

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

STANLEY JANIK,

Plaintiff and Appellant,

v.

RUDY, EXELROD & ZIEFF et al.,

Defendants and Respondents.

A102513

(Alameda County
Super. Ct. No. 2002070478)

**ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

BY THE COURT:

It is ordered that the opinion filed herein on June 22, 2004, be modified as follows:

Section 3 shall be replaced with the following:

3. *The chronology of events in the Bell action does not negate negligence as a matter of law.*

Finally, defendants argue that even if they were under a duty to consider asserting a UCL claim in *Bell*, the chronology of the litigation establishes as a matter of law that they were not negligent in failing to do so. Defendants contend that prior to the decision of the California Supreme Court in *Cortez* in June 2000, there was no authority to support a claim for unpaid wages under the UCL (see, e.g., *Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 290-291) and that *Cortez* was not decided until long after the certification of the class in May 1998, the expiration of the opt-out period in September 1998, and the trial court order in April 1999 granting the class members' motion for summary adjudication establishing Farmers's

liability.¹ Defendants argue that “[u]nder California law, as well as fundamental principles of due process, a class certification order cannot be modified once there has been a ruling on the merits.”

While there may well have been sound strategic reasons for not seeking to amend the complaint after the Supreme Court decided *Cortez*, we cannot agree that the law was such that a motion to amend was doomed to fail. Defendants rely on *Green v. Obledo* (1981) 29 Cal.3d 126, 146 (*Green*), in which the court reiterated that Federal Rule of Civil Procedure, rule 23, subdivision (c)(1), applies to California class actions and permits the order certifying the class to be altered or amended only “before the decision on the merits.” *Green* explained, however, “[w]e have always recognized that it is desirable for the trial court to retain some measure of flexibility in handling a class action.” (*Green*, supra, 29 Cal.3d at p. 148.) When rule 23, subdivision (c)(1) was amended in 2003, explicitly to permit amendment of an order certifying a class action at any time “before final judgment,” the amendment was consistent with a number of federal court decisions that had equated the decision on the merits with the final judgment. (*In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation* (3rd Cir. 1955) 55 F.3d 768, 792, fn. 14 [“Under Rule 23, subdivision (c)(1), the court retains the authority to re-define or decertify the class until the entry of final judgment on the merits.”]; *Officers for Justice v. Civil Service Com’n or City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, [“Rule 23, subdivision (c)(1) specifically provides that the district court’s determination on the maintainability of a class action ‘may be conditional, and may be altered or amended before the decision on the merits.’ Consequently, before entry of a final judgment on the merits, a district court’s order respecting class status is not final or irrevocable, but rather, it is inherently tentative”].) As explained in the Advisory Committee Notes to the 2003 amendment, “This change avoids the possible ambiguity in referring to ‘the decision on the merits.’”

¹ The Court of Appeal affirmed this order in March 2001, and the trial on the issue of damages began on June 26, 2001. The verdict was returned on July 10, 2001.

Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.”

Accordingly, we cannot say that the class action court necessarily lacked the authority to permit amendment of the complaint or of the class certification order after *Cortez* was decided and before *Bell* went to trial.² There may well have been good reasons for proceeding to trial on the existing pleadings rather than attempting to reopen the scope of the complaint, but this is a question that cannot be decided on the present demurrer. We are in no position to decide as a matter of law that class counsel fulfilled its duties to the class by foregoing their claim for an additional year of recovery.

The petition for rehearing is denied. There is no change in the judgment.

² If, after the decision in *Cortez*, class counsel decided not to seek leave to amend based upon a well considered determination that under *Green* such a motion probably would be denied, those facts would of course tend to establish that counsel were not negligent in failing to bring the motion.

Trial court: Alameda County Superior Court

Trial judge: Honorable James A. Richman

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