New York Class Action Law Does Not Permit the Award of Fees and Expenses to Successful Objectors to a Class Action Settlement

In a divided Opinion, the New York Court of Appeals recently held that New York's statutory class action law, Civil Practice Law and Rule ("CPLR") Section 909, does not permit the award of attorney's fees to successful objectors in a New York state class action. *Flemming* v. *Barnwell Nursing Home and Health Facilities, Inc.*, No. 149 (N.Y. Oct. 21, 2010).

I. Background

Flemming is a class action suit brought in New York state court on behalf of residents of Barnwell Nursing Home. The class alleged that the nursing home's patient care fell below statutory standards. After six years of litigation, the parties reached settlement and made a motion for court approval of the settlement pursuant to CPLR 908. Caroline Ahlfors Mouris, acting on behalf of her mother's estate, filed objections to the proposed award of attorney's fees to class counsel, compensation for settlement administrator, and the class representative's incentive award. Mouris also moved for an award of attorney's fees she incurred in bringing her objection.

The New York Supreme Court denied Mouris's objections, and awarded fees in accordance with the submission of class counsel and the requesting parties. The court held that Mouris's objections did not assist the court or benefit the class.

On appeal, the Appellate Division reduced or eliminated each of the fee awards to which Mouris had objected. However, the Appellate Division declined to award Mouris attorney's fees, holding that CPLR 909 does not provide for the payment of attorney's fees to objectors in a class action, only class counsel.[1]

The Court of Appeals affirmed.

II. The Court's Decision

In Judge Pigott's Opinion for the majority, the Court of Appeals held CPLR 909 permits the award of attorney's fees in a class action if counsel benefits all class members.[2] The Court found, however, that an important limitation of CPLR 909 is that attorney's fees are only awarded to "representatives of the class."[3] CPLR 909 does not affirmatively authorize an award of attorney's fees to counsel other than class counsel.[4] The Court noted that in other statutes, where the Legislature intended to award attorney's fees to any party, it drafted this provision explicitly in the statute.[5]

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1 *Flemming* v. *Barnwell Nursing Home and Health Facilities, Inc.*, 56 A.D.3d 162, 168 (2008).

2 The text of CPLR 909 reads: "If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class."

3 *Flemming* v. *Barnwell Nursing Home and Health Facilities, Inc.*, No. 149 (N.Y. Oct. 21, 2010), at *4.

4 *Id*. at *4.

5 *Id*. at 4-5. For example, the Court cites Surrogate Court Procedure Act § 2302(6) ("[T]he court may award to a fiduciary or any party to the proceeding such sum as it deems reasonable for . . . counsel fees . . . .").

The Court distinguished Rule 23(h) Federal Rule of Civil Procedure, under which federal courts have awarded attorney's fees to successful class action objectors, holding that, while based on the federal rule, CPLR 909 is different.[6]

The Court rejected Mouris's argument that attorney's fees may be awarded based on the "common fund" doctrine. The "common fund" doctrine first appeared in an 1882 U.S. Supreme Court decision[7] and the N.Y. Court of Appeals adopted the rule in 1891 in *Woodruff v. New York, Lake Erie & W. R.R. Co.*[8] In *Woodruff*, the Court held "that one who successfully conducts a litigation . . . for the benefit of a fund, shall be protected in the distribution of such fund for the expenses necessarily incurred by him in the performance of his duty." Here, however, the Court did not follow this rule. First, the Court noted that "no modern New York court has applied such rule to authorize an objector's counsel fee award in a class action lawsuit."[9] Further, the Court stated that the Legislature revised Article 9 of the CPLR in 1975. The Court reasoned that if the Legislature wanted to incorporate the "common fund" doctrine in the CPLR it would have done it when making these revisions.[10]

III. The Dissent

Judge Smith, joined by Chief Judge Lippman, dissented from the majority's opinion based on three arguments. First, the dissent stated the Court's decision was bad public policy. Second, the decision was contrary to a nearly 120 year-old Court of Appeals precedent. Third, the decision was not required by the plain meaning and legislative history of CPLR 909.

The dissent argued that counsel's fees need to be controlled in class actions and an objector is the most effective check on out of control fees. A defendant generally has no incentive to object to fees coming out of a settlement fund because the amount of fees awarded will not affect the total settlement amount paid by the defendant. Only a class member has incentive to object because a successful objection serves to enlarge the net amount distributed to the class. But an objector needs a lawyer and without the possibility of recovering attorney's fees there will be fewer objections to class counsel fees. Most class members without a lawyer will not object because the stake they have in the overall settlement is too small to justify hiring an attorney. The dissent believed the majority's decision "greatly lessens the likelihood that fee applications submitted by class counsel will ever be opposed."[11]

The dissent also cited the "common fund" doctrine as a reason for awarding attorney's fees to successful class action objectors. According to the dissent, the "common fund" doctrine applies because "those who benefit from the lawyer's efforts should bear the cost."[12] Though there is no New York case that speaks directly to this point, prior to the adoption of Rule 23(h) some federal courts held that "counsel fees could be awarded to objectors to class action settlements under common fund principles."[13]

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6 Rule 23(h) reads, in part: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

7 *Trustees v. Greenough*, 105 U.S. 527 (1882).

8 129 N.Y. 27 (1891).

9 *Flemming* v. *Barnwell Nursing Home and Health Facilities, Inc.*, No. 149 (N.Y. Oct. 21, 2010), at *5.

10 *Id*. at *5.

11 *Id*. at Dissent *2.

12 *Id*. at Dissent *3.

13 *See, e.g., Frankenstein v. McCrory Corp.*, 425 F. Supp. 762, 767 (S.D.N.Y. 1977); *In re Anchor Sec. Litig.*, 1991 WL

The dissent's final argument was that the majority's decision incorrectly held that the adoption of CPLR 909 in 1975 altered the common law by limiting the scope of the "common fund" doctrine.[14] The dissent opined that this would be a valid interpretation of the statute "if the Legislature had enacted a systematic codification of the common fund doctrine as it related to class actions, and left objectors' fees out of that codification." Instead, the dissent stated that there is no support for this reading in either the legislative history or the background of the statute. Further, there is no public policy reason why the Legislature would want to make this change. The majority instead gave CPLR 909 the "unintended consequence" of repealing part of the "common fund" doctrine.[15]

IV. Significance of the Decision

Flemming is a significant decision because it is fairly common in federal court for objectors to receive attorney's fees for their contribution to the class. The Court of Appeals interpreted CPLR 909 as an effective repeal of the "common fund" doctrine, thus removing the possibility of compensation for successful objectors to New York state class actions. This leaves open the possibility that New York courts, in deciding attorney's fees in a class settlement, will only hear one side of the argument. Potential objectors may simply decide not to pursue objections to class counsel's fee proposals if there is no possibility of compensation for their efforts.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

53651, at *1 (E.D.N.Y. 1991).

14 *Flemming* v. *Barnwell Nursing Home and Health Facilities, Inc.*, No. 149 (N.Y. Oct. 21, 2010), at Dissent *5.

15 *Id.* at Dissent *5.