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COURT OF APPEALS

STATE OF NEW YORK

DESROSIERS,

Respondent,

-against-

No. 121

PERRY ELLIS MENSWEAR, LLC,

Appellant.

VASQUEZ,

Respondent,

-against-

No. 122

NATIONAL SECURITIES CORPORATION,

Appellant.

20 Eagle Street
Albany, New York
November 14, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



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Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 121 and 122,
3 Desrosiers v. Perry Ellis, Vasquez v. National Securities.
4 Counsel.

5 MR. BUZZETTA: Good afternoon, and may it please
6 the court. My name is Daniel Buzzetta on behalf of
7 National Securities Corporation. May I respectfully
8 request one minute for rebuttal?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. BUZZETTA: Thank you, Your Honor. Your
11 Honors, by its - - - by its explicit and plain terms, CPLR
12 908 applies only to class actions. Reinforcing that fact
13 is the - - - is the requirement that notice be distributed
14 to all members of the class. Only class actions have
15 members of the class. This case was never a class action.
16 It was never certified as such under - - -

17 JUDGE FAHEY: So Avena has been the - - - the
18 rule in this state for over thirty-five years, and in
19 essence, you're asking us not to overturn our decision but
20 the First Department's decision and the effect of
21 jurisprudence of the state for thirty-five years. Do you
22 agree with that principle?

23 MR. BUZZETTA: I do, Your Honor.

24 JUDGE FAHEY: Let me just follow that up.

25 MR. BUZZETTA: Yes.



1 JUDGE FAHEY: Because it's - - - that's self-
2 evident. I think we all agree with that. But what is
3 there in the legislative inaction that would make us think
4 that if they didn't - - - if they wanted it changed they
5 would have changed it? They've done nothing for all this
6 time and, you know, they know about the rule. They've been
7 familiar with it. And if they haven't changed it, why
8 should we change it?

9 MR. BUZZETTA: Two - - - two things to that, Your
10 Honor. First, at least one commentator has noted that the
11 Avena decision in the thirty-five years since it's been
12 enacted - - -

13 JUDGE FAHEY: That - - - that was McLaughlin but
14 the Vincent commentaries were a little bit different, I
15 thought, and perhaps a little more balanced.

16 MR. BUZZETTA: Respectfully, what I was referring
17 to is the commentary that I believe in 2015 that Avena has
18 all but been ignored since it was enacted in 1982. It's an
19 obscure decision. Not well known. Courts have followed it
20 in the breach. Some courts have applied it, others have
21 not. And I would say - - -

22 JUDGE FAHEY: I've encountered a number of trials
23 courts that have - - - that have relied on it.

24 MR. BUZZETTA: Your Honor, that's right. There
25 are a number of trial courts, but I would submit that there



1 are an equal number, if not more, trial courts that have
2 either ignored it, have not applied it, and frankly, Your
3 Honor - - -

4 JUDGE RIVERA: But it's always been the rule of
5 First Department. I mean First - - -

6 MR. BUZZETTA: It has since - - -

7 JUDGE RIVERA: - - - First Department has always
8 followed its own precedent, correct?

9 MR. BUZZETTA: There was one case, the Astil
10 case, Your Honor, where the lower court cited to 908 for
11 requirement - - - requiring notice, but when it got to the
12 First Department, the First Department didn't even cite its
13 own precedent in Avena. It didn't even discuss 908. I
14 would submit that the Avena decision is not well-reasoned.
15 It never looked at the legislative history to Rule 908.
16 And at this point - - -

17 JUDGE RIVERA: So if we agree with you does that
18 incentivize or dis-incentivize abuse?

19 MR. BUZZETTA: I don't think abuse becomes an
20 issue when, as in this case, you have the main plaintiff
21 settling individually on his or her behalf with no
22 preclusive effect, no res judicata effect on any members of
23 the putative class to the extent any exist. They could
24 have brought their own lawsuit if they wanted to
25 notwithstanding the resolution with Vasquez,



1 notwithstanding the resolution with Avena. And therein,
2 frankly, lies one of the issues with the Avena court which
3 is they did not consider what is the impact to the unnamed
4 classed members. They assumed that when a named class
5 representative settles that there is personal - - -

6 JUDGE FEINMAN: If I may, a moment ago you
7 started to say that the Avena court did not look at the
8 legislative history. But why would we even do that and why
9 would they do that if the plain language, as you were just
10 arguing a moment ago, is so unambiguously clear?

11 MR. BUZZETTA: Correct, Your Honor. And this
12 court - - -

13 JUDGE FEINMAN: So to me there's a little tension
14 there.

15 MR. BUZZETTA: I respect - - - I - - - thank you,
16 Your Honor. This court has held that the first thing you
17 look at is the language of the statute. Where it's clear
18 and unambiguous you can rely on that language. But you
19 should also consider and can also consider the legislative
20 history to see if the language somehow undermines the
21 intent of the legislature. Here there is not one word
22 penned in the legislative history that suggests that 908 or
23 any article of Article 9 was intended to apply to cases
24 that were not certified as class actions.

25 JUDGE RIVERA: What did - - - what - - - what was



1 the understanding of the Federal Rule, Rule 23, before the
2 amendment?

3 MR. BUZZETTA: The amendment that occurred in
4 2003 to clarify that under the federal practice notice is
5 only - - - for certified cases there was - - -

6 JUDGE RIVERA: But doesn't that mean that before
7 that it applied - - - notice was required regardless of
8 certification? Isn't that what the cure was, the amendment
9 was intended to do?

10 MR. BUZZETTA: There was a - - - there was a
11 clarification because there were some courts - - - not all
12 courts, some courts looked at that prior version of 23(e)
13 and just - - - and applied it to putative cases beginning
14 with the Philadelphia - - -

15 JUDGE FEINMAN: Well, don't the majority of
16 circuits who applied it?

17 MR. BUZZETTA: I don't think it's the majority of
18 circuits? In fact, I think that there's an equal balance.
19 If you look back at the Shelton case where the First
20 Circuit - - - the Fourth Circuit, that case goes through -
21 - -

22 JUDGE RIVERA: But even if - - - even if you're
23 correct, then aren't you merely arguing that the situation
24 in the federal courts is the same as the situation post-
25 Avena in the state courts. And if Congress felt it was



1 necessary to amend to clarify or the rule, excuse me, had
2 to be amended to clarify, then wouldn't we expect that the
3 state legislature would have to do the same or there - - -
4 you'd need the same clarification for 908?

5 MR. BUZZETTA: I see that my time is up. May I
6 answer the question?

7 CHIEF JUDGE DIFIORE: Yes.

8 MR. BUZZETTA: Your Honors, I don't think
9 anything can be read into the legislative inaction by the
10 New York Legislature. Again, Avena not a well-recognized
11 law, all but forgotten, legislative priorities being what
12 they are I think it is within the province of this court,
13 Your Honor, to interpret 908 according to its plain meaning
14 and especially since the legislative history has never
15 indicated that it applies to anything but certified class
16 actions.

17 CHIEF JUDGE DIFIORE: Counsel, can anything be
18 read into the use of the word "maintain" in Section 902?

19 MR. BUZZETTA: I don't think, Your - - - I don't
20 think so, Your Honor. When you take a step back and you
21 look at Article 9 and why it was created, it was enacted in
22 1975 to provide a procedure to manage class actions. 901
23 and 902 are simply the gateway to - - - for a case to
24 become a class action. All of the rules that follow that
25 are all rules that are - - -



1 CHIEF JUDGE DIFIORE: Or to be maintained.
2 Perhaps it's a class action upon the moment that it's filed
3 as a class action. And in order to maintain it to its
4 logical end, if you're going to run out the litigation - -
5 -

6 MR. BUZZETTA: You would expect that to be in the
7 legislative history, and it's not. And I - - - and I again
8 repeat that the whole purpose, the text, the purpose, the
9 structure of Article 9 was intended for the management of
10 class actions, and everything that follows Rule 902 are all
11 geared to the management of what is a class action. Notice
12 in a class action, attorneys' fees in a class action, and
13 the penultimate section is 908 which says that a class
14 action cannot be settled without notice to all members of
15 the class.

16 JUDGE WILSON: Chief, I have one question, if I
17 might?

18 CHIEF JUDGE DIFIORE: Yes, please.

19 JUDGE WILSON: Counsel, do you know as a
20 practical matter under 904 whether - - - which requires
21 notice, whether the notice is sent out on filing or sent
22 out on certification.

23 MR. BUZZETTA: On certification, Your Honor.
24 There is no case that we have found where notice is sent
25 out on filing. The 904(b) notice that Your Honor is



1 referring to is notice that is issued with the permission
2 of the court once the court certifies the case as class
3 action.

4 JUDGE GARCIA: Chief Judge, may I ask one
5 question?

6 CHIEF JUDGE DIFIORE: Yes.

7 JUDGE FAHEY: So to follow up on that basic
8 question, in this case, who would get notice? How would
9 you know who would get notice?

10 MR. BUZZETTA: That's a - - - that's a very good
11 question, Your Honor. Frankly, I don't have the answer to
12 that because this case was never certified. A 903 order
13 was never issued identifying the members of the class.
14 Therefore, it raises a very real practical question of - -
15 -

16 JUDGE FAHEY: We've had this rule on the books in
17 the First Department at least - - - I mean us saying you do
18 this. So who gets notices under those cases?

19 MR. BUZZETTA: No court - - - no cases that we
20 have found have actually explained that, Your Honor. It's
21 a mystery. Who will get notice in a case that has never
22 been certified?

23 JUDGE RIVERA: How is the - - - how is the class
24 defined?

25 MR. BUZZETTA: Very broadly, Your Honor. On page



1 11 of the record it says, "Persons who performed such
2 trades including but not limited to," this is in paragraph
3 10 of the record. Who is that in this case that was filed
4 in 2014 with a six-year statute of limitations dating back
5 to 2008? Who has common claims? Who is typical - - - who
6 has typical claims? Are there enough? The numerosity
7 requirement which is a requirement to be a class action.
8 We don't know if there's one, one hundred, or more because
9 the 902, 901 analyses was never done in this case, Your
10 Honors. Therefore, it raises the legitimate practical
11 question who gets notice, and no court has resolved that.
12 The Avena court didn't, and the court below did not resolve
13 it. And you run the risk, Your Honors, of sending out
14 notice to a broad group of potential class members, thereby
15 prejudicing the defendant or perhaps underestimating and
16 limiting the notice which potentially could prejudice
17 putative class members out there. It is really, Your
18 Honors, a question that has not been resolved and another
19 reason why the Avena decision was not well reasoned and
20 should not be the law in the First Department.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.
22 Counsel.

23 MR. HENRY: Good afternoon. May it please the
24 court, I'm Frank Henry, and I represent Perry Ellis
25 International. Thank you for letting me appear in front of



1 your court. I'm from Florida.

2 So when this case was filed, we made the decision
3 early on after having been served with the complaint to
4 serve an offer of compromise to the case. We did not
5 believe in the merits of the case and we served an offer of
6 compromise in order to limit our costs in the litigation.
7 It was accepted within the time limit required under the
8 rule, and we waited. We paused to move to dismiss the case
9 because the plaintiff had accepted the offer. We paused
10 until the expiration of the sixty-day period within which
11 the - - -

12 JUDGE STEIN: Well, what should - - - what should
13 and could the plaintiff have done if the plaintiffs, plural
14 here, wanted to pursue this further as a class action to -
15 - - to let other people know that this was happening and to
16 have a broader impact?

17 MR. HENRY: The plaintiff should have filed a
18 motion to certify the case as a class action under Section
19 902. We would have had a hearing. We would have
20 determined what the appropriate class was. And under
21 Section 904, there would have been notices that would have
22 been sent out.

23 JUDGE WILSON: Was there anything in your
24 settlement agreement that prevented counsel from the
25 plaintiff from going and looking for other plaintiffs?



1 MR. HENRY: No. No. We didn't have a settlement
2 agreement. We served a pure offer of compromise to enter
3 one judgment against our client exclusive of costs and - -
4 - and the plaintiff thankfully accepted it. The plaintiff
5 is satisfied with the result and we were satisfied with
6 that result. We waited for the sixty days to expire, and
7 when we moved the court to dismiss the case for the first
8 time the plaintiff raised this issue of class notice. The
9 plaintiff stipulated to the - - - to the dismissal of our
10 case. There was no issue in front of the trial court as to
11 whether the case should be dismissed. The plaintiff's only
12 argument was that because under Section 908 under its - - -
13 as you just heard argument on, under the language of
14 Section 908, because this was styled as a class action,
15 because it was pleaded as a class action there was,
16 therefore, a class action and therefore the - - - the court
17 was obligated to send out notices to the class.

18 JUDGE FEINMAN: I'm curious do you have any
19 thoughts about the problem that came up at the end of the
20 last argument, which is why is it impractical for the court
21 to sort of fashion who's going to get notice later on? I
22 know that's not necessarily how you would do it if you
23 were, you know, trying to certify the class on the
24 plaintiff's motion, but fine, you offered to compromise,
25 you picked them off, that's fine. Now have the hearing and



1 figure out who gets the notice and fashion the notice as
2 part - - - because any notice always has to be approved by
3 the court before it's sent. So why can't the court do it
4 then?

5 MR. HENRY: So there are a number of parts of
6 that process that are unpredictable in my view. If you
7 affirm the decision of the lower court here we're going to
8 go back to the trial court and presumably we're going to
9 take discovery and they're going to take discovery as to
10 who the members of this class are. And then there's going
11 to be a hearing in front of the trial judge as to the
12 appropriateness, numerosity, typicality, adequate
13 representation - - -

14 JUDGE FEINMAN: Well, the reality is for your
15 action anyway it's going to be whoever was an intern in - -
16 - in a certain time period. Really not that hard, it's a
17 matter of searching your records.

18 MR. HENRY: On its face - - -

19 JUDGE FEINMAN: I mean I don't what discovery
20 you're going to need from the plaintiff.

21 MR. HENRY: Well - - -

22 JUDGE FEINMAN: It's really all going to be in
23 your control.

24 MR. HENRY: On its face you're correct, but the
25 reality is that be - - - that this is a claim for unpaid



1 wages depending upon the argument that those interns were
2 employees. And their status as employees is dependent upon
3 their individual job duties and responsibilities. So let's
4 say there are 300 people in this class. Well, whether or
5 not any one of those 300 people are actually employees of
6 my clients - - -

7 JUDGE RIVERA: Yeah, but that's a merits
8 argument, right? That's a merits argument. That has
9 nothing do with just giving them notice that the complaint
10 is no longer active. I mean that's a merits argument about
11 - - - that could have been true even if it was certified as
12 a class, right, because you might have very much challenged
13 certain persons as not employees down the road.

14 MR. HENRY: It goes to the issue of typicality I
15 think and whether the claims of the - - - of the
16 representative plaintiff are typical of the group. And - -
17 - and my argument would be at that hearing that they aren't
18 typical of the group. And - - -

19 JUDGE WILSON: Does it go to predominance as
20 well?

21 MR. HENRY: I'm sorry?

22 JUDGE WILSON: Does it go to predominance as
23 well?

24 MR. HENRY: It does because we don't know whether
25 - - - you know, the - - - the reality is we would have to



1 go back and have this hearing in every class action that's
2 pleaded before the trial court.

3 JUDGE WILSON: So do you know of any - - - any
4 circumstance where a hearing like that has actually
5 occurred to provide notice in a case that had been settled?

6 MR. HENRY: Not to my knowledge, no.

7 JUDGE WILSON: So you're - - - this is your
8 hypothesis of what might happen.

9 MR. HENRY: Yeah. Your - - - that's exactly
10 right. I'm - - - I have no expectation of what we're going
11 to do when we get back to the trial court.

12 JUDGE RIVERA: But your - - - your whole argument
13 is, you know, you're just going to make us advise people
14 who really would never have fit under the class, but the
15 alternative that you present is that nobody gets advised.
16 So I - - - I'm not really understanding the logic of that
17 approach.

18 MR. HENRY: The problem with - - -

19 JUDGE RIVERA: It might - - - it might be more -
20 - - less costly. I get that argument. But otherwise, I
21 don't see sort of from the fairness perspective or even
22 from a logic perspective why your rule works.

23 MR. HENRY: Your Honor, respectfully, there has
24 to be some reason for this Rule 908, and the only reason
25 that I can see for the rule - - - if I can continue, I see



1 that my time's up. The only reason that I can see for the
2 rule is because in an ordinary case where the plaintiff had
3 timely moved for class certification, the court would have
4 sent notices out to all members of the class. And those
5 notices would have said you're a member of our class. Your
6 rights could be prejudiced as a result of what's going on
7 in this court proceeding and therefore, you know, you
8 should pay attention. It would say something to that
9 effect. In this case, that never happened, and so the
10 notice that we'll be sending out, if you send us back to
11 the trial court with that directive, is that this case that
12 you've never heard of because no notice was ever sent out
13 and a case that you'll never be a part of because you can't
14 join it, it's been dismissed, and a case that's never going
15 to be certified as a class action because under O'Hara the
16 sixty-day rule has expired, we're telling you the name and
17 address for the attorneys for the plaintiff.

18 JUDGE STEIN: So - - -

19 MR. HENRY: That's the only - - -

20 JUDGE STEIN: So what you're saying is that this
21 is no different from a procedural posture than if the
22 plaintiff had only sued on his own behalf?

23 MR. HENRY: That's exactly right, Your Honor.

24 JUDGE STEIN: And - - - and then other people
25 under similar circumstances would either come to the



1 decision that they had a cause of action on their own or
2 they wouldn't.

3 MR. HENRY: But the - - - but, yes, that's true.
4 But the notice that the court will be sending out, the only
5 useful information on it will be the name and address of
6 the plaintiff's attorneys. And I was talking before we
7 came into this argument if I was a plaintiff's attorney - -
8 <indecipherable>

9 JUDGE FAHEY: See, I would disagree with you that
10 useful information may be that someone would - - - may not
11 even be aware that they would have an action and now they
12 would be aware that they have an action. And that's - - -
13 that's the fundamental policy distinction between the
14 notice and - - - between giving notice and not giving
15 notice. Somebody's aware now that they may have an action
16 and justifiably object to it, but still, there's a basis
17 for it other than providing the attorneys' name.

18 MR. HENRY: The notice that was prepared by the
19 plaintiffs in this case expressly disavows any substance as
20 to whether there's a claim to be had in the case. In fact,
21 it says we're not telling you you do have a claim. In an
22 ordinary case where the procedure's different - - -

23 JUDGE FAHEY: No, they're just telling every
24 intern who works that - - - that - - -

25 MR. HENRY: Tell every intern - - -



1 JUDGE FAHEY: - - - there's a possible class
2 action out there.

3 MR. HENRY: Exactly.

4 JUDGE FAHEY: So - - - yeah. Okay.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. HENRY: Thank you, Your Honor.

7 CHIEF JUDGE DIFIORE: Counsel.

8 MS. LUSHER: Good afternoon. May it please the
9 court, I'm LaDonna Lusher.

10 JUDGE FAHEY: Counsel, could you simply put out
11 ads saying - - - I see them on TV all the time saying, you
12 know, if you worked for Perry Ellis or - - - you know, you
13 may have - - - and during such-and-such period of time you
14 may have - - - you know, you may have an action against
15 them. Call 1-800-, you know, whatever.

16 MS. LUSHER: Yes. Absolutely we could.

17 JUDGE FAHEY: Okay. So I'm - - - I'm struggling
18 to understand why the particular posture of these cases is
19 any different from any case where a person sues on his or
20 her own behalf. The only difference being they use the
21 words and others similarly situated, but nothing further
22 happened. Nobody was ever notified that this action was -
23 - - was brought or pending or they might have any rights or
24 anything. And then at this early, early stage, it's
25 settled, and the plaintiff says I'm happy. I - - - I don't



1 need to pursue this class action. You know, thank you very
2 much. Why - - - what is - - - what purpose is being served
3 to this unknown putative class to send them notice at this
4 point in time that this action was settled?

5 MS. LUSHER: It's actually a dual purpose, and
6 the court in Avena I think does a wonderful explanation of
7 explaining why. The first is that you're notifying
8 potential class members that their fiduciary that had an
9 obligation to them has now settled his or her claim - - -

10 JUDGE STEIN: Yeah, but when does that - - -
11 that's one of the problems - - - questions I have about
12 Avena is this fiduciary duty. When does - - - that arises
13 the moment somebody files a lawsuit saying myself and
14 others similarly situated? All of a sudden there's this
15 class of people that they have a fiduciary duty to?

16 MS. LUSHER: Absolutely. As soon as that class
17 action is filed - - -

18 JUDGE WILSON: Until the class is - until the
19 class is certified you don't actually have a determination
20 by the court that counsel is adequate, do you?

21 MS. LUSHER: Well, you don't. That's true. I
22 mean there - - - there's a point in time after some class
23 certification discovery is done and then the court rules
24 whether or not the elements of Article 9 have been met for
25 it to proceed or be maintained as a class action. But even



1 as soon as it's filed you have a named plaintiff who is now
2 representing every other potential member of that class and
3 they have a duty - - -

4 JUDGE WILSON: That is the question, right, is
5 whether they're representing them or whether they're asking
6 for permission to represent them.

7 MS. LUSHER: Absolutely. And they do, and it's
8 the whole purpose behind why Article 9 was enacted and why
9 the - - - particularly the part about article - - - excuse
10 me, Section 902 talking about how you're supposed to decide
11 early on whether or not a class action should be maintained
12 as a class action before getting to the merits of whether -
13 - - of the actual decision of a case.

14 JUDGE WILSON: Suppose there's no settlement and
15 the court dismissed the action. Is notice required?

16 MS. LUSHER: Yes, it would be in most cases.
17 There are decisions that are out there that - - - that
18 actually have been decided from some trial courts and also
19 from some of the federal courts that have said if it was an
20 involuntary dismissal on the merits that perhaps notice
21 wasn't needed. But in the majority of cases, if you have a
22 situation, particularly as in these cases where you have a
23 settlement where a named plaintiff has now settled his or
24 her claim and the case is not going to continue, that the
25 court has a duty to send out notice to the beneficiaries



1 that have now have had an interest in the action since it
2 was filed and whose statute of limitations are now ticking.
3 The First Department cited American Pipe in one of its
4 decisions - - -

5 JUDGE STEIN: But if - - - if this action had
6 never been brought their statute of limitations would be
7 ticking. And so - - - and it's - - - it's stayed during
8 the pendency of the action, but if they never knew that an
9 action had been started in the first place, then their - -
10 - they still have the same responsibility to - - - to do
11 something within the statute of limitations. So again, I
12 don't see how they're prejudiced by this particular
13 situation.

14 MS. LUSHER: It's a very good point, and it was
15 actually discussed by the court in Avena. And it's also
16 been discussed by other federal courts who said that
17 whether or not these people know that they actually had a
18 cause of action doesn't matter. What matters is that there
19 was a fiduciary who has now settled his or her claim and
20 that a notice should go out to make sure that there's no
21 collusion in that settlement.

22 JUDGE STEIN: But if we - - - if we were not to
23 agree with the fiduciary duty aspect of Avena then - - -
24 then where does that leave us?

25 MS. LUSHER: Then it also goes to the two - - -



1 the second part of the purpose behind 908 and that's to
2 inform individuals that their statute of limitations is now
3 expiring. So - - -

4 JUDGE STEIN: But when I have a cause of action
5 on - - - for something, whatever it may be, negligence or -
6 - - or whatever, do I have somebody to - - - to alert me?
7 Do - - - do the courts somehow alert me that this is my
8 statute of limitations and it may be running? I just - - -
9 I don't understand how the fact that - - - that an
10 individual plaintiff brings a lawsuit somehow changes my
11 responsibility to file my claim. Again, assuming that I've
12 never been noticed - - - notified of any of this and I'm
13 just going along my merry way.

14 MS. LUSHER: Sure, absolutely. And part of the
15 reason that Article 9 was enacted was to help streamline
16 class actions so that you - - - that individuals could rely
17 on other individuals to bring an action and that you didn't
18 have all kinds of different plaintiffs running to the
19 courthouse to file their own separate actions. And it goes
20 toward streamlining that so that you do have one individual
21 that brings the action on behalf of the rest of the class.

22 JUDGE FEINMAN: And tolls the statute of
23 limitations for those individuals.

24 MS. LUSHER: And tolls - - - exactly, so that
25 those - - -



1 JUDGE FEINMAN: And - - - and that's part of the
2 purpose of sending out the notice so that they know that
3 toll is being lifted.

4 MS. LUSHER: Absolutely. And they can sit - - -

5 JUDGE GARCIA: But how do they know the toll was
6 in place?

7 MS. LUSHER: Well, some do and some don't, but
8 the whole - - - the whole justification behind it so that
9 they can be notified once the action has been dismissed
10 that they now have a claim that could be expiring. It's -
11 - -

12 JUDGE STEIN: Wouldn't it be more effective then
13 to say that - - - that anybody filing -- commencing an
14 action in which they purport to be doing it on behalf of a
15 class must at the time that they - - - they file and serve
16 their summons they make an application for determination
17 from the court as to whether - - - whether to certify it as
18 a class. Wouldn't that be a more effective way of doing
19 this?

20 MS. LUSHER: From the very beginning?

21 JUDGE STEIN: Um-hmm.

22 MS. LUSHER: I mean from the way the class
23 actions used to be brought was that you had all kinds of
24 different people filing actions and intervening to join.
25 And there is language in Article 9 that talks about sending



1 out notice at the commencement of a class action, but this
2 particular section of 908 goes directly to the point of
3 these two cases and that's where you have an individual who
4 settled. And you have to protect the class action process
5 and its integrity by notifying other individuals so that
6 they have the opportunity to object to that settlement, to
7 be notified about it - - -

8 JUDGE STEIN: But how is that a class action if
9 no class has been identified, nobody's been notified? I -
10 - - it just - - - to me it seems like it's a - - - you
11 know, it's an attempt to get a class action.

12 MS. LUSHER: It becomes a class action as soon as
13 its filed, and that was recognized by the Supreme Court in
14 American Pipe. And they discussed how the statute of
15 limitations was tolled the moment that that class action is
16 filed and it's on behalf of all potential members of the
17 class.

18 JUDGE FAHEY: Can I turn to one - - - to one of
19 the potential effects? Let's say this court reversed and
20 we said that they would - - - we wouldn't apply the notice
21 provisions. Would this have any effect on the court's
22 approval process, say, of termination of class or in any
23 other way if we reversed. Would the court even need to
24 approve the termination of a purported class?

25 MS. LUSHER: I believe that it would.



1 JUDGE FAHEY: Would it?

2 MS. LUSHER: Yes. I believe that, you know, in
3 Avena again - - -

4 JUDGE FAHEY: This is if we reversed Avena.

5 MS. LUSHER: Even in - - - even if you look at
6 the language of the - - - of the statute, the language is
7 mandatory. The language says that, "A class action shall
8 not" - - - shall not "be dismissed, discontinued, or
9 compromised without approval of the court." The second
10 sentence says that, "Notice of that proposed dismissal,
11 discontinues, or compromise shall be given to all members
12 of the class in such a manner as the court directs." And
13 going back to a question that was earlier about Article 9
14 and whether or not class action means putative class action
15 or certified class action, there is several provisions in
16 the article that say the words "class action." And for
17 instance, Article - - - or Section 902 that I was just
18 discussing refers to a class action but we know it hasn't
19 been certified yet because that's the rule that says you
20 have to be able to apply for certification within sixty
21 days. But it refers to applying for that certification of
22 the class action. There are other provisions of Article 9
23 that say maintaining as a class action, and those are
24 Articles 909 when they're talking about attorneys' fees
25 where the individual attorneys apply for their fees at the



1 end of the case, and that's after the class has been - - -
2 the class action has been maintained. The same is in
3 Section 905 as well. So this language for class action
4 appears all over the statute, and it most certainly applies
5 to putative class action as well as certified class
6 actions. And if you look at the justifications - - -

7 JUDGE STEIN: What - - - what - what about
8 O'Hara's language? Doesn't that sort of indicate that it's
9 not a class action until the plaintiff takes the steps
10 necessary?

11 MS. LUSHER: The O'Hara decision was an
12 interesting decision because what happened is that there
13 was a decision that was made on the merits of the named
14 plaintiff's claims, and the named plaintiff didn't move for
15 a class certification but the trial court sua sponte
16 certified the class. But the court's decision really
17 emphasized the fact that a meritorious decision had been
18 made on that plaintiff's claims, and you can't then certify
19 a class because at that point you've now opened the door to
20 a judgment that has been given in favor to a plaintiff and
21 how you're going to decide who that judgment affects. And
22 that's another reason that you have to decide class
23 certification status early in a case so that it's done
24 before the merits are ruled upon. Then at that point, you
25 can have a decision on the merits that affects the class,



1 but you have to define that class first before the
2 meritorious decision is made.

3 JUDGE RIVERA: So if - - - so if can just circle
4 back to something else you were saying about streamlining
5 the class action process and the integrity of class
6 actions. So there's a slightly different comment that I'm
7 going to make, and I want you to address it. So if - - -
8 as I think I'm understanding in part your advocacy of this
9 rule is that from the plaintiff's perspective what society
10 gets from this is the possibility that someone's going to
11 be notified and they may pursue either individually their
12 own rights or a class action on the same claims or similar
13 claims. But the employer's rule or the defendant's rule is
14 one that seeks to undermine that effort to the extent that
15 people aren't on notice. Is that sort of at the end of the
16 day what this really boils down to? The - - - the notice
17 provides the possibility that again it's reflecting a
18 societal interest that if indeed there is a harm those who
19 have been harmed now know and they can choose to take
20 action individually or as a class?

21 MS. LUSHER: Absolutely. Or they can choose to
22 take no action at all which often happens.

23 JUDGE RIVERA: Correct.

24 MS. LUSHER: And that's the whole point behind
25 this - - - the statute. Again, it's a two-fold purpose.



1 It serves to show that there was no collusion so that all
2 the other beneficiaries can be on notice and decide whether
3 or not they want to object to the settlement or intervene.
4 And then it also shows - - - tells them that their statute
5 of limitations is now ticking.

6 JUDGE RIVERA: Yes.

7 MS. LUSHER: And these things apply whether or
8 not a class action is certified or whether it's not
9 certified. You have putative class members who need to be
10 on notice of whether or not a - - - their beneficiary- - -
11 their fiduciary has now settled their - - - a claim that
12 they thought that they could stand by and watch be brought
13 on their behalf.

14 JUDGE RIVERA: So what about the issue of how to
15 define the class if it hasn't been certified - - -

16 MS. LUSHER: Honestly - - -

17 JUDGE RIVERA: - - - beforehand?

18 MS. LUSHER: Oh, I'm sorry. Excuse me. It's
19 honestly very easy. My firm prosecutes class actions every
20 day, and there are notices that go out all the time. And -
21 - -

22 JUDGE WILSON: And how many times does the
23 certified class match the definition in the complaint in
24 your experience?

25 MS. LUSHER: I'm going to say most of the time.



1 It does. The majority of the time it does match the
2 definition in the complaint, but again, you know, it's - -
3 it's - practically speaking, it's something that's really
4 worked out very easily between plaintiff's attorneys and
5 defense attorneys and that a court oversees. It's really
6 very practically done, and it's also - - - there's a
7 corollary to when you think about it under the Fair Labor
8 Standards Act for 216(b) actions. In those cases, you have
9 a notice that goes out very early on to similarly situated
10 plaintiffs that - - - there's been no determination as to
11 whether they're actually similarly situated. But a notice
12 goes out to a group that's been identified, a little bit of
13 evidence has been put forth that that may be true, and a
14 notice goes out to tell them that their statute of
15 limitations is ticking and they need to file a claim form
16 in order to stop that so that they can be part of that
17 action. That's nothing different than a notice going out
18 here to class members in - - - under Article 9 where they
19 were notified that their statute of limitations could be
20 expiring. If they would need to do something or want to do
21 something they have that opportunity. And in these two
22 particular cases, you will have a lot of individuals who
23 now will not be able to bring claims for unpaid wages if
24 this court were to decide that notice should not issue
25 because they won't be notified.



1 I know my time is up but I just wanted to make
2 that point that you have individuals - - - we filed this
3 class action in 2014 in one of the cases. You have
4 individuals who have unpaid wage claims from 2008 to 2011
5 who will no longer be allowed to bring their claim because
6 their claim will have been expired and they won't have been
7 notified. Under Perry Ellis - - -

8 JUDGE STEIN: If this particular plaintiff had
9 never sought to recover for himself they never would have
10 known - - - known either, right?

11 MS. LUSHER: Perhaps, but perhaps they did know.
12 I mean just because it's not a highly publicized case on TV
13 doesn't mean that the named plaintiff didn't say something
14 to some certain people, doesn't mean that other people
15 weren't aware of an action. Just because other people
16 haven't come forward doesn't mean that they don't know.
17 And my firm gets calls from people all the time who don't
18 necessarily want to step forward and - - - and put
19 themselves out there.

20 JUDGE STEIN: So assuming that's true those
21 people who hear that somebody else filed a lawsuit figure
22 they can just sit back and wait until they hear something?

23 MS. LUSHER: Absolutely they can, and that's been
24 one of the justifications for having notice in a class
25 action. And it's also one of the justifications for at the



1 point that a class is certified when a notice goes out
2 people have an opportunity to exclude themselves. And if
3 they don't, they - - - then they're part of that class, and
4 they have that opportunity at that point. But they also
5 have to be notified that that's a gamble that they take if
6 they don't exclude themselves. But it's very important.
7 Notification couldn't be more important here wherein the
8 other cases where you have interns who only had unpaid wage
9 claims for approximately three months. Those individuals
10 if they aren't notified, they will also lose their
11 opportunity to bring a claim. And that's one of the most
12 important and compelling reasons behind this - - - this
13 statute.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 JUDGE WILSON: If they're good claims why can't
16 you find them - - - these people?

17 MS. LUSHER: If they're good - - -

18 JUDGE WILSON: Can't you ask your client do you
19 have any friends who were interns, can I contact them, I
20 got a good claim here?

21 MS. LUSHER: Well, practically speaking, you
22 know, there are a lot of ethics rules for plaintiff's
23 attorneys about how, you know, whether or not - - -

24 JUDGE WILSON: You already have a fiduciary
25 obligation to them you told me.



1 MS. LUSHER: I'm sorry?

2 JUDGE WILSON: You already have a fiduciary
3 obligation to them you told me.

4 MS. LUSHER: We do.

5 JUDGE WILSON: It seems to me if you have a
6 fiduciary obligation to these unnamed people you can't have
7 an ethical violation from trying to represent them?

8 MS. LUSHER: Well, I think that Judge Cahn
9 commented on that in the Empire Blue Cross Blue Shield case
10 where he said that there was nothing stopping from the
11 plaintiff's attorneys in that case from putting out an
12 advertisement, and that was alluded to earlier. And that's
13 true. We can put out advertisements ethically and
14 properly. However, it's not the same as a court authorized
15 notice that has been approved by a court and it also may
16 not go to the same people. I mean practically speaking,
17 you know, counsel brought up that who would you even know
18 to send the notice to. Well, there's been cases where
19 courts have ordered you give the names and addresses. It's
20 the same that happens in any class action. You give the
21 names and the addresses of the individuals that are members
22 of the class or the putative members of the class and you
23 send out notice to them.

24 JUDGE RIVERA: You know, a kind of general
25 newspaper notice that you're talking about anyway is very



1 much frowned upon.

2 MS. LUSHER: It is - - -

3 JUDGE RIVERA: It's not - - - it's not geared to
4 give actual notice which is the point here. And you have
5 to have a judge order that when that is the last possible
6 recourse.

7 MS. LUSHER: Absolutely.

8 JUDGE STEIN: So - - - so do we know the Federal
9 Rules were amended to say that notice wasn't required under
10 these circumstances unless the class had already been
11 certified? Did the federal government not consider the
12 arguments that you're making here?

13 MS. LUSHER: I - - - I think that they did. I -
14 - - in the courts, - - - you know, there was a real split
15 amongst the courts at that time. And - - - and it was
16 interesting because - - -

17 JUDGE STEIN: So they could have gone either way
18 to clarify what the rule was - - - should be, right?

19 MS. LUSHER: They - - - they could have.
20 However, I think that it's important to consider the fact
21 that the federal legislature took it upon themselves
22 because the courts were divided to amend the rule and to -
23 - - to decide that it was only going to apply to certified
24 class actions. And then - - -

25 JUDGE GARCIA: But isn't that what we're doing



1 here? I mean they did that because the Supreme Court
2 hadn't ruled on it. So we now have the opportunity to rule
3 on it unlike the federal situation where they had this
4 split, nothing was happening, and so the Congress acted - -
5 - or they acted to change the rule. So I don't really
6 understand that argument that we should wait for the
7 legislature because we've never considered this and we can
8 clarify it. We don't - - - we don't need to do that.

9 MS. LUSHER: You're absolutely - - -

10 JUDGE RIVERA: Isn't it different here because
11 you've already had Congress amend - - - you've already had
12 the amendment of the federal rule and the state hasn't
13 acted.

14 MS. LUSHER: Well, you're absolutely right.

15 JUDGE GARCIA: Well, this Court hasn't acted.

16 JUDGE FEINMAN: And - - - and there's no split
17 here.

18 MS. LUSHER: You're absolutely right, and the
19 court can do whatever it decides.

20 JUDGE FEINMAN: I'm not talking about the nine of
21 - - - the seven of us. I'm talking about there's no split
22 in the Departments - -

23 MS. LUSHER: It's true this Court can do whatever
24 it decides, but, you know, I would - - - I would emphasize
25 that there's a part in our brief that we discuss about how



1 this precedent has been followed at least by the lower
2 courts for thirty years. And for this court to overturn
3 Avena at this point - - -

4 JUDGE GARCIA: But aren't we making the First
5 Department the Court of Appeals there? I mean we've never
6 ruled on it so if people have been following a First
7 Department case - - - I mean they can do that. They're - -
8 - other departments aren't bound by it. So this is our
9 opportunity to say what the rule is and to interpret 908.
10 So the fact that there's been a First Department rule out
11 there for thirty years shouldn't really be the end game for
12 the Court of Appeals, right?

13 MS. LUSHER: Agreed, but it's a very persuasive
14 decision. And the - - - and the reasoning behind it's - -
15 -

16 JUDGE GARCIA: People can disagree on its
17 persuasiveness.

18 MS. LUSHER: Well, perhaps. But I - - - the
19 reasoning behind it is - - -

20 JUDGE RIVERA: They may have persuaded the state
21 legislature.

22 MS. LUSHER: Exactly. I mean the - - - the thing
23 is is that I think that this Court can look to the fact
24 that the legislature has had the opportunity and just as
25 recently as March 2016 legislation was presented - - -



1 JUDGE GARCIA: Although haven't we said in other
2 context it's very hard to read the motives of the
3 legislature when they don't act?

4 MS. LUSHER: That's true. But they didn't - - -
5 they did not change the rule. They haven't changed the
6 rule to this day, and the majority view has been that this
7 - - - this statute applies to class actions whether they've
8 been certified or whether they haven't been certified. And
9 if the legislature wanted to act it could have and it
10 hasn't yet.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MS. LUSHER: Thank you.

13 CHIEF JUDGE DIFIORE: Counsel.

14 MR. BUZZETTA: Thank you, Your Honor. I'd like
15 to briefly address the issue of the purpose of notice.
16 We've heard that notice is to - - - the purpose of it is to
17 advise the putative class about the tolling or the ticking
18 of the statute of limitation - - - limitations or letting
19 them know that the toll is in place. Respectfully, I think
20 that that is a red herring. Notice is imperfect because,
21 in a whole slew of cases, notice is never given or if it is
22 given it's given too late. For instance, consider the
23 American Pipe case, which is the case that - - - from which
24 this notice issue derives. In that case, after the case -
25 - - the court decided that the case not a class action.



1 The putative class only had eleven days within which to
2 file their claim or their claim would have been time-
3 barred. Notice would not have been issued within eleven
4 days. So this notice that - - - this notion that you need
5 to give notice to advise people of their rights, notice
6 wouldn't have come in that case. Notice doesn't come in
7 cases where class certification is denied. Notice doesn't
8 come in class - - - in cases where motions to dismiss are
9 granted. So there are a whole slew of cases where you do
10 not get notice. Instead of relying on notice to advise
11 people of their rights - - -

12 JUDGE RIVERA: Isn't that where you lost as
13 opposed to where you settled?

14 MR. BUZZETTA: I'm sorry, Your Honor?

15 JUDGE RIVERA: Isn't that where you lose as
16 opposed to where you settle? Doesn't that make a
17 difference?

18 MR. BUZZETTA: I'm sorry. I didn't - - - I
19 didn't hear you.

20 JUDGE RIVERA: The - - -

21 JUDGE FAHEY: Isn't that where you lose instead
22 of where you settle? When you settled you - - - you got
23 something for it. That means I suppose that the claim has
24 some value. That's why people would want notice.

25 MR. BUZZETTA: But again at that point, Your



1 Honors, we need to go back to the plain language of the
2 statute which says what was settled? Not a class action
3 but an individual claim was settled.

4 JUDGE FAHEY: In - - - in - - - that was brought
5 in the context of a class action statute.

6 MR. BUZZETTA: Right. But the class was never
7 certified under 901, 902, and there were no - - -

8 JUDGE FAHEY: Which goes - - - which goes once
9 again to the argument of that the class action is being - -
10 - can't be used for an individual's benefit and to create
11 the economic parity that's the underlying policy principle
12 behind a class action lawsuit you want to make sure that
13 people that have similar claims be notified.

14 MR. BUZZETTA: But let's put the onus on the
15 people that have those claims to be aware of their statute
16 of limitations and to bring those claims when they have
17 them rather than rely on notice which is imperfect and may
18 never come. And frankly, Your Honors, I think what the
19 Avena court also does talking about societal interest, it
20 discourages settlements, right. If defendants would have
21 to have notice go out notwithstanding an individual
22 settlement, I would suggest that perhaps defendants would
23 not settle cases because effectively every case - - -

24 JUDGE FAHEY: That just feeds into the argument
25 that - - - that the class action can't be exploited for an



1 individual. It has to benefit the class, and if it doesn't
2 benefit the class then it seems to inherently suggest that
3 it's benefitting just the individual and it was brought
4 solely for that purpose.

5 MR. BUZZETTA: It could only - - -

6 JUDGE FAHEY: In other words, it was kind of a
7 red herring.

8 MR. BUZZETTA: It could only benefit the class
9 upon certification which didn't occur in this case. And
10 here we have a plaintiff, Vasquez, who decided to settle
11 the case on his own to benefit himself, never even sought
12 approval under 908 and belatedly sought notice. But he did
13 decide to settle the case for his own benefit rather than
14 from the class. And, Your Honors, I submit that in a case
15 where there was a settlement precertification where there
16 was no impact on the putative class members, 908 does not
17 require notice.

18 CHIEF JUDGE DIFIORE: Counsel.

19 Thank you, sir.

20 MR. BUZZETTA: Thank you, Your Honors.

21 MR. HENRY: Thank you, Your Honor. There has
22 been no adjudication of liability in either of these cases.
23 There was a settlement, a tender, and the idea that we'll
24 be sending out notices to members of a class notifying them
25 of their rights is misleading because we don't know whether



1 the plaintiff had a good claim much less anybody in the
2 class. I mean what - - - what I hear the plaintiff
3 advocating is a system where the court is sanctioning an
4 educational experience for the public based upon a lawsuit
5 that was filed.

6 JUDGE RIVERA: No. Not for the public.

7 MR. HENRY: Well, these are - - -

8 JUDGE RIVERA: Potential class - - - potential
9 plaintiffs who may have been injured and who may have a
10 claim.

11 MR. HENRY: Imagine, Your Honor, if - - - if the
12 plaintiff in this case instead of identifying interns as
13 the class had identified as all non-exempt Perry Ellis
14 employees such that when we picked off the plaintiff in the
15 - - - in the case we guaranteed that the court was going to
16 send notice to every single non-exempt employee which is
17 almost everybody at Perry Ellis International. Well,
18 that's in a - - - that's the court sending a notice to
19 those people saying you have rights under New York Law.
20 You have rights under the Fair - - -

21 JUDGE RIVERA: You were saying you may.

22 MR. HENRY: You may. You may have rights under
23 the Fair Labor Standards Act. We discussed the Fair Labor
24 Standards Act and the federal procedure for sending out
25 notices in those cases. And before those notices go out



1 there's a hearing and there's a determination as to what
2 the notice is going to say, and it's all before an
3 adjudication of liability. It's all before there's a
4 trial. It's all before something occurs in the case.
5 There's never a circumstance in an FLSA case where there's
6 been a trial or been a settlement or been any kind of
7 adjudication of liability and then notice goes out after
8 the fact. In fact, that's what the O'Hara case mandated
9 against. It said that you can't have notices going out to
10 class members after the - - - the liability's already been
11 established because then you've got somebody - - - you've
12 got a group of people that are coat-tailing on a plaintiff
13 that took the risk, filed a lawsuit. And that's - - -

14 JUDGE RIVERA: But in the settlement - - - but in
15 the settlement is the employer agreeing or is the defendant
16 agreeing that they're liable that indeed they did violate
17 the law?

18 MR. HENRY: No. No. No. We - - - we've never -
19 - -

20 JUDGE RIVERA: Well, I'm not - - - I'm not
21 understanding your analogy. I'm sorry.

22 MR. HENRY: Well, the plaintiff was saying that
23 in FLSA cases that these notices are sent out routinely to
24 class members and that's true. The Fair Labor Standards
25 Act Section 216 allows notices to be sent to similarly



1 situated people, but there's always a hearing before those
2 notices are sent out. As to who the notices are going to
3 go to - - - and it's always before a finding of liability
4 so that these people have either opted into the case or
5 they're not in the case. But at the time there's a trial
6 we know who's - - - who's involved. What - - - what the
7 plaintiffs are talking about in this case is much
8 different. The plaintiffs are talking about in any case
9 where a class is alleged in the complaint that the court
10 sends out a notice to anybody that's broadly alleged in the
11 complaint that they may have rights under the statute and
12 that they should call the plaintiff's counsel to discuss
13 them. And that's a very different thing.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MR. HENRY: Thank you, Your Honor.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Desrosiers v. Perry Ellis Menswear, LLC, No. 121, and Vasquez v. National Securities Corporation, No. 122 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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