Mastering Class Action Lawsuits: All You Need to Know

Torts, Insurance & Compensation Law and Trial Lawyers Sections

January 17, 2019

New York Hilton Midtown

NYC

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New York State Bar Association

Torts, Insurance and Compensation Law and Trial Lawyers Sections

Thursday, January 17, 2019 | 8:45 a.m. – 4:25 p.m.

New York Hilton Midtown | NYC

7.0 Credits

4.0 in Areas of Professional Practice, 2.0 in Skills and 1.0 in Ethics

This program is transitional and is suitable for all attorneys including those newly admitted.

Annual Dinner | Wednesday, January 16, 2019 | 6:30 p.m. to 10:30 p.m.

The Edison Ballroom, 240 West 47th Street

Honoree: **Honorable Michael J. Garcia**, New York Court of Appeals

MCLE Program | Thursday, January 17, 2019 | 8:45 a.m. to 4:25 pm | Regent, Second Floor

Agenda

8:45 a.m. – 9:00 a.m. **Business Meeting and Election of Officers and District Representatives of the Torts, Insurance and Compensation Law Section and Business Meeting and Election of Officers and District Representatives of the Trial Lawyers Section**

9:00 a.m. – 9:50 a.m. **Class Actions 101: From Basics to High-Level Choice of Law Issues**

This session will outline Rule 23's elements using real-life cases, audience participation, and debate regarding whether class certification should have been granted.

Speaker: **Daniel R. Karon, Esq.**
Karon LLC, Cleveland, OH

(1.0 credit in Areas of Professional Practice)

9:50 a.m. – 10:40 a.m. **New York Court of Appeals Decision in *Desrosiers v. Perry Ellis Menswear, LLC* and its Impact on Notification of Class Members**

This past year saw significant developments in class action jurisprudence. Our panel will address recent federal and New York state class action decisions, including the New York Court of Appeals decision in *Desrosiers v. Perry Ellis Menswear, LLC*.

Panelists: **Hon. Eugene M. Fahey**
New York Court of Appeals, Albany, NY

Professor John C. Coffee, Jr.
Columbia University Law School, New York, NY

(*1.0 credit in Areas of Professional Practice)*

10:40 a.m. – 10:50 a.m. **Break**

10:50 a.m. – 11:40 a.m. **The Long Reach of Class Actions: Trends in Class Action Litigation**

Class action litigation is increasing in volume, with claims ranging from labor and employment to consumer fraud to product liability and beyond. This session will cover the litigation and subject matter trends based on a survey, as well as topics such as the use of arbitration clauses and risk management approaches.

Speaker: **Julianna Thomas McCabe, Esq**.
Carlton Fields, Miami, FL

(*1.0 credit in Areas of Professional Practice)*

11:40 a.m. – 12:30 p.m. **Avoiding Legal Ethics Violations in Class Actions**
From soliciting potential plaintiffs at the outset to final settlement of claims, this session will provide valuable guidance to practitioners navigating a host of ethical issues.

Speaker: **Peter A. Bellacosa, Esq.**
Phillips Lytle LLP, New York, NY

(*1.0 credit in Ethics)*

12:30 p.m. – 1:45 p.m. **Luncheon on Your Own**

1:45 p.m. – 2:35 p.m. **Critical Junctures: Depositions of Class Representatives and Challenging Expert Testimony at the Class Certification Stage**
Critical junctures in the life of a class action include the depositions of class representatives, and challenges to expert testimony at the class certification stage. This session will highlight key strategies for approaching these key depositions and challenges to expert witnesses.

Panelists: **Jacqueline K. Seidel, Esq.**
King & Spalding LLP, New York, NY

Honor R. Costello, Esq.
Crowell & Moring LLP, New York, NY

(1.0 credit in Skills)

2:35 p.m. – 2:45 p.m. **Break**

2:45 p.m. – 3:35 p.m. **Emerging Issues in Data Breach and Privacy Regulation Class Actions**
Former FBI Director Robert Mueller, III once observed that there are two categories of companies: those that have been breached and those that will be. With soaring numbers of data breaches and other improper use of personal identification information, the courts have grappled with jurisdiction, mandatory arbitration provisions, pleading sufficiency, privilege issues, class certification and settlement. Learn where this litigation has been and where it is heading.

Speaker: **Steven P. Benenson, Esq.**
Porzio, Bromberg & Newman, PC, Morristown, NJ

(1.0 credit in Areas of Professional Practice)

3:35 p.m. – 4:25 p.m. **New Settlement Paradigms – How to Navigate the Rule Changes**
This session addresses the recent amendments to Rule 23(c) and (e), as well as recent New York State court settlements and decisions, and their significance for new settlement paradigms.

Speaker: **Ellen Gusikoff Stewart, Esq.**
Robbins Geller Rudman & Dowd LLP, San Diego, CA

(*1.0 credit in Skills)*

SECTION CHAIRS
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Trial Lawyers | **Violet E. Samuels, Esq.** | Samuels & Associates, PC | Rosedale

PROGRAM CO-CHAIRS
Torts, Insurance and Compensation Law | **Lisa L. Smith, Esq.** | Phillips Lytle LLP | Buffalo
Trial Lawyers | **Violet E. Samuels, Esq.** | Samuels & Associates, PC | Rosedale

MCLE INFORMATION

Program	**2019 NYSBA TICL and Trial Lawyers Section Annual Meeting**		
Date/s:	01/17/2019	Location:	New York, NY
Evaluation:	www.nysba.org/am2019-tic0 This evaluation survey link will be emailed to registrants following the program.		
Total Credits:	**7.00**		

Credit Category:

4.00	Areas of Professional Practice	0.00	Law Practice Management
1.00	Ethics and Professionalism	2.00	Skills
0.00	Diversity, Inclusion and Elimination of Bias		

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys participating via webcast should refer to Additional Information and Policies regarding permitted formats.

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In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

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The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

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MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

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In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

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☐ As a NYSBA member, **PLEASE BILL ME $40 for Trial Lawyers Section dues.** (law student rate is $15)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Trial Lawyers Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name ____________________

Address ____________________

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City __________ State _____ Zip __________

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name ____________________

Address ____________________

City __________ State _____ Zip __________

Office phone (_____) __________

Home phone (_____) __________

Fax number (_____) __________

E-mail address ____________________

Date of birth _____ /_____ /_____

Law school ____________________

Graduation date __________

States and dates of admission to Bar: __________

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
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E-mail mrc@nysba.org • www.nysba.org

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Please designate the committee(s) in which you would like to participate. Space limits may apply.

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___ Commercial Collections (TRIA4200)
___ Construction Law (TRIA3000)
___ Continuing Legal Education (TRIA1020)
___ Criminal Law (TRIA3300)
___ Diversity (TRIA4100)
___ Employment Law (TRIA3700)
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___ No Fault Law (TRIA3500)
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___ Trial Advocacy Competition (TRIA2700)
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2019 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60
ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60
OTHER	
Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

NEW YORK STATE BAR ASSOCIATION

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☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Torts, Insurance and Compensation Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name ___________________________

Address ___________________________

____

City ____________ State _____ Zip ____________

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name ___________________________

Address ___________________________

City ____________ State _____ Zip ____________

Office phone (________) ____________________

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Fax number (________) ____________________

E-mail address ___________________________

Date of birth ________ /________ /________

Law school ___________________________

Graduation date ____________

States and dates of admission to Bar: ____________

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New York State Bar Association, One Elk Street, Albany NY 12207

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JOIN A TORTS, INSURANCE AND COMPENSATION LAW SECTION COMMITTEE(S)

All active Section members are welcome and encouraged to join one or more Committees or Divisions at no additional cost. Please indicate the group/s you would like to join:

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___ Automobile Liability (TICL1100)
___ Business Torts and Employment Litigation (TICL1300)
___ Class Action (TICL1400)
___ Construction and Surety Law Division (TICL4000)
___ Continuing Legal Education (TICL1020)
___ Diversity (TICL4200)
___ Ethics and Professionalism (TICL3000)
___ General Awards (TICL1600)
___ Governmental Liability (TICL1700)
___ Information Technology (TICL2900)
___ Insurance Coverage (TICL2800)
___ Laws and Practices (TICL1800)
___ Membership (TICL1040)
___ Municipal Law (TICL2100)
___ No Fault (TICL4400)
___ Premises Liability/Labor Law (TICL2700)
___ Products Liability (TICL2200)
___ Professional Liability (TICL2300)
___ Social Media (TICL4600)
___ Sponsorships (TICL4500)
___ Toxic Tort (TICL4300)
___ Workers' Compensation Law Division (TICL4100)

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Class Action 101: From Basics to High-Level Choice of Law Issues

Daniel R. Karon, Esq.
Karon LLC, Cleveland, OH

Rule 23's implicit requirements

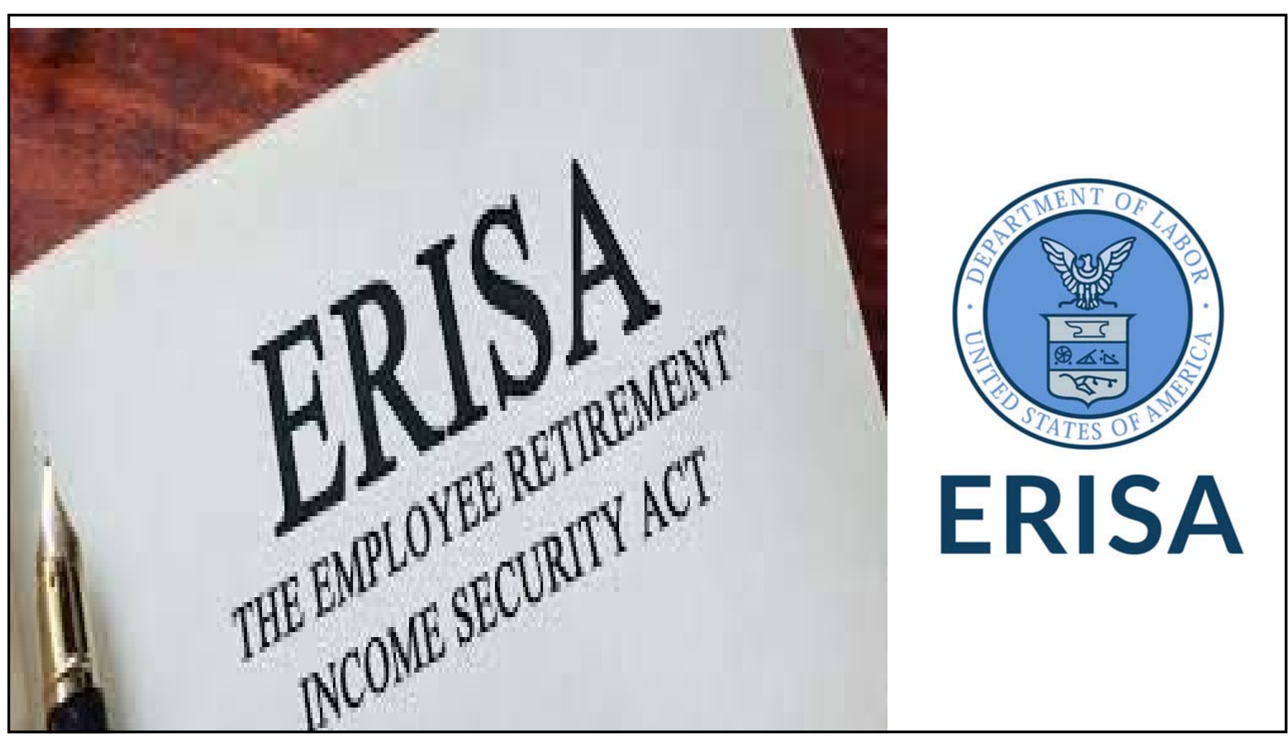
1. Live controversy
2. Class membership
3. Definable class (ascertainability)

Rule 23(a)'s requirements

1. Numerosity
2. Commonality
3. Typicality
4. Adequacy of class representative and counsel

Rule 23(b)'s requirements

Type 1: (1)(A) Separate actions would create risk of inconsistent adjudications for class members that would establish incompatible standards of conduct for defendant

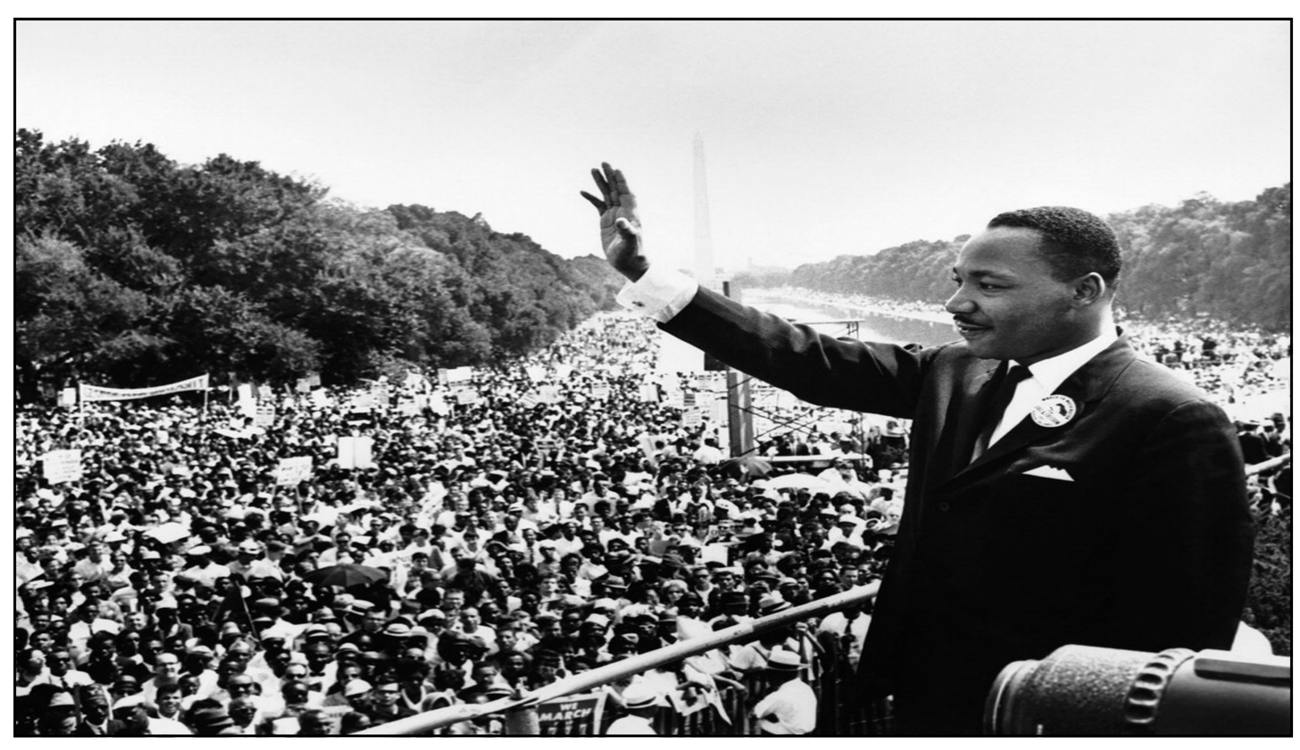


Rule 23(b)'s requirements

Type 1: (1)(B) Adjudications of class members' claims would dispose of other class members' interests or would impede other class members' ability to protect their interests

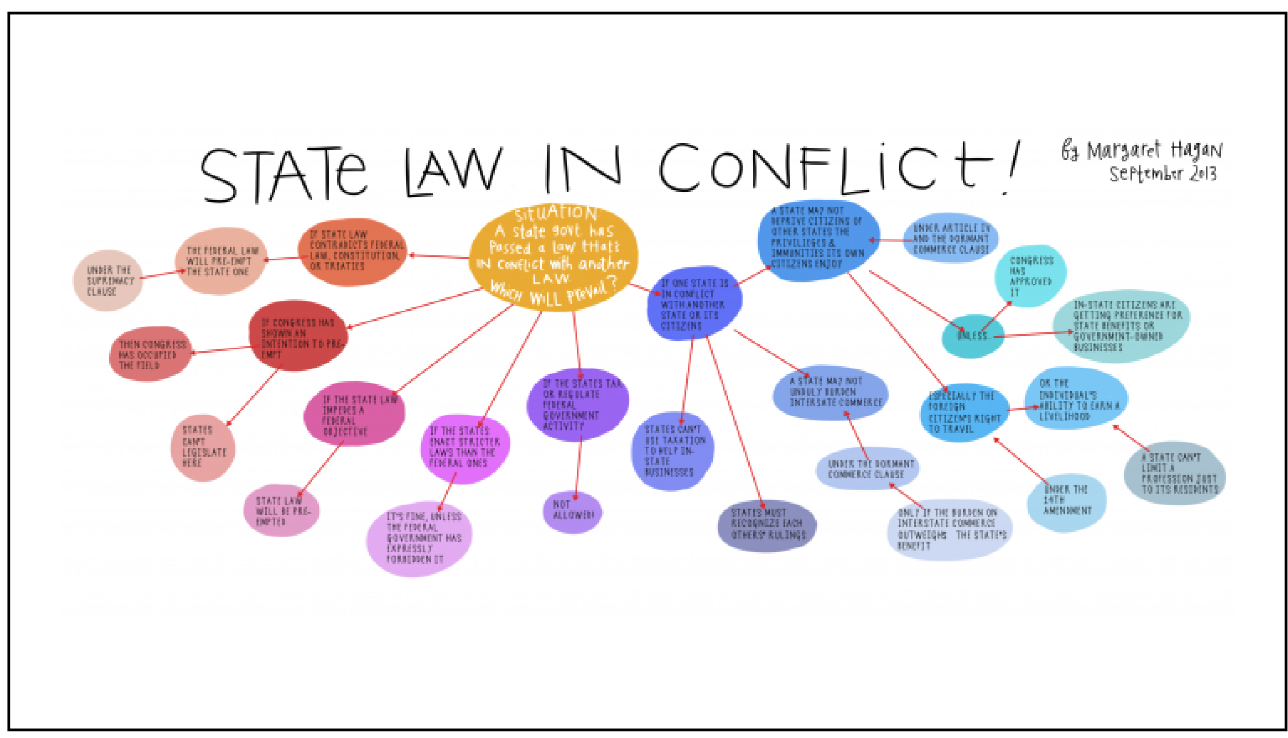
Rule 23(b)'s requirements

Type 2: (b)(2) declaratory or injunctive relief



Rule 23(b)'s requirements

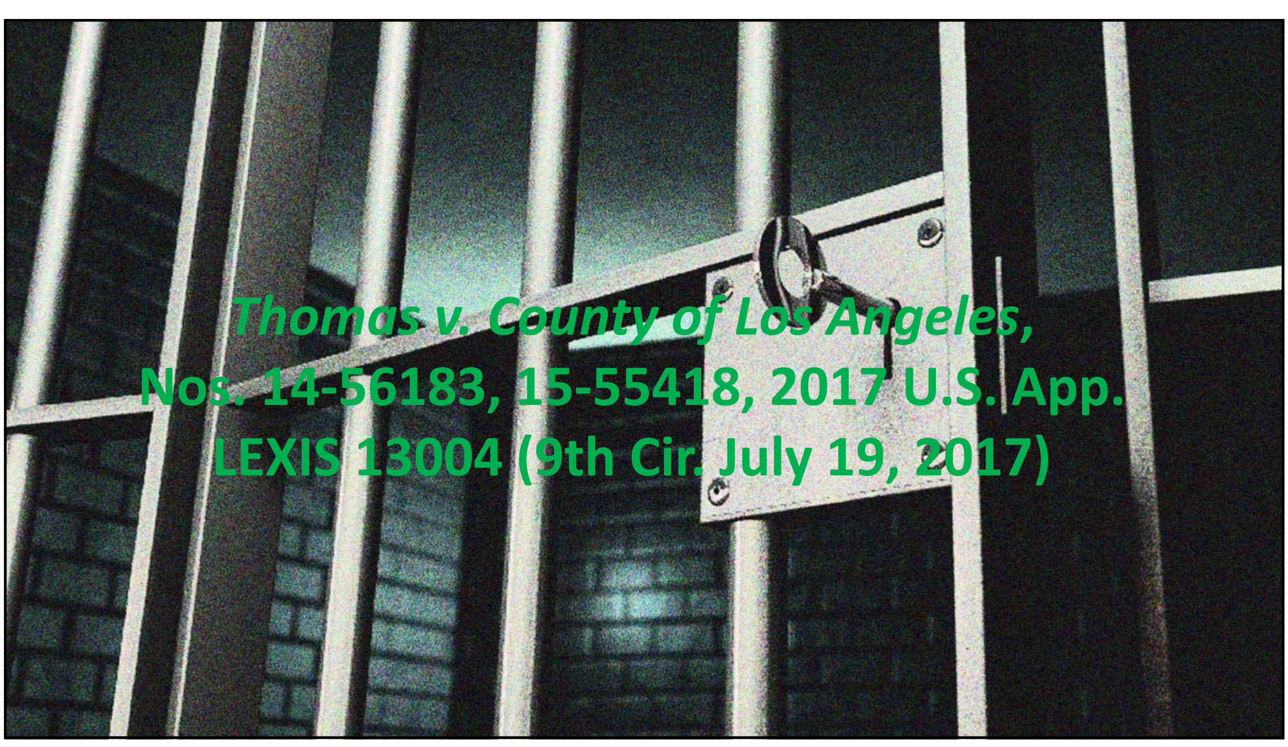
Type 3: Common factual or legal questions *predominate* over class members' individual questions



Rule 23(b)'s requirements

Type 3: Class action is the *superior* method for adjudicating plaintiff's claim

AUDIENCE
PARTICIPATION


Thomas v. County of Los Angeles,
Nos. 14-56183, 15-55418, 2017 U.S. App.
LEXIS 13004 (9th Cir. July 19, 2017)

AFFIRMED DISTRICT
COURT'S ORDER
DECERTIFYING CLASS

AVIS
Schwartz v. Avis Rent a Car Sys. LLC,
No. 11-4052, 2014 U.S. Dist. LEXIS 121322
(D.N.J. Aug. 28, 2014)

MOTION: GRANTED

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12

"When Congress gives you lemons . . ."

Plaintiffs' attorneys are forced by the Class Action Fairness Act to devise innovative new ways to prosecute interstate class actions

Daniel R. Karon

The Class Action Fairness Act, which creates federal jurisdiction over multi-state class actions, caused many plaintiffs' attorneys to predict multi-state, class-action lawsuits' demise. But this isn't true. Rather, if properly pleaded, creative plaintiffs' attorneys can resolve class actions in federal court on the same multi-state basis as in the past.

The Class Action Fairness Act of 2005[1] transformed class-action practice and procedure as we know it. CAFA's major changes involve: (1) expanding federal-diversity jurisdiction to include virtually all interstate class actions; (2) allowing defendants to remove state-court, class-action lawsuits, restricting federal courts' ability to remand them, and providing expedited appellate review; (3) adding noteworthy steps to the procedure for settling class actions; and (4) providing a structure for evaluating coupon settlements and attorneys' fees in coupon settlements.

Since CAFA's enactment, some plaintiffs' attorneys have conceded the ability to pursue multi-state, class-action lawsuits alleging violation of one or multiple states' substantive laws. Perhaps this is because scant commentary exists describing and examining the new ways that creative plaintiffs' attorneys can actually plead their previously state-court, class-action lawsuits to appreciate CAFA's effects.[2] After explaining CAFA's requirements, this article will describe some innovative, new methods for pleading successful multi-state, class-action cases after CAFA.

CAFA's subject-matter-jurisdictional effect

CAFA changed federal subject-matter-jurisdictional doctrine with regard to class-action claims based on diversity jurisdiction. Before CAFA amended the federal diversity-jurisdiction statute (28 U.S.C., §1332), to create federal jurisdiction for claims involving minimal diversity[3] and amounts in controversy that, individually, total less than $ 75,000,[4] federal courts were not allowed to aggregate class members' claims to establish the jurisdictional minimum.[5] Rather, for federal subject-matter jurisdiction to exist, "each plaintiff in a Rule 23(b)(3) class action [had to] satisfy the jurisdictional amount, and any plaintiff who [did] not [had to] be dismissed from the case. . . ."[6]

But believing that, due to the non-aggregation rule, "class-actions [were long being] manipulated for personal gain,"[7] and that "lawyers who represent plaintiffs from multiple states [were] shopping around for the state court where they expected to win the most money,"[8] on February 10, 2005, Congress passed CAFA, and on February 18, 2005, President Bush signed it into law. CAFA amended the federal-diversity statute and abrogated the non-aggregation rule, thus creating original federal-court, subject-matter jurisdiction for class-action claims exceeding $5 million in potential aggregate damages. As a result, plaintiffs can no longer realistically sue multi-state, class-action lawsuits alleging application of a single state's substantive law in state court – assuming their claims involve any worthwhile damages (i.e., over $5 million) – but must rather file their class-action lawsuits in federal court.

A new world view

Although some plaintiffs' attorneys continue to test federal judges, due to class actions' new forum the notion of multi-state class actions alleging violation of a single state's substantive law has all but vanished after CAFA. While plaintiffs occasionally succeeded in certifying and settling multi-state cases in state courts pre-CAFA, plaintiffs' class-action attorneys generally agree that federal courts are reluctant to certify multi-state class-actions applying a single state's substantive law, even though the U.S. Supreme Court's *Phillips Petroleum Co. v. Shutts*[9] decision suggests this approach's propriety under

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certain circumstances.[10] Since plaintiffs can now no longer necessarily expect courts to certify multi-state classes alleging violation of a single state's substantive law, some plaintiffs' attorneys have begun to devise new and innovative ways to achieve a hopefully similar result while accepting CAFA's restrictions and realities.

Pursuing 50-state class actions

• *Suing one or only a few cases for victims in all 50 or multiple states*

As suggested, plaintiffs' counsel can still file 50-state, class-action lawsuits even after CAFA. Although, before CAFA, plaintiffs' lawyers often sued multi-state claims on behalf of an individual class representative, this practice invoked inevitable standing, subject-matter jurisdiction, and – if plaintiff even reached class certification – class-membership issues. Plaintiffs' counsel sued in this manner (and sometimes still do) because they sought to capture the most expansive class possible while spending the least effort necessary.

But a properly alleged multi-state, class-action lawsuit usually requires multiple class representatives – ethically retained and with genuine damages. And while plaintiffs' counsel can certainly sue these multiple clients' lawsuits in these clients' home-state federal courts, counsel might instead prefer to sue these clients' claims together in a single federal forum under a single state's (forum's or otherwise) substantive law.

After all, since counsel must now file these lawsuits in federal rather than state court, these cases are subject to multidistrict consolidation,[11] meaning the Multi-District Litigation (MDL) Panel will most likely consolidate and transfer them to a single district court anyway. So, to avoid multiple filing fees and hiring multiple local counsel, plaintiffs' counsel may prefer to file in a single federal court having proper venue. When doing so, plaintiffs' counsel should strongly consider the defendant's (or main defendant's, where multiple defendants exist) home state (assuming its law is good there), since doing so permits plaintiffs' counsel to encourage classwide application of that state law's substantive under *Shutts*,[12] even if class representatives may not exist from all states for whose citizens counsel has filed suit.

• *Suing in 50 states under 50 states' respective substantive laws*

Suing 50 individual class-action lawsuits or alleging state-law claims on behalf of 50 states' class members in a single, colossal class-action lawsuit involves immense labor and organization. As such, plaintiffs' counsel should consider whether this exercise is worth it, meaning they should balance the benefit of complete, multi-state coverage versus the risk of leaving some states unsued. Although suing on claims for victims nationwide (whether via 50 initially separate lawsuits or one master complaint) deters uninvited plaintiffs' attorneys from joining in plaintiffs' counsel's cause, suing in this ambitious manner may present significant manageability issues to the transferee (or original, as the case may be) judge, which the judge may consider insurmountable even well before considering superiority at class certification.[13] Therefore, plaintiffs' counsel needs to balance the risk of additional, unwanted plaintiffs' counsel against the risk of upsetting and alienating their trial judge right from the start when deciding whether to sue multiple cases that end up consolidated or one super-case alleging multiple states' claims.

The effectiveness of suing "exemplar-state," class-action lawsuits

Suing on behalf of class members in a limited number of states – "exemplar states" – is an innovative alternative to suing multiple cases or one mega-case and can potentially solve the likely management issues involved with over-ambitious pleading at potentially minimal, if any, eventual cost.[14] Exemplar states simply means a handful of states, whether sued separately or together, for whose alleged victims plaintiffs' counsel, by way of appropriate class representatives, file a single class-action complaint.

If plaintiffs' counsel pursue the exemplar route, they must include class representatives from enough states (however their judgment determines that is) to effectively litigate their case, while, of course, focusing on states with good substantive state law and significant populations. Doing so allows plaintiffs' counsel's exemplar case to remain small enough to avoid manageability issues yet big enough to hopefully coax a global settlement should the opportunity arise.

But since other plaintiffs' attorneys can immediately access all federal class-action case filings through the electronic databases PACER, Courtlink, and Casestream, suing only exemplar states leaves plaintiffs' counsel vulnerable to other attorneys suing overlapping or competing class actions. This means other counsel may sue for consumers in states not yet in suit or may even sue on top of pending cases. Plaintiffs' counsel suing exemplar-state, class-action lawsuits must therefore organize and consolidate their leadership structure and positions early (perhaps by requesting a pre-trial order, or orders depending on the status of consolidation, appointing them interim lead or co-lead counsel), thus helping defeat any likely future leadership attacks. Because if plaintiffs' counsel does not take the time and care to organize their claim's politics, they had better be prepared to argue and win inevitable lead-counsel motions by demonstrating their extensive (if true) pre-filing investigation, their class-action lawsuit's proprietary nature, and their entitlement to a lead or co-lead counsel position.

Embracing or avoiding CAFA's federal subject-matter jurisdiction

Of course, suing in the above-described manner will most certainly subject a plaintiff's lawsuit to CAFA's newly created federal subject-matter jurisdiction, which exists so long as plaintiffs' alleged claims exceed $5 million

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and minimal diversity exists, which occurs when at least one plaintiff resides in a different state from at least one defendant. But even where minimal diversity exists, state-court jurisdiction may remain if plaintiff alleges less than $5 million in damages or pleads one of CAFA's "local case" exceptions.

• *Alleging damages less than $5 million in damages*

Although long ago the U.S. Supreme Court ruled that district courts could not aggregate class members' damages to satisfy minimum jurisdictional requirements,[15] CAFA now requires aggregation to determine whether a plaintiff's amount in controversy satisfies CAFA's new jurisdictional minimum by exceeding $5 million. So, if class plaintiffs want to remain in state court, they may want to consider alleging under $5 million in damages.

With respect to injunctive relief, before CAFA, district courts measured injunctive relief's value by determining whether the injunctive relief sought exceeded the federal-diversity statute's $75,000 threshold. And while relief to individual class members would not typically exceed $75,000, the injunctive relief's total cost to defendants typically did. But CAFA's mandatory aggregation provision now appears to require that courts measure injunctive and other non-monetary relief according to the total classwide benefit sought or the total cost to defendant. As a result, plaintiffs who desire to remain in state court might want to consider avoiding requests for injunctive relief while at the same time pleading damages less than $5 million.[16]

• *CAFA's "home-state" and "local-controversy" exceptions*

According to CAFA's home-state exception,[17] if two-thirds or more of the proposed class members and the primary defendants are citizens of the state where plaintiff filed suit, federal subject-matter jurisdiction under CAFA does not exist. And under CAFA's local-controversy exception,[18] if two-thirds of the plaintiffs and at least one defendant against whom significant relief is sought are citizens of the state where plaintiff filed suit; the principal injuries occurred in that state, and no other class actions against any of the defendants on behalf of the same class have been filed in the past three years, federal subject-matter jurisdiction under CAFA does not exist either.

• *Facing or forgetting the remand fight*

If less than one-third of all class members are citizens of the original forum state, CAFA requires federal subject-matter jurisdiction and remand cannot occur. But district courts have discretion to decline subject-matter jurisdiction if between one-third and two-thirds of the class members and the primary defendants are citizens of the state where plaintiff filed suit. And when exercising their discretion to decline jurisdiction, CAFA requires district courts to consider the following additional factors:

- Whether the claims involve matters of national or interstate interest;
- Whether the claims will be governed by the laws of the State in which the action was originally filed or by the laws of other States;
- Whether the class action has been pled in a manner that seeks to avoid federal jurisdiction;
- Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- Whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
- Whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.[19]

Finally, district courts must remand class actions if they satisfy CAFA's home-state or local-controversy exceptions.

As shown, CAFA's remand considerations involve the number of plaintiffs and where they reside, but from a plaintiff's perspective, counting class members and identifying their geographical locations can be virtually impossible at a lawsuit's inception. After all, defendants – not plaintiffs – are in a better position to know class members' identities and addresses. Further exacerbating this problem is the reality that many class members will likely have moved or purchased the product involved in the lawsuit through third parties, like distributors or retailers. These problems all create the very real risk of remand-related mini-trials over class size and class members' geographic locations, which mini-trials will likely require information that defendants will be uncomfortable disclosing. And even more uncomfortable is the possibility that if plaintiffs allege under $5 million in damages and forego a request for injunctive relief, defendants will be forced to argue that class members' damages actually exceed $5 million, which no defendant would relish doing.

Furthermore, while CAFA refers to "primary" defendants and defendants from whom "significant" relief is sought or who caused plaintiff's alleged "principal injuries," CAFA does not define either of these terms. Nevertheless, plaintiffs' counsel can try to influence remand by naming (or not naming) certain defendants; describing them as primary defendants or as defendants from whom they seek significant relief; or by describing injuries so as to make the injuries principal injuries.

Given the above-described likelihood of uncertainty and confusion, where minimal diversity exists trying to massage CAFA's contours into a formula that requires remand, is an all-but-impossible undertaking, whether concentrating on a class-action lawsuit's amount

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in controversy; class members' number and/or locations; which defendant is primary or significant; or which defendant caused plaintiff's alleged principal injuries. Given this difficulty, plaintiff's counsel should not try too hard to retain state-court, subject-matter jurisdiction for fear that attempting to do so may result in a remand-related sideshow, which plaintiff may lose after spending substantial time and money. Instead and most fundamentally, even given CAFA's enactment if plaintiffs' attorneys continue to sue responsible and worthwhile cases and believe in their cases with the ardor, zeal and fervor required by all states' ethical rules, it should make no real difference where plaintiffs' counsel try their cases, and justice should prevail whether sought in state or federal court.

Crafting broad settlements under CAFA

Come hopeful settlement time, drafting a suitably broad settlement agreement in a 50-state, class-action lawsuit (where class representatives from all 50 states are involved) is rather straightforward, as the settlement agreement will necessarily affect claims in all 50 states. But crafting a satisfactory settlement agreement in an exemplar-state, class-action lawsuit requires additional thought.

During litigation, defendants understandably strive for the narrowest class possible, but during settlement defendants endorse the broadest class possible. Since a typical exemplar-state, class-action complaint only alleges claims on behalf of people under comparable substantive laws in a handful of states, at settlement time the parties must figure out how to provide defendants expansive relief (without which defendants likely will not agree to settle) while recognizing and respecting due process and perhaps comity concerns. Because if the parties' settlement involves only the exemplar states, this leaves multiple states available for later lawsuits by other attorneys, which situation will surely discourage defendants from settling under any approach. And with the exemplar-state case possibly (but likely not) tolling any unsued state claims' statutes of limitations, even if an exemplar-state case lingered for years, huge exposure to defendants may still exist by way of other plaintiffs' lawyers bringing claims for citizens residing in any unsued states.

So, to be safe at settlement time, plaintiffs' counsel should consider amending their complaint to allege claims on behalf of class members in all 50 states. If plaintiffs sued their complaint in the defendant's (or the main defendant's, when multiple defendants exist) home state, amending their complaint in this manner does not necessarily create the standing, subject-matter jurisdiction, and class-membership issues described earlier since *Shutts* permits the forum state substantive law's extraterritorial application if doing so does not violate due process, such as when plaintiffs sue in the defendant's home state.[20] On the other hand, if plaintiffs sued (or the MDL Panel consolidated and transferred) their complaint in some other state, *Shutts* similarly allows the extraterritorial application of the pleaded states' substantive laws so long as no conflicts exist among these laws and the newly added states' substantive laws.[21] Finally, certain state's substantive laws, independent of *Shutts*, allow their extraterritorial application, which means that a federal court may approve multi-state settlements pursuant to these certain substantive laws without even the need to conduct a *Shutts* analysis.[22]

So even after CAFA, multi-state resolutions are possible, indeed desirable. If the parties take care while crafting their multi-state, class-action settlement agreements (keeping the aforementioned due process, jurisdictional and standing concerns that CAFA created in mind), the parties can likely resolve their litigation with the relief and peace of mind that everyone desires.

Conclusion

CAFA unquestionably made pleading, litigating, and settling multi-state, class-action cases more difficult, but it hardly made this procedure impossible. Although substantial class-action cases are now in federal court to stay, their new venue need not unduly agitate plaintiffs' counsel. If plaintiffs' attorneys pursue sensible and worthwhile multi-state, class-action lawsuits with the foregoing pleading themes in mind, plaintiffs' attorneys should be able to successfully resolve these claims even after CAFA.

Endnotes:

1 28 U.S.C., §1332(d).
2 Since this article examines federal class-action lawsuits, it will not discuss methods for avoiding CAFA's federal-subject-matter-jurisdictional requirements, such as pleading multiple city, county, or even smaller classes, each alleging under $5 million in potential damages.
3 28 U.S.C., §1332(d)(2)(A).
4 *Id.* at §1332(d)(2)(C).
5 *See Snyder v. Harris* (1969) 394 U.S. 332, 336 (The Court explained that "when two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount."). *See also Zahn v. Int'l Paper Co.* (1973) 414 U.S. 291, 299 (The Court explained that "class actions involving plaintiffs with separate and distinct claims were subject to the usual rule that a federal district court can assume jurisdiction over only those plaintiffs presenting claims exceeding the $10,000 minimum specified in 1332 [, and that a]ggregation of claims was impermissible.").
6 *Zahn*, 414 U.S. at 301.
7 Press release, The White House, President Signs Class-Action Fairness Act of 2005, http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html (last visited June 18, 2006).
8 *Ibid.*
9 472 U.S. 797 (1985).
10 *See id.* at 821 (Allowing extraterritorial application of single state's substantive law so long as "the choice of [one state's] laws is not arbitrary or unfair."). *See also In re St. Jude Med., Inc.* Silzone Heart Valves Prods. Liab. Litig., MDL No. 01-1396, 2006 U.S. Dist. LEXIS 74797 (D. Minn. Oct. 13, 2006), *11-12 ("Given defendant's significant contacts with Minnesota, no one would doubt that an individual class member could sue defendant in Minnesota and apply Minnesota law. Similarly, the Court concludes that it is constitutionally permissible to apply Minnesota law in the class action context.").
11 *See* 28 U.S.C., §1407(a) (2006) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

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[12] Of course, if the MDL Panel transfers the consolidated case to a "neutral" forum, plaintiffs may still argue that defendant's (or the main defendant's, if any) home state's law applies classwide under *Shutts*.
[13] *See* Fed. Rules Crim. Proc. 23(b)(3)(D) (When deciding whether a class action is the superior to other ways to resolve a controversy, the court may consider "the difficulties likely to be encountered in the management of a class action.").
[14] *See. e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.* (D. Maine 2006) 235 F.R.D. 127, 148 (certifying exemplar-state classes of indirect automobile buyers and lessees); *D.R. Ward v. Rohm & Haas Co.* (E.D. Pa. 2006) 470 F. Supp. 2d 485, 494 (denying defendants' motion to dismiss plaintiffs' exemplar-state complaint in consumer price-fixing case).
[15] *Zahn v. Int'l Paper Co.* (1973) 414 U.S. 291.
[16] Although avoiding a request for injunctive relief for the sole purpose of remaining in state court, when injunctive relief should be sought as an integral part of the class's damages, may subject class counsel to an adequacy-of-representation challenge at the lawsuit's class-certification stage.
[17] 28 U.S.C., §1332(d)(4)(B).
[18] *Id.* at §1332(d)(4)(A).
[19] *Id.* at §1332(d)(3)(A)-(F).
[20] *See supra* note 9.
[21] *See Shutts*, 472 U.S. at 816 (A court may apply a single state's substantive law extraterritorially so long as the law sought to be applied "is not in conflict with that of any other jurisdiction connected to the suit.").
[22] *See, e.g., Freeman Indus., LLC v. Eastman Chem. Co.* (Tenn. 2005) 172 S.W.3d 512, 523 (Non-Tennessee residents may invoke Tennessee's antitrust statute so long as the defendants' "alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree.").

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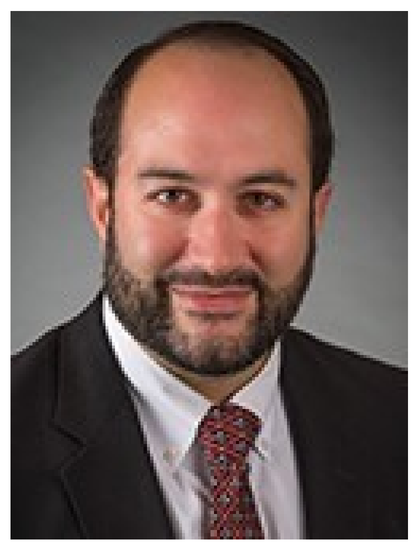
Expert Analysis

How Plaintiffs and Defense Counsel Misperceive Each Other

By **Daniel Karon and Philip Calabrese** September 25, 2017, 11:05 AM EDT

Daniel Karon



Philip Calabrese

What part of our job makes us most miserable? What part makes us want to quit? Here's a hint. It has to do with lawyers.

Tell your friends that lawyers are required to take continuing education classes not only on the law but also on alcoholism and substance abuse. Most other jobs — cashiers, secretaries, computer-repair techs, furniture salespeople, gas station attendants — don't require classes like ours. Add that our divorce rate is sky high and that, according to CNN, of all jobs, lawyers rank fourth in suicide.

Sure, law has its stressors. What job doesn't? But what is it that uniquely qualifies our profession for heightened misery? Misery to the point that lawyers who've left the practice jokingly (yet seriously) brand themselves "recovering"?

Our nonscientific thesis posits that our unhappiness comes from being terrible to each other. We believe this terribleness derives from a mutual demonization, objectification and vilification that, these days, seems baked into the art of advocacy.

Civility, as state bar associations call it, is a topic we frequently discuss within ranks but never with our opposition. These discussions, therefore, tend to stoke their own fire since when a group of lawyers agrees with itself (especially when centering on castigating its opponent) nothing understanding or conciliatory tends to emerge.

Why do opposing lawyers have such a dreadful time getting along? We think it stems from a shared misconnection, sowing a reciprocal misunderstanding, that leads to communal meanness.

It's not a fundamental or anthropological misconception, of course, because we're all just people. People who have families and mortgages. Who work hard to send our kids to school and to save for retirement. Who want to achieve these things by creating our vision and performing our version of the right thing.

We perceive our professional misconnection as centering on the previous paragraph's last point — our vision and version of the right thing. To unpack our thesis — that lawyers don't understand, appreciate or consider their opponents' vision or version of the right thing — we looked inward. We did this because we believe much of our misconnection derives from misperceiving (or outright ignoring) each other's goals, purposes and motivations.

To validate our theory, we chose not to consider what we thought of ourselves. We conduct that exercise all the time. These opinions tend to be gratuitously high.

We also chose not to consider what we thought of each other. That approach, we felt, was fraught with peril. It held too much judgment and was a good way to ruin our friendship.

So we crafted a more imaginative approach. We — a plaintiffs class action lawyer and a defense class action lawyer — examined ourselves. We asked what we believed our opposition thought about us and how our opposition judged us. Afterward, we presented this self-portrait to each other for assessment. We wanted to see how accurate we were about what we believed our opposition thought.

From this exercise, we hoped an understanding might emerge about what plaintiffs and defense lawyers think of each other. From this understanding, we hoped to draw comparisons and to recognize contrasts. We hoped to reveal an understanding that would

demonstrate how similar we are and why, based on these similarities, there exists no basis for the professional consternation that infects our profession.

How Dan Believes the Defense Bar Perceives the Plaintiffs Bar

The defense bar thinks plaintiffs lawyers fall into two principal camps: serious lawyers and shakedown lawyers.

Serious lawyers file cases like VW diesel emissions, Enron and Exxon Valdez. They are technically competent, ceaselessly committed and creative.

Shakedown lawyers file cases like Subway footlong, Starbucks iced coffee and the Ford truck coupon case. They walk the aisles at CVS looking for lawsuits concerning products whose labels, in their expert pharmacological opinion, don't hold up. They file a dozen alleged food-mislabeling cases, hoping one will stick since one settlement will pay their yearly nut.

Serious lawyers politick cases in ways that would dazzle Congress and make John Grisham wince, blithely horse-trading inventories and bargaining leadership. After all, there's a reason the bestselling novels and Hollywood blockbusters are about us.

Despite our never-ending list complaints about how the deck is stacked against us, defense lawyers think our work is rather easy, never mind the array of defenses available to dash even our best cases.

And, of course, we're all rich, only flying commercial when our private jets are down for repair. (I was at a hearing recently where defense counsel asked whether I'd flown my jet. I told her I hadn't; that I'd flown Southwest. Middle seat. Boarding group C.)

Finally, despite serious lawyers' serious acumen, the defense bar is convinced that we're largely, if not exclusively, profit-driven. Never mind that the cause is existentially valid; that's not why we filed the case. Any true purpose is pure pretext. It's the money that drives us. Period.

What the Real Plaintiffs Bar Looks Like

That's what I believe the defense bar largely (though, I'm certain, not entirely) thinks of my practice. Phil has read my remarks and has largely confirmed them.

Now, here's the truth. I'm not a shakedown lawyer, so I can't speak to how they perceive themselves or think anyone else does. I can only agree with defense counsel's perception of them.

As for serious lawyers, only a smattering of us fits the defense bar's stereotype. Serious lawyers are not viciously entrepreneurial, we do not place politics over our plaintiffs and we are not purely profit-driven. We are not uniformly rich, we don't all fly private and we are not fodder for the next Grisham novel.

Instead, we put everything on the line for what we believe in. We risk our families' comfort and security, often, these days, for the same wages as we could make doing hourly work, that is, if we won. We teach, we lecture and we write because we think our message of fairness, accountability and responsibility is important and worth sending — now more than ever.

We read Law360 every morning, dreading the possibility that the House has proposed another bill that will put us (and you) out of business. So we lobby Congress and testify on the Hill, doing our part (typically as one witness of four) to save the ever-dwindling bucket rights that remain for consumers, which consumers, of course, include defense lawyers and the real people who work at corporations.

We've made a life choice not to stand idle while the next defective product kills someone or the next Ponzi scheme guts a retired couple's savings. That's why we resent when someone paints us with the same ugly, entrepreneurial, profit-driven brush as they do shakedown lawyers. Indeed, we work to discourage shakedown lawyers from filing cases that would advance congressional efforts to eviscerate consumers' rights and our shared practice.

We do all this on our own time and our own dime because we care about protecting access to justice, keeping the marketplace fair and ensuring that everyone — including defendants — retains the rights that our Constitution guarantees.

We're comfortable with the notion that risk deserves reward and that getting paid for doing good work is not an illicit concept. We know that without risk-taking plaintiffs lawyers — lawyers who put everything on the line for what they believe in — not only would corporate cheaters would run amuck, ravaging consumers and victimizing well-behaving corporations, but also there would be no defense lawyers. After all, our practice is essential to yours. Yours is not essential to ours.

At bottom, we believe it's the shakedown lawyers who spur defense counsel's misperception of our practice. Shakedown lawyers are so brash, shameless and visible that it's easy for the defense bar, the Chamber of Commerce and social media to graft their ugliness onto the better, more important and more virtuous aspects and people of the plaintiffs bar. If ever a few bad apples ...

The plaintiffs bar is necessary. Consider how things would look without us. We'd be left with an uncomfortable choice between governmental regulation and an unenforced wasteland where companies steal and products kill. Just like corporations are people, the plaintiffs bar is people. People who work hard and risk everything to do something that they believe is right and that matters.

How Phil Believes the Plaintiffs Bar Perceives the Defense Bar

The plaintiffs bar thinks defense lawyers have it easy. We have clients who pay us monthly, allowing us to have lucrative practices and extravagant (or at least comfortable) lifestyles with little risk.

We command vast resources that includes legions of associates, paralegals and secretaries, around-the-clock docket clerks and word-processing departments, and Lexis, Westlaw and the latest software, industry resources and online tools — all enshrined in lavish offices bedecked in weekly floral arrangements and rotating artwork.

According to the plaintiffs bar, our clients leverage these resources to mount a vigorous, but largely frivolous, defense to generally meritorious claims. We fight for every scrap of ground — removal, standing, dismissal, Twombly, ascertainability (is that even in Rule 23?), interlocutory appeals and more.

We have never seen an unobjectionable discovery request, we rarely produce all relevant discovery, we feign mistake when we intentionally fail to produce relevant documents, we move to disqualify every expert under Daubert and we file an endless series of motions, whether on discovery issues, Rule 23 or summary judgment. Our game is one of delay and driving up costs, hoping to break plaintiffs counsel's will and spirit and to outlast their resources.

On the merits, we know the Federal Rules of Civil Procedure better than we know our own children, and we deploy these rules to distract from the real and substantial harm that our clients have done.

When it comes to taking a deposition or arguing a motion, maybe a few of us have decent (but not great) stand-up skills. Even fewer of us have any meaningful trial experience. But our focus on procedure and discovery distracts from these weaknesses and the largely indefensible merits of every plaintiff's case.

Supporting and enabling all of this are our well-heeled clients, whose wealth is only exceeded by their depth of personnel and resources available to educate us about the lawsuit's factual and legal background that we'll never disclose to the extent it damages our client's case.

At bottom, our clients seek to make a buck by selling shoddy products, marketing deceptively or engaging in other behavior so egregious that its illegality is patently obvious to anyone who is not a defense lawyer.

What the Real Defense Bar Looks Like

I have shared these perceptions with Dan, and he tells me I'm right. He tells me large swaths of his bar (not him, of course) perceive my practice largely along these lines.

Like most generalizations, this portrait has some kernels of truth but largely misses the mark. The businesses we represent employ many people. These businesses and their people make significant positive contributions to society. They make the products we love and use every day. They build our cars, they produce our food and they make our country the wealthiest the world has ever seen.

They do all this at great cost, with great risk and in the face of myriad challenges and obstacles. In many cases, class actions challenge (usually with the benefit of hindsight) a product or practice at the core of a company's success. This makes the case personal for the real people whose product or practice is targeted.

Do some companies engage in shady or illegal practices? Of course. But these companies — these people — are the exception. The problem is too many cases have too little merit and do little more than impose cost with little benefit to customers or society. In these circumstances, litigation feels more like legalized extortion than the administration of justice.

As for our litigiousness, the burdens of discovery are generally asymmetrical. Most plaintiffs have few, if any, worthwhile documents. Plaintiffs counsel often lack any idea how difficult and costly harvesting documents or identifying custodians can be, particularly in large, sprawling organizations with high turnover and frequent acquisitions, and where plaintiffs allegations often span decades.

In many cases, plaintiffs counsel has had months or years to investigate their claims before filing suit, so it should not surprise them that defense counsel and its clients need time too. Moreover, the motions that plaintiffs lawyers complain about protect rights and interests important not only to defendants but also to plaintiffs. Though plaintiffs counsel might prefer that defendants confess judgment and pay a fee, there is nothing wrong with insisting that plaintiffs carry their burden of proof.

Plaintiffs counsel also has little visibility into the broad and diverse range of company stakeholders, even on small matters. So when a case should settle, stakeholders need to reach that conclusion. That takes time and effort.

Every time plaintiffs lawyers talk about the risk they face when filing suit, we and our clients hear two things. First, plaintiffs counsel doesn't appreciate the risks and costs to defendants. To the contrary, we often perceive plaintiffs counsel as part of a calculated strategy to force settlement of a defensible claim.

Second, plaintiffs counsel has little appreciation for how much the economics facing law firms have changed in the past ten years. Even meritless claims can net plaintiffs counsel more fees than defense counsel, to say nothing of the increased risk of fee disputes and malpractice claims that accompany unfavorable results.

The defense bar is not a band of soulless mercenaries who defend the indefensible for the right price. It’s a group of thoughtful lawyers doing their jobs, protecting people and businesses who deserve it and encouraging accountability where necessary and appropriate.

Owning and Deconstructing Our Stereotypes

So we thought we had each other figured out? Apparently not. Because of this, is it any surprise that we treat each other so poorly? Given our misperceptions, what could we expect?

But now we know our professional stereotypes aren’t true. We’ve seen how essential it is to deconstruct these stereotypes — stereotypes that discourage good behavior and encourage the ugliness that makes us unhappy.

Given the professional and personal overlap we’ve exposed, we hope everyone can begin to appreciate that plaintiffs and defense lawyers are just people who have committed their professional lives to helping people solve their problems.

And these problems are shared in that their solution requires the involvement of plaintiffs and defense attorneys. It’s just that we approach these shared problems from different entry points and from different perspectives. But this doesn’t make one approach right and the other wrong. It just makes them different.

Lawyers are lawyers. There’s no need for misery, particularly when considering what lies at the nub of our professional charge — helping people. Every day should invigorate us because every day carries the prospect of doing something great for another person.

Sure, our process is an adversarial one. We don't mean to suggest it isn't. But adversarial needn't mean personal. If we keep in mind that we're the same person, just on the other side of the v., we believe our profession can go a long way toward recapturing the civility and consideration that once defined the art of advocacy and the practice of law.

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Why 'Class Action Attorney Fees' Are Such Dirty Words

By **Daniel Karon** July 13, 2017, 9:18 AM EDT

Daniel Karon

"Look at this. It's one of those class action settlement notices."

"I can never understand those things. What's it say?"

"I don't know. But whatever it says, I'm sure those plaintiffs lawyers are making out."

How many times have we heard this discussion? Hell, how many times have we had this discussion? For eons, the notion that plaintiffs class action lawyers deserve payment — sometimes handsome — for their services has drawn ridicule and scorn.

But why? Why do so many people insist that payment to plaintiffs class action lawyers deserves unrivaled scrutiny — scrutiny reserved for no other profession, even when these lawyers have achieved good results?

Does the answer lie in the gauche television spots that advertise for mass tort clients? No, those are just irksome. Is the answer found in the manufactured law firm studies that purport to show that plaintiffs class action lawyers make gobs of money at their clients' expense? No, those are just lies.

Then what's driving the public's disdain? Disdain that has spilled into our courts and routinely affects attorneys' fee requests at final approval. What has gotten people so riled up that the first thing they look for in class action settlement notices is the attorneys' fee provision, never mind that these notices provide their readers a benefit that they didn't have moments earlier?

When you boil it down, the issue really isn't plaintiffs class action lawyers getting paid. Everybody deserves to get paid for their work. Defense lawyers deserve to get paid for their work. Judges deserve to get paid for their work. Other professionals, like doctors, engineers and accountants, deserve to get paid for their work.

Turning to corporate America, certainly no one would question that Bill Gates, Jeff Bezos and Mark Zuckerberg deserve to get paid for the work that they do. Because when you do a job and when you add value, you deserve to get paid. Just not plaintiffs class action lawyers.

Presently, I have a class action lawsuit pending against a health club chain for stealing wages from its group fitness instructors by refusing to pay them for all the time that they worked. I also have a class action case against a health insurer for slipping secret charges into its administrative contracts with cities, counties and school districts, leaving these groups with less money to pay for vital community programs and services.

What I do not have is a class action case against Subway for failing to provide customers twelve inches of sandwich, despite the store's advertisement that it would. Nor do I have a case against Starbucks because its ten-ounce iced coffee drinks are slightly less than ten ounces, since, after all, Starbucks needs to leave room for the ice that makes its drinks iced in the first place.

My cases are sensible. They involve real clients. And they strive to solve my real clients' real problems. Easily, Subway and Starbucks don't fit that bill. Those were "lawyers' cases." They were intended to do but one thing — make plaintiffs counsel money. No sensible person can fairly say that if I win my cases — if I spend thousands of hours, risk hundreds of thousands of my own dollars and forego other fee-paying opportunities — I don't deserve to make a respectable fee.

So back to my question: What's driving the public's disdain for plaintiffs class action lawyers getting paid? Actually, I answered this question when I remarked that "when you add value, you deserve to get paid." Because it's not about moving papers and exchanging capital. It's about making a difference. It's about adding value.

I suspect that no one questioned class counsel's impressive payday in the breast implant litigation. There, attorneys recovered $3.4 billion for women who suffered autoimmune disease from defective silicone breast implants. I also doubt anyone honestly believed that plaintiffs counsel didn't earn their fee in the Enron securities case. That case settled for $7.2 billion and compensated shareholders whose stock became worthless when the company collapsed.

But when 1 million owners of defective Ford trucks received the opportunity to claim coupons worth $300 or $500 toward the purchase of a new vehicle while plaintiffs lawyers took home $25 million in fees, that was a problem. (Sounds an awful lot like Subway and Starbucks, doesn't it?)

No one can deny the age-old maxim that risk deserves reward. Without risk-taking plaintiffs lawyers — lawyers who put everything on the line for what they believe in — there would be no defense lawyers and corporate cheaters would run amuck, ravaging consumers and victimizing well-behaving corporations.

But no one should expect plaintiffs lawyers to risk their families' comfort and security for the same wages as these lawyers could make performing hourly work. Anyone who thinks different is either delusional or professionally jealous, though that jealousy tends to dissipate at the specter of no direct deposit every two weeks or at losing class certification after having spent four years and half a million dollars of your own money pursuing something you believed in.

Considering all this, it's little wonder that in Amchem Products v. Windsor, the U.S. Supreme Court, when centering on small recoveries, expressed that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," and that "[a] class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

It's not the class action system that's defective. That system is thoughtful, sensible and well intentioned. It's the system's all too frequent manipulation by reckless plaintiffs lawyers and their defense colleagues' complicity in supporting senseless settlements that's the problem.

And when considering defense counsel's insistence that their clients have instructed them to settle lawyers' cases, the easiest response is for them simply to resist plaintiffs counsel's demands for outlandish fees and to let the judge decide. After all, it's unethical to negotiate attorneys' fees until the parties have settled anyway.

Stupid class action lawsuits filed by feckless lawyers are a disgrace. They are a tax on society. They torture Rule 23's purpose, which is to help people on a mass basis, not hurt them. But as destructive as bad class actions are, good class actions are that essential.

So the next time you wince at a class action settlement notice's description of attorneys' fees, ask yourself whether you're troubled by the lawyers' right to get paid or by the remedy that these lawyers obtained as their basis for doing so. I think you'll be surprised at how your perception has changed.

Daniel R. Karon is a class action attorney in Cleveland, Ohio and Law360 guest contributor. He chairs the American Bar Association's National Institute on Class Actions and teaches complex litigation at Columbia Law School.

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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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NYSBA Annual Meeting: Class Action Program
The Year in Class Action Jurisprudence
January 17, 2019

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.

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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

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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

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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.

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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

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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

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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

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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

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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,

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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

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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

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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

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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

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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

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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

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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.

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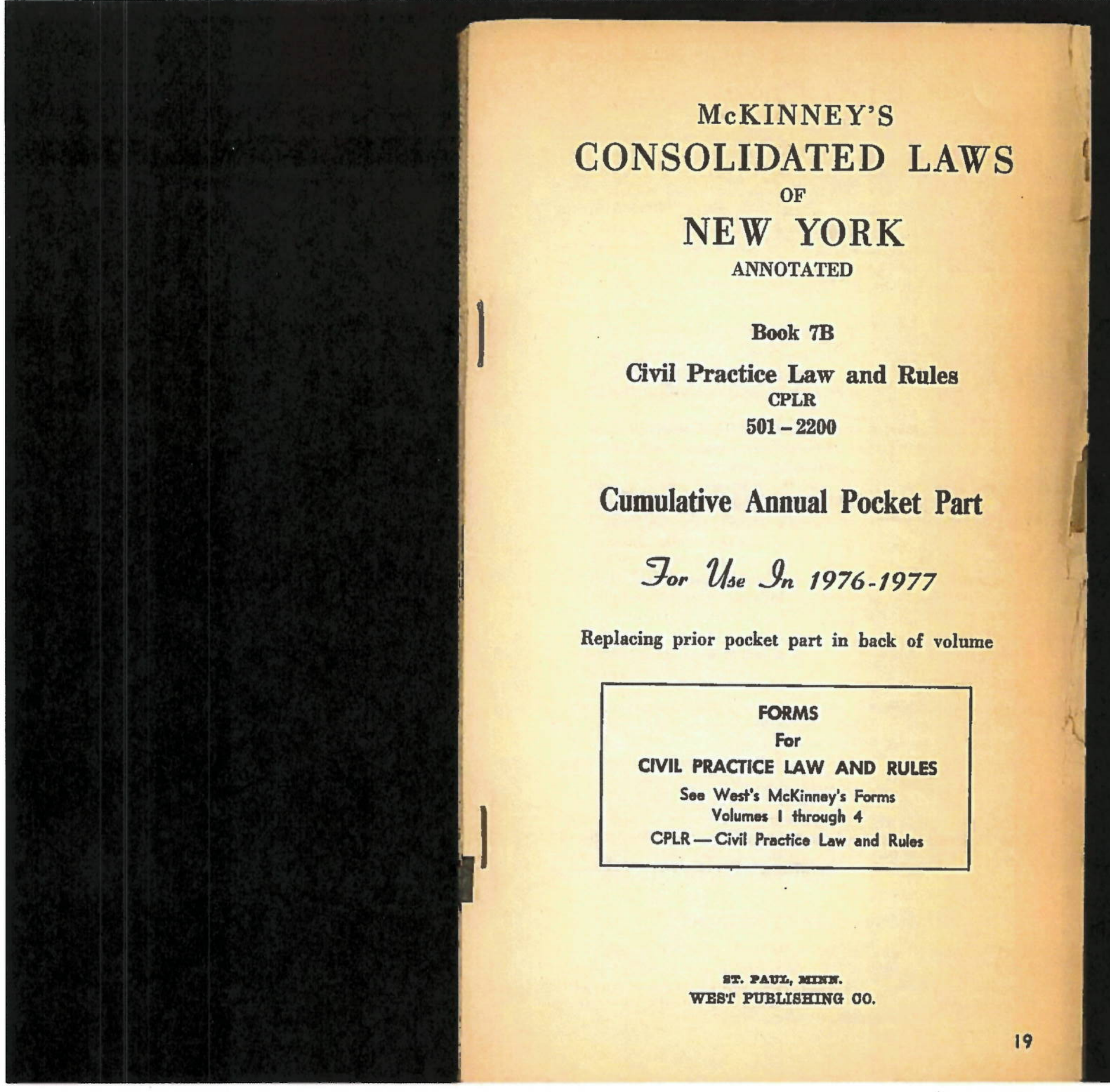

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§ 906. Actions conducted partially as class actions

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 918.

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

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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

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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,

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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

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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

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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

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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

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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**

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Desrosiers v. Perry Ellis Menswear, LLC, N.Y., December 12, 2017

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

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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.

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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

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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)

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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

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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.

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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**

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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?"

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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

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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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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.

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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*

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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

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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

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(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.*).

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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

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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.

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CLASS ACTIONS IN THE DOCK:

Trends and Developments in Class Certification and Class Action Practice

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

December 1, 2018

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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.

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[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.

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[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).

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[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

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[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

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[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

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[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.

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[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

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[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

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[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

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[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

---

[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

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[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).

The Long Reach of Class Actions: Trends in Class Action Litigation

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The 2018 Carlton Fields
Class Action Survey
Best Practices in Reducing Cost and
Managing Risk in Class Action Litigation
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Introduction

Carlton Fields is pleased to share its seventh annual Class Action Survey, providing an overview of important issues and practices related to class action matters and management. As this annual publication evolves, we strive to report on historical trends captured since the inception of the survey and to include information related to emerging issues.

Class action spending has risen for a third consecutive year, and is expected to increase again in 2018. Companies express concern about the intersection between regulatory proceedings and class action litigation. They continue to struggle with reduced staffing and to grapple with the best way to employ cost-saving measures such as alternative fee arrangements without sacrificing the quality of their defense efforts.

This installment of the Carlton Fields Class Action Survey is based on interviews with general counsel or senior legal officers at 385 companies of all sizes and business types. They shared their thoughts about class action exposure and best practices for class action management. We thank you for taking the time to review our survey, and trust you will find valuable information that helps your company and its legal department manage these prevalent, costly lawsuits both effectively and efficiently.

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Executive Summary

Class action spending has been on the rise annually since 2015, after a downward trend that occurred between 2011 and 2014.

Across industries, companies spent $2.24 billion on class action lawsuits in 2017. The number of companies facing class actions climbed to 59 percent, up from 53.8 percent in 2016. Companies reported that the magnitude of potential exposure and risk also rose. While the average volume of class actions per company increased slightly, from 5.9 in 2016 to 6.3 in 2017, a more significant jump in class action matters per company is anticipated in 2018.

Labor and employment matters remained the most common type of class actions companies faced in 2017. They accounted for 24.7 percent of matters, and 21.6 percent of spending. Consumer fraud matters remained the second most prevalent category of class actions, comprising 18.2 percent of matters and 18.9 percent of spending. There was a sharp rise in product liability and antitrust matters, which ranked third and fourth, respectively. Together, these four segments accounted for two-thirds of class action spending. While companies continue to view data privacy class actions as a threat, fewer than one quarter have actually faced a data privacy class action.

Sixty-eight percent of companies report facing one or more class actions on an ongoing basis, a number that has been fairly consistent for several years. For the first time this year, we report on the intersection between regulatory proceedings and class actions. Over 70 percent of companies report having faced regulatory proceedings and class actions concurrently.

The volume of bet-the-company and high-risk class action matters per company increased from 25.3 percent in 2016, to 26.2 percent in 2017. While the percentage of companies that faced a bet-the-company class action dipped slightly, from 16.7 to 13.9 percent, those companies facing high-risk matters increased from 37.5 percent in 2016 to 42.6 percent in 2017.

Although risk and exposure continued to rise, the number of in-house lawyers assigned to manage class actions has not increased. On average, companies dedicate 3.2 full time attorneys to handle class action litigation, and the amount of time those attorneys spend each week on the management of class actions increased for the fourth consecutive year. Fewer companies made a single individual accountable for their class action outcomes. Only 51.6 percent of companies, down from 62.2 percent in 2016, reported that they made a single individual accountable. More than 58 percent of companies, up from 46.2 percent in 2016, described outside counsel's role in early case assessment as "essential."

When evaluating the risks presented by class actions, exposure was still deemed the most important variable, and companies reported a rise in the importance of applicable case law as compared to other risk

variables. Class action settlement rates increased from 62.5 to 70.8 percent. While most cases settled at the pre-certification stage, 37.5 percent settled following certification, up from 23.4 percent in 2016. "Coming in under estimated exposure" displaced damages as the key determinant of success.

Companies are cautiously optimistic about the impact of future Supreme Court rulings on class action risk for businesses, with 32.1 percent reporting that they expect any changes in the composition of the Court to be favorable. Most companies report, however, that the political climate in Washington, D.C., in general, does not impact their defense of class actions.

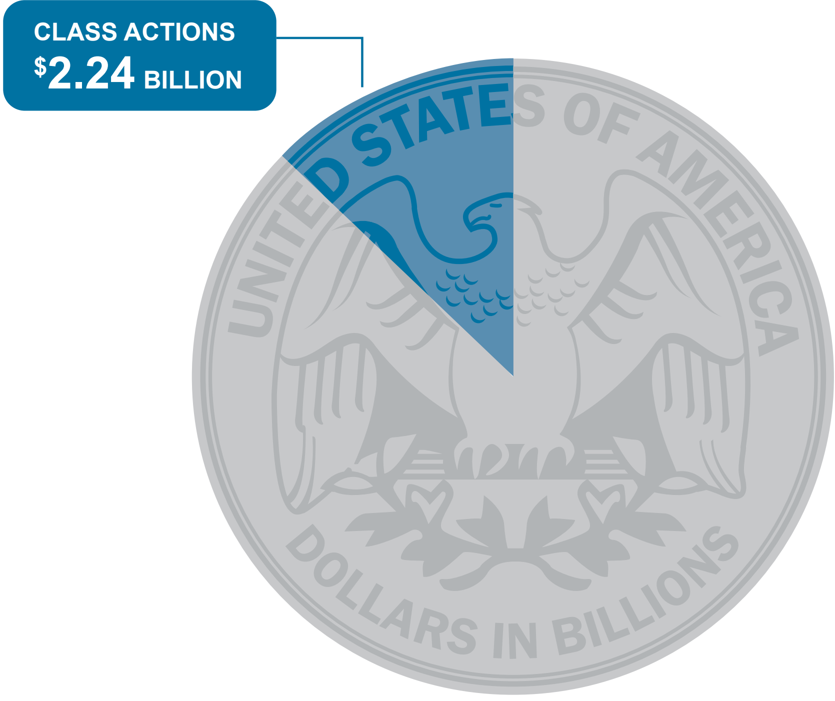
After the use of class action waivers in arbitration clauses dropped to 30.2 percent in 2016, more companies, 37.2 percent, reported using these clauses in 2017. As the number of class actions managed continued to rise, companies also returned to alternative fee arrangements, seeking budget predictability and efficiency. Forty-nine percent of companies reported using AFAs, up from 35.8 percent in 2016 and down just slightly from 49.2 percent in 2015. Within companies using AFAs, fixed fees remained the most prevalent type, although the percentage of companies using them dropped from 78.9 percent to 71.7 percent. In addition, phased fee arrangements, where work is assessed and billed by a portion or segment of the class action process, continued to become more common. Forty percent of companies reported using phased fees, up from 30.2 percent in 2016.

Class Action Spending and Budgets

Class Action Spending Increases A Third Consecutive Year

Class action spending increased to $2.24 billion in 2017, accounting for 11.4 percent of all litigation spending in the United States.

$19.7 Billion Market for Legal Services in Litigation

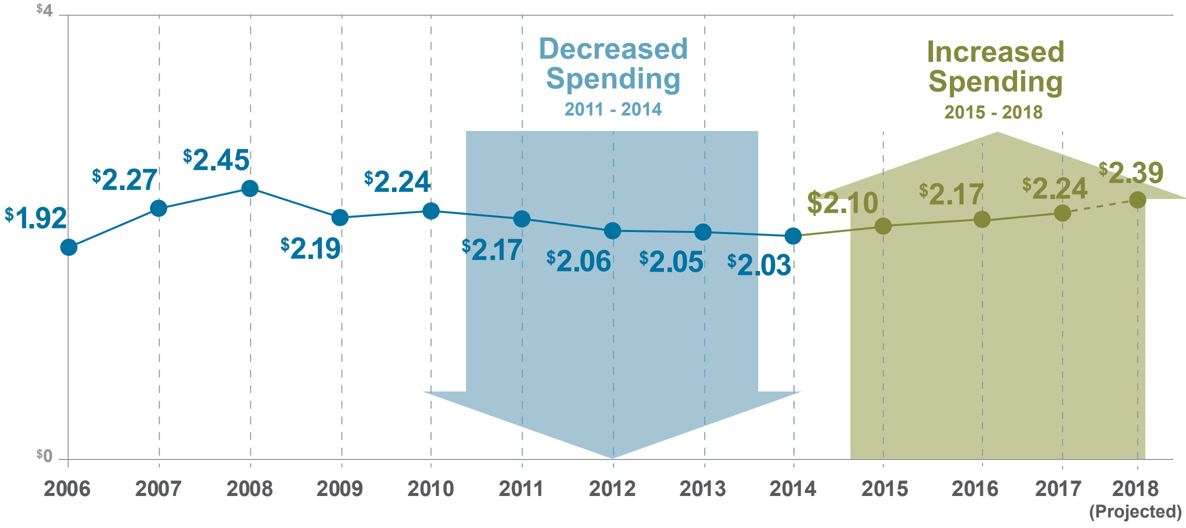


Increased Class Action Spending Trend Continues

In 2018, class action spending is projected to climb to $2.39 billion, its high-water mark over the last 10 years. This continues the trend of increased spending that began in 2015.

U.S. Corporate Legal Spending on Class Actions

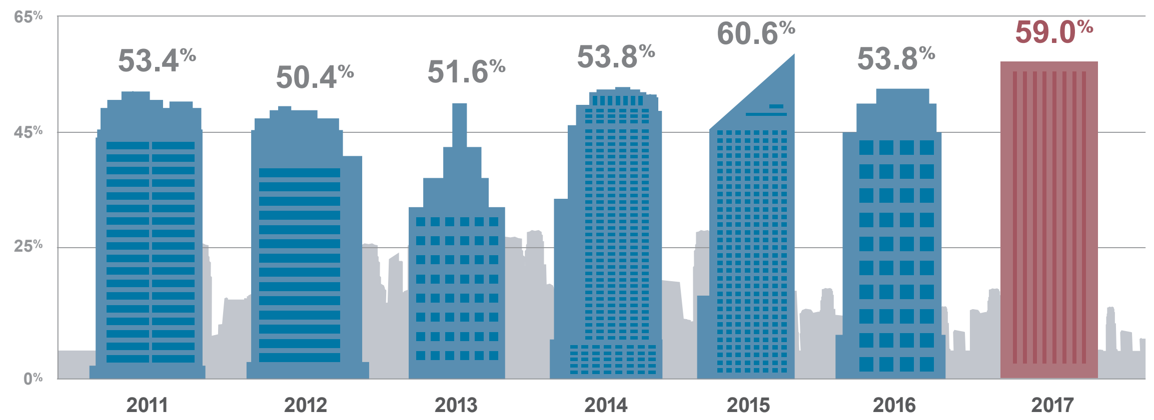
$ Billions



Type and Frequency of Class Actions

Percentage Of Companies Managing Class Actions Approaches Sixty Percent

In 2017, the number of companies managing class actions increased to 59 percent. Over a seven-year span, the historical annual average of companies managing such cases is approximately 55 percent.



Product Liability And Antitrust Account For Greater Share Of Class Action Matters And Spending

Although labor and employment class actions remain the most common type of class action, making up 24.7 percent of matters and 21.6 percent of spending, these are sharp reductions from 2016. Product liability class actions now account for 14.9 percent of matters and 12.1 percent of spending. Antitrust class actions now account for 12.6 percent of matters and 13.5 percent of spending. Together, four segments account for two-thirds of all class action matters and spending.

Class Actions and Annual Spending Breakdown by Type

Percent of Matters and Spending

PRACTICE	MATTERS	SPENDING
LABOR & EMPLOYMENT	24.7%	21.6%
CONSUMER FRAUD	18.2%	18.9%
PRODUCT LIABILITY	14.9%	12.1%
ANTITRUST	12.6%	13.5%
SECURITIES	7.1%	7.4%
INTELLECTUAL PROPERTY	6.9%	7.4%
OTHER	15.6%	19.1%

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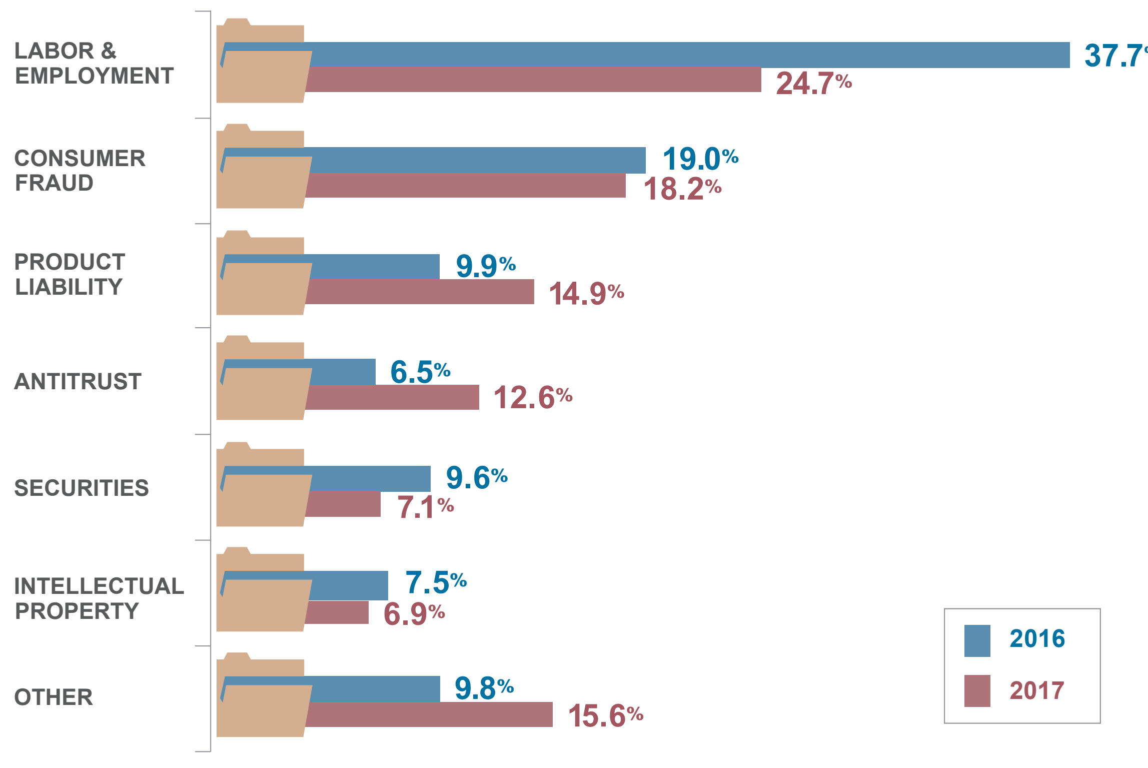
Sharp Rise In Product Liability And Antitrust Class Actions

Companies reported a drop in their percentage of class actions involving labor and employment issues in 2017, and the difference was reflected in the corresponding increases in both product liability and antitrust class actions. Product liability increased as a percentage of matters from 9.9 percent in 2016 to 14.9 percent in 2017. The percentage of antitrust class actions reported by surveyed companies nearly doubled, increasing from 6.5 percent in 2016 to 12.6 percent in 2017. Although it has been widely reported that 2017 saw a substantial increase in the number of securities class actions filed in the federal courts, our survey respondents identified fewer securities matters as a percentage of their class actions.

Class Action Matters – Breakdown by Type

Percent of Matters



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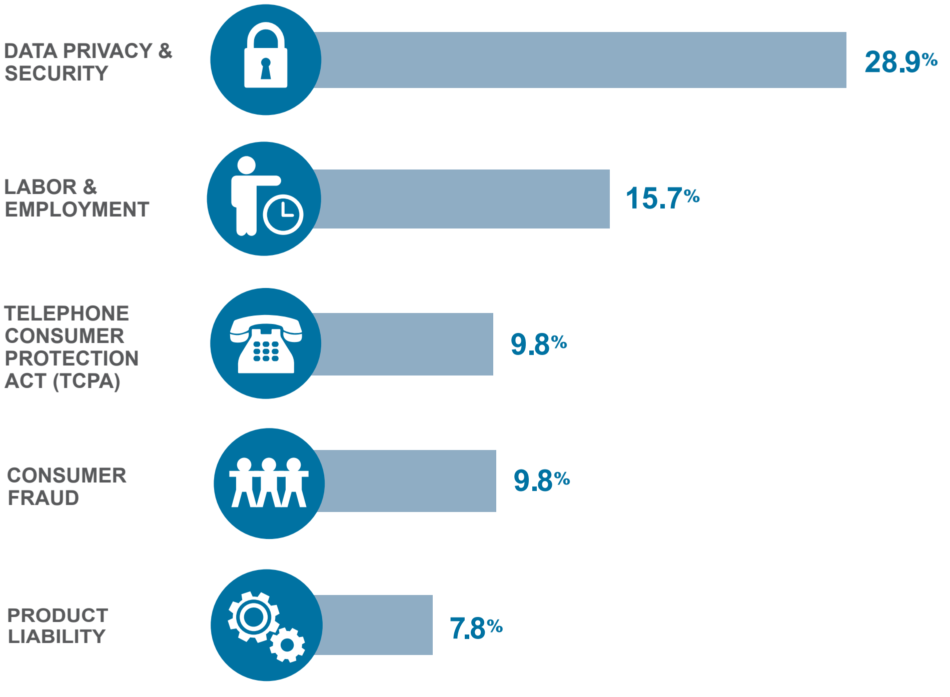
Data Privacy And Security Class Actions Return As The Predicted Next Wave

In 2018, data privacy and security is again the top concern for corporate counsel as the predicted next wave of class actions. This is consistent with responses in four of the last five years. Companies cite the potential for data breach claims associated with internet connected products, such as medical devices and home appliances, as an example of the predicted next wave of data breach litigation. Nearly 16 percent of companies continue to express concern about a wave of future class action filings involving employment matters.

Predicted Next Wave of Class Actions

Percent of Companies



Note: Chart does not add up to 100%. Excludes responses under 7%.

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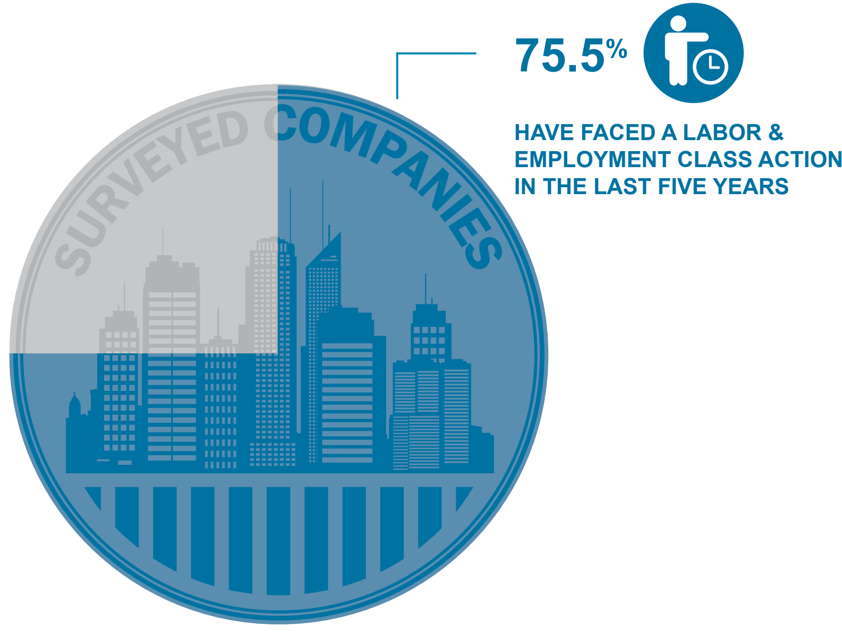
Three-Fourths Of Companies Have Faced A Labor And Employment Class Action In The Last Five Years

While the majority of companies have faced a labor and employment class action in the last five years, concern over future threats of labor and employment class actions varied greatly from company to company. On a 1 to 10 scale, the average level of concern was 4.85. Companies that previously faced a labor and employment class action report the highest level of concern.

Labor & Employment Class Actions
Percent of Companies



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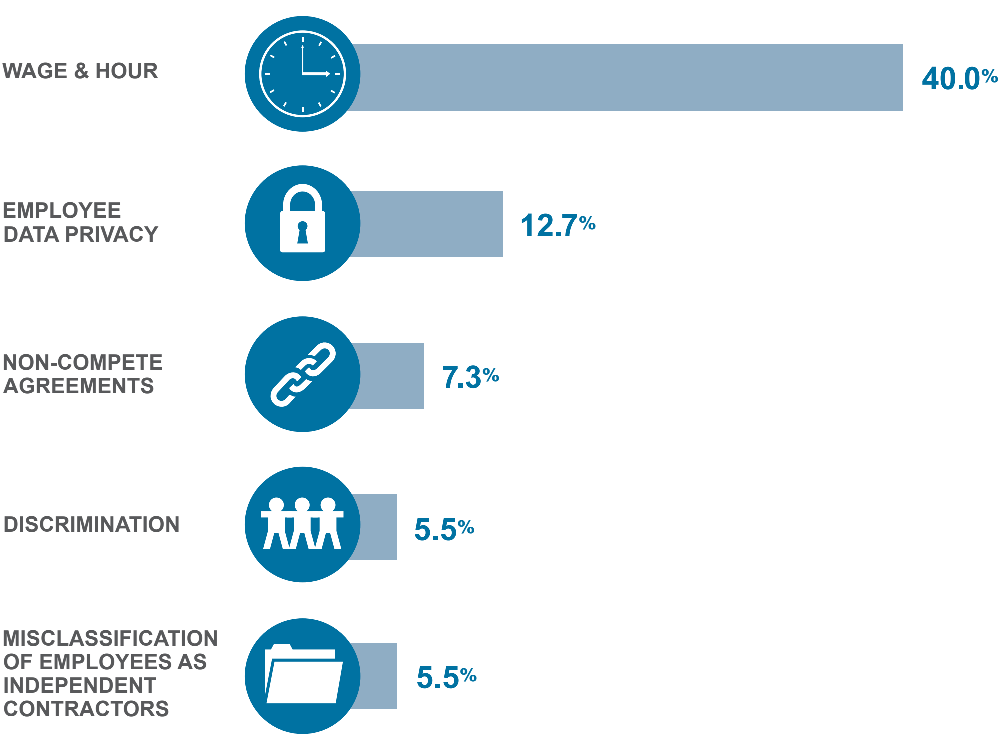
Wage And Hour Class Actions Are The Dominant Labor And Employment Concern For Companies

Forty percent of companies viewed wage and hour class actions as the greatest employment-related class action threat.

Labor & Employment Matters – Highest Level of Concern

Percent of Companies



Note: Chart does not add up to 100%. Excludes responses under 5%.

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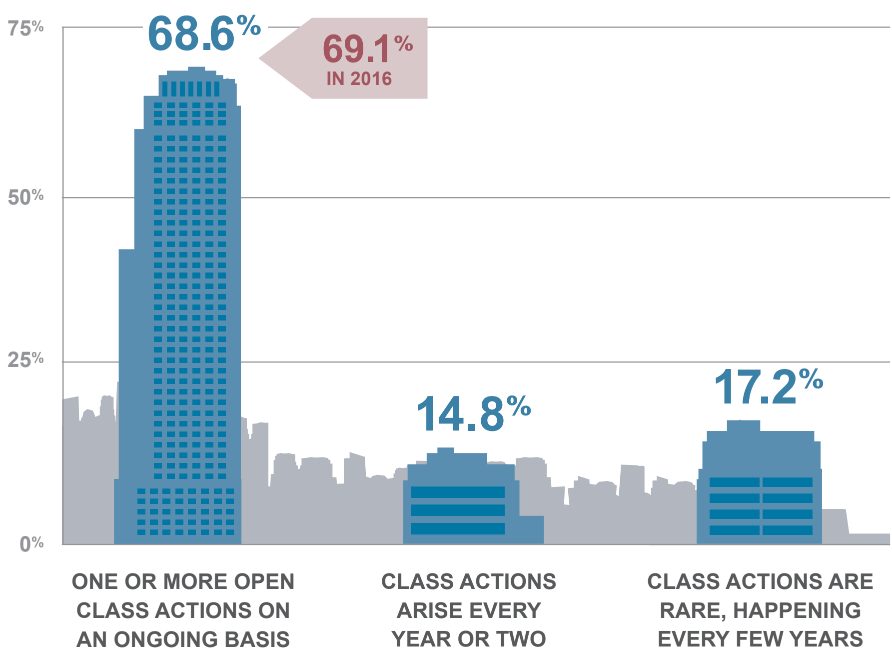
Class Actions Remain A Part Of Everyday Life For Many Organizations

Of the companies surveyed that reported handling class actions, the percentage indicating they had one or more open class actions on an ongoing basis was 68.6 percent, a number which has varied minimally over the last three years. Fewer companies, 14.8 percent, reported facing a class action "every year or two" compared to the 17.6 percent that provided the same response in 2016. The number of companies reporting that class actions are a rare occurrence was up four percentage points to 17.2 percent.



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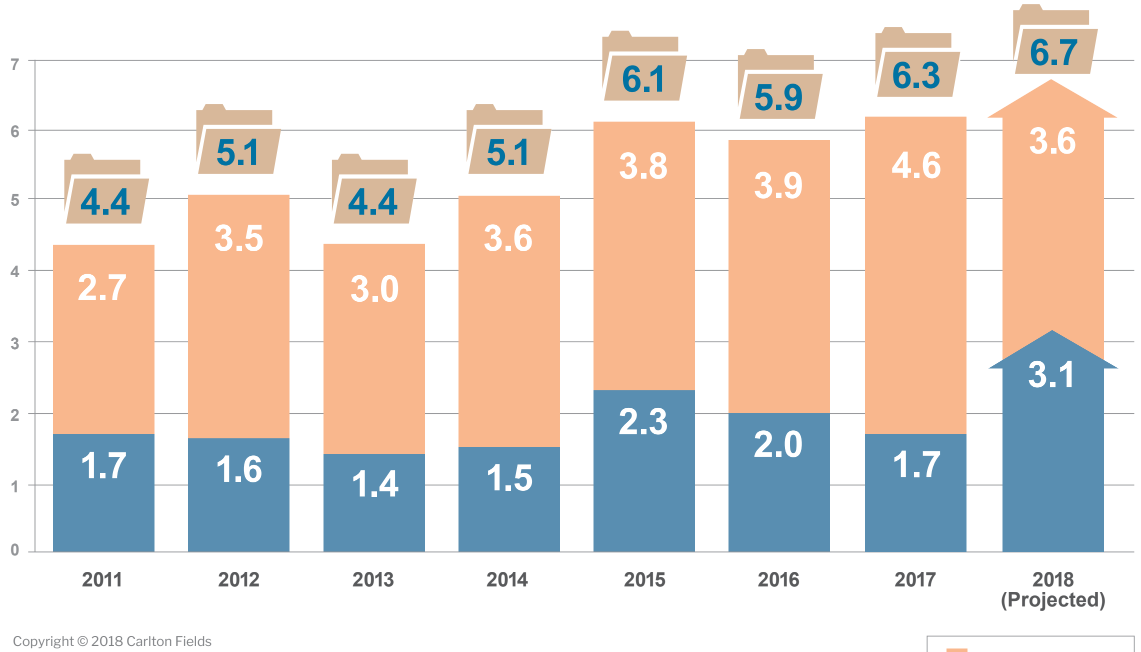
The Number Of Class Actions Per Company Reached A New High In 2017

On average, companies managed 6.3 class actions in 2017, a slight increase over the number of class actions they managed in 2016, and the highest number reported in the seven years of the survey. Companies expect this number to increase again, to 6.7 class actions in 2018. Companies averaged 1.7 new class actions in 2017, but they predict this number will rise to 3.1 in 2018.

Current and Future Class Actions

Average Number of Matters Per Company



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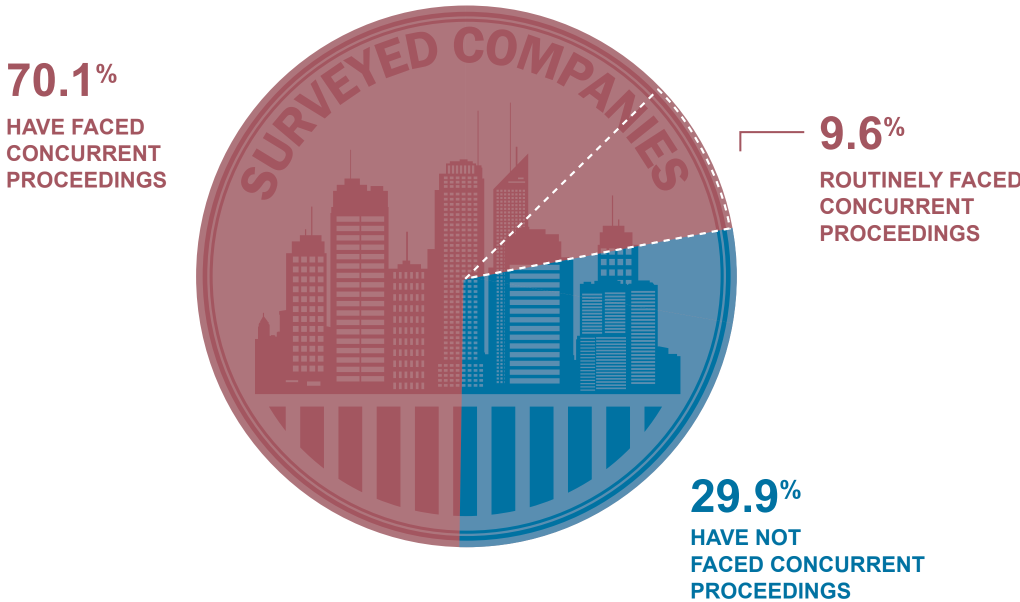
Most Companies Face Concurrent Regulatory Proceedings And Class Actions

Seventy percent of companies report having faced regulatory proceedings and related class actions concurrently, and 9.6 percent report that concurrent proceedings routinely occur.

Frequency of Concurrent Class Actions & Regulatory Proceedings
Percent of Companies



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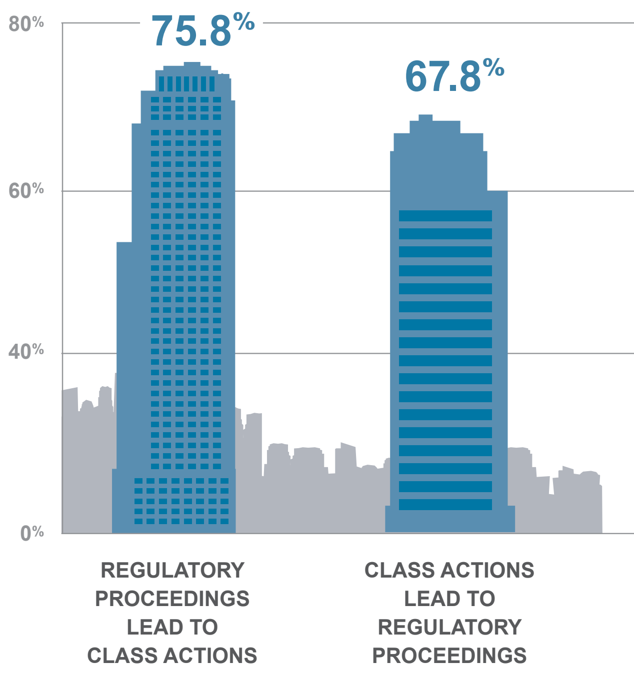
The Link Between Regulatory Proceedings And Class Actions

Nearly 76 percent of companies report that regulatory proceedings have been followed by a class action at some point, while 67.8 percent report that class action litigation has led to regulatory proceedings.



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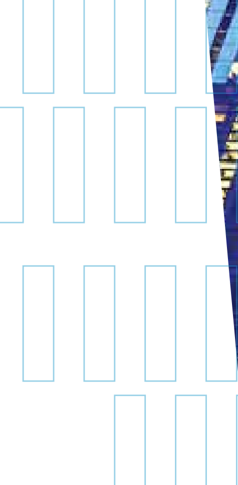

Concurrent Regulatory Proceedings And Class Actions Are A Significant Concern To Companies

When asked which of three scenarios concerned them the most, 60 percent of companies reported that they were most concerned about concurrent regulatory and class action proceedings. Approximately 26 percent were most concerned about regulatory proceedings leading to class action filings, and only 14.3 percent of companies were most concerned about regulatory proceedings following class action litigation.

Level of Concern
Percent of Companies

SURVEYED COMPANIES

60.0%
MOST CONCERNED ABOUT CONCURRENT PROCEEDINGS

25.7%
MOST CONCERNED ABOUT REGULATORY PROCEEDINGS LEADING TO CLASS ACTIONS

14.3%
MOST CONCERNED ABOUT CLASS ACTIONS LEADING TO REGULATORY PROCEEDINGS

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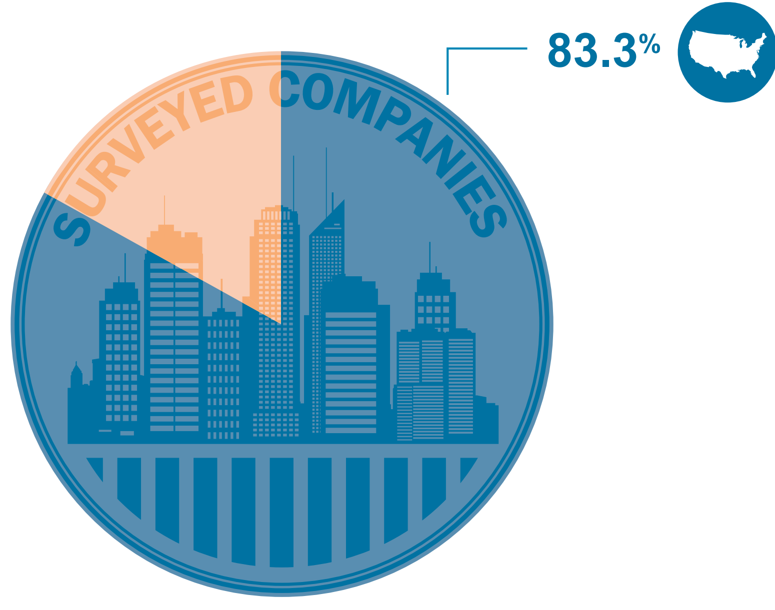
Most Companies Defend Class Actions Filed In The United States Only

Of the companies that reported defending class actions in the past 12 months, 83.3 percent said they are defending matters filed in the United States only. Companies that indicated they were defending class actions outside the United States reported that these matters were filed in Canada, the United Kingdom, the Netherlands, and Germany.

Defending Class Actions in the U.S. Only

Percent of Companies



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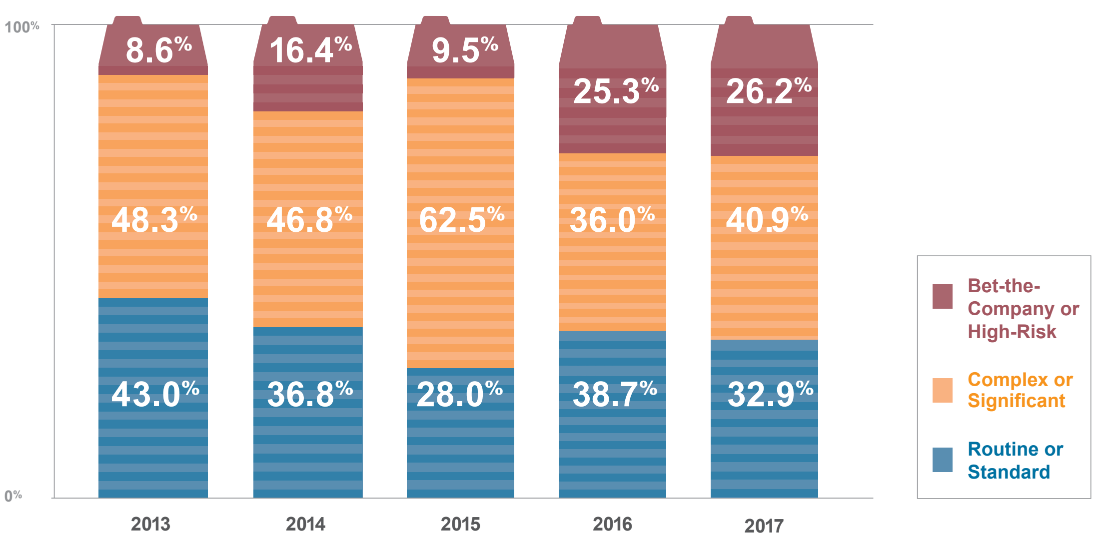
Risk Associated With Class Actions Continues To Rise

The volume of bet-the-company and high-risk class actions continued to rise, from 25.3 percent in 2016, to 26.2 percent in 2017. Class actions categorized as complex or significant also rose from 36 percent in 2016 to 40.9 percent in 2017 as the types of class actions companies considered routine or standard declined. This rise in higher risk matters is consistent with the increase in class action spending over the past three years.

Class Actions by Risk Level

Percent of Matters



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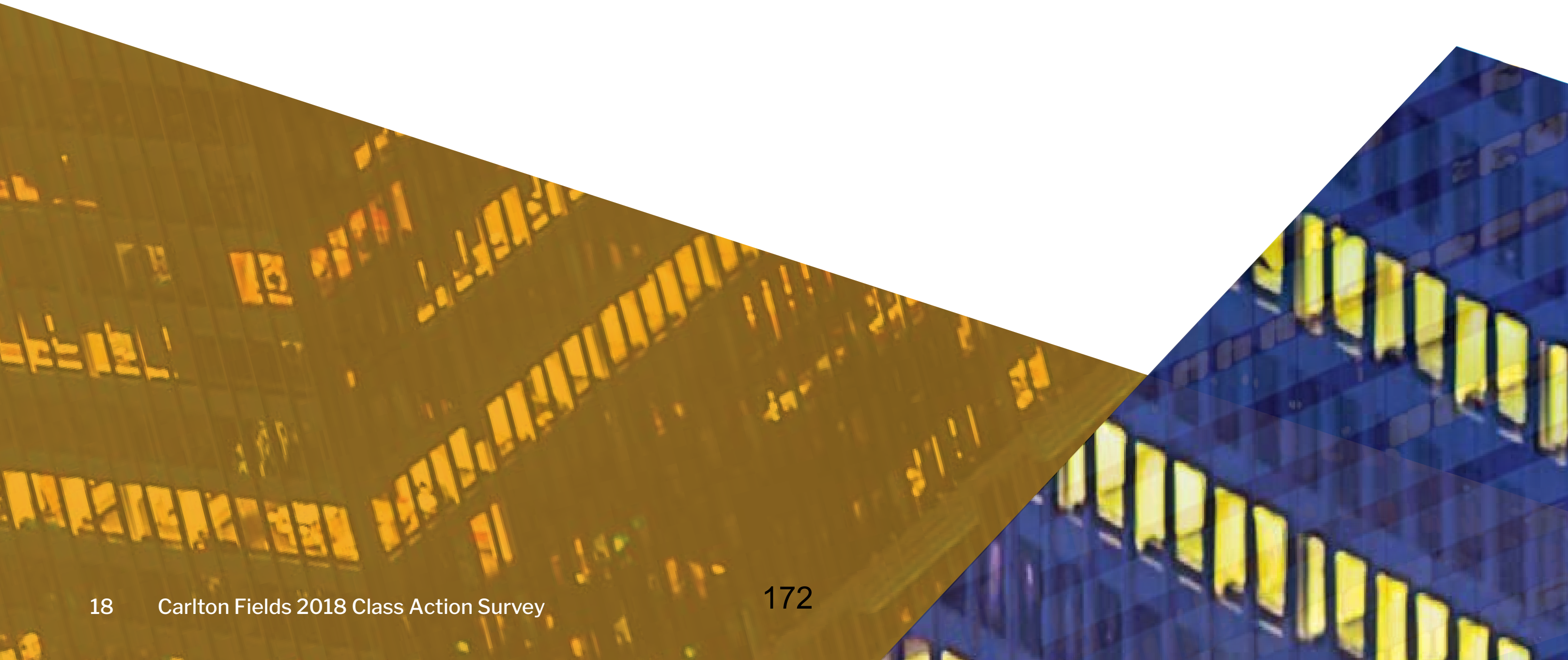
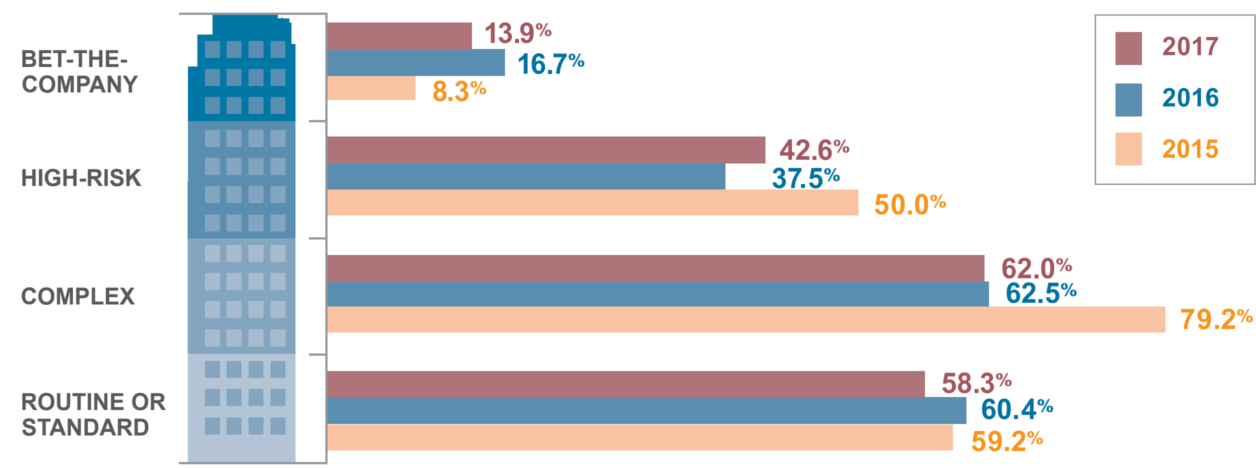


High-Risk Class Actions Are More Prevalent

After doubling in 2016, the percentage of companies currently facing bet-the-company class actions in which the exposure is deemed potentially devastating to the company, decreased from 16.7 to 13.9 percent. The percentage of companies facing high-risk class actions, however, increased from 37.5 percent to 42.6 percent. The number of companies facing class actions of other risk levels remained relatively constant.

Companies Handling One or More Cases by Risk Level

Percent of Companies



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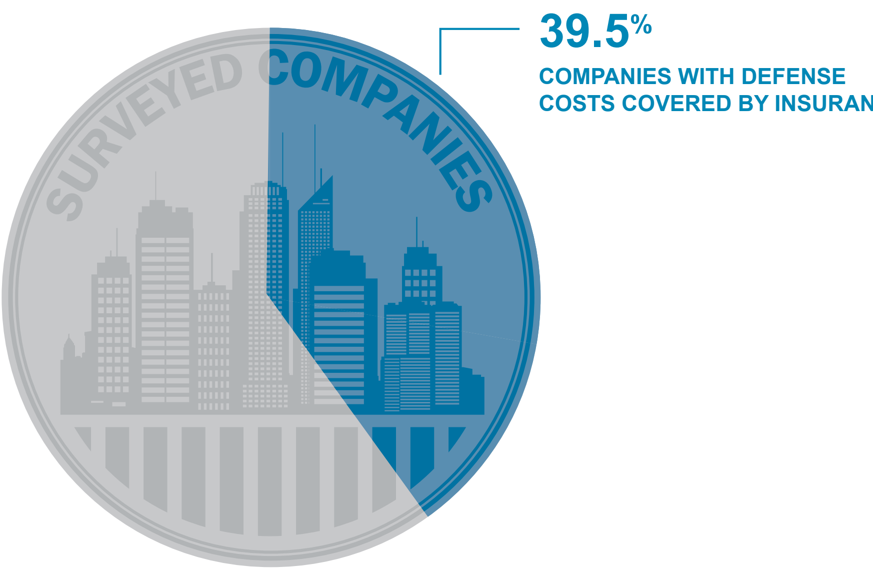
Insurance Covers Class Action Defense Costs For More Companies

In 2017, 39.5 percent of companies had a portion of their class action defense costs covered by insurance, up from 27.7 percent the previous year. The portion of covered class action defense costs is reported to be 41 percent or less by most companies.

Defense Costs Covered by Insurance
Percent of Companies



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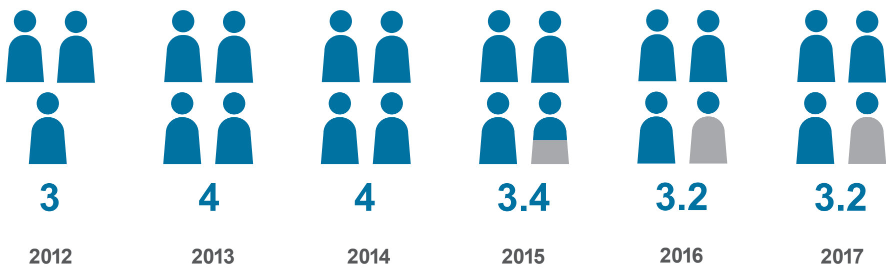
How Companies Manage Class Actions

In-House Staffing For Class Actions Is Unchanged

Although some organizations report using as many as 20 in-house attorneys to manage their class action matters, on average, companies relied on fewer than four in-house attorneys to handle class actions. Although companies report that they are facing more class actions with higher risk, they did not dedicate new internal resources to manage those matters last year. As a result, reliance on outside counsel increased, as did the number of hours that each dedicated in-house attorney spent managing class actions.

In-House Attorneys Dedicated to Class Actions

Average Number of Lawyers



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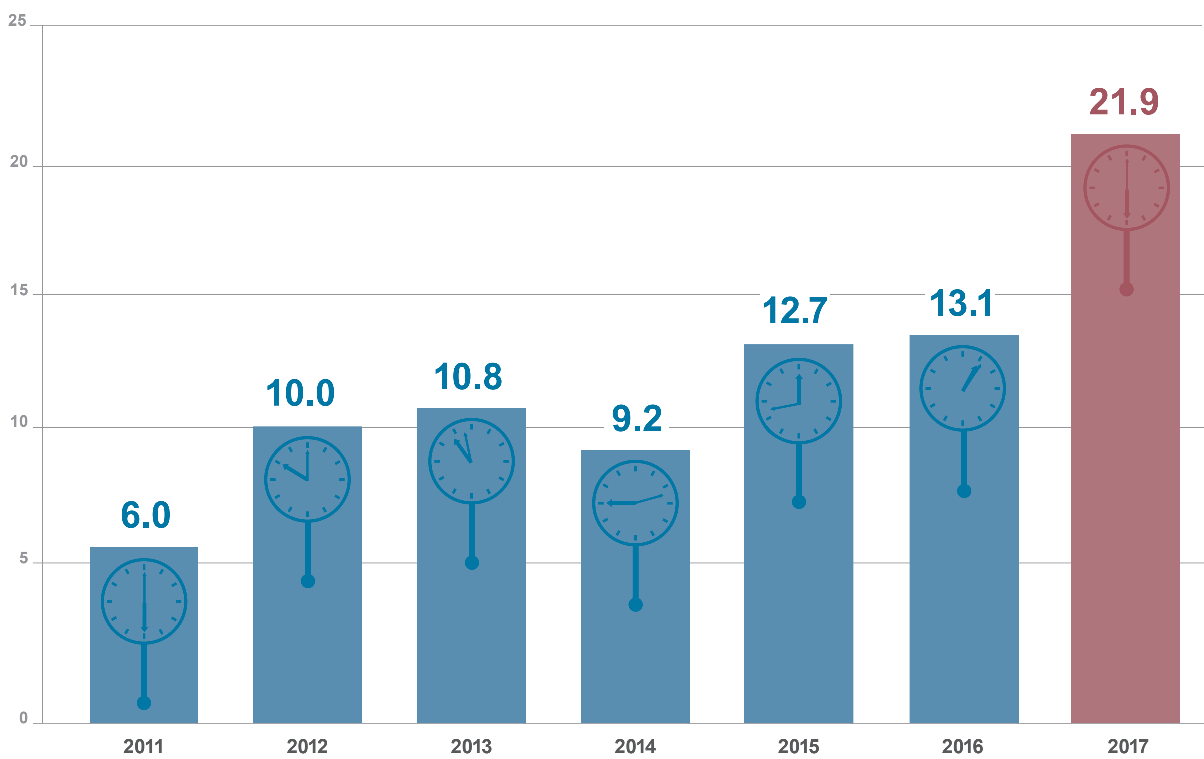
Higher Risk And More Matters Increase Time Attorneys Spend Managing Class Actions

Although spending, risk, and volume of class actions continued to rise, companies were forced to manage these matters with virtually the same in-house resources that were dedicated to the defense of class actions in 2016. As a result, the time each in-house attorney spent managing class actions increased substantially in 2017, reaching a new high of 21.9 hours per week, up from 13.1 hours in 2016.

Aggregate Attorney Time Spent on Class Actions

Hours Per Week



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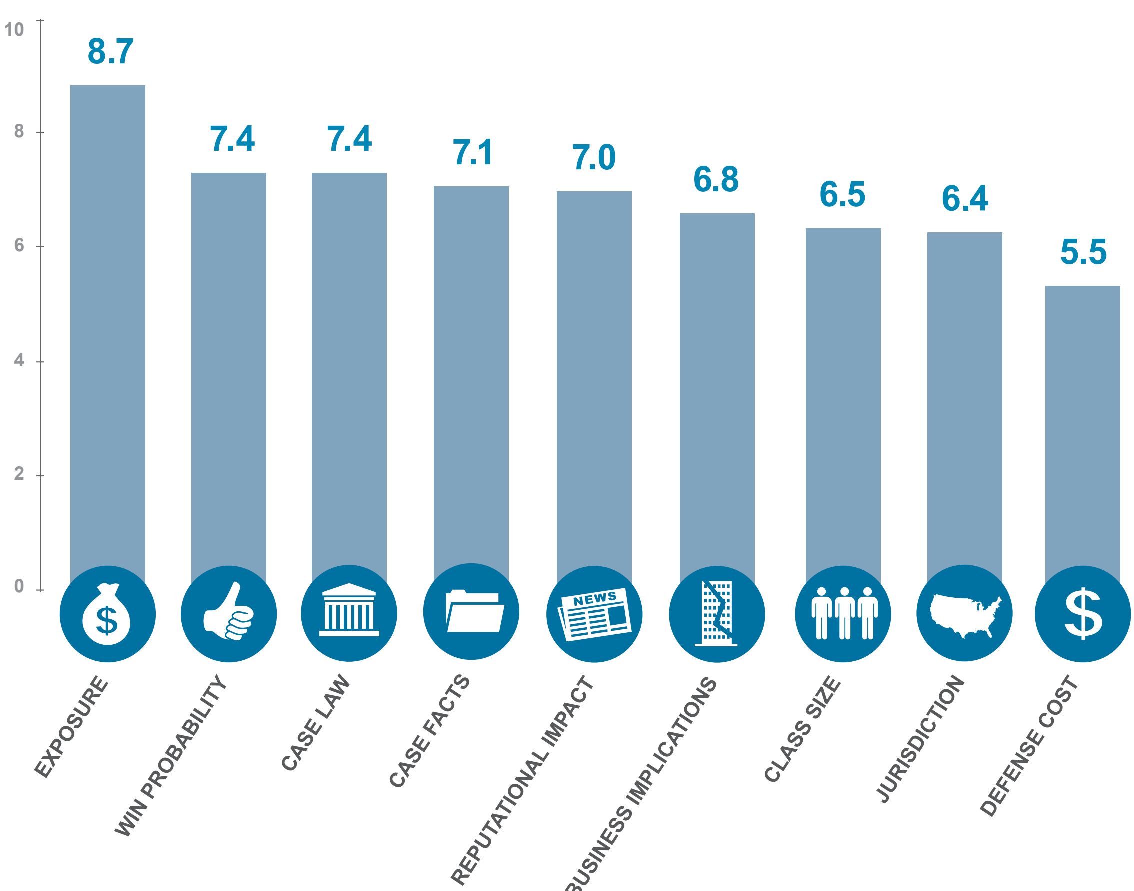
How Companies Approach Class Action Risk

Exposure Remains The Most Important Risk Variable

For the fifth consecutive year, potential exposure was considered the most important risk factor by corporate counsel, followed by win probability, and applicable case law. Defense cost was ranked the least important variable when assessing class action risk levels.

Importance of Risk Variables
1-10 Rating



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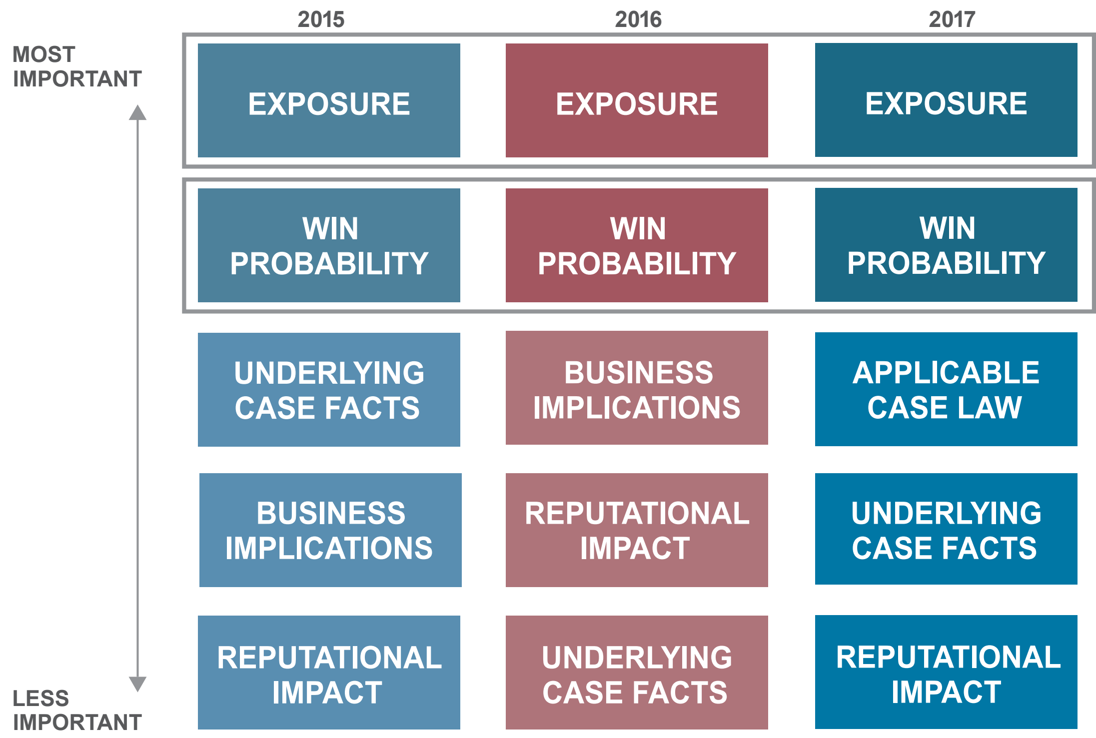
Top Two Class Action Risk Variables Remain Unchanged In 2017

When assessing the risk of class actions, exposure and win probability remained the top variables. In 2017, the business implications category no longer ranked among the top five factors in assessing class action risk and was displaced by applicable case law.

Importance of Risk Variables

Level of Importance



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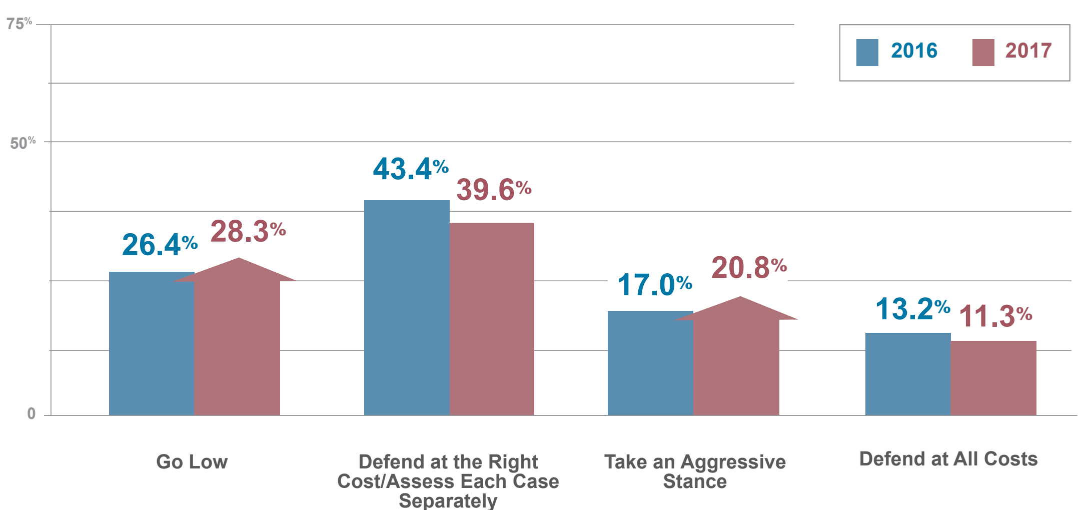
Companies Maintain Consistent Defense Philosophies Despite Increased Volume Of Class Actions

Although companies report an increased volume and complexity of pending class actions, their class action defense philosophies remained relatively steady. A “defend at all costs” philosophy was employed by 11.3 percent of companies, compared to 13.2 percent in 2016. The “defend at the right cost/assess each case separately” philosophy decreased from 43.4 percent to 39.6 percent. Slightly more companies, 20.8 percent, report taking “an aggressive stance,” over 17 percent in 2016. The “go low” philosophy was also up from 26.4 percent in 2016 to 28.3 percent.

Class Action Defense Philosophies

Percent of Companies



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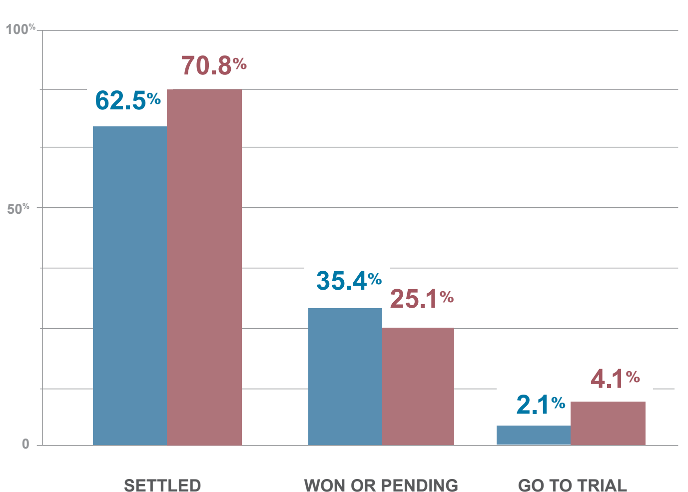
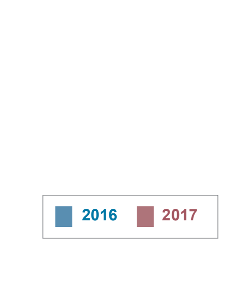
Companies Report Settling A Higher Percentage Of Their Class Actions

On average, companies settle 70.8 percent of their class actions, up from 62.5 percent in 2016. The percentage of class actions that reportedly go to trial also increased from 2.1 percent in 2016, to 4.1 percent. About 58 percent of companies report settling cases brought as class actions before any class is certified.

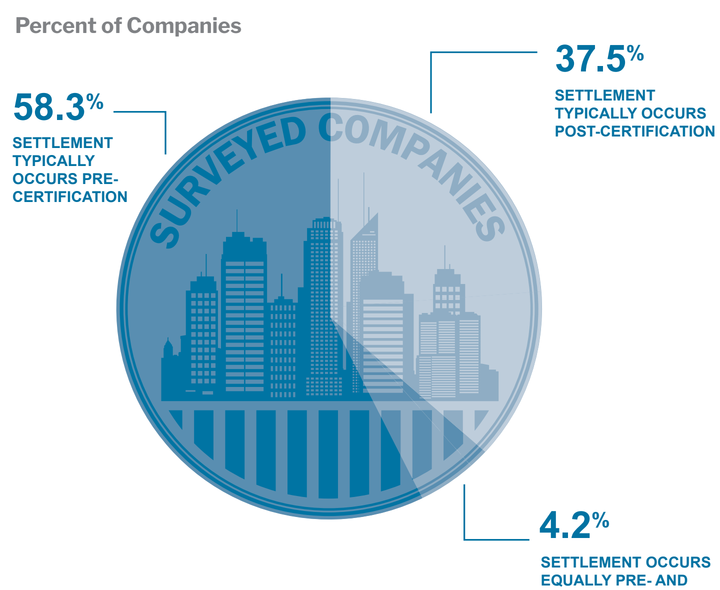
Class Actions Settled and Settlement Timing

Percent of Matters





Percent of Companies



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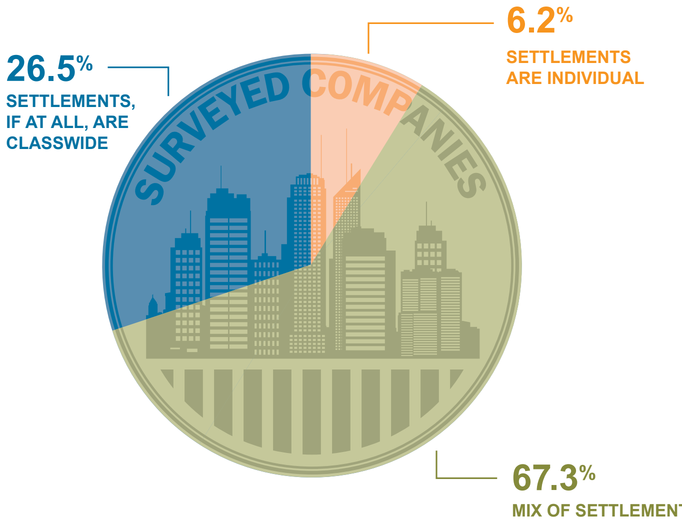
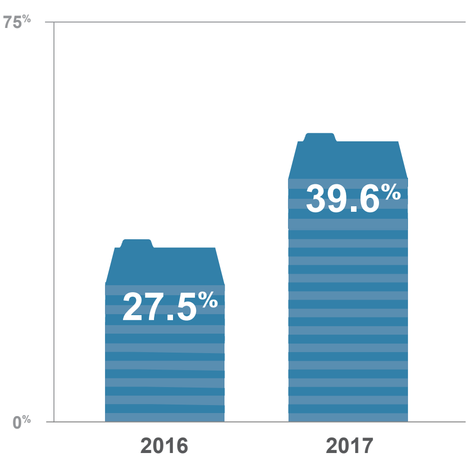
Most Companies Report A Mix Of Classwide And Individual Settlements

Sixty-seven percent of companies report that they use a mix of both individual and classwide settlements, an increase of nearly 20 percentage points from 2016. As a result, fewer companies report that they settle such matters on solely a classwide or individual basis. Companies that settle at least some class actions individually report a greater percentage of such settlements. In 2016, their class actions were resolved as individual cases 27.5 percent of the time, on average. In this year's survey, that percentage increased to 39.6 percent.

Individual v. Classwide Settlements
Percent of Companies



Individual Settlements
Percent of Matters



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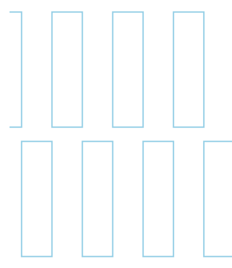
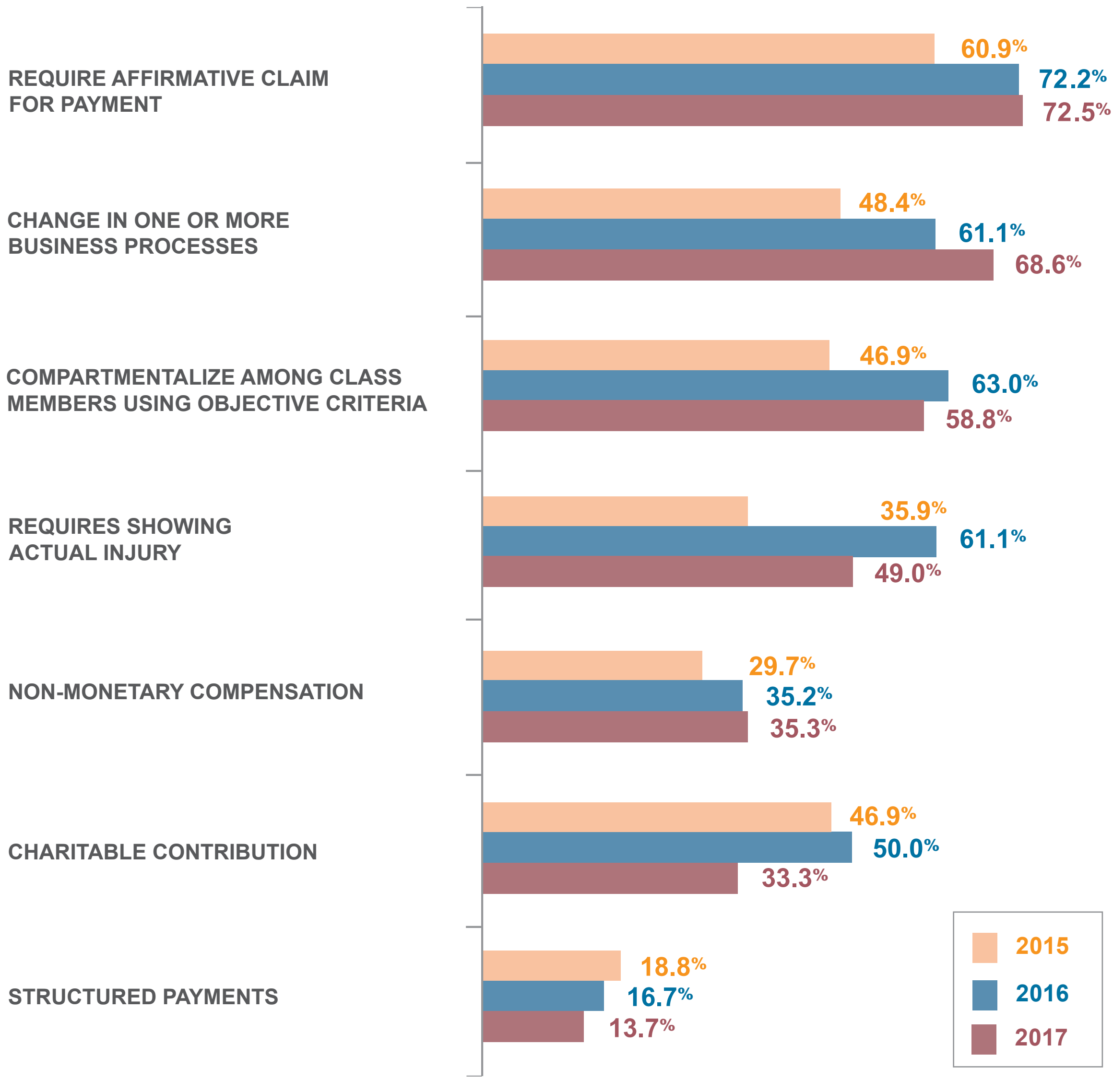


Elements Of Class Action Settlements

Companies use a host of conditions in structuring class action settlements, and year over year, some are used more often than others. As in past surveys, requiring an affirmative claim for payment is the most widely utilized settlement condition, and structured payments are the least widely utilized condition. The percentage of companies entering into settlements that include a change in business processes has increased substantially over the past two years. In 2017, there were notable decreases in the percentage of companies that required a showing by class members of actual injury, and in the percentage of companies including provisions for a charitable contribution, known as a cy pres award.



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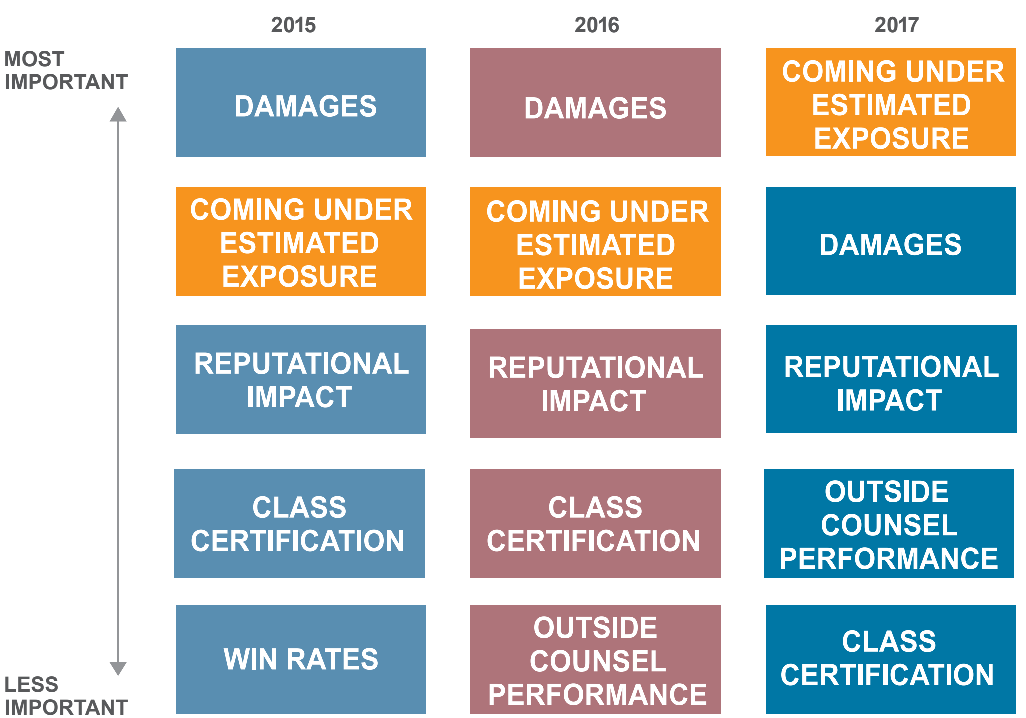
Resolving Class Litigation At Below Estimated Exposure Is Most Important Measure Of Success

When companies measure success in their defense of class actions, they consider factors such as the reputational impact of the litigation, their counsel's performance, damages assessed in the litigation, and whether they defeated certification. The most important factor companies identified this year was coming in under estimated exposure.

Importance of Success Metrics



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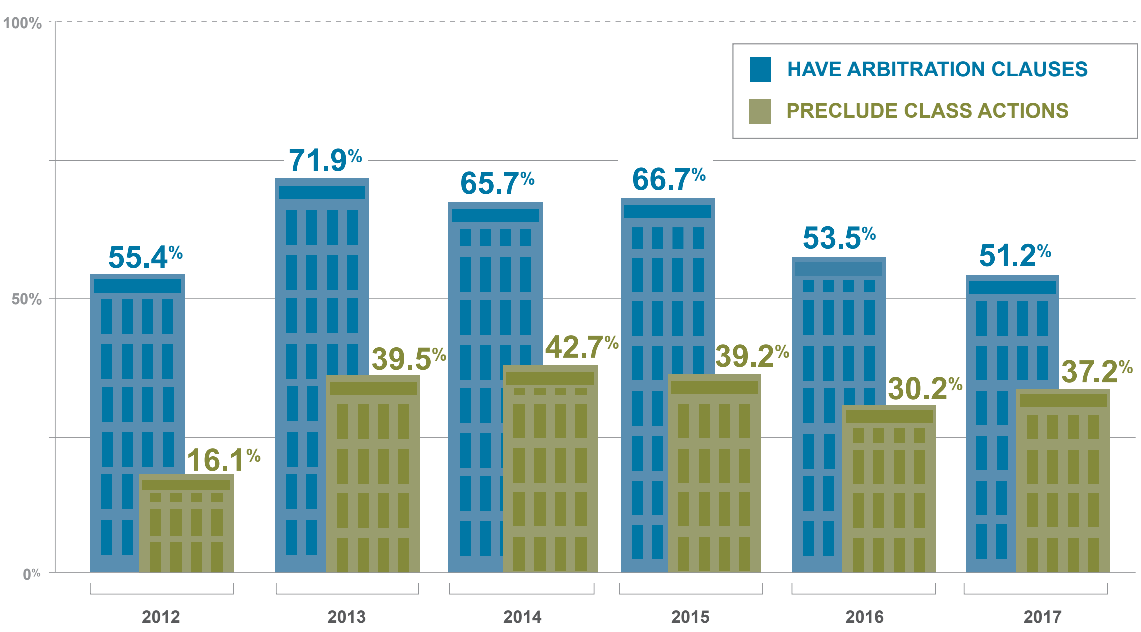
More Companies Employ Mandatory Arbitration Clauses Precluding Class Arbitration

The Consumer Financial Protection Bureau's rule banning the use of class action waivers in arbitration clauses in certain consumer financial contracts was repealed before it ever took effect. Nevertheless, the Bureau had begun considering the rule by as early as 2015, and in 2016, fewer companies reported using such arbitration clauses in their contracts. In 2017, the number of companies using contractual provisions that prohibit class proceedings in arbitration rose from 30.2 percent to 37.2 percent.

Arbitration Clause Usage

Percent of Companies



Note: Other legal limitations, such as state insurance laws, restrict the use of arbitration provisions in certain contracts.

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In Their Own Words: Corporate Counsel Weigh In On The Nullification Of The CFPB Rule

"We will continue to use these clauses—they are really status quo."

Head of Litigation
Fortune 1000 Financial Services Company

"We were preparing to comply with the changes before this ruling, but we have reverted back to our original process."

VP & Associate General Counsel of Global Litigation
Fortune 500 Financial Services Company

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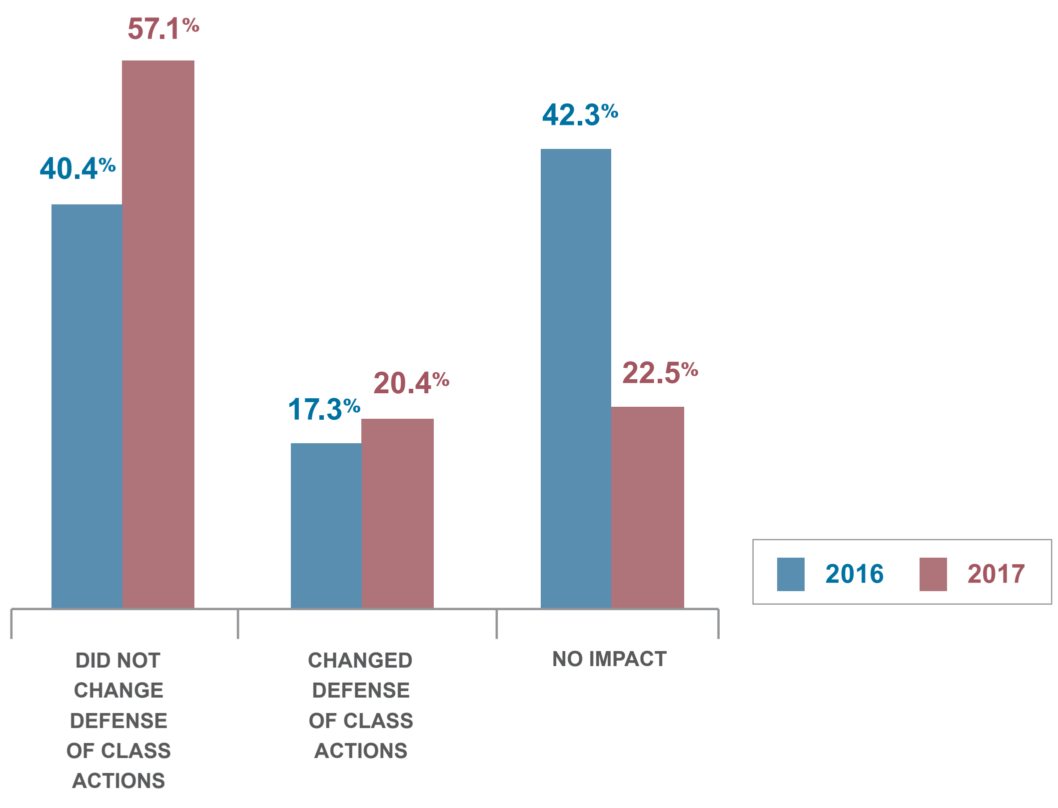
Most Companies Report Changes In Federal Discovery Rules Have Had No Impact On Class Action Defense

In 2015, Federal Rule of Civil Procedure 26 was amended to restore an overarching concept of proportionality to the scope of discovery. Although the rule change was designed to improve the federal discovery process in all civil actions, nearly 60 percent of companies report that the amended discovery rule has had no impact on their defense of class actions. Only 20.4 percent of companies report that the 2015 rule changes have had an impact.

Impact of Changes to Federal Discovery Rules
Percent of Companies



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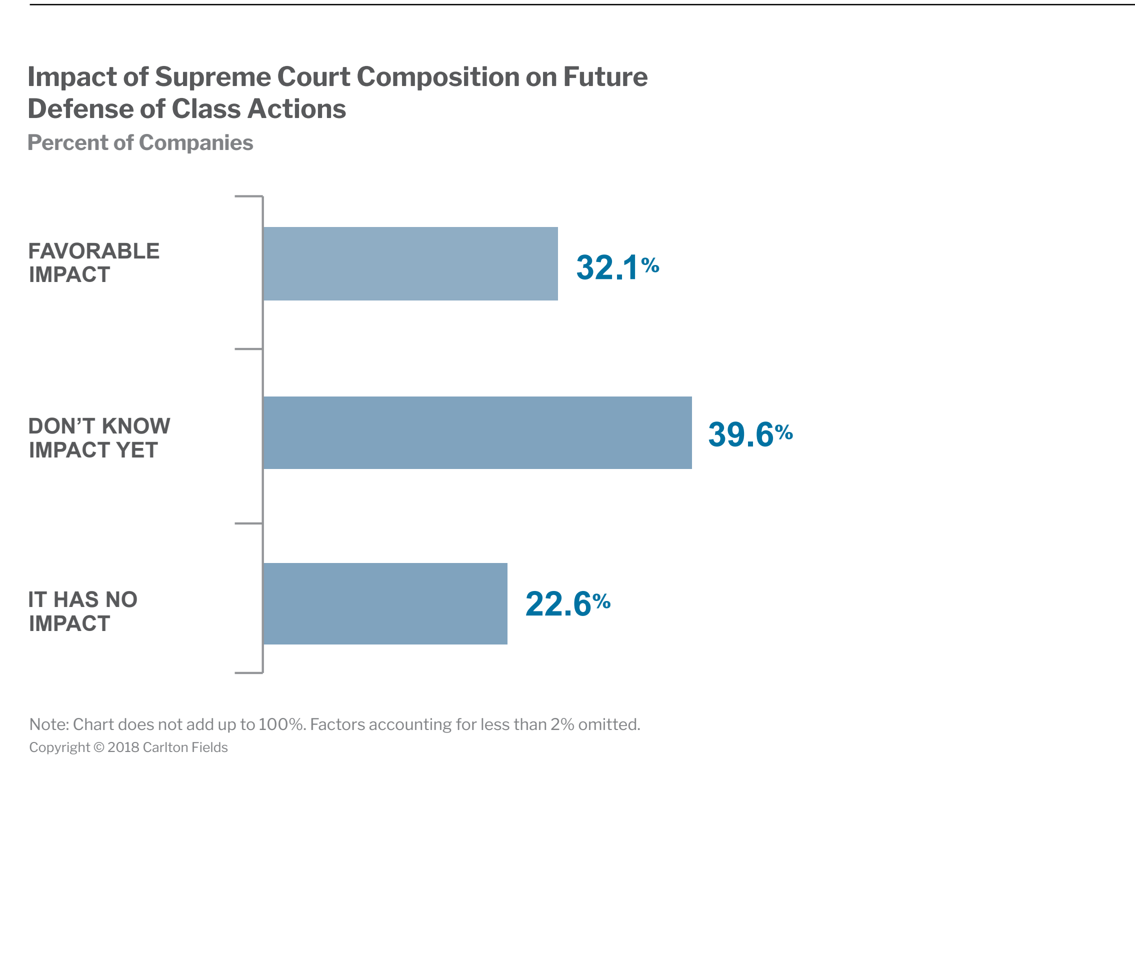
The Impact of the Supreme Court and Politics on Risk

Changing Composition Of The Supreme Court Leads To Questions About Class Action Risk

Most companies report uncertainty about what impact the composition of the Supreme Court will have on the future of class actions. The most important factor leading to this uncertainty is the anticipated replacement of one of the current justices with a new appointee in the near future. Nearly one-third of companies report that they expect future class action rulings from the Court will be business-friendly.



Note: Chart does not add up to 100%. Factors accounting for less than 2% omitted.

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In Their Own Words: Corporate Counsel Weigh In On Supreme Court Composition And Its Impact On Class Action Risk

"It could have an impact. A more conservative court will enforce the application of existing class action rules and restrictions."

Vice President - Litigation
Global Insurance Company

"I don't think it will change the defense of class actions in the next 5-10 years."

Associate General Counsel
Automobile Manufacturer

"Until another is replaced it shouldn't be too impactful. However, depending on the next appointee, we could see significantly fewer or significantly more class actions."

Vice President, Deputy General Counsel
Fortune 1000 Manufacturer

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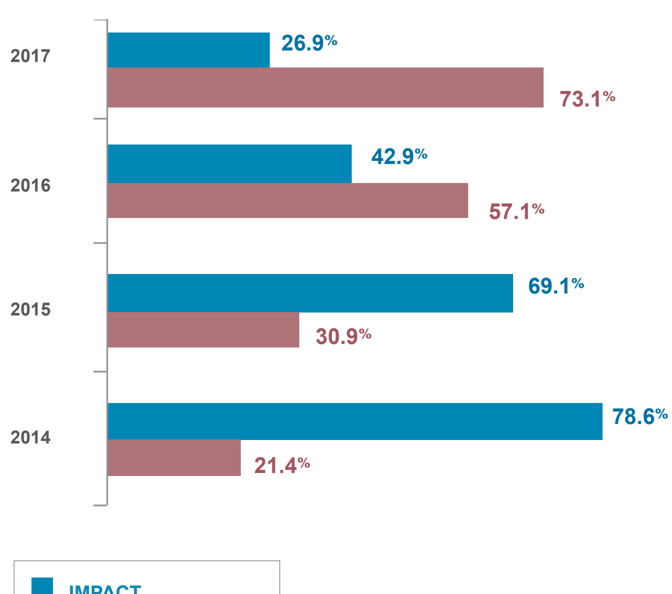
Few Companies Report That Recent Supreme Court Rulings Impact Their Management Of Class Actions

Just 27 percent of companies report that any recent Supreme Court rulings have impacted their own approach to class action management. When asked which Supreme Court rulings have had some impact, most identified landmark opinions issued several years ago, such as *Wal-Mart Stores v. Dukes*, the Court's 2011 opinion that tightened class certification standards.

A handful of the Court's most recent decisions, however, have drawn the attention of corporate counsel, including decisions related to standing, personal jurisdiction, and the use of statistical sampling to adjudicate liability and damages. The standing case, *Spokeo v. Robins*, reversed the Ninth Circuit's decision holding that a class plaintiff, who suffered no apparent damages from a defendant's alleged statutory violation, nevertheless had standing to sue. Corporate counsel also identified *Bristol-Myers Squibb Co. v. Superior Court* as impactful. Although *Bristol-Myers Squibb* involved a mass joinder of plaintiffs rather than class claims, the 2017 decision has given class action defendants an opportunity to argue that a court cannot constitutionally exercise specific personal jurisdiction against an out-of-state defendant with respect to out-of-state class members with no connection to the jurisdiction. A lower court split is beginning to develop over the reach of *Bristol-Myers Squibb* in class actions. In a 2016 case unfavorable to corporate defendants, the Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo* allowed plaintiffs in a wage and hour class action to use statistical sampling to establish the amount of time spent "donning and doffing" clothing as allegedly unpaid overtime for class members.

Do Recent Class Action Rulings Impact Legal Departments?

Percent of Companies



Recent Rulings Impacting How Legal Departments Manage Class Actions

(in order of number of mentions)

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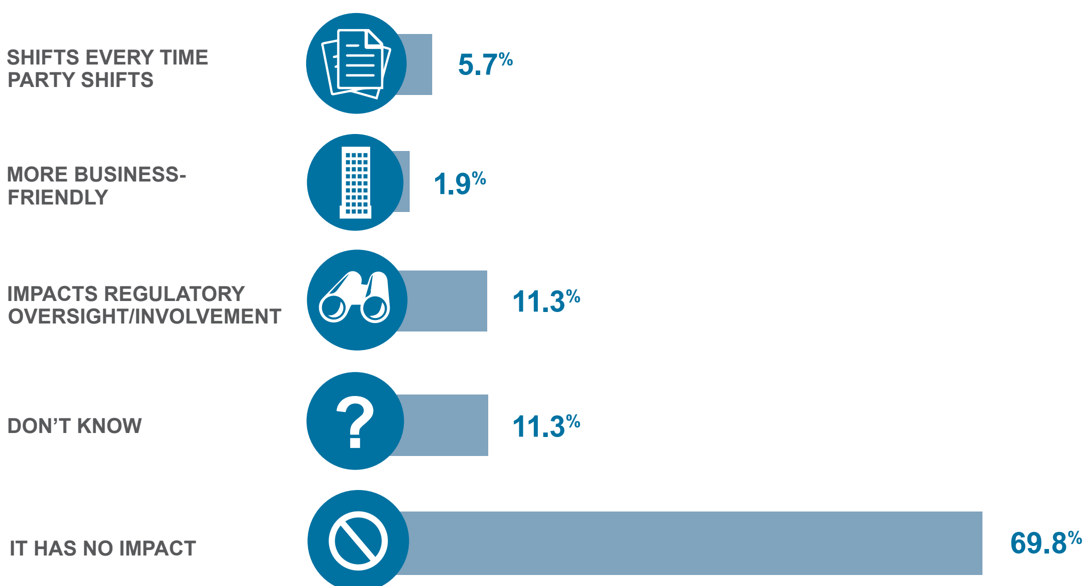
Political Climate In Washington Has Little Reported Impact On Class Actions

Few companies have changed their approach to managing class actions based on the current political climate in Washington, and most companies do not believe the political climate has any immediate impact on class action matters. Eleven percent of companies, however, report that the political climate in Washington does impact regulatory oversight and involvement related to their business.

Impact of Political Climate on Class Actions

Percent of Companies



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In Their Own Words: Corporate Counsel Weigh In On Washington's Political Climate

"It doesn't impact how we manage our class actions, but it will probably impact how many we get."

Assistant General Counsel, Litigation
Fortune 1000 Retailer

"We pay little, if any, attention to what's going on in Washington, D.C."

Director and Managing Counsel, Litigation
Fortune 500 Consumer Goods Manufacturer

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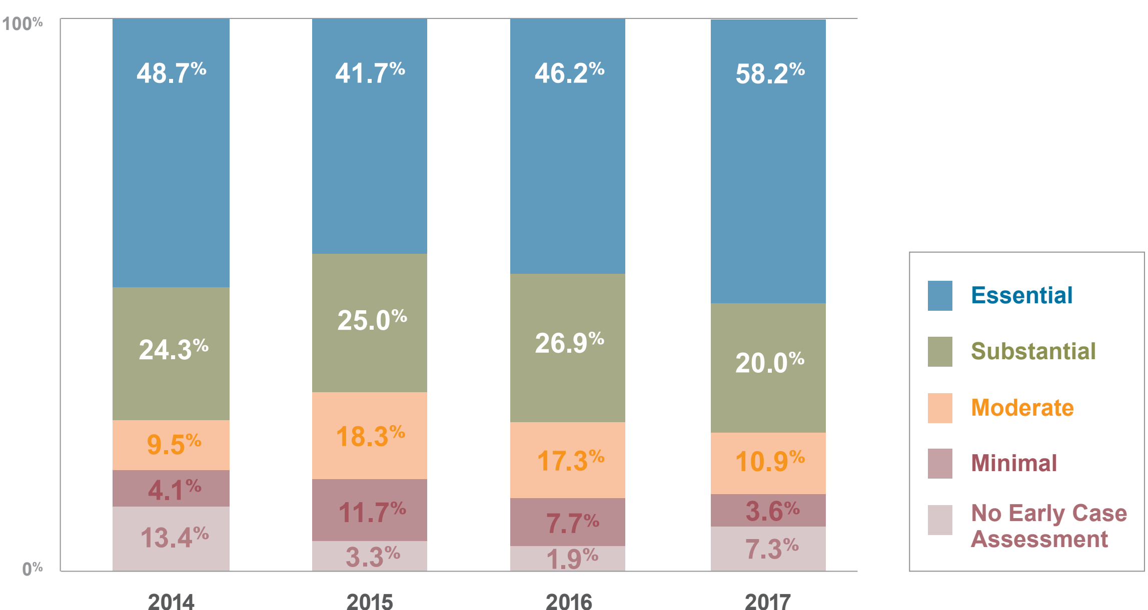
Strategies for Managing Class Action Cost

Companies Consistently Rely On Early Case Assessment Involving Outside Counsel

Most companies continue to rely on early case assessment, which is viewed as a critical tool for reducing class action exposure. Seventy-eight percent of companies say outside counsel involvement in early case assessment is substantial or essential, up from 73 percent in 2016.

Outside Counsel Involvement in Early Case Assessment
Percent of Companies



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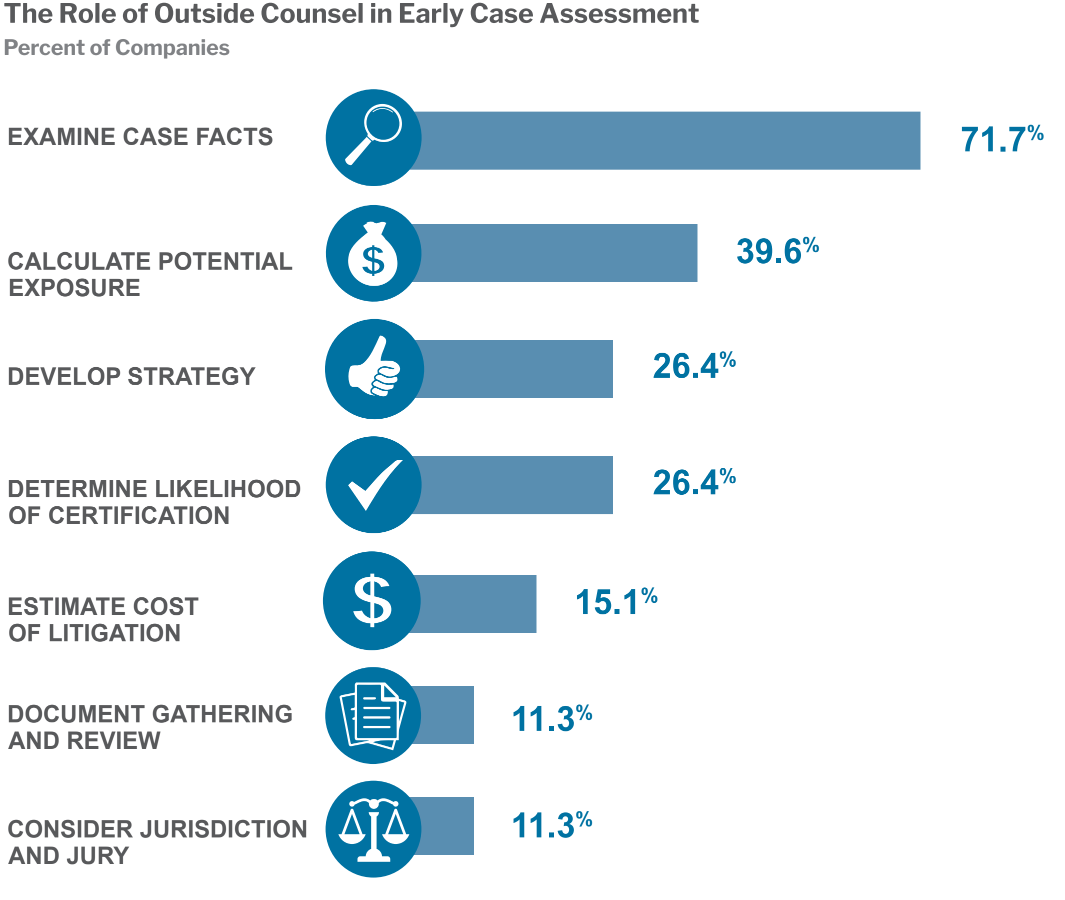
Outside Counsel's Growing Role In Early Case Assessment

As companies see an increase in the number and exposure of their class actions, they rely more heavily on outside counsel for key components of the early case assessment process. The most significant way in which companies use outside counsel for early case assessment is to conduct a preliminary investigation of the relevant case facts.



Note: Chart adds up to more than 100%. Multiple responses allowed.

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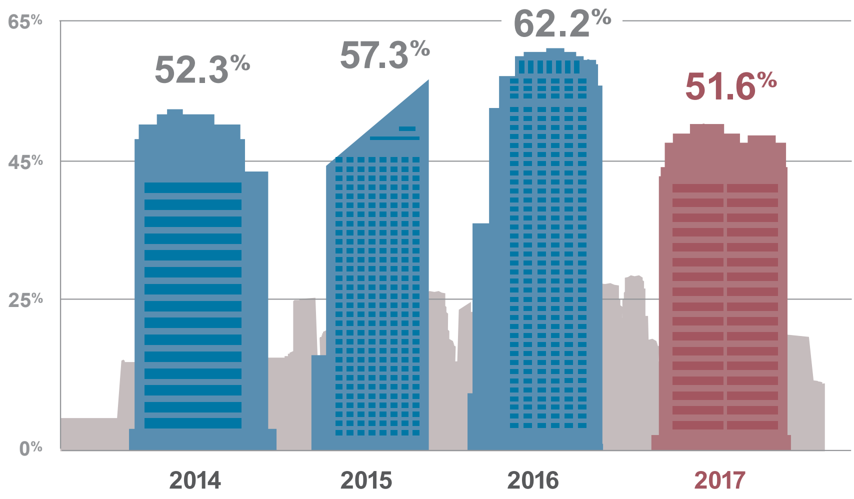
Fewer Companies Make A Single Individual Accountable For Class Action Outcomes

For the first time in four years, fewer companies made a single individual accountable for their class action outcomes. Even so, more than half of the companies surveyed still use this approach to class action management.

Assign a Single Individual

Percent of Companies



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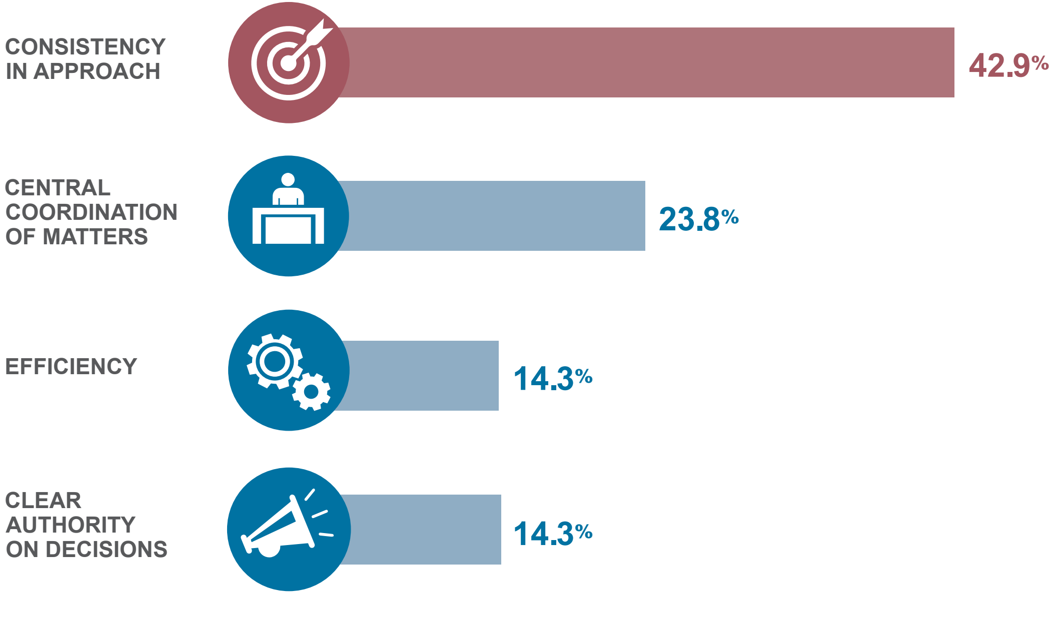
A Consistent Approach Is The Leading Benefit Of Holding A Single Individual Accountable

Companies that make a single individual accountable for class action outcomes report that the biggest benefit is the consistent approach this brings to matter management. As class action exposures increase, companies gravitate toward predictable, structured approaches to help them better manage risk.



Note: Chart does not add up to 100%. Factors accounting for less than 2% omitted.

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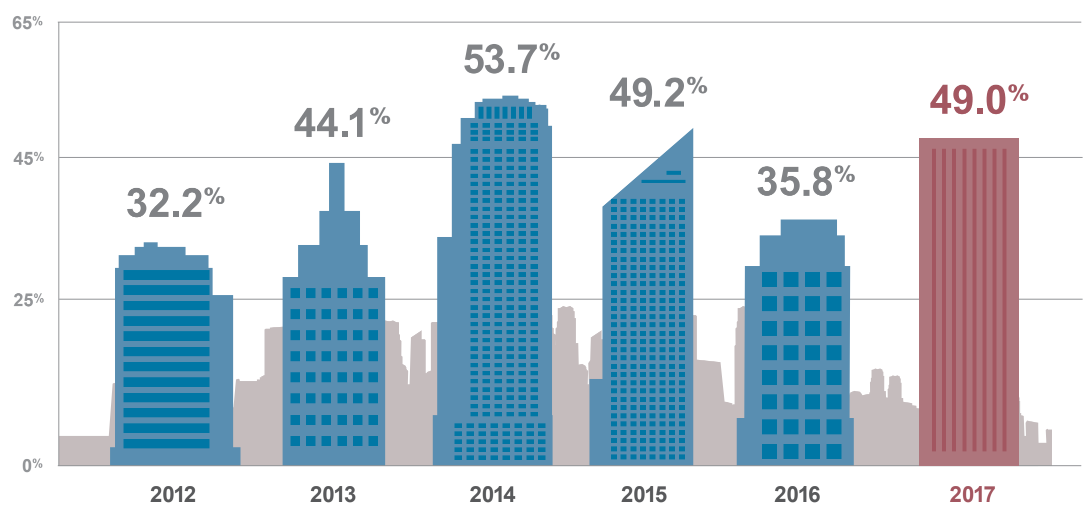
Increased Use Of Alternative Fee Arrangements In Class Action Matters

After two years of decline, the percentage of companies that use AFAs to manage class actions rose to 49 percent, as companies sought budget predictability and the most efficient approach for managing their legal spend.

Alternative Fee Arrangement Use in Class Actions

Percent of Companies



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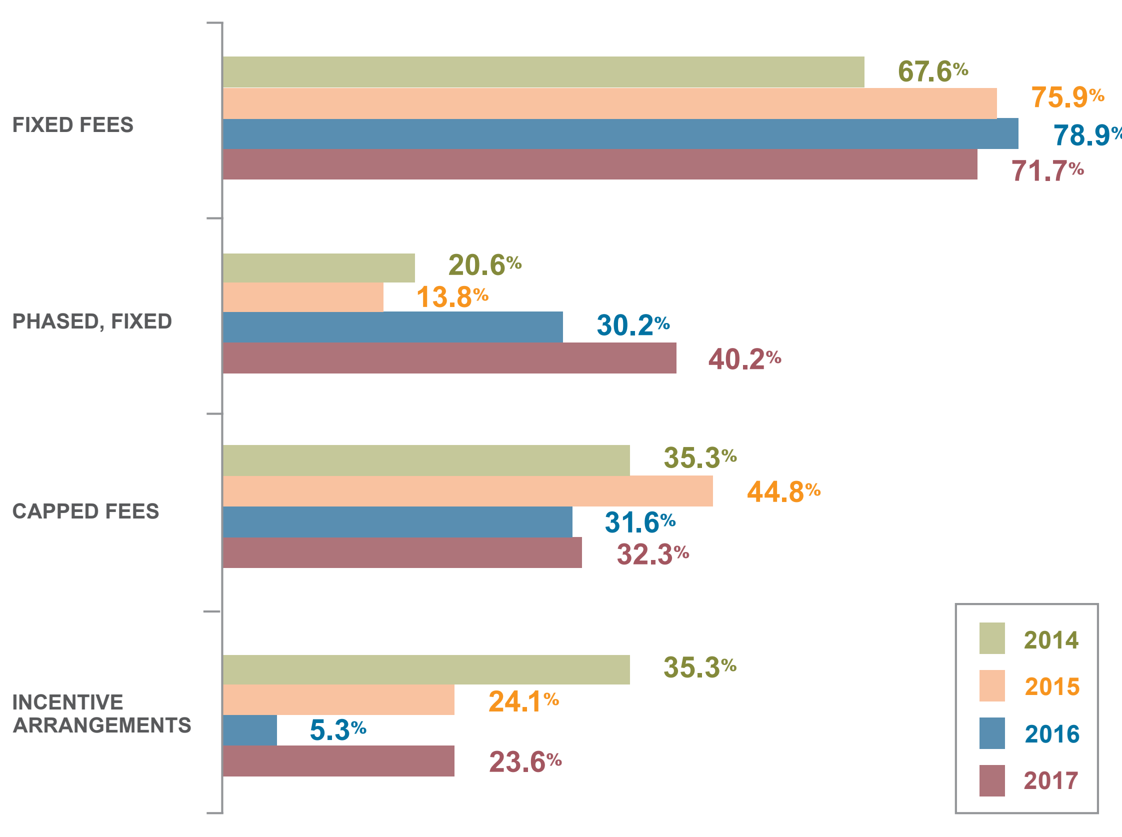
Use Of Phased Fee Arrangements Increases For Second Consecutive Year

While fixed fees remain the most widely used AFA for class action work, companies continue to move toward phased fee arrangements where work is assessed and billed by a portion or segment of the litigation process. This approach offers predictability and more focused management of discrete components of class action work.



Note: Chart adds up to more than 100%. Multiple responses allowed.

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Methodology and Approach

The 2018 Carlton Fields Class Action Survey results were compiled from 411 interviews with general counsel, chief legal officers, and direct reports to general counsel.* Consistent with the approach used in past years, to control for bias and assure objectivity, Carlton Fields retains an independent consulting firm to select the companies and conduct the interviews. To obtain additional data on bet-the-company class actions, that firm augmented its work with supplemental research. The consulting firm provides only aggregate data to Carlton Fields. All individual responses and company names are kept confidential and excluded from the survey results.

Survey participants' companies had an average annual revenue of $13.9 billion, and median annual revenue of $5.9 billion. The surveyed companies operate in more than 25 industries, including banking and financial services, consumer goods, energy, high tech, insurance, manufacturing, pharmaceuticals, professional services, and retail trade.

About Carlton Fields

Carlton Fields has litigated and counseled clients in hundreds of class actions for more than 30 years in federal and state courts across the nation. These cases present unique challenges due to their different rules, enhanced scope, and higher stakes. The firm understands the potential impacts, costs, and risks associated with class actions, and is a leader in developing legal approaches and strategies for handling class action litigation.

If you would like to learn about the survey and how these results may impact you, or to discuss the Carlton Fields class action practice, please contact Julianna Thomas McCabe at 305.347.6870 or jtmccabe@carltonfields.com.

To obtain additional copies of this report, visit https://ClassActionSurvey.com.

Scan this QR code to view *Classified: The Class Action Blog*.

Scan this QR code for more class action resources.

* In addition, to present the survey results in context, pages 4-6 contain, with permission, information published by BTI Consulting Group.

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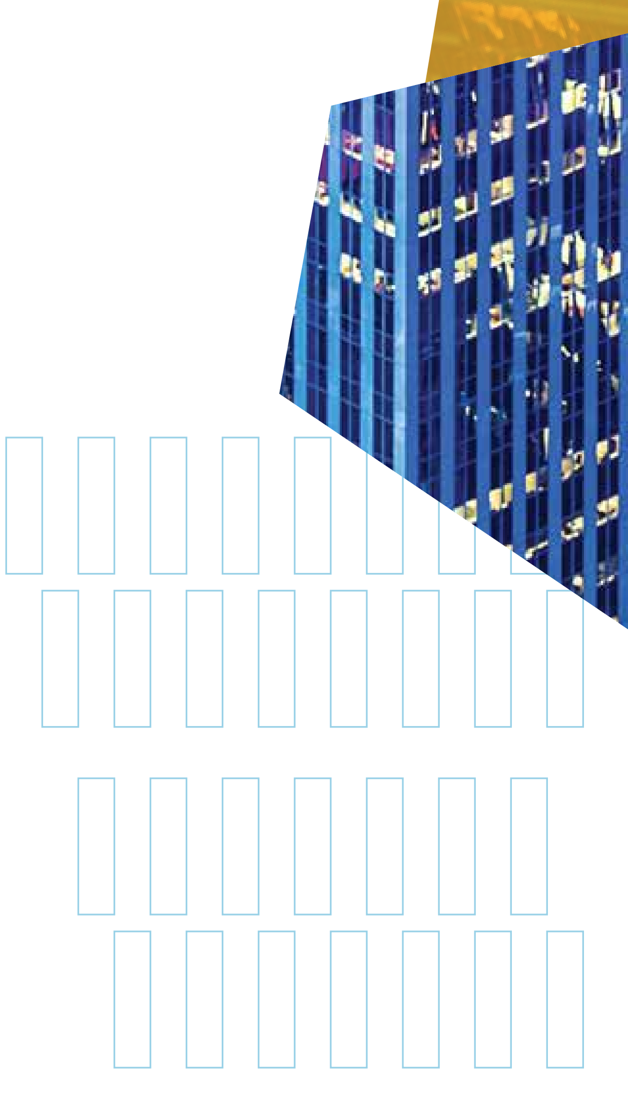

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Avoiding Legal Ethics Violations in Class Actions

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Phillips Lytle LLP, New York, NY

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"We may trust the man to help his fellow man if by doing so he helps himself – particularly if only by helping others will he be able to protect and promote his own interests. . . . Our system of justice tolerates and at times favors litigation through champions who stand or fall with the whole group."

- A. Homburger, *State Class Actions and the Federal Rule*, 71 Col. L. Rev. 609, 610 (1971).

"If we desire respect for the law, we must first make the law respectable."

- Louis D. Brandeis

I. Introduction

1. Lawyers assume several fiduciary duties upon taking on a new client, such as the duty to:

   (1) to provide competent representation;
   (2) to appropriately exercise and allocate control;
   (4) to communicate;
   (5) and
   (6) to resolve conflicts of interest.

   See 22 N.Y.C.R.R. 1200.0.

2. Several ethical issues arise that are peculiar to litigation of class action lawsuits, and some of the duties outlined above pose particular concerns.

3. This presentation will focus on, among other things, the duties of exercising appropriate control, engaging in proper communications, and navigating conflicts of interest in the context of the key stages of litigation of class action lawsuits.

II. Prefiling and Precertification Stages

1. **Preliminarily** - Some class actions that are barred under the CPLR are not necessarily barred in federal court

A. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010)-

i. In this case, the District Court dismissed the matter pursuant to CPLR § 901(b), "which precludes a suit to recover a 'penalty' from proceeding as a class action," and the Second Circuit affirmed. *Id.* at 397-98.

ii. The Supreme Court, Justice Antonin Scalia, reversed and remanded the matter, noting that while "keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping . . . a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to 'disembowel either the Constitution's grant of power over federal procedure' or Congress's exercise of it." *Id.* at 415-16 (quoting *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965)).

2. **Communication**

A. Considerations for Plaintiffs' counsel

i. For plaintiffs' counsel, ethical considerations regarding communication revolve around the rules against soliciting new clients. *See Alfaro v. Vardaris Tech, Inc.*, 69 A.D.3d 436, 436 (1st Dep't 2010) (citing *Kleiner v. First Nat'l. Bank of Atlanta*, 751 F.2d 1193, 1202-1203 (11th Cir.1985); *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981), *appeal dismissed* 659 F.2d 1081 (6th Cir.1981)); *see also* Jack A. Raisner, Ryan A. Hagerty, & Lee Schreter, *Ethical Issues*, American Bar Association, Section of Labor and Employment Law, Federal Labor Standards, Legislation Committee, Key West, Florida, February 22-24, 2012 (discussing ethical issues in soliciting clients in the class action context).

ii. Certain types of communication are less susceptible than others to a finding of improper solicitation, such as First Class mail and email. *See Rosenbohm v. Cellco P'ship*, Case No. 2:17-cv-731, 2018 WL 4405836, at *4 (S.D. Ohio Sept. 2018).

iii. Solicitation of "professional employment for the purposes of filing a class action" is analyzed under the "adequacy" requirement of class certification, and can be a violation of the Rules of Professional Conduct. *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 17cv2335-GPC(MDD), 2018 WL 6300479, at *7 (S.D. Cal. Nov. 29, 2018); *Cleven v. Mid-America Apartment Cmtys, Inc.*,

No. 1:16-CV-820-RP, 2018 WL 4677891 (W.D. Tx. Sept. 5, 2018); *Ogden v. AmeriCredit Corp.*, 225 F.R.D. 529, 535 (N.D. Tex. 2005) (listing solicitation as a factor that "tend[s] to weigh against a finding of adequacy.").

a. Such violation does not, however, necessarily render a plaintiff inadequate to represent the class. *See id.*

iv. Sanctions for improper solicitation include

a. Denial of class certification. *See Cleven*, 2018 WL 4677891; *Defendant First American Title Insurance Company's Memorandum in Support of Its Motion to Compel*, *Piazza v. First Am. Title Ins. Co.*, No. 306-cv-765 AWT, 2008 WL 627844 (D. Conn. Jan. 8, 2008).

b. Orders directing corrective and curative notice to solicited class members and that any future advertisements be "prominently marked as such" to prevent "confusion with court-authorized notices." *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1246 (N.D. Ca. 2000) (court ordered such notice where solicitations were "disruptive of the orderly class action," and labeled as "notices" without court approval).

c. Order to remove contact information from notice. *See Castillo v. Perfume Worldwide Inc.*, CV 17-2972 (JS) (AKT), 2018 WL 1581975, at *9 (E.D.N.Y. Mar. 30, 2018).

v. **ABA Model Rules of Professional Conduct:**
Rule 7.3: Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

vi. Solicitation of putative class members is not *per se* unethical so long as counsel does not violate relevant ethical rules in the way he or she communicates with those individuals. *Bowen v. Groome*, No. 11-139-GPM, 2012 WL 2064702, *1 (S.D. Ill. June 7, 2012) ("Solicitation of a named plaintiff does not in and of itself foreclose counsel's adequacy.") (citing *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011), as modified, Sept. 22, 2011); *Jim Ball Pontiac-Buick-GMC, Inc. v. DHL Express (USA), Inc.*, No. 08-CV-761C, 2011 WL 815209, at *5 (W.D. N.Y. Mar. 2, 2011) ("Defendant further states that counsel solicited plaintiff to be the class representative, an action it deems 'ethically questionable' and intended primarily to advance the interests of the law firm rather than the class members. Having considered the objections of defense counsel, the court nonetheless concludes that the class is adequately represented by plaintiff's counsel."); *Kennedy v. United Healthcare of Ohio, Inc.*, 206 F.R.D. 191, 197 (S.D. Ohio 2002); *cf. Ramos v. Banner Health*, 325 F.R.D. 382, 394 n.6 (D. Colo. 2018) ("Plaintiffs' supplemental briefing also argues that their advertisement did not constitute an

improper or unethical 'solicitation,' and that a prohibition against similar advertisement would undermine ERISA's purposes. These arguments have little bearing on the present Rule 23 analysis, and the Court takes no view of whether there was anything improper about counsel's advertisement.") (citation omitted*); Spagnuoli v. Louie's Seafood Restaurant, LLC*, 20 F. Supp. 3d 348, 358-59 (E.D.N.Y. 2014) ("[E]ven assuming that [plaintiff's law firm] did improperly solicit clients, such a violation of the NYRPC would not, in the Court's view, support disqualification here …. [T]he Court has not discovered any court within this Circuit that has disqualified an attorney when confronted with similar circumstances.") (citation omitted); *see* William B. Rubenstein, Newberg on Class Actions, Ethical Concerns In Class Action Practice, § 19:4 (Westlaw, Nov. 2018 Update).

vii. Federal Rules of Civil Procedure Rule 23 has been used to address alleged improper solicitation of putative class members in the context of determining whether to certify a class. *See Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323-24 (11th Cir. 2008), declined to extend *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525 (7th Cir. 2012); *cf. Ramos*, 325 F.R.D. at 394 n.6; *Spagnuoli*, 20 F. Supp. 3d at 358-59; *German v. Fed. Home Loan Mortg. Corp.*, 885 F. Supp. 537, 556 (S.D.N.Y. 1995) ("While some courts have held that the ethical conduct of counsel is relevant to the issue of adequacy of counsel, there is no unquestionable proof on this record that such improper solicitation has occurred.") (citing *Brame v. Ray Bills Fin. Corp.*, 85 F.R.D. 568 (N.D.N.Y. 1979); *see also* William B. Rubenstein, Newberg on Class Actions, Ethical Concerns In Class Action Practice, § 19:4 (Westlaw, Nov. 2018 Update).

a. **Federal Rule of Civil Procedure Rule 23: Class Actions (<u>recently amended</u>)**

(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)--**or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement 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 may be by one or more of the following: United States mail, electronic**

means, or other appropriate means.[1] 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 brought or maintained as a class action with respect to particular issues.

[1] It remains to be seen what the limits will be with respect to notice given via "electronic" or "other appropriate means," e.g. whether notice by text message or even social media would be considered "appropriate."

(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--**or a class proposed to be certified for purposes of settlement**--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) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal **if giving notice is justified by the parties' showing that the court will likely be able to:**

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

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

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) **the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;**

(iii) **the terms of any proposed award of attorney's fees, including timing of payment; and**

(iv) **any agreement required to be identified under Rule 23(e)(3); and**

(D) **the proposal treats class members equitably relative to each other.**

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

(4) New Opportunity to be Excluded. 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) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). [**removed language: "; the objection may be withdrawn only with the court's approval."**] 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.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, **but not from an order under Rule 23(e)(1) [removed language: "if a petition for permission to appeal is filed."] A party must file a petition for permission to appeal** with the circuit clerk within 14 days after the order is entered, **or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf.** 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).

B. Considerations for defense counsel

i. Issues for defense counsel revolve around rules prohibiting communication with represented parties

ii. ABA Model Rules of Professional Conduct:

Rule 4.2: Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

C. **At this point the key questions become: When does representation begin, and up to what point is defense counsel permitted to communicate directly with class members?**

i. **ABA Formal Ethics Opinion 07-445**:

a. "The key to evaluating the propriety of contacting putative class members is whether they are deemed to be represented by the lawyer or lawyers seeking to certify a class." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445, at *1 (2007).

b. Before a class action has been certified, counsel for plaintiff and defendant have interests in contacting putative members of the class. **Model Rules of Professional Conduct 4.2 and 7.3 do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class. Both plain[t]iff's and defense counsel must nevertheless comply with Model Rule 4.3**. *Id.*

c. If represented, Rule 4.2 bars defense counsel from communicating with class members.

d. If not represented, plaintiffs' and defense counsel may communicate with class members (discussed further below).

ii. Federally, the majority view is that an attorney-client relationship, carrying with it all of the relevant fiduciary duties, is not created pre-certification. *See In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL 4401970, at *2 (E.D. La. Sept. 22, 2008) (holding that, precertification, only named plaintiffs may claim attorney-client privilege) (citing *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 313 (3d Cir. 2005); *Cobell v. Norton*, 212 F.R.D. 14, 17 (D.D.C. 2002); *Morisky v. Pub. Serv. Elec. & Gas Co.*, 191 F.R.D. 419, 424 (D.N.J. 2000); *In re Shell Oil Ref.*, 152 F.R.D. 526, 528 (E.D.La. 1989); 5 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 15:16 (4th ed.2002); Manual on Complex Litigation § 30.24 (3d ed.)).

iii. Further, an attorney-client relationship is "different in the class context than it is in a traditional, nonclass situation," whereas a relationship between class counsel and named class members is "one of private contract, whereas the relationship between absent class members and class counsel is one of court creation." *In re Chicago Flood Litig.*, 289 Ill. App. 3d 937, 942 (1st Dist., 2d Dep't 1997)).

iv. **CPLR Article 9**

a. Was modeled after the Federal Rules of Civil Procedure. *See Desrosiers v Perry Ellis Menswear, LLC*, 30 N.Y.3d 488, 495 (2017); New York City Bar Association, Council on Judicial Administration and Litigation Committee, Report on Legislation by the Committee on State Courts of Superior Jurisdiction, n. 8 (April 2016).

b. In general under Article 9, a class action becomes such when "all of the prerequisites of CPLR 901 and 902 have been met, an order issued pursuant to CPLR 903 and notice sent pursuant to CPLR 904." Thomas A. Dickerson, *New York Law Journal*, https://www.law.com/newyorklawjournal/2018/02/15/when-is-a-class-action-a-real-class-action/ (February 15, 2018); *but see* discussion of *Desrosiers*, 30 N.Y.3d at 495 below.

c. **CPLR § 901: Prerequisites to a class action**

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

      1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

      2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

      3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

      4. the representative parties will fairly and adequately protect the interests of the class; and
      5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

   b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action. N.Y. CPLR 901 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

d. **CPLR § 902: Order allowing class action**

Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move

for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action. N.Y. CPLR 902 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

e. **CPLR § 903: Description of a class**

The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice. N.Y. CPLR 903 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

f. **CPLR § 904: Notice of class action (discussed more fully in discussion of Settlements below)**

(a) In class actions brought primarily for injunctive or declaratory relief, notice of the pendency of the action need not be given to the class unless the court finds that notice is necessary to protect the interests of the represented parties and that the cost of notice will not prevent the action from going forward.

(b) In all other class actions, reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.

(c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider

I. the cost of giving notice by each method considered

II. the resources of the parties and

III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

(d) I. Preliminary determination of expenses of notification. Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

II. Final determination. Upon termination of the action by order or judgment, the court may, but shall not be required to, allow to the prevailing party the expenses of notification as taxable disbursements under article eighty-three of the civil practice law and rules. N.Y. CPLR 904 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

v. **Thus, generally, defense counsel is free to communicate with potential class members, including negotiating settlements, up**

to the point when class members are represented, and class members are represented when:

a. **the class is certified; and**

b. **the opt-out period has expired.** ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445 (2007); *but see Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1207 (11th Cir. 1985); *Gortat v. Capala Bros., Inc*., No. 07-CV-3629, 2010 WL 1879922 (E.D.N.Y. May 10, 2010) (compiling decisions where Rule 4.2 applied as soon as the class was certified).

c. A small number of federal courts, however, preclude defense counsel from communicating directly with potential class members **from the moment the litigation is commenced**. *See e.g. Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001).

d. In essence, when litigating class actions, defense counsel engaging in precertification communications with putative class members should be mindful of the many ethical considerations.

D. Regardless of when the communication occurs, counsel may not communicate with class members in any way that is **coercive, misleading, or improper.**

i. **ABA Model Rules of Professional Conduct**

a. **Rule 4.3: Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. Model Rules of Prof'l Conduct r. 4.3 (Am. Bar Ass'n 2018).

b. **Rule 4.1: Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. Model Rules of Prof'l Conduct r. 4.1 (Am. Bar Ass'n 2018).

c. **Rule 8.4 (a) and (c):**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Model Rules of Prof'l Conduct r. 8.4 (a), (c) (Am. Bar Ass'n 2018).

d. See also, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445 (2007).

ii. While the precertification stage is fraught with potential for abuse with regard to communication between counsel and class members, the settlement stage, discussed below, carries its risks for attorneys communicating with class members as well.

E. Orders limiting Precertification Communications

i. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the U.S. Supreme Court considered whether an order limiting counsel's communication with putative class members violated the right to free speech under the First Amendment. There, the Court recognized "the possibility of abuses in class-action litigation," and that "such abuses may implicate communications with potential class members." *Id.* at 104.

a. While cautioning that the order "involved serious restraints on expression," the court ultimately upheld its use only to prevent "serious abuses" implicated by communications with potential members of a class. *Id.*

b. Any such order, however, must:

1) be narrow and limited in scope;

2) identify the potential abuses that gave rise to the order; and

3) be supported by "a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.* at 101.

c. Even so, limitations on speech in this regard are reviewed using "a relaxed standard of scrutiny better suited to the hardiness of commercial speech," and "will satisfy first amendment concerns if it is grounded in good cause and issued with a 'heightened sensitivity.'" *Kleiner*, 751 F.2d at 1205.

ii. With that said, in order to show that a court should impose some kind of restrictions on counsel's communication with putative class members, a moving party must show that (1) "a particular form of communication has occurred or is threatened to occur," and (2) the particular form of communication at issue is abusive in that it threatens the proper functioning of the litigation." *Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc.*, 214 F.R.D. 696, 697-98) (S.D. Ala. 2003).

3. **Conflicts of Interest**

A. "[T]he typical pathology of class action litigation . . . is riven with conflicts of interest." *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 686 (7th Cir. 2008).

B. Conflicts between class members

i. **FRCP Rule 23(a)(4)**

a. The perquisite set forth in Fed. R. Civ. P. Rule 23(a)(4) is that "the representative parties will fairly and adequately protect the interests of the class."

1) One of the purposes of this prerequisite is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citing *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 157-58, n. 13 (1982)).

2) A denial of certification on this ground, however, must be "**fundamental**," and go "**to the heart of the litigation**." *Charron v. Wiener*, 731 F.3d 241, 250 (2d Cir. 2013) (quoting *Cent. States SE. & SW. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC.*, 504 F.3d 229, 246 (2d Cir. 2007)).

ii. **CPLR § 901**

i. The New York State prerequisites are set forth in CPLR § 901: Prerequisites to a class action

ii. Section 901(a)(4) mirrors its federal counterpart by requiring that "the representative parties will fairly and adequately protect the interests of the class." N.Y. CPLR 901(a)(4) (Westlaw through L.2018, ch. 1 to 372, 377-403).

iii. **CPLR § 902**-

a. Within 60 days after all responsive pleadings are due, plaintiff must move for an order determining whether the class action can be maintained.

b. The court must consider the factors set forth in CPLR § 902 in determining whether the class action may continue as such. *See* N.Y. CPLR 902 (Westlaw through L.2018, ch. 1 to 372, 377-403).

C. Conflicts between class counsel and class members

i. "The relevant case law . . . generally holds that class counsel's duty, above all, is to the class members as a whole and not to any particular named plaintiff. Furthermore, the duty to the class is owed regardless of whether the class has yet been certified." *Med. & Chiropractic Clinic, Inc. v. Oppenheim*, No. 8:16-cv-1477-T-36CPT, 2018 WL 3707836, at *9 (M.D. Fla. Aug. 8, 2018) (citing *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981), *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982), and *Fla. Bar v. Adorno*, 60 So. 3d 1016, 1018, 1025 (Fla. 2011)) (holding that a three-year suspension

was warranted for an attorney whose misconduct included negotiating a seven million dollar settlement on behalf of seven named plaintiffs, while abandoning thousands of putative class members, and obtaining a nondisclosure agreement with the named plaintiffs for which the only logical reason could be keeping the facts of settlement secret from putative class members); *see Smith v. SEECO, Inc.*, No. 4:14-CV-00435 BSM, 2017 WL 2221707, at *3 (E.D. Ark. May 20, 2017) ("There can be no question that . . . class counsel has a unique attorney-client relationship with class members regardless of whether that relationship was established after certification or at the conclusion of the opt-out period") (citing *Kleiner*, 751 F.2d at 1206-07.

ii. CPLR § 901(a)(4), which requires "adequate representation," also applies in this context

a. Adequacy of representation implicates "plaintiffs as class representatives and counsel, and the impact of alleged improper or unethical conduct by each." *Meachum v. Outdoor World Corp.*, 171 Misc. 2d 354, 358 (Sup. Ct. Queens Cty. 1996).

b. Such representation "depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation." *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977) (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3rd Cir. 1975)).

c. Furthermore, "[t]he conduct of plaintiff's counsel, particularly the ethical considerations of such conduct, is a factor in considering the adequacy of representation." *Meachum*, 171 Misc. 2d at 358 (citing *Cannon v. Equitable Life Assurance Soc'y of U.S.*, 106 Misc. 2d 1060, 1068 (Sup. Ct. Queens Cty. 1980)).

iii. *Tanzer v. Turbodyne Corp.*, 68 A.D.2d 614 (1st Dep't 1979)

a. In this decision, the First Department reversed Special Term, and denied class certification where numerous conflicts of interest existed, including questions whether plaintiffs' attorney was a stockholder in the defendant's company, whether "class representatives were closely related to the lawyers for the class and that they (the class representatives), as a regular practice, made small investments in corporations for the purpose of bringing lawsuits through the law firm." *Stern v. Carter*, 82 A.D.2d 321, 343-44 (2d Dep't 1981).

iv. **ABA Model Rules of Professional Conduct 1.7: Conflicts of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. Model Rules of Prof'l Conduct r. 1.7 (Am. Bar Ass'n 2018).

v. However, class counsel who may be adverse to certain class members is not precluded from representing those members.

vi. Arguably the most concerning conflicts of interest that arise between class counsel and members arise during the **settlement stage** discussed below.

III. Settlement

1. **Control-**

A. Generally, counsel directs the strategy and conducts the strictly legal duties of litigation.

B. Clients have the sole authority over the objectives of representation, and exclusively over matters such as whether to settle. *See* 22 N.Y.C.R.R. 1200.0 r. 1.2 (Westlaw 2018).

C. **22 N.Y.C.R.R. 1200.0 Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. 22 N.Y.C.R.R. 1200.0 r. 1.2(a) (Westlaw 2018)

2. **Judicial Approval of Settlement and Notice**

A. **Federal Rule of Civil Procedure 23**

i. "The drafters designed the procedural requirements of Rule 23, especially the requisites of subsection (a), so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests. The rule thus represents a measured response to the issues of how the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995).

ii. **Federal Rule of Civil Procedure 23(e): Settlement, Voluntary Dismissal, or Compromise**

a. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. Fed. R. Civ. P. 23(e).

1) Under section (e)(1), "the court must provide notice of [any settlement] to 'all class members who would be bound' by the proposal." *Desrosiers*, 30 N.Y.3d at 498 (quoting Fed. R. Civ. P. 23(e)(1)(B)).

2) "Thus, under the current federal rule, mandatory approval and notice of a proposed settlement is now required only for certified classes." *Id.*

B. **CPLR § 908**

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. N.Y. CPLR 908 (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

i. *Desrosiers v Perry Ellis Menswear, LLC*, 30 N.Y.3d 488 (2017).

a. In this case, the Court of Appeals considered "whether CPLR 908 applies only to certified class actions, or also to class actions that are settled or dismissed before the class has been certified." *Id.* at 492.

b. The Court was reviewing two First Department decisions that, in part, relied upon an earlier decision *Avena v. Ford Motor Co.*, 85 A.D.2d 149 (1st Dep't 1982).

c. In a split 4-3 decision, the Court held that, pursuant to CPLR § 908, "notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given," regardless of whether the class had been certified. *Id.*

d. In making this determination, the Court stated that there were "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." *Id.* at 499.

e. In her dissenting opinion, Judge Stein asserted that the majority found "ambiguity in CPLR 908 where none exists," and "place[d] undue weight on the First Department's holding in *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dep't 1982])." *Id.* (Stein, J., dissenting).

1) According to Judge Stein, "the requirement in CPLR 908 that notice be provided 'to all members of the class' is expressly limited to a 'class action.'"

Id. (quoting N.Y. CPLR 908 (Westlaw through L.2018, ch. 1 to 372, 377 to 403)).

ii. CPLR § 908 also implicates the ethical issue of **conflicts of interest** inasmuch as "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.' " *Id.* at 495 (citing Mem from St Consumer Protection Bd, May 29, 1975 at 7, Bill Jacket, L 1975, ch 207).

3. **Settlement Communications-**

A. Once class members are considered represented, any communication should be directed to class counsel.

B. Any communications occurring before that point are not precluded, including communication for the purpose of settlement, but must not be, as discussed above, misleading, coercive, or otherwise unethical. *See Kleiner*, 751 F.2d at 1202 ("A unilateral communications scheme [from a defendant to putative class members] is rife with potential for coercion."); *The Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260, 263 (S.D. W.Va. 2007) ("Abusive practices that have been considered sufficient to warrant a protective order include communications that coerce prospective class members into excluding themselves from the litigation; communications that contain false, misleading or confusing statements; and communications that undermine cooperation with or confidence in class counsel.") (quoting *Cox Nuclear Med.*, 214 F.R.D. at 698; *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002)).

C. *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979)-

i. In this case, the 7th Circuit set forth a three-step analysis in determining whether a particular settlement communication was improper.

a. "an offer to settle should contain sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available avenues for pursuing his claim if he does not settle." *Id.* at 1139; *see Kay,* 246 F.R.D. at 263; *Keystone*, 238 F. Supp. 2d at 157.

D. Settlement communications that do not inform putative class members of important facts, such as the existence of a lawsuit, the nature of the lawsuit, the putative class member's position with respect to the lawsuit, etc., have been found to be "misleading or coercive." *Friedman v. Intervet Inc.*, 730 F. Supp. 2d 758, 762 (N.D. Ohio 2010); *cf. Cox*, 214 F.R.D. at 699.

4. **Conflicts of Interest and Informed Consent -**

A. In many cases, it is nearly impossible to obtain informed consent from all members of a class

B. Incentive Awards -

i. An example of a potential fundamental conflict is the use of Incentive Awards-

a. Incentive Awards are "designed to compensate [a class action plaintiff] for bearing [certain] risks," such as his or her liability for defendant's costs, including, in some cases, attorney's fees. *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876-77 (7th Cir. 2012).

b. These awards pose potential ethical issues in cases where they are extended exclusively to named plaintiffs who support settlement. In those situations, named plaintiffs may be tempted to accept a settlement offer regardless of the best interests of the class. *See Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014); *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009); *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012).

5. **Settlement offers that include language barring class counsel from bringing subsequent lawsuits against particular defendants are generally unethical and unenforceable to that extent.**

A. **ABA Model Rules of Professional Conduct 5.6: Restrictions on Rights to Practice**

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. Model Rules of Prof'l Conduct r. 5.6 (Am. Bar Ass'n 2018); *see also In re Hager*, 812 A.2d 904 (D.C. 2002); *Adams v. BellSouth Telecomm., Inc.*, No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001).

6. **Considerations for Objectors**

A. "A federal district court possesses broad inherent power to protect the administration of justice by levying sanctions in response to abusive litigation practices." *Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 386 (2d Cir. 1981).

B. These powers include the authority to discipline attorneys appearing before a court who are deemed to engage in such practices. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991) (citing *Ex Parte Burr*, 22 U.S. 529 (1824)); *see In re Petrobras Sec. Litig.*, 14-CV-9662 (JSR), 2018 WL 4521211, at *3 (S.D.N.Y. Sept. 21, 2018) (discussing the broad inherent power of courts to sanction attorneys who engage in bad faith litigation practices).

C. *In re Petrobras Sec. Litig.*, 14-cv-9662 (JSR), 2018 WL 4521211 (S.D.N.Y. Sept. 21, 2018)-

i. Here, the Court defined "objectors" as "members of the class who file objections to proposed class action settlements prior to the Court's determination of whether or not to finally approve the settlement to which it has previously given preliminary approval." *Id.* at *1.

ii. While recognizing that objectors' objectives can serve instrumental purposes, such as "protecting class interests" by "bring[ing] to light evidence that a settlement was collusive or that class counsel's fee award was inflated," objectors can also pursue much more self-interested goals that thwart the judicial process. *Id.*

iii. One way in which objectors' efforts inhibit or "pervert the process" is "by filing frivolous objections and appeals, not for the purpose of improving the settlement for the class, but of extorting personal payments in exchange for voluntarily dismissing their appeals. *Id.* (citing *Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018) (referring to self-serving efforts of objectors as "objector blackmail"), *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991), *In re Initial Public Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010)).

iv. In dealing with counsel and members who the Court determined to be in this class of objectors, the Court noted a then-pending amendment to Federal Rules of Civil Procedure Rule 23, which would require "judicial approval of any monetary settlements to objectors," and had the potential to hinder what it dubbed "these abusive side deals." *In re Petrobras Sec. Litig.*, at *1 (citing Proposed Amendments to the Federal Rules of Civil Procedure, Rules 5, 23, 62, and 65.1, Slip Order at *9-15 (U.S. Apr. 26, 2018, https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf).

v. The Court found that the objectors, who were blocking a final order awarding a nearly $3 billion settlement that the Court had approved several months prior, asserted objections that lacked "any colorable merit," and were made in bad faith. *Id.* at *4.

vi. The Court: (1) imposed sanctions on one attorney in the amount of $10,000; (2) ordered one of the objectors to post an appeals bond of $5,000; (3) ordered the other objector to post a similar bond in the amount of $50,000.

7. ***Cy Pres* Settlement Awards**

A. Under the doctrine of *cy pres*, courts are authorized to "distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries for the indirect benefit of the class." *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 741 (9th Cir. 2017) (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)).

B. "A *cy pres* award must be 'guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members.'" *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (quoting *Nachshin*, 663 F.3d at 1039).

C. Potential Ethical Issues for Plaintiffs' Counsel

i. *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012).

a. "To avoid the 'many nascent dangers to the fairness of the distribution process,' we require that there be 'a driving nexus between the plaintiff class and the cy pres beneficiaries.' " *Id.* at 865) (quoting *Nachshin*, 663 F.3d at 103); *see In re Google*, 869 F.3d at 743 ("when 'unbridled by a driving nexus between the plaintiff class and the *cy*

pres beneficiaries[,] [the *cy pres* doctrine] poses many nascent dangers to the fairness of the distribution process.' ") (quoting *Nachshin*, 663 F.3d at 1038) (citing *Dennis*, 697 F.3d at 865).

ii. Issues generally arise for class counsel who has some kind of conflict of interest with respect to any cy pres award or an interest in resolving the litigation quickly.

iii. Recently, the U.S. Supreme Court granted certiorari and heard oral argument for *Frank v. Gaos*, 138 S. Ct. 1697 (2018), which arose out of 9th Circuit case, *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017). *See* Transcript of Oral argument, *Frank v. Gaos*, No. 17-961 (U.S. Oct. 31, 2018). The Court also recently asked the parties to address standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), in supplemental briefing so it is possible that the case could be decided on that basis without reaching the Cy Pres issues.

a. In *In re Google*, the Court reviewed, using an abuse of discretion standard, the District Court's approval of a $5.3 million cy pres-only award to six organizations that pledged to use the settlement funds to promote internet privacy.

b. Preliminarily, the Court, citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012), found that "because the settlement took place before formal class certification, settlement approval requires a 'higher standard of fairness.'" *In re Google*, 869 F.3d at 741 ("at this early stage of litigation, the district court cannot as effectively monitor for collusion and other abuses, [and thus] we scrutinize the proceedings to discern whether the court sufficiently 'account[ed] for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit.'") (second alteration in original) (quoting *Lane*, 696 F.3d at 819).

c. The Court held that the *cy pres*-only award was appropriate where each class member would receive approximately 4 cents, that the award was "non-distributable" under FRCP Rule 23, *id.* at 742, and that the attorneys' fees awarded were reasonable, *id.* at 747.

d. The "crux" of the appeal, though, was "whether approval of the settlement was an abuse of discretion due to claimed relationships between counsel or the parties and some of the *cy pres* recipients." *Id.* at 743.

1) In this regard, the Court upheld the award, stating that "the claimed relationships d[id] not 'raise substantial questions about whether the selection of the recipient was made on the merits." *Id.* at 744 (quoting Principles of the Law of Aggregate Litig., § 3.07 cmt. b (Am. Law Inst. 2010))..

D. Potential Ethical Issues for Defense Counsel

i. **ABA Model Rules of Professional Conduct Rule 1.8: Current Clients: Specific Rules**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. Model Rules of Prof'l Conduct r. 1.8 (Am Bar Ass'n 2018).

ii. "In addition, courts exercise close review of cy pres distributions as part of the settlement approval process to ensure that the settlement is fair, reasonable, and adequate. Therefore, under Model Rule 3.3, which directs attorneys to engage in candor toward the tribunal, attorneys with an interest or relationship with a cy pres beneficiary should also disclose this to the court so that the court is equipped with all relevant facts and knowledge needed to review and decide whether to approve the settlement." *Id.*

IV. More on possible ramifications of ethics violations

1. **New York-**

   A. **Judiciary Law § 90 (2) -** authorizes each Appellate Division Department

   > "to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice." N.Y. Jud. Law § 90(2) (Westlaw through L.2018, ch. 1 to 372, 377 to 403).

   B. **22 N.Y.C.R.R. § 1200.0-1200.59**

      i. Rules of Professional Conduct

   C. **22 N.Y.C.R.R. § 1240**

      i. Rules for Attorney Disciplinary Matters

2. A few possible repercussions for violating relevant ethical rules

   A. Denial of attorney's fees. *See Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012)

   B. Denial of class certification. *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489 (7th Cir. 2013); *Creative Montessori Learning Ctrs. v. Ashford Gear, LLC*, 662 F.3d 913 (7th Cir. 2011).

   C. Disciplinary action under relevant ethical rules. *See* Section IV(1) above.

   D. Disqualification as class counsel. *cf. Reliable Money Order,* 704 F.3d at 500 (finding that even if counsel violated ethical rules, their conduct "d[id] not mandate disqualification of counsel.").

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Critical Junctures: Depositions of Class Representatives and Challenging Expert Testimony at the Class Certification Stage

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<u>DEPOSING CLASS REPRESENTATIVES</u>

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I. INTRODUCTION

Deposing class representatives in a putative class action is a critical step in class certification discovery. Many times class counsel develop their theory of the case before they identify plaintiffs. As a result, named plaintiff's deposition testimony may not align with the claims and class definition in the complaint, providing valuable evidence to defeat class certification. The proposed class representatives may even provide significant admissions undermining class counsel's theory of the case. For example, a plaintiff's individual belief as to the nature of his injury or what caused it may differ from what is alleged in the complaint.

Because Rule 23 is not "a mere pleading standard," the party seeking certification "must affirmatively demonstrate compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). But given the Supreme Court's instruction that courts should conduct a "rigorous analysis" of whether "the prerequisites of Rule 23(a) have been satisfied," defense counsel should be prepared to offer evidence showing why named plaintiff has not and cannot meet the requirements of Rule 23. *Id.* at 351.

Rule 23(a) requires numerosity, commonality, typicality, and adequacy. *Id.* at 349. While commonality and typicality "tend to merge with the adequacy-of-representation requirement," the adequacy inquiry required by Rule 23(a)(4) remains significant in its own right. *Id.* at 349 n.5.

> In essence, commonality and typicality require a convergence of interest between the class and its representative, while [adequacy] requires this and more, asking also whether conflicts might undermine the convergence of interest, and whether the representative parties are competent to promote the interests of the class even assuming their interests align with those of the class.

1 Newberg on Class Actions § 3:57 (5th ed.).

Because the typicality and adequacy requirements focus on the attributes of the proposed class representatives, they are particularly relevant topics for named plaintiff's deposition. *See id.* § 3:50. We will therefore focus on these requirements and how defense counsel can use named plaintiff's deposition to gather evidence that they cannot be met. We will touch briefly on how deposition testimony can be used in connection with arguments against certification under Rule 23(b)(3) as well.

As always, be sure to carefully study the law in your jurisdiction as the case law on these topics can vary.

II. TYPICALITY

A class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement protects the putative class by ensuring that their claims will rise or fall with the named plaintiff's claims. *See CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011). Otherwise, the class could be left "in the lurch" if named plaintiff's claims fail or succeed for reasons unique to him. *See id.* at 724.

To obtain certification, plaintiff must show that "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). While the factual background of named plaintiff's claim need not be identical to that of

the class members, "the disputed issue of law or fact [should] occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *In re Fosamax Prod. Liab. Litig.*, 248 F.R.D. 389, 398 (S.D.N.Y. 2008).

Defense counsel should question plaintiff closely on her claims with an eye toward identifying differences between the factual and legal bases for those claims and the claims alleged in the complaint. *See, e.g.*, *Levias v. Pac. Mar. Ass'n*, No. 08-CV-1610-JPD, 2010 WL 358499, at *5 (W.D. Wash. Jan. 25, 2010) (declining to find typicality "in view of [p]laintiff's seniority and rather limited work experiences vis-à-vis the class"); *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 167 (S.D.N.Y. 2003) (in products liability action, named plaintiffs' claims were not typical because they arose "from a substantially different course of events" and they would have "dissimilar" legal arguments "to those members of the class that were stuck by different needle device products"). It can be helpful "to compare what is needed to prove the plaintiff's claim with proofs needed for those of the proposed class." *In re Fosamax*, 248 F.R.D. at 398 (citing Newburg on Class Actions § 17:11).

The existence of "an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class." *CE Design*, 637 F.3d at 726; 7A Fed. Prac. & Proc. Civ. § 1764 (3d ed.) (recognizing that repeat securities class action plaintiffs (*i.e.*, "professional" plaintiffs who have filed numerous suits) may not be typical because they may be subject to unique reliance defenses). Defense counsel should therefore question named plaintiffs about facts relevant to potential defenses as well. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000) (finding that named plaintiff's claim in securities fraud suit was atypical because she was a professional broker and subject to unique defenses). If named plaintiff signed a release and other class members did not,

"she may be subject to unique defenses that could become a focus of the litigation, rendering her atypical and making class certification inappropriate." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599-601 (3d Cir. 2009) (noting that a class representative could also be atypical if she did not sign a release but other class members did).

III. ADEQUACY

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). While the named plaintiff has the burden of establishing adequacy, some courts presume the truth of plaintiff's assertion of adequacy unless defendant offers evidence to the contrary. *See* 1 Newberg on Class Actions § 3:55 (5th ed.); *but see London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1253 (11th Cir. 2003) ("[A]dequacy is for the plaintiffs to demonstrate; the plaintiffs are not entitled to any presumption of adequacy."); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) (same). So it is important for defense counsel to affirmatively seek evidence of named plaintiff's inadequacy.

Counsel should investigate potential conflicts between named plaintiff's interests and the interests of absent class members. *See In re Flag Telecom*, 574 F.3d at 35. They should also try to develop evidence showing named plaintiff's lack of qualifications, *e.g.*, his "lack of ability or willingness to take an active role in and control of the litigation to protect the interests of the absentee class members." *Nat'l Air Traffic Controllers Ass'n. v. Dental Plans, Inc.*, No. CIV.A. 1:05-CV-882TW, 2006 WL 584760, at *3 (N.D. Ga. Mar. 10, 2006).

Note that the typicality inquiry often "merges" with the adequacy inquiry." *CE Design*, 637 F.3d at 724. A plaintiff with an atypical claim may be inadequate because she lacks "the motivation or incentives to adequately pursue the claims of other class members." 1 Newberg on Class Actions § 3:57 (5th ed.). Where the facts support it, defendants should argue that

plaintiff's atypicality means she fails both Rule 23(a)(3) and Rule 23(a)(4). *See In re Schering Plough*, 589 F.3d at 602 ("Because of the similarity of the typicality and adequacy inquiries, certain questions—like whether a unique defense should defeat class certification—are relevant under both.") For example, a named plaintiff subject to a release "may lack the same financial stake as other members of the class." *Id.* In other words, she may be an inadequate representative because she has "different incentives in terms of how much time, energy, and money she is willing to spend pursuing the claim." *Id.*

A. Conflicts of Interest

The adequacy inquiry looks for "conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997); *see also Burton v. Chrysler Grp. LLC*, No. CIV.A. 8:10-00209, 2012 WL 7153877, at *7 (D.S.C. Dec. 21, 2012) ("Basic due process requires that named plaintiffs possess undivided loyalties to absent class members."). The court need not find an actual conflict. *Aliano v. CVS Pharmacy, Inc.*, No. 16CV2624FBSMG, 2018 WL 3625336, at *6 (E.D.N.Y. May 21, 2018). A "potential conflict of interest" will suffice "to render a named plaintiff an inadequate class representative." *Aliano*, 2018 WL 3625336, at *6 (internal quotation and citation omitted).

Thus, defense counsel should ask named plaintiffs about potential conflicts of interest between named plaintiffs and the putative class, such as prior claims against and releases of defendant. *See, e.g.*, *Levias,* 2010 WL 358499, at *6 (finding that the possibility of a "favorable settlement" in named plaintiff's individual action "might undermine [his] loyalty . . . to the putative class"); *Danielson v. DBM, Inc.*, No. 1:05-CV-2091-WSD, 2007 WL 9701055, at *6 (N.D. Ga. Mar. 15, 2007) (finding potential conflicts of interest where "[s]everal named

Plaintiffs resolved their warranty claims before joining this action, and at least one of the named Plaintiffs signed a release of liability").

Other specific types of conflicts are differences in type of relief sought (*e.g.*, prospective v. retrospective) and differences in type of injury (*e.g.*, current v. future). See 1 Newberg on Class Actions § 3:50 (5th ed.); *Amchem*, 521 U.S. at 625-27 (recognizing conflict between currently injured class members and exposure-only class members who may suffer injury in the future); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 234 (2d Cir. 2016) (recognizing conflicting interests of Rule 23(b)(2) class seeking injunctive relief and Rule 23(b)(3) class seeking monetary relief)

Another important source of conflicts is named plaintiff's relationship with class counsel. Close relationships between class counsel and named plaintiffs "create[ ] a present conflict of interest—an incentive for [named plaintiff] to place the interests of [class counsel] above those of the class." *London*, 340 F.3d at 1255 ("The long-standing personal friendship of [plaintiff] and [counsel] casts doubt on [plaintiff]'s ability to place the interests of the class above that of class counsel."); *see also Ctr. City Periodontists, P.C. v. Dentsply Int'l, Inc.*, 321 F.R.D. 193, 208 (E.D. Pa. 2017) (finding no adequacy, in part, because plaintiff and class counsel had been close friends for twenty-five years); *O'Shaughnessy v. Cypress Media, L.L.C.*, No. 4:13-CV-0947-DGK, 2015 WL 4197789, at *5 (W.D. Mo. July 13, 2015) (finding brother of class counsel inadequate class representative because "he [was] more likely to refrain from criticizing a fee request submitted by him, or to give too much deference to his recommendation regarding a settlement").

For example, there may be a conflict where:

- class counsel has represented named plaintiff in numerous class actions over nearly a decade (*Aliano*, 2018 WL 3625336, at *6);

- class counsel has represented named plaintiff as a defendant for no charge (*id.*);
- named plaintiff is the brother of class counsel (*Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 95 (7th Cir. 1977));
- named plaintiff and class counsel were "business partners in a series of real estate deals" (*Sipper v. Capital One Bank*, No. CV 01-9547 LGB (MCX), 2002 WL 398769, at *3-5 (C.D. Cal. Feb. 28, 2002));
- named plaintiff and class counsel were joint defendants in a lawsuit (*id.*); and
- named plaintiff was the long-term friend and former stockbroker of class counsel (*London*, 340 F.3d at 1255).

However, a close relationship in and of itself is not always a disqualifying conflict. *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 309 (S.D.N.Y. 2004) (declining to find named plaintiff could not "fairly and adequately protect the interests of the class" due to his close personal relationship with class counsel). But when combined with other indicia of inadequacy, a close relationship can be significant. *See Bohn v. Pharmavite, LLC*, No. CV 11-10430-GHK AGRX, 2013 WL 4517895, at *3 (C.D. Cal. Aug. 7, 2013) (acknowledging that plaintiff's inconsistent testimony and failure to conduct due diligence was "even more troubling when viewed in light of Plaintiff's close personal relationship with" class counsel).

An examination of named plaintiff's financial incentives may also show that a close relationship with class counsel constitutes a disqualifying conflict of interest. *See London*, 340 F.3d at 1254-55. For example, when class counsel's fee will "far exceed the class representative's recovery," a close relationship may provide evidence that the class representative may "allow settlement on terms less favorable to the interests of absent class members." *Id.* Similarly, "a Court will consider whether the value a class member may recover [in the class action] is eclipsed by the benefit that plaintiff expects from an ongoing relationship with class counsel." *Aliano*, 2018 WL 3625336, at *5-6 ("The sheer number of lawsuits brought

with [class counsel] as counsel and [plaintiff] as lead plaintiff creates the appearance that [plaintiff] is likely interested in bringing additional actions with [class counsel] as his counsel in the future.").

On the other hand, if plaintiff doesn't know class counsel at all, that suggests they have not been overseeing or actively participating in the litigation, which raises concerns discussed further below.

B. Qualified to Serve as Class Representative

1. Understanding of Case

To be an adequate class representative, named plaintiff must be able to manage the litigation and provide a check on class counsel. *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. 2008). This requires at least "a minimal degree of knowledge regarding the action" and "a general understanding of the nature of class-action litigation." *Scott v. New York City Dist. Council of Carpenters Pension Plan*, 224 F.R.D. 353, 355 (S.D.N.Y. 2004) (citations omitted); *see Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005); *Baffa*, 222 F.3d at 61. An adequate class representative must also actively participate in the litigation.

The knowledge requirement is not necessarily a high bar for plaintiffs. *In re Flag Telecom*, 574 F.3d at 42 (noting that the Second Circuit "disfavor[s] [ ] attacks on the adequacy of a class representative based on the representative's ignorance"); *but see Berger*, 257 F.3d at 483 n.18 ("Plaintiffs should understand the actions in which they are involved, and that understanding should not be limited to derivative knowledge acquired solely from counsel."). "But the standard is not so low as to be meaningless." *In re Monster Worldwide*, 251 F.R.D. at 135.

A proposed class representative must "be aware of the basic facts underlying the lawsuit." *Id.* (internal quotation omitted) (recognizing that in complex cases named plaintiffs

need not be experts on all aspects of the case). Therefore, named plaintiffs may be denied class representative status "where [they] have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys.'" *Id.* (quoting *Baffa*, 222 F.3d at 61).

For example, in *In re Monster Worldwide*, the district court found it "appalling" that the witness testifying for named corporate plaintiff in a Rule 30(b)(6) deposition did not know:

- the name of the stock at issue in the case;
- the name of defendants;
- whether the corporate plaintiff he represented ever owned the stock at issue;
- whether an amended complaint had been filed;
- whether he had ever seen any complaint;
- whether a motion to dismiss had been filed; or
- whether the corporate plaintiff had moved for summary judgment.

Id.; *but see In re Intuitive Surgical Sec. Litig.*, No. 5:13-CV-01920-EJD, 2016 WL 7425926, at *8 (N.D. Cal. Dec. 22, 2016) (distinguishing *In re Monster Worldwide* because it involved a corporate plaintiff being deposed under Rule 30(b)(6), which requires the corporate entity "to educate its designees about matters beyond his or her personal knowledge").

Likewise, an individual named plaintiff was recently found in adequate based on deposition testimony revealing that he did not know why he filed the lawsuit, what relief he was seeking on behalf of the class, the legal basis for his claim, and what was improper about the letter upon which he based his Fair Debt Collection Practices Act claim. *Ocampo v. GC Servs. Ltd. Partnership*, No. 1:16-cv-09388, Mem. Op. (ECF No. 72) at 19-22 (N.D. Ill. Nov. 28, 2018).

Therefore, defense counsel should question named plaintiffs to see if they understand "the nature of th[e] action, the facts alleged, and the theories of relief against defendant." *Bodner v. Oreck Direct, LLC*, No. C 06-4756 MHP, 2007 WL 1223777, at *2 (N.D. Cal. Apr. 25, 2007) (concluding from "the record that plaintiff's counsel, and not plaintiff, is the driving force behind this action"); *see Danielson*, 2007 WL 9701055, at *6; *Jones v. CBE Grp., Inc.*, 215 F.R.D. 558, 568-69 (D. Minn. 2003).

If opposing counsel argues that this information is privileged, that too can support an argument that named plaintiff is inadequate. *See, e.g.*, *Karnes v. Fleming*, No. CIV.A. H-07-0620, 2008 WL 4528223, at *3 (S.D. Tex. July 31, 2008) ("That the proposed class representative gained knowledge of the facts and issues from counsel is insufficient."); *Bodner*, 2007 WL 1223777, at *1-2 (inadequate plaintiff obtained "virtually all of [his] knowledge regarding this matter . . . from his attorneys"); *Kelley v. Mid-Am. Racing Stables, Inc.*, 139 F.R.D. 405, 409 (W.D. Okla. 1990) ("Based on plaintiffs' testimony in this case, the Court finds that these plaintiffs are inadequate representatives because of their almost total lack of familiarity with the facts of their case. Indeed, what the plaintiffs know appears to come entirely from their counsel.").

2. Understanding of & Willingness to Fulfill Duties:

Adequacy requires that "parties are not simply lending their names to a suit controlled entirely by the class attorney." *Alberghetti v. Corbis Corp.*, 263 F.R.D. 571, 580 (C.D. Cal. 2010), *aff'd*, 476 F. App'x 154 (9th Cir. 2012); *see Unger*, 401 F.3d at 321("Class representatives must satisfy the court that they, and not counsel, are directing the litigation."). Thus, class representatives must understand the nature of a class action. *See Burton*, No. 2012 WL 7153877, at *7 ("Plaintiff [ ] testified that no one has ever explained to him the cost and

benefits of a class action versus an individual action" and "he did not understand that this case is a class action . . . .").

Further, a class representative should understand his duties and obligations to the class and confirm his willingness to represent the class. *See, e.g.*, *Price v. United Servs. Auto. Ass'n*, No. 10-2152, 2012 WL 2847821, at *8 (W.D. Ark. Mar. 16, 2012), *report and recommendation adopted sub nom. Price v. USAA Cas. Ins. Co.*, No. 2:10-CV-02152, 2012 WL 2847916 (W.D. Ark. July 11, 2012) ("Plaintiff's own testimony demonstrates that he does not understand or appear to care about his duty as a class representative to vigorously pursue the interests of potential class members."); *Alberghetti*, 263 F.R.D. at 579-80 (finding inadequacy where plaintiff testified that she did not agree to represent all members of the proposed class, only a small subset of the proposed class); *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, No. MDL 071873, 2008 WL 5423488, at *10 (E.D. La. Dec. 29, 2008) (finding it concerning that some "proposed class representatives believe that they have no responsibility to other class members" and one "stated that he does not want to be a representative").

For example, a plaintiff may not be adequate where he does not know or understand:

- that the case is a class action (*Scott*, 224 F.R.D. at 356);
- what a class action is (*id.*; *Ocampo*, 11/28/18 Mem. Op. at 20);
- what a class representative is or what duties a class representative owes to class members (*Scott*, 224 F.R.D. at 356; *Price*, 2012 WL 2847821, at *8; *Ocampo*, 11/28/18 Mem. Op. at 20);
- the class definition or who is in the class (*Price*, 2012 WL 2847821, at *8; *Scott*, 224 F.R.D. at 356);
- what effect winning the case will have on his claims or class members' claims (*Scott*, 224 F.R.D. at 356);
- "what would happen if class certification was denied" (*Price*, 2012 WL 2847821, at *8); and

- "how his attorneys would be compensated if [plaintiff] lost the lawsuit." (*id.*).

3. <u>Active Participation</u>

An adequate class representative must actively participate in and devote time to the case. The failure to do so weighs against a finding of adequacy. *In re Monster Worldwide*, 251 F.R.D. at 135-36 (recognizing as problematic named plaintiff's failure to learn about the substance of the case until shortly before the deposition and failure to devote any time to the case prior to preparing for the deposition). For example, plaintiff's failure to conduct basic due diligence on her claims can demonstrate inadequacy:

> [Plaintiff] testified at her deposition based on unverified memories that turned out to be mostly incorrect. These issues could have been easily avoided had Plaintiff made the effort to conduct simple due diligence on her claims. That she failed to do so—and provided deposition testimony without having done so—raises serious questions about her interest and commitment to protecting the interest of the classes.

Bohn, 2013 WL 4517895, at *3.

Other evidence of failure to participate that constitutes potential inadequate representation is:

- failure to read the complaint before filing or before sitting for deposition (*Bodner*, 2007 WL 1223777, at *1-2; *Danielson*, 2007 WL 9701055, at *6; *Scott*, 224 F.R.D. 356);

- failure to comply with discovery obligations, such as refusing to answer relevant questions at deposition (*Darvin v. Int'l Harvester Co.*, 610 F. Supp. 255, 257 (S.D.N.Y. 1985)); and

- over deference to class counsel (*Scott*, 224 F.R.D. at 356 (noting that plaintiff testified "he would leave every decision up to his attorney and never question his advice")).

If during her deposition named plaintiff purports to actively participate in the litigation, test that contention by inquiring about her communications with class counsel. *See, e.g.*, *Griffin v. GK Intelligent Sys.*, 196 F.R.D. 298, 302 (S.D. Tex. 2000) (finding class representatives

inadequate when "[t]hey do not participate in litigation decisions, do not receive regular cost/expense information, and they learn of activity in the case when they are copied on matters already completed"). This line of inquiry need not stray into privileged communications if defense counsel focuses on how often they confer, by what method they confer, and for how long they confer. The fact of communication, as opposed to the substance of communications, is not privileged.

4. Credibility

While many courts have rejected arguments that "prior unrelated unsavory, unethical, or even illegal conduct" renders a named plaintiff inadequate, 1 Newberg on Class Actions § 3:68 (5th ed.), "[a] named plaintiff who has serious credibility problems . . . may not be an adequate class representative," *CE Design*, 637 F.3d at 726. "[C]redibility or integrity" is relevant to named plaintiff's "adequacy to the extent they concern issues directly relevant to the litigation or involve confirmed examples of dishonesty, such as a conviction for fraud." *Bohn*, 2013 WL 4517895, at *1 (internal quotations and citations omitted); *see also Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 105 (N.D. Ill. 2013) (acknowledging courts deny class certification where "the class representative generally lacked credibility or the class representative's credibility was severely strained with respect to the claims in the lawsuit").

Therefore, credibility remains a topic to be explored during a named plaintiff's deposition. But for "an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims." *CE Design*, 637 F.3d at 728.

For example, inconsistent or untruthful testimony may render plaintiff inadequate. *See, e.g.*, *id.* at 726-27 (finding named plaintiff's testimony raised doubts about his truthfulness);

Savino v. Computer Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998) (affirming district court denying class certification on adequacy grounds where plaintiff "repeatedly changed his position as to whether he received" the letter his statutory claim was based upon, "creat[ing] serious concerns as to his credibility at trial"); *Gbarabe v. Chevron Corp.*, No. 14-CV-00173-SI, 2017 WL 956628, at *34 (N.D. Cal. Mar. 13, 2017) (finding named plaintiff inadequate due to inconsistencies in his testimony and discovery responses that "raised significant, unanswered questions about [his] credibility"); *Jovel v. Boiron, Inc.*, No. 11-CV-10803-SVW-SHX, 2014 WL 1027874, at *5 (C.D. Cal. Feb. 27, 2014) ("Because [named plaintiff]'s inconsistent statements were both significant and related to a material issue, if he serves as a representative plaintiff he will reduce the likelihood of prevailing on the class claims.").

Also, criminal convictions, particularly if they entail fraud, may render plaintiff inadequate. *See Jamison*, 290 F.R.D. at 105 (recognizing that felony conviction for fraud was "sufficient by itself to render [named plaintiff] an inadequate representative under the case law"); *but see Benedict v. Altria Grp., Inc.*, 241 F.R.D. 668, 674 (D. Kan. 2007) ("There is no evidence [plaintiff]'s criminal history presents a conflict of interest with other class members or would affect her ability to prosecute the action vigorously on behalf of the class.").

It is not necessarily problematic to be a professional class action plaintiff. *CE Design*, 637 F.3d at 724 ("Indeed, an experienced plaintiff in such an action may be able to ensure that class counsel act as faithful agents of the class."). But, as noted above, defense counsel should scrutinize named plaintiff's incentives and relationship with class counsel as they could be evidence of a conflict. *See, e.g.*, *Aliano*, 2018 WL 3625336, at *5-6.

5. Financial Ability

In light of the trend for class counsel to represent class plaintiffs on contingency, the ability of named plaintiff to finance the litigation is generally less of a concern now. *See* 1 Newberg on Class Actions § 3:69 (5th ed.).

But in a recent case, the district court found it problematic that plaintiff "testified that he is unwilling to bear financial burdens to proceed as a class representative." *Ocampo*, 11/28/18 Mem. Op. at 21. The court noted that "a class representative must have commitment to his case, including exposure to costs under Rule 54(d)." *Id.* at 22. While the court did not deny certification on this basis, it found this was "another reason why [p]laintiff ha[d] failed to establish that he [was] an adequate class representative. *Id.*

Further, numerous courts still recognize that litigation funding and fee agreements can be relevant to the adequacy determination. *Gbarabe v. Chevron Corp.*, No. 14-CV-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (holding that "the litigation funding agreement is relevant to the adequacy determination" where the claims were expensive to investigate and prepare for trial and class counsel was dependent on outside funding to prosecute the case); *see also Gusman v. Comcast Corp.*, 298 F.R.D. 592, 600 (S.D. Cal. 2014) (concluding that "[p]laintiff's retainer and fee agreement with counsel in this case is relevant to the Rule 23(a)(4) analysis of whether [p]laintiff is an adequate representative of the class"); *Porter v. Nationscredit Consumer Disc. Co.*, No. CIV.A. 03-3768, 2004 WL 1753255, at *2 (E.D. Pa. July 8, 2004), *aff'd sub nom. Porter v. Nationacredit Consumer Disc. Co.*, 285 F. App'x 871 (3d Cir. 2008) ("Fee agreements may be relevant to a plaintiff's ability to protect the interests of potential class members by adequately funding the suit . . . .").

So it may be worth asking named plaintiff about her understanding of how the litigation is financed and his willingness to bear costs.

IV. RULE 23(b)(3)

Rule 23(b)(3) requires that "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." Fed. R. Civ. P. 23(b)(3). Defense counsel can also explore whether named plaintiff can meet these requirements by deposition.

A. Predominance

Defense counsel should investigate all aspects of plaintiff's claims and defenses to develop evidence that individual issues predominate over common issues. While it is reminiscent of commonality,[1] the predominance requirement is "far more demanding because it tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." 7AA Fed. Prac. & Proc. Civ. § 1777 n.12 (3d ed.) (citing *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th 2005). Thus, it is not enough for common questions to exist, rather the court must "evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3)." § 1778.

For example, predominance may be defeated by showing individual questions regarding:

- causation (*see, e.g.*, *Brown v. Electrolux Home Prod., Inc.*, 817 F.3d 1225, 1237 (11th Cir. 2016); *Oscar v. BMW of N. Am., LLC*, 274 F.R.D. 498, 511 (S.D.N.Y. 2011));
- reliance (*see, e.g.*, *Webb v. Carter's Inc.*, 272 F.R.D. 489, 503 (C.D. Cal. 2011); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 267 F.R.D. 549, 562 (D. Minn. 2010), *aff'd*, 644 F.3d 604 (8th Cir. 2011)); and

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[1] The commonality requirement dictates that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As the Supreme Court has acknowledged, however, it is not so much whether there are "common questions" but rather whether "a classwide proceeding [can] generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

- injury-in-fact (*see, e.g.*, *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150, 157 (S.D. Iowa 2001)).

Also, certain affirmative defenses requiring individualized proof, such as comparative fault and assumption of risk, can defeat predominance. *See id.* at 159. When there is more than one named plaintiff, asking the same questions of each can produce evidence that individual issues predominate.

B. Superiority

The superiority requirement means the class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Defense counsel can pursue evidence to show a class action is not superior by asking whether plaintiff pursued any other avenues for resolving their claim or whether they could have pursued another avenue, such as an individual lawsuit or a complaint to a government agency.

New York State Bar Association – Class Action Program

The Use of Daubert Challenges at the Class Certification Stage – What Practitioners Should Know Before Bringing/Defending Against Such Challenges

Submitted by Jacqueline Seidel, King & Spalding

I. Overview of the Rules

A. Federal Rule of Evidence 702:

1. The proponent of the expert evidence must show:

a) The witness is has specialized knowledge which will help the tier of fact

b) The testimony is reliable

c) Based on sufficient facts or data

d) Is the product of reliable principles and methods

e) The expert has reliably applied the principles and methods to the facts of the case

B. Federal Rule of Evidence 23:

1. For a putative class that is seeking monetary relief, the plaintiff must demonstrate:

a) Numerosity

"the class is so numerous that joinder of all members is impractical"

b) Commonality

"there are questions of law or fact common to the class"

c) Typicality

"the claims or defenses of the representative parties are typical of the claims or defenses of the class"

d) Adequacy

"the representative parties will fairly and adequately protect the interests of the class"

e) Superiority

"the class action is superior to other methods of adjudication"

f) Predominance

"there are common questions of law or fact that predominate over any individual class member's questions"

2. To satisfy this burden: parties often rely on expert evidence/testimony.

II. What Role Do *Daubert* and Expert Testimony Play at the Class Certification Stage?

A. *Daubert* motions are often filed during the class certification stage

1. Class certification often requires plaintiffs to present expert testimony to meet their burden of showing commonality, predominance or ascertainability.

a) *American Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (motorcycle design defect class action);

b) *Campbell v. Nat'l R.R. Passenger Corp.*, No. CV 01-1513 (EGS), 2018 WL 1997254, at *9 (D.D.C. Apr. 26, 2018) (employment racial discrimination class action); and

c) *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin'l Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014) (class consisted of investors who had been allegedly given misrepresentations on the financial health of the company).

2. Thus, if plaintiffs' experts' theories are flawed, they fail to carry their burden and class certification is improper. *See, e.g.*, *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187-88 & n.8 (3d Cir. 2015) ("Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'though evidentiary proof' that Rule 23(b) is satisfied.").

3. Plaintiffs generally argue that *Daubert* is typically used to shield the fact finder from flawed evidence in a federal trial. However, class certification hearings are not trials; class certification hearings are heard before judges, nor juries; and it is the juries – and not judges - who need *Daubert* protection.

4. However, Defendants will argue that *Daubert* is meant to do more than just protect the jury from flawed evidence; it is meant to ensure that unreliable expert testimony is removed from the case as early as possible.

III. What is the current state of the law on the appropriate standard of scrutiny?

There is currently a split among federal courts regarding how to evaluate the reliability of an expert's testimony for purposes of class certification. As is discussed in more detail below, the 6th, 7th, 9th, and 11th Circuits have applied a "fuller" *Daubert* analysis. Alternatively, the 8th Circuit has endorsed a limited or "tailored" *Daubert* test.

A. Supreme Court Rulings That Discuss *Daubert* at the Class Certification Stage

1. The Supreme Court touched briefly on expert issues as they relate to class certification in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (appealed to Supreme Court after was decided by Eastern District of Pennsylvania and appealed to Third Circuit), but did not address *Daubert* directly.

a) The Court did not address whether the expert testimony supporting plaintiffs' damages theory was reliable.

b) But the Court did reaffirm that class certification requires a "rigorous analysis" including an examination of expert opinions and concluded that it was erroneous to "refus[e] to entertain arguments against [the plaintiffs'] damages model that bore on the propriety of class certification simply because those arguments would also be pertinent to the merits determination."

c) The *Comcast* ruling clearly endorses an in-depth analysis of plaintiffs' class action theories at the class certification stage, including expert issues, though it did not directly address how *Daubert* applies.

2. In combination with the Court's dicta in *Wal -Mart v. Dukes*, 131 S. Ct. 2541, 2553-54 (2011), this suggests that the Court may favor a full *Daubert* analysis with regard to experts' class certification opinions.

a) In *Dukes*, the Court noted that "[t]he District Court [for the Northern District of California] concluded that *Daubert* did not apply to expert testimony at the class certification stage of class action proceedings. *We doubt that this is so.*" (emphasis added)

b) At this point, however, it seems unlikely that the Court will make its position on this issue clear any time soon as the recent certiorari petition in *Taylor Farms Pacific, Inc. v. Pena*, No. 17-395 (9th Cir. May 3, 2017), which raised the question of "[w]hether a district court may certify a class action based on information that does not meet the standards of

admissibility set forth in the Federal Rules of Evidence and Civil Procedure," was denied on Feb. 20, 2018.

c) However, as the Supreme Court has acknowledged: "A district court's ruling on the certification issue is often the most significant decision rendered in" class proceedings. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *see also Coopers & Lybrand*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

B. Circuits applying the Full *Daubert* Analysis

1. The 6th, 7th, 9th, and 11th Circuits have applied this approach. Generally the reasons for following the "fuller" approach include:

a) A full *Daubert* inquiry was more consistent with the "rigorous analysis" required of certification decisions generally.

b) The 2003 amendments to Rule 23 removed "conditional" certification as an option.

c) The *Dukes* decision obligated courts to consider merits issues at the certification stage.

2. Circuit Cases that have followed the "fuller" approach:

a) The Seventh Circuit was the first appellate court to hold that *Daubert* applied at class certification or at least "if the situation warrants." *American Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010).

There, Plaintiffs alleged that Honda's Gold Wing GL1800 motorcycle had a design defect that made the steering assembly shake excessively. The Plaintiffs relied heavily on their expert to demonstrate the predominance of common issues. Plaintiffs' expert opined that motorcycles should, by design, "exhibit decay of any steering oscillations sufficiently and rapidly so that the rider neither reacts nor is frightened by such oscillations." The Defendants argued the report was unreliable as it was (i) not supported by empirical testing; (ii) not developed through a recognized standard-setting procedure; (iii) not generally accepted; and (iv) not the product of independent research. The Court held that "when an expert's report or testimony is critical to class certification, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion."

b) *Sali v. Corona Regional Medical Center*, No. 15-56460, 2018 WL 2049680, at *7 (9th Cir. May 3, 2018) ("[I]n evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*."). In *Sali*, the Ninth Circuit found that the district court erred by denying certification on the basis that Rule 23(b)(3)'s predominance requirement was not satisfied.

c) *In re Carpenter Co.*, No. 14-0302, 2014 U.S. App. LEXIS 24707, at *11 (6th Cir. Sep. 29, 2014) ("Given the Supreme Court's statement in *Wal-Mart* and the district court's application of *Daubert* to critical

witnesses," district court did not abuse discretion by conducting a *Daubert* analysis at the class certification stage.)

d) *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin'l Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014) (quoting *American Honda* "We hold that when an expert's report or testimony is critical to class certification, . . . the district court must perform a full *Daubert* analysis before certifying the class . . ."))

3. In some circuits where the court of appeals has not addressed the issue, district courts have applied the full *Daubert* approach:

a) *See, e.g.*, *Campbell v. Nat'l R.R. Passenger Corp.*, No. CV 01-1513 (EGS), 2018 WL 1997254, at *9 (D.D.C. Apr. 26, 2018) ("The Court is persuaded that it must conduct a full *Daubert* inquiry at the class-certification stage."). In *Campbell*, seventy-one African-American employees at Amtrak alleged that Amtrak engaged in racial discrimination in its hiring, promotion, and disciplinary practices. The court granted defendant's motion to exclude plaintiffs' testimony and report that set forth background principles of "good" human-resource management policies and stated that Amtrak did not have adequate mechanisms in place because the opinions were "unreliable."

b) *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 CIV. 5450 (NRB), 2018 WL 1229761, at *12 (S.D.N.Y. Feb. 28, 2018) ("We are persuaded by the view that expert evidence submitted at the class certification stage is subject to the *Daubert* standard."). There, DOJ

argued that defendants' proposed testimony as to the adequacy of the government's discovery, establishment of conspiracy, and benefit or harm was improper.

c) *Coleman v. Union Carbide*, No. 2:11-0366, 2013 WL 5461855 (S.D. W. Va. Sept. 30, 2013) ("[T]he court first turns to the *Daubert* inquiry, inasmuch as the expert opinions in the case are the primary evidentiary means chosen by plaintiffs to discharge their burden under Rule 23.")

d) *Cannon v. BP Prods. North America*, No. 3:10-cv-00622, 2013 WL 5514284, at *5 (S.D. Tex. 2013) ("in one sense scrutiny of expert testimony being used to show that a case is susceptible to class treatment seems less controversial than the normal application of Daubert, because it does not intrude on the jury's role given that class certification is an issue for the court.").

C. The "Focused/Tailored" *Daubert* Analysis

1. In *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011), the Eighth Circuit held that a "more conclusive *Daubert* inquiry at the class certification stage would [be] impractical." There, plaintiffs were homeowners alleging that certain brass fittings used in the company's plumbing systems were inherently defective. Plaintiffs' proposed experts would opine as to results from testing and examining brass fittings. The court reasoned that a more "focused" inquiry was necessary due to the preliminary nature of class certification rulings:

a) "[A]n exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings."

b) *Zurn Pex* was decided before the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) but two weeks after its decision in *Walmart Stores, Inc. v. Dukes*.

2. Some courts have rejected the *Zurn Pex* reasoning:

a) *See, e.g.*, *Soutterv. Equifax Info. Servs. LLC*, 299 F.R.D. 126, 130 (E.D. Va. 2014) ("The rationale that animated Lewis and Zurn and their fellow travelers...is at odds with the real world effect of a class certification decision.")

b) *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 115 (S.D.N.Y. 2015) (rejecting *Zurn* holding its rationale "must yield to the mandate to conduct a rigorous analysis prior to certifying a class"), objections overruled, No. 10-CIV-6950-ATRWL, 2018 WL 1609267 (S.D.N.Y. Mar. 30, 2018)

Other courts stop short of addressing the issue or are not sure whether there is a real difference between the "full" and "tailored" approaches:

1. *See, e.g.*, *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 24 (D.D.C. 2012) (stating that "it is unclear whether a full analysis of [a class certification expert's] report and testimony is even appropriate at this stage," noting the conflicting approaches)

2. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187-88 & n.8 (3d Cir. 2015) ("We have no occasion to examine whether there might be some variation between the Seventh and Eighth Circuit formulations. Consistent with our holding here, both courts limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of Rule 23's requirements.")

IV. How does discovery set the stage for a successful or unsuccessful pre-certification *Daubert* challenge?

A. Even if a jurisdiction takes a more tailored/focused approach on the *Daubert* inquiry—these jurisdictions may be compelled to conduct a full *Daubert* analysis at the class certification stage if there has been advanced discovery.

1. The *Zurn* court felt compelled to apply a limited *Daubert* analysis at least in part because of the bifurcated discovery in that case (separating discovery for purposes of class certification from merit discovery). *See* 644 F.3d at 612-613.

2. However, other courts distinguish themselves from *Zurn. See, e.g., PBProp. Mgmt., Inc. v. Goodman Mfg. Co.*, L.P., No. 3:12-CV-1366-HES-JBT, 2016 WL 7666179, at *9–10 (M.D. Fla. May 12, 2016) (holding that "the reasoning behind the 'tailored' *Daubert* analysis in *Zurn* [wa]s not present" because the parties had conducted merits discovery); *Stone v. Advance Am.*, 278 F.R.D. 562, 566 (S.D. Cal. 2011) ("Unlike the typical case when a motion to certify a class is filed early in the proceedings, this case is at an advanced stage. The parties have completed discovery, exchanged expert reports, and the pretrial conference is imminent. The Court conducts a full *Daubert* analysis now to avoid a duplicative motion *in limine*.")

3. *Zurn Pex* suggests that a full *Daubert* analysis would be permissible where merits discovery has taken place:

"[A]n exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings." *In re ZurnPex*, 644 F. 3d 604 (8th Cir. 2011)

V. When is a *Daubert* challenge not an appropriate tactic?

A. Expensive early discovery and motion practice

1. Costs can be prohibitively expensive

B. Expert might be limited without full discovery

C. Might weaken post-certification *Daubert* challenges

VI. How can counsel develop expert testimony to support or withstand a *Daubert* challenge during the class certification stage?

A. Defense experts can be the biggest help to prepare for a *Daubert* challenge to plaintiff's experts, including your strategy for deposing the plaintiff expert

B. Develop questioning that will get the admissions needed

C. Specifically, when deposing a plaintiff expert, draw out mistakes or errors, both big and small.

1. Obviously, greatest amount of time and effort should be placed on glaring errors in the plaintiffs' expert's analysis, however, even errors of nonmaterial facts can help break down the expert's credibility. *See e.g.*, *IBEW Local 90 Pension Fund v. Deutsche Bank AG*, No. 11 CIV. 4209 KBF, 2013 WL 5815472, at *3 (S.D.N.Y. Oct. 29, 2013) (*Daubert* motion granted and class certification denied in a financial misrepresentation class action, where the expert evaluated

the New York Stock Exchange, but failed to analyze the German market, despite the vast majority of the trades occurred outside of the United States, and primarily in Germany).

D. Find variations among class members (i) elements of the cause of action or (ii) proof of causation.

E. Defense counsel should prepare their own expert to testify about the flaws in plaintiffs' expert's analysis.

Emerging Issues in Data Breach and Privacy Regulation Class Actions

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EMERGING ISSUES IN DATA BREACH AND PRIVACY REGULATION CLASS ACTIONS©

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I Introduction

In a 2018 survey of over 400 general counsel, their direct reports, and chief legal officers, roughly 30% identified data privacy and security as the next significant wave of class action litigation. See The 2018 Carlton Fields Class Action Survey at 9.[1] There are two basic types of class actions at play: "data breach" and "data privacy regulation."

In the typical data breach case, a malign third party exploits a security vulnerability and steals data. Common breaches include network hacks, exposed networks, nation-state attacks, insider attacks, cyber-espionage, and lost or stolen data devices.[2] The stolen data then is used for identity fraud, held ransom, appropriated for competitive advantage, or exploited for intelligence-gathering purposes. Plaintiffs claim that the target company acted negligently, engaged in unfair business practices, fraud or misrepresentation and/or breached its contract, by failing to take reasonable measures to secure personal identifying information ("PII"),[3] respond

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[1] "Companies cite the potential for data breach claims associated with internet connected products, such as medical devices and home appliances, as an example of the predicted next wave of data breach litigation." Id.

[2] Former FBI Director Robert Mueller, III famously observed that there were two categories of companies: those that have been breached, and those that will be. (Comments made at RSA Cybersecurity Conference in March 2012). See https://archives.fbi.gov/archives/news/speeches/combating-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies.

[3] PII includes social security numbers, credit or debit account numbers, passports, driver's licenses, dates of birth, passwords, biometric data, medical records, email addresses etc.

promptly to system breaches, and provide timely notification to protect against identity theft and associated losses.

In contrast, data privacy regulation cases do not necessarily involve a third-party theft nor are they based on tort or contract claims. Instead, data privacy claims are based on mere *technical* violations of consumer protection regulations governing the collection, handling and use of PII.

Depending on the type of case, plaintiffs may include consumers, insureds, employees, business partners, and financial service firms. The damages and other equitable relief obtained[4] can be substantial, as can awards of attorneys' fees under consumer protection statutes.[5] Courts are still grappling with how to deal with the resulting lawsuits. We highlight some of the emerging issues in the federal cases involving jurisdiction, mandatory arbitration provisions, pleading sufficiency, discovery privileges, class certification and settlement.[6]

II. Standing in Data Breach Class Actions

A. The Injury-In-Fact Requirement and the Risk of Future Identity Theft

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[4] This often includes the costs of replacing credit and debit cards, late or overdraft fees, credit reports and insurance, credit monitoring services fees, and miscellaneous identity theft expenses for classes with millions of members.

[5] For example, in what is still the largest data breach in history, Yahoo agreed to pay $50 million to a class of some 3 billion account holders, plus $35 million in attorneys' fees and expenses. In re Yahoo Inc. Customer Data Security Breach Litigation, Civil Action No. 5:16-02752 (N.D. Cal. Oct. 22, 2018). Health insurer Anthem Inc. paid $115 million to settle a class action after a data breach exposed the PII of over 78 million people. In Re Anthem, Inc. Data Breach Litigation, Civil Action No. 5:15-02617 (N.D. Cal. Aug. 15, 2018). Target agreed to a $10 million settlement in a data breach affecting 70 million customers, plus $6.75 million in attorneys' fees and expenses. In re Target Corp. Customer Data Security Breach Litigation, MDL No. 14-2522 (D. Minn. March 19, 2015). GameStop agreed to pay up to $235 of expenses for each of 1.3 million credit card holders, plus class counsel fees and costs of $557,500, after a breach of its servers resulted in the theft of PII. Bray v. GameStop, Civil Action No. 1:17-01365 (D. Del. July 23, 2018). And Wendy's entered into a $3.4 million settlement in which affected customers could collect up to $5,000 in compensation. Torres, et al. v. Wendy's International LLC, Civil Action No. 6:16- 210 (M.D. Fla. Aug. 23, 2018).

[6] The Class Action Fairness Act of 2005 ("CAFA") expanded federal jurisdiction over class actions by granting district courts original jurisdiction over putative class actions in which minimal (rather than complete) diversity exists and the amount in controversy exceeds $5 million. *See* 28 U.S.C. § 1332(d)(2). CAFA defines "class action" as "any civil action filed under [Federal Rule of Civil Procedure 23] or similar State statute or rule . . . ." *Id.* at (d)(1)(B).

Article III, §2 of the United States Constitution limits the jurisdiction of the federal courts to actual "cases" or "controversies." This "bedrock requirement," Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982), restricts the province of the judiciary to "decid[ing] on the rights of individuals." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803). A plaintiff seeking redress in federal court must therefore have standing to sue. Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007). Standing exists when a plaintiff suffers an injury-in-fact that is causally connected to the defendant's wrongful conduct, which can be remedied by a decision in the plaintiff's favor. Lujan v. Defs. of Wildlife, 112 S. Ct. 2130, 2136 (1992). Courts have held that the mere potential for future injury will not suffice and that harm complained of must be "actual or imminent, not conjectural or hypothetical." Id.

In the typical data breach class action, the plaintiffs may have been reimbursed for any fraudulent charges, and offered free credit monitoring services. Plaintiffs nonetheless assert that the PII theft subjects them to an increased *risk* for future identity theft, causing emotional harm and forcing them to incur additional mitigation costs. Defendants often seek dismissal under Fed. R. Civ Pro. 12(b)(1) arguing that such a non-imminent potential for future harm does not constitute an injury-in-fact. This frequently litigated issue has led to a circuit split.

Some courts have taken a narrow view of the issue. For example, in Reilly v. Ceridian, 664 F. 3d 38 (3d Cir. 2011), employees filed a putative class action after the defendant-payroll processing vendor's computer system was breached and hackers extracted PII for over 25,000 individuals. Id. at 40. Plaintiffs alleged that the defendant was negligent in safeguarding their PII, but they were unaware whether the stolen data had been used. Id. The district court granted

the defendant's motion to dismiss, finding that the plaintiffs did not suffer the requisite injury-in-fact. Id. at 41. The Third Circuit affirmed. Id. at 46.

Other courts have been more receptive to these claims. In Pisciotta v. Old National Bancorp., 499 F. 3d 629 (7th Cir. 2007), the Seventh Circuit found that the plaintiffs had standing when faced with operative facts similar to those in Reilly. The Pisciotta plaintiffs were victims of a bank website's breach and claimed standing based on the risk of future misuse of their PII with no evidence of financial loss. Id. at 631-632. The court found that standing existed: "the injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent defendant's actions." Id. at 634.

B. The Supreme Court's Clapper Decision and its Fallout

The diametrically opposed holdings in Reilly and Pisciotta created significant uncertainty that commentators thought would be clarified when the Supreme Court granted certiorari in Clapper v. Amnesty Intern., USA. 133 S. Ct. 1138 (2013). Clapper did not involve a classic data breach scenario. The plaintiffs were American citizens whose employment involved communicating with likely subjects of Foreign Intelligence Surveillance Act surveillance. Id. at 1142. The plaintiffs complained that their own communications could be subjected to the same surveillance. Id. They asserted, and the Second Circuit agreed, that there was an injury-in-fact based upon the "objectively reasonable likelihood that their communications will be acquired…at some point in the future." Id. at 1143, 1146. The Supreme Court disagreed, finding that the plaintiffs' "theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." Id. at 1143. The majority's decision, however, contained an important footnote noting that it was possible to "find

standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." Id. at fn 5.

Perhaps not surprisingly, post-Clapper cases have continued to yield inconsistent results with a moderate trend in favor of finding standing. For example, in 2015, the Seventh Circuit in Remijas v. Neiman Marcus Group, LLC, 794 F. 3d 688 (7th Cir. 2015), reversed after a district court dismissed a data breach suit relying in part on Clapper. The Remijas plaintiffs had their credit card numbers stolen by hackers who breached Neiman Marcus' network. Id. at 690. Approximately 9,000 of the 350,000 affected customers had experienced instances of fraud. Id. at 694. The other plaintiffs asserted that the increased risk of future misuse of their data and the cost associated with mitigating it met the injury-in-fact requirement. Id. at 694-695.

The Seventh Circuit found these injuries to be sufficient, noting that "Clapper does not…foreclose any use whatsoever of future injuries to support Article III standing." Id. at 693. The court then relied on the footnote in Clapper and held:

> [I]t is plausible to infer that the plaintiffs have shown substantial risk of harm from the Neiman Marcus data breach. Why else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities.

Id. at 693-694.

On this basis, the Seventh Circuit concluded that the "Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing." Id. at 693.

In 2016, the Sixth Circuit reached a similar conclusion in Galaria v. Nationwide Mut. Ins. Co., 663 Fed. Appx. 384 (6th Cir. 2016). There, the court found standing for plaintiffs

whose PII had been exposed when an insurance carriers' network was breached noting that, "Where a data breach targets personal information, a reasonable inference can be drawn that the hackers will use the victims' data for…fraudulent purposes." Id. at 388. The Galaria court concluded this absent any allegation that the stolen PII had been misused. Id. at 386-387.

In 2017, however, the Fourth Circuit in Beck v. McDonald, 848 F. 3d 262 (4th Cir. 2017), affirmed the dismissal of a very similar suit. The Beck plaintiffs complained of an increased risk of future identity theft and associated costs when a laptop containing their PII was stolen from a healthcare provider. Id. at 2267. The Fourth Circuit found the plaintiffs lacked standing stating, "for the Plaintiffs to suffer the harm of identity theft that they fear, we must engage with the same attenuated chain of possibilities rejected by the Court in *Clapper*." Id. at 275. This skeptical stance has been adopted by other courts. See Whalen v. Michaels Stores Inc., 689 Fed. Appx. 89 (2d Cir. 2017) (plaintiff whose credit card number was stolen as part of a data breach lacked standing where fraudulent charges were reimbursed and no other PII was exposed).

In Attias v. Carefirst, Inc., the D.C. Circuit reviewed the dismissal of a suit brought by victims of a health insurer's data breach. 865 F. 3d 620 (D.C. Cir. 2017). The district court had dismissed the case for lack of standing, finding that the increased risk of future identity theft too speculative to be an injury-in-fact. Id. at 622-623. There were no allegations that the data had actually been used to the plaintiffs' detriment. Id.

But the D.C. Circuit reversed, holding:

> No long sequence of uncertain contingencies involving multiple independent actors has to occur before the plaintiffs in this case will suffer any harm; a substantial risk of harm exists already, simply by virtue of the hack and the nature of the data that the plaintiffs allege was taken.

Id. at 629.

Defendants petitioned the Supreme Court for certiorari. Many practitioners saw this as an ideal opportunity for the Court to resolve the issue and provide useful guidance for future cases. On February 20, 2018, to the surprise of many, the Supreme Court declined to grant certiorari leaving the D.C. Circuit's decision in place. See Carefirst, Inc. v. Attias, 138 S. Ct. 981 (2018). The Court's denial of certiorari is not precedential, and does not indicate how it will ultimately tackle the circuit conflict. Until then, confusion and non-uniform results will continue and data breach plaintiffs have several friendly circuits that will likely allow their cases to proceed past a motion to dismiss on standing.

III. Standing in Data Privacy Regulation Class Actions

The collection, use and storage of biometric data PII such as fingerprints, facial geometry and iris scans have been fertile grounds for data privacy regulation class actions under the Illinois Biometric Information Privacy Act ("BIPA"). Passed in 2008, BIPA was the first statute to simultaneously regulate biometric data, and afford a private cause of action for violations of its rules. At its heart, BIPA requires companies to obtain written consent before collecting biometric PII and to securely store it once obtained. See 740 I.L.C.S. 14/1 et seq.[7] BIPA's enactment triggered a wave of data privacy class actions.

Just like their data breach counterparts, plaintiffs in BIPA cases are often hard pressed to demonstrate any pecuniary loss. Defendants therefore regularly argue that the absence of out-of-

[7] As of November 2018, Texas and Washington have enacted similar laws, but they do not create a right to a private cause of action for violations. The recently enacted California Consumer Privacy Act provides a private right of action where companies fail to implement a general privacy policy or otherwise disclose what PII has been collected, and from where, for what use, and whether it will be disclosed or sold and to whom, and the right to opt out or to have the data deleted without penalty.

pocket loss means that no injury-in-fact exists. Motions based on these arguments have met with mixed results.

Although not a data privacy case, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), was initially viewed as a death-knell for the majority of BIPA-related suits. Spokeo operates a website allowing users to find information about a person's "occupation, hobbies, finances, shopping habits, and musical preferences". Id. at 1546. Plaintiff learned his website profile contained inaccurate information regarding his socioeconomic status. Id. at 1544. He alleged this violated the Fair Credit Reporting Act of 1970, but could not point to any concrete harm suffered because of these inaccuracies. Id. at 1544, 1549-1550.

The Supreme Court held that "a bare procedural violation, divorced from any concrete harm" could not satisfy the injury-in-fact requirement. Id. at 1549. Although many expected this statement would curtail BIPA-related filings, the Court also noted that "this does not mean…that the risk of real harm cannot satisfy the requirement of concreteness." Id. This equivocal language, like that in Clapper's footnote, has resulted in varied rulings similar to those rendered in the data breach arena.

For instance, in McCollough v. Smarte Carte, Inc., 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016), a public locker provider collected customers' fingerprints to use as keys without obtaining written consent. Id. at *1. This practice violated BIPA, but the plaintiffs could allege no concrete damages and voluntarily provided their fingerprints to the defendant. Id. at *2-3. The court dismissed the case finding this mere "technical violation" of BIPA, without more, did not constitute a sufficient injury-in-fact under Spokeo. Id. at *4-5.

The Second Circuit followed suit when it affirmed dismissal in Santana v. Take-Two Interactive Software, Inc., 717 Fed. Appx. 12 (2d Cir. 2017). Plaintiffs voluntarily provided the

defendant-video game publisher with facial biometric PII to create personalized in-game characters. Id. at 14. Similar to McCollough, the defendant failed to obtain written consent and committed technical BIPA violations, but the plaintiffs had suffered no out-of-pocket loss. Id. The Second Circuit observed that BIPA's core objective is to "prevent the unauthorized use, collection, or disclosure of an individual's biometric data." Id. at 15. The court reasoned that dismissal was warranted because the BIPA violations were technical and implicated no risk that biometric data would be misused. Id. at. 15-17.

Potential defendants took comfort in the McCollough and Santana decisions. It seemed that the tide of BIPA class action litigations would be stemmed by the requirement that plaintiffs demonstrate harm beyond a mechanical violation of the statute. Recent developments suggest this sense of security may have been misplaced.

In February 2018, the Northern District of California allowed a BIPA suit to proceed against Facebook without showing financial injury. Patel v. Facebook, Inc., 290 F. Supp. 3d 948 (N.D. Cal. 2018) involved a Facebook feature that uses facial geometry to identify individuals in user-uploaded photographs and then suggest this person be "tagged" for identification and profile-linking purposes. Id. at 951. Unlike McCollough and Santana, some of the Patel plaintiffs were not necessarily aware that their information was being collected. Id.

There was no financial or other tangible harm. But the court found that the plaintiffs had suffered the requisite injury-in-fact, stating:

> [T]he plain text of BIPA…leave(s) little question that the Illinois legislature codified a right of privacy in personal biometric information. There is equally little doubt about the legislature's judgment that a violation of BIPA's procedures would cause actual and concrete harm. BIPA vested in Illinois residents the right to control their biometric information by requiring notice before collection and giving residents the power to say no by withholding

> consent…Consequently, the abrogation of procedural rights mandated by BIPA necessarily amounts to a concrete injury.

Id. at 953-954.

Patel may appear in line with McCollough and Santana because plaintiffs did not voluntarily submit their biometric PII to Facebook. Some plaintiffs posted photographs from which Facebook extracted their facial geometry while others had their information taken from photographs posted by third-parties. The court's opinion, however, did not limit its findings to the latter class of plaintiffs. Patel may portend a data privacy circuit split similar to that in data breach cases.[8]

IV. Class Action Waiver and Arbitration Provisions

In addition to standing challenges, class action waiver and arbitration provisions in contractual terms of use and other agreements present a formidable obstacle to pursuing data breach or data privacy regulation class actions. Since the Supreme Court's decision in AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011), which validated the inclusion of class action waiver and mandatory arbitration provisions in consumer contracts, many companies have included them. Such clauses have been invoked in data breach cases, and have withstood attacks asserting that they are procedurally unconscionable under state law, an issue left open by Concepcion.

For example, in Flores v. Uber Technologies, Civil Action, No. 17-cv-8503 (C.D. Cal. Sept. 5, 2018), both users and drivers of the popular car service Uber sued after a breach exposed PII for millions of people. Uber's terms and conditions contained a conspicuously displayed arbitration and class action waiver clause. Id. at *2. Uber moved to compel arbitration under this

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[8] Defendants that unsuccessfully move for dismissal on the basis of standing have sometimes obtained summary judgment on identical grounds after conducting damage-related discovery. See, e.g. Walker v. Boston Med. Ctr., 2015 WL 9946193 (Mass. Super. Ct., Nov. 20, 2015).

and related provisions in its terms of service. Id. at *4. Plaintiffs argued their claims fell outside the arbitration clause's scope, and the provisions were unconscionable and insufficiently prominent. Id. at *6.

The court first noted that the "principal purpose of the FAA [Federal Arbitration Act] is to ensure that private arbitration agreements are enforced according to their terms." Id. at *3. As such, the court's involvement is limited to "determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Id. at *4. If the answers to these questions are in the affirmative, section 4 of the FAA requires courts to compel arbitration under the terms of the agreement. Id. The court found that the arbitration and class action waiver clauses were clear, unambiguous and compelled the parties to submit the dispute to arbitration. Id. at *6-7.

V. Failure to State a Claim

Data breach claims that sound in common law negligence and breach of contract may also be vulnerable to substantive (rather than jurisdictional) dismissal under Fed. R. Civ. Pro 12(b)(6) because the pleadings do not plausibly meet the proximate causation requirement absent allegations of clear financial injury. See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

In In re SuperValu, Inc. Customer Data Security Breach Litigation, 2018 WL 1189327 (D. Minn. Mar. 7, 2018), hackers stole customer credit card information from a grocery store's payment-processing network. Sixteen plaintiffs sued, but only one had experienced fraudulent charges and these charges were reimbursed. Id. at *1-2. The remaining plaintiffs sought damages relating to the increased risk of future identity theft. Id. at *2. The district court initially dismissed the entire suit, finding there was no injury-in-fact for any plaintiff. Id. The

Eighth Circuit affirmed on the fifteen plaintiffs who had not experienced fraudulent charges, but reversed on the other plaintiff finding that he satisfied the injury-in-fact requirement because he had experienced fraudulent charges. Id. at *3-4. The case was remanded for consideration of whether his allegations otherwise stated a claim upon which relief could be granted. Id.

On remand, the district court dismissed the case for failing to state a claim because there were no cognizable damages. Specifically, the court found that applicable state law negligence claims required allegations of out-of-pocket financial losses. Id. at *12-13. The plaintiff's inability to alleged such damages proved fatal. Id.

In In re Sony Gaming Networks and Customer Data Sec. Breach Litig., 903 F. Supp. 2d 942 (S.D. Cal. 2012), the district court found that the plaintiffs sustained an injury-in-fact under Article III , but dismissed the case for failing to allege a cognizable injury under California state law. The plaintiffs were consumers whose PII was stolen when the defendant's network was breached. Id. at 950-951. No out-of-pocket losses were alleged, but the plaintiffs claimed that the wrongful dissemination of their PII alone would meet the injury-in-fact requirement. Id. at 957. The court agreed, stating this "future harm may be regarded as a cognizable loss sufficient to satisfy Article III's injury-in-fact requirement." Id. at 958.

The court next considered the defendant's motion to dismiss for failure to state a cognizable negligence claim under California state law. The court noted that "[u]nder California law, appreciable, nonspeculative, present harm is an essential element of a negligence cause of action." Id. at 962. As the plaintiffs had only alleged potential future harm, the court dismissed their common law negligence claim:

> While Plaintiffs have currently alleged enough to assert Article III standing to sue based on an increased risk of future harm, the Court finds such allegations insufficient to sustain a negligence

> claim under California law….Accordingly, without specific factual statements that Plaintiffs' Personal Information has been misused, in the form of an open bank account, or un-reimbursed charges, the mere danger of future harm, unaccompanied by present damage, will not support a negligence action.

Id at 963.

These rulings suggest that defendants faced with common law negligence claims should consider motions to dismiss absent clearly pled damages. Such motions can be effective in obtaining either complete dismissals or narrowing the class of plaintiffs and issues remaining for discovery.

VI. Discovery and Privilege Issues

In discovery, plaintiffs often seek internal investigative documents relating to how and when a breach occurred and what steps the target company took in response. Such requests may implicate the attorney-client[9] or work-product privileges.[10] Courts faced with these questions engage in a fact-specific analysis that turns on when counsel was hired, the level of their involvement and the purpose behind the sought-after materials' creation.

For example, in In re Experian Data Breach Litigation, 2017 WL 4325583 (C.D. Cal. May 18, 2017), the court denied a motion to compel a report prepared by a forensic consultant hired to investigate a data breach. After Experian discovered the breach, it immediately retained outside counsel to advise as to its response before litigation was commenced. Id. at *2. Outside counsel then engaged a third-party forensic consultant to prepare a report analyzing what had

[9] The attorney-client privilege protects confidential attorney-client disclosures that relate to the subject of a legal representation or assistance. Fisher v. United States, 96 S. Ct. 1569, 15677 (1976). The privilege extends to communications made by corporate employees to attorneys providing counsel to the corporation itself, Upjohn v. United States, 101 S. Ct. 677, 685 (1981), and attorneys and experts or consultants hired to assist in the provision of legal services to the company. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

[10] The work-product doctrine shields materials prepared in anticipation of litigation or trial by or for a party or its representative, except where the requesting party can demonstrate a significant need for the materials and cannot obtain them without undue hardship. See Fed. R. Civ. P. 26(b)(3).

transpired. Id. The consultant provided the report to Experian's outside counsel, who then shared it with the company's in-house attorneys to develop their legal strategy in response to the foreseeable class action. Id.

The plaintiffs sought production of that report, arguing that Experian had "independent business duties to investigate" the data breach and hired the consultant to fulfill them. Id. Experian contended that the report was work-product material prepared by a third-party retained by outside counsel to provide legal advice. Id. The court sought to determine if the report was prepared because of litigation by weighing factors such as the timing of retention of the non-testifying expert, and the existence of other evidence, including supporting affidavits and engagement letters. Id.

The court noted that the consultant was hired by Experian's outside counsel to "assist…in providing legal advice in anticipation of litigation". Id. The court was not swayed by the consultant's having done unrelated work for Experian directly. Id. at *3. The court also found that the work-product doctrine's hardship exception did not apply because the plaintiffs could obtain the same data that the consultant relied upon directly from Experian in discovery. Id. Finally, the court noted that work-product protection was not waived by sharing the report with Experian's customer, T-Mobile, because the disclosures were "very limited and closely controlled" by Experian's outside and in-house attorneys. Id. The fact that Experian and T-Mobile had signed a joint defense agreement before the report was shared weighed against finding a waiver. Id.

A more nuanced result followed in In re Premera Blue Cross Customer Data Security Breach Litigation, 296 F. Supp. 3d 1230 (D. Oregon, Oct. 27, 2017). There, the plaintiffs moved to compel the production of: (1) documents prepared by the defendant's employees that

incorporated the advice of counsel, but were not prepared by or sent to counsel ("Category One"); (2) documents that were prepared at the request of counsel, but not prepared by or sent to counsel and which did not appear to be prepared because of the litigation ("Category Two"); and (3) documents relating to an outside forensic consultant's investigation of the security event that triggered the litigation ("Category Three"). Id. at 1240-1245.

Regarding Category One, the court concluded that the entirety of these documents were "not internal factual investigatory reports prepared at the request" of an attorney. Id. at 1241. Instead, they included "business documents that the company would have prepared regardless of litigation" and were not attorney-client or work-product privileged. Id. at 1241-1242. The court noted, however, that certain of these documents contained attorney-client protected materials such as drafts, edits and "redlines by an attorney communicating legal advice." Id. at 1242. These documents were held immune from production under both the attorney-client privilege and work-product doctrine. Id.

Category Two consisted largely of documents prepared at the request of attorneys relating to technical aspects of the breach, company policies and public relations concerns. Id. The court again noted the primary purpose of the majority of those documents "was not to communicate with counsel or obtain legal advice, but instead to perform a business function." Id. While some of these business functions were delegated and managed by outside counsel, this did not render the documents attorney-client privileged. Id. As to work product, the defendant argued that these documents had a dual business and legal purpose. Id. at 1244. The court concluded that the defendant had failed to show that "the documents were created because of litigation rather than for business reasons, or that the documents would not have been created in substantially similar form but for the prospect of litigation" and compelled their production. Id.

The court found that the Category 3 reports generated by the defendant's outside forensic consultant were discoverable because the defendant retained and directed the consultant rather than its attorneys. Id. at 1245. Even though "the supervisory responsibility later shifted to outside counsel, the scope of the work performed did not change." Id. The court reasoned this "is not sufficient to render all of the later communications and underlying documents privileged or immune from discovery as work product." Id.

These cases strongly suggest that once a company learns of a data breach, it should promptly retain outside counsel as a "breach coach," who will then lead the investigation and response process and have complete control over the retention and direction of any outside consultants, and their work product.

VII. Class Certification Issues

A. Predominance Issues

Cybersecurity plaintiffs most commonly seek certification under the predominance prong of Fed. R. Civ. Pro. 23(b)(3) and can usually satisfy the numerosity, commonality, typicality and adequacy requirements of Rule 23(a). Although there is limited case law on the subject, several reported decisions illustrate that plaintiffs can have trouble meeting the predominance requirement because the nature of the injuries suffered by members of the putative class often varies.

For instance, in In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D 21 (D. Me. 2013), the court denied class certification because it was not convinced that common damage questions predominated. There, a putative class of grocery store customers sued when their credit card information was stolen by hackers. Id. at *23. After years of litigation, the proposed class consisted of customers who made out-of-pocket payments to mitigate the risk of

fraud and certification was sought under Rule 23(b)(3). Id. at *24. The court concluded that the plaintiffs had met the prerequisites of Rule 23(a). Id. at *24-30.

Turning to predominance under Rule 23(b)(3), the court noted that although there were common liability questions regarding whether the defendant adequately secured customer PII, "things differ…in the actual impact on particular cardholders…and the actual mitigating steps they took and the costs they incurred." Id. at *30. The plaintiffs argued that damages could be demonstrated for the entire class through statistical proof presented by experts who would testify as to what proportion of the fees incurred were attributable to the intrusion as opposed to other causes. Id at *31-32. This would enable the jury to render a lump sum verdict that would then be divided amongst the class. Id.

The court acknowledged that certification had been granted in non-data breach cases where expert witnesses opined that damages could be calculated and distributed to class members using a statistical formula. Id. at *32-33. The Hannaford plaintiffs had failed to offer such an expert opinion with their certification motion and the court held this failure, coupled with the inherent damages-related predominance issues, required denial of certification. Id. at *33.

Contrasted with In re Hannaford, a group of financial institutions that had to replace customer credit/debit cards, reimburse fraudulent charges and take other remedial steps in response to the data breach at nation-wide Target stores obtained class certification in In re Target Corp. Customer Data Sec. Breach Litig., 309 F.R.D. 482 (D. Minn. 2015). Target opposed the application, arguing that damages had to be calculated on a bank-by-bank basis "meaning that individual damages issues predominate over any potential class-wide issues." Id.

at *486. The court disagreed, and noted that the plaintiffs had offered expert testimony on the issue:

> Although Plaintiffs' damages may ultimately require some individualized proof, at this stage Plaintiffs have established, through Dr. Cantor's report, that it is possible to prove classwide common injury and to reliably compute classwide damages resulting from reissuance costs and fraud losses.

Id. at *489.

Although In re Hannaford and In re Target Corp. highlight the importance of expert statistical testimony to prove class-wide damages, certification may also turn on the similarity between the injuries suffered by members of the putative class and the ease with which a lump sum verdict can be rendered and then divided amongst them. The In re Hannaford plaintiffs were individual customers who likely behaved differently when their PII was compromised. Conversely, the financial institutions who sued in In re Target Corp. suffered an essentially identical type of injury all readily attributable to the network breach. This most likely explains the disparate results reached.

B. Decertification Due to Adequacy and Conflicts of Interest

Adequacy issues due to conflicts of interest between data breach plaintiffs have resulted in decertification at the settlement approval stage.[11] In Remijas v. Neiman Marcus Group, LLC, 2018 WL 4404673 (N.D. Ill., Sept. 17, 2018), the district court decertified the class when the parties requested approval of a proposed settlement. After the 7th Circuit found the plaintiffs had standing, 794 F. 3d 688 (7th Cir. 2015), the case proceeded and a motion to simultaneously certify the class and approve the settlement was eventually filed. Id. at *2.

[11] The "Rule 23 adequacy inquiry…uncovers conflicts of interest between the named plaintiffs and the class they seek to represent." Langbecker v. Ele. Data Sys. Corp., 476 F. 3d 299, 314 (5th Cir. 2007). Courts have noted that adequacy is the single most important factor in determining whether to certify a settlement class. See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F. 3d 283, 308 (3d Cir. 1998).

The case was filed after Neiman Marcus' point of sale terminals were infected with malware in some stores. Id. at *1. Three subclasses were proposed: (1) plaintiffs who made purchases at locations where the malware was present ("Subclass One"); (2) plaintiffs who made purchases at stores where no malware was installed, but during the period where the malware was present elsewhere ("Subclass Two"); and (3) plaintiffs who made purchases when no malware existed at any store ("Subclass Three"). Id. at *3. The proposed settlement contemplated financial compensation for Subclass One only and identity theft mitigation services for the others. Id.

Objectors argued that the conflict between the interests of the three subclasses and the representative plaintiffs (who were to receive $2,500) rendered them inadequate under Rule 23(a)(4). Id. at *2-3. Plaintiffs' counsel claimed this could be addressed by structuring the settlement so individual class members would not learn whether their card number had been compromised until after they had opted into the settlement. Id. at *3. The court noted this proposal created "an appearance of manipulation or dishonesty" that undermined "the integrity of the class action mechanism", but ultimately concluded that Subclass One could adequately protect the interests of Subclass Two through such a mechanism. Id.

The court, however, disagreed regarding Subclass Three. When the settlement was reached, the period in which the malware was present was public knowledge. Id. at *4. The class representatives were aware from the outset Subclass Three could "not have made their purchases at a time when the malware was active" and had little incentive to accept the proposed settlement, which afforded them no meaningful relief. Id. In fact, Neiman Marcus had offered identity theft mitigation services before the litigation was commenced. Id. at *5. The court held

that "the settlement class as it is currently composed has a fundamental conflict that undermines the adequacy of the representation of the class." Id. at *4.

Remijas demonstrates the problems that can arise when the representative plaintiffs' interests diverge from those of other class members, especially those in subclasses who will receive different remedies.

VIII. Settlement Considerations

Settlements of data breach and privacy class actions have spawned additional litigation where defense counsel and third-party administrators have not taken appropriate measures to protect against further disclosure of PII. In Beckett v. Aetna, Inc. et. als., Civil Action No. 2:17-CV-3864 (E.D. Penn. Oct. 16, 2018), defendant had settled an earlier litigation involving a discriminatory policy that required members to obtain HIV-related medications through mail order pharmacies, without the ability to speak to a pharmacist. This created an enhanced risk of exposing their HIV status. In administrating the settlement, Aetna improperly disclosed members' HIV status to legal counsel, a settlement administrator and a mailing vendor and further exposed the members' status, including their medications, by mailing claims notification letters in envelopes with clear windows.

A second lawsuit ensued. The complaint alleged that Aetna was responsible for all financial and non-financial harm caused by the disclosure under various theories of liability including negligence, negligence per se, invasion of privacy, unjust enrichment, and violations of Pennsylvania's Confidentiality of HIV Related Information Act, 35 P.S. § 7601 and Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-201-1 –201-9.3. The case was quickly mediated and settled for roughly $17 million. In addition to providing monetary relief and class

counsel's fees and expenses,[12] the settlement agreement dictates several measures designed to avoid further improper disclosures of PII:

- Use of an opaque envelope of appropriate and sufficient stock and with no transparent window so as to obscure the contents.
- Use of a return address on the outside of the envelope with no identifying information other than a P.O. box, city, state and ZIP Code;
- Including a statement on the front of the envelope that it contains "Confidential Legal Information – To Be Opened Only By The Addressee";
- Use of a protective cover page that folds around the Notice of Class Action Settlement and identifies that the information therein is confidential and solely for reading by the Settlement Class Member; and
- Use paper stock that will protect the confidentiality of the contents of the envelope from being read through the envelope.

Beckett provides useful guidance and precautions to follow when administering a data breach or privacy regulation class action settlement to avoid further unintended exposure of members' PII.

VIII. Conclusion

With the growing numbers of company data breaches—including the recent reported hack of Marriott's worldwide reservation systems—and more states considering or enacting data privacy regulations that provide a private cause of action, the jurisprudence in this fast moving area will likely continue to evolve. Efforts of companies to moot the class by quickly offering credit monitoring and fraud mitigation services, the inability of the majority of class members to allege concrete harm, the increasing use of class action waiver and arbitration clauses, and potential conflicts amongst class members pose substantial, but not insurmountable challenges in

[12] Aetna agreed to pay $500 to each of the approximately 11,875 class members who were mailed the exposed letter and $75 each to an additional 1,600 individuals whose health information was disclosed to Aetna legal counsel and the mailing vendor. In addition, class members are eligible to receive up to an additional $20,000, for financial and nonfinancial harm, upon the submission of documentation evidencing out-of-pocket expenses, and a questionnaire detailing the emotional and psychological harm they have suffered.

prosecuting these claims. Where classes have been certified and cases settled, additional care must be taken to assure that the claims administration process does not cause further disclosure of PII.

New Settlement Paradigms: How to Navigate the Rule Changes

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NEW SETTLEMENT PARADIGMS – HOW TO NAVIGATE THE RULE CHANGES AND OTHER RECENT DEVELOPMENTS

Settlements of class actions are highly favored – courts like them because complex litigation is generally very demanding of a court's time, and its limited judicial resources can be directed to other matters; class members like them because they recover some portion of a loss suffered by them without having to take on a big, well-financed defendant for what is usually a relatively small claim, and defendants like them because they resolve distracting and potentially expensive litigation.

This article addresses the recent amendments to Rule 23 of the Federal Rules of Civil Procedure, which took effect on December 1, 2018, a number of recent class action settlement decisions from New York state courts, the new settlement guidelines enacted by the Northern District of California, and, finally, the full *cy pres* settlement case currently under consideration by the United States Supreme Court.

I. AMENDMENTS TO RULE 23[1]

The first amendments to Rule 23 in 15 years primarily address settlement procedures. In general, the amendments: require lawyers to provide additional information to the Court before the Court grants preliminary approval; encourage parties to consider alternative methods for providing notice, including by electronic means; imposes limitations on compensating objectors without court approval; and clarifies final settlement criteria. As of the date of this submission there are no reported decisions interpreting the new rules.

[1] The amendments, with redlines and committee notes, can be found at https://www.supremecourt.gov/orders/courtorders/frcvls_5924.pdf.

A. GIVING NOTICE UNDER RULE 23(c)(2)(B)

1. This amendment specifically endorses the propriety of combined Rule 23(b)(3) certification and settlement notices.

2. This amendment does not change the substance of what a notice should contain, or the requirement that the method of notice be "the best notice is practicable." Notice has traditionally been provided by mail and publication, and those may, in certain circumstances, remain the preferred primary methods, of giving notice, but the amended rule requires the parties to consider whether "electronic means, or other appropriate means" would constitute the most reliable and effective means of notice, in light of new technologies, and the make-up of the Class and its likely access to this new technology, *i.e.*, email, texts, online digital media, websites, social media, and how the defendant communicates with class members if it is a company or business. The Federal Judicial Center's Judges' Class Action Notice and Claims Processing Checklist and Plan Language Guide, which, provides extensive guidance on the formatting and contents of class action notices, also serves as a useful guide. *See* https://www.fjc.gov.sites/default/files/2012/notcheck.pdf The notice should be informative and easy to understand, and class member calls to action, such as objecting, opting out or filing a claim should be immediately and easily identifiable.

3. Rule 23(c)(2) now likely requires (and the Committee Notes recommend) that the parties submit a declaration or affidavit of a notice expert (usually the notice or claims administrator) to the Court in connection with the motion for preliminary approval detailing the proposed means of notice and its anticipated effectiveness (including whether it will actually come to the attention of the class) and provide the Court with a copy of each notice, including screen shots. *See* Committee Notes for proposed 2018 Amendments.

4. The Committee Notes also advise the parties and the Court to focus on the method of opting out of the Class, balancing the convenience to the Class Member with the risk of unauthorized opt-outs. *Id*.

B. CLASS ACTION SETTLEMENTS UNDER RULE 23(e)

Rule 23(e) requires Court approval before "claims, issues or defenses of a certified class (or a class proposed to be certified for purposes of settlement) may be settled, voluntarily dismissed or compromised . . . ." As amended, Rule 23(e) expressly adopts a two-step approval process – initially providing the Court with information sufficient for it to approve the sending of notice under Rule 23(e)(1), and subsequently holding a hearing under Rule 23(e)(2) at which the Court determines whether a settlement is fair, reasonable and adequate.

As amended, this rule requires that the proponents of a settlement "front load" information for the Court before notice is provided to potential class members. Courts will now be required to consider at preliminary approval many of the same procedural and substantive factors that it traditionally considers at final approval. The purpose of this amendment is to require the proponents of settlement to "front load" settlement approval, *i.e.*, provide sufficient evidence to the Court that it "will likely be able to approve" the proposed settlement and certify the class for purposes of judgment on the proposal following notice to and an opportunity to be heard by the class. *See* Rules 23(e)(1)(A) and 23(e)(1)(B).

1. Rule 23(e)(1). Rule 23(e)(1) does not identify what specific information the parties must provide to the court before a decision allowing notice to provided is made. The Committee Notes provide substantial guidance here. In short, "[a]t the time they seek notice to the class, the proponents of the Settlement should ordinarily provide the Court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. "While of course the subjects to be addressed will vary

depending on the particular case, some general observations can be made." (Committee Notes to Subdivision (e)(1)).

(a) Class Certification. If the court has already certified the litigation class, then the court should be informed if the settlement class differs from the litigation class in any way. If the class has not yet been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class.

(b) Other information in support of the settlement. The Committee Notes identify additional information that the parties should consider providing to the court at the preliminary approval stage: the extent and type of benefits that the Settlement will confer on class members, including, if appropriate, the claims process and the anticipated claims rate, and the recipient of any unclaimed funds; the likely range of litigated outcomes, and risks of continuing with the litigation; the extent of discovery completed; the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal; the fees that will be sought and the timing of payment of fees; and any agreement that must be identified under Rule 23(e)(3).

2. Rule 23(e)(2). Rule 23(e)(2) lists the core issues of procedure and substance that a court must consider in deciding whether to send notice and approve a proposed Settlement. The parties should provide information to the court evidencing that class representatives and counsel have adequately represented the class; that the settlement was negotiated at arm's length, including whether a mediator was involved; that the expected relief to class members is adequate in light of: the costs, specific risks and delay of trial and appeal, including the likelihood of success and an estimate of the likely range of a class-wide recovery; the effectiveness of any method of processing class-member claims, and the burdensomeness of the claims process; the

terms of any proposed award of attorneys' fees, including timing of payment; and any agreement required to be identified under Rule 23(e)(3). The court must also consider whether the proposal treats class members equitably relative to each other. This likely requires plaintiff's counsel to address the proposed plan of allocation and establish that all class members are being treated equitably, relative to the strength of the claims alleged or sought to be released. This evaluation does not displace the criteria for approval factors enumerated by courts nationwide, as, for example, the Second Circuit in *City of Detroit v. Grinnell*, 495 F.2d 448 (1974), but according to the Committee Notes, should "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." The parties should focus "on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." (Committee Notes on Rule 23(e)(2)).

When class members would be bound under Rule 23(c)(3), the Court must also determine whether it can certify the Class under the standards of Rules 23(a) and 23(b) for purposes of judgment based on the proposal.

3. Rule 23(e)(5) contains important clarifications and changes with respect to objections and objectors to class action settlements. This is the amendment that has garnered the most discussion and commentary. The Committee Notes acknowledge that "[o]bjections by class members can provide the Court with important information bearing on its determination under Rule 23(e)(2) whether approve the proposal," and this rule strengthens the ability of good-faith objectors to pursue meritorious objections. However, "professional" or "serial" objectors often seek to hold up valid settlements in bad-faith. The amendments are designed to curtail abusive professional objector tactics.

(a) Rule 23(e)(5)(A). The amendment to this rule eliminates the prior requirement that an objection could only be withdrawn with the approval of the court. The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. *See* Fed. R. Civ. P. 23(e)(5)(A) committee's notes to the proposed 2018 amendment. The amendment also requires the objector to identify whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. This requirement can provide the court with useful information on the objector's motivation and permit evaluation on whether payment for withdrawing the objection is justified. While failure to provide needed specificity in an objection may be a basis for rejecting it, courts should not unduly burden class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards. *Id.*

(b) Rule 23(e)(5)(B). This amendment requires court approval for payment in connection with an objection or a threat of an objection. "Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with: foregoing or withdrawing an objection, or foregoing, dismissing, or abandoning an appeal from a judgment approving the proposal." It is designed to reduce the financial incentive for professional objectors to object solely for personal financial gain by subjecting them to greater judiciary scrutiny and provide transparency on the consideration being paid (either in monetary or non-monetary terms).[2]

[2] Rule 23 (e)(5)(B)(ii) applies to payments for forgiving, dismissing or abandoning an appeal of an approved settlement. Nevertheless, the motion for approval of such a payment must be made in the district court.

As noted in the advisory committee notes, "[g]ood faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h)." The committee also acknowledges that "some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process." *Id*. Some of these objectors or their counsel have sought to obtain consideration for withdrawing their objections or dismissing appeals for judgments approving class settlements. Class counsel may conclude that paying or providing other consideration to the objector or its counsel to withdraw the objection or appeal is in the class' best interest in a particular case. But the Committee Notes warn (any many courts have noted) that this is a system "that can encourage objections advanced for improper purposes." Court approval of such consideration should help deter frivolous, bad faith objections from "professional" objectors that provide no benefit to class members. And if conversation involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees. *See* Committee Notes.

4. Rule 23(f). This rule clarifies that a decision to permit notice of a settlement pursuant of Rule 23(e)(1) does not grant or deny class certification, and review under Rule 23(f) would be premature. *See* Committee Notes. The rule also extends the time to file a petition for review of a class certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf.

II. SETTLEMENT CONSIDERATIONS UNDER CPLR ARTICLE 9

Settlements in New York courts are governed by CPLR §908, which provides that: "[a] class action shall not be dismissed, discontinued, or compromised without 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." Following are some recent New York decisions addressing recent settlement approval-related issues.

A. Preliminary Approval Standards

There is no explicit requirement under Article 9 for preliminary approval of settlements. New York courts look to Federal Rule of Civil Procedure 23 "to inform New York's class action law." *Vasquez v. Nat'l Secs. Corp.*, 49 Misc. 3d 597, 600 (Sup. Ct., N.Y. County 2015), aff'd 130 A.D. 3d 503 (1st Dept. 2016). New York courts have adopted the federal court practice of hearing and considering preliminary approval motions. *Saska v. Met. Museum of Art*, 2016 N.Y. Misc. LEXIS 4184, *27-*28 (Sup. Ct., N.Y. County 2016).

At the present time, the standard for granting preliminary approval of a class action settlement is not as high as that for granting final approval. "Preliminary approval is the first step in the settlement process. Preliminary approval requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Illoldi v. Koi NY LLC*, 2016 U.S. Dist. LEXIS 71057, at *1 (S.D.N.Y. 2016). The decision to grant preliminary is what has been deemed "probable cause" or "within a range of reasonableness to submit the proposed settlement to class members and thereafter hold a full-scale hearing as to its fairness. *Saska v. Metropolitan Museum of Art*, 2016 N.Y. Misc. LEXIS 4184, at *28-*30 (citing federal cases). It remains to be seen if New York courts adopt the higher preliminary approval standards set forth in the amendments to Rule 23 of the Federal Rules of Civil Procedure.

B. Class Certification – Nationwide Settlement Class

Matter of HSBC Bank U.S.A. N.A. Checking Account Overdraft Litig., 2015 N.Y. Misc. LEXIS 3908 (N.Y. County 2015). Here, Justice Bransten certified a nationwide settlement class of HSBC account holders in the United States who, within the applicable statute of limitations,

incurred an overdraft fee on a debit card transaction as a result of HSBC's practice of posting transactions from highest to lowest dollar amount. In her discussion of the commonality element of CPLR §901(a)(2), Justice Bransten acknowledged that "since the Settlement Class is a national class, it is important to note the differences that exist, state-by-state, with respect to the applicable contract and consumer protection laws." 2015 N.Y. Misc. LEXIS 3908, at *17. She concluded, however, that "[d]espite these variations in state law, common issues nonetheless predominate by virtue of HSBC's uniform contract with the Settlement Class and its uniform practice of "high-to-low posting." *Id*. at *18.

C. Approval of Nonmonetary Settlements

Over the past several years, non-monetary settlements, mostly in the form of merger challenges, have become increasingly disfavored by courts and commentators. Delaware Chancery courts, where much of the country's merger litigation has traditionally taken place, took the lead in disapproving such settlements when proposed "disclosure-only" resolutions provided only disclosures that were deemed not material or even helpful to shareholders. *See Matter of Trulia, Inc. Stockholders Litig.*, 129 A.3d 884 (Del. CH. 2016). The *Trulia* court went on to note that "scholars, practitioners and members of the judiciary have expressed (concerns) that these settlements rarely yield genuine benefits for stockholders." *Id*.

Several New York courts have followed the *Trulia* decision to deny approval of disclosure-only settlements where the proposed disclosures were determined to be not legally material or of little value. *See City Trading v. Nye*, 46 Misc. 3d 1206 (Sup. Ct. N.Y. County 2015) and 59 Misc. 3d 497 (Sup. Ct. N.Y. County 2018); and *Matter of Allied Healthcare Shareholder Litig.*, 49 Misc. 3d 1210 (Sup. Ct. N.Y. County 2015). Justice Ramos denied preliminary approval of a proposed disclosure-only settlement in *Allied Healthcare* without identifying the additional disclosures, noting only that "[n]ot one of the additional disclosures the

defendants included in the supplement to the proxy at class counsels' urging could be characterized as significant nor would the failure to make any of the additional disclosures have resulted in this Court issuing a preliminary injunction to prevent or delay the merger." 2015 N.Y. Misc. 3810, at *2. In contrast, the *City Trading* court twice considered each additional disclosure and concluded that none were material, beneficial or helpful, and in fact were "utterly useless to the shareholders." 59 Misc. 3d at 498. Both courts were highly critical of non-monetary disclosure-only merger litigation.

Nevertheless, disclosure settlements have been approved by New York courts in the years since *Trulia*. *In Gordon v. Verizon Communications, Inc.*, 148 A.D. 3d (1st Dept. 2017), the Court evaluated the proposed settlement under the factors enumerated for class action settlements enumerated by the First Department in *In re Colt Industries Shareholder Litig.*, 155 A.D. 2d 154 (199), *aff'd as mod.* 77 N.Y. 2d 195 (1991), and added and evaluated two additional factors to reverse a decision of the motions court to disapprove a non-monetary settlement which included additional disclosures and a corporate governance reform.[3]

The First Department explained in *Gordon* that: "[M]ore than two decades of mergers and acquisitions litigation following *Colt* have been informative as to the need to curtail excesses not only on the part of corporate management, but also on the part of overzealous litigating shareholders and their counsel. Accordingly, a revisiting of our five-factor *Colt* standard is warranted in order to affect an appropriately balanced approach to judicial review of proposed non-monetary class action settlements and to provide further guidance to courts reviewing such proposed settlements in the future." *Id*. at 158.

[3] The *Colt* approval factors are: likelihood of success; the extent of support from the parties; the judgement of counsel; the presence of bargaining in good faith; and the nature of the issues of law and fact. *See Colt*, 155 A.D. 2d at 160.

The two additional factors added by the *Gordon* court are: whether the proposed settlement is in the best interests of the putative settlement class as a whole, and whether the settlement is in the best interest of the corporation. *Id*. The *Gordon* court evaluated the four categories of additional disclosures and found that they were of some benefit to Verizon shareholders. *Id*. The court also found that the prospective corporate governance reform met the enhanced standard for approval, as it provided a benefit to both Verizon shareholders and to Verizon. *Id*. at 161.

Justice Kornreich, who twice declined to approve the *City Trading* case, nevertheless approved a proposed non-monetary settlement in *Roth v. Phoenix Cos.*, 56 Misc. 3d 191 (Sup. Ct. N.Y. County 2017), a bondholder class action challenging a proposed reduction of a defendant corporation's reporting obligation following a merger and the allegedly inadequate disclosure of the transaction's implications to those bondholders. *Id*. at 193. The merger agreement challenged in *Roth* would have eliminated the rights of certain bondholders to receive certain financial information. The settlement preserved the bondholders' disclosure rights. *Id*. at 194. In approving the settlement, Justice Kornreich said:

> [T]he settlement is outstanding. It provides for expeditious beneficial relief for the class that affords them material disclosures without the need for protracted, costly litigation. While disclosure-only settlements resolving pre-merger lawsuits are the subject of much controversy and often properly viewed with a fair degree of skepticism, this case lacks the pernicious indicia of a frivolous "strike suit" seeking a "merger tax." Here, the gravamen of plaintiff's complaint is a challenge to the disclosure implications of the merger, which the court finds to have been well-founded. The terms of the Settlement sufficiently remedy plaintiff's concerns.

Finally, a non-monetary, settlement was recently approved outside of the merger context. *See Saska v. Metropolitan Museum of Art*, 2016 N.Y. Misc. LEXIS 4184 (Sup. Ct. N.Y. County 2016) (preliminary approval) and 2017 N.Y. Misc. LEXIS 2324 (Sup. Ct. N.Y. County 2017) (final approval). *Saska* concerned the Museum's "pay what you wish admissions policy." The

parties ultimately settled the case for equitable relief in the form of a consent decree with respect to the "pay what you wish policy" that would be binding on the Museum for 78 months, but no monetary damages. The court approved the settlement, which provided the following release of claims: "[a]ll other members of the Settlement Class release only claims for equitable relief and for attorney's fees and expenses, and shall not be deemed to have settled, discharged or released the Museum from any claim for monetary damages."[4]

The court also addressed and overruled an objection to this settlement as a "worthless disclosure only" one, finding the case "bears absolutely no resemblance to a lawsuit about inadequate pre-merger disclosure. Rather, this case concerns whether the Museum's patrons were deceived by the Museum's admission policy. The instant settlement, which remediates any possible deception, provides a real benefit to the public." 2017 N.Y. Misc. LEXIS 2324, at *10.

D. Other Settlement Issues

- Notice. *Vasquez v. National Sec. Corp.*, 2015 N.Y. Misc. LEXIS 1457 (Sup. Ct. N.Y. County 2015), *aff'd* 2016 N.Y. App. Div. LEXIS 3638 (1st Dept. 2016): CPLR §908 requires notice of proposed dismissal of an action although the class had not yet been certified and plaintiff class representative has been paid all of his monetary damages. Although federal law no longer requires this notice, CPLR Article 9 has not yet been similarly amended.

- Incentive Awards. *Saska v. Metropolitan Museum of Art*, 2017 N.Y. Misc. 2324 (Sup. Ct. N.Y. County 2017): CPLR §909 does not expressly permit incentive awards for class representatives. CPLR §909 provides for representatives and objectors to recover attorneys' fees, but does not provide for a separate cash award. While acknowledging that other courts had approved such awards, and that such awards were deserving in this particular case, the court

[4] The three named plaintiffs released their claims for monetary damages.

nevertheless denied the request, citing the code section and the CPLR commentary, especially in light of the amendment to CPLR §909 following the Court of Appeals' decision in *Fleming v. Barnwell Nursing Home & Health Facilities, Inc.*, 15 N.Y. 3d 375 (2010).

- Opt out Rights. In *Colt*, the Court of Appeals considered whether a class action complaint demanding primarily equitable relief required the court to give class members an opportunity to opt out of the class. The *Colt* court concluded that class members have no constitutional due process right to opt out of a class that seeks predominantly equitable relief, as long as the prerequisites for certification of the class are satisfied. *See* 77 N.Y. 2d at 194-196. *Colt* also observed that unlike Rule 23, CPLR article 9 does not specifically enumerate or identify any particular category of case in which opt out rights are mandatory. Rather, CPLR §903 permits a court to exercise discretion to permit opt outs when appropriate. *Id*. at 194-195. The *Colt* court ruled that although the claims asserted and relief obtained was essentially equitable in nature, the release of damage claims without opt out rights for out-of-state class members with no ties to New York State was improper.

This aspect of *Colt* was recently affirmed by the Court of Appeals in *Jiannaras v. Alfant*, 27 N.Y. 3d 349 (2016). The Court declined to distinguish a claim for "incidental damage claims" from individualized damage claims. 27 N.Y. 3d at 353. The Supreme Court in *Jiannaras* had declined to approve a disclosure settlement that it otherwise found was fair and reasonable, solely because it failed to provide op out rights to non-residents with respect to damage claims.

III. NEW NORTHERN DISTRICT OF CALIFORNIA SETTLEMENT GUIDELINES

Why discuss the California settlement guidelines at the NYSBA Meeting? These "guidelines" which became effective in the Northern District on November 1, 2018, are the most

comprehensive set of settlement considerations in the country, and it can be expected that courts nationwide, many of which have started to more critically evaluate class action settlements at preliminary approval, will ultimately formulate their own guidelines, based at least in part on these guidelines.[5] Experience has also shown that courts are more and more interested in what happens with respect to Class Members interests after final approval and, presumably after Plaintiffs' counsel has been paid its fees and expenses.

An earlier set of guidelines appeared on the Northern District's website, but they were not uniformly followed by that court's judges; in fact, a number of the judges in that court have issued their own settlement guidelines. *See*, *e.g.*, *Luna v. Marvell Technology Group*, Case No. C 15-05447 WHA, Notice Regarding Factors To Be Evaluated For Any Proposed Settlement (ECF No. 105) (Nov. 28, 2016), an example of a standing order of Judge William H. Alsup, issued at an early stage of the litigation, (*see* Appendix B) and well before the settlement of that case in late 2017; and the Order Requiring Supplementation issued by Judge Edward Chen in *In re Leapfrog Enterprise, Inc. Securities Litigation*, 15-cv-00376-EMC (ECF No. 172) (Feb. 28, 2018) which was issued after that court reviewed Plaintiff's Unopposed Motion for Preliminary Approval of Settlement. (*See* Appendix C).

Judge Phyllis Hamilton, the Chief Judge of the Northern District, sought guidance from class action practitioners on both the plaintiff and defense side to review potential revisions to the initial guidelines that had been proposed by the Court's staff. Many of the practitioners' suggestions were adopted by the Court. The guidelines also dovetail with the Rule 23 amendments, especially with respect to the front-loading of information at the preliminary approval stage. Notably, the Court singles out cases litigated under the Private Securities

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[5] The Guidelines can be found at https://www.cand.uscourts.gov/ClassActionSettlementGuidance, and are attached as Appendix A hereto.

Litigation Reform Act of 1995, which contains its own settlement and notice provisions. Parties in those cases are directed to "follow the statute and case law requirements that apply to such cases, such as regarding reasonable cost and expense awards to representative plaintiffs, and this procedural guidance to the extent applicable."

A. Preliminary Approval

1. The guidelines require 12 categories of information be provided to the Court at the preliminary approval stage, and recommends that the parties take these requirements into account "during settlement negotiations" and when drafting class notices. Among the requirements:

(a) a description of the differences between the Class proposed for settlement purposes and the Class proposed in the operative complaint (if the Class has not previously been certified) or the certified Class (the litigation class) and an explanation as to why the differences are appropriate. Given the concerns raised by courts nationwide in settlements that provide for a broader settlement class than the class litigated on behalf of, broader settlement classes should be the exception rather than the rule;

(b) a description of any differences between claims being settled and the claims in the operative complaint, and the appropriateness of the broadening of those claims. Again, any expansion of the claims being released should be made with caution and will be viewed with suspicion;

(c) the actual recovery versus the potential recovery, and how that recovery will be distributed, as well as whether there is any reversion of funds to the defendants or their insurers, and the anticipated amount of such reversion (and also noting the Ninth Circuit's case law disfavoring reversions); and

(d) the "risks" of litigation and why the settlement is fair, reasonable and adequate under the circumstances. Although these "risks" have always been addressed in the final approval motion, and summarized at preliminary approval, additional detail is now required at the preliminary approval stage. An explanation of the proposed plan of allocation should also be provided at this stage.

(e) Whether a claim form is required and the estimated number and/or percentage of class members who are expected to submit a claim, based on previous experience of the claims administrator and/or counsel, with examples of such prior experiences and the reasons for the selection of those examples. The declaration from the claims administrator may address these requirements. The guidance also recommends that class counsel provide specific data for at least one of their past comparable class settlements (*i.e.*, settlements involving the same or similar clients, claim and/or issues) and provide the following information: the total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to each *cy pres* recipient, the administrative costs, the attorneys' fees and costs and the benefit conferred on the class in coupon or non-monetary relief settlements. A concern about low participation rates in consumer class actions is likely the impetus for this requirement.

(f) The process used to select the claims administrator and anticipated administration costs. This guideline likely requires a competitive bidding procedure, and potentially will result in a race to the bottom, as claims administrators attempt to undercut each other on price. The concern here is that quality could suffer; cheaper is not always better, and

experience matters, especially in litigations with complex plans of allocation and various types of non-customary distributions.

(g) Notice. The guidelines also require that the notice is easily understandable, taking into account the membership of the Class, and identifies the information that the notice must contain. The guidelines also suggest that the parties consider increasing notice to class members ***via*** third-party data sources, social media, a settlement website and/or a marketing specialist to supplement mail and publication notice, so as to achieve "the best notice that is practicable," and includes suggested language to be included in the notice, as well as specific instructions for objections and opt-outs. At least 35 days should be provided for Class Members to object to the Settlement or opt-out of the Class.

(h) Attorneys' Fees. The preliminary approval motion must now provide information regarding the anticipated requested attorneys' fees and litigation expenses, a supporting lodestar calculation, and, if the fee request will be based on having obtained injunctive relief and/or other non-monetary relief for the Class, a discussions of the benefit. Whether courts will focus solely on the lodestar in determining a fair fee remains to be seen. The Ninth Circuit does not require a lodestar cross-check on a percentage fee request, and the criticisms of lodestar fee awards remain – is plaintiff's counsel running up their time in order to justify its fee? Is this in the best interests of the Class? Must every hour spent on the litigation be justified? The preliminary approval motion should also address the amount of any incentive awards that may be sought, as well as evidence supporting such a request.

(i) *Cy Pres* Awardees. If any portion of the settlement fund will be distributed to a *cy pres* organization, the recipient(s) should be identified at preliminary approval,

as well as an explanation of how the recipient(s) are related to the subject matter of the litigation, and any relationship between counsel and the recipient.

(j) Class Action Fairness Act (CAFA). The motion for preliminary approval should address the applicability of CAFA, and how the settlement complies with 28 U.S.C. §1712 if coupons are included in the recovery.

B. Final Approval Requirements

1. Class Members' Response. The motion for final approval should provide the Court with responses to any objections, the number of undeliverable class notices and claims packets, the number of class members who submitted valid claims and the number of opt-outs.[6]

2. Attorneys' Fees. Here, the guidelines move from "should" to "must," *i.e.*, counsel ***must*** include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund, and a detailed declaration of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information. Counsel should also be prepared to submit copies of billing records.

3. Incentive Awards. All requests for incentive awards must be supported by evidence of the proposed awardees' involvement in the case and any other justification for the award.

C. Post-Distribution Accounting

1. Courts are increasingly interested in what happens in a settlement after it grants final approval. The guidelines now require that within 21 days after the distribution of the settlement fund and payment of attorneys' fees, the parties shall file a post-distribution

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[6] Unless the final approval hearing is held after the claim submission deadline, the number of "valid claims" will be unavailable in virtually all cases.

accounting and post to the settlement website an "easy-to-read" chart with the following information: the total settlement fund; the number of class members; the number of class members to whom notice was sent and not returned as undeliverable; the claims rate (the number and percentage of claim forms submitted); the number of opt-outs and objections; the average, median, largest and smallest recovery per claimant; the notice and payment methods; the number and value of checks not cashed; amounts distributed to each *cy pres* recipient; administrative costs; and attorneys' fees and costs, including as a percentage of the settlement fund, and the multiplier, if any; if any non-monetary relief is obtained, such as discount coupons, debit cards, or similar instruments, the chart should include the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the Class.[7] Practitioners in the Northern District have developed a "nutrition label" chart to provide this information to the Court and Class Members. *See* Appendix D.

2. The Court may hold a hearing following submission of this information.

D. Yahoo Breach Settlement

On November 2, 2018 and November 5, 2018, Judge Lucy Koh of the Northern District issued orders in the Yahoo! security breach litigation (Case No. 16-MD-02752-LHK) requiring supplemental information regarding the proposed settlement which largely track the new guidelines. (ECF Nos. 333, 335) Notably, the Court asked for an estimate of the potential class recovery had the case not settled, as well as Plaintiff's counsel's lodestar. In their response to the orders, Counsel produced their lodestar, and submitted under seal information regarding how

[7] Some of this information, such as the number of uncashed checks and the amount of *cy pres* distribution, will not be fully available 21 days after distribution is made.

much the class could have gotten had the case not settled, telling Judge Koh that revealing this information would reveal attorney work product and mental impressions. This work product concern will likely be raised by Plaintiff's counsel, especially given the risk that a settlement is not approved, and litigation continues.

The Court heard the preliminary approval motion on November 29, 2018, and the motion remained under advisement as of the date of the submission of these materials.

IV. CY PRES CONSIDERATIONS

Frank v. Gaos, 17-961, currently pending in the Supreme Court ***may*** determine the propriety of the rare situation of full *cy pres* settlements; *i.e.*, those in which, because distribution to class members is impossible, or even impractical, no settlement funds are distributed in any manner to class members, but rather, after deduction of notice expenses and attorneys' fees, are given directly to third parties, likely public-interest or charitable organizations, that ideally are related to the subject matter of the litigation.

The underlying lawsuit was a privacy challenge to Google's practice of sharing information about its customers' internet searches. The case settled for $8.5 million. *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1126-1127 (N.D. Cal 2015). Plaintiffs' complaint represented that the class was made up of 129 million Google users. The $8.5 million included $1 million in notice and administrative costs, $5,000 in incentive awards to each of the three named plaintiffs, and $2.125 million to plaintiffs' counsel, with the remaining $5.3 million awarded *cy pres* to six academic and non-profit institutions which were "independent and free from conflict, have a record of promoting privacy protection on the Internet, reach and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online

privacy risks." *Id.* at 1133.[8] There was no direct distribution of the settlement fund to class members, as the parties informed the district court that it was "infeasible" to do so – it would result in a payment of only four cents per class member – and the costs of identifying, processing and paying claims would exceed the available funds. The district court agreed. *Id.*

The proposed *cy pres* recipients were Carnegie Mellon University; the World Privacy Forum; Illinois Tech's Chicago-Kent College of Law Center for Information, Society and Policy; Stanford Law School Center for Internet and Society; the Berkman Center for Internet & Society at Harvard University; and the AARP Foundation. Google already supported some of these organizations through donations.

Following notice, only five class members objected, arguing that *cy pres* relief was inappropriate because it would in fact be practical to distribute the settlement fund through a claims-made process or a lottery, and because class counsel were alumni of several of the *cy pres* recipients. One of the objectors was Ted Frank of the Competitive Enterprise Institute. Mr. Frank has challenged settlements, including *cy pres* settlements, for a number of years.

Judge Davila approved the settlement, finding the settlement "non-distributable." *Id.* at 1132. Judge Davila also determined that the "*cy pres* distribution accounts for the nature of this suit, meets the objectives of the [Stored Communications Act] and furthers the interests of class members." *Id*. at 1133. After evaluating each of the six proposed recipients, Judge Davila concluded that it was "satisfied that the proposed *cy pres* distribution 'bears a substantial nexus to the interests of the class members,' as required by the Ninth Circuit." *Id.*

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[8] Google also agreed to "maintain information on its website" which addresses "how information concerning users' search queries are shared with third parties" and directs users to Google's privacy policy for additional information. [CITE]

The court addressed the objections to the settlement, and overruled them. With respect to the *cy pres* objections, the Court reiterated that plaintiffs had adequately established that plaintiffs had sufficiently shown "that the cost of distributing this or really any settlement fund to the class members would be prohibitive." *Id*. at 1137. Finally, the Court rejected the objections to the extent they argued that the *cy pres* recipients were unrelated to the subject matter of the litigation and because some of plaintiffs' counsel attended Harvard University, one of the recipients. *Id*. at 1138. While noting the potential for a conflict of interest, the court held that there was "no indication that counsel's allegiance to a particular alma mater factored into the selection process. Indeed, the identity of potential *cy pres* recipients was a negotiated term included in the Settlement Agreement and therefore not chosen solely by Harvard alumni." *Id.* at 1138.

The Ninth Circuit affirmed the settlement, *Gaos v. Holyoke*, 869 F.3d 737 (2017), finding that although *cy pres*-only settlement are considered the exception and not the rule, they are appropriate where, as here, the settlement fund is non-distributable, and noting that the Ninth Circuit has "never imposed a categorical ban on a settlement that does not include direct payments to class members." *Id*. at 742.

The Court also evaluated and approved the six proposed *cy pres* recipients, finding that the district court "appropriately found that the *cy pres* distribution addressed the objectives of the Stored Communications Act and furthered the interests of the class members." *Id*. at 743. In considering the argument that three of the *cy pres* recipients had previously received *cy pres* funds from Google it did "not impugn the settlement without something more, such as fraud or collusion." *Id*. at 745. the Ninth Circuit found "that 'something more' [was] missing here." *Id*.

Finally, the court rejected the argument that the link between the *cy pres* recipients and class counsel's alma maters raised a significant question about whether the recipients were selected on the merits. *Id*. While noting that there may be occasions where such a relationship could cast doubt on the selection process, there was no evidence before the court which would create such doubt. *Id*.

Circuit Judge Wallace dissented in part. While he agreed that a *cy pres*-only settlement was appropriate in this case, he never the less contended that the "fact alone that 47% of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further in a case such as this." *Id*. at 748. Judge Wallace "would vacate the district court's approval of the class settlement, and remand with instructions to hold an evidentiary hearing, examine class counsel under oath, and determine whether class counsel's prior affiliation with the *cy pres* recipients played ***any*** role in their selection as beneficiaries." *Id*. (emphasis in original).

Frank petitioned the Supreme Court for review, which was granted. Following full briefing by the parties, several amici and the government, argument was held on November 1, 2018. Then it got interesting. A large portion of the argument was spent on the question of whether the plaintiffs even had standing to bring the action, in light of the Supreme Court's 2016 *Spokeo, Inc. v. Robins* decision (136 S.Ct. 1540) (2016). The *Spokeo* Court held that a plaintiff in federal court cannot establish standing simply by alleging a violation of a federal statute (here, the Stored Communications Act); rather, the plaintiffs must allege an "injury-in-fact" that is both "concrete" and "particularized." 136 S.Ct. at 1545. Standing had not been raised by any of the parties to the litigation, or the reviewing courts at the settlement stage. Plaintiffs' lack of *Spokeo* standing to sue Google was raised by the Justice Department in its brief, which did not take sides

on the merits of the case, and the district court had approved the settlement prior to issuance of the *Spokeo* decision. Each of the advocates advised the Court that remand would permit full briefing on the complex question raised with respect to *Spokeo* standing and claims brought for violation of the SCA.

On November 5, 2018, the Court directed the parties and the Solicitor General to file supplemental briefs addressing whether any named plaintiff has Article III standing to bring the litigation. Briefing will be completed on December 21, 2018.

On the merits of the appeal, the Court acknowledged full *cy pres* settlements were rare, and questions and comments by the Justices predictably followed party lines. It is unlikely that the Court will hold that when further re-distribution of residual settlement funds is no longer economically feasible in common fund cases, that those funds may not be donated to appropriate organizations.[9] The Court will likely, at the minimum, obligate lower courts to evaluate full *cy pres* cases very carefully, both with respect to the feasibility of distribution to class members and the proposed beneficiaries of any such funds if distribution is not possible.

When drafting settlement agreements, counsel should consider drafting a provision that permits payment of "de minimus residual distributions" to appropriate organization(s) following a determination that further distributions or re-distributions of settlement funds would no longer be economically feasible. Identification of the organization(s), the relevance to the subject matter of the litigation, and any association between any of the parties or their counsel to the organization should also be disclosed to the court.

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[9] Legal aid groups and other non-profits rely on these contributions of residual post-distribution funds, and have argued that an unfavorable ruling could threaten this funding.

Appendix A (*Procedural Guidance for Class Action Settlements* – Northern District of California) to Materials Submitted by Ellen Gusikoff Stewart

Procedural Guidance for Class Action Settlements

Updated November 1, 2018 and December 5, 2018

> ***NOTE**: This updated guidance, first published November 1, 2018, was modified December 5, 2018 to include the following clarification: the first sentence of the guidance has been revised to reflect that even though the guidance is highly recommended, the parties must comply in the first instance with the specific orders of the presiding judge.*

Parties submitting class action settlements for preliminary and final approval in the Northern District of California should review and follow these guidelines to the extent they do not conflict with a specific judicial order in an individual case. Failure to address the issues discussed below may result in unnecessary delay or denial of approval. Parties should consider this guidance during settlement negotiations. Parties should also consider the suggested language below when drafting class notices. In cases litigated under the Private Securities Litigation Reform Act of 1995, follow the statute and case law requirements that apply to such cases, such as regarding reasonable costs and expenses awards to representative plaintiffs, and this procedural guidance to the extent applicable.

Preliminary Approval

1) INFORMATION ABOUT THE SETTLEMENT—The motion for preliminary approval should state, where applicable:

a. If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

b. If a litigation class has been certified, any differences between the settlement class and the class certified and an explanation as to why the differences are appropriate in the instant case.

c. If a litigation class has not been certified, any differences between the claims to be released and the claims in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

d. If a litigation class has been certified, any differences between the claims to be released and the claims certified for class treatment and an explanation as to why the differences are appropriate in the instant case.

e. The anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.

f. The proposed allocation plan for the settlement fund.

g. If there is a claim form, an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.

h. In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instant case.

2) SETTLEMENT ADMINISTRATION—In the motion for preliminary approval, the parties should identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years. The parties should also address the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs. The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing.

3) NOTICE—The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members. The notice should include the following information: (1) contact information for class counsel to answer questions; (2) the address for a website, maintained by the claims administrator or class counsel, that has links to the notice, motions for approval and for attorneys' fees and any other important documents in the case; (3) instructions on how to access the case docket via PACER or in person at any of the court's locations. The notice should state the date of the final approval hearing and clearly state

that the date may change without further notice to the class. Class members should be advised to check the settlement website or the Court's PACER site to confirm that the date has not been changed. The notice distribution plan should be an effective one.

Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.

The notice distribution plan should rely on U.S. mail, email, and/or social media as appropriate to achieve the best notice that is practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c)(2). If U.S. mail is part of the notice distribution plan, the notice envelope should be designed to enhance the chance that it will be opened.

Below is suggested language for inclusion in class notices:

> This notice summarizes the proposed settlement. For the precise terms and conditions of the settlement, please see the settlement agreement available at www.______________.com, by contacting class counsel at _________________, by accessing the Court docket in this case, for a fee, through the Court's Public Access to Court Electronic Records (PACER) system at https://ecf.cand.uscourts.gov, or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, *[insert appropriate Court location here]*, between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.
>
> PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.

4) OPT-OUTS—The notice should instruct class members who wish to opt out of the settlement to send a letter, setting forth their name and information needed to be properly identified and to opt out of the settlement, to the settlement administrator and/or the person or entity designated to receive opt outs. It should require only the information needed to opt out of the settlement and no extraneous information. The notice should clearly advise class members of the deadline, methods to opt out, and the consequences of opting out.

5) OBJECTIONS—Objections must comply with Federal Rule of Civil Procedure 23(e)(5). The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filings. The notice should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement. The notice should clearly advise class members of the deadline for submission of any objections.

Below is suggested language for inclusion in class notices:

"You can ask the Court to deny approval by filing an objection. You can't ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you must object.

Any objection to the proposed settlement must be in writing. If you file a timely written objection, you may, but are not required to, appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for hiring and paying that attorney. All written objections and supporting papers must (a) clearly identify the case name and number (__________ v. ___________, Case Number ___________), (b) be submitted to the Court either by mailing them to the Class Action Clerk, United States District Court for the Northern District of California, *[insert appropriate Court location here]*, or by filing them in person at any location of the United States District Court for the Northern District of California, and (c) be filed or postmarked on or before __________________."

6) ATTORNEYS' FEES—The court will not approve a request for attorneys' fees until the final approval hearing, but class counsel should include information about the fees they intend to request and their lodestar calculation in the motion for preliminary approval. In a common fund case, the parties should include information about the relationship among the amount of the award, the amount of the common fund, and counsel's lodestar calculation. To the extent counsel base their fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class. Counsel's lodestar calculation should include the total number of hours billed to date and the requested multiplier, if any. Additionally, counsel should state whether and in what amounts they seek payment of costs and expenses, including expert fees, in addition to attorneys' fees.

7) INCENTIVE AWARDS—Judges in this district have different perspectives on extra payments to named plaintiffs or class representatives that are not made available to other class members. Counsel seeking approval of incentive awards should consult relevant prior orders by the judge reviewing the request. The court will not approve a request for incentive awards until the final approval hearing, but the parties should include information about the incentive awards they intend to request as well as the evidence supporting the awards in the motion for preliminary approval. The parties should ensure that neither the size nor any conditions placed on the incentive awards undermine the adequacy of the named plaintiffs or class representatives. In general, unused funds allocated to incentive awards should be distributed to the class pro rata or awarded to cy pres recipients.

8) CY PRES AWARDEES—If the settlement contemplates a cy pres award, the parties should identify their chosen cy pres recipients, if any, and how those recipients are related to the subject matter of the lawsuit and the class members. The parties should also identify any relationship they or their counsel have with the proposed cy pres recipients. In general, unused funds allocated to attorneys' fees, incentive awards, settlement administration fees and payments to class members should be distributed to the class pro rata or awarded to cy pres recipients.

9) TIMELINE—The parties should ensure that class members have at least thirty-five days to opt out or object to the settlement and the motion for attorney's fees and costs.

10) CLASS ACTION FAIRNESS ACT (CAFA)—The parties should address whether CAFA notice is required and, if so, when it will be given. In addition the parties should address substantive compliance with CAFA. For example, if the settlement includes coupons, the parties should explain how the settlement complies with 28 U.S.C. § 1712.

11) PAST DISTRIBUTIONS—Lead class counsel should provide the following information for at least one of their past comparable class settlements (i.e. settlements involving the same or similar clients, claims, and/or issues):

a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to each cy pres recipient, the administrative costs, and the attorneys' fees and costs.

b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons or debit cards or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in easy-to-read charts that allow for quick comparisons with other cases.

12) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or WordPerfect) of all proposed orders and notices should be submitted to the presiding judge's Proposed Order (PO) email address when filed. Most judges in this district use Microsoft Word, but counsel should check with the individual judge's Courtroom Deputy.

Final Approval

1) CLASS MEMBERS' RESPONSE—The motion for final approval briefing should include information about the number of undeliverable class notices and claim packets, the number of class members who submitted valid claims, the number of class members who elected to opt out of the class, and the number of class members who objected to or commented on the settlement. In addition, the motion for final approval should respond to any objections.

2) ATTORNEYS' FEES—All requests for approval of attorneys' fees must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. Counsel should be prepared to submit copies of billing records themselves at the court's order.

Regardless of when they are filed, requests for attorneys' fees must be noticed for the same date as the final approval hearing. If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions. The motion for attorneys' fees should refer to the history and facts set out in the motion for final approval.

3) INCENTIVE AWARDS—All requests for incentive awards must be supported by evidence of the proposed awardees' involvement in the case and other justifications for the awards.

4) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or Word Perfect) of all proposed orders and judgments should be submitted to the presiding judge's Proposed Order (PO) email address at the time they are filed.

Post-Distribution Accounting

1) Within 21 days after the distribution of the settlement funds and payment of attorneys' fees, the parties should file a Post-Distribution Accounting, which provides the following information:

a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, and the multiplier, if any.

b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in an easy-to-read chart that allows for quick comparisons with other cases.

2) Within 21 days after the distribution of the settlement funds and award of attorneys' fees, the parties should post the Post-Distribution Accounting, including the easy-to-read chart, on the settlement website.

3) The Court may hold a hearing following submission of the parties' Post-Distribution Accounting.

Appendix B (*Luna v. Marvell* –Notice Regarding Factors to Be Evaluated for any Proposed Settlement) to Materials Submitted by Ellen Gusikoff Stewart

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL LUNA,

Plaintiff,

v.

MARVELL TECHNOLOGY GROUP, *et al.*,

Defendants.

No. C 15-05447 WHA

NOTICE REGARDING FACTORS TO BE EVALUATED FOR ANY PROPOSED CLASS SETTLEMENT

For the guidance of counsel, please review the *Procedural Guidance for Class Action Settlements*, which is available on the website for the United States District Court for the Northern District of California at www.cand.uscourts.gov/ClassActionSettlementGuidance.

In addition, counsel should review the following substantive and timing factors that the undersigned judge will consider in determining whether to grant preliminary and/or final approval to a proposed class settlement. Many of these factors have already been set forth in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir. 2011), but the following discussion further illustrates the undersigned judge's consideration of such factors:

1. ADEQUACY OF REPRESENTATION.

Anyone seeking to represent a class, including a settlement class, must affirmatively meet the Rule 23 standards, including adequacy. It will not be enough for a defendant to stipulate to adequacy of the class representation (because a defendant cannot speak for absent class members). An affirmative showing of adequacy must be made in a sworn record. Any possible

United States District Court
For the Northern District of California

1 shortcomings in a plaintiff's resume, such as a conflict of interest, a criminal conviction, a prior
2 history of litigiousness, and/or a prior history with counsel, must be disclosed. Adequacy of
3 counsel is not a substitute for adequacy of the representative.

4 To elaborate, when a settlement proposal is made prior to formal class certification, there
5 is a risk that class claims have been discounted, at least in part, by the risk that class certification
6 might be denied. Absent class members, of course, should be subject to normal discounts for
7 risks of litigation on the merits but they should not be subject to a further discount for a risk of
8 denial of class certification, such as, for example, a denial based on problems with a proposed
9 class representative, including a conflict of interest or a prior criminal conviction. This is a main
10 reason the Court prefers to litigate and vet a class certification motion *before* any settlement
11 discussions take place. That way, the class certification is a done deal and cannot compromise
12 class claims. Only the risks of litigation on the merits can do so.

13 **2. DUE DILIGENCE.**

14 Please remember that when one undertakes to act as a fiduciary on behalf of others (here,
15 the absent class members), one must perform adequate due diligence before acting. This
16 requires the representative and his or her counsel to investigate the strengths and weaknesses of
17 the case, including the best-case dollar amount of claim relief. A quick deal up front may not be
18 fair to absent class members.

19 **3. COST-BENEFIT FOR ABSENT CLASS MEMBERS.**

20 In the proposed settlement, what will absent class members give up versus what will they
21 receive in exchange, *i.e.*, a cost-benefit analysis? If the recovery will be a full recovery, then
22 much less will be required to justify the settlement than for a partial recovery, in which case the
23 discount will have to be justified. The greater the discount, the greater must be the justification.
24 This will require an analysis of the specific proof, such as a synopsis of any conflicting evidence
25 on key fact points. It will also require a final class-wide damage study or a very good substitute,
26 in sworn form. If little discovery has been done to see how strong the claim is, it will be hard to
27 justify a substantial discount on the mere generalized theory of "risks of litigation." A coupon
28

United States District Court
For the Northern District of California

settlement will rarely be approved. Where there are various subgroups within the class, counsel must justify the plan of allocation of the settlement fund.

4. THE RELEASE.

The release should be limited only to the claims certified for class treatment. Language releasing claims that "could have been brought" is too vague and overbroad. The specific statutory or common law claims to be released should be spelled out. Class counsel must justify the release as to each claim released, the probability of winning, and its estimated value if fully successful.

Does the settlement contemplate that claims of absent class members will be released even for those whose class notice is returned as undeliverable? Usually, the Court will *not* extinguish claims of individuals known to have received no notice or who received no benefit (and/or for whom there is no way to send them a settlement check). Put differently, usually the release must extend only to those who receive money for the release.

5. EXPANSION OF THE CLASS.

Typically, defendants vigorously oppose class certification and/or argue for a narrow class. In settling, however, defendants often seek to expand the class, either geographically (*i.e.*, nationwide) or claim-wise (including claims not even in the complaint) or person-wise (*e.g.*, multiple new categories). Such expansions will be viewed with suspicion. If an expansion is to occur it must come with an adequate plaintiff and one with standing to represent the add-on scope and with an amended complaint to include the new claims, not to mention due diligence as to the expanded scope. The settlement dollars must be sufficient to cover the old scope plus the new scope. Personal and subject-matter jurisdiction over the new individuals to be compromised by the class judgment must be shown.

6. REVERSION.

A settlement that allows for a reversion of settlement funds to the defendant(s) is a red flag, for it runs the risk of an illusory settlement, especially when combined with a requirement to submit claims that may lead to a shortfall in claim submissions.

United States District Court
For the Northern District of California

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2 **7. CLAIM PROCEDURE.**
3 A settlement that imposes a claim procedure rather than cutting checks to class members
4 for the appropriate amount may (or may not) impose too much of a burden on class members,
5 especially if the claim procedure is onerous, or the period for submitting is too short, or there is a
6 likelihood of class members treating the notice envelope as junk mail. The best approach, when
7 feasible, is to calculate settlement checks from a defendant's records (plus due diligence
8 performed by counsel) and to send the checks to the class members along with a notice that
9 cashing the checks will be deemed acceptance of the release and all other terms of the
10 settlement.
11 **8. ATTORNEY'S FEES.**
12 To avoid collusive settlements, the Court prefers that all settlements avoid any agreement
13 as to attorney's fees and leave that to the judge. If the defense insists on an overall cap, then
14 the Court will decide how much will go to the class and how much will go to counsel, just
15 as in common fund cases. Please avoid agreement on any division, tentative or otherwise.
16 A settlement whereby the attorney seems likely to obtain funds out of proportion to the benefit
17 conferred on the class must be justified.
18 **9. DWINDLING OR MINIMAL ASSETS?**
19 If the defendant is broke or nearly so with no prospect of future rehabilitation, a steeper
20 discount may be warranted. This must be proven. Counsel should normally verify a claim of
21 poverty via a sworn record, thoroughly vetted.
22 **10. TIMING OF PROPOSED SETTLEMENT.**
23 In order to have a better record to evaluate the foregoing considerations, it is better to
24 develop and to present a proposed compromise *after* class certification, *after* diligent discovery
25 on the merits, and *after* the damage study has been finalized. On the other hand, there will be
26 some cases in which it will be acceptable to conserve resources and to propose a resolution
27 sooner. For example, if the proposal will provide full recovery (or very close to full recovery)
28 then there is little need for more due diligence. The poorer the settlement, however, the more

justification will be needed and that usually translates to *more* discovery and *more* due diligence; otherwise, it is best to let absent class members keep their own claims and fend for themselves rather than foist a poor settlement on them. Particularly when counsel propose to compromise the potential claims of absent class members in a low-percentage recovery, the Court will insist on a detailed explanation of why the case has turned so weak, an explanation that usually must flow from discovery and due diligence, not merely generalized "risks of litigation." Counsel should remember that merely filing a putative class complaint does not authorize them to extinguish the rights of absent class members. *If counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made.* "[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

It is reasonable to discount class members' claims by the risk of litigation on the merits, but it is not reasonable to further discount claims by the risk that class certification will be denied. *See* Howard Erichson, *Beware The Settlement Class Action*, DAILY JOURNAL, Nov. 24, 2014.

11. A RIGHT TO OPT OUT IS NOT A CURE-ALL.

A borderline settlement cannot be justified merely because absent class members may opt out if they wish. The Court has (and counsel have) an independent, stand-alone duty to assess whether the proposed settlement is reasonable and adequate. Once the named parties reach a settlement in a purported class action, they are always solidly in favor of their own proposal. There is no advocate to critique the proposal on behalf of absent class members. That is one reason that Rule 23(e) insists that the district court vet all class settlements.

12. INCENTIVE PAYMENT.

If the proposed settlement by itself is not good enough for the named plaintiff, why should it be good enough for absent class members similarly situated? Class litigation proceeded well for many decades before the advent of requests for "incentive payments," which too often are simply ways to make a collusive or poor settlement palatable to the named plaintiff. A request for an incentive payment is a red flag.

United States District Court
For the Northern District of California

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13. NOTICE TO CLASS MEMBERS.

Is the notice in plain English, plain Spanish, and/or plain Chinese (or the appropriate language)? Does it plainly lay out the salient points, which are mainly the foregoing points in this memorandum? Will the method of notice distribution really reach every class member? Will it likely be opened or tossed as junk mail? How can the envelope design enhance the chance of opening? Can mail notice be supplemented by e-mail notice?

* * *

Counsel will please see from the foregoing that the main focus will be on what is in the best interest of absent class members. Counsel should be mindful of the factors identified in *In re Bluetooth*, 654 F.3d at 946–47, as well as the fairness considerations detailed in *Hanlon*, 150 F.3d at 1026. Finally, for an order denying proposed preliminary approval based on many of the foregoing considerations, *see Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal. June 19, 2007).

Dated: November 28, 2016.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Appendix C (*In re Leapfrog* – Order Re Supplemental Briefing and/or Evidence) to Materials Submitted by Ellen Gusikoff Stewart

United States District Court
For the Northern District of California

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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 IN RE LEAPFROG ENTERPRISE, INC.
8 SECURITIES LITIGATION,
_______________________________________/
9 This Document Relates to:
10
11 All Actions.

Case No. 15-cv-00347-EMC

ORDER RE SUPPLEMENTAL BRIEFING AND/OR EVIDENCE

Docket No. 169

12
13 The Court has reviewed Lead Plaintiff's motion for preliminary approval and
14 accompanying submissions. Having done so, the Court hereby orders the parties to file
15 supplemental briefing and/or evidence as follows. (A joint filing is preferred. This does not
16 preclude the parties from providing their separate positions within the joint filing.) The parties'
17 filing shall be made **within one week of the date of this order**.
18 A. Maximum Value of the Case
19 Lead Plaintiff states that its expert "estimates that the maximum recoverable damages
20 under the alleged Class Period of May 5, 2014, through June 11, 2015, are $89 million." Mot. at
21 10 n.4. Lead Plaintiff shall explain whether this estimate includes *all* of the claims it has ever
22 asserted in this case or just the two accounting claims (*i.e.*, the goodwill and long-lived asset
23 claims). *See, e.g.*, Docket No. 88 (order) (dismissing claims based on allegedly false and
24 misleading statements about LeapFrog's inventory, the rollout of LeapTV, and LeapFrog's
25 financial guidance).
26 B. Risks of Litigation
27 In its motion, Lead Plaintiff states that one risk of litigation with respect to the long-lived
28 asset claim is the difficulty in proving that Lead Plaintiff or other putative class members' losses

United States District Court
For the Northern District of California

were due to the disclosure about the long-lived asset impairment as opposed to some other reason. *See* Mot. at 11 ("[B]ecause LeapFrog's stock price declined in the wake of the Company's announcement of its disappointing fiscal year 2015 financial results, an announcement that also contained substantial commentary on issues not directly related to taking a charge for LeapFrog's long-lived asset impairment, Defendants would have argued that facts other than the announcement of the impairment were the proximate cause of Lead Plaintiff's losses."). The parties shall address what possible "other" reasons for the losses there could have been.

C. Net Settlement Fund

Under the Settlement Agreement, "Net Settlement Fund" is defined as "the Settlement Fund less: (i) Court-awarded attorneys' fees and expenses; (ii) Notice and Administration Expenses; (iii) Taxes; and (iv) any other fees or expenses approved by the Court." Sett. Agmt. § III, ¶ 1.18. How much in taxes do the parties anticipate will be deducted from the gross settlement fund?

D. Average Recovery

Lead Plaintiff indicates that the average recovery per share is estimated to be $0.125 before deduction of attorney's fees and expenses and $0.083 after such deduction. What is the average recovery when not only attorney's fees and expenses are deducted but also claim administration fees and expenses (the full $350,000 contemplated by the Settlement Agreement) and taxes?

E. Attorney's Fees and Expenses

Although the Court is not requiring Lead Plaintiff, at this time, to file a motion for attorney's fees and expenses, more information about the fees and expenses is needed than that contained within the pending motion. For example:

- What is the asserted lodestar? (An estimate is acceptable.)
- What is the range of hourly rates?
- What is the number of hours on which the lodestar is based?
- What were the major litigation tasks and how much time was spent on each? (Estimates are acceptable.)
- What and how much were the major expenses?

United States District Court
For the Northern District of California

F. Incentive Award

What is the factual basis for the requested $5,600 incentive award?

G. Proofs of Claims

1. Settlement Agreement § III, ¶ 7.6

The Settlement Agreement provides that "Lead Counsel shall have the right, but not the obligation, to advise the Claims Administrator to waive what Lead Counsel deem to be *de minimis* or formal or technical defects in any Proof of Claim submitted." Sett. Agmt. § III, ¶ 7.6. The Court has some concerns about the implications of this provision. For example, should Lead Counsel have an obligation to give the Claims Administrator, prior to the Claims Administrator's review of Proofs of Claims, some guidelines as to what should be considered *de minimis* or formal or technical defects that should be waived? Should Lead Counsel have an obligation to give advice if such advice is requested by the Claims Administrator, and is the Claims Administrator obligated to follow that advice?

2. Settlement Agreement § III, ¶ 7.7(b)

The Settlement Agreement gives Lead Counsel discretion as to whether a late-filed Proof of Claim shall be accepted. *See* Sett. Agmt. § III, ¶ 7.7(b). Should there be an express provision that such discretion shall be reasonably exercised?

3. Settlement Agreement § III, ¶ 7.7(d)-(e)

The parties shall clarify the "appeals" process for deficient Proofs of Claims. *See* Sett. Agmt. § III, ¶ 7.7(d)-(e). For example:

- Does a claimant have an avenue for appealing a decision by the Claims Administrator and/or Lead Counsel that a deficiency is not curable?
- For a curable deficiency, is it correct that (a) the claimant is given an opportunity to cure and (b) only if the Claims Administrator and/or Lead Counsel determine that the attempt to cure is not successful does the claimant have an opportunity to seek judicial review?

H. Plan of Allocation

Lead Plaintiff represents that, under the Plan of Allocation, "LeapFrog common stock must

have been purchased or otherwise acquired during the Class Period [May 5, 2014, to June 11, 2015] and held through the end of trading on May 15, 2015 (Friday)." Mot. at 16. Lead Plaintiff shall explain the factual and/or legal basis for the May 15, 2015, restriction (*e.g.*, is this related to the alleged corrective disclosure dates?). Is this consistent with the Plan of Allocation described in the Settlement Notice?

I. Defendants' Right to Withdraw from the Settlement

Defendants have the right to withdraw from the settlement in the event that the requests for exclusion from the settlement class exceed certain agreed-upon criteria. *See* Sett. Agmt. § III, ¶¶ 11.2-.3. This right is memorialized in a supplemental agreement. The parties shall lodge a copy of the supplemental agreement with the Court for in camera review.

J. Means of Notice

In its motion, Lead Plaintiffs refers to mail notice and publication/transmission notice but not email notice or DTC notice, which is discussed in the Joaquin Declaration (*i.e.*, the declaration from the proposed Claims Administrator). *See* Joaquin Decl. ¶¶ 4, 12-13. Lead Plaintiff shall clarify whether these other means of notice shall also be provided. In addition, Lead Plaintiff shall clarify whether the publication notice in *The Wall Street Journal* is a one-day publication. *Compare* Joaquin Decl. ¶ 11 (noting that the Summary Notice will "be posted with the *BusinessWire*, an online newswire service, where it will be available for a month").

K. Reminder Notice

The parties shall address whether it is worth having a reminder notice sent to putative class members.

L. Content of Notice

1. Settlement Notice

The Court has comments and/or proposed edits on the Settlement Notice (*i.e.*, the long-form notice that will be mailed), *see* Prop. Order, Ex. A-1, below.

Page 1, ¶ 1. The sentence regarding average recovery should be bolded.

Page 1, ¶ 4. The entire paragraph – regarding the need to submit a claim form to obtain a share of the settlement – should be bolded.

Page 1, ¶ 5. The sentence referring to the "Class Period" should provide the exact dates for the Class Period.

Page 2, ¶ 3. The dollar amount of attorney's fees (not just the percentage) should be specified.

Page 3, chart. The part of the chart explaining the objection option should clarify that an objector should still fill out a Proof of Claim or she will not receive any distribution from the net settlement fund.

Page 4, Table of Contents. The items currently numbered 19 and 20 regarding objections should be moved up so that they follow the items on requests for exclusion. (The same should be done for the substantive sections.)

Page 5, Table of Contents. The item currently numbered 24 regarding "do nothing" should be moved up so that it follows the items on objections. (The same should be done for the substantive sections.)

Page 9, Question 8. The specific dollar amounts for deductions that could be made from the gross settlement fund should be specified (*e.g.*, attorney's fees and expenses, claims administration fees and expenses).

Page 10, Question 10. The following phrase should be bolded: "you must submit supporting documents."

Page 11, Question 13. Can a Settlement Class member submit a request for exclusion online and, if not, why not?

Page 11, Question 17. The exact dollar amount of attorney's fees should be specified.

Page 13, Question 19. The last sentence in Question 19 should be rephrased to state as follows: "Even if you object, you ~~can~~ **must** still submit a Proof of Claim to be eligible for a cash payment from the Settlement. ~~However, if~~ If you do not submit a claim form, you will not receive a payment."

Page 17, footnote 3. Is there a typo in the last sentence – *i.e.*, is the June 15 date correct?

2. Summary Notice

Page 1, ¶ 2. The exact dollar amount of attorney's fees and expenses should be specified.

United States District Court
For the Northern District of California

1 3. Claim Form

2 The Court has comments and/or proposed edits on the Claim Form, *see* Prop. Order, Ex.
3 A-2, below.

4 **Page 3, ¶ 1.** Is the September 9 date correct?

5 **Page 3, ¶ 3.** The last sentence regarding failure to provide documentation should be
6 bolded.

7 **Page 3, ¶ 5.** The sentence regarding manual signing should be bolded.

8 **Page 6.** Is the September 9 date correct?

9 M. Proposed Order Granting Preliminary Approval

10 The Court has a few comments and/or proposed edits below.

11 **Prop. Order ¶ 3.** This paragraph states that the Court is certifying the Settlement Class.
12 However, in ¶ 7, the parties seem to concede that certification should ultimately be determined at
13 the final approval hearing. *See* Prop. Order ¶ 7(c) (providing that a hearing shall be held to
14 consider, *inter alia*, "whether the Settlement Class should be certified"). The parties should
15 address this conflict.

16 **Prop. Order ¶ 16.** Language should be added to this paragraph so that it reads as follows
17 (the new language is underlined): "Lead Counsel shall, at least fourteen (14) calendar days before
18 the Settlement Hearing, file with the Court proof of mailing of the Notice and Proof of Claim, both
19 to putative class members individually and to nominees for putative class members."

20 **Prop. Order ¶ 17**. Language should be added to this paragraph to clarify how long the
21 publication/transmission notice will be available on *The Wall Street Journal* and *BusinessWire*.

22 **Prop. Order ¶ 17(a).** The parties should consider whether to add a ¶ 17(a) to cover the
23 additional means of notice identified in the Joaquin Declaration (*i.e.*, email notice and DTC
24 notice).

25 **Prop. Order ¶ 23.** This paragraph provides that a request for exclusion must be made
26 such that it is received at least 3 weeks prior to the final approval hearing. Depending on when the
27 final approval hearing is, this could mean that there are different times for Settlement Class
28 members to file requests for exclusion or Proofs of Claims. This could be confusing for

United States District Court
For the Northern District of California

1 Settlement Class members. Is it simpler to have just one date by which the Settlement Class
2 members must respond to the notice – whether to file a Proof of Claim, an objection, and/or a
3 request for exclusion?
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5 **IT IS SO ORDERED**.
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7 Dated: February 28, 2018
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9 EDWARD M. CHEN
United States District Judge
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Appendix D (Nutrition Label) to Materials Submitted by Ellen Gusikoff Stewart

Audience

Brent T. Robinson, et al. v. Audience, Inc., et al.
No. 1:12-cv-232227 (Santa Clara Superior Court)

Total Settlement Amount	$6,050,000
Notice and Claim Packets Mailed	11,540
Number of Packets Returned Undeliverable	373 3.23%
Claims Submitted	2,285 19.80%
Opt-Outs Received	0
Objections Received	0
Mean Recovery per Claimant	$5,987.56
Median Recovery per Claimant	$296.42
Largest Recovery by Claimant	$282,542.79
Smallest Recovery by Claimant	$10.22
Method of Notice	Direct Mail Published in Investor's Business Daily, PR Newswire and over DTC Legal Notice Systems
Method of Payment	Checks and Wires
Number of Checks Not Cashed	9
Value of Checks Not Cashed and Included in Supplemental Distribution	$11,596.56
Cy Pres Distribution	$0
Administrative Costs	$141,069.53
Attorneys' Costs	$96,181.79
Expert Fees	$17,782.35
Attorney Fees	$1,815,000
% of Settlement Amount	30%
Multiplier	0.83
Distribution Completed	February 16, 2018
Reverter to Defendants	$0

Speaker Biographies

PETER A. BELLACOSA, ESQ.
BIOGRAPHY

Mr. Bellacosa concentrates his practice in the areas of product liability, mass torts, class action defense, ERISA, securities, and commercial disputes. He also has extensive experience with criminal and regulatory investigations, as well as handling matters in state and federal trial and appellate courts, and in arbitrations. Mr. Bellacosa has represented a diverse group of leading U.S. and international companies in complex, high-stakes disputes. Prior to joining Phillips Lytle, Mr. Bellacosa was a partner in Kirkland & Ellis LLP's litigation department for over 20 years.

PRACTICE AREAS

- Product Liability and Mass Tort Litigation
- White Collar Criminal Defense & Government Investigations
- Class Action
- Commercial Litigation including Breach of Contract; Business Torts; ERISA; Fraud/RICO; Securities Litigation

ADMITTED TO PRACTICE

- New York
- U.S. District Court, Eastern District of New York
- U.S. District Court, Northern District of New York
- U.S. District Court, Southern District of New York
- U.S. Court of Appeals, First Circuit
- U.S. Court of Appeals, Second Circuit
- U.S. Court of Appeals, Third Circuit
- U.S. Court of Appeals, Eleventh Circuit
- U.S. Supreme Court

HONORS & AWARDS

- Appointed by Governor George Pataki as Member of the Council for the State University of New York Health Science Center at Brooklyn, 1997 (Reappointed 2002); Reappointed by Governor David Paterson, 2009
- Appointed by New York Court of Appeals to the Board of Trustees of the Lawyers' Fund for Client Protection, 2009 (Reappointed and Elected Treasurer 2012)
- Appointed Member of the Appellate Division, First Department, Departmental Disciplinary Committee, 2008 (Reappointed 2010)
- Appointed by Ret. Chief Judge Judith Kaye, Chief Judge of the State of New York, to the Committee to Promote Public Trust and Confidence in the Legal System, 1998
- Certified Guardian and Court Evaluator pursuant to Part 36 of the Rules of the Chief Judge of the State of New York and Article 81 of the New York Mental Hygiene Law

EDUCATION

- St. John's University School of Law, J.D., 1988
- Georgetown University, B.A., 1985

PROFESSIONAL ASSOCIATIONS

- New York City Bar Association
- New York State Bar Association

PRESENT ACTIVITIES

- New York State Lawyers' Fund for Client Protection, Board of Trustees, Treasurer

STEVEN P. BENENSON, ESQ.
BIOGRAPHY

Steven P. Benenson is a senior principal of Porzio, Bromberg & Newman, PC, in New York City and Morristown, New Jersey. For 34 year, Steve has represented public and private companies in high risk and "bet the company" class-actions, and commercial, business, and product-liability litigations in trial and appellate courts across the country. He chairs the firm's Complex Litigation Practice Group. *Best Lawyers in America* describes Steve as a "top notch litigator," whose "ability to quickly understand complex factual situations or unfamiliar technical issues is unmatched [and]. . .translates into his ability to effectively convey his client's position to any tribunal." Steve also has been recognized in the International Who's Who of Commercial Litigators and New Jersey Super Lawyers for business litigation and class action defense. He is a Vice Chair to the ABA TIPS Business Litigation and Trial Practice Committees, a member of the DRI Business Litigation Committee's Class Action Specialized Litigation Group and has served on the American Land Title Association, Title Counsel Committee. Steve is a frequent lecturer and author on class action topics.

EDUCATION
Dartmouth College, BA, *magna cum laude,* 1981
Cornell University Law School, JD 1984

BAR ADMISSIONS
New York, New Jersey, Washington, DC

PUBLICATIONS

- *New Jersey Supreme Court Holds Mere Technical Violations of Consumer Protection Regulations Do Not Satisfy TCCWNA's Aggrieved Consumer Requirement*, Porzio Class Action Update, April 18, 2018.
- *Defeating Certification of "No-Injury" Consumer Protection Class Actions*, LJN, Product Liability Law & Strategy, January 2018.
- Co-Editor, *A Practitioner's Guide to Class Actions*, Second Edition, American Bar Association, New Jersey Law Section, Fall 2017.
- *Anti-Injunction Decision Hamstrings Ability to Settle Federal Class Actions*, Porzio Class Action Update, March 2015.
- *A Second Bite at the Apple? CAFA Jurisdiction After Class Certification Denial*, Defense Research Institute, The Business Suit, Vol 17, Issue 2, February 2014.
- *Circumventing Class Action Predominance Through Improper Merits Discovery*, Defense Research Institute, In-House Defense Quarterly, September 2012.

PROFESSOR JOHN C. COFFEE, JR.
BIOGRAPHY

Professor John C. Coffee, Jr. is the Adolf A. Berle Professor of Law at Columbia University Law School and Director of its Center on Corporate Governance. He is a Fellow at the American Academy of Arts and Sciences and has been repeatedly listed by the National Law Journal as among its "100 Most Influential Lawyers in America." Professor Coffee has served as a Reporter to The American Law Institute for its Corporate Governance Project, has served on the Legal Advisory Board to the New York Stock Exchange, and was a member of the SEC's Advisory Committee on the Capital Formation and Regulatory Processes. Professor Coffee is the author or editor of several widely used casebooks on corporations and securities regulation, including Coffee and Sale, SECURITIES REGULATION: Cases and Materials (13th ed. 2015); Choper, Coffee and Gilson, CASES AND MATERIALS ON CORPORATIONS (8th ed. 2013); and Klein, Coffee, and Partnoy, BUSINESS ORGANIZATIONS AND FINANCE (11th ed. 2010). His books include Coffee, ENTREPRENEURIAL LITIGATION: Its Rise, Fall, and Future (Harvard University Press 2015); Coffee, GATEKEEPERS: The Professions and Corporate Governance (Oxford University Press 2006); Coffee, Lowenstein, and Rose-Ackerman, KNIGHTS, RAIDERS AND TARGETS: The Impact of the Hostile Takeover (Oxford University Press 1988); and Ferran, Moloney, Hill and Coffee, THE REGULATORY AFTERMATH OF THE GLOBAL FINAINCIAL CRISIS (Cambridge University Press 2012). According to recent surveys of law review citations, Professor Coffee is the most cited law professor in U.S. law reviews over the last fifteen years in the combined corporate, commercial, and business law fields.

HONOR COSTELLO, ESQ.
BIOGRAPHY

Honor Costello is a counsel in Crowell & Moring's New York office. She litigates complex health care, antitrust, intellectual property, and commercial disputes with a focus on class actions and multidistrict litigation (MDL) proceedings. She has represented insurers, reinsurers, managed care organizations, chemical companies, energy companies, and pharmaceutical companies in state and federal litigation.

Recent matters include:

- Defending companies in MDL comprised of national and statewide class actions asserting antitrust claims.
- Defending major automobile manufacturer in multiple class actions alleging vehicle performance defects, breach of warranty, fraud, and consumer protection claims.
- Defending chemical companies in class and individual actions alleging federal statutory and state law tort claims based on environmental contamination.
- Defending health insurers in Employee Retirement Income Security Act (ERISA) litigation.
- Representing a medical school in litigation over breach of a patent license agreement.
- Representing a major pharmaceutical company in Hatch-Waxman litigation involving generic drugs.
- Representing a U.S. reinsurance company in litigations relating to underlying asbestos and environmental losses.
- Representing a leading marketing and communications agency in a dispute with former employees regarding violation of nonsolicitation covenants and misappropriation of trade secrets.

Honor received her J.D. from Cornell Law School in 2011. While in law school, she served as a managing editor of the *Cornell Journal of Law and Public Policy*. She also served as a judicial intern to the Honorable Charles J. Siragusa, U.S. District Court for the Western District of New York. Honor graduated from Wellesley College with a B.A. in English.

HONORABLE EUGENE M. FAHEY
BIOGRAPHY

Eugene M. Fahey, Associate Judge of the Court of Appeals, was born in Buffalo, New York, in September 1951. He attended high school at St. Joseph's Collegiate Institute. Later, he graduated from the State University of New York with a B.A. in political science in 1974 (cum laude), a law degree in 1984 and an M.A. in European History in 1998. Judge Fahey served on the Buffalo Common Council from 1978 to 1983 and again from 1988 to 1994. He served as Law Clerk to Judge Edgar C. NeMoyer in the New York Court of Claims before entering private practice in 1985, serving as house counsel for Kemper Insurance Company until 1993. Judge Fahey was elected to Buffalo City Court in 1994.

He was elected to the Supreme Court in 1996, and was re-elected in 2010. As a Supreme Court Justice, Judge Fahey was assigned to handle a civil calendar as well as criminal Special Term and presided over a variety of cases in Erie County as well as the outlying counties in the Eighth Judicial District. He was assigned to the Commercial Division in Erie County in January 2005 until his appointment by Governor George E. Pataki to the Appellate Division, Fourth Department in December 2006. In January 2015, Judge Fahey was nominated to the Court of Appeals by Governor Andrew Cuomo. The New York State Senate unanimously confirmed that nomination on February 9, 2015. He and his wife, Colleen Maroney-Fahey, live in Buffalo, New York. They have one daughter.

DANIEL R. KARON, ESQ.
BIOGRAPHY

Daniel R. Karon manages Karon LLC. He represents and defends consumers and corporations in consumer-fraud and antitrust class-action lawsuits. In addition to teaching at Columbia, he has lectured at Vanderbilt, Ohio State, Notre Dame, Georgia, Tulane, and other law schools. He was a lecturer in law at Cleveland State University's Cleveland-Marshall College of Law. He also serves on Loyola University Chicago School of Law's Institute for Consumer Antitrust Studies' U.S. Advisory Board.

He serves as lead counsel in *Lorain County v. Medical Mutual of Ohio, Aftermarket Sheet Metal Indirect Purchaser Antitrust Litigation*, *Schwartz v. Avis Rent-A-Car Corp.*, *Klein v. Budget Rent-A-Car Group,* and *Sallee v. Dollar Thrifty Rent A Car*; served as lead counsel in the *Magnesium Oxide Antitrust Litigation, Dairy Indirect-Purchaser Antitrust Litigation*, *Johnson v. Evangelical Lutheran Church of America, Bausch & Lomb Contact Lens Product Liability Litigation* and *Schwartz v. Alltel Corp.*; and is co-lead counsel in multiple other antitrust and consumer fraud class-action cases.

He was extensively involved in the *LCD-TFT Indirect Purchaser Antitrust Litigation* (nationwide price-fixing class action that settled for $1.1 billion), *Vitamins Direct Purchaser Antitrust Litigation* (nationwide price-fixing class action that resolved for $2 billion), *NASDAQ Market-Makers Antitrust Litigation* (nationwide price-fixing class action that settled for $1.027 billion), *Monosodium Glutamate Antitrust Litigation* (nationwide price-fixing class action that settled for $130 million), *Methionine Antitrust Litigation* (nationwide price-fixing class action that settled for $101 million), and *Sorbates Direct Purchaser Antitrust Litigation* (nationwide price-fixing class action that settled for $94.5 million).

Mr. Karon chairs the ABA's National Institute on Class Actions. He is co-vice chair of the American Association of Justice's Class Action Litigation Group. He was an editorial board member and contributing author to the ABA Litigation Section's magazine Class Actions Today–Jurisdiction to Resolution. He was a member of the Ohio Association of Justice's Board of Trustees and served as an editorial board member for the OAJ's Ohio Trial magazine.

Mr. Karon writes a bimonthly column for Law360. He has published several law-review articles, bar-journal articles, and op-eds on class-action topics. He lectures nationally on class actions for the ABA and other bar associations.

Mr. Karon received his B.A. from Indiana University and his J.D. from the Ohio State University College of Law.

JULIANNA THOMAS MCCABE, ESQ.
BIOGRAPHY

Julianna Thomas McCabe, is a class action litigator and appellate lawyer at Carlton Fields, Miami, with national experience representing clients in the financial services industry. She has defended complex cases in high stakes litigation including punitive damage and bad faith lawsuits in Florida, Mississippi, Arkansas, Oklahoma, Texas, West Virginia, California and other venues. Julianna has prepared briefs filed in the United States Supreme Court, several U.S. courts of appeals, and in various state supreme courts and intermediate appellate courts.

Julianna has represented clients at arbitration, and has litigated the enforceability of contractual arbitration clauses under the Federal Arbitration Act. She has also mediated and settled numerous complex cases on behalf of the firm's financial services clients. Julianna is licensed to practice in all Florida state and federal courts and in the U.S. Courts of Appeal for the Fifth, Sixth, Ninth, and Eleventh Circuits.

Julianna is the national class actions practice group leader.

RECOGNITION

- Most Effective Lawyers Award, Appellate, Daily Business Review (2017)
- Outstanding Contributor Award, Lawyers for Civil Justice (2016)
- Pro Bono Service Award, Put Something Back Pro Bono Program, Dade County Bar Association (2009)
- Selected for Florida Rising Star, Florida Super Lawyers (2009)

EDUCATION

Boston University School of Law (J.D., magna cum laude, 2000)
University of Connecticut (M.A., 1995)
University of Akron (B.A., magna cum laude, 1993)

BAR ADMISSIONS

Florida

JACQUELINE K. SEIDEL, ESQ.
BIOGRAPHY

Jacqueline Seidel is a New York-based partner in King & Spalding's Trial & Global Disputes practice who defends multi-national companies in complex class and mass action litigation pending in both state and federal court. She frequently partners with clients at the outset of a matter to develop and implement all-inclusive exit strategies for large-scale bet-the-company litigation. Often, such strategies include liaising with clients and virtual law firms to plan a long term, systematic exit strategy and/or global resolution, structuring and implementing court-approved comprehensive settlement programs and successfully resolving large groups of cases. She has also successfully managed putative class, mass and individual actions alleging false advertising, unfair business practices, unfair and deceptive trade practices, consumer fraud, consumer protection, and a wide range of common law personal injury and property damage claims.

While Ms. Seidel has represented clients in a wide range of industries, including the automobile, pharmaceutical, medical device, consumer goods, insurance, reinsurance and media industries, recently her practice has centered on negotiating and executing resolutions of some of the largest and most complex litigations in the automotive industry.

In recognition of her work, Ms. Seidel has been named a New York "Rising Star" in class action and product liability defense by *Super Lawyers* for the past three consecutive years and a "Rising Star" for Product Liability by *Law360* in 2018.

ELLEN GUSIKOFF STEWART, ESQ.
BIOGRAPHY

Ellen Gusikoff Stewart is a partner in Robbins Geller Rudman & Dowd LLP's San Diego office, and is a member of the Firm's Summer Associate Hiring Committee. She currently practices in the Firm's settlement department, negotiating and documenting complex securities, merger, ERISA and derivative action settlements.

Notable settlements include: KBC Asset Management v. 3D Systems Corp. (D.S.C. 2018) ($50 million); Luna v. Marvell Tech. Group (N.D. Cal. 2018) ($72.5 million); Garden City Emps.' Ret. Sys. v. Psychiatric Solutions, Inc. (M.D. Tenn. 2015) ($65 million); and City of Sterling Heights Gen. Emps.' Ret. Sys v. Hospira, Inc. (N.D. Ill. 2014) ($60 million).

Ms. Stewart earned a Bachelor of Arts degree from Muhlenberg College and a Juris Doctor degree from Case Western Reserve University.