New York Court of Appeals Decision in *Desrosiers v. Perry Ellis Menswear, LLC* and its Impact on Notification of Class Members

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Outline for Discussion of *Desrosiers v Perry Ellis Menswear, LLC*
(30 NY3d 488 [2017])

Addressing: Whether notice to putative class members of termination of an alleged class action is required pursuant to CPLR 908 when the class has not been certified.

Prepared by: Hon. Eugene M. Fahey
Associate Judge
New York State Court of Appeals

I. Facts/Procedural History

- CPLR 908

II. Case Analysis

A. "Ambiguity" analysis

B. Purpose of CPLR 908 - safeguard against a "quickie" settlement State Consumer Protection Board

C. New York State Bar Association/Committees recommended that notice should be required only for certified class actions

D. Model - FRCP 23 (e) (former)

E. Application of former rule 23 (e) by Federal Circuits

F. New York Appellate Division - *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dept 1982])

G. Legislative inaction

H. Comparison to current Federal Rules of Civil Procedure (FRCP) 23 (e)

I. New York City Bar Association Council on Judicial Administration recommended changes to CPLR article 9

J. Practice Commentaries/policy considerations
- McLaughlin/Alexander

K. Conclusion: Notice mandatory
Manner - Up to trial court

III. Dissent - Judge Stein

A. *O'Hara v Del Bello* (47 NY2d 363 [1979])

B. *Avena* flawed

C. "Plain-language" requires

IV. Post-Decision Commentary

1. (Judy Greenwald, *New York ruling on class settlements could cost businesses*, Business Insurance, December 14, 2017 [https://www.businessinsurance.com/article/20171214/NEWS06/912317946/New-York-Court-of-Appeals-ruling-class-settlements-could-cost-businesses])

2. (Alan S. Kaplinsky, *N.Y. Decision May Hinder Early Class Action Settlements*, Nat L Rev, January 4, 2018 [https://www.natlawreview.com/article/ny-decision-may-hinder-early-class-action-settlements])

3. (Richard J. Schager, Jr., *"Desrosiers': Judicial Approval, Class Notice Are Required for Settlement of Uncertified Class Actions*, NYLJ, January 23, 2018 [https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/23/desrosiers-judicial-approval-class-notice-are-required-for-settlement-of-uncertified-class-actions/])

4. (Thomas A. Dickerson, *When Is a 'Class Action' a Real Class Action*, NYLJ, February 15, 2018 [https://www.law.com/newyorklawjournal/2018/02/15/when-is-a-class-action-a-real-class-action/])

5. (Angela Turturro, *Creating Complications: Notice Requirements for Resolving Putative Class Actions*, NYLJ, February 23, 2018 [https://www.law.com/newyorklawjournal/2018/02/23/creating-complications-notice-requirements-for-resolving-putative-class-actions/])

V. What Are Other States Doing?

- Compare California/Delaware

VI. Could CPLR 907 Have Provided a Basis for Notice?

- Was not raised on this appeal

VII. Attachments - Statutes/Official Cases

- CPLR 907-908 (with Practice Commentaries)
- 2002 FRCP 23 (e)/2017 FRCP 23 (e)
- *O'Hara v Del Bello* (47 NY2d 363 [1979])
- *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dept 1982])
- *Desrosiers v Perry Ellis Menswear, LLC* (30 NY3d 488 [2017])

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 9. Class Actions (Refs & Annos)

McKinney's CPLR Rule 907

Rule 907. Orders in conduct of class actions

Currentness

In the conduct of class actions the court may make appropriate orders:

1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action;

3. imposing conditions on the representative parties or on intervenors;

4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;

6. dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

Credits
(Added L.1975, c. 207, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Vincent C. Alexander

Both the complexity of the class action mechanism and the need for protection of absent class members dictate ongoing and active judicial management. Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, Civil Procedure 783 (4th ed. 2005) [hereinafter cited as Friedenthal, Kane & Miller]; Homburger, The 1975 New York Judicial Conference Package: Class Actions and Comparative Negligence, 25 Buff. L.Rev. 415, 428 (1976). Thus, CPLR 907 authorizes the court, throughout the course of the class action, to issue "appropriate orders" governing the conduct of the action. The statute confers broad and flexible powers and provides guidelines to assist the court in performing its supervisory role. *City of Rochester v. Chiarella*, 1982, 86 A.D.2d 110, 116, 449 N.Y.S.2d 112, 115 (4th Dep't); *Friar v. Vanguard Holding Corp.*, 1980, 78 A.D.2d 83, 100, 434 N.Y.S.2d 698, 709 (2d Dep't); N.Y.Jud.Conf.Rep., Twenty-first Ann.Rep., Leg.Doc.No.90, p. 254 (1976) [hereinafter cited as Jud.Conf.Rep.]. Although written for federal judges applying Fed.R.Civ.P. 23, the Manual for Complex Litigation 4th (Federal Judicial Center 2004) contains guidance that state judges and practitioners may find helpful in dealing with many managerial issues in state class action practice.

CPLR 907 draws upon the provisions of Fed.R.Civ.P. 23(d). The New York version, however, contains some notable variations. Subdivision (2) gives the court discretion to allow members of the class "to appear and present claims or defenses, or otherwise to come into the action" without the need to move for intervention (see CPLR 1012, 1013). As explained in the Judicial Conference Report, the court can "tailor the effect of

an appearance to the exigencies of the particular case." Jud.Conf.Rep., supra, at p.254.

Subdivision (5) allows the court to order that a money judgment in favor of the class be paid on a delayed basis or in installments. This provision helps avoid the threat of "annihilating" judgments (see Practice Commentaries on CPLR 901, at C901:11, supra) and "social consequences such as loss of employment." Jud.Conf.Rep., supra, at p.255. Interestingly, CPLR 907(5) predates the "structured judgment" provisions of CPLR Articles 50-A and 50-B, which apply only in medical malpractice, personal injury and property damage cases. There is no reason why an installment-payment judgment in a class action need conform to the eccentric and conflicting provisions of those articles.

Neither CPLR 907 nor any other provision of Article 9 addresses the potential use of a so-called "fluid recovery" scheme, which has been utilized in some jurisdictions to overcome manageability objections when identification of class members in actions for money damages is virtually impossible. See generally *State of California v. Levi Strauss & Co.*, 1986, 41 Cal.3d 460, 224 Cal.Rptr. 605, 715 P.2d 564. Assume, for example, that a taxicab company is found liable for overcharging its riders. Distribution of the damages, however, may present a problem because of the virtual impossibility of identifying all of the thousands of affected riders. To resolve the dilemma, the court might direct the defendant to reduce its fares over the next few years until the economic equivalent of the unclaimed amounts is reached. See *Daar v. Yellow Cab Co.*, 1967, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732. Thus, unjust enrichment is precluded, the deterrent goals of the class action will be met, and the taxi-riding public--an approximation of the relevant class--will reap the benefits of the judgment. The validity of such a judgment appears not to have been considered by the New York courts and is disfavored in federal practice except in settlements. See *In re "Agent Orange" Product Liability Litigation*, C.A.N.Y.1987, 818 F.2d 179, 185-86. On the other hand, the court in *Friar v. Vanguard Holding Corp.*, 1986, 125 A.D.2d 444, 509 N.Y.S.2d 374 (2d Dep't), upheld a judgment requiring the delivery of unclaimed funds to the State Comptroller, to be held in accordance with the terms of the Abandoned Property Law. 125 A.D.2d at 446-47, 509 N.Y.S.2d at 376-77. Reversion of such funds to the defendant, the court said, "would be equivalent to awarding it the benefit of its own

wrongdoing, a result which should not be sanctioned." Id. at 446, 509 N.Y.S.2d at 376.

Two additional decisions by New York courts illustrate the managerial judicial role that CPLR 907 contemplates. *Murray v. Allied-Signal, Inc.*, 1991, 177 A.D.2d 984, 578 N.Y.S.2d 4 (4th Dep't), addressed the issue of post-certification discovery of class members. The court declared that "discovery directed to absent class members of the class is permitted where it is necessary and helpful to the correct determination of the principal suit." Id. at 984, 578 N.Y.S.2d at 5. As in federal practice, however, such discovery should be restricted to avoid discouraging class members from participating in the action. See also Manual for Complex Litigation 4th, at 302-03 (Federal Judicial Center 2004). In *Murray*, the trial court ordered that issues common to the class were to precede any trials on individual damages. The Appellate Division ruled, therefore, that individual bills of particulars concerning such damages should be deferred until after trial of the common issues. Until such "appropriate time," defendant was entitled only to a bill of particulars and discovery from the class representative. (Pre-certification discovery from class representatives is discussed in the Practice Commentaries on CPLR 902, at C902:1, supra.)

The court in *Carnegie v. H & R Block, Inc.*, 1999, 180 Misc.2d 67, 687 N.Y.S.2d 528 (Sup.Ct.N.Y.Co.), dealt with communications by parties and counsel with class members, an issue that has frequently come before the federal courts. See *Gulf Oil Co. v. Bernard*, 1981, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693; Manual for Complex Litigation 4th, at 247-49, 300-02 (Federal Judicial Center 2004). The court held that a defendant's pre-certification communications with class members could be restricted to protect the fairness of the class action process. (After certification, ethical limitations severely limit defense counsel's communications with class members because of the attorney-client relationship between class members and class counsel.)

Carnegie arose out of a claim that H & R Block improperly advertised its ability to obtain "rapid refunds" for its tax preparation customers when in fact the company merely facilitated a "refund anticipation loan" (RAL) from a cooperating bank. After commencement of the action, but prior to certification, H & R Block inserted an arbitration clause in its RAL forms pursuant to which customers, both new and

old, agreed to arbitrate any disputes arising out of RALs (including prior RALs) rather than join any class action. The form did not disclose the pendency of the *Carnegie* litigation, meaning that those who signed the form were unaware of their potential status as class members. This conduct, said the court, was "patently deceptive." The court's remedial action consisted of an order that all class members who signed the RAL forms containing the arbitration clause be told in the class certification notice (CPLR 904, 907(2)) that they would have the right to choose between arbitration, participation in the class, or neither. The cost of such notice was imposed on the defendant. See CPLR 904(d)(I). The court thus reached an accommodation between competing interests in informed decision-making by the class, free speech, and ongoing business relationships.

Notes of Decisions (13)

McKinney's CPLR Rule 907, NY CPLR Rule 907
Current through L.2018, chapters 1 to 356.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 9. Class Actions (Refs & Annos)

McKinney's CPLR Rule 908

Rule 908. Dismissal, discontinuance or compromise

Effective: April 27, 2009
Currentness

A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Credits
(Added L.1975, c. 207, § 1.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Vincent C. Alexander

2018

C908:2. Notice of Settlement Approval.

The Court of Appeals, in the 4-3 decision of *Desrosiers v. Perry Ellis Menswear, LLC*, 2017, 30 N.Y.3d 488, 68 N.Y.S.3d 391, 90 N.E.3d 1262, enshrines *Avena* as definitive law for the interpretation of CPLR 908. (See the discussion of the Appellate Division *Desrosiers* decision, which the Court of Appeals affirms, in the 2017 Commentary to this section.) Thus, upon settlement of an action brought on behalf of an alleged class, CPLR 908 requires that notice of the settlement be sent

to the members of the putative class even though the action has not been certified as a class action.

The majority proceeded upon the assumption that the text of CPLR 908 is ambiguous as to whether notice is required prior to class certification. CPLR 908 does not refer to "certified" class action or "members of a certified class," or to an action "maintained as a class action," as in CPLR 902 and 909. Turning to other guides to statutory interpretation, the Court found snippets in the Bill Jacket suggesting that the understanding at the time of adoption of CPLR 908 was that it required notice of a settlement of an uncertified action. The First Department, in *Avena,* so interpreted the rule in 1982, without subsequent contradiction in any other Appellate Department; and the Legislature since that time has not intervened to amend the statute, despite receiving invitations to do so, suggesting that *Avena* captured the Legislature's original intent. To the extent *Avena*'s interpretation of CPLR 908 presents practical difficulties and policy concerns, the Legislature is the better branch to address them.

The dissenters found no ambiguity in CPLR 908, arguing that "members of the class" means exactly that: persons who are in a judicially-ordered class and are thereby bound by subsequent proceedings. The language of a statute must be considered in the context of related statutory provisions (CPLR 901-905, 907, 909). No class action exists until an order under CPLR 902 is issued. Also, *Avena,* which was wrongly decided, is not binding on the Court of Appeals, and "subsequent legislative inaction, and the passage of time does not alter that conclusion." Requiring pre-certification notice lacks practical significance: "[T]he notice would essentially inform putative class members that an individual claim [that of the class representative]--of which they received no prior notice--was being resolved by an agreement that was not binding on them [because of the absence of class certification]." Furthermore, practical problems are created by precertification notice, such as identifying the putative class, which consumes the time and resources of both the parties and the court. *Avena* bears little weight, the Appellate Divisions outside the First Department having had no opportunity to examine its wisdom, and lower courts having no choice but to apply it.

2017

C908:1. Court Approval of Settlement.

In *In re Colt Industries Shareholder Litigation*, 1990, 155 A.D.2d 154, 553 N.Y.S.2d 138 (1st Dep't), affirmed as modified, 1991, 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160, the First Department articulated a five-factor inquiry for judicial evaluation of the fairness of a class-action settlement: (1) the likelihood of success on the merits of the case; (2) the extent of support of class members; (3) the judgment of counsel; (4) the good-faith of the bargaining; and (5) the nature of the legal and factual issues. See p.222 of main text. These factors apply to all types of class actions. In the more recent case of *Gordon v. Verizon Communications, Inc.*, 2017, 148 A.D.3d 146, 46 N.Y.S.3d 557 (1st Dep't), the First Department expanded the list of factors to include two more that must be considered in the particularized context of settlements of nonmonetary claims: factor #6, "whether the proposed settlement is in the best interests of the putative settlement class as a whole;" and factor #7, "whether the settlement is in the best interest of the corporation." 148 A.D.3d at 158, 46 N.Y.S.3d at 568.

At issue was a shareholder class action against a corporation and its directors alleging that certain merger documents issued by the corporate defendant failed to contain adequate disclosures about the transaction. The proposed settlement provided for additional proxy disclosures about the terms of the merger and a requirement that the corporate defendant implement a process for obtaining fairness opinions by independent financial advisors about the value of corporate assets sold or spun off in future transactions. No provision was made for any cash payments to the shareholders, but class counsel was to receive an award of attorneys' fees. The shareholders had a right to opt out of the class to preserve monetary claims. Only two objectors appeared at the fairness hearing to voice their opposition on the ground that the settlement did not provide adequate benefit to shareholders. The trial court was persuaded by these objections, but the Appellate Division was not.

The court identified some of the recent literature analyzing the problems that nonmonetary, "disclosure-only" type actions can create in terms of minimal benefits for shareholders and abuse of the class action device. Many courts and commentators view shareholder class actions in this context as a "merger tax" because of the meritless nature of the alleged substantive wrongdoing, which nevertheless

delays consummation of transactions and incentivizes settlements that provide scant benefits other than for the class attorneys whose often-exorbitant fees are paid by the defendants, all of which causes "waste and abuse to the corporation and its shareholders." 148 A.D.3d at 154, 46 N.Y.S.3d at 565.

Thus, the court reviewed the fairness of the settlement in *Gordon* by an expanded analysis that builds upon the traditional five criteria specified in *Colt Industries* by adding the two aforementioned factors 6 and 7 for nonmonetary settlements, in order to help "curtail excesses not only on the part of corporate management, but also on the part of overzealous litigating shareholders and their counsel." Considering new factor #6--the extent to which the settlement is in the best interests of the class as a whole--the court found that the agreed-upon disclosures provided some benefit to all, and the fairness opinion requirement was a significant corporate governance reform. Factor #7 asks whether the settlement is in the best interest of the corporation and is not a mere vehicle for the generation of fees for plaintiffs and class counsel. Here, the interest of the corporation was served by management's active role in formulating the nature and breadth of the additional disclosures as well as the governance reform, and the corporation avoided the legal fees and expenses of a trial. The Appellate Division also concluded that an award of attorneys' fees was appropriate for plaintiff's counsel and remanded to permit the trial court to exercise its discretion in accordance with the usual factors (see Practice Commentaries on CPLR 909) augmented by the additional consideration of the stage of the litigation at which the settlement was reached, and determine "an amount commensurate with the degree of benefit obtained by the class as a result of the litigation."

In *Saska v. Metropolitan Museum of Art*, 2017, 57 Misc.3d 218, 54 N.Y.S.3d 566 (Sup.Ct.N.Y.Co.), the court applied the newly-minted criteria of *Gordon* to approve a nonmonetary settlement in a class action against the Metropolitan Museum of Art alleging misrepresentation in the museum's entrance signage concerning the voluntary vs. mandatory nature of patrons' payment of entrance fees. The settlement produced a revision of the signage in accurate and clear language, giving the class exactly what it asked for (thus satisfying factor #6), and the organizational defendant's interest was well-served by prompt approval of its new signage policy, relieving it of the

threat of future liability and negative publicity. As to attorneys' fees, the court was impressed with the relatively modest fee requested by counsel for a "high level of performance for what is below [counsel's] customary pay." This was no "worthless disclosure-only settlement;" it provided a genuine public benefit. The only part of the proposed settlement that the court did not approve was the request for "incentive awards" to the class representatives because such awards are not within the contemplation of CPLR 909. See 2017 Supplementary Practice Commentaries on CPLR 909.

C908:2. Notice of Settlement Approval.

The First Department held in *Desrosiers v. Perry Ellis Menswear, LLC*, 2016, 139 A.D.3d 473, 30 N.Y.S.3d 630 (1st Dep't), that notice to a putative class was still required as part of the process for judicial approval of a settlement and discontinuance even though the time to seek class certification had expired under CPLR 902 at the time of the discontinuance. "*American Pipe* tolling" keeps absent class members' individual claims viable for the purpose of potential intervention after the denial of class action status despite expiration of the statute of limitations on those claims. See 2015 Supplementary Practice Commentaries on CPLR 902, at C902:1, and 2015 & 2017 Supplementary Practice Commentaries on CPLR 203, at C203:11 (suggesting that individual class members' claims should also get the benefit of *American Pipe* tolling even if the claims are commenced in separate actions). "Thus," says the *Desrosiers* court, "the putative class retains an interest in the action, and CPLR 908 is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired. Notice to the putative class members of the compromise in the instant case is particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of the individual plaintiff's action." 139 A.D.3d at 474, 30 N.Y.S.3d at 631.

2015

C908:2. Notice of Settlement Proposal.

The 1982 *Avena* case held that CPLR 908 requires that notice of a putative class representative's settlement of his or her claim be given to members of the proposed class even if the class has not

been certified. See p. 224 of hardcopy volume. Although critical of the rule, the court in *Vasquez v. National Securities Corp.*, 2015, 48 Misc.3d 597, 9 N.Y.S.2d 836 (Sup.Ct.N.Y.Co.), held that it is still the law within the First Department. The *Vasquez* court, however, took cognizance of the fact that dismissal of a putative class action prior to certification has no res judicata effect on class members, thus mitigating the potential for prejudice because other class members are free to bring an action and seek class certification. The court therefore declared that whatever notice is fashioned must be cost-effective (e.g., e-mail) and must be borne by the plaintiff because "only plaintiff and counsel benefit." See also *Astil v. Kumquat Properties, LLC*, 2015, 125 A.D.3d 522, 4 N.Y.S.3d 179 (1st Dep't) (upholding Supreme Court's order granting class representative's pre-certification voluntary discontinuance, with prejudice as to the named plaintiff but without prejudice to the class, noting that pre-certification decisions are not res judicata as to unnamed members of the class; lower court's order included requirement of notice to class (2013 WL 6142923)).

2009

C908:1 Court Approval of Settlement.

Absent class members, i.e., members of the class who are not named as parties, have a right to make their views known on the fairness of a settlement in a class action, including questioning counsel's role in the process. See Commentary C908:2 (main volume). Does their status as "clients" of class counsel give them the right to demand access to counsel's files to aid in such questioning? The Court of Appeals answered no in *Wyly v. Milberg Weiss Bershad & Schulman*, 2009, 12 N.Y.3d 400, 880 N.Y.S.2d 898, 908 N.E.2d 888.

The question arose in the aftermath of a federal class action alleging accounting fraud by Computer Associates International, Inc., a company in which absent class member Sam Wyly, at the relevant time, owned 1% of the shares, representing a $120 million stake. Wyly sought to undo the federal court's judgment of settlement, claiming that it was procured through the fraud of class counsel. In support of his efforts, Wyly sought an order in New York state court directing class counsel to deliver to him all documents in counsel's files relating to the Computer Associates litigation, including work product. He relied upon the rule in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 1997,

91 N.Y.2d 30, 666 N.Y.S.2d 985, 689 N.E.2d 879, that a client, upon the termination of legal representation, is presumptively entitled to all documents relating to the client's case.

The Court of Appeals, however, determined that the nature of the relationship between class counsel and absent class members "is simply too unlike the traditional attorney-client relationship to support extending the *Sage Realty* presumption to absent class members." Class counsel "represent the interests of and owe a fiduciary duty to the entire class." Furthermore, two practical considerations apply in the class action context. First, class actions usually involve dozens or hundreds of geographically dispersed class members. This presents the prospect for undue burdens on class counsel to produce the entirety of their files to a multitude of absent class members. Second, class actions involve a high degree of supervisory responsibility by trial judges, which includes monitoring class counsel's performance. This reduces the need for individual scrutiny by individual class members.

Thus, the *Sage Realty* rule was modified in the class action context to require consideration of the substantiality of the absent class member's financial interest in the outcome and a demonstration by the absent class member of a "legitimate need for the requested documents." Here, the Appellate Division was held to have correctly determined that Wyly's showing of need was inadequate. The federal district court had already granted Wyly's request for significant post-judgment discovery, none of which unearthed anything suggesting fraud, and it was no abuse of discretion to decline to "second-guess" the federal court's judgment.

2006

C908:1. Court Approval of Settlement.

Klein v. Robert's American Gourmet Food, Inc., 2006, 28 A.D.3d 63, 808 N.Y.S.2d 766 (2d Dep't), contains valuable guidance on several settlement-related matters. *Klein* was a consumer fraud action for damages alleging that defendants misrepresented the fat and caloric content of certain snack food products. The Supreme Court certified, for settlement purposes, a nationwide class of all persons who purchased the products during a four-year period and, after a fairness hearing, approved the parties' proposed settlement. At no point in

the proceedings did the lower court develop a record demonstrating a factual basis for its certification and settlement decisions, and it refused to entertain objections to the settlement filed by one of the class members. The Appellate Division reversed and remanded with directions for further consideration and factual development. The Appellate Division offered instruction on a number of matters.

Class member's rescission of her opt-out submission. The trial court held that the principal objector to the proposed settlement lacked standing to object because she had opted out of the class. The Appellate Division, however, found that the objector had standing because, among other reasons, she should have been allowed to opt back into the class. The appellate court declared that, in general, a class member who opts out of the class may, with the court's permission, rescind the opt-out if he or she does so before the final deadline for submission of requests for exclusion from the class. 28 A.D.3d at 68-69, 808 N.Y.S.2d at 771. The objector in the instant case timely requested to opt back in and did so under circumstances that caused no prejudice.

Trial court's protective responsibilities. The Appellate Division observed that the prerequisites of CPLR 901 and 902 apply with equal force to class actions in general and classes certified solely for settlement purposes. Indeed, settlement-only certifications require that "heightened attention" be given to the particular prerequisites that seek to protect the interests of the class. 28 A.D.3d at 70, 808 N.Y.S.2d at 772, quoting *Amchem Products, Inc. v. Windsor*, 1997, 521 U.S. 591, 620, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689. The trial court must act as "protector of the rights of absent class members" both as to certification and the fairness, reasonableness and adequacy of the settlement. 28 A.D.3d at 70, 808 N.Y.S.2d at 772, quoting *Polar Int'l Brokerage Corp. v. Reeve*, S.D.N.Y.1999, 187 F.R.D. 108, 112.

Class certification concerns. Because of the barren record, the Appellate Division was unable to say whether the class in the present case had been appropriately defined and certified. The court expressed several concerns. 28 A.D.3d at 71-73, 808 N.Y.S.2d at 773-74. First, based on the defendants' alleged wrongdoing--misrepresentations about the caloric and fat content of certain snack foods--the court questioned whether it was appropriate to certify a class consisting of *all* purchasers of the products. Were all purchases made for the reason, in whole or

part, that the snacks were low in fat and caloric content? Was not the definition of the class too broad? Second, nearly all of the alleged bases of liability (common law fraud, negligent misrepresentation, breach of express warranty, and false advertising under N.Y. Gen.Bus.Law § 350) required individualized showings of reliance. Did members of the class make their purchases in reliance on the defendants' false representations about fat and caloric content or other considerations? Finally, was it appropriate to certify a nationwide class as to the separate claim for deceptive trade practices under N.Y. Gen.Bus.Law § 349? Although individual reliance is not a required element of that cause of action, only purchases made in New York are within the scope of the statute. The Appellate Division did not rule out the possibility of certification, but insisted that the trial court make a new determination, based on a factually developed record, that takes into account the potential predominance of individual issues as well as all other factors under CPLR 901 and 902.

Reasonableness of the settlement. The Appellate Division questioned whether the terms of the settlement were "fair, adequate, reasonable, and in the best interest of class members." 28 A.D.3d at 73. 808 N.Y.S.2d at 774. Under the terms of the settlement, the defendants agreed to provide, over a period of years, $3.5 million worth of discount coupons good toward future purchases of the snack foods at issue in the case. No specific distributions of cash or coupons were to be made to individual members of the class. Rather, any member of the public could acquire the coupons through future purchases of the snack foods. The Appellate Division was skeptical that this "fluid recovery" or "cy pres" type of compensation made sense in the present case. See Practice Commentaries on CPLR 907, at pp.217-18 of main volume. The members of the class with the most serious grievances--persons who sought low-fat, low-calorie snacks and were misled as to those aspects of defendants' products--would be the least likely to buy defendants' products in the future and therefore the least likely to gain any benefit from the settlement.

Attorney's Fees. The Appellate Division found no basis in the record justifying the trial court's approval of the agreed-upon attorney's fee of $790,000, which was apportioned among the plaintiffs' firms. The burden of proving the reasonableness of an attorney's fee rests with the claimant; and in the instant case, the brief, generalized descriptions of

the nature of tasks performed and aggregate hours contributed by each firm as a whole failed to meet such burden. The court wrote:

Although the claimant is not required to tender contemporaneously-maintained time records, "the court will usually, and especially in a matter involving a large fee, be presented with an objective and detailed breakdown by the attorney of the time and labor expended, together with other factors he or she feels supports the fee requested".... Otherwise stated, "[t]he valuation process requires definite information, not only as to the way in which the time was spent (discovery, oral argument, negotiation, etc.), but also as to the experience and standing of the various lawyers performing each task (senior partner, junior partner, associate, etc.)"....

28 A.D.3d at 75, 808 N.Y.S.2d at 776 (internal citations omitted).

Another recent Appellate Division decision, *Hibbs v. Marvel Enterprises, Inc.*, 2005, 19 A.D.3d 232, 797 N.Y.S.2d 463 (1st Dep't), addresses the following issue: Should the terms of a class action settlement be rejected because the judge prefers an "opt-in" procedure instead of the parties' agreed-upon opt-out method for exclusion from the class? Under an opt-in approach, a class member must affirmatively express his or her desire to join the class in order to be bound by the judgment or settlement. Opting in is neither the statutory norm in New York, nor is it constitutionally required. See CPLR 903; *Phillips Petroleum Co. v. Shutts*, 1985, 472 U.S. 797, 812-14, 105 S.Ct. 2965, 2974-76, 86 L.Ed.2d 628.

The Appellate Division in *Hibbs*, finding no legal or constitutional mandate for use of the opt-in method, held that the IAS court abused its discretion by conditioning its approval of a proposed settlement of a 5,200-member class action on the parties' adoption of an opt-in procedure. The trial judge stated that the local rules of the Commercial Division of the Supreme Court called for use of the opt-in method, but he gave no further reason as to why it might be appropriate in the instant case. The Appellate Division declared that the Commercial Division rules "are not dispositive on the fairness of the opt-out method." 19 A.D.3d at 233, 797 N.Y.S.2d at 464. On this point, the rules should be treated as "just general guidelines," subject to exceptions; and in the present case there was no good reason to suppose

that the opt-out method would prevent class members from exercising an informed choice about participating in the settlement.

PRACTICE COMMENTARIES

by Vincent C. Alexander

C908:1 Court Approval of Settlement.

C908:2 Notice of Settlement Proposal.

C908:1. Court Approval of Settlement.

CPLR 908 carries forward the longstanding rule that any voluntary discontinuance or compromise of a class action must be approved by the court. Class actions, therefore, fall outside the normal principle of the adversary system that parties may freely settle their disputes without judicial intervention. The Advisory Committee Notes to the analogous federal rule explain that "court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement." 2003 Adv.Comm.Notes, Fed.R.Civ.P. 23(e). Due process requires adequate representation throughout class litigation, including during settlement. *Stephenson v. Dow Chem. Co.*, C.A.N.Y.2001, 273 F.3d 249, 259-61, affirmed in part and vacated in part, 2003, 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106.

CPLR 908 specifies no standard for judicial approval of class action settlements. The Appellate Division, First Department, however, has described the inquiry as whether the terms of the settlement are "fair, adequate and in the best interests of the class." *Rosenfeld v. Bear Stearns & Co.*, 1997, 237 A.D.2d 199, 199, 655 N.Y.S.2d 473, 473 (1st Dep't), appeal dismissed 90 N.Y.2d 888, 661 N.Y.S.2d 832, 684 N.E.2d 282. See also *Klurfeld v. Equity Enterprises, Inc.*, 1981, 79 A.D.2d 124, 133, 436 N.Y.S.2d 303, 308 (2d Dep't) ("fairness"); *LeRose v. PHH US Mortgage Corp.*, 1996, 170 Misc.2d 858, 861, 652 N.Y.S.2d 484, 486 (Sup.Ct.Niagara Co.) ("fair, reasonable and adequate").

Drawing upon federal precedents, the Appellate Divisions have identified various factors to evaluate the fairness of a settlement: the likelihood of success on the merits of the underlying case; the extent of support of

the settlement by the parties, taking into account the number of class members who opt out of the class or file objections to the terms of the settlement; counsel's judgment; whether bargaining occurred in good faith and at arm's length; the nature of the legal and factual issues; and the potential expense of the litigation. *Rosenfeld v. Bear Stearns & Co.,* supra; *Klurfeld v. Equity Enterprises, Inc.,* supra, 79 A.D.2d at 133, 436 N.Y.S.2d at 308. Cf. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* C.A.N.Y.2005, 396 F.3d 96, 116-24; *In re Global Crossing Securities and ERISA Litigation,* S.D.N.Y.2004, 225 F.R.D. 436, 455-70. The *Klurfeld* court declared that the factors should not be applied in a "formulistic" way, indicating that the weight to be given particular factors will vary with the circumstances of the case. *Klurfeld v. Equity Enterprises, Inc.,* supra, 79 A.D.2d at 133, 436 N.Y.S.2d at 308-09.

Consistent with federal practice (cf. Fed.R.Civ.P. 23(e)(1)(C)), New York courts customarily conduct a fairness hearing, on notice, as part of the approval process. See, e.g., *In re Colt Industries Shareholder Litigation,* 1990, 155 A.D.2d 154, 157, 553 N.Y.S.2d 138, 140 (1st Dep't), affirmed as modified, 1991, 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160. The various decisions cited above indicate that the approval of proposed class action settlements is by no means a "rubber stamp" process.

With respect to the court's review of applications for attorney's fees, see the Practice Commentaries on CPLR 909, infra. As part of its settlement review, the court may approve an agreement by the parties for binding arbitration of the attorney's fees. *State of New York v. Philip Morris Incorporated,* 2003, 308 A.D.2d 57, 763 N.Y.S.2d 32 (1st Dep't), appeal denied 1 N.Y.3d 502, 775 N.Y.S.2d 239, 807 N.E.2d 289. Once the arbitrator has issued an award, the court has no inherent authority to pass upon the merits of the award, and neither CPLR 908 nor 909 provide a statutory basis for doing so. The arbitrator's decision can be judicially reviewed but only pursuant to the narrow limited review permitted by CPLR 7511.

No definitive decision exists as to whether court approval and notice are required when a settlement occurs between a defendant and the named plaintiff before class action certification occurs. The danger in such cases is that plaintiff, having formally invoked the threat of a class action, will abandon the potential class if offered an overly generous settlement. Thus, the court in *Avena v. Ford Motor Co.,* 1982, 85 A.D.2d 149, 447

N.Y.S.2d 278 (1st Dep't), held that both court approval and notice to the potential class were necessary. See also Commentary C908:2, below. It is worth noting that disagreement on this point among federal courts was resolved by a 2003 amendment to Fed.R.Civ.P. 23(e)(1)(A), which restricts the need for court approval to "a certified class."

C908:2. Notice of Settlement Proposal.

The second sentence of CPLR 908 mandates notice to all class members of any discontinuance or compromise, regardless of whether CPLR 904 required notice of the initial certification order. Notice enables class members to file objections to the settlement and to apprise the court of possible fairness considerations independent of the biased views of counsel and the class representatives. See *Avena v. Ford Motor Co.*, 1982, 85 A.D.2d 149, 155, 447 N.Y.S.2d 278, 281 (1st Dep't). The court has discretion as to the method by which notice should be given. See Practice Commentaries on CPLR 904, supra. See also *Klurfeld v. Equity Enterprises, Inc.*, 1981, 79 A.D.2d 124, 132-33, 436 N.Y.S.2d 303, 308 (2d Dep't) (trial court properly exercised discretion in refusing to require second notice following hearing in which defendant made slight increase in monetary value of settlement proposal). Due process may dictate judicial rejection of a settlement proposal if adequate notice cannot be given to relevant members of a class or subclass. *Meachem v. Wing*, 227 F.R.D. 232, (S.D.N.Y. 2005).

CPLR 908 provides no guidance regarding the contents of the settlement notice. The court in *In re Colt Industries Shareholder Litigation*, 1990, 155 A.D.2d 154, 553 N.Y.S.2d 138 (1st Dep't), affirmed as modified, 1991, 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160, fills the gap by holding that the notice, at minimum, must "inform all class members of the pending action ... , the composition of the class, the issues between the parties, the terms of the proposed settlement, how a class member may object, the time period within which such objection, if any, must be made, and the date on which the Trial Court will hold a hearing, at which same will consider the fairness of the proposed settlement." Id. at 160, 553 N.Y.S.2d at 142. The due process standard governing the notice of settlement is one of reasonableness. See *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, C.A.N.Y.2005, 396 F.3d 96, 113-14 (to satisfy due process, settlement notice must " 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are

open to them in connection with the proceedings' ") (internal citations omitted).

It seems clear from the New York cases, as in federal practice, that notice is required when the decision on certification (CPLR 902) is made simultaneously with the court's consideration of a settlement proposal. See, e.g., *In re Colt Industries Shareholder Litigation*, supra; *Klurfeld v. Equity Enterprises, Inc.*, supra.

As discussed in Commentary C908:1, above, the court in *Avena v. Ford Motor Co.*, 1982, 85 A.D.2d 149, 447 N.Y.S.2d 278 (1st Dep't), held that the court-approval and notice provisions of CPLR 908 were mandatory in the case of pre-certification agreements that settle only the named plaintiffs' claims. Although the court's interpretation of the statute may be correct, the wisdom of requiring notice in all such cases is debatable. Notice can be expensive, such settlements have no res judicata impact on the potential class members, and the court's screening of the settlement terms, particularly in injunctive and declaratory actions, may be enough to insure protection for all. On the other hand, some settlements present the risk of a "sell out" by the named plaintiffs, the court may be better informed about potential collusion if interested parties are put on notice, and notice may protect potential class members against the running of the statute of limitations.

Prior to a 2003 amendment to Fed.R.Civ.P. 23(e), some federal courts imposed a presumption of notice in all pre-certification settlement cases (see, e.g., *Magana v. Platzer Shipyard, Inc.*, S.D.Tex.1977, 74 F.R.D. 61), while others, in effect, applied a presumption against notice (see, e.g., *Shelton v. Pargo, Inc.*, C.A.(4th Cir.)1978, 582 F.2d 1298). The 2003 amendment eliminates the requirement of notice except as to class members who will be bound by the settlement. Fed.R.Civ.P. 23(e)(1)(B).

Notes of Decisions (28)

McKinney's CPLR Rule 908, NY CPLR Rule 908
Current through L.2018, chapters 1 to 356.

End of Document

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19

§ 906. Actions conducted partially as class actions

When appropriate,

1. an action may be brought or maintained as a class action with respect to particular issues, or

2. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this article shall then be construed and applied accordingly.

Added L.1975, c. 207, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 207, § 3.

Practice Commentary

By Joseph M. McLaughlin

1975

Modeled on Federal Rule 23(c)(4), this section permits isolation of separate issues for class action treatment. Thus, in a mass tort, e. g. an airplane collision, the liability could be determined in a class action under this section, and the damages could then be tried individually. This may prove to be the most important section in the new class action article.

If in the course of a class action, it develops that the class is actually composed of two subclasses with different interests, this section permits the court to subdivide the action into subclasses; and, if necessary, the action may be severed into two actions.

Rule 907. Orders in conduct of class actions

In the conduct of class actions the court may make appropriate orders:

1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action;

3. imposing conditions on the representative parties or on intervenors;

4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;

6. dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

Added L.1975, c. 207, § 1.

Effective Date. Rule effective Sept. 1, 1975, pursuant to L.1975, c. 207, § 3.

Practice Commentary

By Joseph M. McLaughlin

1975

Modeled on Federal Rule 23(d), this rule gives the court enormous regulatory powers over class actions. Unlike the Federal rule, Rule 907 authorizes the court to permit members of the class to enter the action without a formal motion to intervene. There is also a provision, not found in the Federal rule, allowing the court to set terms for payment of a judgment to a victorious class in accordance with the financial capacity of the defendant. This was included, at the behest of the Judicial Conference, to avoid harsh economic consequences such as business failures and their concomitant loss of employment.

Rule 908. Dismissal, discontinuance or compromise

A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Added L.1975, c. 207, § 1.

Effective Date. Rule effective Sept. 1, 1975, pursuant to L.1975, c. 207, § 3.

Practice Commentary

By Joseph M. McLaughlin

1975

Unlike CPLR 1005(b) which made notice optional, this rule now requires notice to the class that the action is to be dismissed, discontinued or compromised. Rule 908 is modeled on Federal Rule 23(e), and has the salutary effect of discouraging collusive settlements of class actions.

Forms for CPLR

Notice of proposed compromise, see McKinney's CPLR Forms § 3:42k.
Notice of proposed discontinuance, see McKinney's CPLR Forms § 3:42j.

Notes of Decisions

1. Stipulation of parties

Ex parte approval of stipulation of discontinuance as to certain defendant directors in stockholders' derivative action should not be granted except on fairly decisive showing that there is no cause of action against them. Borden v. Guthrie, 1964, 42 Misc.2d 879, 248 N.Y.S.2d 913.

Rule 909. Attorneys' fees

If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class.

Added L.1975, c. 207, § 1.

Effective Date. Rule effective Sept. 1, 1975, pursuant to L.1975, c. 207, § 3.

Practice Commentary

By Joseph M. McLaughlin

1975

If a class action results in the creation of a fund, it is traditional to award the successful attorney a reasonable fee from the fund. This rule codifies the practice. Rule 909 provides that in an appropriate case the attorney's fee may be paid directly by the opponent of the class (normally the defendant).

Where no fund is created, there has been some question as to how the attorney should be compensated. If the class can be identified, e. g., members of a union, there is no doubt that a reasonable attorney's fee may be awarded from a class "treasury" if, as a result of the attorney's labors the class has benefited. See Murray v. Kelly, 1961,

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ber's decision to participate in the litigation. Carnegie v. H&R Block, Inc., 1999, 180 Misc.2d 67, 687 N.Y.S.2d 528. Parties ⇐ 35.31

Defendant against whom prospective class action has been brought may not, in its communications with prospective class members prior to certification, deceive or mislead members. Carnegie v. H&R Block, Inc., 1999, 180 Misc.2d 67, 687 N.Y.S.2d 528. Parties ⇐ 35.31

It is not necessary for court to find actual harm from party's impermissible contact with prospective class members before ordering corrective action. Carnegie v. H&R Block, Inc., 1999, 180 Misc.2d 67, 687 N.Y.S.2d 528. Parties ⇐ 35.31

6. Review

Enforceability of arbitration clause contained in refund anticipation loan (RAL) form used by tax preparation service, which was inserted into form after prospective class action challenging its refund procedures was brought, would be conditioned on steps to protect fairness of class action process; clause would not operate to preclude class members' participation in class action unless those members, after receiving notice concerning pendency of class action and choice as to arbitration, elected to opt out of class. Carnegie v. H&R Block, Inc., 1999, 180 Misc.2d 67, 687 N.Y.S.2d 528. Arbitration ⇐ 6.2

Rule 908. Dismissal, discontinuance or compromise

Supplementary Practice Commentaries

By Joseph M. McLaughlin

1990

C908:1. Settlement of Class Actions.

Although Rule 908 requires that notice be given to the entire class of a proposal to settle the case, the rule is silent as to what the notice shall contain. *In re Colt Industries Shareholder Litigation*, 1990, 155 A.D.2d 154, 553 N.Y.S.2d 138 fills in the gap:

> We believe that a Trial Court properly exercises its discretion under CPLR Rule 908, by only approving for publication a notice, which, at a minimum, informs all class members of the pending class action (CPLR § 904), the composition of the class, the issues between the parties, the terms of the proposed settlement, how a class member may object, the time period within which such objection, if any, must be made, and, the date on which the Trial Court will hold a hearing, at which same will consider the fairness of the proposed settlement. 155 A.D.2d at 160, 553 N.Y.S.2d at 142.

1982

C908:1. Settlement of Class Actions.

This rule states that a class action shall not be settled "without the approval of the court." Section 902 provides that "in an action brought as a class action" the plaintiff must move within sixty days after the pleadings are closed for an order certifying the class. Suppose that the parties decide to settle the case before the certification motion has been made. Is court approval necessary? Has "a class action" been brought within the meaning of Rule 908? These questions, which have created a conflict in the federal courts under Federal Rule 23, were raised in Avena v. Ford Motor Co., 1982, 85 A.D.2d 149, 447 N.Y.S.2d 278. The Appellate Division, First Department, held that not only must court approval be obtained, but notice of the settlement must be given to all members of the class, as well.

The conclusion that an uncertified "class action" cannot be settled or dismissed without court approval is by no means self-evident. As already noted, there is a conflict among the federal cases on the point. *Compare* Shelton v. Pargo, Inc., C.A.Va.1978, 582 F.2d 1298, 1303 (no court approval necessary) with Rothman v. Gould, D.C.N.Y.1971, 52 F.R.D. 494 (court approval required). The philosophical arguments are fairly obvious—the plaintiff in even a purported class action is a fiduciary, etc. The problems are not so much philosophical as practical.

In the first place, although CPLR 902 calls for the certification motion in 60 days, it is the rare class action that sees a motion brought in so short a time. With the comprehensive pre-certification discovery that has become more the norm than the exception, purported class actions now abound where the motion to certify will not be made for several years. During that interval, the action is technically not a class action; it is at best a purported class action. If during that period, the class action features of the complaint were eliminated, whether by amendment of the complaint or by stipulation, the class would no longer be bound by any settlement. One may then question what the value of a court order is.

If court approval is required even for a pre-certification settlement of a class action, it would not be surprising to see plaintiffs making half-hearted motions to certify the class, in the expectation that the motion will be denied and the parties will then be free to settle the case unencumbered by the rules governing settlement of class actions. Opportunities for sharp practice arise.

Another feature of the Avena case should be noted. The court held that no only must a court order approving the settlement be obtained, but, in accordance with the second sentence of Rule 908, notice of the proposed settlement must be given to all members of the class. The expense attendant upon notifying a class of several hundred thousand people can make one question whether the game is worth the candle.

As is apparent from the conflicts among the courts that have considered the question, respectable arguments can be made on both sides of both question. Perhaps the legislature should take a closer look at this narrow question. It is certain to arise with greater frequency as the time interval between commencement of a purported class action and the required motion to certify the class under CPLR 902 continues to expand.

Practice Commentaries Cited

Lincoln Plaza Associates v. Various Tenants, 1987, 134 Misc.2d 791, 512 N.Y.S.2d 330.

United States Code Annotated

Class actions, see Fed.Rules Civ.Proc. Rule 23, 28 USCA.

Notes of Decisions

2. Restitution for class members

In action alleging that brokerage house adopted policy of paying New York customers with checks drawn on banks outside New York State, with object of securing for itself one or more day's additional use of client's money, proposed settlement of class action by which brokerage house would discontinue cross-country checking and pay plaintiffs' attorneys fees would be rejected since customers were entitled to return of profits realized by brokerage house through its policy. Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1979, 101 Misc.2d 655, 421 N.Y.S.2d 794. Brokers ⇐ 38(7); Compromise And Settlement ⇐ 62

3. Discretion of court

Trial court properly exercises its discretion under rule governing class action notice by only approving for publication notice which, at minimum, informs all class members of pending class action, composition of class, issues between parties, terms of proposed settlement, how class member may object, time period within which such objection must be made and date on which trial court will hold hearing to consider fairness of proposed settlement. In re Colt Industries Shareholder Litigation (1 Dept. 1990) 155 A.D.2d 154, 553 N.Y.S.2d 138, appeal granted 76 N.Y.2d 704, 559 N.Y.S.2d 983, 559 N.E.2d 677, affirmed as modified on other grounds 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160. Parties ⇐ 35.47

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1)the prosecution of separate actions by or against individual members of the class would create a risk of

(A)inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B)adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2)the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3)the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

History

(Amended July 1, 1966; Aug. 1, 1987.)

(Amended Dec. 1, 1998.)

Annotations

Notes

Other provisions:

Notes of Advisory Committee on Rules.

Note to Subdivision (a). This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L J 551, 570 et seq. (1937); Moore and Cohn, Federal Class Actions, 32 Ill L Rev 307 (1937); Moore and Cohn, Federal Class Actions--Jurisdiction and Effect of Judgment, 32 Ill L Rev 555-567 (1938); Lesar, Class Suits and the Federal Rules, 22 Minn L Rev 34 (1937); cf. Arnold and James, Cases on Trials, Judgments and Appeals (1936) 175; and see Blume, Jurisdictional Amount in Representative Suits, 15 Minn L Rev 501 (1931).

The general test of former Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in former Equity Rule 38, see Del Ch Rule 113; Fla Comp Gen Laws Ann (Supp, 1936) § 4918(7); Georgia Code (1933) § 37-1002, and see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala Code Ann (Michie, 1928) § 5701; 2 Ind Stat Ann (Burns, 1933) § 2-220; NYCPA (1937) § 195; Wis Stat (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in

Notice

1 OF 3 PARTS

Rule 23. Class Actions

(a)Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a

class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e)Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f)Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(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) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h)Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

History

(Amended Feb. 28, 1966, eff. July 1, 1966; March 2, 1987, eff. Aug. 1, 1987; April 24, 1998, eff. Dec. 1, 1998; March 27, 2003, eff. Dec. 1, 2003; April 30, 2007, eff. Dec. 1, 2007; March 26, 2009, eff. Dec. 1, 2009.)

Annotations

Notes

Other provisions:

Notes of Advisory Committee on Rules.*Note to Subdivision (a).* This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary*

47 N.Y.2d 363, 391 N.E.2d 1311, 418 N.Y.S.2d 334

Frederick A. O'Hara, on Behalf of Himself and
All Others Similarly Situated, Respondent,
v.
Alfred B. Del Bello, as County Executive of
the County of Westchester, et al., Appellants.

Court of Appeals of New York
Argued March 28, 1979;
decided June 12, 1979

CITE TITLE AS: O'Hara v Del Bello

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 17, 1978, which (1) dismissed as academic an appeal from a judgment of the Supreme Court (John C. Marbach, J.), entered in Westchester County, granting summary judgment to petitioner, and (2) affirmed so much of a further order of said court as adhered, upon reargument, to its original determination granting summary judgment to petitioner.

Petitioner, a Westchester County Court stenographer, commenced a proceeding, on behalf of himself and all others similarly situated, to direct payment of certain travel vouchers. Respondents, three county officials, moved to dismiss the petition without having served an answer, and the Supreme Court granted summary judgment to petitioner. Respondents later moved for reargument on the grounds that they had not been given notice that the court might treat the motion to dismiss as one for summary judgment and had not been afforded an opportunity to serve an answer and that no determination had ever been made regarding the propriety of maintaining a class action. The motion for reargument was granted, but the court adhered to its previous decision, stating that only a question of law had been posed by the litigation and that the matter had been so argued by the county officials themselves.

The Court of Appeals modified the order of the Appellate Division to limit to the named petitioner the relief granted by the Supreme Court, and, as modified,

affirmed, holding, in an opinion by Judge Jones, (1) that an affirmance of an award of summary judgment to petitioner, granted on respondents' motion to dismiss the petition under CPLR 3211 (subd [a]) prior to service of an answer, presents no reversible error of law in the Court of Appeals since the determination on the merits involved only a question of law which was argued by the parties on the motion and respondents at no time identified or demonstrated the existence of any material factual ***364** issues, and (2) that where there has been a failure to comply with the procedures and requirements of CPLR article 9 for determination of class action status, class action relief is not available.

O'Hara v Del Bello, 62 AD2d 1034, modified.

HEADNOTES

Judgments
Summary Judgment

() In a proceeding by a court reporter to direct payment of certain travel vouchers, an affirmance of an award of summary judgment to the petitioner, granted upon respondents' motion to dismiss the petition under CPLR 3211 (subd [a]) prior to service of an answer, presents no reversible error of law in the Court of Appeals since the determination on the merits involved only a question of law which was argued by the parties on the motion and respondents at no time identified or demonstrated the existence of any material factual issues; moreover, respondents were not prejudiced by the court's failure to give the notice required by CPLR 3211 (subd [c]) that the motion was being treated as one for summary judgment inasmuch as they had a full opportunity to argue the merits of the controlling question of law upon reargument.

Actions
Class Actions

() In a proceeding by a court reporter, on behalf of himself and all others similarly situated, to direct payment of certain travel vouchers, where there was a failure to comply with the procedures and requirements of CPLR article 9 for determination of class action status, class action relief is not available, and there is no basis for granting relief other than to the individual who brought the proceeding; a case

seeking class action relief should not, after appeals to the Appellate Division and Court of Appeals, be remitted to the Supreme Court for a determination as to whether a class action may be maintained since the explicit design of CPLR article 9 is that a determination as to the appropriateness of class action relief shall be promptly made at the outset of the litigation.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

20 NY Jur, Equity § 75

3 Carm-Wait 2d, §§ 19:167 et seq.; 6 Carm-Wait 2d, § 38:39

CPLR 3211 subds (a), (c), Article 9

59 Am Jur 2d, Parties § 80; 73 Am Jur 2d, Summary Judgment §§ 13, 14

Am Jur Pl & Pr Forms (Rev), Summary Judgment, Form 14

5 Am Jur Trials p 105, Summary Judgment Practice ***365**

POINTS OF COUNSEL

Samuel S. Yasgur, County Attorney (Kenneth E. Powell, Jonathan Lovett and *Peter J. Holmes* of counsel), for appellants.
I. The courts below committed reversible error in disregarding the mandatory procedures of CPLR article 9. *(Peterson v Berger,* 84 Misc 2d 517; *Matter of Rockwell v Morris,* 12 AD2d 272, 9 NY2d 791, 10 NY2d 721, 368 US 913; *Hansberry v Lee,* 311 US 32; *Eisen v Carlisle & Jaquelin,* 417 US 156; *People ex rel. Cardona v Singerman,* 63 Misc 2d 509; *People ex rel. Cox v Appelton,* 62 Misc 2d 403; *Matter of Knapp v Michaux,* 55 AD2d 1025; *Matter of Rubin v Levine,* 41 NY2d 1024; *Matter of Martin v Lavine,* 39 NY2d 72; *Matter of Rivera v Trimarco,* 36 NY2d 747.) II. The courts below committed reversible error by denying appellants' statutory right to interpose an answer and by granting summary judgment without advance notice. *(Guggenheimer v Ginzburg,* 43 NY2d 268; *Rovello v Orofino Realty Co.,* 40 NY2d 633; *Kingsbay Housing Co. Section I v Hoffman,* 61 AD2d 822; *Fletcher v Fletcher,* 56 AD2d 589; *Town of Huntington v Town of Oyster Bay,* 55 AD2d 641, *Black v Long Is. R. R. Co.,* 54 AD2d 570; *Matter of Board of Educ. v Nyquist,* 37 AD2d 642, 31 NY2d 468; *Matter of Posner v Rockefeller,* 33 AD2d

683, 25 NY2d 720; *Orshan v Anker,* 59 AD2d 937; *Matter of La Rocque v Farnan,* 51 AD2d 1057.)

Marjorie E. Karowe for respondent.

I. The court below did not err in holding that the instant petition constituted a proper class action. (*Matter of Rubin v Levine,* 41 NY2d 1024; *Matter of Martin v Lavine,* 39 NY2d 72; *Matter of Jones v Berman,* 37 NY2d 42; *Matter of Rivera v Trimarco,* 36 NY2d 747; *Matter of Knapp v Michaux,* 55 AD2d 1025; *Ammon v Suffolk County,* 90 Misc 2d 871; *Guadagno v Diamond Tours & Travel,* 89 Misc 2d 697; *Strauss v Long Is. Sports,* 89 Misc 2d 827, 60 AD2d 501; *Swanson v American Consumer Inds.,* 415 F2d 1326.) II. The court's initial error of treating respondent's motion under CPLR 3211 as a motion for summary judgment without first giving notice to the parties was subsequently cured by affording respondents a full and fair opportunity to present the merits of the proceeding to the court. III. Respondents chose to proceed by way of a motion to dismiss pursuant to CPLR 3211; having lost on the merits, they may not now claim the benefit of CPLR 7804 (subd [f]) in an effort to avoid the consequences. (*Cullen v Naples,* 31 NY2d 818; *Rogers v Niforatos,* 57 AD2d 984; ***366** *Maybrown v Malverne Distrs.,* 57 AD2d 548; *Matter of McGirr v Division of Veterans' Affairs, Executive Dept., State of N. Y.,* 56 AD2d 653; *Guibor v Manhattan Eye, Ear & Throat Hosp.,* 56 AD2d 359; *Kremens v Minc,* 55 AD2d 928; *Berman v Shatnes Lab.,* 43 AD2d 736; *Sargent v Halsey,* 42 AD2d 375.)

OPINION OF THE COURT

Jones, J.

(,)An affirmance of an award of summary judgment to petitioner, granted on respondents' motion to dismiss the petition under CPLR 3211 (subd [a], pars 2, 7) prior to service of an answer, presents no reversible error of law in this court when it appears that the determination on the merits involved only a question of law which was argued by the parties on the motion and respondents have at no time identified or demonstrated the existence of any material factual issues. When there has been a failure to comply with the procedures and requirements of CPLR article 9 for determination of class action status for the litigation, however, class action relief is not available.

()In this proceeding, in which officials of Westchester County have been directed by the courts below to honor and pay travel vouchers properly certified and presented to the county for payment for the period November, 1975 to April 1, 1977, the order of the Appellate Division must be modified to limit to the named petitioner, a

court stenographer of the Supreme Court for the Ninth Judicial District, the relief that has been granted.

The proceeding was commenced on or about February 18, 1977 by the individual petitioner "on behalf of himself and all others similarly situated"--the others described as Supreme Court reporters in Westchester County who had been denied payment of their authorized and approved travel vouchers by the county-- pursuant to CPLR article 78 for a judgment directing payment of properly certified travel vouchers, past and future. On the return day of the petition, March 24, 1977, respondents, county officials, without having served an answer, moved to dismiss the petition on the ground that petitioner had failed to exhaust administrative remedies available to him and that "No cause of action has been established" against respondents. Following oral argument and submission of supporting and opposing affidavits, on May 18, 1977 the Justice at Special Term granted judgment denying the motion ***367** to dismiss and directing payment by them of all properly certified travel vouchers presented for the period from November, 1975 to April 1, 1977. No determination was included in the judgment whether the proceeding could be maintained as a class action and no order so determining was otherwise issued.

On July 21, 1977 the county officials moved for reargument of the judgment on the grounds that they had not been given notice that the court might treat the motion to dismiss as one for summary judgment and had not been afforded an opportunity to serve an answer and that no determination had ever been made regarding the propriety of maintaining a class action. Petitioner did not oppose the making of the motion for reargument but by responsive affidavit sought to justify and uphold Special Term's award of affirmative relief in his favor prior to service of an answer on the ground that only an issue of law on undisputed facts was presented, and to sustain the treatment of the proceeding as a class action as a discretionary, *sua sponte* determination by the court. The reply affidavit submitted on behalf of the county officials, although stating that there were issues of fact not yet before the court, failed to identify any such issue. The affidavit originally served with the notice of motion for reargument had been devoid even of an allegation of the existence of factual issues. It had however specified respects in which there had been failure of compliance with CPLR article 9 (the class action article)-- namely, that no hearing had been held to determine the applicability of class relief, no order had ever been issued permitting the class action and no definitive description of the class had ever been made, either during the pendency of the proceeding or in the judgment, all as required by CPLR 901, 902, 903 and 905.

The motion for reargument was granted, but the court adhered to its previous decision, stating that only a question of law had been posed by the litigation and that the matter had been so argued by the county officials themselves. It added the observation that the class to which the ruling applied is small and their identities a matter of record--namely, the official court reporters of the Ninth Judicial District. The Appellate Division affirmed Special Term's order on the motion for reargument.

()With respect to respondents' claim that, absent notice as prescribed by CPLR 3211 (subd [c]), summary judgment should not have been granted to petitioner on their motion to dismiss ***368** the petition under paragraphs 2 and 7 of subdivision (a) of that section, we note that there were no disputed questions of fact, that none were identified when their motion for reargument was entertained, and that the sole issue was one of statutory construction on which rested the right to reimbursement from the county of travel expenses incurred by a court stenographer, the precise question fully addressed by the parties on the motion to dismiss. Additionally, the county officials have failed to show how they have been prejudiced by their failure to receive notice under subdivision (c). In these circumstances we cannot say that it was error as a matter of law for the Appellate Division to have affirmed the summary judgment granted below.

()Inasmuch as there was a failure to comply with the procedural and substantive provisions of CPLR article 9 with respect to class action, however, there is no basis for granting relief other than to the individual party who brought the proceeding. Accordingly, the order of the Appellate Division should be modified to limit the relief to the named petitioner.

We cannot accept the proposal advanced by the dissenter that the case should now be remitted to Special Term for a determination under CPLR article 9 whether a class action may be maintained--a procedure which is not suggested by petitioner himself. The explicit design of article 9, as of rule 23 of the Federal Rules of Civil Procedure, the general scheme of which it incorporates, is that a determination as to the appropriateness of class action relief shall be promptly made at the outset of the litigation. The commentary accompanying the class action legislation sponsored by the Judicial Conference which was substantially enacted as article 9 by chapter 207 of the Laws of 1975 included the statement: "Proposed section 902 would adopt the federal policy of determining, at least tentatively, the propriety of maintaining a class action in the initial stages of the proceedings" (Twenty-first Ann Report of NY Judicial Conference, 1976, p 252). Of particular significance, too, is the sentence in the Judicial Conference Report which follows that just quoted: "A

wide range of discretion would enable the court to vary the order *at any time before reaching a decision on the merits." (Id.;* emphasis added.) Also notable is the fact that, when section 902 was enacted by the Legislature it specified in even more explicit language than did its Federal counterpart (Fed Rules Civ Prac, rule 23, subd [c], par [1])--the latter being the form ***369** proposed by the Judicial Conference--the time for class action status determination. Whereas the Federal rule and the Judicial Conference proposal provided that the determination shall be made "As soon as practicable after the commencement of the action", section 902 as enacted requires that the plaintiff shall move for an order to determine class action status within 60 days after time for service of defendant's responsive pleading has expired-- clearly a time early in the litigation and one contemplating address to the issue whether the litigation shall proceed as a class action well before any determination on the merits of the action. *

* Although there are instances of cases under the Federal rule in which the certification as a class action has been withheld until after the merits had been determined, those cases have had unique characteristics and provide no precedent for a similar result in this case (e.g., *Jimenez v Weinberger,* 523 F2d 689, cert den *sub nom. Mathews v Jimenez,* 427 US 912 [holding limited to suits under rule 23, subd (b), par (2)]; *Alexander v Aero Lodge No. 735,* 565 F2d 1364 [action proceeded to trial as class action]). Certification as a class action after determination of the merits was held improper in *Peritz v Liberty Loan Corp.* (523 F2d 349).

To countenance making the determination as to the identity of the beneficiaries on whose behalf the litigation had been prosecuted or defended after its outcome is known would be to open the possibility both of conferring a gratuitious benefit on persons who have not been parties and were not at any time exposed to the risk of an adverse adjudication and further of substantially enlarging the liabiility of the loser beyond anything contemplated during the contest and resolution of the issues on their merits. Additionally, that the resolution on the merits would be known might operate inescapably and understandably to affect the determination as to class action status.

Petitioner's remedy in this instance would have been for him, on learning of the disposition at nisi prius to grant class action relief but without conformity with the requirements of article 9, then promptly to have sought--or to have joined with respondents in seeking--reargument and reconsideration at Special Term to assure compliance with the procedures mandated by the statute, rather than urging the propriety of the court's handling of the matter. Having chosen to accept the premature granting of class action relief and to rely on arguments that the court's disposition was authorized and proper, he cannot now be permitted to return for a second opportunity to establish entitlement to class action status.

In modifying the order of the Appellate Division such that *370 the named petitioner retains the judgment favorable to him, we record that in our court the parties did not address the merits of the claim for reimbursement by the county in brief or on oral argument.

The order of the Appellate Division should be modified, without costs, to limit to the named petitioner the relief granted by Supreme Court, and, as so modified, affirmed.

Gabrielli, J. (dissenting in part).

I respectfully dissent in part. While I agree with the majority's decision to sustain the Appellate Division affirmance of the award of summary judgment to the named petitioner, I cannot concur in this court's action in limiting all relief to the named petitioner only, solely because of Special Term's failure to follow proper procedures for certification of a class action. Rather, I would remit the matter to Special Term for a determination, as mandated by CPLR article 9, whether class action status is appropriate in this instance and, if so, for certification of the proper class.

This article 78 proceeding was commenced by petitioner O'Hara as a class action brought on behalf of himself and all "those persons employed as Supreme Court Reporters in the County of Westchester, New York who have been denied payment of their authorized and approved travel vouchers by the County of Westchester". The petition alleged that since November, 1975 Westchester County had refused to reimburse court reporters for travel expenses incurred while assigned to Supreme Court, Westchester County. The relief requested was twofold: payment of all vouchers already submitted, and an order instructing the county to continue to honor such vouchers in the future.

Some 26 days after the proceeding was commenced, and without filing an answer, respondents moved to dismiss the petition on the ground that it failed to state any cause of action since the State, and not Westchester County, was liable for the court reporters' travel expenses, and, further, that the petitioner had failed to seek reimbursement from the State. Petitioner O'Hara opposed the motion to dismiss, contending that pursuant to section 313 of the Judiciary Law the county was responsible for these expenses. Additionally, O'Hara requested the court to direct respondents to file and serve an answer. Instead, some 16 days after the motion to dismiss was made, Special Term *sua sponte* and without notice to the *371 parties converted the motion to dismiss into a motion for summary judgment, and granted

summary judgment ordering respondents to "pay all submitted travel vouchers which have been properly certified" as well as those to be submitted in the future.

Respondents moved to reargue, contending that it was error to award summary judgment without notice and without affording respondents an opportunity to answer, and that the court had also erred in granting relief to the class without following the procedures provided by CPLR article 9. Special Term granted the motion to reargue, but then adhered to its original decision, concluding that summary judgment was proper because the only issue presented in the proceeding was the question of law raised on the motion to dismiss, and that there was no need for a class certification procedure since "the class to which the ruling applies is small and their identities are a matter of record". Respondents appealed to the Appellate Division, which affirmed, and we then granted respondents leave to appeal to this court.

I am in full agreement with the conclusion reached by the majority of this court that we should not set aside the grant of summary judgment to O'Hara, the named petitioner. I cannot concur, however, in the majority's arbitrary dismissal of the claims of the other members of the class at this late date simply because Special Term acted hastily in granting relief to the class. I know of no rule of law or equity which supports this result, and I find it to be both unjust and repugnant. Where the court of first instance prematurely grants relief to a litigant, the proper corrective action is remittal for continuation of the proceeding, not dismissal of the claim. The rule followed by the majority would, in effect, seem to mandate that in any case in which we decided that the courts below erred by granting summary judgment to a plaintiff despite the existence of a question of fact, we should then dismiss the complaint rather than remitting for further proceedings. So stated, the oddity of this proposition is manifest, and yet that is, in effect, what the majority of this court has determined to do in this instance.

This result is especially abhorrent because the flaw in the certification of the class is not due to any action or inaction upon the part of the petitioner, but rather is solely the result of Special Terms' precipitous decision. To penalize the as yet unknown members of the class and to deprive them of the ***372** right to recover which would otherwise result from the grant of summary judgment to the named petitioner, solely because of judicial error, is both unjust and unreasonable. CPLR 902 requires the person who commences a class action to move for permission to maintain the action as a class action within 60 days after the time for service of a responsive pleading has expired. In this instance, the time for service of an answer never expired because summary judgment was granted *sua sponte* first, and hence

the time within which petitioner was required to move for class certification never began to run. In short, petitioner had no opportunity to correct what this court now deems to be not merely error, but fatal error.

I note that it is quite possible that class certification would not be proper in this instance. For one thing, the class does indeed appear to be quite small, and class certification is available only if "the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable" (CPLR 901, subd a, par 1). Moreover, class certification might be improper insofar as this proceeding is aimed at the correction of errors in governmental operations, since "on the granting of any relief to the [named petitioner] comparable relief would adequately flow to others similarly situated under principles of *stare decisis*" (*Matter of Bey v Hentel,* 36 NY2d 747, 749; accord *Matter of Martin v Lavine,* 39 NY2d 72, 75; *Matter of Jones v Berman,* 37 NY2d 42, 57). That rationale, however, would appear inapplicable where an accrued claim for damages or monetary relief is involved, for relief to subsequent petitioners would in no way aid those other members of the class whose valid claims might otherwise become time-barred in the interim. Moreover, our concern for the possible impaired efficiency of governmental operations is less justifiable where the claims are not likely to repeatedly arise and the class of claimants may be readily defined (see *Beekman v City of New York,* 65 AD2d 317, 318-319). At any rate, these determinations must be made in the first instance by the court of original jurisdiction, not by this court.

Accordingly, I vote to modify the order appealed from by remitting the matter to Supreme Court, Westchester County, for further proceedings on the issue of class certification, and would otherwise affirm.

Judges Jasen, Wachtler and Fuchsberg concur with Judge ***373** Jones; Judge Gabrielli dissents in part and votes to modify in a separate opinion; Chief Judge Cooke taking no part.
Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. ***374**

85 A.D.2d 149, 447 N.Y.S.2d 278

Anthony Avena et al., on Behalf of Themselves
and All Others Similarly Situated, Respondents,
v.
Ford Motor Company, Appellant

Supreme Court, Appellate Division, First Department, New York
12646-47
February 25, 1982

CITE TITLE AS: Avena v Ford Motor Co.

SUMMARY

Appeals (1) from an order of the Supreme Court at Special Term (Hilda G. Schwartz, J.), entered September 9, 1980 in New York County, which denied approval of a settlement, and (2) from an order of said court, entered December 2, 1980 which granted reargument, and, upon reargument, adhered to its earlier determination.

See Avena v Ford Motor Co., 107 Misc 2d 444.

HEADNOTES

Actions
Class Actions
Compromise and Discontinuance

() An order denying court approval of a proposed compromise and discontinuance of a purported class action suit by settlement of the individual claims of the named plaintiffs and discontinuance of the class action aspects of the case without prejudice to the claims of other members of the class, but without notice to them, is affirmed, where no application has been made for an order to determine whether the action is to be maintained as a class action and for certification as such under CPLR 902; CPLR 908 requires that notice of a proposed dismissal, discontinuance

or compromise of a class action be given to all members of the class, and an action which purports to be a class action but has not yet been certified as such by the court is deemed a class action for purposes of CPLR 908, since the risk that plaintiffs' decision whether or not to apply for class action certification may be influenced by whether the settlement is satisfactory or not gives plaintiffs an opportunity to use the class action claim for unfair personal aggrandizement in the settlement.

Actions
Class Actions
Notice of Compromise and Discontinuance

() The provision of CPLR 908 that notice of a proposed dismissal, discontinuance, or compromise of a class action shall be given to all members of the class in such manner as the court directs requires that notice be given and does not merely leave to the court's discretion how and whether notice shall be given; it is a basic duty of a fiduciary to disclose all relevant facts to his beneficiaries.

APPEARANCES OF COUNSEL

J. Peter Coll, Jr., of counsel (*Charles W. Gerdts, III* and *Mio P. Sylvester* with him on the brief; *Donovan Leisure Newton & Irvine*, attorneys), for appellant.
Jonathan M. Plasse of counsel (*Robert S. Schachter* with him on the brief; *Kass, Goodkind, Wechsler & Labaton*, attorneys), for respondents. ***150**

OPINION OF THE COURT

Silverman, J.

These are appeals from orders of Special Term of the Supreme Court denying court approval of a proposed compromise (107 Misc 2d 444) and discontinuance of a purported class action suit by settlement of the individual claims of the named plaintiffs and discontinuance of the class action aspects of the case without prejudice to the claims of other members of the class, but without notice to them.

Although the defendant has answered, no application has been made for an order to determine whether the action is to be maintained as a class action and for certification as such under CPLR 902.

The primary issue on the appeal is whether on an application to approve such a compromise at that stage of the action the court can or should dispense with notice to the putative class. Special Term held that notice was mandatory. We agree.

The action arises from a claim that a certain percentage of Ford vehicles, 1974 through 1977 models, equipped with certain types of engines, are susceptible of developing a cracked engine block. Some six or seven months before the institution of this action, defendant Ford had instituted an extended policy program, publicly announced, notice of which was given by mail to each owner of the subject vehicles, that Ford would pay 100% of the cost of repairs of any subject vehicle developing a cracked engine block, within 36 months of ownership or 36,000 miles, due to the causes identified. This program did not cover engine block cracks due to other causes. The program had been the subject of an investigation by the Federal Trade Commission. Apparently the notice of this program stimulated the bringing of this action. Of the three named plaintiffs, one plaintiff, Anthony Avena, claimed that his engine block had cracked but that he had been denied coverage because the Ford dealer who had inspected the vehicle concluded that the engine block had cracked due to Mr. Avena's failure to maintain the vehicle properly. Another plaintiff, plaintiff Silverman, owned a car whose engine block had not cracked or had any symptoms of a cracked block, but ***151** feared that his vehicle some day might develop a cracked engine block. The third named plaintiff had voluntarily withdrawn from participation in the action. The action is entitled in the name of the three named plaintiffs, "on Behalf of Themselves and All Others Similarly Situated," and the prayers for relief in the complaint are all for judgments in favor of "plaintiffs and the class" or "plaintiffs and the members of the class." (The prayers for relief are for damages and mandatory injunction to comply with the terms of warranties and to require Ford to remove any time and mileage limitations in the warranty and to inspect and repair the defects free of charge.)

The proposed terms of the settlement essentially were that plaintiff Avena would receive from Ford either repair of the engine block of his car or reimbursement of out-of-pocket expenses for repair; plaintiff Silverman would receive an inspection of his car to determine whether it exhibited any of the symptoms of the cracked engine block problem; Messrs. Avena and Silverman would execute general releases to Ford; Ford would pay plaintiffs' attorney $6,000 for legal services; plaintiffs would seek an order of discontinuance to dismiss with prejudice all individual claims asserted by the named plaintiffs but without prejudice to any claims of the putative members of the alleged class. The settlement further provided that as a condition of the compromise Ford required that the order of discontinuance contain no provision for notice to putative members of the alleged

but uncertified class and that if the court determines that such notice is necessary, then Ford shall withdraw from the settlement agreement.

For some reason plaintiffs' attorneys did not apply for court approval of the compromise and discontinuance, but Ford did and plaintiffs' attorneys consented.

Special Term refused to approve the settlement without notice to the putative members of the class on the ground that such notice was mandatory (107 Misc 2d 444, *supra*). Defendant Ford appeals from that determination.

CPLR 908 provides: "A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, ***152** or compromise shall be given to all members of the class in such manner as the court directs."

Subdivision (e) of rule 23 of the Federal Rules of Civil Procedure is substantially identical.

The first question logically is whether an action, which purports to be a class action but has not yet been certified as such by the court, shall be deemed "a class action" for the purposes of CPLR 908.

()There is some difference in the Federal authorities as to whether it must be so considered under the Federal rules. (Cf. *Shelton v Pargo, Inc.*, 582 F2d 1298, 1303, and *Magana v Platzer Shipyard*, 74 FRD 61, indicating that it need not be, and *Philadelphia Elec. Co. v Anaconda Amer. Brass Co.*, 42 FRD 324, and *Rothman v Gould*, 52 FRD 494, indicating that it must be so considered; see, also, Developments in the Law - Class Actions, 89 Harv L Rev 1318, 1542, n 32.) In the present case the movant does not seriously dispute the applicability of CPLR 908, and we agree. The fiduciary obligations of the named plaintiffs in instituting such an action are generally recognized and not disputed. The potential for abuse by private settlement at this stage is also obvious and recognized. After all plaintiffs must decide whether to apply for class action certification, which if granted, would surely involve great expense and risk to defendant, or on the other hand, must decide not to apply for class action certification for reasons legitimate or illegitimate. And obviously the risk that plaintiffs' decision on this point may be influenced by whether the settlement is satisfactory or not gives to plaintiffs an opportunity to use "the class action claim for unfair personal aggrandizement in the settlement". (*Shelton v Pargo, Inc.*, 582 F2d, at p 1314.) For these reasons we think that CPLR 908 should apply to even a without prejudice (to the class)

settlement and discontinuance of a purported class action before certification or denial of certification.

()The question then is whether the provision of CPLR 908 that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs" requires notice to be given or merely leaves to the court's discretion not ***153** only how notice shall be given but whether. Again the Federal courts have divided on the question whether the provision for notice is mandatory or merely discretionary under the Federal rule. (See cases cited, *supra*.)

The natural reading of the statute on its face is that *some* notice *must* be given, but that the court has discretion as to what kind of notice.

As in any difficult question, there are policy considerations to support either view.

Clearly some control of settlement or discontinuance of a purported class action is necessary. The abuses which have developed incident to the beneficent widened availability of class actions and the potential for abuse in a private settlement even before certification are widely recognized. The requirement of notice to the class makes settlement more difficult, perhaps even impossible in some cases. But of course CPLR 908 intends to make settlement of class actions somewhat more difficult as part of the price of preventing abuse. And by the very act of asking for court approval, which would otherwise not be necessary, the parties recognize that such settlements are subject to greater control and thus more difficult than the settlement of a purely individual lawsuit. The question is how much more difficult shall they be. Shall court approval be sufficient with or without notice to the class, or shall notice of the proposed settlement be given somehow to the class, or should there perhaps be a hearing at which the court inquires into the fairness, desirability, lack of collusion, and adherence to fiduciary standards before deciding whether to give notice to the class?

In this connection I note that it is a basic duty of a fiduciary to disclose all relevant facts to his beneficiaries. (Cf. *Wendt v Fischer*, 243 NY 439, 443.) In that context a requirement of the settlement that notice not be given to the members of the class is particularly unpalatable. On the other hand, if the court should determine that no notice need be given to the class anyhow, perhaps the unpalatability of that as a requirement of the settlement becomes merely a matter of taste. Indeed the parties in the present case say they have no desire to conceal the facts of the ***154** settlement from the class, they just do not desire to go to the expense of notifying

the individual members of so large and amorphous a class. We may also speculate that at least the defendant is not particularly anxious to stir other as yet quiescent members of the class, and perhaps other plaintiff lawyers who specialize in class actions, into starting new litigations.

As to the present case, plaintiffs say that on further examination of the facts and answers to interrogatories they have determined that probably this is not a proper class action. And indeed, there are obvious difficulties about whether this is a proper class action, e.g., given Ford's announced extended policy program, whether "there are questions of law or fact common to the class which predominate over any questions affecting only individual members" (CPLR 901, subd a, par 2); perhaps the predominating question will be merely whether the engine block of a particular car owned by a particular member of the class is or is not defective. But this difficulty must have been apparent before the action was begun as a class action.

The terms of the particular settlement before us are not shocking:

The little bit that the individual plaintiffs are receiving may be no more than they are entitled to. But it remains true that the named plaintiffs-fiduciaries are assured of that little bit (notwithstanding some possible questions as to whether they are really entitled to it) by the settlement, while their beneficiaries, the other members of the class, are left to struggle for themselves.

The lawyers are receiving a fee of $6,000, which in absolute terms is a modest amount. And under the Magnuson-Moss Warranty Act (US Code, tit 15, § 2310, subd [d], par [2]) if a consumer prevails in an action brought under the act, the court may award attorneys' fees based on actual time expended. But again the actual time expended here seems to have been almost entirely in the determination whether this is a proper class action. (There is some question whether plaintiffs have complied with the prerequisites for bringing a class action under that act.) The question whether in the circumstances of this case plaintiffs' attorneys would be entitled under the act to these ***155** attorneys' fees is resolved in favor of the attorneys for the plaintiffs-fiduciaries by the settlement.

These advantages to the fiduciaries and their attorneys (if indeed they are advantages) are modest enough; perhaps even only nominal. But long ago Judge Cardozo said with respect to the argument that the beneficiaries of an alleged fiduciary's breach of obligation were not damaged: "This is no sufficient answer by a trustee forgetful of his duty. The law 'does not stop to inquire whether the

contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case' (*Munson v. Syracuse, etc., R. R. Co.*, [103 NY 58, 74]; cf. *Dutton v. Willner*, 52 N. Y. 312, 319). Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion." (*Wendt v Fischer*, 243 NY, at pp 443-444.)

It is suggested that instead of requiring notice, the court should hold a hearing to determine whether notice is really necessary and whether the terms of the settlement are so fair, and so free from collusion or undue advantage to the fiduciaries arising out of their fiduciary status, that no notice need be given to the class. (See, e.g., *Shelton v Pargo, Inc.*, 582 F2d 1298, *supra; Magana v Platzer Shipyard*, 74 FRD 61, *supra.*) We do not think this is quite satisfactory. In our adversary system of justice the court must rely on adversary attorneys to produce the necessary facts. But here, without some notice to the outside world and to possible other members of the class and their representatives (or at least the appointment of a special guardian), who is to find and present to the court considerations that may cast doubt upon the agreement of the attorneys for defendant and for the named plaintiffs for a settlement without notice?

On the whole, we think it is safer to adhere to that "uncompromising rigidity" by which in the past "the rule of undivided loyalty [has] been maintained". (*Wendt v Fischer, supra*, p 444.) ***156**

Fiduciary obligations should not be lightly assumed and cannot be lightly discarded.

Accordingly, the determination of Special Term should be affirmed. We have no occasion at this time to pass on what kind of notice would be adequate, or whether the individual plaintiffs would be free of their fiduciary obligations if they had applied to the court for class action certification or a determination of the propriety of class action status, and the court had finally determined that the action could not be maintained as a class action.

The order of Supreme Court, New York County, Special Term (H. Schwartz, J.), entered December 2, 1980 denying approval of the settlement should be affirmed without costs.

The appeal from the order of September 9, 1980 should be dismissed, without costs, as superseded by the order of December 2, 1980.

Sullivan, J. P., Carro and Bloom, JJ., concur with Silverman, J.; Ross, J., concurs in the result only.
Order, Supreme Court, New York County, entered on December 2, 1980, unanimously affirmed, without costs and without disbursements. The appeal from the order of said court entered on September 9, 1980 is dismissed, without costs and without disbursements, as superseded by the order of December 2, 1980. ***157**

30 N.Y.3d 488, 90 N.E.3d 1262, 68 N.Y.S.3d 391, 2017 N.Y. Slip Op. 08620

**1 Geoffrey Desrosiers, Individually and on Behalf of Other Persons Similarly Situated, Respondent,
v
Perry Ellis Menswear, LLC, et al., Appellants.
Christopher Vasquez, Individually and on Behalf of Other Persons Similarly Situated, Respondent,
v
National Securities Corporation, Appellant, et al., Defendant.

Court of Appeals of New York
121, 122
Argued November 14, 2017
Decided December 12, 2017

CITE TITLE AS: Desrosiers v Perry Ellis Menswear, LLC

SUMMARY

Appeal, in the first above-entitled action, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered May 10, 2016. The Appellate Division (1) reversed, on the law, an order of the Supreme Court, New York County (Eileen A. Rakower, J.), which, insofar as appealed from, had denied plaintiff's cross motion to notify the putative class of the discontinuance of the action pursuant to CPLR 908; and (2) remanded the matter to Supreme Court to fashion an appropriate notification under the statute. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of Supreme Court, properly made?"

Appeal, in the second above-entitled action, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered May 12, 2016. The Appellate Division affirmed that portion of an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.; op 48 Misc 3d 597 [2015]), which had granted plaintiff's motion to compel notice of the impending dismissal of the complaint to putative class members pursuant to CPLR 908, reserving judgment on the manner and substance of such notice. The following question was certified by the Appellate Division: "Was the order of Supreme Court, as affirmed by this Court, properly made?"

Desrosiers v Perry Ellis Menswear, LLC, 139 AD3d 473, affirmed.

Vasquez v National Sec. Corp., 139 AD3d 503, affirmed.

HEADNOTE

Actions
Class Actions
Notice of Dismissal, Discontinuance or Compromise—Notice to Putative Class Members

CPLR 908, which provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that ***489** "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs," applies to class actions that are settled or dismissed before the class has been certified. The text of CPLR 908 is ambiguous with respect to this issue, as the statute refers to a "class action" instead of "certified class action" or "maintained as a class action," and to "all members of the class" instead of "all members of the certified class" or "all members of the class who would be bound" by the proposed termination. CPLR 908 has not been amended since it was originally enacted in 1975, and the only previous appellate-level decision to address the issue as it pertains to CPLR 908 concluded that CPLR 908 applied to settlements reached before certification (*Avena v Ford Motor Co.*, 85 AD2d 149 [1st Dept 1982]). For 35 years *Avena* has been New York's sole appellate judicial interpretation of whether notice to putative class members before certification is required by CPLR 908. Under those circumstances, and in light of the legislative history, the legislature's refusal to amend CPLR 908 in the decades since *Avena* was decided indicates that the *Avena* decision correctly ascertained the legislature's intent. Any practical difficulties and policy concerns that may arise from *Avena*'s interpretation of CPLR 908 are best addressed by the legislature, especially considering that there are also policy reasons in favor of applying CPLR 908 in the pre-certification context, such as ensuring that the settlement between the named plaintiff and the defendant is free from collusion and that absent putative class members will not be prejudiced.

RESEARCH REFERENCES

Am Jur 2d Federal Courts §§ 1700, 1729, 1738, 1742–1745, 1751–1754, 1767, 1795; Am Jur 2d Parties §§ 94, 99.

Carmody-Wait 2d Parties §§ 19:336, 19:349–19:350.

McKinney's, CPLR 908.

NY Jur 2d Parties §§ 301, 312–313.

Siegel, NY Prac §§ 139–143, 147.

ANNOTATION REFERENCE

See ALR Index under Civil Procedure Rules; Class Actions; Compromise and Settlement; Dismissal, Discontinuance, and Nonsuit; Notice of Knowledge.

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Query: not! /5 dismiss! & putat! /5 class!

POINTS OF COUNSEL

Bluerock Legal, P.A., Miami, Florida (*Frank H. Henry*, of the Florida bar, admitted pro hac vice, of counsel), and *Nicoll Davis & Spinella, LLP*, New York City (*Steven C. DePalma* of ***490** counsel), for appellants in the first above-entitled action.
I. The lawsuit that was dismissed by the Supreme Court was not a class action. (*O'Hara v Del Bello*, 47 NY2d 363; *Shah v Wilco Sys., Inc.*, 27 AD3d 169.) II. The Supreme Court was correct in denying Geoffrey Desrosiers' motion seeking class relief. (*Shah v Wilco Sys., Inc.*, 27 AD3d 169; *Meraner v Albany Med. Ctr.*, 211 AD2d 867; *Powlowski v Wullich*, 102 AD2d 575; *Avena v Ford Motor Co.*, 107 Misc 2d 444, 85 AD2d 149.) III. The Supreme Court was correct because the rights of potential class members were not impacted by the dismissal of this lawsuit and the Appellate Division should be reversed. (*Avena v Ford Motor Co.*, 85 AD2d 149.)
Virginia & Ambinder, LLP, New York City (*LaDonna M. Lusher* and *Jack L. Newhouse* of counsel), and *Leeds Brown Law, P.C.*, Carle Place (*Jeffrey K. Brown* of counsel), for respondent in the first above-entitled action.

I. Notice under CPLR 908 is mandatory. (*Avena v Ford Motor Co.*, 85 AD2d 149; *Astill v Kumquat Props., LLC*, 2013 NY Slip Op 32964[U], 125 AD3d 522; *Borden v 400 E. 55th St.*, 2012 NY Slip Op 33712[U]; *Diakonikolas v New Horizons Worldwide Inc.*, 2011 NY Slip Op 33098[U]; *Matter of Beekman Hill Assn. v Chin*, 274 AD2d 161; *Putnam v Otsego Mut. Fire Ins. Co.*, 45 AD2d 556.) II. CPLR 908 notice is not conditioned on plaintiff-respondent timely moving for class certification. (*Huebner v Caldwell & Cook*, 139 Misc 2d 288; *O'Hara v Del Bello*, 47 NY2d 363; *Shah v Wilco Sys., Inc.*, 27 AD3d 169; *Galdamez v Biordi Constr. Corp.*, 50 AD3d 357; *Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841; *Chavarria v Crest Hollow Country Club at Woodbury, Inc.*, 109 AD3d 634.) III. CPLR 908's notice requirement protects absent class members and the integrity of class actions. (*Pludeman v Northern Leasing Sys., Inc.*, 2005 NY Slip Op 30270[U]; *American Pipe & Constr. Co. v Utah*, 414 US 538; *Brinckerhoff v Bostwick*, 99 NY 185; *Paru v Mutual of Am. Life Ins. Co.*, 52 AD3d 346; *Yollin v Holland Am. Cruises*, 97 AD2d 720; *Independent Invs. Protective League v Options Clearing Corp.*, 107 Misc 2d 43; *Sonnenschein v Evans*, 21 NY2d 563; *City of Rochester v Chiarella*, 65 NY2d 92; *Wendt v Fischer*, 243 NY 439.) IV. Defendants' calculated tactics demonstrate why CPLR 908 notice is mandatory. (*Weinstein v Jenny Craig Operations, Inc.*, 41 Misc 3d 1220[A], 2013 NY Slip Op 51783[U]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14; *Sonnenschein v Evans*, 21 NY2d 563; *Brinckerhoff v Bostwick*, 99 NY 185; *Diakonikolas v New Horizons Worldwide Inc.*, 2011 NY Slip Op 33098[U]; ***491** *Astill v Kumquat Props., LLC*, 2013 NY Slip Op 32964[U]; *Matter of Colt Indus. Shareholder Litig.*, 155 AD2d 154; *Jackson v National Grange Mut. Liab. Co.*, 299 NY 333.)

Baker & Hostetler LLP, New York City (*Daniel J. Buzzetta, Amy J. Traub* and *Erica Barrow* of counsel), for appellant in the second above-entitled action.

I. The Appellate Division erred by requiring notice in a case that is not a class action. (*O'Hara v Del Bello*, 47 NY2d 363; *Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55; *Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63; *American Pipe & Constr. Co. v Utah*, 414 US 538; *Paru v Mutual of Am. Life Ins. Co.*, 52 AD3d 346.) II. *Avena v Ford Motor Co.* (85 AD2d 149 [1982]) should be overturned because it ignores that individual resolutions do not bind the alleged class through issue or claim preclusion. (*Shelton v Pargo, Inc.*, 582 F2d 1298; *Brinckerhoff v Bostwick*, 99 NY 185; *Astil v Kumquat Props., LLC*, 125 AD3d 522; *Diakonikolas v New Horizons Worldwide Inc.*, 2011 NY Slip Op 33098[U]; *Borden v 400 E. 55th St.*, 2012 NY Slip Op 33712[U]; *Abramovitz v Paragon Sporting Goods Co.*, 202 AD2d 206; *Canestaro v Raymour & Flanigan Furniture Co.*, 42 Misc 3d 1210[A], 2013 NY Slip Op 52270[U].)

Virginia Ambinder, LLP, New York City (*LaDonna M. Lusher, Lloyd R. Ambinder* and *Jack L. Newhouse* of counsel), and *Leeds Brown Law, P.C.*, Carle Place (*Jeffrey*

K. Brown, Daniel Markowitz and *Michael A. Tompkins* of counsel), for respondent in the second above-entitled action.

I. Notice of this action's proposed dismissal to putative class members is required. (*Moore v Metropolitan Life Ins. Co.*, 33 NY2d 304; *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382; *Friar v Vanguard Holding Corp.*, 78 AD2d 83; *Weinstein v Jenny Craig Operations, Inc.*, 41 Misc 3d 1220[A], 2013 NY Slip Op 51783[U]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14; *Avena v Ford Motor Co.*, 85 AD2d 149; *Matter of Beekman Hill Assn. v Chin*, 274 AD2d 161; *Independent Invs. Protective League v Options Clearing Corp.*, 107 Misc 2d 43; *People v Giordano*, 87 NY2d 441.) II. The authority relied on by defendant-appellant is inapplicable. (*O'Hara v Del Bello*, 47 NY2d 363; *Galdamez v Biordi Constr. Corp.*, 50 AD3d 357; *Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841; *Chavarria v Crest Hollow Country Club at Woodbury, Inc.*, 109 AD3d 634; *Abramovitz v Paragon Sporting Goods Co.*, 202 AD2d 206; *Canestaro v Raymour & Flanigan Furniture Co.*, 42 Misc 3d 1210[A], 2013 NY Slip Op 52270[U].) III. The trial court approved the settlement ***492** and ordered the action dismissed after CPLR 908 notice is issued. (*Matter of Colt Indus. Shareholder Litig.*, 155 AD2d 154.) IV. Defendant-appellant offers arguments beyond the scope of this appeal. (*Price v Price*, 69 NY2d 8; *Penguin Group [USA] Inc. v American Buddha*, 16 NY3d 295; *Solicitor for Affairs of His Majesty's Treasury v Bankers Trust Co.*, 304 NY 282; *Mohrmann v Kob*, 291 NY 181; *Bowlby v McQuail*, 240 NY 684; *Slater v Gallman*, 38 NY2d 1; *Price v New York City Bd. of Educ.*, 16 Misc 3d 543.)

OPINION OF THE COURT

Fahey, J.

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." On this appeal, we must determine whether CPLR 908 applies only to certified ****2** class actions, or also to class actions that are settled or dismissed before the class has been certified. We conclude that CPLR 908 applies in the pre-certification context. As a result, notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given.

I.

Plaintiff Geoffrey Desrosiers worked as an unpaid intern for Perry Ellis Menswear, LLC in 2012. In February 2015, he commenced a class action against defendants Perry Ellis Menswear and an affiliated entity (collectively, Perry Ellis), alleging that

Perry Ellis improperly classified employees as interns. He sought wages on behalf of himself and similarly-situated individuals.

In March 2015, Perry Ellis sent an offer of compromise to Desrosiers, which he accepted. On May 18, 2015, Perry Ellis moved to dismiss the complaint. By that date, the time within which Desrosiers was required to move for class certification pursuant to CPLR 902 had expired. Desrosiers did not oppose dismissal of the complaint, but he filed a cross motion seeking leave to provide notice of the proposed dismissal to putative class members pursuant to CPLR 908. Perry Ellis opposed the cross motion, arguing that notice to putative class members was inappropriate because Desrosiers had not moved for class certification within the required time. Supreme Court dismissed ***493** the complaint but denied the cross motion to provide notice to putative class members.

On appeal, the Appellate Division reversed the order insofar as appealed from by Desrosiers (*Desrosiers v Perry Ellis Menswear, LLC*, 139 AD3d 473 [1st Dept 2016]). The Court concluded that CPLR 908 "is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired," and that notice to putative class members is "particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of the individual plaintiff's action" (*id.* at 474).

Plaintiff Christopher Vasquez was employed by defendant National Securities Corporation (NSC) as a financial products salesperson in 2007 and 2008. In June 2014, he filed a class action against NSC on behalf of himself and all similarly-situated individuals who worked for NSC after June 2008. Vasquez alleged that the compensation paid by NSC fell below the required minimum wage, and he sought wage and overtime compensation for himself and similarly-situated individuals.

The parties agreed to postpone a motion for class certification in order to complete pre-certification discovery. In February 2015, before Vasquez had moved for class certification, NSC made a settlement offer, which Vasquez accepted the following month. NSC thereafter moved to dismiss the complaint. Vasquez cross-moved to provide notice of the proposed dismissal to putative class members pursuant to CPLR 908. NSC opposed the cross ****3** motion, asserting that CPLR 908 applies only to certified class actions.

Supreme Court granted the cross motion to provide notice to putative class members and granted NSC's motion to dismiss the complaint, but directed that the

action would not be marked disposed until after notice had been issued (*Vasquez v National Sec. Corp.*, 48 Misc 3d 597, 601-602 [Sup Ct, NY County 2015]). On appeal, the Appellate Division affirmed (*Vasquez v National Sec. Corp.*, 139 AD3d 503 [1st Dept 2016]). Adhering to its 1982 decision in *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dept 1982]), the First Department reasoned that "[t]he legislature, presumably aware of the law as stated in *Avena*, has not amended CPLR 908" (*Vasquez*, 139 AD3d at 503).

***494** In each case, the Appellate Division granted the defendant leave to appeal to this Court, certifying the question whether its order was properly made. We now affirm in both cases.

II.

"In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention" (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 120 [2012]). "The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]; *see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]).

The text of CPLR 908 is ambiguous with respect to this issue. Defendants argue that the statute's reference to a "class action" means a "certified class action," but the legislature did not use those words, or a phrase such as "maintained as a class action," which appears in CPLR 905 and 909. Plaintiffs assert that an action is a "class action" within the meaning of the statute from the moment the complaint containing class allegations is filed, but the statutory text does not make that clear.

Similarly, the statute's instruction that notice of a proposed dismissal, discontinuance, or compromise must be provided to "all members of the class" is inconclusive. Defendants contend that there are no "members of the class" until class certification is granted pursuant to CPLR 902 and the class is defined pursuant to CPLR 903. Yet the legislature did not state that notice should be provided to "all members of the certified class," or "all members of the class who would be bound" by the proposed termination, or some other phrase that would have made the legislature's intent clear. In the context of these ambiguities, we turn to other principles of statutory interpretation and sources beyond the statutory text itself to discern the intent of the legislature (*see Albany Law School*, 19 NY3d at 120; *Matter of Shannon*, 25 NY3d 345, 351 [2015]).

CPLR article 9 was enacted in 1975, replacing former CPLR 1005. The Governor's Approval Memorandum stated that the legislation would "enable individuals injured **4 by the same pattern of conduct by another to pool their resources and collectively seek relief" where their individual damages "may not be sufficient to justify the costs of litigation" (Governor's Approval *495 Mem, Bill Jacket, L 1975, ch 207, 1975 NY Legis Ann at 426, 1975 McKinney's Session Laws of NY at 1748). With respect to CPLR 908, which the legislature has not amended since it was originally enacted in 1975, the State Consumer Protection Board observed that the purpose of that statute "is to safeguard the class against a 'quickie' settlement that primarily benefits the named plaintiff or his or her attorney, without substantially aiding the class" (Mem from St Consumer Protection Bd, May 29, 1975 at 7, Bill Jacket, L 1975, ch 207).

The New York State Bar Association's Banking Law, Business Law, and CPLR Committees, which opposed the bill, recommended that CPLR 908 be amended such that its notice provisions would apply only to certified class actions (*see* Letter from NY St Bar Assn Banking Law, Business Law, and CPLR Comms at 5, Bill Jacket, L 1975, ch 207). Those committees "agree[d] that any settlement or withdrawal of an action commenced as a class action should be subject to court approval," but expressed the view that "if the dismissal, discontinuance or compromise is effected prior to the determination that a class action is proper, the court should be permitted to dispense with notice to class members" (*id.*).

In addition, CPLR article 9 was "modeled on similar federal law," specifically, Federal Rules of Civil Procedure rule 23 (Governor's Approval Mem, Bill Jacket, L 1975, ch 207; *see* Siegel, NY Prac § 139 at 247 [5th ed 2011]). At the time, rule 23 (e) was virtually indistinguishable from the current text of CPLR 908; it provided that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs" (former Fed Rules Civ Pro rule 23 [e]).

The majority of federal circuit courts of appeal to address the issue concluded that the prior version of rule 23 (e) also applied in the pre-certification context, but that notice to putative class members before certification was discretionary, after consideration of factors such as potential collusion and the publicity the class action had received (*see e.g. Doe v Lexington-Fayette Urban County Govt.*, 407 F3d 755, 761-763 [6th Cir 2005], *cert denied* 546 US 1094 [2006]; *Crawford v F. Hoffman-La Roche Ltd.*, 267 F3d 760, 764-765 [8th Cir 2001]; *Diaz v Trust Territory of Pac. Is.*, 876 F2d 1401, 1408-1409 [9th Cir 1989]; *496 *Glidden v Chromalloy*

Am. Corp., 808 F2d 621, 626-628 [7th Cir 1986]).[1] Conversely, the United States Court of Appeals **5 for the Fourth Circuit concluded that the prior version of the rule mandated notice to class members only in certified class actions (*see Shelton v Pargo, Inc.*, 582 F2d 1298, 1314-1316 [4th Cir 1978]).[2] Thus, faced with virtually identical language in the former version of Federal Rules of Civil Procedure rule 23 (e), most federal circuit courts of appeal to consider the issue concluded that rule 23 (e) applied even before a class had been certified.[3]

In New York, the only appellate-level decision to address this issue as it pertains to CPLR 908 (other than the two decisions on appeal here) is *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dept 1982]). In that case, the named plaintiffs settled with the defendant before class certification, and the settlement was without prejudice to putative class members (*see id.* at 151). **6 The trial court refused to approve the settlement without first providing notice to the putative class members (*see id.*). The Appellate Division affirmed that determination, concluding that CPLR 908 applied to settlements reached before certification. The First Department reasoned that the "potential for abuse by private settlement at this stage is . . . obvious and *497 recognized" (*id.* at 152), and that the named plaintiffs had a fiduciary obligation to disclose relevant facts to putative class members (*see id.* at 153, 156).

This Court has never overruled *Avena* or addressed this particular issue, and no other department of the Appellate Division has expressed a contrary view. Consequently, for 35 years *Avena* has been New York's sole appellate judicial interpretation of whether notice to putative class members before certification is required by CPLR 908.

Generally, "we have often been reluctant to ascribe persuasive significance to legislative inaction" (*Boreali v Axelrod*, 71 NY2d 1, 13 [1987]; *see Clark v Cuomo*, 66 NY2d 185, 190-191 [1985]). We have distinguished, however, "instances in which the legislative inactivity has continued in the face of a prevailing statutory construction" (*Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd.*, 41 NY2d 84, 90 [1976]). Thus, "[w]hen the Legislature, with presumed knowledge of the judicial construction of a statute, [forgoes] specific invitations and requests to amend its provisions to effect a different result, we have construed that to be some manifestation of legislative approbation of the judicial interpretation, albeit of the lower courts" (*Matter of Alonzo M. v New York City Dept. of Probation*, 72 NY2d 662, 667 [1988]). Stated another way, "it is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained" (*Matter*

of Knight-Ridder Broadcasting v Greenberg, 70 NY2d 151, 157 [1987]). "The underlying concern, of course, is that public policy determined by the Legislature is not to be altered by a court by reason of its notion of what the public policy ought to be" (*id.* at 158).

Granted, the persuasive significance of legislative inaction in this context carries more weight where the legislature has amended the statute after the judicial interpretation but its amendments "do not alter the judicial interpretation" (*id.* at 157), or when the judicial interpretation stems from a decision of this Court or "unanimous judgment of the intermediate appellate courts" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 334 [1988]). Nevertheless, the fact that the legislature has not amended CPLR 908 in the decades since *Avena* has been decided is particularly persuasive evidence that the Court correctly interpreted the legislature's intent as it existed when ***498** CPLR 908 was enacted in light of developments occurring in the years after *Avena* was decided.

Specifically, in 2003, Federal Rules of Civil Procedure rule 23 (e) was amended to clarify that the district court must approve any settlement, voluntary dismissal, or compromise involving a "certified class," and that the court must provide notice of such to "all class members ****7** who would be bound" by the proposal (Fed Rules Civ Pro rule 23 [e] [1]). Thus, under the current federal rule, mandatory approval and notice of a proposed settlement is now required only for certified classes.

That same year, the New York City Bar Association's Council on Judicial Administration recommended several changes to CPLR article 9, including amendments to CPLR 908. The Council opined that, unlike the updated federal rule, CPLR 908 should continue to require judicial approval of settlement at the pre-certification stage, but that notice to putative class members before certification should be discretionary, not mandatory, and should be provided when necessary to protect members of the putative class (*see* NY City Bar Assn, Council on Judicial Administration, *State Class Actions: Three Proposed Amendments to Article 9 of the Civil Practice Law and Rules*, 58 Rec of Assn of Bar of City of NY at 316 [2003], available at http://www.nycbar.org/pdf/report/Art9.draft.082703.MWord.pdf [last accessed Dec. 7, 2017]). Various committees of the City Bar made the same recommendation in 2015 (*see* NY City Bar Assn, State Courts of Superior Jurisdiction Committee, Council on Judicial Administration, and Litigation Committee, *Proposed Amendments to Article 9 of the Civil Practice Law and Rules to Reform and Modernize the Administration of Class Actions in NYS Courts*, Nov. 5, 2015, available at http://www2.nycbar.org/pdf/report/uploads/20072985-ClassActionsProposedAmendsArt9CPLRJudici [last accessed

Dec. 7, 2017]). Notwithstanding these repeated proposals, and the legislature's awareness of this issue (*see* 2016 NY Assembly Bill A9573; *cf. Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 287 [2009]), the legislature has left CPLR 908 untouched from its original version as enacted in 1975.

Thus, despite criticisms of the *Avena* decision (*see e.g.* Joseph M. McLaughlin, 1982 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 908:1 [1976 ed], 2005 Pocket Part at 248-249), the 2003 amendment of the federal rule upon which CPLR 908 was modeled to address this situation, and ***499** specific and repeated calls to the legislature to amend the statute, the legislature has not amended CPLR 908, either to state that *Avena* was not a correct interpretation of its original intent or to express its revised, present intent. Under these circumstances, and in light of the legislative history discussed above, we conclude that the legislature's refusal to amend CPLR 908 in the decades since *Avena* was decided indicates that the *Avena* decision correctly ascertained the legislature's intent (*see Alonzo M.*, 72 NY2d at 667; *Knight-Ridder*, 70 NY2d at 157).

Any practical difficulties and policy concerns that may arise from *Avena*'s interpretation of CPLR 908 are best addressed by the legislature (*see Knight-Ridder*, 70 NY2d at 158), especially considering that there are also policy reasons in favor of applying CPLR 908 in the pre-certification context, such as ensuring that the settlement between the named plaintiff and ****8** the defendant is free from collusion and that absent putative class members will not be prejudiced (*see Avena*, 85 AD2d at 152-155; *see also Diaz*, 876 F2d at 1409; *Glidden*, 808 F2d at 627; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C908:2 at 224-225). The balancing of these concerns is for the legislature, not this Court, to resolve.

Accordingly, in both *Desrosiers* and *Vasquez*, the orders of the Appellate Division should be affirmed, with costs, and the certified questions answered in the affirmative.

Stein, J. (dissenting). The majority finds ambiguity in CPLR 908 where none exists and, in my view, places undue weight on the First Department's holding in *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dept 1982]). Even a cursory reading of the analysis in *Avena* reveals that it is not grounded in the unambiguous statutory text. We are not bound by the result in that case or by subsequent legislative inaction, and the passage of time does not alter that conclusion. Instead, it is within the

province of this Court of last resort to interpret the statute as a matter of law, guided by our principles of statutory interpretation.

In that regard, the requirement in CPLR 908 that notice be provided "to all members of the class" is expressly limited to a "class action." In each of the actions here, plaintiffs did not comply with the requirements under article 9 of the CPLR that are necessary to transform the *purported* class action into an *actual* class action, with members of a class bound by the disposition ***500** of the litigation. Thus, there is no class action here, and no basis under the statutory scheme to mandate CPLR 908 notice to putative members of an undefined class that an individual claim—of which they had received no prior notice and in which they had taken no part—is being settled, but the settlement is not binding on them. For these reasons, I respectfully dissent.

I.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should . . . give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N. Y. v City of New York*, 41 NY2d 205, 208 [1976] [citations omitted]). Therefore, "the starting point in any case of interpretation must always be the language itself" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]), considering the various statutory sections together with reference to each other (*see Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [2012]). We are also guided by the principle that "resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*Majewski*, 91 NY2d at 583 [internal quotation marks and citation omitted]). ****9**

Article 9 of the CPLR begins with CPLR 901, which specifies the prerequisites that must be satisfied for one or more members of a designated class to sue or be sued as representative parties on behalf of the other members of that class. CPLR 902 requires the plaintiff "in an action brought as a class action" to "move for an order to determine whether it is to be so maintained" within 60 days after expiration of the time in which a defendant must serve responsive pleadings. Thereafter, "[t]he action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied" (CPLR 902). In determining whether the action "may proceed as a class action," the court must consider certain factors, including the interests of the members of the purported class, the impracticability

or inefficiency of proceeding separately, any pending litigation, the desirability of concentrating the litigation, and class action management difficulties ***501** that may arise (*see* CPLR 902 [1]-[5]). If the court allows the action to proceed as a class action, the order "permitting [the] class action" must describe the class (CPLR 903; *see also* 907).

Once the prerequisites of sections 901 and 902 have been met, reasonable notice of the commencement of the class action must be given to the certified class "in such manner as the court directs," except in the case of class actions brought primarily for equitable relief, in which case, the court has discretion to determine whether notice is necessary and appropriate (CPLR 904 [a], [b]; *see also* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 904). Any judgment in a class action must describe the class, and such a judgment is binding only upon "those whom the court finds to be members of the class" (CPLR 905; *see also* 909).

CPLR 908—the provision at issue here—prescribes that a "class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The question before us is whether this provision requires notice to putative class members if the action is settled or dismissed *prior* to class certification. In my view, it does not.

CPLR 908 must be considered in the context of the statutory scheme set forth in the entirety of article 9. Inasmuch as "[an] action may be maintained as a class action *only if* the court finds that the prerequisites under section 901 have been satisfied" upon a motion brought within the specified time period pursuant to CPLR 902 (emphasis added), it follows that a purported class action is not actually "a class action" until so adjudicated by the court; concomitantly, prior to class certification, there are no "members of the class" to whom notice could be provided. Thus, there is no statutory basis for applying the CPLR 908 notice requirement when, as here, the litigation is resolved during the pre-certification phase without prejudice to the rights of putative class members.

There is nothing talismanic about styling a complaint as a class action. Indeed, ****10** any plaintiff may merely allege that a claim is being brought "on behalf of all others similarly situated." However, under article 9 of the CPLR, the court, not a would-be class representative, has the power to determine whether an action "brought as a class action" may be maintained as such, and may do so only upon a showing that the ***502** prerequisites set forth in CPLR 901 have been satisfied

(CPLR 902).[1] Logically, the converse of that proposition must also be true—i.e., if the court has not made an affirmative finding that the CPLR 901 prerequisites have been met, the action may not be maintained as a class action. Here, the fact that plaintiffs did not comply with CPLR 902 and did not obtain orders adjudicating their actions as class actions is fatal to their argument that notice of their settlements to purported class members is required.

This Court's holding in *O'Hara v Del Bello* (47 NY2d 363 [1979]) is instructive. In that case, the petitioner commenced a proceeding on behalf of himself and others similarly situated who were denied payment of authorized and approved travel vouchers by their employer. Supreme Court granted the petitioner summary judgment, directing the respondents to pay all properly submitted travel vouchers, including those to be submitted in the future. This Court ****11** ultimately affirmed the award of summary judgment to the petitioner, but modified the judgment to limit relief to only the named petitioner. We held that, "[i]nasmuch as there was a failure to comply with the procedural and substantive provisions of CPLR article 9 with respect to class action[s] . . . there [was] no basis for granting relief other than to the individual party who brought the proceeding" (*O'Hara*, 47 NY2d at 368). The Court reasoned that "[t]he explicit design of article 9 . . . is that a determination [pursuant to CPLR 902] as to the appropriateness of class ***503** action relief shall be promptly made at the outset of the litigation" (*id.*). The Court emphasized that

> "[t]o countenance making the determination as to the identity of the beneficiaries on whose behalf the litigation had been prosecuted or defended after its outcome is known would be to open the possibility both of conferring a gratuitous benefit on persons who have not been parties and were not at any time exposed to the risk of an adverse adjudication and further of substantially enlarging the liability of the loser beyond anything contemplated during the contest and resolution of the issues on their merits" (*id.* at 369).

The majority now construes CPLR 908, contrary to its plain language, to permit the results this Court cautioned against in *O'Hara*. Plaintiffs in both actions failed to make timely CPLR 902 motions for an order to certify the class. Instead, they accepted settlement offers, allowed the deadline for certification to pass, and declined to oppose defendants' motions to dismiss, but nonetheless subsequently asked the court to direct notice to putative class members under CPLR 908. As in *O'Hara*, by virtue of plaintiffs' failure to comply with CPLR article 9—and particularly CPLR 902—there is no basis to impose the notice requirements of CPLR 908, which only apply to class actions, not purported class actions.

Directing such notice under these circumstances would lack practical significance. Indeed, the notice would essentially inform putative class members that an individual claim—of which they received no prior notice—was being resolved by an agreement that was not binding on them. Moreover, as defendants point out, because no class had been certified under CPLR 902, it is unclear to whom notice was purportedly required. Not only would this uncertainty create administrative difficulties that would entail the expenditure of time and resources by both the court and the parties,[2] the ultimate purpose of the notice appears, at most, to be to allow **12 plaintiffs' counsel to *504 identify more clients at the expense of the court and defendants.[3]

II.

In concluding that CPLR 908 should be applied to actions that were never adjudicated to be class actions, the majority places great weight on the fact that lower courts have **13 been bound to follow *Avena* (85 AD2d 149 [1st Dept 1982]) because this Court has not yet overruled that case, and no other Appellate Division Department has had the occasion to express a contrary view. However, the interpretation of the plain language of CPLR 908 is now squarely before us, and inaction on the part of other appellate courts—or the legislature—in the wake of *Avena* is no hindrance to our adherence to the statutory text.

In my view, the First Department's decision in *Avena* was flawed and continued reliance on it is misguided. It is evident, simply from the manner in which the First Department framed its inquiry, that the Court departed from the statutory text, contrary to longstanding fundamental rules of construction (*see Majewski*, 91 NY2d at 583). Instead of starting with the text of CPLR 908 itself—which by its plain terms applies only to "class *505 actions"—the *Avena* court began its analysis by inquiring whether an action that merely "purports to be a class action" should nevertheless "*be deemed* 'a class action' " to which CPLR 908 would apply (*Avena*, 85 AD2d at 152 [emphasis added]). Further, noting that the defendant in *Avena* did not dispute the applicability of CPLR 908, the First Department broadly stated, without citation, that "[t]he fiduciary obligations of the named plaintiffs *in instituting [a class] action* are generally recognized and not disputed" (85 AD2d at 152 [emphasis added]). It was solely on this basis that the First Department concluded "that CPLR 908 should apply to even a without prejudice (to the class) settlement and discontinuance of a purported class action before certification or denial of certification" (*id.*).

However, it is questionable whether a would-be class representative has fiduciary responsibilities in the pre-certification stage in light of the absence of the would-be representative's authority to bind putative class members (*see* CPLR 905; *cf. Standard Fire Ins. Co. v Knowles*, 568 US 588, 593 [2013]). Because there is no res judicata impact upon *putative* class members (*see Rodden v Axelrod*, 79 AD2d 29, 32 [3d Dept 1981]), their ability to bring their own claims is unimpaired and they are, therefore, not impacted by the resolution of the named plaintiff's individual claim.[4] Under these circumstances, it is difficult to understand why the *Avena* court would invoke fiduciary considerations in the pre-certification context and hold that CPLR 908 should apply to even a settlement that is without prejudice to the putative class. While the majority glosses over whether it actually agrees with *Avena*, it adopts the rule of that case, following the novel theory espoused by the First Department, without question. I would not ****14** acquiesce to the reasoning in *Avena*; instead, I would interpret the statute before us, which inexorably leads me to conclude that CPLR 908 notice is not required prior to certification.

Further, contrary to the majority's reasoning here, the legislature's failure to amend CPLR 908 after *Avena* was decided does not compel the conclusion that *Avena* correctly ascertained the legislature's intent (*see* ***506** *Matter of New York State Assn. of Life Underwriters v New York State Banking Dept.*, 83 NY2d 353, 363 [1994]; *see also People v Ocasio*, 28 NY3d 178, 183 n 2 [2016] [legislative "inaction is susceptible to varying interpretations"]).[5] Despite acknowledging that this case does not present one of the scenarios in which legislative inaction may nonetheless carry some significance (*cf. Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 157 [1987]; *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 334 [1988]), the majority relies on the length of time that has passed since *Avena* was decided. Although *Avena* may enjoy a distinguished patina owing to the passage of time, the decision has not withstood any meaningful consideration by other appellate courts. To the contrary, the case has been followed by only a handful of lower courts (*see e.g. Astill v Kumquat Props., LLC*, 2013 NY Slip Op 32964[U] [Sup Ct, NY County 2013]; *Diakonikolas v New Horizons Worldwide Inc.*, 2011 NY Slip Op 33098[U] [Sup Ct, NY County 2011]), which were bound to do so. Moreover, as Supreme Court observed here, the "wisdom" of the rule announced in *Avena* "has been questioned by many, including the CPLR commentary." (*Vasquez v National Sec. Corp.*, 48 Misc 3d 597, 599 [2015].) Thus, the existence of *Avena* is no bar to this Court adopting a more reasoned approach based on the express language of CPLR 908.

Finally, to the extent the majority relies on certain federal cases construing the pre-2003 version of rule 23 (e) of the Federal Rules of Civil Procedure, each of those

cases held **15 that notice to putative class members prior to certification was *discretionary*, based on various considerations not included in the rule itself (*see Diaz v Trust Territory of Pac. Is.*, 876 F2d 1401, 1408, 1411 [9th Cir 1989] [adopting the "majority approach" and holding that "(n)otice to the class of pre-certification dismissal is not . . . required in all circumstances"]). *507 Those cases do not address the dispositive issue in this case, which is—as the majority acknowledges—whether notice is *mandatory* under CPLR 908. Although there may be policy considerations that support the discretionary rule crafted by various federal courts—which was ultimately rejected by Congress (Fed Rules Civ Pro rule 23 [e])—our role here is to interpret the plain language of CPLR 908.

For the reasons stated herein, I would hold that the plain language of CPLR 908, taken in context, does not require notice to putative class members if the action is resolved prior to class certification.

Chief Judge DiFiore and Judges Rivera and Feinman concur; Judge Stein dissents in an opinion, in which Judges Garcia and Wilson concur.

In each case: Order affirmed, with costs, and certified question answered in the affirmative.

FOOTNOTES

1 Although these federal courts held that notice to putative class members before certification was discretionary under the former version of rule 23 (e), the parties do not ask us to read discretion into CPLR 908, nor could we based on the text of that statute. CPLR 908 states that notice "shall" be provided, but that the *manner* of notice will be "as the court directs." The only question on this appeal is whether mandatory notice is required only after certification or also before certification. For similar reasons, we reject plaintiffs' contention that the Appellate Division ordered notice in an exercise of its discretion, and therefore that its orders are reviewable by this Court only for an abuse of discretion as a matter of law. These appeals present an issue of law.

2 The Fourth Circuit shared the concern that pre-certification settlements between the named plaintiff and the defendant might involve collusion. The circuit court instructed district courts to examine proposed settlements for collusion or prejudice to absent putative class members and, if such collusion or prejudice existed, to hold a certification hearing and give notice to members of the class in the event that certification was granted (*see Shelton*, 582 F2d at 1315-1316).

3 Other circuit courts of appeal did not directly address this issue before the 2003 amendment to rule 23 (e) (*see e.g. Rice v Ford Motor Co.*, 88 F3d 914, 919 n 8 [11th Cir 1996] ["In this Circuit, the applicability of Rule 23 (e) to proposed classes prior to their certification is an open question"]). Many federal district courts also considered this issue (*see generally* Annotation, *Notice of Proposed Dismissal or Compromise of Class Action to Absent Putative Class Members in Uncertified Class Action under Rule 23 [e] of Federal Rules of Civil Procedure*, 68 ALR Fed 290).

1 Contrary to the majority's reasoning, CPLR 908 is not ambiguous because it uses the phrase "class action" instead of "maintained as a class action." These phrases are used interchangeably throughout CPLR article 9

to refer to an action that has been adjudicated a class action by the court pursuant to the mechanism set forth in CPLR 902. The phrase "class action" is repeatedly used throughout article 9 in instances, like CPLR 908, where it is readily apparent that the intent of the legislature is to refer to an actual "class action," not merely a purported class action (*see* CPLR 903 ["(t)he order permitting a class action shall describe the class"], 904 [certification notice requirement referring to "class actions"], 907 [permitting certain court orders in the "conduct of class actions"]). The majority also posits that CPLR 908 is ambiguous because the phrases "class action" and "all members of the class" do not also include the word "certified." This reasoning is unsound. Insofar as "[t]he language is certain and definite, intelligible and has an unequivocal meaning" (*People ex rel. New York Cent. & Hudson Riv. R.R. Co. v Woodbury*, 208 NY 421, 424 [1913]), within the context of the statutory scheme (*see Bloomberg*, 19 NY3d at 721), there is no occasion to engage in "conjecture about or to add to or to subtract from [the] words" used by the legislature (McKinney's Cons Laws of NY, Book 1, Statutes § 76, Comment).

2 Although plaintiffs minimize the significance of this burden, mandating notice of pre-certification dismissals requires that the court and the parties attempt to define both the group of individuals to whom notice should be provided in the absence of a defined class, as well as the content of that notice, all concerning the resolution of individual claims that do not bind the notice recipients in any way. While, in some cases, it may be easy to identify the putative class members, in others, it may be difficult and time-consuming, as well as expensive, to identify and provide notice to them.

3 Any claimed virtue of plaintiffs' position that notice is required to protect putative class members is a distraction. If plaintiffs desired to obtain relief on behalf of the putative class members, they could have followed the proper procedure to certify the class. Instead, they settled their individual claims. Moreover, while it could reasonably be argued that mandating notice here amounts to no more than solicitation on behalf of plaintiffs' counsel, it is worth noting that directing notice prior to certification could, under some circumstances, actually inure to the detriment of a plaintiff's attorney. For example, a plaintiff's attorney could quickly conclude that a putative class action has little merit, and would not wish to bear the cost of notifying putative class members in a class that could not, for instance, be certified due to lack of typicality or predominance. Therefore, knowing that the majority's rule may impose the costs of notice even if no class is ever certified (*see* CPLR 904 [d] [presumptively placing the costs of notice on the plaintiff]), members of the plaintiffs' bar may be less likely to commence some class actions in the first place. Relatedly, the majority's rule may also discourage settlement. If a plaintiff's attorney determines that there are deficiencies with either the named plaintiff's claim or the class claim, or both, the attorney would have an incentive to litigate and lose the class certification motion rather than to stipulate to a dismissal, because the stipulation of dismissal would require notice, whereas (presumably, although the majority is unclear about this), no notice would be required in the event that the court denied class certification.

4 To the extent the *Avena* court expressed concern about the prospect of disingenuous plaintiffs using a frivolous class action claim as leverage in settlement negotiations, it bears noting that there are other mechanisms in place to prevent such abuse, including, of course, early certification (as required under article 9 of the CPLR) and sanctions.

5 Similarly, the memorandum of the consumer protection board and the bar association letter cited by the majority lack persuasive force (*see* majority op at 495). To the extent the memorandum indicates that the purpose of CPLR 908 is to safeguard against a settlement benefitting only the named plaintiff or plaintiff's counsel to the detriment of the class (*see* Mem from St Consumer Protection Bd, May 29, 1975 at 7, Bill Jacket, L 1975, ch 207), this concern is implicated only when the disposition would bind the class, i.e., after certification. For its part, the bar association advanced its interpretation of CPLR 908 within the context of its advocacy for a discretionary notice regime (*see* Letter from NY St Bar Assn Banking Law, Business Law, and CPLR Comms at 5, Bill Jacket, L 1975, ch 207 ["the court should be permitted to dispense with notice to class members"]). The legislature clearly rejected that approach.

CLASS ACTIONS IN THE DOCK:

Trends and Developments in Class Certification and Class Action Practice

John C. Coffee, Jr. and Alexandra D. Lahav

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CLASS ACTIONS IN THE DOCK
Trends and Developments in Class Certification and Class Action Practice

 **By John C. Coffee, Jr. and**  **Alexandra D. Lahav**

December 1, 2018

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I. SECURITIES LITIGATION

A. A Quick Census

In 2017, securities class actions soared to a near record level, well above the last decade's experience. In the first half of 2018, this trend continued, but with a significant difference. In the first six months of 2018, 204 securities class actions were filed (more or less on par with 2017).[1] The difference is that in 2018, the alleged losses were far higher.

Two measures are frequently used to measure losses. In terms of the maximum dollar loss, which is calculated by totaling the total market capitalization decrease during the entire class period, the first half of 2018 saw class actions claim a maximum dollar loss of $643 billion. This contrasts with a similar maximum dollar loss of $291 billion in the first half of 2017 (and it exceeds the $521 billion total such loss for all of 2017). Such losses are, however, rarely recovered because of difficulties in proving loss causation. If we look instead at the "disclosure dollar loss," which looks to the loss following the corrective disclosure relating to the alleged misstatement, the "total disclosure loss" was $157 billion for the first half of 2018. This contrasts sharply with a total disclosure loss of only $59 billion in the second half of 2017 and a total disclosure loss of $137 billion for all of 2017. In short, the first half of 2018 exceeded all of 2017 in this regard.

Put simply, securities class actions are staying as numerous, but growing much larger. This probably reflects the recent downturn in some high-tech companies and the very active M&A market (in which most large mergers are still challenged in court). Although M&A cases

[1] See "Securities Class Action Filings Continue at Historic Pace Through First Half of 2018," (July 25, 2018), available at www.cornerstone.com. These numbers imply, as this report finds, that more than 750 securities class actions have been filed since midyear 2016 -- the most prolific two year period since the passage of the Private Securities Litigation Reform Act in 1995.

continued to account for a large share of securities class actions in 2018, Cornerstone found that "core" filings (basically, non-M&A cases) grew even more rapidly in the first half of 2018, jumping from 87 in the first half of 2017 to 111 in the first half of 2018. "Mega" filings (defined as cases with claimed "disclosure dollar" losses over $5 billion) also increased markedly.

Of course, an increase in the number and size of securities class actions does not necessarily imply similar growth in other class actions. But it is the only reliable data that we have, because Cornerstone Research and NERA uniquely report securities class actions filing and settlement data every six months.

If the rate of filings in the first half of 2018 continues throughout the year, it will mean that 8.5% of all companies listed on the NYSE or NASDAQ will have been sued in 2018. This growth may cause the securities industry to push even harder to legitimize the use of mandatory arbitration clauses in corporate charters (so as to bar securities class actions -- at least in IPOs). This is a move that the SEC has long resisted, but it may face increased pressures under Trump.

B. Statutes of Repose

Last year, in CalPERS v. ANZ Securities, Inc.,[2] the Supreme Court resolved a Circuit split and curtailed its prior ruling in American Pipe & Construction Co. v. Utah,[3] to hold that the filing of a class action does not toll the 3-year statute of repose in Section 13 of the Securities Act of 1933. Section 13 establishes a one and three year statute of limitation for alleged violations of Sections 11 and 12 of the 1933 Act: one year after discovery of the untrue statement, or "after such discovery should have been made by the exercise of reasonable diligence," but in no event more than three years after the sale of the security. Correspondingly,

[2] 137 S. Ct. 2042 (2017)
[3] 414 U.S. 538 (1974)

the Securities Exchange Act of 1934 has a 2 and 5 year rule, with the latter period also being its statute of repose;[4] these latter periods will apply in Rule 10b-5 litigation.

In American Pipe, the Court had permitted the filing of the class action to toll the one year period, but in CalPERS, it found that there can be no equitable tolling of the three year period (or presumably the five year period under the 1934 Act). While American Pipe still applies to the one year period, the three year period seems now an absolute bar. This means that if a class action under the Securities Act of 1933 settles after year three years, no class member may at that point opt out and file an individual action (which is what plaintiff CalPERS had attempted to do in this case growing out of the Lehman Brothers bankruptcy).

Almost certainly, this rule will similarly apply to the two and five year periods for Rule 10b-5 litigation.[5] Also, it is likely to apply outside the federal securities context to other statutes having a statute of repose provision (or arguably having one). Thus, how does one determine if a limitations period in a statute represents a statute of limitations (and thus is subject to equitable tolling) or a statute of repose (and thus is not)? Writing for the 5-4 majority, Justice Kennedy found that statutes of limitations generally run from "'when the cause of action accrues'—that is, 'when the plaintiff can file suit and obtain relief.'"[6] In contrast, statutes of repose "begin to run on 'the date of the last culpable act of omission of the defendant'"[7]—such as the sale of the security. This distinction is likely to be litigated in future cases that provide only a single period of limitation.

[4] See 28 U.S.C. §1658(b). Indeed, the Third Circuit has just so held, ruling that CalPERS implies that the repose period (5 years) under the Exchange Act also cannot be equitably tolled. See North Sound Capital LLC v. Merck & Co., 2017 WL 327886 at *1 (3d Cir. August 2, 2017).
[5] See supra note 4.
[6] 137 S. Ct. at 2049.
[7] Id.

The practical consequence of CalPERS is that many institutional investors will want to file a parallel individual action (which may be consolidated with the class action) before the three or five year statute of repose period runs out. In all likelihood, both sides will let this "protective" suit lie dormant (both to economize on legal costs and because defendants would rarely want an individual suit to come to trial before the class action was resolved, as it could arguably give rise to offensive collateral estoppel).

A more troubling question involves how class counsel should respond to the approach of the three or five year statute of repose period. Often, the class action will not have been resolved by this period. In her dissent, Justice Ginsberg noted:

> "As the repose period nears expiration, it should be incumbent on class counsel, guided by district courts, to notify class members about the consequences of failing to file a timely protective claim."[8]

This will be costly, but her comment suggests that district courts could require it. Notice of any proposed settlement will probably also have to indicate whether opting out is still feasible (in terms of whether an individual action can be filed).

As Justice Ginsberg further noted, one impact of CalPERS may be to slow down the settlement process, as defendants may prefer to settle only after the statute of repose has expired (to limit opt outs to those who had earlier filed an individual action). This is debatable. Others believe that most institutional investors are sophisticated and will file a parallel action as a matter of course (in which case delay would achieve little for defendants). But this remains to be seen, as smaller institutions may not want to incur the costs of filing an individual action, at least until they are dismayed by the settlement. At a minimum, few defendants seem likely to announce a settlement just before the repose period expires.

[8] 137 S. Ct. 2042 at 2058.

Conversely, the announcement of a settlement may also lead some institutional investors to wish to rejoin the class (to economize on the costs of individual litigation and avoid the risk of an adverse judgment). Questions may arise about their ability to do so after the statute of repose has expired. Some defense counsels are even arguing that a class may not be certified after the statute of repose has expired, notwithstanding that the action was filed on a timely basis. At present, this seems an overbroad interpretation of CalPERS.

One recent decision interpreting CalPERS may cut both ways. In Pasternack v. Schrader,[9] the Second Circuit ruled that a plaintiff who filed a motion to amend within the limitations period did so on a timely basis, even though the ruling granting the motion came afterwards. The panel said that "for purposes of a statute of repose, when a plaintiff moves for leave to amend to add claims within the limitations period and attaches a proposed amended complaint to the motion, the claims are timely." Although not precisely on point, this language suggests that if class certification is sought before the statute of repose expires, the motion need not be ruled upon before the expiration of the repose period.

The gray area under Pasternack, however, would arise when the class action is filed on a timely basis within the repose period, but no motion to certify a class is filed until after the expiration of that period. Defendants were, of course, on notice that a class action would be sought, but no motion to certify was filed, so as to come within the Pasternack formula. Such a case will likely soon arise because plaintiffs generally prefer to defer class certification until a settlement is reached to pass the considerable costs of notifying class members onto the settling defendants. However, if there is no settlement in prospect as the statute of repose's expiration point approaches, plaintiff's counsel will face a difficult choice: whether to bear these costs

[9] 863 F. 3d 162, 175 (2d Cir. 2017).

themselves and file the certification motion, or to wait and argue that defendants had full knowledge that a class action was being sought.

C. Follow-on Class Actions

In China Agritech, Inc. v. Resh,[10] a near unanimous Supreme Court held that a pending class action did not toll the statute of limitations for putative class members who seek to bring a subsequent class action after the statute of limitations had expired. These persons may still file individual actions or intervene in another action (so long as the statute of repose has not expired), but they cannot start a successive class action. Once again, this narrowed the impact of the Court's decisions in American Pipe & Construction Co. v. Utah and Crown Cork & Seal Co. v. Parker.[11] Still China Agritech may do more than just this, and here a robust debate (and further litigation) is likely.

The facts of China Agritech are revealing and arguably symptomatic. The actual case was the third of three successive and similar class actions, all alleging that the petitioner/defendant had engaged in securities fraud. The district court had twice denied class certification in the first two cases, and the third was filed a year and a half after the expiration of the two year statute of limitations that applies to Securities Exchange Act claims. The district court dismissed this third action based on the statute of limitations, and the Ninth Circuit reversed, citing American Pipe and finding that the two year limitations period had been tolled by the overlapping duration of each of the prior two class actions.

The Circuits were split on this issue, but Justice Ginsburg's decision makes very clear that efficiency and economy are now the "watchwords of American Pipe" and both are major

[10] 138 S. Ct. 1800 (2018).
[11] 462 U.S. 345. 350

concerns of Rule 23. Her decision emphasizes that early filing "soon after the commencement of the first class action seeking class certification" is appropriate (because it allows the district court to make a choice between the contending actions) and later filings become more dubious.

Considerable tension exists between China Agritech and Smith v. Bayer Corp.,[12] which held that putative class members were not bound by the dismissal of an earlier class action so long as it had not been certified. Recognizing that its decision could permit serial re-litigation of a putative class action (possibly in different forums), the Court in Smith v. Bayer indicated that it expected the subsequent federal court to "apply principles of comity to each other's class certification when addressing a common dispute." This has left the Bar in a state of some uncertainty as to what "principles of comity" required. Now, China Agritech makes clear that the statute of limitations will not be tolled for the subsequent class action. It also may hint that class actions filed within the statute of limitations may be disfavored, unless they were filed "early on, soon after the commencement of the first action seeking class certification." Although the case did not involve such a class action filed within the untolled statute, Justice Ginsberg noted that "Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on." Thus, there is a risk that a subsequent class action filed a year after the first class action (but still with a year to go before the statute of limitations ran) could be disfavored. Possibly, a court could deny certification of the second class on grounds of superiority or a lack of adequate representation. We will likely see such motions in the near future.

What will be the immediate practical impact of China Agritech? Arguably, China Agritech may induce plaintiff's attorneys to file "protective" class actions soon after the initial action was filed to satisfy this new "early on" requirement. These actions may, of course, be

[12] 564 U.S. 299 (2011).

consolidated by the Judicial Panel on Multi-District Litigation, but in reality consolidation does not always happen when there are only two or three overlapping class actions. In these cases, however, plaintiff's counsel in the "protective" action may find it difficult to explain its slowness if it did not seek early certification of its subsequently filed class action. Also, if the same plaintiff's counsel files both actions more or less contemporaneously, the later action will be lucky to survive, unless it involves very different facts.

In a concurring opinion, Justice Sotomayor suggested that China Agritech applied only to securities class actions because of special provisions in the Private Securities Litigation Reform Act ("PSLRA"). This seems an unlikely reading of the case, because Justice Ginsburg's decision (which spoke for eight members of the Court) was framed broadly in terms of Rule 23 and the policies underlying American Pipe.

To sum up, China Agritech involved an untimely successive class action that depended upon equitable tolling, but much of the dicta in the case can be read broadly to discourage later class actions that were timely when filed, but in which class certification was not promptly sought. Delay is becoming dangerous.

D. Securities Class Actions In State Court

In Cyan Inc. v. Beaver County Employees Retirement Fund,[13] the Court held unanimously this year that actions may continue to be filed in state court under the Securities Act of 1933 (as that statute expressly provides) and that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") did not strip state courts of jurisdiction over class actions alleging violations of only the Securities Act. (The Securities Exchange Act of 1934 expressly denies state courts such jurisdiction, and thus Rule 10b-5 cases cannot be heard in state court).

[13] 138 S. Ct. 1061 (2018).

A unanimous Supreme Court decision declining to curb class actions is a rarity -- a virtual unicorn. But it shows when the seeming plain meaning of the statutory language is weighed against non-frivolous policy concerns that call for curtailing class actions, the statutory language will win with this Court.

The Securities Act of 1933 not only expressly allowed state courts to exercise jurisdiction over 1933 Act claims,[14] but also barred the removal of such actions to federal court. In 1998, Congress enacted SLUSA to prevent plaintiffs (and plaintiff's attorneys) from evading the requirements of the PSLRA (enacted in 1995) by filing a securities fraud action in state court (which would typically allege violations of state law or common law standards). SLUSA's language barred actions "based upon the statutory law or common law of any state" from being maintained in state or federal court, but it said nothing about an action based on the express provisions of the 1933 Act.

Petitioners in Cyan were forced to argue that the policy and intent of SLUSA required that it be read to cover 1933 actions as well, notwithstanding the 1933 Act's express grant of state court jurisdiction and its bar of removal of such actions to federal court. This proved too much of a stretch of SLUSA's language for any Justice to accept.

What will be the impact of Cyan? In the first half of 2018, Cornerstone reports that some five securities class actions were filed in California state courts that raised 1933 Act claims. Of course, this number was likely deflated by the pendency of Cyan, but afterwards, this number may increase significantly. To date, such claims seem to have been filed almost exclusively in California. As a practical matter, the choice of a state forum may allow the plaintiff to escape (at least to some degree) the rigorous pleading rules of the PSLRA. Alternatively, a shorter docket

[14] See Section 22(a) of the Act. This section also bars removal of such actions to federal court.

length may also enable a plaintiff to get to an earlier trial. Or, some plaintiffs may anticipate friendlier judges in state court.

Another factor making California a popular forum may be personal jurisdiction. Plaintiffs will probably need to sue in the defendant corporation's state of incorporation or the state of its principal place of business. Thus, California is a logical venue for Silicon Valley defendants, while Illinois is not.

E. Attorneys' Fees in Securities Class Actions

Courts are getting tougher and moving into collateral areas beyond simply calculation of the lodestar and its multiplier (if any). Two examples are described below.

1. *In re Petrobras Securities Litigation*[15]

In this very large and noteworthy case, the settlement came to a resounding $3 billion, and Class Counsel sought a fee award of $284 million plus reimbursement of $14.5 million in litigation expenses. Thus, requested fees plus expenses came to approximately 10% of the fund, and Class Counsel used a 1.78 multiplier to justify its fee award. The court (Judge Jed Rakoff) cut back the requested fee award by approximately $100 million (or one third) to $186.5 million. The court also imposed a holdback (as it customarily does) with 50% of the fee withheld until distribution of the settlement to the class was completed.

Although the Court, citing Perdue v. Kenny A.,[16] noted that "[T]here is a strong presumption that the lodestar is sufficient,"[17] that was not his primary problem with the fee request. Rather, Judge Rakoff found that Class Counsel's lodestar of $158.9 million included $110 million in time "billed" by the Pomerantz firm's contract and staff attorneys, but only $27

[15] See In Re Petrobras Secs. Litig., 2018 U.S. Dist. LEXIS 105550 (S.D.N.Y. June 22, 2018).
[16] 559 U.S. 542 (2010)
[17] Id at 546

million "billed" by partners and associates of that firm. The status of contract attorneys has been a recurring issue in recent fee award cases: Do contract attorneys merit a multiplier? Or should their salaries be just treated as an expense (for which reimbursement without any multiplier is appropriate)? Compromising on this issue, the Court imposed a 20% lodestar redirection for work done on "low level document review" and in addition subtracted from the lodestar all work done by 27 foreign attorneys not admitted in the U.S. On this basis, the Court computed an adjusted lodestar of $104.8 million. It then found that a multiplier of 1.78 could be applied to this number, because, in its view, the case involved real risk and class counsel provided "exceptional" services. On this basis, the old days when multipliers of 3 and higher were commonly awarded seem long gone. Presumably, if counsel's services were only average and the risk modest, no multiplier would have been awarded.

In a final fee ruling, Judge Rakoff cut the fee award to objector's counsel from a requested $200,000 to 10% of their lodestar. The objector (the Center for Class Action Fairness) is a frequent objector to class action settlements and is generally respected as a diligent adversary, but the court did not feel that it had provided much benefit to the class.

Possibly the clearest message of the Petrobras opinion is that some forms of work (such as work done by foreign attorneys not admitted to practice in the U.S. or work done in translating foreign documents) will not qualify for a lodestar (but can be compensated as a reasonable expense). The status of contract attorneys in fee determinations remains in doubt.

2. *Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co.* [18]

The District Court in this case (Judge Mark L. Wolf) initially awarded a $75 million fee award to Class Counsel and then, after press reports suggested misconduct, appointed a retired district court judge (Gerald Rosen) as a Master to investigate these charges. The Master then

[18] 2018 U.S. Dist. LEXIS 111322 (D. Mass. June 28, 2018).

hired Professor Stephen Gillers, a much quoted presence on the CLE circuit, as its expert on legal ethics. When the Master's report was filed under seal with the Court in May 2018, a fierce and messy brawl erupted (which is still continuing) between the Court and the Labaton Sucharow law firm.

After closed hearings that denied most of counsel's request for redactions, the report was unsealed. The most salient finding in it concerned a payment made by class counsel (seemingly from the fee award) of $4,100,000 to Damon Chargois, a Texas lawyer who had done no work on the case. The fee to Chargois was apparently the product of an agreement between him and the Labaton firm that the firm would pay "20% of its fee in every class action in which it represented" the Arkansas pension fund recruited by Chargois to serve as lead counsel in this action.[19] The Master found that this payment was "an impermissible fee for solicitation in violation of the Massachusetts Rules of Professional Conduct" and recommended that the Labaton firm be required to disgorge this fee. The Master further recommended that the Labaton firm and a name partner in that firm be found to have breached their fiduciary duties to the class for failing to disclose this agreement and that the Arkansas pension fund be removed as lead plaintiff in the action. Professor Gillers also concluded that Rule 11 of the Federal Rules of Procedure had been violated. The Master further noted that the Labaton firm had represented in in other cases eight additional clients obtained from Chargois under this 20% fee agreement.

When the Court declined to order redaction of this information, the Labaton firm moved to recuse him for bias. The Court rejected this motion in a careful opinion and Labaton appealed to the First Circuit (which quickly dismissed the appeal in a brief one page opinion). Neither decision should surprise us.

[19] Id at * 11.

Clearly, all of this is extraordinary -- both the conduct and the attempt to recuse a long-serving and highly respected judge. Perhaps the most revealing statement released by the Court was in its separate opinion refusing to recuse itself at Labaton's request.[20] There, it quoted Chargois describing his role in the case in a message to the Labaton firm, which stated:

> "We got you ATRS (the Arkansas fund) as a client after considerable favors, political activity, money spent and time dedicated in Arkansas, and Labaton would use ATRS to seek lead counsel appointments in institutional investor fraud and misrepresentation cases. Where Labaton is successful in getting appointed lead counsel and obtains a settlement or judgment award, we split Labaton's attorney fee award 80/20 period."[21]

None of this was disclosed to the Court, the client or the class.

These references to "favors" and "political activity" could have criminal law implications, as the Hobbs Act and bribery statutes could be violated if payments were made on a quid pro quo basis. Additionally, press reports indicate that the Arkansas Legislature has now begun an investigation. Possibly, this case is unrepresentative. But possibly it is a "slice of life" in the seamy underworld of securities litigation that rarely comes to the surface. It is, of course, too soon to pass judgment on all the factual claims in this case, but this does not seem a scandal that will soon vanish or be forgotten. Rather, it is the type of case that could destroy a law firm (just as happened to Milberg, Weiss a decade ago).

[20] Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co., 2018 U.S. Dist. LEXIS 11320 (D. Mass June 28, 2018).
[21] Id at * 10

II. SETTLEMENT CLASSES

Under Amchem Products, Inc. v. Windsor,[22] both litigation classes and settlement classes are required to meet essentially the same rigorous standards for class certification. But the Court recognized one seemingly modest exception: manageability need not be considered in the case of a settlement class. Specifically, Justice Ginsburg wrote for the Court that a district court "[c]onfronted with a request for settlement-only class certification…need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial."[23]

Over recent years, this modest exception has grown so that in some Circuits it has now largely swallowed the predominance standard and allowed settlement classes to be certified that could not have satisfied the predominance standard if the case were to be litigated. The leading case standing for this proposition is probably In re American International Group, Inc., Securities Litigation.[24] There, the parties to a complex securities fraud case (involving a reinsurance transaction between AIG and General Reinsurance Corporation that seemed to lack "economic substance") agreed to settle the action for $72 million. But the District Court (Judge Deborah Batts) determined that the parties could not invoke the "fraud-on-the-market" doctrine and thus the reliance of class members on the allegedly false information was an individual issue that precluded any finding of predominance, thereby causing the action to flank Rule 23(b)(3). This resulted in the unusual procedural step of both plaintiffs and defendants appealing the denial of class certification.

On appeal, the parties argued that the individual reliance issues that had led the court to deny certification would not pose a problem of trial manageability because the very existence of

[22] 521 U.S. 591 (1997).
[23] Id. at 620.
[24] 689 F.3d. 229 (2d Cir. 2012).

the settlement eliminated the need for a trial (and a showing of predominance). This read Amchem's manageability exemption about as broadly as possible, but the Second Circuit agreed with the appellants.

First, in a decision by Judge Gerard Lynch, the panel noted that the district court had erroneously "viewed manageability and predominance as two independent inquiries under Rule 23(b)(3)."[25] However, because "the plain text of Rule 23(b)(3) states that one of the 'matters pertinent' to a finding of predominance is 'the likely difficulties in managing a class action,'…the existence of a settlement that eliminates manageability problems can alter the outcome of the predominance analysis."[26] Judge Lynch then concluded: "We now clarify that a Section 10(b) settlement class's failure to satisfy the fraud-on-the-market presumption does not necessarily preclude a finding of predominance."[27]

To be sure, this decision does not say that the failure to satisfy Basic's presumption is irrelevant, and Judge Lunch expressly noted that if the class subdivided into a subgroup that could satisfy the "fraud-on-the-market" doctrine and another that could not, there would be a conflict within the class that would raise "adequacy of representation" issues.[28] Indeed, the Second Circuit has vacated one major settlement class action on precisely this grounds that conflicts existed among different categories of class members. See In re Literary Works in Elec. Databases Copyright Litig.[29] In effect, the current trend may be towards reading Amchem as less a case about predominance and more one about adequacy of representation.[30] And in Denney v. Deutsche Bank AG,[31] the Second Circuit indicated that the real limit on the scope of a settlement

[25] Id. at 242
[26] Id.
[27] Id at 242-43.
[28] Id at 243.
[29] 634 F.3d 242, 250-55 (2d Cir. 2011).
[30] For such a statement, see In re Prudential Inc. Co. Sales Practices Litig., 148 F.3d 283, 308 (3d Cir. 1998).
[31] 443 F.3d 253, 268-269 (2d Cir. 2006).

class was Article III standing, which may imply that settling class must plead a class definition that indicates that the class members did suffer an injury-in-fact.[32]

The Third Circuit has probably led the Second Circuit in this regard. In Sullivan v. DB Inv. Inc.,[33] Judge Scirica (in a concurring opinion) emphasized that, in the settlement class context, manageability (and hence predominance) were less important, but "other inquiries assume heightened importance and heightened scrutiny because of the danger of conflicts of interest, collusion, and unfair allocation."[34]

One very important implication of this de-emphasis of predominance in the settlement class context is the possibility of expanding the scope of the class, once a settlement is reached. Suppose plaintiffs' counsel had initially narrowly defined the class to satisfy predominance in a litigation class. But once a settlement is reached, both sides have incentives to expand the class's scope. Plaintiff's counsel are normally happy with a large class because it implies a larger fee award (given the reality that the plaintiff's fee award is usually measured as a percentage of the total recovery). Defense counsel may want "global peace" and is eager to blend other claimants (possibly located outside the United States) into a global settlement. Or, defendants may be interested in including other claimants on a reduced settlement basis. Thus, one danger is that the recovery to the original and narrowly defined class will be diluted if the class's scope is expanded; alternatively, there is a danger that the new class members in the expanded class will receive an overly discounted settlement. Either way, the original plaintiff's counsel may be seduced into accepting dilution or an inferior settlement for those in the expanded portion of the new class, because such counsel will almost certainly receive an enhanced fee award. Given

[32] Id. at 268-69. Denney states that the class "must be defined in such a way that anyone within it would have standing." The scope of Denney can be debated, but taken with the Sullivan v. DB Inv. Inc. case next discussed, it seems to show a focus on adequacy of representation in both the Second and Third Circuits.
[33] 667 F.3d 273, (3d Cir. 2011).
[34] Id. at 335.

these incentives, cases that straddle international borders (particularly in securities cases) seem likely to expand like an accordion when the settlement class stage is reached.

A case that exemplifies the issues in late expansion of the class, but also shows that such expansion can be benign and desirable, is In re Petrobras Securities Litigation.[35] There, Judge Rakoff was faced with a massive fraud that had reverberated across Brazil and brought down the Brazilian government. After Judge Rakoff denied a motion to dismiss, dealing with complex issues involving loss causation and predominance, his decision was largely upheld by the Second Circuit, but the Circuit panel still reversed and remanded his decision on one issue: predominance. Although Petrobras' stock traded on the New York Stock Exchange, its bonds traded on an off-exchange basis.[36] This raised an issue of "domesticity" under Morrison v. National Bank of Australia,[37] because it had held that rule 10b-5 reaches only purchases and sale of securities in the United States. Some of the Petrobras bonds likely traded outside the United States (although they settled through the Depository Trust Company ("DTS")).

On remand, the parties decided to settle for approximately $3 billion (one of the largest class action settlements in recent years). But objectors were not satisfied. They objected to the settlement on two grounds: (1) that those bondholders in the class that settled their transactions through DTC were not properly part of the class and had to be excluded based on Morrison; and (2) that even if these bondholder claimants could be included in the class, there was a fundamental conflict between them and the "domestic" claimants who purchased on the New York Stock Exchange. In their view, this necessitated subclasses and separate representation. Given that the Second Circuit had already reversed class certification on the grounds that "domesticity" was an individual issue that prevented any finding of predominance (unless class-

[35] 2018 U.S. Dist. LEXIS 105550 (S.D.N.Y. June 22, 2018).
[36] In re Petrobras Sec. Litig., 862 F.3d 250 (2d Cir. 2017).
[37] 561 U.S. 247 (2010).

wide evidence of domesticity could be found for the bondholder purchasers), this problem looked serious.

But, as Judge Rakoff pointed out in his decision approving the settlement as fair and granting certification to this class, this was exactly the problem solved by In re Am. Int'l Grp. Inc. Sec Litig.[38] As he deftly phrased it: "In the Second Circuit, plaintiffs are entitled to settle even entirely non-meritorious claims."[39]

In short, although, in a litigation class, defendants were entitled to assert that predominance could not be satisfied, in a settlement class this was beside the point because defendants could willingly waive this issue. Perhaps ironically, Morrison had made the settlement class certifiable because it had held that the "domesticity" of the purchases and sales related not to the court's subject matter jurisdiction, but to the merits (which could be waived).

A key distinction here needs to be underlined. Although "no class may be certified that contains members lacking Article III standing" (see Denney v. Deutsche Bank AG[40]), domesticity goes only to the merits and not Article III standing. To have Article III standing, the class need only be defined in such a way that its members are alleged to have suffered injuries-in-fact. Because the Petrobras note and bond purchasers had clearly lost money, there was no issue about their Article III standing, even if they could not have proven a necessary element in their cause of action (i.e., domesticity) at a trial.

Although predominance thus may drop out of the picture in a settlement class, there still remains the issue of adequacy of representation. If there was, for example, a "fundamental conflict" among the various class members, such a class still could not be certified -- at least

[38] 689 F.3d 229, 243 (2d Cir 2012).
[39] 2018 U.S. Dist. LEXIS 105550, at *25. Notably, claims without value were also at issue in DB Sullivan investments in the Third Circuit, where absent class members were included from states that did not recognize indirect purchaser claims.
[40] 443 F.3d 253, 264-5 (2d Cir. 2006).

absent subclassing. In Petrobras, some of the objectors asserted that non-domestic purchasers, having effectively "meritless" claims, could not share in the settlement or were impermissibly diluting the recovery of the "domestic" purchasers.[41] Did this amount to a fundamental conflict, which would require separate representation and subclassing? This is exactly the context where both the Second and Third Circuits have said special scrutiny is needed. Here, Judge Rakoff focused closely on the facts and relied on three separate factors that demonstrated to him that the settlement was fair and did not unfairly dilute the claims of the domestic purchases. First, although a number of presumably sophisticated institutions had opted earlier out of the Petrobras class action, virtually all rejoined the class action once the $3 billion settlement was announced. Because they were largely "domestic" purchasers, their re-entry to the class suggested that they were pleased with the outcome (and did not believe their interests were diluted in favor of the "foreign" purchasers added to the class).

Second, the Petrobras class action had three lead plaintiffs: the pension funds of Hawaii and North Carolina and Universities Superannuation Scheme Limited ("USS"), a Brazilian pension fund connected to Petrobras. Both Hawaii and North Carolina held only domestically purchased stock whereas USS held substantial securities purchased both inside and outside the U.S. Collectively, this was a structure that approached subclassing, as both Hawaii and North Carolina had no incentive to give away a disproportionate share of the settlement to non-domestic purchasers. Finally, Judge Rakoff stressed that if any special master undertook to identify those bond purchasers who purchased in the U.S. and those who did not, this screening

[41] It should be noted that the Petrobras settlement did not include all world-wide purchasers of its stock or bonds, but only those who (i) traded on the NYSE, (ii) those who otherwise traded in the U.S., and (iii) those who cleared through DTC. This last category could have included foreign purchasers, but there was no way to tell without individual screening of each trade. The Petrobras class did not include those who purchased Petrobras securities in Brazil (and many did). Expansion to all international purchasers could, however, be the next step in this line of cases.

process would be costly and might consume most of the recovery to the bond purchasers (and delay receipt). These three factors suggest that the class did not suffer any prejudice from the inclusion of the non-domestic bond purchasers, even if their claims were legally "meritless".

Nonetheless, even if the Second and Third Circuits seem to agree, the issue of whether predominance remains a relevant hurdle in the case of settlement class actions remains open in other Circuits. Here, the most noteworthy decision in 2018 is probably Espinoza v. Ahearn (In re Hyundai and Kia Fuel Econ. Litig.).[42] In this nationwide class action based on consumer protection statutes, a 2-1 majority of this Ninth Circuit panel reversed the class certification order of the district court in a settlement class, finding that significant variation among state consumer protection statutes caused the action to flank the predominance standard of Rule 23(b)(3). Obviously, this panel (by a 2-1 margin) did not buy the argument that "manageability subsumes predominance" or that both issues drop out of the picture in settlement class actions. Standing alone, this decision might have created a significant conflict among the Circuits and invited Supreme Court review.

But then in late July, 2018, a majority of the active judges in the Ninth Circuit voted to vacate the Hyundai and Kia decision and rehear the case *en banc*.[43] A decision agreeing with AIG and Deutsche Bank in the Second and Third Circuits would leave no clear conflict among the Circuits. Still, the decision might still be considered "cert.-worthy" by a Supreme Court that has recently been disinclined to reduce barriers to class certification. Of course, it is possible that the Court is less opposed to settlement class actions (where the defendant by definition also favors the settlement), but it is also plausible that some on the Court want to chill all forms of class actions.

[42] 881 F.3d 679 (9th Cir. 2018).
[43] In re Hyundai & Kia Fuel Economy Litig., 2018 U.S. App. LEXIS 20906 (9th Cir. July 27, 2018). (Vacating and granting rehearing *en banc*).

In settling a securities class action, it would today appear possible to settle foreign claims that are based on foreign law held by purchasers who bought outside the United States. The court approving this settlement, or hearing such a trial, would be effectively asserting its supplemental jurisdiction, which allows the court to hear claims that involve the same nucleus of operative facts. Presumably, the defendant's alleged misstatements or omissions supply those common operative facts. This area remains to be fully explored.

III. Cy Pres Awards

Back in 2013, Chief Justice Roberts hinted that he would like to find an appropriate vehicle for considering the propriety of *cy pres* awards in class action settlements.[44] It appears he finally got his wish in Frank v. Gaos,[45] a case that raises the question of when (if ever) *cy pres* awards are acceptable in class action settlements.

Frank v. Gaos involves the settlement of a class action alleging violations of the federal Stored Communications Act as well as California law. The plaintiffs alleged that Google disclosed their search terms to third party websites. Importantly, the case was initially dismissed on standing grounds, and the plaintiff amended her complaint. Before she could pass a second motion to dismiss gauntlet, Google apparently decided that settling all outstanding related litigation against it was a good idea, and in the name of global peace consolidated another similar action before the same judge and the parties agreed to settle both. The settlement agreement set up a fund of $8.5 million. Of that, approximately 25% went to the attorneys and the remainder was to be distributed to organizations that promote or research privacy on the Internet. Six recipients were selected: four universities and two NGOs. The facts are somewhat less egregious than Marek, the earlier case the Court refused to take, because there the settlement funds went to

[44] Marek v. Lane, 571 U.S. 1003 (2013) (statement of Chief Justice Roberts respecting denial of certiorari).
[45] 138 S. Ct. 1697 (2018).

an organization created and controlled by the defendant (Facebook) whereas in Frank the funds went to organizations that had a relationship with, but were not controlled by, the parties. But still, the optics are not good because no attempt was made in the settlement to compensate class members.

On appeal to the Ninth Circuit, objectors argued that the settlement should not have been approved because it did not even attempt to provide compensation to class members. The Ninth Circuit rejected objector's arguments. It emphasized first that the distribution of the damages award would be too costly given the size of the award and the size of the class: "The remaining settlement fund was approximately $5.3 million, but there were an estimated 129 million class members, so each class member was entitled to a paltry 4 cents in recovery—a *de minimis* amount if ever there was one."[46] Furthermore, the court noted that the plaintiffs' claims were very weak, thus the small settlement amount was fair and equitable.

Objectors also argued that the relationship between the *cy pres* recipients and Google/class counsel was too cozy. Google had donated to some of these organizations; class counsel were alumni of others. The appellate court rejected this argument on several grounds. First, it noted that Google donates to hundreds of organizations. The court explained: "in emerging areas such as Internet and data privacy, expertise in the subject matter may limit the universe of qualified organizations that can meet the strong nexus requirements we impose upon *cy pres* recipients."[47] Second, it recognized that the organizations in question had questioned Google's practices with respect to internet privacy, mitigating the allegations of collusion. Finally, it noted that "something more" than an overlap of giving or interests must be shown, such as fraud or collusion. The court was careful to note that a past relationship with a *cy pres* recipient could be

[46] In re Google Referrer Header Privacy Litig., 869 F.3d 737, 742 (9th Cir. 2017), cert. granted sub nom. Frank v. Gaos, 138 S. Ct. 1697 (2018).
[47] In re Google Referrer Header Privacy Litig., 869 F.3d at 746.

a "stumbling block" to approval, but that in this case the district court did not abuse its discretion.

It is worth noting that *cy pres* awards are not always of the type in Frank v. Gaos. For example, in Keepseagle v. Perdue,[48] the D.C. Circuit approved a large *cy pres* settlement under which most of the remaining $380 million in a compensation fund in a class action would go to a variety of non-profit organizations that provided services to Native American farmers. The litigation had had a long and tortured history, beginning in 1999 when Native American farmers sued the Department of Agriculture for discrimination in various benefit programs. The action settled for $680 million, but it proved infeasible to distribute more than $300 million to claimants, as few filed. A revised settlement was negotiated under the court's supervision that provided for the remainder to be distributed both to *cy pres* beneficiaries and to those who had received an earlier distribution. This did not satisfy some class members who wanted the entire remainder to be distributed proportionately to those who had earlier filed claims and received an initial distribution.

In the course of rejecting these claimants, the D.C. Circuit panel discussed decisions in other Circuits that had rejected *cy pres* distributions and found that they involved fact patterns in which the *cy pres* distribution was not expressly negotiated in the settlement. By implication, it agreed that standardless discretion might be improper, as was the court or special master making the distribution according to its own preferences and without authorization in the settlement agreement. On its facts, Keepseagle seems hard to quarrel with for a variety of reasons. Had the *cy pres* provision not been approved, an extraordinary amount of money would have gone to a few members of a very large class (despite the efforts of the class's own representatives to direct the funds to beneficiaries serving the class as a whole).

[48] 856 F.3d 1039 (D.C. Cir. 2017).

Because some *cy pres* awards do make sense sometimes, if it reaches the issue of *cy pres* at all, it is possible that the Court will adopt the approach set forth in the ALI's influential Principles of the Law of Aggregate Litigation, as have a number of appellate courts. § 3.07 sets out an order of preference in settlements where *cy pres* is contemplated. First, money should go to class members if at all possible: "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members."[49] If there is money left over, it should be (re)distributed to the class members who have already received a distribution, on the theory that class action settlements rarely provide 100% recovery.[50] Only if neither of these is feasible should the money be distributed to "a recipient whose interests reasonably approximate those being pursued by the class." § 3.07(c) (2010). The ALI approach has been cited positively by a number of appellate courts. See, e.g., In re BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1064 (8th Cir. 2015)(rejecting *cy pres* award); In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 33 (1st Cir. 2012) (judicial approval of *cy pres* award was not an abuse of discretion); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011) (*cy pres* award was an abuse of discretion when other class members could receive funds). Cf. In re Baby Prod. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) (stating that "Although we agree with the ALI that *cy pres* distributions are most appropriate where further individual distributions are economically infeasible, we decline to hold that *cy pres* distributions are only appropriate in this context.")

The big surprise in Frank v. Gaos came in June, when the Solicitor General filed an amicus brief in the case asking the Court to remand for the lower court to consider the plaintiff's

[49] Principles of the Law of Aggregate Litigation § 3.07(a) (2010).
[50] Id. at § 3.07(b).

standing. The government's argument is that the district court erred when it failed to consider whether the plaintiffs had standing under Spokeo, Inc. v. Robins[51] at the settlement stage because Spokeo had yet to be decided. In general, parties cannot waive the standing requirement. Thus, the fact that the defendant did not assert its argument after the plaintiff amended her complaint does not settle the question of Article III standing. And, as the government points out, in considering a settlement the court is exercising jurisdiction over the case, which requires that the parties have standing.[52] If the government's argument wins the day, Spokeo could turn out to be a strange gift for defendants. On the one hand, the Court's narrowing of the standing requirement in Spokeo is beneficial to defendants in privacy and data breach class actions, as it gives them a chance to convince a court to dismiss the case before substantial investment in class certification motions. On the other hand, if defendants cannot settle cases where a Spokeo standing issue lurks in the sidelines, then they may find themselves having to litigate and relitigate standing multiple times, when a global class action settlement could have resolved their exposure once and for all. The question of whether it is more efficient for a company such as Google to continue litigating standing, perhaps facing multiple plaintiffs in multiple jurisdictions, as opposed to paying $8.5 million seems to be answered by the facts of the Gaos case itself: the company could have continued litigating after Spokeo came down and chose instead to consolidate and settle.

Is the Court likely to take the road mapped out by the Solicitor General? At oral argument, the Court primarily focused on the standing issue under Spokeo. While several justices doubted that the case could survive a rigorous Spokeo analysis, some justices (including Justice Ruth Bader Ginsburg) expressed the view that plaintiffs might be able to identify some alternative

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[51] 136. S. Ct. 1540 (2016).
[52] Brief for United States as Amicus Curiae Supporting Neither Party at 11.

theory for satisfying Spokeo. On November 5, 2018, several days after the argument, the Court called for additional briefing on the question of justicability. Having neither remanded the case nor scheduled re-argument, the Court seems likely to decide the case on the Spokeo standing issue, and thus to again leave the question of the propriety of cy pres settlements for another day. But a reversal based on Spokeo will make clear that the Court is insisting on a rigorous analysis of standing, even in a case involving a settlement and well-pleaded allegations of violations of federal law.

IV. Arbitration and Class Actions

The Supreme Court continued the trend of favoring the Federal Arbitration Act (FAA) apace this year. As in past years, in every case pitting class actions against arbitration at the Supreme Court level, arbitration has prevailed. This term the issue that arose was whether the National Labor Relations Act (NLRA) had any effect on the validity of arbitration clauses barring class actions. In a 5-4 opinion written by Justice Gorsuch, the Court held that such arbitration clauses would be binding and neither the NLRA nor the FAA's savings clause required otherwise.[53]

Three consolidated cases presented the question. In Ernst & Young LLP v. Morris, which was the focus of the factual scenario presented by the Court in support of its opinion, an accountant for Ernst & Young signed an arbitration agreement barring class actions. He attempted to bring a Fair Labor Standards Act (FLSA) action against his employer based on allegations that Ernst & Young had misclassified junior accountants and therefore owed them overtime pay. It is easy to see why the Court chose this case as its focus in describing the factual predicate for a decision: one would expect an accountant to be a sophisticated actor who

[54] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

entered knowingly into an arbitration agreement and had some market power to take his labor elsewhere.

This narrative might have been somewhat less convincing had it included some of the facts of the other cases. In Epic Systems v. Lewis, the software company had sent an email to employees with an arbitration provision to which they were deemed to have assented by continuing to work at the company. When an employee sought to bring an FLSA claim in federal court, the company moved to dismiss under the FAA. And in National Labor Relations Board v. Murphy Oil USA, Inc., gas station attendants also attempted to bring FLSA claims in federal court. Murphy Oil brought a motion to dismiss and while it was pending, one of the employees filed a complaint with the NLRB arguing that the arbitration provision violated her rights under the NLRA. That complaint was the genesis of the case before the Court.

The Court's reasoning was based on two foundations. First, nothing in the NLRA explicitly *requires* that employees be permitted collective litigation (either under the FLSA or as a Rule 23 class action).[55] Second, there were no allegations that the agreements were obtained by "an act of fraud or duress or in some other unconscionable way that would render any contract unenforceable."[56] The barriers that individualized arbitration creates to relief were not a sufficient reason to disregard such an agreement under AT&T Mobility, LLC. v. Concepcion.[57] Part of the decision which is not so important for class actions but very important for other litigation involving the administrative state was the Court's lack of deference to the NLRB's decision with respect to contracts requiring individual arbitration.[58] Many Court-watchers predict that the Court will revisit and likely limit or even eliminate the Chevron doctrine in the

[55] Recall that the FLSA claim does not give rise not a class action under Rule 23, but rather provides an opt-in provision once the claim as been certified under the statute. The procedure is statutorily dictated.
[56] Epic Sys. Corp., 138 S. Ct. at 1622.
[57] 563 U.S. 333 (2011).
[58] Epic Sys. Corp., 138 S. Ct. at 1629.

coming years, and although the Court gave lip-service to applying Chevron, this decision hints that the doctrine may not survive much longer in its present form.

The dissent, authored by Justice Ginsburg (joined by Justices Breyer, Kagan and Sotomayor), pointed out that there was a conflict between the two statutes, and that the Court's decision placed the FAA over the NLRB. Justice Ginsburg wrote that "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."[59]

The outcome of these cases is consistent with every other case of recent vintage challenging arbitration provisions. For example, in 2017 the Court invalidated a Kentucky rule requiring that a power of attorney contain a clear statement authorizing the agent to enter into an arbitration agreement on the principal's behalf. In Kindred Nursing Centers Limited Partnership v. Clark,[60] the decedents had granted a power of attorney to plaintiffs, who had then entered into an arbitration agreement with the defendant nursing home on behalf of the decedents. Plaintiffs later sued alleging that defendant's negligent care had caused the death of the decedents and arguing that the power of attorney was invalid because it violated Kentucky's "clear statement" rule. Justice Kagan wrote the decision for an eight justice majority (only Justice Thomas dissented), noting that Kentucky had done "exactly what Concepcion barred" by adopting "a legal rule hinging on the primary characteristic of an arbitration agreement—namely a waiver of the right to go to court and receive jury trial."[61]

Despite the Supreme Court's consistency, both lower federal and state courts continue to recognize exceptions to FAA preemption. For example, in McGill v. Citibank, N.A.,[62] the California Supreme Court held that an arbitration agreement waving the right to seek "public"

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[59] Epic Sys. Corp., 138 S. Ct. at 1633.
[60] 137 S. Ct. 1421 (2017).
[61] Id. at 1426-27.
[62] 2 Cal. 5th 945, 393 P.3d 85 (2017)

injunctive relief violates California public policy and is therefore unenforceable. The decision distinguished "public" injunctive relief from "private" injunctive relief, finding that the former sought to enjoin acts that "threaten future injury to the general public" and benefitted the plaintiff only to an "incidental" degree.

At the district court level, a recent case raised the question of what the endgame of individual arbitration clauses is and how far judges will tolerate clauses which appear to limit access to any legal proceeding, whether in arbitration or in court. For example, in a recent case before Judge Donato in San Francisco, Fitbit argued that a class action of consumers could not proceed because the user agreements contained arbitration clauses forbidding class actions. The judge agreed. The consumer in that case then filed an arbitration proceeding with the American Arbitration Association (AAA), the provider in the user agreement, at a cost of $750.[63] She wanted to test the validity of the arbitration provision, a decision that rested with the arbitrator. The AAA determined that her case was worth $200, and Fitbit offered her $2,800 to drop her claim. When she refused, Fitbit nevertheless communicated to the arbitrator that the case was over, preventing her from testing the validity arbitration provision. At a hearing following these events, Fitbit's lawyers admitted that arbitration was not feasible for most consumers because the filing fee far exceeded their likely recoveries: "A claim that is $162 - an individual claim - is not one that any rational litigant would litigate."[64] The judge threatened to hold Fitbit's lawyers in contempt for attempting to take away the consumer's right to arbitrate with these tactics. At a follow-on hearing, Fitbit's lawyers backed off their earlier statements, emphasizing that it was

[63] See Alison Frankel, Fitbit Lawyers Reveal "Ugly Truth" About Arbitration, Judge Threatens Contempt, Reuters, 6/1/18, available at https://www.reuters.com/article/legal-us-otc-fitbit/fitbit-lawyers-reveal-ugly-truth-about-arbitration-judge-threatens-contempt-idUSKCN1IX5QM

[64] Id.

not rational for *Fitbit* to arbitrate a $162 claim and that the company would allow the arbitration to go forward.[65]

Similar expressions of judicial disapproval have come in other cases involving electronic user agreements, which are routinely upheld. For example, in a case involving Uber, the ride-sharing platform, Judge Rakoff refused to enforce an arbitration provision on the grounds that the consumer's agreement was not knowing because the terms of the agreement were buried.[66] That decision was reversed by the Second Circuit.[67] Judge Rakoff's scathing response to this reversal indicates that the judges closest to the facts of these cases are uncomfortable with these outcomes. He wrote:

> …while appellate courts still pay lip service to the 'precious right' of trial by jury, and sometimes add that it is a right that cannot readily be waived, in actuality federal district courts are now obliged to enforce what everyone recognizes is a totally coerced waiver of both the right to a jury and the right of access to the courts—provided only that the consumer is notified in some passing way that in purchasing the product or service she is thereby 'agreeing' to the accompanying voluminous set of 'terms and conditions.'
>
> This being the law, this judge must enforce it—even if it is based on nothing but factual and legal fictions.[68]

As he must, he upheld the arbitration agreement and the class action was dismissed.

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[65] Alison Frankel, Fitbit In "Ugly Truth" Case: We Meant To Say Arbitration Is Irrational For Us, Not Consumers, Reuters, 7/3/2018, available at https://www.reuters.com/article/legal-us-otc-fitbit/fitbit-in-ugly-truth-case-we-meant-to-say-arbitration-is-irrational-for-us-not-consumers-idUSKBN1JT2RU

[66] Meyer v. Kalanick, 200 F. Supp. 3d 408, 410–11 (S.D.N.Y. 2016), vacated sub nom. Meyer v. Uber Techs., Inc., 868 F.3d 66 (2d Cir. 2017).

[67] Meyer v. Uber Techs., Inc., 868 F.3d 66 (2d Cir. 2017).

[68] 291 F. Supp. 3d at 529.

V. Developments in Class Certification: Testing Evidence Admissibility

In a decision this May, the Ninth Circuit deepened a circuit split on the question of whether evidence presented at the class certification stage must be in an admissible form.[69] While most courts require that expert evidence at class certification meet some form of the Daubert standard (and there are nuances in the case law),[70] the question of whether the form of the evidence presented must be admissible *at trial* has split the courts.

Sali did not involve expert evidence.[71] The declaration in question was drafted by a paralegal who reviewed the underlying payroll records for the named plaintiffs and presented an analysis of the data. The underlying payroll data was not presented to the district court in an admissible form, but rather in this summary manner. The District Court denied class certification in part because it refused to consider this declaration based on the view that it could not be admitted at trial. The Ninth Circuit reversed, holding that the evidence presented to support the rigorous inquiry at class certification need not be in admissible form. The Court explained that imposing trial procedures at "this early stage of a litigation makes little common sense" because full discovery has not yet been conducted and "transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action."[72]

By contrast, the Fifth Circuit has held that the court's "findings must be made based on adequate admissible evidence to justify class certification."[73] Other courts have limited their holdings on admissibility to expert evidence, but hold that it must be admissible *at trial*.[74]

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[69] Sali v. Corona Reg'l Med. Ctr., 889 F.3d 623 (9th Cir. 2018).

[70] For example, the Eighth Circuit only requires the parties at class certification to meet a "tailored" Daubert standard in which they scrutinize the reliability of expert testimony without ruling as to whether it would be admissible at trial. *In re Zurn Plumbing Prods. Liab. Litig. v. Cox*, 644 F.3d 604 (8th Cir. 2011).

[71] 889 F.3d at 630-31.

[72] *Id.* at 631.

[73] Unger v. Amedisys Inc., 401 F.3d 316, 319 (5th Cir. 2005).

VI. Personal Jurisdiction Over Class Members

A new argument that defendants have begun to make in class actions challenges personal jurisdiction over absent class members in national class actions in light of the Supreme Court's decision last term in Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.[75] In Phillips Petroleum Co. v. Shutts,[76] the Supreme Court upheld a Kansas court's assertion of jurisdiction over absent class members from other states in a money damages class action. Since then, it has been generally agreed upon that a state may exercise personal jurisdiction over absent class members. Is that about to change? We think that this is unlikely; so far this argument has been unsuccessful, but no Circuit Court has ruled on the issue.

A little background: usually, the question of personal jurisdiction over plaintiffs does not arise because the plaintiff has brought the suit and thereby consents to jurisdiction. Absent class members, however, do not consent to be jurisdiction just as they do not expressly consent to being bound by the class action. The operation of class action safeguards such as adequacy of representation legitimates precluding them from subsequent suits, and the fact that they face no costs of litigation or penalty if they lose was the Supreme Court's justification for the exercise of personal jurisdiction over them in Shutts. One would imagine that personal jurisdiction would be a genuine barrier in *defendant* class actions because there the absent class members do face costs and losses, but these are so rare as to make the question purely academic.

However, the reasoning recent Supreme Court case invalidating "pendant" personal jurisdiction calls this ruling into question. In Bristol Myers Squibb the Court held that a plaintiff

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[74] See, e.g., In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015) (holding that expert evidence relied on for class certification must meet Daubert standard); Messner v. Northshore Univ. Health Sys., 669 F.3d 802 , 812 (7th Cir. 2012) (same).

[75] 137 S. Ct. 1773 (2017).

[76] 472 U.S. 797 (1985).

who purchased and ingested a drug in Ohio, and lived in Ohio, could not file a suit in California against the drug manufacturer. The manufacturer had significant business interests in California, and the plaintiff was suing in a proceeding with California plaintiffs, but the Supreme Court said this was insufficient. There must be a tight link between the plaintiff's claim and the forum. It is important to note that the Supreme Court specifically stated in Bristol-Myers Squibb that the decision was not relevant to the questions raised in Shutts because Bristol-Myers Squibb involved a challenge by *defendants* to jurisdiction whereas Shutts involved absent plaintiffs. Yet defendants have seized on the decision to attempt to undermine jurisdiction in class actions. The reason is that if a plaintiff who was injured in Ohio cannot join a lawsuit against a manufacturer of that drug in California under Rule 20, then that plaintiff should not be able to "join" a lawsuit under Rule 23.

This reasoning depends one one's view of the class action. If the class action is a complex joinder device, then it may be that the relationship between each class member and the forum state must be evaluated. This would certainly make class actions unwieldly and might even be a complete barrier in many cases. On the other hand, if the class action is an "entity" created by the court under the auspices of Rule 23 and represented by the named plaintiffs, then the court would continue to have jurisdiction over class members.

So far, most courts have rejected the extension of Bristol Myers Squibb to class actions. Some opinions rely on the fact that the Court specifically limited its ruling and stated that the class action question was not relevant to its decision in the case.[77] In Morgan v. U.S. Xpress, the District Court reasoned that the Court in Bristol Myers Squibb referred to the "case" between plaintiff and defendant, which translated to the class action context means the named plaintiffs

[77] Morgan v. U.S. Xpress, Inc., No. 3:17-CV-00085, 2018 WL 3580775, at *4 (W.D. Va. July 25, 2018); In re Morning Song Bird Food Litig., No. 12CV01592 JAH-AGS, 2018 WL 1382746, at *2 (S.D. Cal. Mar. 19, 2018) (Bristol Myers Squibb did not change governing law).

(class representatives) and the defendant. Other courts have articulated the same idea a bit differently, stating that the rule in Bristol Myers Squibb applies only to the named parties.[78]

Courts have also relied on the difference between a mass tort, which provides no formal procedural safeguards but is understood as an aggregation of individual actions, and the class action which is governed by both due process and rule-imposed safeguards. The argument that class actions are different from and provide better safeguards than mass torts has been the most successful in the lower courts so far.[79]

Some plaintiffs have argued that Bristol Myers Squibb is by its terms only applicable in state courts, so that federal courts may continue to exercise pendant personal jurisdiction and therefore the status quo ante with respect to class actions also remains. This argument has generally been unsuccessful.[80] As cases percolate up the appellate chain, we may see the legal standard develop in this area.

VII. Rule 23 Amendments: Objectors

After much delay and deliberation, new amendments to Rule 23 took effect on December 1, 2018, marking the first time in nearly fifteen years that class action procedure has been formally changed. The new revisions address class notice, the settlement approval process, and objections -- with the last topic attracting most of the attention.

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[78] *See also* Gaines v. Gen. Motors, LLC, No. 17CV1351-LAB (JLB), 2018 WL 3752336, at *2 (S.D. Cal. Aug. 7, 2018) ("most courts that have had considered the question appear to have concluded that Bristol-Myers applies to named parties."); Horowitz v. AT&T Inc., No. 3:17-CV-4827-BRM-LHG, 2018 WL 1942525, at *15 (D.N.J. Apr. 25, 2018) (applying Bristol Myers Squibb to named plaintiffs in class action only).

[79] See, e.g., Morgan v. U.S. Xpress, supra at *4; Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018); In re Chinese-Manufactured Drywall Prod. Liab. Litig., No. MDL 09-2047, 2017 WL 5971622, at *14 (E.D. La. Nov. 30, 2017); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-CV-00564 NC, 2017 WL 4224723, at *4 (N.D. Cal. Sept. 22, 2017).

[80] Fitzhenry-Russell, id; Roy v. FedEx Ground Package Sys., Inc., No. 3:17-CV-30116-KAR, 2018 WL 2324092, at *9 (D. Mass. May 22, 2018).

New Rule 23(e)(5) requires an objector to explain "with specificity" the grounds for its objection and to detail to whom the objection applies (i.e., just the objector, a portion of the class, or the entire class). Most importantly, this provision forbids any payment or other consideration being paid or given to an objector (or other person) for "forgoing or withdrawing an objection" or "forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal," unless such payment or other consideration was first approved by the court after a hearing. Obviously, this broad provision covers counsel fees paid to the objector's counsel by class counsel.

Behind this amendment was the sense that professional objectors increasingly seek to extort payments by holding the settlement hostage. Because the appellate process is lengthy, the settlement is halted in its tracks until the objector's appeal is resolved, thus delaying the distribution of the settlement to the class members. To enable the settlement fund to be paid out, class counsel sometimes felt compelled to offer payments to the objectors to induce the withdrawal of their objections.

The new rule does not require judicial approval to withdraw or dismiss an objection, but only for the receipt of any consideration in connection therewith. Specifically, the new Rule 23(e)(5) reads as follows:

Rule 23(e)(5)

(5) Class-Member Objections.

(A) In general. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset

of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection,

or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

VIII. Judicial Sanctions Against Professional Objectors

Still another technique by which to deter objectors when the Court found them to be engaged in what it termed "objector blackmail" was used by United States District Judge Jed Rakoff in the Petrobras litigation. See In re Petrobras Secs. Litig., 2018 U.S. Dist. LEXIS 161898 (S.D.N.Y. September 19, 2018). There, relying on Rule 11 and 28 U.S.C. § 1927, Judge Rakoff imposed sanctions (at the requesting of the lead plaintiffs) against counsel to one objector in the amount of $10,000 and ordered two other objectors to post appeal bonds of $5,000 and $50,000 respectively. In the case of the latter objectors (who were ordered to post appeal bonds but were not

sanctioned), Judge Rakoff spared them after finding that their objections at least had an "arguably colorable basis." Although one case is not clearly a trend, the judicial mood seems to be shifting toward more punitive treatment of professional objectors. See also Pearson v. Target Corp., 893 F.3d 380, 382 (7th Cir. 2018).