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Iv. Civil Procedure

IV. CIVIL PROCEDURE

Precertification Settlement of Class Actions.

Rule 23 of the Federal Rules of Civil Procedure provides that, before a class action in the federal courts can proceed to trial on the merits, the suit must be certified as a class action.[1] Once certification has been ordered, dismissals and compromises of the action are subject to Rule 23(e),[2] which requires court approval of the proposed settlement or dismissal and notice of the termination to absent class members.[3] Rule 23(e)'s provision for court approval and notice protects the interests of absent class members[4] by providing the absentees with an opportunity to object to the fairness and adequacy of the settlement.[5] Where a precertification settlement is reached, however, notice to the putative class is not as crucial since the

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August 8, 1978). The Supreme Court affirmed the lower court's decision, finding that the court's application of state law was proper. Butner v. United States, 99 S. Ct. 914, 917. However, the Court did not address the petitioner's challenge to the application of North Carolina law by the Fourth Circuit. *Id.* at 916.

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[1] FED. R. CIV. P. 23(c)(1) provides that "[a]s 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." Certification involves a determination by the district court that the purported class exists in fact and not merely on the basis of the allegations in the plaintiff's complaint. *See generally* 1 NEWBERG ON CLASS ACTIONS §§ 1100-1160 (1977) [hereinafter cited as NEWBERG]; Connolly & Connolly, *Qualifying Title VII Class Action Discrimination Suits: A Defendant's Perspective,* 9 ST. MARY'S L.J. 181, 182-83 (1977).

[2] FED. R. CIV. P. 23(e) states 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."

[3] Although Rule 23(e) seemingly applies to all dismissals, courts have held that no notice must be sent to absent class members when the dismissal is based on the merits of the class claim, when the complaint does not state a claim upon which relief can be granted, or when a defendant who is not an indispensible party is dismissed. *See* Washington v. Wyman, 54 F.R.D. 266, 270 (S.D.N.Y. 1971); Daugherty v. Ball, 43 F.R.D. 329, 335 (C.D. Cal. 1967); Smith v. Industrial Sec. Corp., 49 F. Supp. 959, 960 (D. Conn. 1943); Massaro v. Fisk Rubber Corp., 36 F. Supp. 382, 386 (D. Mass. 1941).

[4] *See* McArthur v. Southern Airways, Inc., 556 F.2d 298, 302-03 (5th Cir. 1977); Berse v. Berman, 60 F.R.D. 414, 416 (S.D.N.Y. 1973); Washington v. Wyman, 54 F.R.D. 266, 270 (S.D.N.Y. 1971).

[5] The purpose of Rule 23(e) notice is to inform the members of the class of the terms and options open to them under the proposed settlement. 2 NEWBERG, *supra* note 1, at § 2650(a); *see* Miller v. Republic Nat'l Life Ins. Co., 559 F.2d 426, 429 (5th Cir. 1977); Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); Airline Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 455 F.2d 101, 108 (7th Cir. 1972); Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 378 (E.D. Pa. 1970), *aff'd sub nom.,* Act Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971).

putative class is not bound by the named plaintiff's settlement.[6] But if a valid class does exist,[7] the elimination of the named plaintiff prior to certification may prejudice the putative class which relied on the plaintiff, as class representative, to champion class claims.[8] In *Shelton v. Pargo, Inc.*,[9] the Fourth Circuit considered whether Rule 23(e) should be extended to precertification settlements and rejected a strict application of Rule 23(e) in favor of a more flexible approach employing the policy considerations inherent in Rules 23(e) and (d).[10]

Shelton filed a complaint "on behalf of herself and all others similarly situated" alleging that her employer, Pargo, had engaged in racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964.[11] Pargo's answer included a motion to strike all allegations of a class action.[12] In response to Pargo's answer, Shelton moved the district court to certify the class action and to allow the suit to proceed as both an individual action and a class action under Rule 23.[13] While these motions were pending, Shelton and Pargo settled the claim.[14] Shortly

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[6] A voluntary stipulation of dismissal signed by all the parties appearing in the action operates as an adjudication upon the merits of the plaintiff's claim, thus foreclosing the named plaintiff's right to sue on the dismissed claim. FED. R. CIV. P. 41(a)(1). Nevertheless, a voluntary dismissal of the named plaintiff's claim under Rule 41(a)(1) does not moot the class claim unless the settlement agreement purports to settle the class claim as well. 3 NEWBERG, *supra* note 1, at § 4960. Therefore, the court is not foreclosed from inquiring into any possible prejudice caused by dismissal of the putative class claim. *See, e.g.*, Laurenzano v. Texaco, Inc., 14 FED. RULES SERV. 2d 1262, 1263 (S.D.N.Y. 1971).

[7] Prior to certification, *see* note 1 *supra*, the district court can usually garner some indication on the validity of the class by the number of motions to intervene in the action or the strength of the plaintiff's precertification discovery information on class viability. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967).

[8] *See* Cohen v. Beneficial Loan Corp., 337 U.S. 541, 549-50 (1949); Young v. Higbee Co., 324 U.S. 204, 213 (1945); Rothman v. Gould, 52 F.R.D. 481, 483 (N.D. Ill. 1970); Miller v. Steinbach, 268 F. Supp. 255, 281 (S.D.N.Y. 1967). Prejudice to the absent class occurs when a settlement and dismissal binds the absent class members by operating as res judicata against the class claim. *See generally* Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971 (1971) [hereinafter cited as Dole]; McGough & Lerach, *Termination of Class Actions: The Judicial Role*, 33 U. PITT. L. REV. 445 (1972). Prejudice to the absent class also may result when the named plaintiff and defendant reach a collusive settlement which purports to settle the class claim and the absent class is given no opportunity to object to the terms of the settlement. Yaffe v. Detroit Steel Corp., 50 F.R.D. at 483; *see Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1540-41 (1976) [hereinafter cited as *Developments—Class Actions*].

[9] 582 F.2d 1298 (4th Cir. 1978).

[10] *Id.* at 1302-16. In cases covered by Rule 23, the court may make a wide variety of administrative orders, including notice of any change in the action, to protect the absent class and efficiently conduct the handling of the class action. FED. R. CIV. P. 23(d).

[11] 582 F.2d at 1300; *see* 42 U.S.C. § 2000(e) *et. seq.* (1976).

[12] 582 F.2d at 1300.

[13] *Id.* at 1300-01. A plaintiff is entitled to maintain both an individual and a class action in one suit. *See* FED. R. CIV. P. 23(c)(4)(A); Jordan v. Wolke, 75 F.R.D. 696, 698-99 (E.D. Wis. 1977). A plaintiff may desire to maintain both an individual and a class action when one of the plaintiff's particular issues is not common to the class. Jordan v. Wolke, 75 F.R.D. at 698.

[14] 582 F.2d at 1301.

thereafter, the district court denied Pargo's motion to strike the class allegations and ruled that Shelton's motion to certify the class was premature.[15] The parties then attempted to have the action dismissed under Rule 41(a)(1),[16] but the district court would not allow the dismissal until the parties sent a court-approved notice to the putative class members.[17] The district court reasoned that, although the putative class would not be bound by the settlement, Rule 23(e) always requires that members of a putative class receive notice even though the class has not been certified.[18] The district court stated that the putative class may have relied on the named plaintiff to prosecute its claim, and was therefore entitled to notice so the class could take action to protect its own rights.[19]

On appeal to the Fourth Circuit, Pargo argued that Rule 23(e)'s notice requirement only applies to actions certified as class actions and, since the class had never been certified, the settlement involved no more than the dismissal of an individual action.[20] Pargo also contended that since the district court found that a dismissal of Shelton's action would not bind the putative class members,[21] such settlements should be encouraged and not inhibited by a notice requirement.[22] Additionally, Pargo criticized the district court for not refraining from ordering notice of the proposed settlement until and unless the action was certified under Rule 23(c)(1).[23]

The Fourth Circuit held that the necessity of notice of a precertification settlement must be determined from the facts of the particular case.[24] While not requiring the district court to undertake a certification hearing in every case,[25] the Fourth Circuit held that a district court must conduct a careful hearing into the terms of a precertification settlement to determine whether dismissal of the suit would result in prejudice to the putative class or whether the named plaintiff used the class action device for unfair personal gain in negotiating the settlement.[26] If the district court is satisfied from the hearing that no prejudice to the putative class will result and that the plaintiff has not used the class action device to increase

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[15] *Id.*

[16] *Id.*; *see* note 6 *supra.*

[17] 582 F.2d at 1301. The notice in *Shelton* was designed to inform putative class members of the settlement and dismissal of the named plaintiff's claim and to give the putative class members an opportunity to intervene in the action. *Id.*

[18] *Id.* The district court relied on the reasoning in Muntz v. Ohio Screw Prods., 61 F.R.D. 396 (N.D. Ohio 1973), applying a procedural rule first enunciated in Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967). In *Philadelphia Electric,* the district court applied the Rule 23(e) notice and settlement approval provisions to precertification settlements. *Id.* at 327; *see* text accompanying notes 47-56 *infra.*

[19] 582 F.2d at 1301; *see* text accompanying note 8 *supra.*

[20] *Id.* at 1302.

[21] *Id.*; *see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974); Katz v. Carte Blanche Corp., 496 F.2d 747, 759-62 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974).

[22] 582 F.2d at 1302.

[23] *Id.*

[24] *Id.* at 1315.

[25] *Id.* at 1314-15.

[26] *Id.* at 1314-16.

unfairly the size of his settlement, the district court may approve the settlement and dismissal without engaging in a Rule 23(c)(1) certification hearing or requiring Rule 23(e) notice to be given to the putative class.[27] The district court can, however, order a certification hearing or notice even in the absence of prejudice to the putative class or misuse of the class action procedure by the named plaintiff.[28]

In deciding not to require notice of a precertification settlement in every case, the Fourth Circuit reasoned that the explicit language of Rule 23(e) only applies to the dismissal or compromise of a "class action."[29] The court noted that a suit is not properly a class action until certification is accomplished under Rule 23(c)(1).[30] Before certification, unnamed putative class members are not bound by any settlement reached by the named plaintiff.[31] The court realized that Rule 23(e)'s purpose is to prevent unnamed members of a certified class from being bound by a settlement of their claims by the named plaintiff without an opportunity to object to the settlement terms.[32] Since putative class members are not bound by a precertification settlement of the named plaintiff's action, the court reasoned that Rule 23(e) notice to the putative class is unnecessary.[33] Thus, the

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[27] *Id.* The Rule 23(e) notice provision is not automatically applied to precertification settlements, since the Fourth Circuit determined that the notice provision does not apply until the class is certified under Rule 23(c)(1). *See* text accompanying notes 29-34 *infra.*

[28] 582 F.2d at 1314-16. If the fair conduct of the action so requires, the district court may order notice or a certification hearing under Rule 23(c)(1). *Id.*; FED. R. CIV. P. 23(d).

[29] *Id.* at 1303; *see* Pan Am. World Airways, Inc. v. United States District Court, 523 F.2d 1073, 1078-79 (9th Cir. 1975); Weight Watchers of Phila., Inc. v. Weight Watchers Int'l, 455 F.2d 770, 773 (2d Cir. 1972); Rodgers v. United States Steel Corp., 70 F.R.D. 639, 642 (W.D. Pa. 1976).

[30] 582 F.2d at 1302; *see* East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 398 (1977); Sosna v. Iowa, 419 U.S. 393, 399 n.8 (1975); Roman v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976); Pan Am. World Airways, Inc. v. United States District Court, 523 F.2d 1073, 1079 (9th Cir. 1975); Laurenzano v. Texaco, Inc., 14 FED. RULES SERV. 2d 1262, 1263 (S.D.N.Y. 1971); Berger v. Purolator Prods., Inc., 41 F.R.D. 542, 543 (S.D.N.Y. 1966). The Fourth Circuit noted two recent cases which questioned the assumption the Rule 23(e) applies only to certified actions. 582 F.2d at 1303-04; *see* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 67 (S.D. Tex. 1977); Duncan v. Goodyear Tire and Rubber Co., 66 F.R.D. 615, 616 (E.D. Wis. 1975) (certification is not a prerequisite to use of Rule 23(e) to control the dismissal of a precertification settlement). Widely accepted, however, among the courts and commentators is the assumption that Rule 23(e) comes into operation only after certification. *See, e.g.*, Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Pan Am. World Airways, Inc. v. United States District Court, 523 F.2d 1073, 1078-79 (9th Cir. 1975); Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After* American Pipe and Construction Co. v. Utah, 48 S. CAL. L. REV. 771, 775 n.16a (1975) [hereinafter cited as Wheeler]; Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 599 [hereinafter cited as *Continuation of Class Actions*].

[31] 582 F.2d at 1303; *see* Nesenoff v. Muten, 67 F.R.D. 500, 503 n.4 (E.D.N.Y. 1974); Beaver Assoc. v. Cannon, 59 F.R.D. 508, 510 (S.D.N.Y. 1973); Polakoff v. Delaware Steeplechase and Race Ass'n, 264 F. Supp. 915, 917 (D. Del. 1966).

[32] 582 F.2d at 1303; *see* text accompanying note 5 *supra.*

[33] *Id.* Additionally, the Rule 23(e) requirements of court approval of a settlement and notice to absent class members presume that a class exists to receive the notice. Without a Rule 23(c)(1) certification determination to identify the members of the class, the issuance

court determined that Rule 23(e) is not designed, nor should it be used, to notify unnamed putative class members of a precertification settlement.[34]

While the Rule 23(e) notice provision is by its terms inapplicable to a precertification settlement, the Fourth Circuit recognized that plaintiff abuse of the class action device requires district court control over the disposition of a suit filed as a class action.[35] The court reasoned that, due to the special responsibility imposed on courts by actions brought as class actions,[36] the district court has broad supervisory power under Rule 23(d) over precertification motions to dismiss.[37] The district court need not conduct a certification hearing or send notice to the putative class to exercise its supervisory role over the uncertified class action.[38] The terms of the proposed settlement must be subjected to a careful hearing, however, to determine whether abuse of the class action device has occurred.[39] If the district court finds no evidence of abuse, the court may approve the settle-

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of Rule 23(e) notice is very difficult. Also, absent knowledge of the membership nature of the class, problems in the form, wording and publication of the notice are encountered. The foregoing problem suggest that if a district court determines that notice is necessary to protect a putative class, the court must make at least some minimal inquiry into the existence of a class and the terms of a precertification settlement. *See generally* 2 NEWBERG, *supra* note 1, at § 2650-70; *see also* text accompanying notes 35-40 & 44-46 *infra*.

[34] 582 F.2d at 1303.

[35] *Id.* at 1306; *see* Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973); Papilsky v. Berndt, 466 F.2d 251, 257 (2d Cir.), *cert. denied,* 409 U.S. 1077 1972); Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461, 464 (N.D. Ind. 1976).

[36] Rule 41(a)(1) allows the parties to enter a voluntary dismissal without court approval, subject to Rule 23(e), which requires court approval of the dismissal of a class action. Despite the fact that an action is not properly a class action before certification, *see* text accompanying note 30 *supra,* class action allegations in a complaint are not viewed by the court as if they do not exist. *See* Kahan v. Rosenstiel, 424 F.2d 161, (3d Cir.), *cert. denied sub nom.,* Glen Alden Corp. v. Kahan, 398 U.S. 95 (1970); Gaddis v. Wyman, 304 F. Supp. 713, 715 (S.D.N.Y. 1969); *Continuation of Class Actions, supra* note 30, at 596. Furthermore, there is a presumption of class action status until certification is denied. *See* Pearson v. Ecological Science Corp., 522 F.2d 171, 177 (5th Cir. 1975), *cert. denied sub nom.,* Skydell v. Ecological Science Corp., 425 U.S. 912 (1976); Held v. Missouri Pacific R.R., 64 F.R.D. 346, 347 (S.D. Tex. 1974). Although Rule 23(e) expressly applies only to certified class actions, an action filed as a class action will be so considered before certification. Therefore, Rule 41(a)(1) dismissal without court approval is not available. 582 F.2d at 1306; Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.20 (3d Cir. 1973); Papilsky v. Berndt, 466 F.2d 251, 257 (2d Cir. 1972); Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461, 464 (N.D. Ind. 1976).

[37] 582 F.2d at 1306; *see* Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973); Redhail v. Zablocki, 418 F. Supp. 1061, 1067-68 (E.D. Wis. 1976), *aff'd,* 434 U.S. 374 (1978); Peoples v. Wainwright, 325 F. Supp. 402, 403 (M.D. Fla. 1971); Levin v. Mississippi River Corp., 289 F. Supp. 353, 363 (S.D.N.Y. 1968). Although the *Shelton* court cited these cases, none of them consider the use of Rule 23(d) at the precertification stage. Nevertheless, several authorities assert that Rule 23(d) gives the district court the power and discretion to supervise a precertification settlement and dismissal. Bantolina v. Aloha Motors, Inc., 75 F.R.D. 26, 33 (D. Hawaii 1977); Rothman v. Gould, 52 F.R.D. 494, 499-500 (S.D.N.Y. 1971); Almond, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?,* 56 N.C.L. REV. 303, 330-31 (1978) [hereinafter cited as Almond]; Dole, *supra* note 8, at 985; *Developments—Class Actions, supra* note 8, at 1548.

[38] 582 F.2d at 1306, 1314; *see* text accompanying notes 61-66 *infra.*

[39] 582 F.2d at 1314.

ment and dismiss the action.[40]

The Fourth Circuit realized that plaintiff abuse of the class action device can occur because the plaintiff, as representative party, voluntarily accepts a "fiduciary obligation" towards the putative class.[41] Such an obligation cannot be abandoned by a collusive settlement agreement with the defendant[42] nor by insertion of a class allegation in the complaint in order to secure additional bargaining leverage over the defendant during the precertification stage of the litigation.[43] Since either form of plaintiff abuse of the class action device can occur at any point once the action is filed as a class action,[44] the Fourth Circuit relied on the supervisory responsibility of the district court, as embodied in Rule 23(d), to give the district court broad administrative power to curb such abuse.[45] Apart from the question of whether Rule 23(e) can be used to provide judicial control over precerti-

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[40] *Id.* at 1315.

[41] *Id.* at 1305. "[T]he active participants . . . possess, in a very real sense, fiduciary obligations to those not before the court . . ." Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973). *See also* 2 NEWBERG, *supra* note 1, at § 2705(a). Newberg notes that some courts have characterized the plaintiff's representative responsibility to the class as similar to the attorney-client relationship or that of a private attorney general with duties analogous to the public counterpart. 2 NEWBERG, *supra* note 1, at § 2705(a) at 1173. Thus, the named plaintiff's representative role begins at the filing of the complaint and does not terminate until the appeal process is completed. *See* Cohen v. Beneficial Loan Corp., 337 U.S. 541, 549-50 (1949); Young v. Higbee Co., 324 U.S. 204, 213 (1945); Sheffield v. Itawamba County Bd. of Supervisors, 439 F.2d 35, 36 (5th Cir. 1971).

[42] 582 F.2d at 1307; *see* text accompanying note 8 *supra.*

[43] 582 F.2d at 1305-06. The class allegation gives the named plaintiff certain leverage over the defendant not available if the suit were brought as an individual action. City of Philadelphia v. American Oil Co., 53 F.R.D. 45, Transcript of Proceedings, March 1, 1971, p. 11 (D.N.J. 1971) ("I have seen nothing so conducive to the settlement of complex litigation as the establishment of a class"). If used only to gain additional bargaining leverage, the inclusion of a class claim unfairly forces the defendant to prepare for a class action rather than an individual claim. *See* Renfrew, *Negotiation and Judicial Scrutiny in Civil and Criminal Antitrust Cases,* 70 F.R.D. 495, 500-01 (1976). Faced with the possibility of complex litigation as expressed in the class allegtion, the defendant is more likely to attempt to placate the plaintiff in return for an early dismissal of the action. *See, e.g.,* Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375, 389 (1972).

[44] 582 F.2d at 1306.

[45] *Id.* at 1309. The Fourth Circuit cited Bantolina v. Aloha Motors, Inc., 75 F.R.D. 26, 33 (D. Hawaii 1977) to support its holding that Rule 23(d)(2) gives the district court broad supervisory power over precertification motions to dismiss the action. In *Bantolina,* however, the court had already determined class viability and had certified the class. The named plaintiff, however, decided to withdraw his motion to certify the class and instead moved that the entire action be dismissed. Since the action was no longer certified, the *Bantolina* court held that although Rule 23(e) could not apply, *see* text accompanying notes 29-34 *supra,* Rule 23(d)(2) gave the district court the power to inquire into the dismissal of the named plaintiff and whether the dismissal would prejudice the rights of the putative class. 75 F.R.D. at 32-33. The court also found that where a precertification motion to dismiss is before the court, Rule 23(d) appears applicable regardless of Rule 23(e)'s similar supervisory power. *Id.* The *Bantolina* court concluded by noting that since no reliance by the putative class on the named plaintiff's representative status could be shown and no prejudice to the putative class was present, the action could be dismissed with court approval without having to notify the putative class of the dismissal. *Id.* at 33; *see* text accompanying notes 75-79 *infra.*

fication settlements and dismissals, the Fourth Circuit thus held that Rule 23(d) gives the district court ample authority to supervise the dispostion of class actions at the precertification stage.[46]

The Fourth Circuit recognized, however, an alternative line of precedent which employs the purposes of Rule 23(e)[47] as a basis for approval of precertification settlements.[48] In an effort to reconcile prior interpretations of Rule 23(e) and to provide further authority for district court supervision over precertification settlements and dismissals, the Fourth Circuit examined *Philadelphia Electric Co. v. Anaconda American Brass Co.*[49] *Philadelphia Electric* held that during the interim between filing and class certification, an action brought as a class action must be assumed to be a class action for the purposes of a dismissal or compromise under Rule 23(e), unless and until a contrary determination is made under Rule 23(c)(1).[50] In *Philadelphia Electric,* the precertification settlement between the named plaintiff and three of the thirteen defendants purported to bind not only the named plaintiff but also members of the putative class.[51] The *Philadelphia Electric* court noted that Rule 23(e) clearly applied to the post-certification situation where class members are bound by a settlement.[52] Therefore, where the parties attempt to bind the putative class by the terms of a precertification settlement, due process considerations may require notice of the settlement even in the absence of Rule 23(e) because of the binding effect of the settlement.[53] Additionally, the district court stated that before approving a settlement, a court should know whether the claims of the putative class are being compromised by the

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[46] 582 F.2d at 1306.

[47] *See* text accompanying note 5 *supra.*

[48] 582 F.2d at 1307.

[49] 42 F.R.D. 324 (E.D. Pa. 1967).

[50] *Id.* at 327.

[51] *Id.*

[52] *Id.*; *see* text accompanying note 8 *supra.*

[53] 42 F.R.D. at 327. Due process considerations may arise when the putative class will be bound by a proposed settlement that purports to bar all further claims by the class represented by the settling plaintiff. Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151, 158 (E.D. Va. 1974); *In re* Four Seasons Sec. Law Litigation, 63 F.R.D. 422, 429-30 (W.D. Okl. 1974), *aff'd,* 525 F.2d 500 (10th Cir. 1975); Berse v. Berman, 60 F.R.D. 414, 416 (S.D.N.Y. 1973); text accompanying note 8 *supra.* Also, a denial of due process of law may occur when the putative class relies on the named plaintiff to prosecute the action, and the action is dismissed before the putative class has an opportunity to intervene. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. at 327; Berse v. Berman, 60 F.R.D. at 416; Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 40 (1967). The reliance interest of the putative class may be at best speculative and usually does not arise unless the case receives sufficient pretrial publicity to inform members of the putative class of the existence of the action. *See* Wheeler, *supra* note 30, at 790. *See also* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 67-70 (S.D. Tex. 1977); Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276, 277 (D. Minn. 1973). Therefore, the reliance interest of the putative class should be given little weight since reliance on the named plaintiff's prosecution of the action presupposes that the putative class has knowledge of the existence of the action. Wheeler, *supra* note 30, at 804-05.

settlement.[54] The *Philadelphia Electric* court thus relied on the purposes inherent in Rule 23(e) to extend to the district court the same control over precertification settlements as mandated by Rule 23(e) for post-certification settlements and dismissals.[55] Before the district court can order notice to the putative class, however, the class must be certified under Rule 23(c)(1).[56]

In *Shelton,* however, the Fourth Circuit distinguished the holding of *Philadelphia Electric.* The Fourth Circuit noted that the settlement in *Shelton* bound only the named plaintiff,[57] whereas the settlement in *Philadelphia Electric* purported to bind the putative class.[58] Since the putative class in *Shelton* was not bound by the settlement, neither the

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[54] 42 F.R.D. at 328. The *Philadelphia Electric* court also cited the relevant statute of limitations as a due process reason for the application of Rule 23(e). The action was filed within three weeks of the limitations bar, and if the settlement purporting to bind the putative class members had been approved, the running of the statute of limitations would have prevented any attempt by the putative class to institute its own action. *Id.* at 326. The expiration of the limitations period is not a bar to the filing of actions by the putative class once the named plaintiff has settled. Under American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), the statute of limitations is tolled when the putative class action is filed and does not begin to run again until the named plaintiff's case is dismissed. *Id.* at 549-52.

[55] 42 F.R.D. at 328. The *Philadelphia Electric* court recognized that the named plaintiff often attempts to enhance his bargaining leverage for settlement by inserting a class allegation into the complaint. *Id.*; *see* note 43 *supra.* To thwart the practice of asserting class allegations to force early settlements, *Philadelphia Electric* held that all suits filed as class actions are to be treated as such for the purposes of settlement or dismissal of the named plaintiff's claim. 42 F.R.D. at 326. Thus, the *Philadelphia Electric* court was able to extend the Rule 23(e) provision for court review of settlements and dismissals into the precertification context. Also, if the court approval *and* notice provisions of Rule 23(e) do not apply to precertification settlements, an undue premium is put on early settlements to avoid Rule 23(e) and collusive settlements, operating to the detriment of the putative class, may be encouraged. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1797 at 237 (1972). Other authorities have contested, however, the idea that Rule 23(e) precertification notice will somehow curb plaintiff abuse of the class action device. Almond, *supra* note 37, at 313-15; Wheeler *supra* note 30, at 797; *Developments—Class Actions, supra* note 8, at 1542 n.33. Almond argues that precertification notice of a proposed settlement sent to a putative class is grossly unfair to the defendant since it portrays him as exceptionally willing to settle early. Therefore, the precertification notice requirement gives the plaintiff a powerful tool to force settlement of the case before it is filed so the defendant may avoid the precertification notice requirement. Almond, *supra* note 37, at 313-14. Those cases which automatically require notice in precertification settlements, however, ignore the portion of the *Philadelphia Electric* holding that notice cannot be sent to the putative class until the class is certified. Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615, 616-17 (E.D. Wis. 1975); Rotzenburg v. Neenah Joint School Dist., 64 F.R.D. 181, 182 (E.D. Wis. 1974); Rothman v. Gould, 52 F.R.D. 494, 495-96 (S.D.N.Y. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 482-83 (N.D. Ill. 1970); *see* text accompanying notes 56-73 *infra.*

[56] 42 F.R.D. at 328. *See also* Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970), *cert. denied sub nom.* Glen Alden Corp. v. Kahan, 398 U.S. 95 (1971); Held v. Missouri Pacific R.R., 64 F.R.D. 346, 351 (S.D. Tex. 1974); Muntz v. Ohio Screw Prods., 61 F.R.D. 396, 399 (N.D. Ohio 1973); Beaver Assoc. v. Cannon, 59 F.R.D. 508, 510 (S.D.N.Y. 1973); Berger v. Purolator Prods., Inc., 41 F.R.D. 542, 543 (S.D.N.Y. 1966); 3 NEWBERG, *supra* note 1, at § 4920.

[57] 582 F.2d at 1314-15.

[58] 42 F.R.D. at 327; *see* text accompanying notes 51-53 *supra.*

purposes of Rule 23(e) nor due process would be violated by not sending notice to the putative class.[59] But where notice is needed to protect the putative class,[60] the Fourth Circuit reasoned that the *Philadelphia Electric* procedure of holding notice in abeyance until certification is too inflexible for proper judicial control of the class action.[61] An automatic application of such a procedure would channel every suit filed as a class action into a certification hearing.[62] Thus, a district court would be compelled to order a certification hearing in every case,[63] even where the prime motivation for an early settlement is the avoidance of the expense and time involved in discovery prior to the certification hearing.[64] The Fourth Circuit held, however, that absent due process considerations[65] or prejudice to putative class members, the necessity for a certification hearing as a condition to either notice or approval of a voluntary settlement becomes a matter of discretion for the district court.[66]

The Fourth Circuit noted that even the *Philadelphia Electric* decision does not compel a certification hearing in every case. Subsequent decisions have interpreted *Philadelphia Electric* to require either a blanket precertification notice requirement[67] a certification hearing before notice is ordered,[68] or dismissal of the action because Rule 23(e) does not apply.[69] The

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[59] 582 F.2d at 1314-15; *see* text accompanying notes 51-53 *supra.*

[60] *See* text accompanying notes 53-55 *supra.*

[61] 582 F.2d at 1309; *see* text accompanying note 56 *supra.*

[62] *Id.* Certification hearings are notoriously time-consuming and expensive for both the parties and the courts. Not only is the court required to supervise the precertification discovery devices, but both the plaintiff and the defendant must gather large amounts of information either the defeat or support the class allegation. *See* Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976); Almond, *supra* note 37, at 326-27; Wheeler, *supra* note 30, at 797.

[63] 582 F.2d at 1311; Wheeler, *supra* note 30, at 788. Under *Philadelphia Electric,* a certification hearing would be needed in every case where prejudice to the putative class reliance or abuse of the class action device is shown, in order to give the district court the authority to send notice to the putative class. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 328 (E.D. Pa. 1967).

[64] 582 F.2d at 1311.

[65] *See* text accompanying notes 53-56 *supra.*

[66] 582 F.2d at 1309, 1314. Rule 23(e)'s provision for court approval of a settlement gives the court control over the action to avoid prejudice to the absent class. The rule also prevents misuse of the class action device by the named plaintiff. *See* text accompanying notes 5-8 & 41-46 *supra.* Rule 23(d)'s language allowing court orders for the "fair conduct of the action" encompasses a judicial administrative power over the continuance of class actions, checked only by abuse of discretion. *See* text accompanying notes 37 & 45 *supra.*

[67] *See* McArthur v. Southern Airways, Inc., 556 F.2d 298, 302 (5th Cir. 1977); Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615, 616 (E.D. Wis. 1975); Rotzenburg v. Neenah Joint School Dist., 64 F.R.D. 181, 182 (E.D. Wis. 1974); Rothman v. Gould, 52 F.R.D. 494, 495-96 (S.D.N.Y. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970).

[68] *See* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 79 (S.D. Tex. 1977); Held v. Missouri Pacific R.R., 64 F.R.D. 346, 351 (S.D. Tex. 1974); Muntz v. Ohio Screw Prods., 61 F.R.D. 396, 399 (N.D. Ohio 1973); Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276, 277 (D. Minn. 1973).

[69] *See* text accompanying note 29 *supra.* The cases which have rejected Rule 23(e) as a basis for court control over the dismissal of precertification settlements have not involved

Fourth Circuit rejected these three alternatives, however, and stated that where no due process considerations are raised by the terms and circumstances of the proposed settlement, *Philadelphia Electric's* extension of the Rule 23(e) court approval provision[70] provides support for the same type of precertification hearing concerning the terms of the settlement as fashioned in *Shelton.*[71] Therefore, the Fourth Circuit stated that the power to hold a precertification hearing prior to approval of a settlement can be drawn either from the supervisory power embodied in Rule 23(d) or the policy of Rule 23(e) to protect absent class members.[72] Under neither source, however, does the class need to be certified to invoke the power necessary to conduct the settlement hearing.[73]

In *Shelton,* the Fourth Circuit combined the varying interpretations of *Philadelphia Electric*[74] to fashion a procedure which strikes a balance between justified interests of the putative class and the problem of inadequate court control over the putative class action. Under the authority of either Rule 23(d) or (e) the district court must conduct a careful hearing in which class action abuse and putative class reliance[75] can be weighed against the policy of encouraging settlements. By not requiring a certification hearing before settlement approval, the Fourth Circuit avoids imposing the expense and time of a certification hearing on the settling parties.[76]

An inquiry to determine whether the named plaintiff has abused the class action device or whether the putative class has relied on the named plaintiff to prosecute its claim will not disrupt the settlement unless positive proof of reliance or abuse is shown.[77] Depending on the circumstances of the case, the district court may order a certification hearing or Rule 23(e) notice to the putative class if abuse, reliance or binding effect on the putative class is shown.[78] If the district court finds no evidence of reliance

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proof of abuse of the class action device or settlements which would prejudice the rights of absent class members. *See* Pan Am. World Airways, Inc. v. United States District Court, 523 F.2d 1073, 1078-79 (9th Cir. 1975) (district court desired to notify potential plaintiffs of pending action in which they could join; no compromise or dismissal motions before the court); Weight Watchers of Phila., Inc. v. Weight Watchers Int'l., 455 F.2d 770, 773 (2d Cir. 1973) (precertification settlements between defendant and potential members of class not subject to court approval); Rodgers v. United States Steel Corp., 70 F.R.D. 639, 642 (W.D. Pa. 1976) (direct settlements with individual class members having no effect on the rights of the class; tender of back pay to individual class members who were free to accept or reject without affecting class claim).

[70] 582 F.2d at 1309; *see* text accompanying note 55 *supra.*

[71] 582 F.2d at 1309; *see* text accompanying notes 35-46 *supra.*

[72] 582 F.2d at 1314. *See* text accompanying notes 45-46 & 54-46 *supra.*

[73] 582 F.2d at 1306, 1314.

[74] *See* text accompanying notes 67-69 *supra.*

[75] *See* text accompanying notes 8 & 41-44 *supra.*

[76] *See* text accompanying notes 57-62 *supra.*

[77] 582 F.2d at 1316; *see* Pearson v. Ecological Science Corp., 522 F.2d 171, 176-78 (5th Cir. 1975), *cert. denied sub nom.,* Skydell v. Ecological Science Corp., 425 U.S. 912 (1976); Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276, 277 (D. Minn. 1973); Almond, *supra* note 37, at 332.

[78] *See* text accompanying notes 45-46 & 54-56 *supra.*