[J-88-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

ANDREA D. WILKES, DAVID H. EHRENWERTH AND CHARLES K. CLARK, AS TRUSTEES OF THE MARK E. AND MYRNA L. MASON IRREVOCABLE TRUST, MARK E. MASON AND MYRNA L. MASON	:	Nos. 11 & 12 WAP 2005 Appeal from the Order of the Superior Court, entered May 26, 2004, at Nos. 126 WDA 2003 and 153 WDA 2003, reversing the Order of the Court of Common Pleas of Allegheny County, entered December 24, 2002, at No. GD 00-0745.
v.	:	851 A.2d 204 (Pa. Super. 2004)
PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, A CORPORATION AND BALANCED EQUITIES, INC., A CORPORATION	:	
APPEAL OF: PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, A CORPORATION	:	ARGUED: September 12, 2005

OPINION

MR. JUSTICE CASTILLE **DECIDED: JULY 18, 2006**

The primary issue on appeal is whether appellees Andrea D. Wilkes, David H. Ehrenwerth, and Charles K. Clark, trustees of the Mark E. and Myrna L. Mason Irrevocable Trust, and Mark E. Mason and Myrna L. Mason (collectively "appellees"), are barred by the doctrine of *res judicata* from bringing suit in Pennsylvania against appellant, Phoenix Home Life Mutual Insurance Company ("appellant" or "Phoenix"), due to an out-of-state class action settlement in New York. The Court of Common Pleas of Allegheny County granted

summary judgment for Phoenix and dismissed appellees' suit, finding that since appellees had not opted out of a class action settlement filed in New York state court against appellant concerning the failure of some of its insurance policies to perform as promised, *res judicata* barred appellees from subsequently bringing suit against appellant in Pennsylvania on the same matter. On appeal, however, the Superior Court found that the class action notice apprising appellees of the New York settlement was constitutionally inadequate and reversed the trial court. This Court granted further review to determine the *res judicata* effect of the New York class action settlement, including the question of whether the class action settlement notice was constitutionally adequate. For the following reasons, we find that the Superior Court's decision was in error and, accordingly, we reverse that order and reinstate the trial court order granting Phoenix summary judgment.

In the late 1980s, Mark E. Mason and Myrna L. Mason ("the Masons") established a trust to purchase $7 million in life insurance that would enable the Masons' children to pay estate taxes without having to dispose of any illiquid portion of their estate. Andrea D. Wilkes, eldest daughter of the Masons, David Ehrenwerth, lawyer for the Masons, and Charles K. Clark, accountant for the Masons (collectively "Trustees"), were selected as the trustees for the trust. The Masons desired a policy where the premiums would diminish over time and, eventually, cease altogether at Mr. Mason's retirement, a point when the Masons would welcome fewer financial obligations.

Shortly after creating the trust, the Masons contacted independent insurance agent/broker Sander Lenenberg,[1] an acquaintance of the Masons since the 1970s, to obtain such a policy. Lenenberg suggested that the Masons purchase a whole life insurance second-to-die policy from appellant called a "Survivorship Life Protector" ("SLP"), with a rider referred to as "Optionterm," that would function as annual term insurance.

[1] For purposes of this suit, appellees allege that Lenenberg acted as an agent of Phoenix.

Appellant advertised the proposed policy with phrases such as "quick pay," "rapid pay," and "vanishing premium." Theoretically under this plan, after premium payments had been made for fifteen years, the policy would produce enough dividends and paid-up additions[2] to obviate the need for further out-of-pocket premium payments. The targeted death-benefit value of the policy at the death of the second-to-die (i.e., Mark or Myrna) was $7 million. The proposed whole life insurance portion of the policy consisted of nearly $4.1 million, with the "Optionterm" rider contributing approximately an additional $2.9 million. Based on Lenenberg's projections, the base annual premium cost for the first five years would be $80,813, with the last of such payments required in 1993. The premium payments would then decline to $60,813 through 1999, and would diminish to $40,813 until the last premium payment in 2003. No premium payments would be owed after 2003. Lenenberg's projections did not illustrate any payment scenario to demonstrate what effect the first death of either Mark or Myrna Mason would have on the premiums.

In 1989, the Trustees purchased the SLP policy with the "Optionterm" rider. The policy summary showed that the face value of the whole life insurance was $4,117,647, and the "target face amount" of the "Optionterm" rider was $2,882,353. Insurance Policy Summary Schedule at 2. The total annual premium was listed at $80,813.23. Id. The

[2] A paid-up addition is fully-paid additional insurance purchased through policy dividends.

> In essence, each year dividends are used to purchase small amounts of insurance protection for which no further premiums are needed. This additional protection can then be used to increase the death benefit payable on the policy. The cash value of these paid-up additions can also serve to reduce future premiums.

Helping Your Client Choose the Right Life Insurance, 42 No. 7 PRAC. LAW. 29, 34 (1996).

policy also described how dividends generated by the policy could be used to reduce premiums and purchase paid-up additions. Id. at 9.

In 1994, the Trustees received a notice from Phoenix that the upcoming premium payment for the insurance policy was $80,813. Because the Trustees expected that the premium payments would reduce to $60,813 in 1994, Ehrenwerth wrote Phoenix inquiring about the discrepancy. Appellant responded by letter in April of that year:

> The proposals used in determining the “Quick Pay” date project dividends based on our current interest sensitive dividend scale and are neither guaranteed nor estimates of the future. Actual dividends payable may vary and will depend, to a greater extent than in the past on Phoenix Home Life’s earnings on new investments.

Phoenix Letter to Trustees, April 22, 1994. The letter also provided a new illustration showing that the premium payments would last until the twenty-third year of the policy (as opposed to the fifteenth year) and decline at a slower rate than initially expected. The Trustees then contacted Lenenberg about this letter and, subsequently, appellant reissued a new illustration conforming to the original proposal from 1989. Appellant provided the Trustees with more illustrations in June of 1994 that also matched their original expectations. None of the illustrations that appellant provided the Trustees in 1994, however, included and accounted for a first-to-die death scenario.

In January of 1995, an attorney working with Ehrenwerth’s firm requested that Lenenberg review the policy and make projections that assumed dividends would be reduced by one and two percentage points. Phoenix later provided several illustrations in response to Lenenberg’s inquiry on behalf of the Masons and the Trustees, but again none of the illustrations included a first-to-die death scenario. In March of 1995, Ehrenwerth contacted Lenenberg to inquire why the Trustees had received a notice stating that an additional $5,584.41 was owed on the policy, when Lenenberg had previously indicated

that a payment of $60,813 would be sufficient for 1995. Because there were not enough paid-up additions in 1995 to account for the premium expenses in excess of the payment that the Trustees had made for that year, the Trustees took a loan on the policy, as suggested by Phoenix, to cover the balance due. In February and March of 1996, appellant produced additional illustrations to show how the premium payments would change if the Masons altered their out-of-pocket premium payments for a few years. Again, no death scenario was reflected in the charts provided.

In August or September of 1996, the Trustees received a notice concerning a proposed settlement of a New York state court case involving a nationwide class action against appellant, Michels v. Phoenix Home Life Mutual Ins. Co., Index No. 5318-95 (N.Y. Sup. Ct. Albany Cty. 1995). A cover-letter accompanied the notice, which stated that policyholders of policies purchased between 1980 and 1995 were affected, and also stated that the proposed settlement included an offset benefit for "Optionterm" policies.[3] The letter also outlined the two proposed settlement options for affected policyholders: either alternative dispute resolution ("ADR") or General Policy Relief (which is what appellees ultimately received).[4] Class members were encouraged in the letter to pursue further

---

[3] The cover letter's opening paragraph stated that: "As a Phoenix policyholder who owned an individual, traditional whole life or universal life insurance policy between 1980 and 1995, you are considered a member of the class." Cover letter for Michels Proposed Settlement, at 1.

[4] The third page of the letter summarized the proposed benefits of the settlement, including: "Owners of in-force policies with Optionterm riders will automatically receive: **Optionterm Charge Offset** - A two-year offset of term insurance charges not otherwise covered by dividends." Cover letter for Michels Proposed Settlement, at 3. Accompanying information explained that this automatic relief would only be awarded if a policyholder chose the (continued…)

information: "If you have questions after reviewing this information, you can reach us at a special toll-free number we have set up with class counsel to answer your questions relating to the settlement, 1-800-556-8533." Cover Letter for Michels Proposed Settlement, at 1. Also, the date of the final hearing to approve settlement, November 8, 1996, was provided. Id. at 2.

A four-page question and answer brochure was included with the class action notice and it summarized the details concerning the claims which were made in the suit and how policyholders would be affected by the settlement. The brochure explicitly noted that vanishing premium policies were implicated in the class plaintiffs' claims and that an offset for "Optionterm" policies automatically would be awarded in the settlement.[5] The "Optionterm" charge offset was delineated as follows:

> Class members will automatically receive the Optionterm Charge Offset if they (1) have in-force whole life policies with Optionterm riders and (2) do not elect to submit a claim to the ADR Process. Optionterm coverage is term insurance generally paid for by dividends. In some cases, dividends may in the future be insufficient to maintain coverage, and certain out-of-pocket payments may be required. If your policy has an Optionterm rider, the Optionterm Charge Offset will eliminate your out-of-pocket costs during the first two years for which an out-of-pocket outlay is required. (Class members will have the option of deferring the offset to the second and third years if they wish.)

(…continued)
General Policy Relief at settlement, as opposed to ADR. Question and Answer Brochure for Michels Proposed Settlement, at 2.

[5] The brochure stated that the lawsuit involved claims concerning: "How the company sold vanishing premium polices, which Phoenix called 'Quick Pay' or 'Rapid Pay' policies. Vanishing premiums is a sales concept under which policy values, rather than out-of-pocket payments, are used to pay premiums on whole life policies… ." Question and Answer Brochure for Michels Proposed Settlement, at 1.

Question and Answer Brochure for Michels Proposed Settlement, at 3. The brochure also provided the toll-free number established by class counsel to answer questions that any policyholder had with respect to the suit.

The settlement notice provided even greater detail concerning the class action, as it stated:

> The Plaintiffs make allegations concerning (i) how Phoenix made use of a method of using dividends to pay premiums on a whole life policy, or interest credited on a universal life policy, rather than paying them in cash, in order that no further out-of-pocket premium would be due after a fixed period of time, which sales concept was variously referred to as "Quick Pay" or "Rapid Pay," as well as Phoenix's use of dividends to help meet the costs of a rider known as Optionterm; (ii) the sale of life insurance by portraying it as an investment, savings, retirement or similar plan without disclosing that it is life insurance or the nature of the policy's benefits; (iii) the replacement of any existing life insurance policy with a new life insurance policy, or the sale of a new life insurance policy funded in whole or in part using an existing policy's cash value; and (iv) the failure to disclose material information in connection with the introduction of new methods for calculating dividends and crediting rates. The allegations in the lawsuits include claims that Phoenix misled policyowners in these and other circumstances.

Notice of Proposed Settlement for Michels Class Action, at 2. The notice warned that policyholders who failed to opt out of the settlement would be bound by its terms and policyholders in the class would be precluded from bringing any other lawsuit against appellant, specifically detailing that policyholders would be prohibited from making any claim about the number of premium payments required to keep the policy active. Id. at 11.

As to the benefits class members would have from the settlement, the notice explained that individuals with whole life policies would be eligible for "General Policy Relief," which could include dividend enhancements for up to four years, and the right to elect optimal premium loans through 2005. The notice also provided more detail as to how,

under a General Policy Relief, offsets would be administered for policies with an "Optionterm" rider:

> The forms of relief available to class members under the proposed settlement are as follows:
>
> **1. <u>General Policy Relief</u>**. …
>
> * * *
>
> **(c) <u>Optionterm Offsets</u>**: Class members with in-force Policies having Optionterm riders will have an opportunity to receive the "Optionterm Offset." For all such class members, the Company will offset the out-of-pocket costs of their Optionterm riders during the first two years for which an out-of-pocket outlay is required to maintain existing levels of Optionterm coverage, unless the class member requests to delay such offset for one year. The purpose of the Optionterm Offset is to help class members maintain originally illustrated coverage that might otherwise require out-of-pocket outlay additional to that originally illustrated.

<u>Id.</u> at 6. For class members who did not believe that General Policy Relief would suffice, the ADR option was again offered and its procedures were explained in detail. <u>Id.</u> at 7-8. The toll-free number established to answer questions about the suit was provided multiple times, along with the address of counsel for the plaintiffs. None of the materials provided in the class action notice suggested that policyholders should contact the agent who sold the policy for further information about the class action.

The Masons claimed that when they received the class action notice, they contacted Lenenberg, who told them that their policy was not affected by the proposed settlement and that they should not opt out. Whether Lenenberg rendered such advice was disputed below; however, the parties agree that the Masons remained part of the class action when the opt-out phase ended on October 18, 1996. In January and March of 1997, Phoenix provided the Masons and their Trustees, through Lenenberg, further illustrations detailing

the future premium schedule payments, illustrations that closely resembled the initial payment schedule provided when the Trustees purchased the policy.

In mid-April of 1997, the Trustees received the details of the class action settlement which had been approved by the Michels court in an opinion dated January 3, 1997. The deadline for policyholders to choose their preferred method of relief (*i.e.*, General Policy Relief or ADR) was May 27, 1997. Appellees claimed that they again solicited Lenenberg's advice and Lenenberg advised them not to select the ADR option because their policy was not affected.[6]

On April 25, 1997, appellant internally produced another set of illustrations, unbeknownst to appellees, detailing what future premium payments would be owed in various circumstances. These illustrations included a "death scenario" which showed that if Mr. Mason died at eighty years-old, which would coincide with the twenty-first year of the policy, the out-of-pocket premium, which had vanished in the policy's thirteenth year, would return in the twenty-fourth year, when Mrs. Mason would be seventy-eight years old. To keep the policy in force through the forty-first year of its existence, in this scenario, Mrs. Mason would need to pay an out-of-pocket premium of $630,774. Appellees never received a copy of these illustrations.

In August of 1998, Mr. Mason discovered that Lenenberg was being investigated by the FBI for fraud perpetrated by misappropriating funds to himself that the Masons had paid on another insurance policy. The Masons responded by writing to appellant and requesting

[6] The record reveals only that the Masons spoke with Lenenberg concerning which relief to invoke; there is no affirmative indication that the Masons returned the election form. However, it is apparent that they received General Policy Relief, which was the default if a putative plaintiff failed to opt-out or did not select ADR.

that a record of all transactions associated with their policy from its purchase be mailed directly to them, not via Lenenberg. On March 12, 1999, appellant sent Ehrenwerth a letter with 110 pages of illustrations, with all illustrations including the dividend enhancement benefit provided according to the General Policy Relief afforded in the class action settlement. One of the scenarios illustrated the premium payments if Mr. Mason died at age eighty-three. It showed out-of-pocket premium expenses returning in the twenty-seventh year of the policy and quickly escalating to exorbitant levels, such that the excess charge to keep the policy in force that year, in addition to the annual $80,813 premium, would be over $500,000. In that scenario, the total out-of-pocket premiums paid over the course of the policy would surpass $5 million.

Thereafter, the Trustees and the Masons filed a complaint against both Phoenix and Lenenberg's company, Balanced Equities, Inc.,[7] in March of 2000 asserting claims for breach of contract, fraud and deceit, negligent misrepresentation, reformation, violation of the Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S. § 20-1 *et seq.*, and bad faith under the Unfair Insurance Practices Act, 42 Pa.C.S. § 8371. In defense, appellant argued, *inter alia*, that the doctrine of *res judicata* barred the lawsuit, citing the <u>Michels</u> class action settlement in which the Masons had participated. The parties each filed motions for summary judgment in 2002 and, on December 23, 2002, the Honorable Judith Friedman of the Court of Common Pleas of Allegheny County granted appellant's motion on all claims. In a contemporaneous memorandum opinion, the trial court

---

[7] Appellants never served Balanced Equities as a defendant, as it was effectively out of business due to Lenenberg's fraud prosecution, conviction and eventual imprisonment.

concluded that *res judicata* barred appellees' complaint as a result of the Michels class action because the prior settlement clearly covered the instant insurance policy. Trial court slip op. (December 23, 2002), at 1. The trial court further found that it was unreasonable for appellees to have relied on any representations that Lenenberg might have made concerning the class action's effect on the instant policy, stating, "[y]ou do not consult your enemy about how to interpret documents in dispute." Id. at 2. The trial court went on to note that if it were free to address the underlying merits of the action, the case would be ripe for resolution given that appellees had already paid premium payments higher than originally promised. The court also noted that there would be a factual dispute regarding agency; specifically, whether appellant was liable for any misrepresentations made by Lenenberg. Id.

The Trustees and the Masons appealed and, on February 14, 2003, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a). Trial court slip op. (February 14, 2003), at 1. In this opinion, the trial court reasoned that the Michels class action notice and accompanying brochure conveyed in plain terms that appellees' policy was implicated in the settlement, and that it was unreasonable as a matter of law for appellees to rely on the representations of Lenenberg and appellant, especially since there was no fiduciary relationship between appellees and appellant that might justify that reliance. Id. at 7-9.

On appeal, a Superior Court panel reversed and remanded in a published opinion. Wilkes v. Phoenix Home Life Mutual Ins. Co., 851 A.2d 204 (Pa. Super. 2004). The panel began its legal analysis by articulating the elements of the *res judicata* doctrine under Pennsylvania authority, but then noted that without adequate class notice, a class member would not be prohibited by *res judicata* from re-litigating claims resolved by a prior class

action settlement. Id. at 210. The panel found that the Michels class action notice did not contain an adequate description to warn the Masons that their policy was affected by the impending settlement, because nothing in the notice mentioned the "second-to-die" policy that the Masons owned or made appellees aware that a "vanished premium for a second-to-die policy including an Optionterm component could reappear and quickly escalate." Moreover, the panel found that appellees could not possibly have been aware that they had been harmed by appellant, since they did not realize anything was wrong with their policy at the time of the Michels settlement. Id. at 212-13.

The panel analogized appellees' case against appellant to Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231 (1997), which involved a challenge to class action certification for settlement purposes in an asbestos exposure case. In Amchem Products, the propriety of class certification, under Rule 23 of the Federal Rules of Civil Procedure, arose because the class members included both individuals experiencing asbestos-related disability and individuals who only had been exposed to asbestos, but were not yet suffering from any asbestos-related medical condition. Id. at 602-03, 117 S.Ct. at 2239-40. Due to the differing interests of the two groups within the class, the Court held that the plaintiffs should not have been certified as a class. Id. at 625, 117 S.Ct. at 2250.

The panel viewed appellees here as being akin to the exposure-only claimants in Amchem Products. The panel then reasoned that it would be unfair to bar appellees' suit based on *res judicata* because: (1) Phoenix and Lenenberg had made several assurances that the policy would function as the Masons were originally told it would in 1989; (2) the Michels notice did not convey the potentially astronomical premium payments that could become due under the SLP policy; and (3) appellant's own corporate representative

admitted that the Michels notice contained no information concerning the potentially large out-of-pocket premium payments required for an SLP policy after the death of the first insured. The panel then proceeded to hold that the notice of the Michels class action settlement sent to appellees was inadequate and, therefore, precluded a grant of summary judgment for appellant based on *res judicata*. Wilkes, 851 A.2d at 213. Moreover, with respect to appellees' failure to opt out of the class action, the panel found that it was not unreasonable as a matter of law for appellees to rely on appellant's and Lenenberg's representations about the policy because appellant was the exclusive source of information concerning the policy's performance. In light of these findings, the panel reversed the grant of summary judgment in favor of appellant, and remanded the case to the trial court for it to reconsider its holding on the issue of fraud. Id. at 213-14.

This Court granted appellant's Petition for Allowance of Appeal, in an order dated April 12, 2005, to resolve the following issues:

> Whether, and to what extent, the doctrine of *res judicata* bars [appellees] from bringing suit in Pennsylvania under the instant circumstances?
>
> Even assuming that *res judicata* bars [appellees'] underlying causes of action, whether the notice of class action settlement received by [appellees] was constitutionally adequate to fix [appellees'] rights in light of their decision not to opt out of the out-of-state class action suit?

Wilkes v. Phoenix Home Life Mutual Ins. Co., 872 A.2d 1124 (Pa. 2005) (per curiam).

On appellate review, a trial court's grant of a motion for summary judgment will only be disturbed upon a finding that a genuine issue of material fact exists or where the moving party was not entitled to such a judgment as a matter of law. Mullin v. Commonwealth, Dep't of Transp., 870 A.2d 773, 778 (Pa. 2005). In conducting our review, the record must be construed in a light most favorable to the non-moving party and any doubt as to the

existence of a genuine issue of material fact must be construed against the moving party. Id. 778-79 (citing Hughes v. Seven Springs Farm, Inc. 762 A.2d 339, 340-41(Pa. 2000)). We review pure matters of law *de novo*.

I. *Res Judicata*.

Appellant first argues that *res judicata* bars appellees' suit because the Michels class action settlement is entitled to full faith and credit. Appellant claims that two other courts have already accepted this proposition in similar cases, namely, Caputo v. Phoenix Mutual Life, 723 A.2d 227 (Pa. Super. 1998) (unpublished decision), and Cappuccio v. Phoenix Home Life Mutual Ins. Co., ATL-L-PP1497-94 (N.J. Super. Feb. 25, 1997) (unpublished decision). Appellant additionally contends that appellees' suit clearly would be barred under New York's *res judicata* doctrine and that, in this case, it is New York law that should be applied.

In response, appellees do not contest that a preliminary *res judicata* test would block their present claims; rather, they combat appellant's arguments by asserting that exceptions to *res judicata* apply. We will begin by first identifying the applicable *res judicata* doctrine.

The United States Constitution requires that full faith and credit "shall be given in each State … to the judicial [p]roceedings of every other State." U.S. Const. Art. IV, § 1. The Full Faith and Credit Clause thus precludes a party from attacking collaterally a judgment of one state by attempting to re-litigate the underlying dispute resolved by that judgment in another state. Thus, full faith and credit typically requires that a state give a judgment the same *res judicata* effect the judgment would have been afforded in the state

in which it was rendered. Thompson v. Thompson, 484 U.S. 174, 180, 108 S.Ct. 513, 517 (1988); Durfee v. Duke, 375 U.S. 106, 109, 84 S.Ct. 242, 244 (1963).

Res judicata, or claim preclusion, prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication. R/S Financial Corporation v. Kovalchick, 716 A.2d 1228, 1230 (Pa. 1998). The doctrine of *res judicata* developed to shield parties from the burden of re-litigating a claim with the same parties, or a party in privity with an original litigant, and to protect the judiciary from the corresponding inefficiency and confusion that re-litigation of a claim would breed. Id.

Appellees do not dispute appellant's argument that this Court's inquiry into whether *res judicata* prohibits the instant suit should begin by applying *res judicata* doctrine as developed in the New York courts.[8] This Court's precedent on the question of which jurisdiction's *res judicata* doctrine should prevail in an instance in which the prior lawsuit arose in another jurisdiction has been unclear. For example, in Commonwealth ex. rel. McClintock v. Kelly,134 A. 514, 516 (Pa. 1926), this Court applied its own *res judicata* doctrine to decide if the decision of a Maryland court should be provided *res judicata* effect. Nearly a half century later, however, this Court gave *res judicata* effect to an Ohio judgment without applying Pennsylvania *res judicata* doctrine; there we rejected a challenge to the validity of an Ohio divorce decree. Barnes v. Buck, 346 A.2d 778, 782 & n.11 (Pa. 1975). Although each opinion cites to the U.S. Supreme Court's Full Faith and Credit Clause

---

[8] We note that, although appellees do not explicitly object to appellant's claim that New York *res judicata* law applies, and appellees devote a portion of their brief to discussing whether New York law distinguishes between extrinsic and intrinsic fraud, appellees also discuss the fraud exception as viewed by Pennsylvania courts. Appellees' Brief at 23-27.

jurisprudence, McClintock, 134 A.2d at 515-16; Barnes, 346 A.2d at 781, different approaches were ultimately employed in the two cases.

The divergence in view found in this Court's precedent is mirrored in the academic authority which exists on the question. Thus, some commentators have argued that the Full Faith and Credit Clause does not dictate that courts must employ the foreign state's *res judicata* doctrine in cases such as this. See, e.g., Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945 (1998) (analyzing different approaches to choice of law issue). It also has been argued that no authority precludes a state from using its own *res judicata* analysis when that state's preclusion law would give at least as much, or more, preclusive effect as the out-of-state court's law would mandate. E.g., Comment, Gregory S. Getschow, *If At First You Do Succeed: Recognition of State Preclusion Laws in Subsequent Multistate Actions*, 35 VILL. L. REV. 253, 276 (1990); see also Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1227-28 (1986) (discussing ability of federal courts to give greater preclusive effect to state court judgments). Finally, it has been argued that differing circumstances may warrant a court in declining to follow an immutable rule that the out-of-state's *res judicata* analysis must be used in every case. 188 ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4467 (2d ed. 2002) (providing several examples of when it may be wise to depart from *res judicata* rules of out-of-state court).

On the other hand, there is ample authority weighing in favor of the proposition that the court should apply the *res judicata* law of the state that rendered the prior judgment. For example, the Restatement (Second) of Conflicts provides as follows:

> When a court has jurisdiction over the parties, the local law of the State where the judgment was rendered determines, subject to constitutional limitations, whether the parties are precluded from collaterally attacking the judgment on the ground that the court had no jurisdiction over the thing or status involved or lacked competence over the subject matter of the controversy.

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 97 (1998). In addition, it is certainly safe to say that the U.S. Supreme Court and several state courts have generally applied the *res judicata* doctrine of the court where the judgment under collateral attack was rendered to determine if and when a collateral attack on that judgment is permissible. See, e.g., Migra v. Warren City School District Board of Education, 465 U.S. 75, 87, 104 S.Ct. 892, 899 (1984) (remanding to District Court to apply Ohio claim preclusion law); Omega Leasing Corp. v. Movie Gallery, Inc., 859 So.2d 421, 424 (Ala. 2003) (looking to Virginia law to determine if judgment was final); O'Connell v. Corcoran, 770 N.Y.S.2d 673, 676 (2003) (according preclusive effect to Vermont divorce decree based on Vermont's *res judicata* law); Jordache Enters., Inc. v. Nat'l Union Fire Ins. Co., 513 S.E.2d 692, 703 (W.Va. 1998) ("the full faith and credit clause generally requires the courts of this State to give the New York judgment at least the res judicata effect which it would be accorded by the New York courts"); Smith v. Shelter Mut. Ins. Co., 867 P.2d 1260, 1265 (Okla. 1994) (applying Arkansas claim preclusion law); Nottingham v. Weld, 377 S.E.2d 621, 623 (Va. 1989) (holding that Virginia courts must give federal court judgment same preclusive effect federal court would have given that judgment). But see, e.g., Ditta v. City of Clinton, 391 So. 2d 627, 629 (Miss. 1980) (applying preclusion law of Mississippi where Louisiana judgment was argued to have preclusive effect); Finely v. Kesling, 433 N.E.2d 1112, 1117 (Ill. App. Ct. 1982) (declining to apply collateral estoppel rules of Indiana).

The "fog of ambiguity" to which Mr. Chief Justice Cappy adverts in his concurrence, then, is a fog that is found both in our precedent and the commentary. Since the parties do not perceive or attempt to dissipate the fog, we are satisfied, in the present case, to indicate an awareness of the issue without purporting to offer, *sua sponte*, a definitive resolution. Therefore, consistently with the manner in which the case has been briefed to us, we will proceed by analyzing whether Michels would bar appellees' suit under New York law.

In New York, the doctrine of *res judicata* prohibits a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter, including all claims that were litigated or could have been litigated in the prior action. In re Hunter, 794 N.Y.S.2d 286, 291 (2005).[9] Where an action has reached a final conclusion, "all other claims arising out of that same transaction or series of transactions are barred, even if it is based upon different theories or if seeking a different remedy." Id. (quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981)) (internal quotations omitted).[10] A final order or judgment has been reached, under New

---

[9] It bears noting that it is not self-evident that the New York test for *res judicata* is coterminous with the approach prevailing in Pennsylvania. See In the Matter of Dennis J. Iulo, 766 A.2d 335, 337 (Pa. 2001) (*res judicata* bars subsequent action where "there exists an identity of issues, an identity of causes of action, identity of persons and parties to the action, and identity of quality or capacity of the parties suing or being sued.").

[10] To determine whether a claim is a part of the same transaction involved in a prior case, the New York Court of Appeals adopted the "transactional" test described in the Restatement (Second) of Judgments § 24(2). See Chen v. Fischer, 6 N.Y.S.3d 94, 100-01 (2005). Section 24(2) of the Restatement provides:

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to

(continued…)

York law, when all of the causes of action have been disposed of between the parties by the order or judgment and there is no need for further judicial action, excluding ministerial tasks. Burke v. Crosson, 623 N.Y.S.2d 524, 527 (1995). Finally, the New York Appellate Division has held that a judgment approving a class action settlement agreement is a final order for purposes of *res judicata*. Sound Distributing Corp. v. Ponce Acquisition Corp., 577 N.Y.S.2d 863 (App. Div. 1992).

Here, when appellant sold its insurance policy to the Masons, the policy employed "quick pay" terminology and appellant referenced "quick pay" in correspondence with appellees. Letter from Phoenix to Trustees, dated 4/22/94. Hence, the Masons plainly were included in the class of plaintiffs in Michels, a lawsuit which brought various claims against appellant involving, *inter alia*, "quick pay" policies that would use accrued dividends to help meet the premiums of an "Optionterm" rider. Of the claims summarized in the class action notice, the first expressly accused appellant of misleading policyholders with regards to:

> a method of using dividends to pay premiums on a whole life policy, or interest credited on a universal life policy, rather than paying them in cash, in order that no further out-of-pocket premium would be due after a fixed period of time, which sales concept was variously referred to as "Quick Pay" or "Rapid Pay," as well as Phoenix's use of dividends to help meet the costs of a rider known as Optionterm… .

(…continued)

> such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Id. There is no issue in the case *sub judice* that the claims appellees would now pursue are part of the same transaction that gave rise to the Michels class action.

Notice of Proposed Settlement for Michels Class Action, at 2. The Michels court issued an eighty-four page opinion on January 3, 1997, addressing the adequacy of the class action settlement reached between appellant and Phoenix policyholders on this, and other, claims. Appellees now seek to challenge that same settlement on various grounds by re-litigating the claim brought in Michels involving "quick pay," an aspect of the Masons' SLP whole life insurance policy.

Viewing these circumstances in light of New York's *res judicata* doctrine, the instant matter plainly involves the same relevant parties as the prior suit, for appellees did not opt out of the Michels class action, and indeed, they benefited from the settlement terms in that they were automatically entitled to receive a period of dividend enhancement, an offset of out-of-pocket premium costs for two years, and the right to elect optional premium loans through 2005. In addition, the present suit concerns the same subject matter as the class action; indeed, in both cases, the claims against appellant include allegations that it misled its policyholders into purchasing an insurance policy with the "quick pay" feature and the policy did not perform as promised. Moreover, a final judgment on the merits was rendered in Michels, as the New York court in that case rendered an opinion on the adequacy of the class settlement, which is deemed a final order under New York law. See Sound Distributing Corp., 577 N.Y.S.2d at 863. Although appellees might take issue with the second prong of the test given their protestations, discussed *infra*, that the class action notice was inadequate because it did not explicitly mention SLP policies, that is not an allegation that would bear directly upon an element of the basic New York test for *res judicata*. And, indeed, appellees do not dispute that, absent the defective notice issue they wish to litigate, *res judicata* would bar this suit. Accordingly, in answer to the first question

this Court accepted for review, we hold that appellees' suit presumptively would be barred by *res judicata* in a New York court and, consequently, we extend full faith and credit to the Michels judgment by preliminarily affording it that same preclusive effect in Pennsylvania.

II. Adequacy of Notice.

Appellant next argues that the Superior Court erred when it declined to give the Michels judgment the preclusive effect it deserved on the separate ground of defective notice, the defect consisting of the fact that the class action notice did not explicitly mention the SLP policy that the Trustees managed and the potentially astronomical premiums that might become due in certain scenarios. Appellant asserts that this Court's review of the adequacy of the class notice should be limited to accepting the Michels court's findings on the notice's adequacy, which appellant claims was extensive.

In the alternative, appellant argues that, even if this Court were to review the class notice *de novo*, the notice was adequate. Appellant emphasizes that the notice clearly explained that appellees would be subject to the terms of the class settlement if they failed to opt out of it, and that all known or unknown claims that may thereafter exist would be precluded by the settlement. In response to appellees' claim that the notice should have provided more information concerning their specific policy, appellant counters that appellees failed to seek further information by calling the toll-free number provided in the Michels notice and in the accompanying brochure. Appellant also notes the impracticality of the Superior Court's adverse decision, as it effectively would require that specific information pertaining to individual policies should have been disseminated to the 510,000 potential class members who were affected in Michels. Appellant submits that constitutional requirements respecting notice impose a more practical and less

burdensome duty: class notice need only provide a reliable means for interested parties to become apprised of the pending action and an opportunity to present objections. Appellant argues that the toll-fee number provided this necessary forum for each potential plaintiff to learn what specific impact the class action would hold for an individual policy. Finally, appellant argues that the fraud alleged should not have any effect on reviewing the adequacy of the class notice because appellees had notice and an opportunity to participate in the litigation, as well as warnings that they could not bring any claims against appellant in later litigation.

In response, appellees counter with the reasoning of the Superior Court that the current case is analogous to Amchem Products, where some of the class action plaintiffs had not yet suffered any physical harm and, accordingly, the Supreme Court held that the plaintiffs could not properly be certified as a class under federal civil procedure rules. In support of this reasoning, appellees point to appellant's failure to notify them of the effect that a death of one, but not both, of the Masons would have on future policy premiums. Appellees argue that the Superior Court rightly found that injury to the Masons had not manifested itself at the time of the settlement, that the class notice omitted necessary information, and that appellant deliberately prevented appellees from learning of the nature of the Masons' harm under the policy. In arguing defective notice, appellees specifically emphasize the absence of any mention of SLP policies in the class notice.

With respect to appellant's argument that this Court must defer to the Michels court's ruling on notice adequacy, appellees assert that this Court should not accept the premise, as it would allow the class action court to predetermine the *res judicata* effect of its own

judgments.[11] Appellees then summarize their position on the merits by arguing that review of the class action notice will prove it to be inadequate as to the Masons because appellant's fraud precluded appellees "from understanding the impact of the class action settlement on their claims." Appellees' Brief at 49.

As Chief Justice Cappy's concurrence notes, there is neither settled controlling authority nor even a consensus on the question of what level of deference a reviewing court should afford a settlement court's findings on the adequacy of class notice. The parties center their debate on two Federal Circuit Court cases. Appellant offers, and the Chief Justice prefers, the non-precedential view set forth by a single judge who authored the lead opinion in Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999) (Opinion Announcing the Judgment of the Court), for the absolutist proposition that this Court should engage in a "limited collateral" inquiry into the procedural aspects of the Michels court's ruling on notice adequacy. Appellees, on the other hand, cite Stephenson v. Dow Chemical Co., 273 F.3d 249 (2d Cir. 2001), *aff'd in relevant part by an equally divided court*, 539 U.S. 111, 123 S.Ct. 2161 (2003) (per curiam), and argue that this Court should conduct a broad collateral review of the settlement court's findings. Appellees contend that, when a party argues that

[11] Appellees preliminarily argue that appellant waived its argument that this Court must accept the Michels court's ruling on notice adequacy, by failing to raise the argument below. In reply, appellant disputes this contention and cites passages from its Superior Court brief. Appellant claims that since appellees failed to previously dispute the notion that full faith and credit requires us to accept the Michels court's ruling on notice adequacy, appellees' waiver argument is itself waived. Appellant's Reply Brief, at 12-13. Given this Court's conclusion, *infra*, that we review challenges to an out-of-state court's ruling on the adequacy of class notice *de novo*, a conclusion that accepts appellees' substantive position, it is unnecessary to pass upon appellees' waiver argument.

a court entered a judgment against it without authority, that party is entitled to *de novo* review in the collateral proceeding. Appellees' Brief at 44-50.

In Epstein, a class of plaintiffs challenged the adequacy of legal representation in a Delaware state court class action settlement. The plaintiffs were included in that class and did not opt out of the settlement.[12] The settlement ended shareholder challenges to a tender offer that Matsushita Electric Industrial Co. made for MCA, Inc. In a lead opinion joined by neither of the two other judges on the panel,[13] Judge O'Scannlain opined that due process does not require a court to engage in "collateral second-guessing" when reviewing the settlement court's findings that support certification of a class settlement. Epstein, 179 F.3d at 648. Instead, Judge O'Scannlain wrote that a reviewing court should restrict itself "to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." Id. at 648-49. Judge O'Scannlain found support for his decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965 (1985), stating that the Supreme Court never implied

---

[12] Epstein has a lengthy procedural history. When the plaintiffs first appeared before the Ninth Circuit, the court considered whether the plaintiffs' federal claims were barred by the Full Faith and Credit Act, 28 U.S.C. § 1738. Epstein, 179 F.3d at 643. The court determined that the settlement released claims within the exclusive jurisdiction of the federal courts. On further appeal, however, the U.S. Supreme Court determined that the Delaware judgment was entitled to full faith and credit. Id. On remand to the Ninth Circuit, a divided panel determined that the Delaware judgment was not entitled to full faith and credit because it violated due process given the inadequacy of class representation. Id. That opinion was later withdrawn and replaced with the opinion discussed in the text above. Id. at 644.

[13] Judge Wiggins concurred in the result reached by Judge O'Scannlain and filed an opinion to explain why he changed his vote from a prior appeal. Judge Thomas dissented and filed an opinion in which he objected to Judge O'Scannlain's failure to discuss whether the plaintiffs were even members of the class.

that a certifying court's determination of the adequacy of representation was subject to collateral review, and cited Federal Circuit Court cases for his view that class members' due process rights are protected by the certifying court and direct appeal courts. Id. at 648 (citing Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1558 (3d Cir. 1994); Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 33 (1st Cir. 1991)). Furthermore, in concurring in the result, Judge Wiggins noted that the Delaware Chancery Court had already addressed individual class member challenges to the class representatives' representation. Id. at 651.

The situation confronting the Second Circuit Court of Appeals in Stephenson two years later was markedly different. In Stephenson, two veterans of the Vietnam War challenged a trial court's finding that their suit against manufacturers of the defoliant known as Agent Orange was barred by a 1984 settlement brought by service members disabled by the herbicide. Stephenson, 273 F.3d at 251. According to the class definition in the prior settlement, both Stephenson veterans were included within the class because they were members of the U.S. military, stationed in Vietnam between 1961 and 1972, and were injured by their exposure to Agent Orange. Id. at 260. The veterans had each been diagnosed with cancer in 1998, but were precluded from obtaining funds from the 1984 settlement because they had not claimed disability prior to 1994. Id. In a unanimous opinion, the Stephenson panel found that a party should not be foreclosed from collaterally attacking a class settlement when the party claims to have been an improper party to the settlement under attack. Id. at 259. The attack was permissible, according to the court, since the adequacy of representation for class members manifesting injuries after 1994 had not previously been addressed and precedent supported such a collateral attack. Id. at

257-58. The court quoted Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115 (1940), for the proposition that class action judgments can only bind members when their interests are unified, as well as the Second Circuit's previous pronouncement that class action judgments are not secure from collateral attack unless the absent members are vigorously represented. Id. at 258 (citing Van Gemert v. Boeing Co., 590 F.2d 433, 440 n. 15 (2d Cir. 1978)).

The apparent divide between the approaches by Judge O'Scannlain and the Stephenson panel is likely a product of the differing tasks and factual circumstances facing the two courts. In Epstein, the dominant issue was the adequacy of class representation, while Stephenson pertained to the propriety of a class member's inclusion in the class which was subject to a prior settlement. In Epstein, the settlement court had already reviewed specific challenges to class counsel's representation, but in Stephenson the certifying and direct appeal courts had not previously addressed the interests of class members who became injured following the exhaustion of the 1984 settlement funds. Thus, the two approaches may not necessarily represent a schism in the law, so much as the reality that courts reviewing a collateral attack on a class settlement, and asked to balance judicial efficiency, finality of a judgment, and an individual's due process rights, may reasonably make different determinations in different circumstances. Class actions do promote judicial efficiency by resolving claims shared by a large number of individuals when they are respected as final. On the other hand, we believe it unwise to adopt a prescriptive rule that would prevent going behind a class action judgment, but for procedural irregularities in that first judgment, irrespective of the specific claim forwarded. When a class member collaterally attacks a class settlement by alleging that he was

wrongfully included in the class, an argument not made in Epstein, we believe the allegation should be permitted substantive collateral review because a class settlement does not always protect the interests of every party subject to it. See Stephenson, 273 F.3d at 259.

In the instant matter, the parties cite no case that specifically addresses the appropriateness and scope of collateral review when class notice is allegedly inadequate. However, the present case is sufficiently analogous to Stephenson to permit substantive collateral review here, as appellees' allegation (taken at face value for purposes of deciding our review paradigm) is premised on the notion that **nothing** in the class notice would have alerted them to the fact that they were inappropriately included in the class and the Michels court never addressed whether notice was adequate for class members with SLP policies. Inadequate notice, in fact, is a recognized exception to the effect of the *res judicata* doctrine. See Kealoha v. Castle, 210 U.S. 149, 155, 28 S.Ct. 684, 687 (1908). Moreover, this Court has previously noted that, in light of the requirements of due process, we are not obliged to give full faith and credit to a judgment of another state where notice was inadequate. See Barnes, 346 A.2d at 782 (citing Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228 (1958) and RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 104 (1971)).[14] To

---

[14] As the Restatement explains in a Comment, courts are not required to give judgments full faith and credit when they are rendered in violation of due process:

> Due process forbids the rendition of a judgment within the United States unless the State of rendition has judicial jurisdiction (see § 24) and unless the parties have been given adequate notice and adequate opportunity to be heard (see § 25). A judgment rendered in violation of these requirements is void in the State of rendition itself, and due process forbids the recognition and enforcement of such a judgment in sister States (see § 92).

(continued…)

ensure that this Court renders an independent judgment on this constitutional question, we believe that a broad collateral review of the notice is warranted for the limited purpose of assessing the appropriate *res judicata* effect. Furthermore, it is not entirely clear to us that the inquiry into adequacy of notice for class action purposes is coterminous with the inquiry into notice for purposes of *res judicata*; this is an additional reason weighing in favor of an independent review.

It is settled that notice is a fundamental requirement of due process, for a proceeding to be respected as final. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950); Pennsylvania Coal Mining Ass'n v. Insurance Dep't of Pa., 370 A.2d 685, 692 (Pa. 1971). Notice is deemed adequate when it is reasonably calculated to inform a party of the pending action and provides the party an opportunity to present objections to the action. Mullane. Additional requirements have been articulated for notices sent in class actions. A potential plaintiff in a class action must be:

> provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Phillips Petroleum Co., 472 U.S. at 812, 105 S.Ct. at 2974.

On several occasions, this Court has explored the specific notice requirements demanded by due process. We have explained that the approach to determining what

---

(…continued)

RESTATEMENT (SECOND) OF CONFLICTS § 104, at Comment (a).

notice is adequate must be flexible and non-technical. Harrington v. Dep't of Transp., Bureau of Driver Licensing, 763 A.2d 386, 391-92 (Pa. 2000). Furthermore, we have noted that due process does not confer upon an individual the right to be deliberately obtuse to the nature of a proceeding. See, e.g., Crooks v. Dep't of Transp., Bureau of Driver Licensing, 768 A.2d 1106, 1109 (Pa. 2001).

Applying these principles, we have no difficulty in rejecting appellees' contention that the notice sent to them concerning the Michels class action did not provide them with sufficient information to comprehend the propriety of their inclusion in that litigation. First, as previously stated the cover-letter accompanying the notice not only stated that policyholders who purchased policies from 1980 to 1995 were affected, but it also mentioned that the proposed settlement included an offset benefit for "Optionterm" policies. The letter specifically noted a toll-free number created by class counsel to answer questions that any policyholder had with respect to the suit and gave the date of the final hearing to approve settlement. Second, the four-page question and answer brochure made clear that the instant insurance policy was covered in the suit, as it stated that vanishing premium policies were included in the plaintiffs' action, and that an offset for "Optionterm" policies would be automatically awarded in the settlement. The brochure, like the letter, also provided counsel's toll-free number for further information. Third, as mentioned in the above discussion on *res judicata*, the notice recounted the ways in which policyholders were allegedly "misled" by appellant, including appellant's: (1) offering policies that would use dividends to pay premiums on whole life insurance, "in order that no further out-of-pocket premium would be due after a fixed period of time, which sales concept was variously referred to as 'Quick Pay' or 'Rapid Pay,' as well as [appellant's] use of dividends

to help meet the costs of a rider known as Optionterm;" (2) sale of life insurance under the guise it was an investment plan; and (3) failure "to disclose material information in connection with the introduction of new methods for calculating dividends and crediting rates." Notice of Proposed Settlement for Michels Class Action, at 2.

The notice also detailed that offsets would be given for individuals owning "Optionterm" polices and that "General Policy Relief" would be available for those with whole life insurance policies. Furthermore, the notice advised the putative class members of their right to opt out, and cautioned members about the consequences of failing to opt out of the suit, expressly warning that policyholders would be prohibited from making **any** claim about the number of premium payments required to keep the policy active. Notice of Proposed Settlement for Michels Class Action, at 11. Again, the toll-free number and addresses of class counsel were listed in the body of the notice.

Considering the breadth of information provided in the Michels class notice, question and answer brochure, and cover-letter, appellees clearly were provided with sufficient information apprising them of the pending litigation and a means to present objections to it or to opt out. Due process requirements aside, notice is not an end in itself; in most instances, the recipient of notice must take some affirmative responsive action, whether it be investigation, a formal pleading, etc. The notice provided here alerted appellees to potential problems with their policy, that these problems involved a lack of disclosure by appellant, and that the specified circumstances in the notice were not exhaustive or exclusive. The proverbial ball was then in appellees' court, to make an assessment of their own individual circumstance, *i.e.*, to determine whether the class action adequately protected their interest. Notice is only the first step: the follow-up is generally a matter of

individual responsibility. Thus, we hold that the notice in the case *sub judice* met the requirements of due process.

Moreover, we agree with appellant that the Superior Court's ruling would establish a higher due process requirement than is constitutionally necessary, at least as far as this case is concerned, in holding that the notice is constitutionally deficient for failing to specifically mention SLP polices. SLP policies were only one type of whole life insurance policy that might be adversely impacted by the vanishing premium policy option that was a primary claim in Michels, a claim that appellees were made amply aware of in the class notice. Due process does not require the notice to list every policy in which vanishing premiums are involved. Instead, an individual of reasonable intelligence could comprehend from the Michels notice that if he has an insurance policy with vanishing premiums, whatever the type of underlying policy, then that policy will be affected by the class settlement and he should investigate to determine the best course in his individual circumstances. The Superior Court's approach would essentially require that the notice list every potential negative consequence of having a policy with "vanishing premiums" or "quick pay," such as the possibility for premiums to skyrocket for SLP policies. This requirement, we believe, is too burdensome--and it certainly is not required to satisfy basic notions of due process. It was sufficient to notify class members that "vanishing premium" policies were alleged by the plaintiffs in Michels not to operate as they were advertised.

Furthermore, we are unpersuaded by appellees' claim that fraud perpetrated by appellant precluded them from discovering the true scope of the Michels litigation. The class notice plainly provided appellees with the necessary information to understand that the Masons' insurance policy would be affected by the class settlement, if they failed to opt

out of it, and even provided appellees with avenues to obtain further information, avenues they neglected to pursue. Simply put, the claim of external fraud forwarded here cannot make this facially constitutionally adequate notice constitutionally inadequate. We do not doubt that appellees now regret not having investigated the matter further when put on notice; but they cannot colorably claim they were unaware of the effect of their choice to surrender all claims.

Lastly, we are unpersuaded by the Superior Court's reliance on Amchem Products. In Amchem Products, the U.S. Supreme Court found that two provisions of Rule 23 of the Federal Rules of Civil Procedure prevented the putative class of plaintiffs, which included both individuals with asbestos-related disabilities and exposure-only claimants, from being certified as a single class. First, Rule 23(b)(3) requires that class members share common questions of law or fact that "predominate over any questions affecting only individual members." The Court held that the class did not meet the predominance requirement, because exposure-only plaintiffs will incur different medical expenses for monitoring and treatment than plaintiffs already treating asbestos related diseases. 521 U.S. at 624, 117 S.Ct. at 2250. Second, the Court ruled that the putative class could not satisfy Rule 23(a)(4)'s requirement that the named parties fairly and adequately represent the class's interests, since class members currently suffering from asbestos disability would desire a immediate compensation for their injuries, whereas exposure-only claimants would be interested in preserving an ample fund for future possible expenses. Id. at 625, 117 S.Ct. at 2250. The Court also observed that the case raised important questions about the adequacy of class notice, but declined to rule on that issue because the class could not be certified. Id. at 628, 117 S.Ct. at 2252.

The Superior Court acknowledged that Amchem Products did not contain a holding directly related to the issue of adequate notice. Wilkes, 851 A.2d at 211. The panel nevertheless proceeded to find that appellees were like the exposure-only claimants in Amchem Products, who were unaware of their asbestos exposure and the potential health risk, because appellees "had no reason to believe they had or were being defrauded as they had received numerous assurances from Phoenix and Lenenberg that their policy coverage was as originally represented in 1989." Therefore, in the panel's view, appellees did not have the necessary information to decide whether to stay in or opt out of the class action. Id. at 213. But the panel's finding in this regard is contradicted by the fact that the policy premium bill for 1994 was $20,000 more than the Masons expected, policy illustrations from 1994 showed the decline of premium payments occurring at a slower rate than initially expected, and the Masons had to borrow roughly $5,500 on their policy in 1995 to account for an unexpected premium payment shortage. While it is true that at the time the Masons had to decide whether or not to opt out of the class action they were unaware of the extent to which they might be defrauded in the future, they had ample evidence that their policy was not operating as advertised at the time the class action notice arrived. Thus, even assuming that Amchem Products would support a holding that class notice is deficient where it does not provide class members with sufficient information to determine whether they share in the injury alleged to have been caused by the defendant, it is of no avail to appellees here because they were given multiple indications that they had suffered the type of injury that was covered by the class action.

III. Fraud.

Appellant's final claim is that appellees cannot succeed on a claim that fraud eviscerates the *res judicata* effect of the Michels judgment, unless appellees prove that class counsel in Michels was deceived, rather than proving fraud in relation to appellees' individual case. In the alternative, appellant argues that appellees were well aware that their policy was not operating as initially expected, they had opportunities to inquire about the class action's effect on the policy, and they never took reasonable steps to do so. Appellant argues that the only time period that is relevant to appellees' fraud claim is from August to October of 1996, during the opt-out period, since appellees only claim fraud in inducing them to fail to opt out of the class action. Appellant further contends that any improper illustrations it provided to appellees before that time are irrelevant because claims of that nature were directly addressed by the Michels suit. Appellant lastly asserts that any fraud after October 1996 is likewise irrelevant.[15]

In response, appellees claim that *res judicata* does not bar the instant suit due to fraud committed by appellant. Appellees contend that it is a well-settled principle that fraud permits a collateral attack on a judgment and, here, fraud occurred during the settlement of the case. Construing the record in the light most favorable to the non-moving party, appellees argue, provides sufficient evidence for a jury to conclude that appellant

---

[15] Because it found for appellees on the notice issue, the Superior Court did not address appellees' claim of fraud and, instead, directed the trial court on remand to reconsider the claim of fraud in light of the panel's findings on notice. Wilkes, 851 A.2d at 214. The fraud issue has been fully briefed here and is ripe for decision. In the interest of judicial economy, we will reach it. See, e.g., Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 435 n.12 (Pa. 2001). The question of whether summary judgment was appropriate on the fraud claim is one of law, hence our review is plenary.

defrauded them. Although Phoenix disputes that Lenenberg had an agency relationship with them, appellees claim that this relationship must be accepted as true for purposes of summary judgment. Moreover, appellees argue that appellant is not entitled to an inference that appellees were on notice of the policy defects, as appellees assert that they reasonably relied on appellant's false and misleading representations and their right to rely on these representations is a question of fact. Lastly, appellees dispute appellant's contention that they must prove fraud occurred in connection with the Michels class action attorneys. Appellees argue that public policy requires that courts ensure that an individual plaintiff's rights in a class action are not sacrificed by "collusive attorneys;" therefore, courts must examine claims of fraud with respect to the individual class members. Appellees also assert that it is unrealistic to expect class members to actively contact class counsel and inform counsel of a defendant's and defendant's agent's representations to a class member.[16]

If a judgment has been procured by fraud or collusion, *res judicata* will not usually be an impediment to litigating a claim anew. Morris v. Jones, 329 U.S. 545, 550-51, 67 S.Ct. 451, 455-56 (1947). It appears that the highest court in New York has yet to apply the generally accepted principle that fraud is an exception to *res judicata*, but it has previously noted the existence of the exception. See Parker v. Hoefer, 142 N.E.2d 194, 196 (N.Y. 1957) (stating that fraud and collusion may generally operate as an exception to *res judicata*, while summarizing U.S. Supreme Court's case law on full faith and credit, but not

[16] For the purposes of this decision, we will assume without deciding that a successful fraud claim may be maintained in relation to individual class members, rather than respecting class counsel. We do so because we find, *infra*, that the claim so viewed fails as a matter of law.

discussing exception in relation to case).[17] Unsurprisingly, it also appears that the elements of fraud that a party seeking to re-litigate a claim must prove to gain the benefit of the fraud exception are left undefined. Considerations of comity weigh against attempting to delineate the specific boundaries of such an exception for New York and, consequently, we decline to sculpt and apply a specific fraud exception to *res judicata* here.

Rather, for present purposes, it is enough to note that we are satisfied that appellees could not successfully argue fraud as an exception to the *res judicata* doctrine in this case given New York's view of fraud cases generally. To establish a *prima facie* case of fraud in New York, one must allege a representation of a material fact, falsity, scienter, reliance, and injury. See Small v. Lorillard Tobacco Co., Inc., 720 N.E.2d 892, 898 (N.Y. 1999). Moreover, reliance on a fraudulent misrepresentation must be reasonable. See Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 796 N.Y.S.2d 790, 791-92 (App. Div. 2005); Ruffino v. Neiman, 794 N.Y.S.2d 228, 229 (App. Div. 2005).

Appellees' allegation of fraud in the case *sub judice* is advanced without any attempt to apply the allegation to a known legal standard or a suggested one. Taking appellees' allegations of fraud at their essence, this Court is asked to conclude that Lenenberg's assertions as appellant's agent (a fact, which we are required to consider as true for the purposes of summary judgment) that the instant insurance policy was not implicated in the Michels litigation undid the effect of the contents of the class notice, question and answer brochure, and accompanying cover letter. In our view, as a matter of law, appellees cannot

[17] Based on our earlier discussion concerning what state's claim preclusion law we should apply, in order to decide if the Michels judgment is entitled to full faith and credit, we analyze the present issue involving the contours of any fraud exception to the *res judicata* doctrine, under New York law.

succeed upon a claim of reasonable reliance on Lenenberg's statements when these statements directly conflict with the text of the class notice itself. Cf. Ruffino, 794 N.Y.S.2d at 229 (plaintiff not entitled as matter of law to reasonably rely on misrepresentations when they directly conflict with terms of consent decree). This is particularly so considering the sophistication of Mr. Mason, a successful businessperson, and trustee Ehrenwerth, an experienced lawyer. Thus, even assuming that a fraud exception to *res judicata* would be accepted under New York law, we find that appellant is entitled to summary judgment on this claim.

For the foregoing reasons, we conclude that *res judicata* applies, that the class notice in this case was constitutionally adequate, and that the allegation of fraud is insufficient as a matter of law to defeat the effect of *res judicata*. Accordingly, we reverse the order of the Superior Court and reinstate the trial court's grant of summary judgment in favor of appellant. Jurisdiction relinquished.

Messrs. Justice Saylor and Eakin join the opinion.

Former Justice Nigro did not participate in the decision of this case.

Mr. Chief Justice Cappy files a concurring opinion.

Madame Justice Newman files a dissenting opinion in which Mr. Justice Baer joins.