signature Lisa M. Mickey