# Monestier on the Illusory Search for Res Judicata of Transnational Class Actions

Tanya J. Monestier, who teaches at the Roger Williams University School of Law, has posted Transnational Class Actions and the Illusory Search for Res Judicata on SSRN. The abstract reads:

*The transnational class action – a class action in which a portion of the class consists of non-U.S. claimants – is here to stay. Defendants typically resist the certification of transnational class actions on the basis that such actions provide no assurance of finality for a defendant, as it will always be possible for a non-U.S. class member to initiate subsequent proceedings in a foreign court. In response to this concern, many U.S. courts will analyze whether the "home" courts of the foreign class members would accord res judicata effect to an eventual U.S. judgment prior to certifying a U.S. class action containing foreign class members. The more likely the foreign court is to recognize a U.S. class judgment, the more likely that an American court will include those foreigners in the U.S. class action.*

*Current scholarship accepts propriety of the res judicata analysis, but questions the manner in which the analysis is carried out. This Article breaks from the existing literature by arguing that the dynamics of class litigation render the res judicata effect of an eventual U.S. class judgment inherently unknowable to a U.S. court ex ante. In particular, I argue that certain "litigation dynamics" – specifically the process of proving foreign law via experts, the principle of party prosecution, and the litigation posture of the action – complicate the transnational class action landscape and prevent a court from accurately analyzing the res judicata issues at play. This is exacerbated by the "structural dynamics" of class litigation: the complexity of foreign law on the recognition and enforcement of judgments; the newness of class action law in most foreign countries; and the distinction between general and fact-specific grounds for non-enforcement of a U.S. class judgment. Accordingly, I argue that U.S. courts should abandon their illusory search for res judicata. Instead, courts should avoid the res judicata problem altogether by employing an opt-in mechanism for*

*foreign class plaintiffs, whereby such plaintiffs are not bound unless they affirmatively undertake to be bound by U.S. class judgment. An opt-in mechanism for foreign plaintiffs also provides several advantages over the current opt-out mechanism: it allows all foreign claimants to participate in U.S. litigation if they so choose; it provides additional protections for absent foreign claimants; it respects international comity; and it sufficiently deters defendant misconduct.*

The paper is forthcoming in the *Tulane Law Review* (Vol. 86, p. 1).

Tip-off: Antonin Pribetic