DISMISSAL OF STOCKHOLDERS' DERIVATIVE ACTIONS AS RES JUDICATA—THE REQUIREMENT OF NOTICE OF PROPOSED DISMISSAL

Papilsky v. Berndt, 466 F.2d 251 (2d Cir. 1972)

An earlier stockholders' derivative action against defendants[1] was dismissed for plaintiff's failure to answer interrogatories.[2] The dismissal, not stated to be without prejudice, was thus an adjudication on the merits.[3] Notice of the proposed dismissal was not given to nonparty stockholders. Plaintiff Papilsky, not a party to the dismissed action, subsequently brought the instant derivative suit on the same cause of action.[4] Defendants claimed that the action was barred and moved for summary judgment. Their motion was denied. On appeal, affirmed,[5] *held*: without prior notice to nonparty stockholders, dismissal of a stockholders' derivative action for failure to answer interrogatories will not bar a subsequent derivative suit by a different stockholder based on the same cause of action.

Traditionally, for res judicata to be invoked the previous judgment must have been final and rendered on the merits.[6] A judgment that did not resolve the substantive merit of a complaint would not bar another suit on the same cause of action.[7] Notwithstanding common law doc-

1. White and Bernstein v. Driscoll, 67 Civ. 98, (S.D.N.Y. 1971) (unpublished opinion).

2. In accordance with Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure, which provides sanctions for failure to allow discovery, dismissal was entered in March, 1971, as to all but the nominal defendant, Affiliated Fund, Inc. The action against Affiliated remained pending until June, when a routine calendar order of dismissal without prejudice was entered.

3. FED. R. CIV. P. 41(b) provides in relevant part that:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

4. Papilsky v. Berndt, 333 F. Supp. 1084 (S.D.N.Y. 1971).

5. Papilsky v. Berndt, 466 F.2d 251 (2d Cir. 1972).

6. "The requirement that a judgment, to be res judicata, must be rendered 'on the merits' guarantees to every plaintiff the right once to be heard on the substance of his claim." Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968). Res judicata as used in this comment refers exclusively to the estoppel effect of a prior judgment when the same cause of action is brought a second time. *See generally* Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29 (1964); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

7. Ruskay v. Jensen, 342 F. Supp. 264 (S.D.N.Y. 1972) (certain claims barred

trine, Rule 41(b) of the Federal Rules of Civil Procedure gives most involuntary dismissals the effect of an adjudication on the merits, which normally would bar further litigation.[8] Although the preclusive effect of the rule is acknowledged to apply to pre-trial dissmissals even if the merits have not been considered,[9] actions in which there was an initial procedural bar or the defendant did not incur substantial inconvenience and expense in preparing to meet the merits are expected.[10] Furthermore, a prior judgment will not be accorded res judicata effect if doing so would result in a denial of due process.[11]

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by previous settlement, other new claims could be asserted). Usually res judicata could be invoked "only after a judgment has been rendered which reaches and determines 'the real or substantial grounds of the action or defense as distinguished from matters of practice, procedure, jurisdiction or form,'" Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968), *citing* Clegg v. United States, 112 F.2d 886, 887 (10th Cir. 1940). *See* RESTATEMENT OF JUDGMENTS § 49 (1942); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 836 (1952); Annot., 54 A.L.R.2d 473, 477, 480.

8. *See, e.g.*, Link v. Wabash R.R., 370 U.S. 626, 633 (1962), *aff'g* 291 F.2d 542 (7th Cir. 1961); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 838 (1952). Unconditional dismissal may be proper in fairness to the defendant. *See* Comment, *Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight*, 34 U. CHI. L. REV. 922, 932-35 (1967). *But see* Madden v. Perry, 264 F.2d 169, *cert. denied*, 360 U.S. 931 (1959). The effect of Rule 41(b) dismissals has not been uniform. *Compare, e.g.*, Cosentino v. Masters, Mates, and Pilots Local 28, 268 F.2d 648 (8th Cir. 1959) (failure to comply with subpoena duces tecum not an adjudication on the merits), *with* Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964) (failure to answer interrogatories was a bar). *See generally* Annot., 5 A.L.R. FED. 897.

9. Societe Internationale v. Rogers, 357 U.S. 197 (1958) (dictum); Stebbins v. State Farm Mutual Auto Ins. Co., 413 F.2d 1100, 1102 (D.C. Cir.), *cert. denied*, 396 U.S. 895 (1969); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962); Fischer v. Dover S.S. Co., 121 F. Supp. 528 (E.D.N.Y. 1954).

10. Costello v. United States, 365 U.S. 265, 285-86 (1961); Saylor v. Lindsley, 391 F.2d 965, 968-69 (2d Cir. 1968); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2373, at 237-39 (1972) [hereinafter cited as WRIGHT & MILLER]. *But see* Weissinger v. United States, 423 F.2d 795, 799 (5th Cir. 1968).

11. In Nasser v. Isthmian Lines, 331 F.2d 124 (2d Cir. 1964), the court concluded that giving res judicata effect to a prior dismissal before a hearing on the merits is not per se a deprivation of due process:

> [T]he dismissal was not a punitive measure, but rather found its roots in "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered."

Id. at 129, *citing* Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350-51 (1909). The effect of Rule 41(b) dismissal as an adjudication upon the merits is only one of several situations in which an individual may not be heard on the merits of his claim. In the interests of judicial efficiency and finality of litigation, the party is given a particular time to raise his claims and if he then fails to act, further litigation is foreclosed. *See* Vestal, *supra* note 6, at 36-54. Due process is not denied as long

The doctrine of res judicata as applied to judgments in stockholders' derivative suits is more complex because of the nature of the action.[12] The stockholder's right of action as governed by Rule 23.1 is secondary because the stockholder is enforcing a claim that the corporation is unwilling to pursue in its own behalf.[13] But the cause of action belongs only to the corporation, not the stockholder, and the alleged wrong that the suit seeks to redress is regarded solely as one that the corporation has sustained.[14] Although the representative character of the plaintiff stockholder has been variously interpreted,[15] the binding effect of the

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as the party has had a fair and adequate opportunity for his claim to be heard. *Cf.* Hansberry v. Lee, 311 U.S. 32, 40 (1940).

12. 7A WRIGHT & MILLER § 1840; *cf.* Hansberry v. Lee, 311 U.S. 32, 44-46 (1940). Caution is warranted in according res judicata effect to a prior judgment in a derivative action because the plaintiff stockholder is affecting a right that belongs to the corporation. *See* note 15 *infra.*

13. The stockholder is allowed to assert the corporate cause of action derivatively, based upon a supposed breach of trust by the corporate officers in their failure to pursue the corporate claim. McLaughlin, *Capacity of Plaintiff Stockholder to Terminate a Stockholder's Suit,* 46 YALE L.J. 421, 423 (1936). Thus, a prerequisite to maintaining the suit is that the plaintiff allege he has exhausted his corporate remedies. FED. R. CIV. P. 23.1. For policy reasons why a corporation may not enforce its right of action, *see* Comment, *Compromise of Derivative Claims by a Corporation with Court Approval,* 52 VA. L. REV. 342, 346 (1966).

14. Where recovery is allowed, judgment is entered in favor of the corporation, and the plaintiff gains nothing individually. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531 (1970); Liken v. Shaffer, 64 F. Supp. 432 (N.D. Iowa 1946); McLaughlin, *supra* note 13, at 421-23. But when plaintiff loses, he must bear the cost himself, *id.* at 426-27.

15. Historically a stockholders' derivative action has been viewed as a species of class action, viz. its inclusion within Rule 23 until 1966. Describing the derivative action as "representative," however, is ambiguous and has caused some courts to erroneously apply certain class action principles to stockholders' derivative actions. *See* McLaughlin, *The Mystery of the Representative Suit,* 26 GEO. L.J. 878, 902 nn.176 & 178, 903 n.179. Although "representative" is accurate as a generic term for the function that the plaintiff serves in bringing the corporate claim, the term is not used there in the same sense as it is with reference to the plaintiff's role in present Rule 23 class actions since in a derivative action the only cause of action that exists belongs to the corporation. *See* Note, *Shareholder Derivative Suits: Are They Class Actions?,* 42 IOWA L. REV. 568, 570-71 (1957). A further source of confusion is whether the plaintiff acts as a type of fictional trustee to enforce a collective right of action by suing on the corporate claim: H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 358; R. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS § 167, at 787-89 (2d ed. 1949); or merely acts as a vehicle to cause the judicial machinery to operate: 4 J. POMEROY, EQUITY JURISPRUDENCE § 1095, at 278 (5th ed. 1941). Courts presently tend to think more in terms of the plaintiff as representing the corporation and not the class of stockholders, McLaughlin, *supra* at 900. To view the corporate claim as a single collective right of the stockholders, however, rather than belonging to the corporate entity, seems most realistic, R. STEVENS, *supra* at 788. *See generally* H.

judgment on nonparties depends upon whether the interests of the corporation were fully and fairly represented.[16] Absent fraud or collusion, a final judgment in a derivative suit would normally bar other stockholders from pursuing the same corporate cause of action.[17]

If a stockholders' derivative action is to be dismissed or compromised, court approval and notice to nonparty stockholders is required by Rule 23.1.[18] Notice prevents any prejudice to a valid claim that might result from a discontinuance by allowing nonparty stockholders to intervene if a dismissal or settlement would not be in the corporation's best interests.[19] Notice also serves to discourage collusion and abuse of the corporate claim for private gain.[20] Whenever the circumstances suggest that dismissal serves as a cloak for collusive settlements or voluntary abandonment, a court should require notice.[21] If a claim is dismissed involuntarily, however, dismissal may be taken as a reflection on the merits of the corporate claim. Policy considerations that support

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HENN, *supra* at 749-813; *Developments in the Law—Multiparty Litigation in Federal Courts*, 71 HARV. L. REV. 874, 943-57 (1958).

16. *See, e.g.*, Ross v. Bernhard, 396 U.S. 531, 538 (1970); Breswick & Co. v. Briggs, 135 F. Supp. 397 (S.D.N.Y. 1955); Winkelman v. General Motors Corp., 44 F. Supp. 960, 1018-22 (S.D.N.Y. 1942). For factors that a court should balance in allowing a second suit, *see* McLaughlin, *supra* note 13, at 425-26. Res judicata will not apply to judgments that relate to the representative's capacity or compliance with the Rule 23.1 prerequisites for bringing the suit. 7A WRIGHT & MILLER § 1840, at 439.

17. *See, e.g.*, Stella v. Kaiser, 218 F.2d 64 (2d Cir. 1954), *cert. denied*, 350 U.S. 835 (1955); Dana v. Morgan, 232 F. 85 (2d Cir. 1916); McLaughlin, *supra* note 13, at 424. The incapacity of other stockholders to relitigate issues already determined is derived from the corporation which is bound by the prior judgment. *See generally* note 15 *supra*.

18. "The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs." FED. R. CIV. P. 23.1. *See* 7A WRIGHT & MILLER § 1840, at 441; Hornstein *Problems of Procedure in Stockholders' Derivative Suits*, 42 COLUM. L. REV. 574, 585 (1942).

19. Policy considerations in permitting a dismissal should be weighed by the court. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.1.24 [2] (2d ed. 1953); 7A WRIGHT & MILLER § 1839; McLaughlin, *supra* note 13, at 426-27.

20. Because the plaintiff has no direct stake in a successful suit, the potential for abuse of the corporate claim by both stockholders and corporate management is considerable. Stockholders may bring "strike suits" in the hope of private settlement or to harass the corporate management. On the other hand, dishonest management may attempt a collusive settlement or "buy-off" of the plaintiff's stock to stifle a valid suit initially brought in good faith. "By the time a derivative suit was dismissed statutes of limitation or laches often barred other stockholders from bringing an action of their own and advantages already gained by litigation were lost." Haudek, *The Settlement and Dismissal of Stockholders' Actions—Pt. I*, 22 SW. L.J. 767, 769-70 (1968).

21. 7A WRIGHT & MILLER § 1839, at 428; Haudek, *supra* note 20, at 778.

giving notice are then considered less applicable.[22]

When a suit is terminated prior to judgment, the court's role is to safeguard the corporate cause of action, if one exists.[23] Usually, the notice requirement of Rule 23.1 would afford nonparty stockholders the opportunity to intervene,[24] but that requirement has been interpreted not to apply to dismissals after a hearing on the merits.[25] Thus while the Rules give the court adequate powers to protect the corporate claim in dealing with proposed settlements[26] and voluntary dismissals,[27] strict application of the language of Rule 41(b) might unduly compromise a corporate claim that is dismissed involuntarily without any notice to absentees.[28]

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22. Since the suit is dismissed against the plaintiff's will, it is reasoned that there is little fear of collusion. When the court is of the opinion that a claim is without merit, notice is not required. National Hairdressers' & Cosmetologists' Ass'n v. Philad Co., 4 F.R.D. 106 (D. Del. 1944); Massaro v. Fisk Rubber Corp., 36 F. Supp. 382, 386 (D. Mass. 1941). When a corporate claim becomes moot, notice to nonparties is unnecessary. Daugherty v. Ball, 43 F.R.D. 329, 335 (C.D. Cal. 1967). *See* Hornstein, *supra* note 18, at 591.

23. Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971). *See* McLaughlin, *supra* note13, at 426; note 19 *supra*.

24. *E.g.*, Smith v. Alleghany Corp., 394 F.2d 381, 391 (2d Cir. 1968); Cohen v. Young, 127 F.2d 721, 725 (6th Cir. 1942), *cert. denied*, 321 U.S. 778 (1944); 7A WRIGHT & MILLER § 1840, at 441-42.

25. Brendle v. Smith, 7 F.R.D. 119, 120 (S.D.N.Y. 1946); Mullins v. DeSoto Securities Co., 45 F. Supp. 871, 886 (W.D. La. 1942); Hornstein v. Paramount Pictures, Inc., 22 Misc. 2d 996, 37 N.Y.S.2d 404 (Sup. Ct. 1942); Haudek, *supra* note 20, at 776. An analogy may be drawn to the notice requirement upon dismissal or settlement of class actions. One must realize, however, that the judgment in Rule 23(b)(1) or (b)(2) actions includes only those whom the court finds are described as members of the class, and in Rule 23(b)(3) actions those who desire to exclude themselves may do so after receiving notice of pendency. *E.g.*, Pelelas v. Caterpillar Tractor Co., 113 F.2d 629, 633 (7th Cir.), *cert. denied*, 311 U.S. 700 (1940) (class action); Hutchinson v. Fidelity Ins. Ass'n, 106 F.2d 431, 436 (4th Cir. 1939) (class action). These safeguards do not exist when construing the effect of prior derivative actions.

26. Court approval of proposed compromises and settlements is mandatory. FED. R. CIV. P. 23.1; Cross v. Oneida Paper Prod. Corp., 117 F. Supp. 919, 920 (D.N.J. 1954). *See* 7A WRIGHT & MILLER §§ 1839, 1840.

27. The court has discretion to make appropriate orders facilitating dismissal, FED. R. CIV. P. 41(a)(2); Pittston Co. v. Reeves, 263 F.2d 328, 329 (7th Cir. 1959); especially when the circumstances of dismissal or the plaintiff's motives are questionable, Mashek v. Silverstein, 20 F.R.D. 421, 422 (S.D.N.Y. 1957).

28. Arguably, the pattern of dismissal in the prior action, *see* notes 1 & 2 *supra*, may have been an attempt by the district court to avoid prejudice to the corporate claim while sanctioning the individual plaintiffs. *Cf.* Malcolm v. Cities Service Co., 2 F.R.D. 405, 407 (D. Del. 1942) (sale of shares did not constitute a "compromise" of the cause of action then requiring notice, however, before the action could be dismissed subse-

In the instant case, the court of appeals reasoned that dismissals of derivative suits for failure to comply with discovery orders are more analogous to voluntary than involuntary dismissals and therefore require notice to nonparty stockholders if such dismissals are to be given res judicata effect.[29] The court's rationale allows the conduct of a self-appointed representative to determine whether nonparty stockholders are entitled to notice of proposed dismissal under the Rules.[30] Consequently the court may be placed in a position of labelling as "voluntary" those dismissals specified within Rule 41(b) as involuntary in order to avoid the effect of the rule as an adjudication on the merits; since dismissals for lack of prosecution and disobedience of the Rules or a court order would permit the representative plaintiff to expose the corporate claim to abuses that Rule 23.1 was meant to prevent, notice should be required.[31]

The court of appeals recognized that, for res judicata purposes, dismissal of a stockholders' derivative action having the operative effect of an adjudication on the merits may not be the equivalent of a judgment after an actual hearing on the merits.[32] Although Rule 23.1

quently notice would be required). When dismissal will not affect the right of other stockholders to properly bring the cause of action, notice has been held unnecessary. Marcus v. Textile Banking Co., 38 F.R.D. 185 (S.D.N.Y. 1965) (dismissed for lack of personal jurisdiction); Massaro v. Fisk Rubber Co., 36 F. Supp. 382 (D. Mass. 1941) (failure to state a claim). *Cf.* Laurenzano v. Texaco, Inc., CCH FED. SEC. L. REP. ¶ 92,950 (S.D.N.Y. 1971) (class action, dismissal binding only upon named plaintiffs); Polakoff v. Delaware Steeplechase & Race Ass'n, 264 F. Supp. 915 (D. Del. 1966) (plaintiffs were not adequate representatives of the class and therefore acted for no one but themselves).

29. 466 F.2d at 259. Lack of opposition to summary judgment has also been viewed as the practical equivalent of a voluntary dismissal calling for notice to absentees. Goldfarb v. Ehlers, CCH FED. SEC. L. REP. ¶ 93,382 (E.D.N.Y. 1972); Certain-Teed Prod. Corp. v. Topping, 171 F.2d 241 (2d Cir. 1948). *Cf.* Jacobs v. Paul Hardeman, Inc., 42 F.R.D. 595 (S.D.N.Y. 1967) (plaintiff who seeks to dismiss his action is an inadequate class representative).

30. Haudek, *supra* note 20, at 777.

31. *See* FED. R. CIV. P. 41(b), quoted in note 3 *supra*. The court, in its footnote 5, is not clear as to whether the exception presently created covers only dismissals for failure to answer interrogatories or is meant to apply to other Rule 41(b) dismissals of stockholders' derivative suits as well, 466 F.2d at 256 n.5.

32. In applying res judicata, the crucial test is whether the procedures adopted have given the party whose rights are thus adjudicated sufficient notice and opportunity to be heard as are required by due process and not merely whether the prior judgment was final. Hansberry v. Lee, 311 U.S. 32, 40 (1940). There are judgments which are on the merits as to a particular plaintiff that do not bind the class. *See* 7A WRIGHT & MILLER § 1840, at 439; Haudek, *supra* note 20, at 787. Res judicata applies with varying effect where the prior judgment although final was rendered on a procedural

notice provisions have been interpreted not to apply following litigation on the merits, the reasons behind the diminished need for notice are valid only because a court has already reached the merits of the cause of action.[33] In the principal case the court realized that preclusion of the corporate claim without a hearing would be inequitable,[34] but the court should have reached that conclusion more directly.[35] Rule 41(b) is a general provision that governs the effect of involuntary dismissals and should not be read as abrogating the specific Rule 23.1 requirement of notice prior to dismissal of stockholders' derivative actions.[36]

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point, or without contest or an examination of the evidence; however, the judgment is conclusive as to those issues actually determined. *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 836 (1952). In determining the effect of a routine calendar dismissal order without notice to plaintiff in a quiet title action, the Supreme Court of New Mexico interpreted a state provision identical to Rule 41(b) of the Federal Rules as follows: "[I]t applies to a dismissal of which the party affected had notice. Notice and hearing, or an opportunity to be heard, is essential to a decision upon the merits. Any other conclusion could well give rise to serious injustice and that without remedy." Otero v. Sandoval, 60 N.M. 444, 445-46, 292 P.2d 319, 320 (1956).

33. "[T]he fact that the plaintiff was the first to act for the corporation does not give him the privilege to perpetrate a wrong on the corporation any more than was possessed by the majority." Hornstein, *supra* note 18, at 574.

> Prior to the institution of a suit all stockholders share the same privilege to bring an action on behalf of the corporation. . . . [T]hus if the suit is discontinued by the plaintiff stockholder, the right of the other stockholders to commence the suit is revived.

McLaughlin, *supra* note 13, at 424.

34. To permit dismissal without notice would provide an easy device whereby fraudulent directors could avoid future liability simply by having a cooperative stockholder sue and then tacitly withdraw at an appropriate time. Furthermore, notice of proposed dismissal to nonparty stockholders protects the corporation from suffering at the hands of a plaintiff who quite apart from the merits of the action chooses not to comply with a discovery order. 466 F.2d at 259.

35. All of the authority cited by the court in support of its conclusion that "Rule 23.1 notice provisions do not apply to dismissals following litigation upon the merits," 466 F.2d at 258, are decisions in which the court has actually heard the substantive merits of the suit. On the other hand, since the court has ultimate power in passing upon the adequacy of a settlement or the equity of a dismissal, *see* note 18 *supra*, notice to nonparties is less necessary after a hearing on the merits.

36. There is no logical reason why the rationale used by the court in its footnote 8, *citing* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.1.24 [2], at 403 (1969), should not extend to involuntary dismissals as well, 466 F.2d at 257 n.8. Although the court alludes to the due process question as aside from Rule 23.1 notice requirements, 466 F.2d at 259-60, it seems that notice of proposed dismissal is required by the Rule to obviate many of the doubts as to due process and adequacy of representation that might otherwise arise. *Cf.* Cohen v. Young, 127 F.2d 721 (6th Cir. 1942); Winkelman v. General Motors Corp., 44 F. Supp. 960, 1020 (S.D.N.Y. 1942). *See* note 40 *infra*.

Rule 23.1 states that "notice of proposed dismissal or compromise shall be given to shareholders or members in such a manner as the court directs." Thus, if taken literally, the discretion of the court as to notice seems limited to the manner in which notice is given. Although a strict requirement of notice of proposed dismissal in every stockholders' derivative action would be impractical, whatever reasons there are for creating exceptions to the notice requirement[37] should be consistent with the overall purpose of Rule 23.1 in protecting the corporate claim and allowing minority stockholders a derivative right of action.[38]

The notice requirement of Rule 23.1 together with the requirement of court approval safeguard the corporate claim.[39] If a judgment does not fully resolve the substantive merits of the cause of action, it is questionable that the corporate claim has been adequately represented before the court.[40] Regardless of whether the court terms the dismissal

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37. Notice is not always feasible because of the cost and the inability of the court to enforce the requirement on an unsuccessful plaintiff. *See* Hornstein, *supra* note 22, at 591; note 28 *supra.*

38. Haudek, *supra* note 20, at 770, speaking of historical abuses of the corporate claim states:

> [T]ermination of the action without notice also served to conceal whatever wrong had been done so that uninformed class members were unable to safeguard their rights. The stockholders suit was in danger of becoming a tool for defeating the class rights it was intended to protect.

39. With reference to notice of proposed settlement the court in Cohen v. Young, 127 F.2d 721 (6th Cir. 1942), stated of Rule 23.1:

> The rule provides for notice to stockholders not only in order that they may have the right to be heard but in order that the court may have the benefit of that broader information which comes from receiving advice . . . and considering evidence proffered by them upon the relevant points of the case.

Id. at 725. In Birnbaum v. Birrell, 17 F.R.D. 409 (S.D.N.Y. 1955), the court denied a motion to approve a settlement because notice was inadequate, stating:

> [I]nadequate notice redounds to the prejudice of the objecting stockholders in depriving the court of the advice of other stockholders who might respond to a more extensive notice with evidence relevant to the protection of the corporation and all of the stockholders.

Id. at 412.

40. Since Rule 23.1 allows any stockholder to maintain a derivative action if he "fairly and adequately represents the interests of the shareholders . . . similarly situated . . ." one stockholder may quite adequately represent the corporate claim before the court. The plaintiff stockholder need not raise every possible issue in order to satisfy the requirements of due process. Thus it sometimes may be difficult to say at what point a particular plaintiff does an inadequate job of representation. The possibility of covert collusion makes it even more difficult, as a practical matter, to determine what the court must do with respect to nonparty stockholders to give effect to the due process right of the corporation. The corporation is entitled to due process (H. HENN, *supra* note 15, § 80), regardless of whether the stockholder bringing the

voluntary or involuntary, a judgment that does not reflect fair representation of the corporate claim should not be given res judicata effect.[41] Rather than merely citing lack of notice as the rationale for creating another exception to the preclusive effect generally given Rule 41(b) dismissals, the *Papilsky* court should have given more weight to the underlying due process considerations of Rule 23.1 and based its holding on the rule's apparent mandate for notice.

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derivative actions is viewed as a representative of the collective rights of the class or the right of the corporate entity alone. *See* note 15 *supra.*

41. Winkelman v. General Motors Corp., 39 F. Supp. 826, 831 (S.D.N.Y. 1940). "If there be uncertainity as to whether the issue was passed upon, the judgment is not conclusive as evidence." Winkelman v. General Motors Corp., 44 F. Supp. 960, 1022, *citing* Bell v. Merrifield, 109 N.Y. 202, 211, 16 N.E. 55, 58 (1888). *See* note 40 *supra.*