New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 259—NO. 16
WEDNESDAY, JANUARY 24, 2018

Outside Counsel

Judicial Approval, Class Notice Required For Settlement of Uncertified Class Actions

In a 4-3 decision last month, a divided New York Court of Appeals held that where an action brought as a class action is voluntarily dismissed, CPLR 908 requires both (1) judicial approval and (2) notice to the putative class, even where the class has not been certified, and even if no class certification motion has been made. *Desrosiers v. Perry Ellis Menswear*, 2017 NY Slip. Op. 08620, 2017 WL 6327106 (Ct. App., Dec. 12, 2017). In rejecting an appeal to overrule a 35-year-old First Department precedent, the court described changes proposed for CPLR 908 in two Reports of the New York City Bar and a bill introduced in 2016, and held that this was the proper approach to change the existing reading of the rule. 2017 WL 6327106 at *5.

In reports with legislative proposals issued in 2003 and 2015, the New York City Bar Association had called for removing the requirement of class notice for a voluntary, pre-certification dismissal but retaining the requirement of judicial approval. Proposed Amendments to Article 9 of the Civil Practice Law and Rules to Reform and Modernize the Administration of Class Actions in

By **Richard J. Schager Jr.**

NYS Courts, Committee on State Courts of Superior Jurisdiction, the Council on Judicial Administration and the Litigation Committee, Nov. 5, 2015 (City Bar 2015 Report); State Class Actions: Three Proposed Amendments to Article 9 of the Civil Practice Law and Rules, Council on Judicial Administration, 58 The Record 316 (2003) (the City Bar 2003 Report). In 2016, a bill was introduced in the Assembly that followed the City Bar recommendations. A.9573 in 2016; 2017 WL 6327106 at *5. The Bill was reported out of the Judiciary Committee but died before being brought to the Assembly floor. In a statement seeming to call for legislative action, the court said that where a legislature has forgone requests to amend a statutory provision, the prevailing statutory construction should not be changed by the courts. 2017 WL 6327106 at *4.

Illustration of How CPLR 908 Applies

A hypothetical may illustrate why many in both the plaintiff bar and the defense bar support legislative revision. Assume that a plaintiff has pleaded a class action for a faulty medical device. The parties stipulate to extend CPLR 902's 60-day period for making the certification motion to permit pre-certification discovery, which reveals that plaintiff's injuries were caused by surgical mistakes in implanting the device. In studying the discovery, plaintiff's counsel realizes he has a sound individual case, but the causation issue makes class certification unlikely because of the absence of common questions of fact (CPLR 901(a)(2)). Defense counsel realizes that the manufacturer's instructions for the surgeon were less clear than they could have been and the manufacturer is prepared to offer a modest

In rejecting an appeal to overrule a 35-year-old First Department precedent, the court described changes proposed for CPLR 908 in two Reports of the New York City Bar and a bill introduced in 2016, and held that this was the proper approach to change the existing reading of the rule.

RICHARD J. SCHAGER JR. *is a member of Stamell & Schager.*

individual settlement, but the manufacturer resists any class-wide settlement because it is confident it would defeat certification on the causation issue. Plaintiff agrees to the settlement (planning his action against the surgeon), and the parties present the court with a stipulation of settlement and dismissal with an explanation of why the class action allegations are being abandoned.

The Court of Appeals view, consistent with the conclusion of the First Department 35 years ago in *Avena v. Ford Motor Co.*, 85 A.D.2d 149 (1st Dep't 1982)), is that CPLR 908 requires *both* judicial approval and class notice in this hypothetical, even if no class has been certified.[1] The post-2003 Federal Rule 23(e) would require *neither* judicial approval nor class notice, essentially treating an uncertified action as two-party litigation. Fed. R. Civ. P. 23(e) (as amended in 2003). Unlike the Federal Rule, however, the City Bar's proposed amendment to CPLR 908—and A.9573—would retain the requirement of court approval, the rule in New York even before enactment of Article 9 in 1976. City Bar 2015 Report at 29-31. But the City Bar/A.9573 proposal would not require notice unless the court finds such notice "necessary for the protection of the represented parties." City Bar Report at pp. 37-41 & Ex. A, p.6. (The phrase "necessary for the protection of the represented parties" is drawn from the class notice of pendency requirement in CPLR 904(a).)

Conflicting Readings of CPLR 908

The Court of Appeals acknowledged that CPLR 908 could be read differently where no class had been certified, and noted how the pre-2003 Federal Rule with comparable language *had* been read differently. Prior to its amendment in 2003, Federal Rule 23(e) was "virtually indistinguishable from the current text of CPLR 908," and the court noted that the majority of federal circuit courts of appeals construed it as requiring judicial approval of settlements but that notice was either discretionary or not required unless a class had been certified. 2017 WL 6327106 at *3. The court also cited the position of various New York State Bar Association committees submitted to the legislature at the time of the enactment of Article 9 (1976), urging that the notice requirements of the proposed CPLR 908 should "apply only to certified class actions." Id.; Letter from NY State Bar Association Banking Law, Business Law, and CPLR Committees at 5, Bill Jacket for Laws 1975, c. 207. But the court concluded 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." 2017 WL 6327106 at *5.

In dissent, Judge Stein pointed out that CPLR 908 could easily, and logically in the context of Article 9, be read to apply only to a *certified* class. Judge Stein also noted that notice to an uncertified class "lack[ed] practical significance"; the notice would simply tell members of a putative class that "an individual claim—of which they had no prior notice—was being resolved by an agreement that was not binding on them." Id. at *8. Judge Stein's dissent argued that "the ultimate purpose of the notice appears, at most, to be to allow plaintiffs' counsel to identify more clients at the expense of the court and the defendants." Id.

Judge Fahey for the majority, however, cited the 1982 *Avena* case as the precedent requiring judicial approval and notice even where no class had been certified (id. at *4), and further noted that "for 35 years *Avena* has been New York's sole appellate judicial interpretation" (id.). The majority held that "[a]ny practical difficulties and policy concerns … are best addressed by the legislature." Id. at *5.

Policy Considerations

The court's opinion also discussed policy considerations behind CPLR 908, including (1) "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 *5), and (2) "safeguard[ing] against a 'quickie' settlement that primarily benefits the named plaintiff or his or her attorney, without substantially aiding the class" (id. at *2). (The court was quoting here a State Consumer Protection Board letter submitted in support of CPLR 908 in 1975, May 29, 1975 at 7, Bill Jacket for Laws 1975, c. 207.) Hearkening back to the 1982 *Avena* decision, the court repeated "that the 'potential for abuse by private settlement at this stage is … obvious and recognized,' and the named plaintiffs had a fiduciary obligation to disclose relevant facts to putative class members." 2017 WL 6327106 at *4 (citing *Avena*, 85 A.D.2d at 151, 153).

Judge Stein in dissent criticized the majority for treating as "talismanic" merely "styling a complaint as a class action." 2017 WL 6327106 at *7. He noted that the plaintiffs in *Desrosiers* and the companion case *Vasquez* had failed to make timely certification motions, allowed the deadline for certification to pass, and failed to oppose the motions to dismiss, "but nonetheless subsequently asked the court to direct notice … ." 2017 WL 6327106 at *8. Not only would class notice require the expenditure of time and resources (including the cost of notice), but "the ultimate purpose of the notice appears, at most, to be to allow plaintiffs' counsel to identify more clients at the expense of the court and defendants." Id.

The City Bar/A.9573 Proposal

In preparing the 2015 Report, the City Bar's Working Group[2] considered the 2003 Federal Rule amendments against the strong New York tradition of requiring judicial approval for the dismissal of any action pleaded as a class action. City Bar 2015 Report at pp. 37-41. (The section of the report addressing CPLR 908 (pp. 27-41 of the Report) is about five times the length of this case comment, and includes a review of the trial court's decision in the *Vasquez* case, the companion case to *Desrosiers* concurrently affirmed by the Court of Appeals.)

Amendments adopted in 2003 removed from the federal rule the requirement of notice for dismissal of pre-certification cases and "focuse[d] on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements." Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure, May 14, 2001 (rev. July 31, 2001), at 30-31 (the 2001 Civ. R. Adv. Comm. Report). Instead of requiring notice of a settlement or dismissal in all circumstances, the amendments adopted the general rule that notice to the class is required only when a class has been certified, using the phrase "to all class members who would be bound by the proposal" that now appears in Fed. R. Civ. P. 23(e)(1).

> The City Bar proposal should be of interest to the Bar and to the Legislature because it preserves for trial courts the discretion to order notice where necessary to protect the class, and addresses the policy considerations raised above.

Even within the Federal Advisory Committee there was a shifting in the approach. The Federal Committee's initial proposal in 2001 had been to retain the requirement of judicial approval for dismissal of class actions not yet certified and to remove only the notice requirement, a variant of the approach recommended in the City Bar 2015 Report. City Bar 2015 Report. After receiving public comment, however, the Advisory Committee changed its approach and eliminated the requirement of judicial approval for dismissal of class actions that had not been certified (the requirement the City Bar 2015 Report proposes be retained in CPLR 908). Taking into account public comments after the proposed rule was published, the Federal Advisory Committee reported:

> As published, Rule 23(e)(1) required court approval for voluntary dismissal or settlement before a determination whether to certify a class. Testimony and comments underscored earlier doubts whether there is much that a court can do when the only parties before it are unwilling to continue with the action. This provision is amended to require court approval only for voluntary dismissal or settlement of the claims, issues or defenses of a certified class.

Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure, May 20, 2002 (rev. June 11, 2002), at 2-3 (the 2002 Civ. R. Adv. Comm. Report).

This change was made by adding the phrase "of a certified class" to the opening paragraph of Rule 23(e). As stated by the Federal Advisory Committee:

> The new rule [Rule 23(e)(1)(A)] requires *approval* only if the claims, issues or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.
>
> Subdivision (e)(1)(B) carries forward the *notice requirement* of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

2002 Civ. R. Adv. Comm. Report at 102-03 (emphasis added).

In the final recommendation for the 2003 amendments to Federal Rule 23, the Committee on Rules of Practice and Procedure simply said in its report to the Chief Justice and the Judicial Conference that, under the new Rule 23(e)(1) of the Federal Rules of Civil Procedure, court approval of the settlement of an action not yet certified is not required: "Approval is not required if class allegations are withdrawn as part of a disposition reached before a class is certified since putative class members are not bound by the settlement." 2002 Federal Judicial Conf. Report at 13.

In contrast to the Federal rule, the City Bar 2015 Report (and A. 9573 introduced in the Assembly in 2016) proposes that the judicial approval requirement be retained, but that notice to the class be discretionary with the trial court, to be ordered on a finding that notice is required for the protection of the members of the putative class. Walking through the draft statutory language of the draft CPLR 908 is beyond the scope of this note, but a fair summary is that (1) judicial approval is required for the settlement or voluntary dismissal of any action pleaded on behalf of a class, (2) notice of the settlement or voluntary dismissal is required to any class member who would be bound by the proposal settlement, and (3) the rule retained discretion for the court to order notice where necessary to protect the interest of the represented parties.

The federal rule is not stringent on judicial approval, elements (1) and (3)—judicial approval is required only if persons are bound by the settlement, and no discretion is retained for the court to order notice when presented with a voluntary dismissal. The New York City Bar proposal and the Assembly proposal (in A.9573) would make a voluntary dismissal subject to court approval, regardless of whether a class is bound.

The City Bar proposal should be of interest to the Bar and to the Legislature because it preserves for trial courts the discretion to order notice where necessary to protect the class, and addresses the policy considerations raised above. Judicial approval will protect against collusive settlements that may prejudice absent members of the putative class, and will safeguard against the "quickie settlements" about which the State Consumer Protection Board cautioned back in 2007, should assuage the concern for "potential abuse by private settlement" expressed by the First Department in *Avena*.

Where "the court finds that notice is necessary to protect the interests of the represented parties" (Proposed Amendment to CPLR 908(a), proposed by A.9573 and the 2015 City Bar Report. The phrase is derived from CPLR 904(a)), the proposed amendment to CPLR 908 preserves for the court discretion to order it.[3] In making its finding, the court could find that a meritorious class claim was being dismissed based on bad judgment or collusive conduct, and may determine that protective notice is appropriate to permit another class member to assume the responsibility of lead plaintiff. The court also might consider whether notice is appropriate for persons with similar claims, who may have relied on the existence of a class pleading for their recovery or to toll the statute of limitations governing their claims. But in circumstances such as the hypothetical posed at the outset of this case comment, the court would likely find that notice is not necessary for protection of the putative class. The draft amendment would permit the court to require notice where circumstances warrant, without requiring mandatory notice as under the current CPLR 908 or permitting the parties to dismiss the case with no notice as under the current Federal Rule 23(e).

1. CPLR 9908 reads:

> 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.

2. The Working Groups for the two City Bar reports were composed of members of the Committee on State Courts of Superior Jurisdiction, the Council on Judicial Administration and the Litigation Committee.

3. A. 9573 and the City Bar Reports do not address the method of class notice, which is within the court's discretion under CPLR 904. The court may consider the costs of notice and may order that notice to the class be given by mail, publication, or both. See *Meshel v. City of Long Beach*, 49 A.D.2d 706 (2d Dep't 1975) (notice of settlement by publication); *In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154 (1st Dep't 1990) (affirming notice to stockholder class by publication); *Michels v. Phoenix Home Life Mut. Ins. Co.*, 1997 WL 1161145 (Sup. Ct. N.Y. Co., Jan. 7, 1997) (notice by a combination of individual mailing and publication). See City Bar 2015 Report at n. 45 & accompanying text.