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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FIRESIDE BANK, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; SANDRA GONZALEZ, Real Party in Interest.	H027976 (Santa Clara County Super. Ct. No. CV817959)

By this petition for extraordinary relief, Fireside Bank (Fireside) seeks to set aside an order certifying a class action charging it with unlawful practices under the Rees-Levering Motor Vehicle Sales and Finance Act, Civil Code sections 2981 through 2984.4 (Rees-Levering). Fireside contends that the trial court impermissibly provided class members an opportunity for "one-way intervention" by ruling on a motion for judgment on the pleadings before notice had been given to the class. We hold that there is no categorical prohibition against such a mode of proceeding; rather there exists at most a *preference* for resolving class issues before entering a dispositive order on the merits of class claims. That preference was never triggered here because the motion on which Fireside's argument is based was addressed not to the class causes of action but to a claim *Fireside* had brought *against* the class representative. We also reject a contention that the

trial court abused its discretion by finding the matter suitable for class treatment. We will therefore deny the petition.

BACKGROUND

It appears that in February 2001, real party Sandra Gonzalez purchased a used van under a conditional sales contract obligating her to make monthly payments and to keep the van insured.[1] The dealer assigned the contract to Fireside, then known as Fireside Thrift Co. She purchased the van for her father, Guadalupe Gonzalez, with the intention that he use and pay for it. When certain sums claimed by Fireside became overdue, it repossessed the van. On September 28, 2001, it sent a notice to Ms. Gonzalez, stating that she could redeem the van by paying the full amount due under the contract within 15 days. The notice correctly itemized the elements of the outstanding debt, i.e., a contract balance of $14,588.73; late charges of $24.91; repossession cost of $300.00; a credit for unearned finance charges of $2,713.46; and a credit for unearned insurance premiums of $1,070.00. However, the notice stated the "total amount due" to be $13,843.64, when the actual sum of the itemized charges, less credits, was $11,130.18. The "total amount due" thus exceeded the amount actually due by $2,713.46, the amount of the credit for unearned finance charges. Fireside attributes this discrepancy to "a computer error" and concedes that similarly inaccurate notices were sent to more than 2,000 other borrowers. (See fn. 2, below.)

In October 2002 Fireside filed a complaint against Ms. Gonzalez alleging that it had sold the van for $3,100, and seeking a judgment for the remaining contract balance of $8,073.47. This sum reflected a credit of $210.75 for a post-repossession payment. She

[1] Sandra Gonzalez's mother, Maria Gonzalez, also entered into the transaction. She originally joined in this litigation, but has since dismissed her claims after accepting an offer of compromise under Code of Civil Procedure section 998. Since Sandra Gonzalez is the sole remaining defendant, cross-complainant, and class representative, we omit any further reference to Maria Gonzalez.

eventually answered the complaint, generally denying its allegations and asserting a variety of affirmative defenses. Among the latter were allegations that (1) the court lacked jurisdiction to enter judgment against her "because Complainant failed to comply with Civil Code § 2983.2(a), and other portions of the Automobile Sales Finance Act," and (2) "[t]he claim is barred, in whole or in part, by Complainant's failure to comply with Civil Code §§ 1632, 2983.2(a), 2983.3, 2983.8(b) and other applicable laws."

About a month after answering the complaint, Ms. Gonzalez filed a cross-complaint alleging among other things that Fireside's notice of intent to sell had "fail[ed] to comply with the notice requirements of Rees-Levering" and that Fireside had thereby "lost its right to a deficiency." She asserted causes of action for (1) conversion, in that Fireside "repossessed the van before the loan was in default"; (2) violations of the Rosenthal Fair Debt Collection Practices Act, Civil Code sections 1788 and following; and (3) illegal, unfair, and deceptive business practices in violation of Rees-Levering and Business and Professions Code sections 17200 and following. The challenged practices included serving notices that did not comply with Rees-Levering, thereby forfeiting the right to claim deficiencies, yet nonetheless pursuing meritless collection actions against borrowers.

Around April 5, 2004, Ms. Gonzalez filed a motion for judgment on the pleadings against Fireside on its complaint—not on her cross-complaint—asserting that "[t]he facts alleged in the complaint . . . show conclusively that Fireside is not entitled to recover . . . . Fireside's post-repossession notice of intent to dispose . . . incorrectly overstated the amount [she] had to pay to redeem [the] vehicle, thereby violating [Civ. Code,] § 2983.2(a). In particular, Fireside failed to credit . . . the amount of unearned finance charges."

Fireside opposed the motion for judgment on the pleadings on two grounds: (1) before Ms. Gonzalez could obtain a ruling on the motion, she had to either "seek or foreswear" certification of a class, a potential remedy to which her counsel had alluded;

and (2) on the merits, she was not entitled to judgment on the pleadings because the notice's inclusion of an incorrect total was not a violation of Rees-Levering, which does not require that the total be stated in such a notice.

On April 27, 2004, at the initial hearing on the motion for judgment on the pleadings, counsel for Ms. Gonzalez said that on the preceding Friday, Fireside had provided discovery indicating that "this defect has infected nearly 3,000 notices." The court said, "If it's going to become a class-action, then we're premature . . . . I think they're entitled to find that out before we go forward with the ruling on this[,] [i.e., judgment on the pleadings]." Counsel for cross-complainants indicated that a decision on whether to seek class treatment was awaiting Fireside's responses to newly propounded discovery. The court continued the hearing for approximately three months.

On or about May 4, 2004, cross-complainants filed an amended cross-complaint. In addition to the causes of action already alleged, it asserted a claim under Rees-Levering on behalf of all persons who had received post-repossession notices from Fireside on accounts started in California in which "the redemption amount in the Notice failed to subtract the credit for unearned finance charges." Fireside's discovery responses reportedly showed that some 2,900 notices had been sent using "the same [faulty] computer program . . . ."[2] (Brackets in original.)

Around June 8, 2004, cross-complainants filed a motion for class certification. Fireside opposed the motion on the ground that the matter was not suitable for class treatment; its opposition memorandum did not refer to any issue of "one-way intervention." The hearing on class certification was eventually continued to July 20, 2004, which was the date already set for a status conference and for the

[2] The pertinent number variously appeared as 2,962 and 2,822. In addition, the motion contemplated the exclusion of recipients from whom Fireside had never sought to recover a deficiency, or whose rights vis à vis Fireside had been the subject of bankruptcy proceedings.

continued hearing on judgment on the pleadings. At that hearing the court expressed an initial inclination to certify the class , and after hearing argument on that point, said it would "have a ruling out by the end of the week . . . ." The subject then turned to judgment on the pleadings, with counsel for Fireside asserting "that it [is] inappropriate to reach a ruling on the merits until certification [is] settled." The court assured counsel that it was "not going to rule" on judgment on the pleadings "until I decide the issue of certification . . . ." Counsel clarified that Fireside opposed any ruling on the motion until *notice* had been given to the class, if any, and the time for members to opt out had expired. "Until that process has completely run its course and the class is set," he said, "we continue to contend that there should be no ruling." The court replied, "I . . . don't disagree with that . . . ." Counsel for Gonzalez likewise opined, "[I]f the defendant objects and doesn't want a ruling prior to class certification, then the defendant is entitled to have a ruling deferred." Shortly thereafter, counsel for Gonzalez asked the court to set a date for a further hearing on judgment on the pleadings "[i]f certification is denied . . . ." The court indicated that the motion was "in effect . . . going to go off calendar" pending a ruling on certification, but that a hearing could be set "[i]f I deny the certification . . . ." Counsel were to notify the court of an agreeable date.[3]

On August 20, 2004, despite these assurances, the court rendered formal orders (1) granting class certification, and (2) granting Gonzalez's motion for judgment on the

[3] We have described this colloquy at some length to show that the court's ultimate decision to rule on the motion for judgment on the pleadings apparently came as a surprise to both parties. Counsel for Gonzalez had acceded, and the court itself had seemed to assent, to Fireside's assertion that a ruling should be delayed until notice had been given to the class. This destroys the factual premise for Fireside's contention that counsel for Gonzalez is guilty of inequitable conduct in securing a precertification ruling on the motion. So far as the record shows, counsel was only too happy to avoid the uncertainty and delay that might come from failing to accommodate Fireside's procedural objection.

pleadings against Fireside's complaint on the basis that "[p]laintiff has failed to comply with the notice requirements under the Rees-Levering Act."

On September 29, 2004, Gonzalez filed a motion for approval of notice to the class. On September 30, 2004, Fireside filed its petition in this court for a writ of mandate. On October 21, 2004, the trial court heard and granted Fireside's motion to stay further proceedings. After requesting informal opposition, this court issued an alternative writ.

DISCUSSION

I. *One-Way Intervention*

A. Introduction

Fireside's primary contention is that the trial court's ruling on Gonzalez's motion for judgment on the pleadings precludes the certification of a class and operates as a forfeiture of any right or power Gonzalez had to act as a class representative. The central premises of Fireside's argument may be stated as follows: (1) A trial court presiding over an incipient class action is categorically precluded from ruling on "the merits" of class claims, over the defendant's objections, prior to certifying the matter for class treatment and giving notice to class members. (2) This rule not only precludes the trial court from ruling directly on the merits of class claims but also from issuing any ruling involving the same issues, including an objection to claims brought *against* the class representative by the class defendant. (3) Where the trial court has issued a ruling in violation of these principles, the only appropriate remedy is to decertify the class and, in effect, bar the would-be class representative from prosecuting claims on behalf of the class.

We reject *all* of these premises. There is no categorical "rule" against "one-way intervention." The California decisions actually purporting to adopt such a rule were all rendered by a single court and seek to justify a grossly overbroad rule by dramatically overstating the dangers posed by precertification rulings on the merits. While those

decisions purport to rest on a federal constitutional interest as reflected in federal cases, the federal courts have all but completely abandoned the supposed prohibition against one-way intervention. The correct rule, when rationally tailored to the interests at stake, is that class issues should *ordinarily* be resolved, and the class notified, before class claims are adjudicated on the merits. A departure from this preferred sequence may ripen into reversible error under particular circumstances, but there is no reason to conclude that it has done so unless the complaining party can point to some concrete prejudice resulting from the departure. Moreover, it is highly doubtful that the preference for fixing the class before adjudicating the merits should impair the trial court's freedom to issue rulings not directed to class claims, even if they involve questions central to those claims; such an extension of the supposed ban seems particularly inappropriate when "merits" issues are raised as a *defense* to claims brought *by* the class defendant *against* the class representative. Finally, even if a precertification ruling on the merits is shown to be error in a particular case—as it has not been here—there is no basis to hold, in the absence of some particularized showing, that the error cannot be satisfactorily remedied by setting aside the offending order with instructions to reconsider the issues de novo after class membership has been settled.

B. The *Home Savings* Decisions

The notion of a blanket prohibition against precertification rulings on issues going to "the merits" originated with two related decisions from the mid-1970's: *Home Sav. & Loan Assn. v. Superior Court* (1974) 42 Cal.App.3d 1006 (*Home Savings I*), and *Home Sav. & Loan Assn. v. Superior Court* (1976) 54 Cal.App.3d 208 (*Home Savings II*).[4] In the first, the defendant in a class action sought extraordinary relief to prevent the trial court from carrying out its proposal to conduct, prior to certification of the class, a

[4] We will sometimes refer collectively to these cases as *Home Savings*.

" 'bifurcated liability trial' " to resolve "various liability questions." (*Home Savings I*, *supra*, 42 Cal.App.3d at p. 1009.) The reviewing court issued prohibition to "restrain[] the trial court from proceeding to trial on the substantive merits of the cause without prior adjudication of the procedural class-action issues, viz. suitability of the action as a class action, determination of the composition of the class, and appropriate notification of members of the class, all pursuant to guidelines set out in rule 23, Federal Rules of Civil Procedure, and Civil Code section 1781." (*Home Savings I*, *supra*, 42 Cal.App.3d at p. 1015.)

The discussion leading to this result wanders among several justifications, or partial justifications: (1) "[p]rompt and early determination of the class is essential because until the composition of the class has been determined defendants cannot tell what the action involves" (*Home Savings I*, *supra*, 42 Cal.App.3d at p. 1010); (2) "until members of the class receive notice of the action they will not be bound" by any determination of the issues (*ibid*.); (3) whether or not the class receives notice, any judgment will bind the defendant, and may collaterally estop it in subsequent litigation, i.e., preclude it from relitigating the issue of its liability (*id.* at p. 1011); (4) "the potentially bound defendant, . . . when he enters upon class litigation is entitled to a judgment that will be meaningful" (*id.* at p. 1012); and (5) absent members of the class are themselves "entitled to appropriate notice of the pendency of a class action that will affect their interests," particularly when "those purporting to represent the class seek payment of substantial compensation from all members of the class in the event of success" (*id.* at p. 1010).

The court attempted to bring several of these considerations together in a ringing denunciation of the proposed bifurcation: "The vice in the procedure followed by the trial court is that it allows so-called 'one-way intervention,' a procedure under which potential members of the class can reserve their decision to become part of the class until the validity of the cause asserted by the named plaintiffs on behalf of the class has been

determined. While one-way intervention has obvious attractions for members of the class on whose behalf an action has been brought in that it creates for them a no-lose situation, for a defendant it holds the terrors of a open-ended lawsuit that cannot be defeated, cannot be settled, and cannot be adjudicated. To him it presents a classic no-win option." (*Home Savings I, supra*, 42 Cal.App.3d at p. 1011.) Taking note of seven other class actions pending against the same defendant, the court found the "terrors" (*ibid.*) of a precertification adjudication so great that due process was implicated: "Due process of law calls for a certain degree of logic and order in the trial of an action. In the present case, for example, defendant might go through a full-dress trial on the merits and win. Such victory, however, would avail it nothing, for the seven other class-action suits pending against it could each proceed its own way unbound by the outcome of this action." (*Id.* at p. 1014, fn. omitted.) Thus, adjudicating the merits while postponing a determination of class issues "fails to protect the defendant's right to a fair trial and to due process of law" and "equally fails to protect the rights of absent members of the class." (*Id.* at p. 1012.)

In *Home Savings II*, *supra*, 54 Cal.App.3d 208, 210, the court extended the reasoning of *Home Savings I* to bar the trial court from granting, prior to giving notice to the class, a motion by class representatives for *summary adjudication* on the merits. The plaintiffs sought to distinguish *Home Savings I* on the ground that the offending order there had contemplated *trial*, presumptively embracing the resolution of *issues of fact*, whereas here the motion raised only an *issue of law*. (*Ibid*.) The reviewing court declared this "a distinction without a difference," explaining, "The key words in *Home* [*Savings*] *I* are *substantive merits*, not *trial*. The controlling factor is not the way the superior court determines the substantive merits of the cause, but whether it does so prior to adjudication of the procedural class issues and prior to notification of the members of the class for whose benefit the action has been brought." (*Id*. at p. 211, italics in original.) The court also rejected an argument that the dangers noted in *Home Savings I*

were averted by the availability of independent appellate review of issues of law and by the doctrine of stare decisis, under which an appellate determination would serve as precedent in subsequent litigation. "Whether the issues are legal or factual, defendant faces a theoretical but nonetheless unfair, no-win option if the sequence of events proposed by plaintiffs is adopted. Prior to final determination of any substantive issue in a class action defendant has the right to know the full potential consequences and liability that may attach to the determination. More is involved than adequacy of counsel [citations], in that notice to the class assures freedom of action to other members of the class, who prior to adjudication of the cause on the merits are entitled to an opportunity to pursue their interests as they think best and enter the litigation as parties if they desire. (Fed. Rules of Civ. Proc., rule 23(c)(2); *Peritz v. Liberty Loan Corporation* (7th Cir. 1975) 523 F.2d 349, 354.)" (*Id.* at p. 212.)

C. Unsoundness of the Rationale

Despite having examined the reasoning in the *Home Savings* cases with some care, we fail to find in it any satisfactory basis for a rule categorically barring trial courts from deciding issues going to "the merits" of class claims prior to certification of the class. The court's adoption of such a rule appeared to rest on three primary rationales: first, that a ruling on class certification is necessary to tell the defendant the true stakes of the litigation, i.e., "what the action involves" (*Home Savings I, supra*, 42 Cal.App.3d at p. 1010); second, that a ruling on the merits prior to fixing the membership of the class could or would deprive the *defendant* of due process of law by depriving it of a binding adjudication against class members; and third, that such a ruling can also adversely affect the interests of *absent class members*, by depriving them of knowledge of what is being done in their names. None of these rationales withstands scrutiny.

It simply is not the case that "until the composition of the class has been determined defendants cannot tell what the action involves . . . ." (*Home Savings I, supra*, 42 Cal.App.3d at p. 1010.) It is the *pleadings* in an action, aided by liberal

modern rules of discovery, that tell an opposing party "what the action involves . . . ." (*Ibid*.) Certainly a ruling on class certification tends to fix the nature of the proceeding as either a class action or not; that is its purpose. Until that occurs, a defendant cannot be sure whether it will in fact be exposed to liability to absent class members. But by that logic, no defendant knows "what [any] action involves" *until a judgment has been entered*, because it cannot be sure it will be held liable *at all*. Furthermore, the defendant cannot be *sure* of class status even after a certification ruling, which is not only subject to appellate reversal but to vacation or modification in the trial court *even after judgment*. (See *Grogan-Beall v. Ferdinand Roten Galleries* (1982) 133 Cal.App.3d 969, 972, 979 [order decertifying class after trial affirmed].)

We are not the first court to look askance at a defendant's claim that it could not adequately defend itself against the risk of class liability until the court ruled on class certification. (See *Lowry v. Obledo* (1980) 111 Cal.App.3d 14, 23 ["We cannot believe that defendants seriously contend that they did not 'know what they were litigating' "].) We can of course imagine a case in which a particular defense on the merits may be significantly more burdensome to prepare against class claims than against an individual claimant. In such a case, forcing the defendant to prove the defense as against the class prior to certification could well constitute a prejudicial abuse of discretion because of the needless expense the defendant will have been forced to incur if class treatment is ultimately denied. But such a narrow and abstract possibility can hardly justify the blanket rule adopted in *Home Savings* and advocated here by Fireside.

We likewise find it impossible to accept the court's assertion that *absent class members* suffer a legally cognizable injury when the trial court adjudicates the merits before they receive notice. As the court repeatedly acknowledged, class members are entitled to notice sooner or later, and when they get it, they are entitled to opt out, i.e., to exclude themselves from the class and avoid the effects of any judgment, favorable or unfavorable. Given this fact, and in the absence of particularized proof to the contrary,

they must be presumed to *benefit* from later certification, if only because it provides additional information on which to predicate a decision. We can detect no logical substance in the suggestion that precertification rulings on the merits somehow deprive class members of knowledge of what is "done in their name" and what are the services "for which they may later be asked to pay." (*Home Savings II*, *supra*, at p. 213.) The court seems to envision class members as somehow better able to *predict* what may be "done in their name" when it yet remains to be done, than to actually *see* (and judge) what *has* been done by consulting the court's file *after* it is done. This is like saying that a person asked to invest in a business presumptively benefits from being required to make a decision as far as possible in advance of its actual launch, with correspondingly few details about its management and business plan. If generalizations on this point are in order, which we doubt, the assumption in *Home Savings* seems less defensible than its contrary, i.e., the later the notice to the class, the better equipped absent members will be to intelligently protect their rights and interests.[5] This is not to foreclose the possibility that particular circumstances might arise in which absent class members would be injured by a delay in notice. In general, however, so long as they retain the right to opt out, the requirement of prompt notice cannot be said to serve their interests; rather it exists for the benefit of the court and the parties immediately before it.

Nor is a blanket prohibition on precertification rulings on the merits justified by the notion that such rulings will invariably injure the *defendant* by affording class

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[5] This point was recognized in *Colwell Co. v. Superior Court* (1975) 50 Cal.App.3d 32, where the court quoted from a federal decision in upholding a *defendant's* right to a precertification determination on the merits: " 'If [the class representative] loses his case . . . [absent members] will not be bound. If [he] establishes [his case] they can be afforded the same opting out option, but the notice will advise them that there is a judgment establishing [the case], and *their decision will be more informed than if the notice was sent early in the proceedings*.' " (*Id.* at p. 35, quoting *Katz v. Carte Blanche Corporation* (3d Cir. 1974) 496 F.2d 747, 760-761, italics added.)

members an unfair opportunity to escape the effects of an adverse judgment. For one thing, no such injury can be suffered where the precertification ruling goes *in favor of the class*. Knowledge of such a ruling cannot be expected to induce absent members to opt out; if anything, it would be expected to have the opposite effect.[6] Thus where the issue comes before an appellate court only *after* a ruling has been made in favor of the class, it is difficult to conceive how the class defendant can ever make the showing of prejudice required for appellate relief. (See Cal. Const., art. VI, § 13 [no reversal for non-prejudicial error]; *Kardly v. State Farm Mut. Auto. Ins. Co.* (1995) 31 Cal.App.4th 1746, 1751-1753 [erroneous exclusion of evidence, amounting to denial of due process, assessed for prejudicial effect].) Certainly Fireside has not done so here.

Moreover, even viewed in advance of the proposed ruling, not all motions seeking an adjudication "on the merits" threaten the harm on which the due process violation in

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[6] It might be suggested that knowledge of such a ruling gives absent members a reason they would not otherwise have to *stay in* the class, and that this too is somehow unfair to the defendant. Such a premise encounters numerous conceptual difficulties, not to mention the empirical obstacle presented by the infinitesimal opt-out rates reported in typical consumer class actions. (See Eisenberg & Miller, The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues (2004) 57 Vand. L. Rev. 1529, 1532, fn. 8 ["class members overwhelmingly do nothing when provided the option to opt-out"]; Abraham L. Pomerantz & William E. Haudek, Class Actions (1969) 2 Rev. of Sec. Reg. 937, 940, quoted in Perino, Class Action Chaos? The Theory Of The Core And An Analysis Of Opt-Out Rights In Mass Tort Class Actions (1997) 46 Emory L.J. 85, 145, fn. 245 [" 'As a practical matter, in class actions brought up to now, the percentage of persons seeking exclusion or to be represented by their own counsel has been extremely small. Most members of the class are usually content to let the aggressive plaintiff and his lawyer represent their interests, particularly in cases involving a large class where individual members do not have much of a stake' "]; Hines, The Dangerous Allure of the Issue Class Action (2004) 79 Ind.L.J. 567, 602, fn. 221, quoting Coffee, Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation (2000) 100 Colum. L. Rev. 370, 422 [" 'rational apathy' rather than meaningful consent may explain low opt-out rates among class members in most settlement class actions involving 'modest claims and no real alternative because their claims are typically too small to litigate on an individual basis' "].)

Home Savings is predicated. Again, that harm occurs when the court issues a ruling *in favor of the defendant* before absent members of the class have been bound to the eventual judgment. But not all rulings on the merits provide an occasion for such a result. The *Home Savings* court conceived of all motions going to "the merits" as presenting the trial court with a heads-or-tails choice between imposing liability and exonerating the defendant. In fact a trial court is often asked to vindicate the claims or defenses of one party without being given any reciprocal opportunity to vindicate the opposing party's position "on the merits." Thus a plaintiff might move for judgment on the pleadings, arguing that while her complaint states a cause of action, the defendant's answer fails to plead a defense because, e.g., it admits the elements of the plaintiff's claim without stating facts sufficient to constitute an affirmative defense. If the court agreed with these contentions it could indeed enter a judgment for the plaintiff. But if the court did *not* agree with these contentions it would *not* be compelled to enter judgment for the defendant; indeed, to do so would constitute error. The motion would raise only one question, i.e., whether the validity of the plaintiff's claim appeared as a matter of law on the face of the pleadings. A negative answer could well mean, and typically would mean, that the court believed the defendant's pleading had raised issues of fact requiring a trial. Even if the court believed that the *defendant* was entitled to judgment as a matter of law, it would have no procedural basis on which to make such a ruling in the absence of some comparable motion *by the defendant*, with due notice to the plaintiff. For these reasons, a plaintiff's motion for judgment on the pleadings, summary judgment, or other dispositive order based on a question of law, cannot threaten the defendant with the harm at the heart of the *Home Savings* analysis. The ruling may resolve "the merits" in favor of the plaintiff, but it cannot resolve them in favor of the defendant. It therefore presents no opportunity for class members to exempt themselves from a judgment in the defendant's favor. On its face, a denial means only that "the merits" remain unresolved. Such pretrial motions, in other words, typically cannot be compared to a purely binary

indicator such as a coin toss—unless it is one in which the coin is entirely capable of landing on its edge.

Once it is recognized that many motions raise issues of "the merits" without offering the possibility of a judgment in the defendant's favor, the core rationale for the categorical rule in *Home Savings* evaporates. Nothing in those opinions suggests a coherent reason for prohibiting trial courts from ruling on such motions, even over the defendant's objection, where doing so may serve the ends of justice.[7] Where a class representative raises a pure issue of law in a procedural context that cannot result in a dispositive ruling for the defendant, concerns about "one-way intervention" simply do not come into play. Rather the primary justification for the rule in *Home Savings* can only arise when a motion is made, prior to class notice, providing an occasion for the trial court to adjudicate class claims in the defendant's favor. If the trial court then issues such a ruling, and class members opt out as a result, the court's failure to notify the class (so as to bind its members) before the ruling may be said to have inflicted prejudice upon the defendant.[8] However, where the court rules in favor of the class, the error, if any,

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[7] The defendant's opposition, after all, may be purely tactical. Counsel for the class representative here argues in effect that the objection to one-way intervention is just the latest in a series of tactical devices employed by Fireside for the purpose, as the class representative contends, of impeding the resolution of class claims and the action as a whole. We need not attempt to read a particular class defendant's mind to know that defendants faced with potentially large judgments may naturally be inclined to pursue delay as the next best thing to victory. One of the regrettable effects of the *Home Savings* rule is that it provides class defendants with a completely artificial *tactical* incentive to oppose *any* motion going to "the merits" in the hope that a ruling over their objection may invalidate a later order certifying the class. Similar tactical effects flow inevitably from procedural rules of all kinds, but there is no reason to tolerate them when the rule at issue lacks a sound basis.

[8] For present purposes we assume, as did the *Home Savings* court, that absent class members who fail to opt out will in fact be bound by an adverse judgment in any subsequent litigation. It would be more accurate, however, to say that they *might* be bound, or at most, would *probably* be bound. The preclusive effect of a judgment is not

cannot be *prejudicial*, at least in the absence of some concrete showing to that effect.[9] Thus a ruling in favor of class claims cannot rationally be attacked on one-way intervention grounds.

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for the rendering court to decide, but remains open to examination if and when the judgment is raised as a bar to subsequent litigation. (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 969 [rights of absent members to relitigate issues ostensibly determined in a class action are "not before the class action court"]; *id.* at p. 968, fn. 12, italics and parentheses in original, quoting Amendments to Rules of Civil Procedure (1966) 39 F.R.D. 69, 106 [" 'the court conducting the [class] action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action' "].) As with many of the conceptions underlying *Home Savings*, the ostensibly stark choice between a judgment that binds absent members and one that does not conveniently overlook a vast body of law and a wide variety of complicating factors that may affect the bottom-line question—which is, for the defendant, to what extent will the outcome in the present litigation protect it from having to defend later litigation raising the same issues? The answer depends not only on the law of judgments and the factors governing its application but on variables affecting the willingness of class members to institute such litigation—factors such as the amount at stake, the extent of and basis for dissatisfaction with the first result, and the strength of any adverse precedent (presumably including the first result) that may be presented to the second court. These and other considerations led Justice Kaus to speak of the "goal" of class action procedure as one of "*practical* res judicata." (*Cartt v. Superior Court*, *supra*, 50 Cal.App.3d at p. 968, italics added.) This sense of the practicalities, so indispensable to sound procedural analysis, seems entirely lacking from the *Home Savings* cases.

[9] No matter whom it favors, of course, the ruling on the merits is subject to eventual appellate review and, if it is erroneous, reversal. If the court rules for the class, it is presumably because the class is entitled to judgment. If that is not the case, the defendant's remedy is to challenge the ruling on the merits, not to assert a spurious procedural bar based on failure to notify the class prior to the ruling.

The availability of appellate review exposes another dubiety in *Home Savings*, i.e., the supposition that a trial court's "ruling on the merits" permits class members to "know" the ultimate outcome of the litigation. In fact no one can be certain of the outcome of any lawsuit until a judgment has been entered and has become immune from appellate review. Even then it remains open to collateral attack, permitting a person ostensibly bound by it to contest its validity. (See fn. 8, *ante*.) All a trial court's "ruling on the merits" does is provide a firmer basis for class members to estimate the *chances* of success. The same may be true of countless other events, including rulings on similar claims by other courts and rulings on non-merits issues by the same court. Indeed it is

Even if we assume a situation in which the trial court's actions may tend to produce a judgment for the defendant from which some class members will have opted out, the basis for the court's due process analysis remains obscure. At bottom the decision appears to rest not on any ponderable injury to a concrete interest, but on a perceived *lack of symmetry* in conducting a proceeding that exposes the defendant to liability on numerous claims without guaranteeing a reciprocal opportunity to conclusively defeat those claims should the merits be decided for the defendant. But the class action procedure is designed in the interests of judicial efficiency, not in recognition of some right in defendants to be "subjected to only one lawsuit." (*Cartt v. Superior Court*, *supra*, 50 Cal.App.3d at p. 968.) A purely conceptual asymmetry cannot properly be relied upon to impose categorical constraints on the trial court's power to manage a putative class action in a manner most conducive to substantial justice and judicial economy. The court in *Home Savings I*, *supra*, 42 Cal.App.3d at p. 1014, wrote that "[d]ue process of law calls for a certain degree of logic and order in the trial of an action." But while logic is always orderly, "order" is not always logical, especially when it involves slavish devotion to abstract conceptions of symmetry divorced from practical experience. "Order" of this kind, unlike logic, is entirely in the eye of the beholder.

D. Other California Cases

Perhaps the best that can be said for the *Home Savings* decisions is that they answer a greatly overstated evil with a grossly overbroad rule. And perhaps not surprisingly, their holdings have met with less than perfect adherence from other courts.

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easy to posit rulings on *discovery motions* that could have a direct bearing on the likelihood of ultimately establishing class claims, or defenses to them. No one would suggest that the court violates the defendant's due process rights by ruling on such issues before notice has been given to the class. The *Home Savings* analysis is thus revealed as unsound in another respect, i.e., its treatment of a "ruling on the merits" as some sort of uniquely infallible portent of the final result. In fact it is neither unique *nor* infallible.

The California Supreme Court has repeatedly acknowledged their rationale without endorsing it. In *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17 (*Pacific Land*), the court "assume[d], for the purposes of the present proceeding, that the reasoning in the [*Home Savings*] cases is sound," but rejected on other grounds a contention that the trial court had erred by issuing a preliminary injunction before ruling on class certification.[10] In *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 372, the court described itself as having "found it unnecessary" in *Pacific Land* to "examine the validity" of the holding in *Home Savings* that the "asserted unfairness to defendants" identified in those cases "amounts to a denial of due process." "[A]s in *Pacific Land Research*," the court ultimately concluded, "we . . . need not pass on the soundness of the *Home* decisions' due process analysis because, even if we assume arguendo that such analysis is correct, the partial summary judgment order at issue here . . . must be upheld since defendant waived whatever rights may be afforded by the *Home* decisions." (*Id.* at p. 373.) In *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 262, the court confirmed that by acquiescing in a ruling on

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[10] In *Clemons v. Western Photo Camera Hut* (1981) 117 Cal.App.3d 392, the same court that decided *Home Savings* embraced the argument the Supreme Court refused to reach in *Pacific Land*, *supra*, 20 Cal.3d 10: That because a motion for preliminary injunction requires a showing that the plaintiff is likely to succeed on the merits, the trial court is powerless to grant such a motion if the complaint includes class allegations and no class has yet been certified. More precisely, the court held that the trial court there had *acted within its discretion* by denying a preliminary injunction on the basis of *Home Savings*. (*Id.* at pp. 395-396.) Under this holding, if a defendant were spewing toxic waste into a shared reservoir and a class action were filed on behalf of the reservoir's users, the trial court would act within its discretion by refusing to grant a preliminary injunction *solely because* to do so might forecast to class members the ultimate outcome of the case. It is hardly a surprise that the Legislature promptly overturned this holding by amending the governing statute to permit preliminary injunctions in class actions "upon the same grounds as in other actions, whether or not the class has been certified." (1982 Stats., ch. 812, § 1, p. 3101; see now Code Civ. Proc., § 527, subd. (b).)

the merits, a defendant waives "whatever right to a premerit determination of the class action issues it might have had." In view of this holding, the court declared, there was "no occasion to address plaintiff's general challenge to the constitutional underpinnings of the *Home I* and *Home II* decisions . . . ." (*Id.* at p. 265, fn. 10.)

The nearest the court has come to endorsing *Home Savings* was in *Green v. Obledo* (1981) 29 Cal.3d 126, 146, where it described those cases as holding that "procedural class-action issues including—the composition of the class—must *ordinarily* be resolved before a decision on the merits is reached." (Italics added.) The court implicitly adopted that proposition in support of its holding that the trial court there had erred by partially decertifying a class after granting the plaintiff's motion for summary judgment. (*Id.* at p. 145.) The court expressly declined, however, to "fashion an iron-clad standard removing all jurisdiction from a trial court to decertify a class or part thereof after such a decision. We have always recognized that it is desirable for the trial court to retain some measure of flexibility in handling a class action." (*Id.* at p. 148.) We thus view the opinion as adopting a substantially less categorical view than in *Home Savings*, one under which class issues should *ordinarily* be decided before issues going to the merits, but implicitly entrusting to the trial court the question whether a departure from that preference is warranted.

Nor have the Courts of Appeal formed a parade behind the *Home Savings* decisions. In *Lowry v. Obledo* (1980) 111 Cal.App.3d 14, the court all but repudiated *Home Savings*, noting that the Supreme Court had "expressly declined to endorse the *Home* cases and . . . found their reasoning inapplicable in two instances." (*Id.* at p. 22, citing *Pacific Land, supra*, 20 Cal.3d at p. 20, and *Civil Service Employees Insurance Co. v. Superior Court, supra*, 22 Cal.3d at p. 373.) The court reasoned that the case before it, seeking to invalidate a welfare regulation, presented "no danger of one-way intervention" (*Lowry v. Obledo, supra*, 111 Cal.App.3d at p. 23) because the "primary issue" was "a matter of law" (*id.* at p. 24). "Had plaintiffs lost on the merits, the doctrine of stare

decisis would have made the likelihood of new litigation by AFDC recipients not bound by notice of this action ' ". . . a remote theoretical possibility." ' " (*Ibid*., quoting *Pacific Land*, *supra*, 20 Cal.3d at p. 20.)

In *Cartt v. Superior Court*, *supra*, 50 Cal.App.3d 960, the court rejected the notion that federal constitutional law grants class action defendants a right to "be assured in advance that in the event of a defense victory all members of the class will be foreclosed from further proceedings." (*Id.* at p. 968, fn. omitted.) The "principle" purpose of notice to the class, wrote Justice Kaus, is not to secure the defendant an ironclad bar to further litigation but to "protect[] . . . the integrity of the class action process, one of the functions of which is to prevent burdening the courts with multiple claims where one will do." (*Id.* at p. 970; see *id.* at p. 968 [defendant has "no constitutional right to be subjected to only one lawsuit"].) It is this goal which requires that the action "settle the dispute between the class and the defendant for all practical, as distinguished from theoretical, purposes: that the entire class' complaint [be] adjudicated *de facto*, if not *de jure*." (*Id*. p. 968.) "Just how this goal of practical res judicata shall be furthered is . . . not a matter of federal constitutional concern as such: rather, it is the business of the state which furnishes the forum for the class action." (*Ibid*, fn. omitted.) The goal is met if, under the circumstances, "renewed harassment is nothing but a remote theoretical possibility." (*Id.* at p. 969, fn. omitted.) The technical res judicata effect of the judgment may actually be "as a practical matter, . . . the least important of the factors which will discourage future litigation . . . ." (*Id.* at p. 970.)

In *Hypolite v. Carleson* (1975) 52 Cal.App.3d 566, 573, decided after *Home Savings I* but before *Home Savings II*, a challenge to a welfare regulation went to trial without any consideration of class issues, despite the presence of class allegations in the complaint. The trial court's initial judgment for the welfare director was reversed, and the trial court entered judgment for the named plaintiffs. (*Id.* at p. 574.) Several months later the court granted a motion by the plaintiffs to certify the class, then entered an

amended judgment defining the class and directing the allowance of benefits to its members. (*Id.* at p. 575.) The question on appeal was whether the amended judgment was precluded by the failure to certify the class "until after the substantive issue of the regulation's validity had been adjudicated to finality . . . ." (*Id.* at p. 577.) The court noted that there was "no statutory requirement that such steps be taken before the trial of an action of this nature commenced as a class action in a California court . . . ." (*Ibid*, fn. omitted.)

To be sure, the response to *Home Savings* has not been universally hostile. (See *Travelers Ins. Co. v. Superior Court* (1977) 65 Cal.App.3d 751, 756-757, 761 [citing *Home Savings* cases in support of rule that trial court "should" determine class "before trying the issue of the defendant's liability"; rejecting defendant's argument that class allegations must be dismissed, but vacating order going to merits]; *Kass v. Young* (1977) 67 Cal.App.3d 100, 104-105 [trial court committed "jurisdictional" error by entering default judgment against defendant in uncertified class action, such that judgment could be attacked at any time].) It nonetheless appears that the only real point of consensus in the California cases is that trial courts should *ordinarily* reserve rulings "on the merits" until after they have certified a class, if one is to be certified, and have bound its members to the judgment, insofar as they will be bound, by giving notice of the action and an opportunity to opt out.

E. Federal Authority

The *Home Savings* court found support for its conclusions not in any California statute, rule, or precedent, but in *federal* procedural rules as interpreted and applied by federal courts. (*Home Savings I*, *supra*, 42 Cal.App.3d at pp. 1012-1013, citing Fed. Rule Civ. Proc., rule 23; *American Pipe & Construction Co. v. Utah* (1974) 414 U.S. 538, 545-549 (*American Pipe*); *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156 (*Eisen*).) California cases have endorsed the use of federal authorities for guidance on class action procedures where California law is silent. (See *Vasquez v. Superior Court*, *supra*,

4 Cal.3d 800, 821; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453.) It is instructive, therefore, to examine the evolving treatment of one-way intervention in the federal courts and rules of procedure.

In *American Pipe*, *supra*, 414 U.S. 538, the court was faced with the question whether the pendency of a class action had tolled the running of the statute of limitations against the claims of absent class members, so that individual claims were timely when filed promptly after class treatment was denied. The analysis of this issue required that the court compare procedures under the rule governing class actions (Fed. Rules of Civ. Procedure, rule 23 (rule 23)) as it then stood and as it had stood before 1966, when some courts held that the pendency of a class action did *not* protect the claims of absent class members. The court noted that the amendments had been actuated in significant part by concerns with one-way intervention: "Under Rule 23 as it stood prior to its extensive amendment in 1966 [citation], a so-called 'spurious' class action could be maintained when 'the character of the right sought to be enforced for or against the class is . . . several, and there is a common question of law or fact affecting the several rights and a common relief is sought.' The Rule, however, contained no mechanism for determining at any point in advance of final judgment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment. Rather, '[w]hen a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted.' [Citations.] A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This

situation—the potential for so-called 'one-way intervention'—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." (*American Pipe*, *supra*, 414 U.S. at pp. 545-547, fns. omitted.) This was accomplished by requiring the court to give notice to absent members, which required them in turn to elect between participating in the action and partaking of any judgment, or opting out and avoiding its effects, but also foregoing any benefits that would accrue to class members under it. (*Id.* at pp. 548-549.)[11]

The second Supreme Court case cited in *Home Savings* was *Eisen*, *supra*, 417 U.S. 156. (See *Home Savings I*, *supra*, 42 Cal.App.3d at pp. 1013-1014; *Home Savings II*, *supra*, 54 Cal.App.3d at p. 212.) The question in *Eisen* was whether it was error to order a class defendant to bear 90 percent of the cost of notice to a plaintiff class based on a finding, "made after a preliminary hearing on the merits of the case, that [the plaintiff] was 'more than likely' to prevail on his claims." (*Eisen*, *supra*, 417 U.S. at p. 177.) The Supreme Court found no authorization in the federal rules for such a "preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action . . . ." (*Ibid*.) It declared the trial court's actions "directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a

[11] The cited provisions of the Federal Rules apply to actions in which class members may choose whether to participate. The rules contemplate other class actions in which no such choice is given. (Fed. Rules Civ. Proc., rules 23(b)(1)-(2), 23(c)(2)-(3).) There is no occasion to concern ourselves with this distinction here, since it appears to be acknowledged by all participants that absent members of the instant class must be given notice and an opportunity to opt out.

class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action . . . .' " (*Id.* at p. 178.) It observed that "a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant."[12] (*Ibid*.)

Neither *American Pipe* nor *Eisen* actually addressed the existence or scope of any supposed "rule" against one-way intervention. Such a rule was found, however, in a relatively early case cited by Fireside here and by the court in *Home Savings II*, *supra*, 54 Cal.App.3d at p. 212. In *Peritz v. Liberty Loan Corp.* (7th Cir. 1975) 523 F.2d 349 (*Peritz*), the district court had severed class certification issues from the central liability issue and *tried the latter to a jury*, over the defendant's objection, before certifying a class. In reversing, the Seventh Circuit relied on the then-recent decisions in *Eisen* and *American Pipe*, finding their "obvious import" to be that "amended Rule 23 [*r*]*equires* class certification prior to a determination on the merits." (*Peritz, supra*, at p. 353, italics original.) The court drew further support for this conclusion from the rule's provision that an order certifying a class "may be altered or amended *before the decision on the*

[12] The reference to "findings" suggests that the court's concern might not have extended to the early resolution of questions of law, which may be relatively immune to subliminal influence and are subject in any event to independent appellate review. The case has been described by a leading commentator as standing only for the principle that "the application of Rule 23 criteria was independent of the merits of the complaint," such that "it was improper for the court to conduct any minihearing on the merits *in connection with class certification*." (Newberg on Class Actions (4th ed. 2002) Initial Class Determination: Strategies and Procedures, § 7:9, p. 33, italics added.) The California Supreme Court reached a similar conclusion in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443, in rejecting a class *defendant's* claim that class certification could properly be *denied* on the ground that class claims were meritless.

merits." (*Id.* at p. 353, quoting former Fed. Rules Civ. Proc., rule 23 (c)(2), italics added.)

Despite a few seemingly categorical decisions like *Peritz*, the notion of a blanket prohibition on pre-certification rulings on the merits has not commanded broad assent in the federal courts. (See Newberg on Class Actions, *supra*, § 7:15, pp. 48-57, and cases cited.) Thus in *Christensen v. Kiewit-Murdock Inv. Corp.* (2d Cir. 1987) 815 F.2d 206, the Second Circuit upheld a decision to defer class certification pending a ruling on a defendant's motion to dismiss for failure to state a claim. "In any particular case," the court wrote, "such procedure may or may not be appropriate depending on the complexity of the legal or factual issues raised by the motion to certify." (*Id.* at p. 214.) And in *Postow v. OBA Federal Sav. and Loan Ass'n* (D.C.Cir. 1980) 627 F.2d 1370, 1380 (*Postow*), the District of Columbia Circuit declined to reverse an order certifying a class merely because "the final designation of the class and the sending of notice to the members occurred after the court granted the [plaintiffs'] motion for summary judgment." The court noted that despite the prohibitory effect given by some courts to *Eisen*, the text of that decision actually indicates "that the plaintiffs there could have continued with their class action, despite the impropriety of the district court's mini-hearing, if they had notified the members of the class rather than attempted to shift part of the notification burden to the defendant." (*Id.* at p. 1381, citing *Eisen*, *supra*, 417 U.S. at p. 179 & fn. 16.) The court concluded that "[d]espite its rhetoric, the *Eisen* Court itself was thus not unduly concerned about class members joining after learning of the trial judge's view of the merits." (*Postow*, *supra*, 627 F.2d. at p. 1381.) The court also noted that later Supreme Court decisions had contemplated the *reversal* of orders *denying* class certification on appeal from a *final judgment*, a result that would necessarily lead to certification of a class after a ruling on the merits had been made and reviewed on appeal—a procedure that would inevitably afford an opportunity for one-way intervention. (*Id.* at pp. 1382-1383, citing *United Airlines, Inc. v. McDonald* (1977)

432 U.S. 385, 396 [putative member of class permitted to intervene after final judgment to appeal denial of class certification]; *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 465, 469 [order denying certification not appealable as matter of right but reviewable on appeal from final judgment]; see also Newberg, *supra*, Notice, § 8.10, p. 195 [describing one-way intervention as a "recognized by-product when a class denial is reversed on appeal after a decision on the merits"].) Indeed, in *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 336, the court affirmed the reversal of an order denying certification over the dissent's explicit objection that "the Court's decision to allow appeals in this situation will reinstate the 'one-way intervention' that the 1966 amendments to Rule 23 were intended to eliminate." (*Id.* at p. 354 (dis. opn. of Powell, J.), fn. omitted.)

The foundation for any supposed federal "rule" against one-way intervention was further eroded, if not obliterated, by the 2003 amendments to rule 23 of the Federal Rules of Civil Procedure. The former requirement of a certification ruling "[a]s soon as practicable after the commencement of [the] action"—language central to the discussions in *American Pipe* and *Eisen*—was replaced with the rather inelegant directive that class issues be determined "at an early practicable time." (Fed. Rules of Civ. Proc., rule 23(c)(1)(A).) The 2003 amendments also replaced the language quoted in *Peritz*, which had permitted a certification order to be modified "before the decision on the merits" with one permitting alteration or amendment "before final judgment." (Fed. Rules of Civ. Proc., rule 23(c)(1)(C).) In commenting on the latter change, the advisory committee disavowed any intention to "restore the practice of 'one-way intervention' that was rejected by the 1966 revision of Rule 23." (Advisory Comm. notes to Fed. Rules of Civ. Proc., rule 23, 2003 Amends., quoted after 28 U.S.C.A., Fed. Rules of Civ. Procedure, rule 23 (2004 pocket part) p. 68.) Yet it acknowledged that by permitting amendments to a certification order up to the entry of final judgment, the amended rule necessarily contemplates the possibility of "amend[ing] the class definition" after an adjudication of

the merits, and that such amendments could require giving "notice and an opportunity to request exclusion" to newly included members. (*Id.* at p. 68; see *id.* at p. 69 [in context of settlement, "[r]edefinition of a class . . . may require notice to new class members . . . ."].) As to such new members, "one-way intervention"—at least as conceived in *Home Savings*—is precisely what the rule permits.

The erosion of the federal inhibition against one-way intervention is reflected in the latest edition of the Manual on Complex Litigation, a publication of the Federal Judicial Center. The previous version was already far from categorical in its discouragement of one-way intervention, stating only that precertification summary judgment in favor of class representatives " 'should usually be avoided.' " (Newberg on Class Actions, *supra*, § 7:15, p. 56, quoting Fed. Jud. Ctr., Manual for Complex Litigation (3d ed. 1995) § 21.11, p. 246.) Even this mild admonition—indeed all reference to one-way intervention—has now been omitted. The only seemingly relevant provision is this: "Motions such as challenges to jurisdiction and venue, motions to dismiss for failure to state a claim, and motions for summary judgment *may* be decided before a motion to certify the class, although such precertification rulings bind only the named parties." (Fed. Jud. Ctr., Manual for Complex Litigation (4th ed. 2004) Class Actions, § 21.11, p. 246, italics added.)

It thus appears that the "rule" against one-way intervention was never categorically applied in federal courts. At most, federal courts have encouraged an early determination of class issues, and may not permit—or may not until recently have permitted—the *postponement* of class certification, over a defendant's clear and consistent objection, *for the purpose* of rendering a decision on the merits. Whatever its erstwhile status, the putative federal "rule" against deciding the merits before certification has become little more than a jurisprudential derelict, the hollow shell of a rule, suffered by virtue of judicial inertia to drift upon the surface currents of federal law.

F. Rule and Application

The correct governing principle is that "procedural class-action issues—including the composition of the class—must *ordinarily* be resolved before a decision on the merits is reached." (*Green v. Obledo*, *supra*, 29 Cal.3d at p. 146, italics added.) Whether to depart from this preferred order of proceedings is a question vested in the first instance in the sound discretion of the trial court. Where that court proposes to depart from the preferred order, and no sufficient justification for such a departure appears, a timely request for appellate intervention by extraordinarily writ should be granted. Where appellate intervention is not sought until *after* the trial court has rendered an order touching on the merits, however, the objecting party will be entitled to appellate relief only upon a showing that it has suffered, or will suffer, prejudice as a result. If a basis for relief is shown, an adequate remedy will ordinarily consist of vacating the offending ruling on the merits with directions to reconsider the matter de novo, if requested, following a determination of class issues.

Here no relief is warranted because, first, the ruling in question was not "on the merits" of the class claims but rather concerned a claim brought *against* the class representative by the class defendant (here, cross-defendant). To remain administrable, the procedural preference must be restricted to motions that actually seek an adjudication of the merits of class claims, or extended at most to claims by class representatives that are substantially identical to class claims. Any other dividing line will prove indefensible since, as we have noted, all sorts of rulings can be seen as providing class members with a reason to forecast an outcome from which they might prefer to opt out.

Second, even if the ruling here were held to have departed without justification from the preference for deciding certification before "the merits," Fireside has pointed to no concrete prejudice and seemingly cannot do so since the ruling favored the class and

cannot operate to deprive Fireside of a binding judgment in its favor.[13] As we have already noted, in the absence of a concrete showing it is impossible to discern any prejudice to a defendant who complains of a precertification ruling *that favors the class*. This is not to say that no defendant could ever show injury in such a case, but Fireside certainly has not done so. Thus even if the ruling on Gonzalez's motion for judgment on the pleadings could be viewed as one "on the merits" of the class claims, and even if we accepted arguendo that this was error, no prejudice has been made to appear. So far as anything before us shows, Fireside has suffered no detriment whatever from the court's granting Gonzalez's motion before notifying the class.

Finally we observe that even if prejudicial error appeared we would go no further than to direct the trial court to set aside the offending order until the class had been notified and given an opportunity to opt out. Fireside argues strenuously that the order certifying the class must be reversed and, implicitly, that Gonzalez must be forever precluded from pursuing class claims, but such a disposition seems neither warranted nor proper. Defendant's proposal seems to rest on some notion that the law requires proceeding in such a manner as to leave absent class members guessing at the ultimate outcome until the time has passed for them to opt out, and that in particular they must be denied any inkling, as they weigh the chances of success, of how the court may rule on the merits. Such an objective is neither jurisprudentially sound nor practically attainable. If relief were warranted, we would simply order the court to vacate its order granting judgment on the pleadings and to stay further proceedings on that motion until the class had been notified, whereupon the court could revisit the matter de novo. As we have

[13] Both parties have exhorted us not to address the merits of the order granting judgment on the pleadings unless we reverse the order certifying the class. We therefore refrain from doing so. We note again, however, that if that order was made in error, Fireside will eventually have an opportunity to secure its reversal.

concluded, however, no relief is warranted on the basis of any supposed violation of a rule against one-way intervention.

II. *Abuse of Discretion*

A. Adequacy of Representation

Fireside also contends that the trial court abused its discretion by certifying the class.

Code of Civil Procedure section 382 "authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.] The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.]" (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

The question whether these criteria are satisfied is largely entrusted to the trial court, whose determination is entitled to considerable appellate deference. "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) "[I]n the absence of other error, [a reviewing] court will not disturb a trial court ruling on class certification which is supported by substantial evidence "unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].' " (*Id.* at pp. 435-436, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) Thus the task of a reviewing court " 'is not to determine in the first instance whether the requested class is appropriate but rather whether the trial court has abused its discretion in [granting]

certification.' " (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, quoting *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 654.)

Here Fireside contends that the pertinent criteria are not satisfied because (1) Gonzalez "is not a typical or adequate class representative"; (2) certification "will not bring substantial benefits to the parties or the court"; and (3) the objectives of a class action would be achieved more efficiently by a non-class suit under the Unfair Competition Law, Business and Professions Code sections 17200 et seq.

Fireside provides no persuasive basis to conclude that the trial court erred in finding Gonzalez to be an adequate representative of class interests. Fireside offers a number of assertions going to this point: (1) Having "never paid a cent on her $8,000 deficiency," Gonzalez is not entitled to any refunds; (2) because she has now secured a ruling in her favor defeating Fireside's claims against her, Gonzalez "no longer has any dog in this fight"; (3) Gonzalez's claims are subject to a "unique defense" because in obtaining a loan from Fireside "she was a straw buyer, posing as the intended purchaser when she did not intend to use, or more importantly, pay for the van"; (4) she is subject to a second "unique defense" because of evidence that when the van was repossessed, her father "threatened the repossessor with a large metal rod"; (5) these unique circumstances "are likely to distract Gonzalez from the class claim"; (6) she breached her fiduciary duties to the class by "pursu[ing] a premature adjudication of the merits of Fireside's claim against her individually"; and (7) she inadequately represented the class by failing to raise all claims that class members might raise were they to sue for themselves, particularly the claims she brought on her own behalf for conversion and violations of statutes concerning fair debt collection practices.

The trial court was not obliged to find that Gonzalez's claims were atypical by virtue of Fireside's "unique defense" that she was a "straw buyer." At the core of this argument is the supposition that by purchasing a vehicle for her father's use, with the expectation that he would make the actual payments, Gonzalez engaged in inequitable

conduct exposing her to a defense of unclean hands. Fireside has failed entirely to establish anything inequitable in this conduct. As Gonzalez points out, one would suppose that loans such as the one here are routinely made to parents purchasing vehicles for their children. If Fireside wishes to prevent such arrangements it is certainly free to require appropriate undertakings and assurances from borrowers. In any event, we are directed to nothing suggesting that Gonzalez assured Fireside, or that Fireside sought assurances, that she was purchasing the vehicle for her own use, or that she expected to pay for it out of her own pocket. Through all its denunciations of Gonzalez's "inequitable" conduct there is no breath of any actual injury suffered by, or threatened against, Fireside. The only assurances this record disclose were the formal contractual undertakings of the loan agreement to which Gonzalez bound herself. It was to her that Fireside looked when payments were not made, and it was from her that it sought a deficiency judgment. There has never been any suggestion that she sought to evade her contractual obligations by way of her supposed "straw buyer" status or otherwise. Given these facts the trial court did not abuse its discretion in discounting this "unique defense" as a basis for finding her an atypical class member.

Nor are we persuaded that Gonzalez's claims are rendered atypical by the events surrounding repossession of the vehicle. Her father testified in deposition that he was sleeping in the van when two men arrived and shone a lamp in his face. Fearing an assault, he raised a curved piece of metal, which may have been a crowbar, but which he described, in translated testimony, as an "arch." Fireside contends that this conduct amounted to a "threat of a criminal act of violence" which "barred Gonzalez from reinstating the contract by making up past-due payments and paying delinquency charges." This contention rests on Civil Code section 2983.3, subdivision (b)(4), under which a buyer under a conditional sale contract loses the statutory right to reinstate the contract if the lender finds in good faith that "[t]he *buyer or any other person liable on the contract* has committed, attempted to commit, or threatened to commit criminal acts

of violence or bodily harm against an agent, employee, or officer of the seller or holder in connection with the seller's or holder's repossession of or attempt to repossess the motor vehicle." (Italics added.)

The statute by its terms has no application here because there is no suggestion that the person whose conduct Fireside cites was either the buyer under the contract or another "person liable on the contract." Defendant does not address this rather patent weakness in its "defense" but simply asserts ipso facto that because of her father's conduct Gonzalez was precluded, as other buyers were not, from reinstating her contract. Accepting this undemonstrated point for purposes of argument, we are still left to puzzle out the basis for defendant's contention that this distinction between Gonzalez's claim and those of other class members renders her *class* claims atypical. The effect of the defense, if borne out, is to destroy Gonzalez's statutory right to *reinstate the loan contract* by *making up past due amounts*. (See Civ. Code, § 2983.3, subd. (b)(4).) But the class claims are concerned with defects in the notice of the right to "redeem" the seized vehicle and thus avoid its forfeiture by *paying the full indebtedness*. (*Id*., § 2983.2, subd. (a)(1).) Fireside leaves us to guess at the basis for its implicit assumption that the latter claims depend on, or are in some material way affected by, Gonzalez's alleged forfeiture of the right to reinstate the contract. Indeed Fireside impliedly concedes the lack of such a connection by falling back on the contention not that these facts make Gonzalez's class claims atypical but that she will be "distract[ed] . . . from the class claim" by her individual claim for conversion based on Fireside's refusal to allow reinstatement of her contract.

Further, we cannot help but notice a certain tension between the different components of this argument. On the one hand, the conversion claim is said to be subject to a "unique defense" under which Fireside asserts it properly refused to allow reinstatement. On the other hand, Gonzalez's claim predicated on that refusal is depicted as an avenue of relief so promising that it is likely to "distract" her from her class claims.

The trial court acted well within its discretion in rejecting this hodgepodge of competing propositions and finding that Gonzalez will adequately represent the class claims whether or not she vigorously pursues her individual claims on the side.

Nor did the trial court abuse its discretion by rejecting the hypothesis that Gonzalez's claim was atypical because she "never paid a cent on her $8,000 deficiency."[14] The cited record basis for this assertion is two pages of deposition testimony in which Gonzalez described the process by which her father made monthly payments under the contract. Although the testimony is not free of ambiguity, it may be taken to mean that she never made any of the "monthly payments" and never gave her father any money to make them. As plaintiff points out, Fireside's own records show a payment of $210.75 *after the van had been repossessed*. Fireside's response is that "[t]he record does not show who made that payment," and that it was plaintiff's burden to present evidence that the payment represented an "exception" to the "rule" described in her deposition testimony. This might be a telling point if the cited testimony established the "rule" Fireside asserts, but it does not; it is readily understood as concerning only "monthly payments." So far as the record shows, Gonzalez was never asked who made the post-repossession payment. To be sure, the record is also insufficient to support Gonzalez's assertion that Fireside's claims on this point are "simply dead wrong." In fact there is no evidence either way.

If it is true, as counsel now unequivocally asserts to this court, that Gonzalez rather than someone else made the payment in question, it is regrettable that no *evidence* to that effect was placed before the trial court. Instead her counsel cited the same documents as are cited here, which establish only a payment by someone not identified in

[14] On the eve of oral argument counsel for Firestone submitted a letter to this court in which he cited deposition testimony he had "[i]nexplicably" neglected to bring to our attention earlier. We decline to consider this tardily interjected new matter, to which Gonzalez has had no opportunity to respond.

this record. This evidentiary vacuum causes us some concern, since all of the *damage claims* on behalf of class members posit one or more payments to Fireside toward a deficiency to which Fireside had forfeited its right. If Gonzalez in fact paid nothing toward the deficiency in her case, her claims are not typical of those class members *who have claims for damages* under the amended cross-complaint.

However, the class claims also include prayers for declaratory and injunctive relief. Class treatment is not precluded by the possibility that a representative plaintiff will not establish an entitlement to all forms of relief sought on behalf of other class members. "The fact that the class representatives had not personally incurred all of the damages suffered by each different class member does not necessarily preclude their providing adequate representation to the class. [Citation.] Differences in individual class members' proof of damages is not fatal to class certification. [Citations.] ' "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." ' [Citation.] ' "[M]ost differences in situation or interest among class members . . . should not bar class suit." ' [Citations.]" (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.)

We are satisfied that the trial court did not abuse its discretion in finding Gonzalez an adequate representative notwithstanding the open possibility that she did not herself pay any part of the deficiency claimed by Fireside under her contract. For similar reasons, we need not detain ourselves long over Fireside's contention that having secured a ruling in her favor, Gonzalez "no longer has any dog in this fight." Nor does any breach of duty to the class appear from her moving successfully for judgment on the pleadings on Fireside's complaint against her. She was fully entitled to defend herself against Fireside's claims; there was nothing premature about the ruling on that matter; and if there had been, the prematurity would have attributable to the court, not Gonzalez, whose counsel explicitly acceded in Fireside's request to withhold any ruling on the motion until after notice had been given to the class. (See fn. 3, *ante*.)

This brings us finally to the contention that Gonzalez has inadequately represented the class by failing to raise all claims that class members might raise in individual suits, particularly the claims she brought on her own behalf for conversion and violations of statutes concerning fair debt collection practices. This argument attempts to skirt a rather large pitfall, which is that there is no apparent reason to suppose that other class members *have* such claims. The gist of the conversion claim is that Fireside, presumably relying on the supposedly assaultive conduct of her father, wrongfully deprived Gonzalez of the statutory right to reinstate the contract. The gist of the unfair debt collection cause of action (see Civ. Code, §§ 1788 et seq.) is that Fireside engaged in improper debt collection practices after repossession of the vehicle, including improper notices, phone calls, and threats. Fireside's argument *assumes* that other class members could state similar claims and that permitting Gonzalez to proceed on her cross-complaint would preclude them from pursuing those claims, thus sacrificing potential awards for emotional distress and other damages. But this record does not establish that the conduct on which these claims depend was common to the class. We are directed to no evidence that Fireside wrongfully barred other class members from reinstating their contracts or that it engaged in unlawful collection practices toward them.

Gonzalez owes class members no duty, fiduciary or otherwise, to assert claims they do not have. The mere possibility that some unknown number of class members *might* have similar claims does not require reversal of the order certifying the class. The pivotal question is whether the trial court properly found that the class claims pursued by Gonzalez are those that one would "reasonably expect[] to be raised by the members of the class," so that a judgment will not, by operation of the rules of claim preclusion, "deprive class members of . . . elements of damage" to which they would otherwise be entitled. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464.)

In the case just cited, the legal theory pursued by the class representatives (nuisance) supported several elements of damage that the representatives were not

seeking, even though class members would reasonably be expected to do so if they sued in their own names. Because these remedies stood to be forfeited, the order certifying the class "sanctioned a clear violation of plaintiffs' fiduciary duty." (*City of San Jose v. Superior Court*, *supra*, 12 Cal.3d at p. 464.) Here, even if it appeared that some members of the class might possess causes of action similar to plaintiff's individual claims, or supporting similar measures of damage, it would not necessarily follow that certification had to be denied. Potential alternatives, should such claims appear, include (1) amending the complaint to assert those claims on behalf of affected class members (see *ibid.*, fn. 14); (2) limiting the issues adjudicated on behalf of the class so as to preserve individual elements of members' claims (see *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 926); (3) dividing the class into subclasses depending on the types of damage different members have suffered (*ibid.*); and (4) "us[ing] the class notice procedure to give those class members with [predominantly individual damage claims] the opportunity to opt out of the class" (*ibid.*).

In *Anthony v. General Motors Corp.* (1973) 33 Cal.App.3d 699, 704, a defendant charged with marketing defective truck wheels argued that a denial of class treatment was proper because the plaintiffs sought only to require the replacement of the wheels while some members of the class had presumably suffered property damage and personal injuries as a result of product failures. The court ruled that this concern would be adequately addressed by a notice "warn[ing] those members of the class defined in the complaint of the risk they run by remaining as participants . . . ." (*Ibid.*) We acknowledge the risk that some members of the class will disregard such a notice, but the resulting harm is offset to a substantial extent by the significant risk that the more heedless members of the class are the least likely to discover their claims or prosecute individual actions in any event.

B. Superiority of Class Action Treatment

Fireside's final challenge to the order certifying the class is that class certification confers no substantial benefits on the class or the court system because a non-representative suit under the Unfair Competition Law, Business and Professions Code sections 17200 et seq. (UCL), would be "equally advantageous." We need not explore this contention in depth. Fireside's argument seems to concede that since a class action can offer fluid recovery, it affords the potential for greater deterrent effect than is achieved through the purely restitutionary remedies allowed in an individual action under the UCL. (See *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 655, 667-668, 671.) Fireside argues, however, that "greater deterrent effect is not needed in this case," because "Fireside unintentionally made a simple mathematical error in the total amount stated in its NOIs" and "discovered and corrected that error itself in October 2001, a year before the underlying action was filed." Plaintiff strenuously protests this characterization of events, but there is no occasion here to delve into all the respects in which it may ultimately be found inaccurate. It is enough here to conclude that Fireside's self-serving unsworn descriptions of its own conduct fall far short of the showing required to establish that the trial court abused its discretion by certifying this matter for class action treatment.

DISPOSITION

The petition for extraordinary relief is denied. Costs to real party in interest, Sandra Gonzalez.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

_____

ELIA, J.

Trial Court:	Santa Clara County Superior Court Court No.: CV817959
Trial Judge:	The Honorable Kevin E. McKenney
Attorneys for Petitioner Fireside Bank:	Severson & Werson Jan T. Chilton Mark D. Lonergan
Attorneys for Real Party in Interest Sandra Gonzalez:	Kemnitzer, Anderson, Barron & Ogilvie Carol M. Brewer Andrew J. Ogilvie Alexander Community Law Center Scott C. Maurer

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