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REPORT BY THE STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE, COUNCIL ON JUDICIAL ADMINISTRATION, AND LITIGATION COMMITTEE ON CLASS ACTIONS IN THE NEW YORK COURTS

PROPOSED AMENDMENTS TO ARTICLE 9 OF THE CIVIL PRACTICE LAW AND RULES

I. INTRODUCTION AND EXECUTIVE SUMMARY

New York has been a leader in the United States in developing class action procedures. New York's statute was the model for state statutes from the mid-19th to the mid-20th Century, and a proposed revision in the 1950's "became the cornerstone of new federal rule 23" adopted in 1966.[1] In recent years, however, New York's statute has fallen behind, particularly after significant amendments to the federal rule in 2003. This Report proposes five amendments to Article 9 to reform and modernize the administration of class actions in New York's courts. The proposed amendments are attached to this Report as Exhibit A.

The basic philosophy behind class actions, "unchanged through the centuries," is that "self-interest, the motivating force that sparks the adversary system," warrants an exception to the traditional joinder rules where there is a commonality of interests.[2]

[1] A. Homburger, *Private Suits in the Public Interest in the United States of America*, 23 Buff. L. Rev. 344, 357 (1974) (hereinafter, "Homburger, *Public Interest Suits*").

[2] A. Homburger, *State Class Actions and the Federal Rule*, 71 Col. L. Rev. 609, 611 (1971) (hereinafter, "Homburger, *State Class Actions*") (describing class actions as part of judicial procedure in the common law since the 17th century, when English chancery courts developed class actions "as an exception to the broad and flexible equity rule that all persons materially interested in the subject of the litigation should be joined as parties.").

> We may trust the man to help his fellow man if by doing so he helps himself – particularly if *only* by helping others will he be able to protect and promote his own interests. . . . Our system of justice tolerates and at times favors litigation through champions who stand or fall with the whole group.[3]

New York's first class action statute was enacted as an amendment to the Field Code in 1849,[4] drawing on English common law antecedents and Justice Story's writings on equity practices.[5] Until the 1938 adoption of the Federal Rules of Civil Procedure (with a predecessor to the current Rule 23), the New York approach "spread with the [Field] Code to most states of the union and became the American standard provision for class actions."[6]

Promulgation of a federal class action rule in 1938 prompted reform in state rules. By 1971, approximately fifteen states had adopted state rules comparable to federal rule.[7] In 1962 the New York Legislature enacted an amendment to the Civil Practice Law and Rules' (CPLR) class action article,[8] adopting a more innovative approach that actually became the basis for major amendments to the federal rule in 1966. Notwithstanding New York's leadership,

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[3] Homburger, *State Class Actions*, at 610. A draft of what became Article 9 of the CPLR was included in Professor Homburger's seminal article. *Id.* at 655-57. The article is a de facto legislative history of CPLR Article 9; it is cited in both the Tenth Annual Report of the Judicial Conference to the Legislature (the "1971 Judicial Conference Report"), *reprinted in* Report of the Administrative Board of the Judicial Conference of the State of New York, Legis. Doc. 90, at 218-19 (1972), and in the Twelfth Annual Report of the Judicial Conference to the Legislature (the "1973 Judicial Conference Report"), *reprinted in* Report of the Administrative Board of the Judicial Conference of the State of New York, Legis. Doc. No. 90, at 206 (1975).

[4] Laws 1849, c. 438 § 119. The early rule read:

> [A]nd when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole.

[5] Homburger, *State Class Actions*, at 612-13 (citing J.STORY, COMMENTARIES ON EQUITY PLEADINGS **§** 97 (1838)).

[6] Homburger, *State Class Actions*, at 613.

[7] *Id.* at 626, n.94.

[8] Laws 1962, c. 308.

however, "[i]n the very year of its enactment the [New York] legislature had a change of heart and . . . reverted to the seemingly indestructible Field Code rule."[9]

In 1975 New York enacted its current Article 9 for class actions.[10] It has not been materially changed in the last forty years. In 2003 significant changes were made to Rule 23 of the Federal Rules of Civil Procedure. This Report's view is that some of the changes to federal law should be considered for Article 9. This Report also is of the view that amendments to Article 9 are appropriate to improve the administration of class actions and to continue to restore New York to a leadership role in commercial litigation. The following amendments are proposed, listed here in the order in which changes would be made to Article 9:

- CPLR 901(b) precludes class certification for actions demanding a statutory penalty or minimum measure of recovery. The rule is unique among class action statutes and was not part of the bill as originally drafted. As discussed in Part II(B) below, the U.S. Supreme Court has concluded that CPLR 901(b) does not govern actions in federal courts, a decision that has encouraged forum shopping and the diversion of cases to federal courts. Recent state court decisions discussed in Part II(C) also have led to confusion over (i) what constitutes a penalty, and (ii) whether it can be waived to permit class certification. To discourage forum shopping and to provide for greater certainty in administration of the law, this Report recommends the removal of the present CPLR 901(b).

- A common law doctrine pre-dating the enactment of Article 9 disfavors class actions against governmental entities. This judicially-developed rule has been slowly eroded over the past fifteen years, and exceptions have made it confusing and inconsistent in application. Part III of this Report recommends a new CPLR 901(b) to formally rescind the rule (and in lieu of the current CPLR 901(b)).

- CPLR 902 presently requires that a motion for class certification is to be made within sixty days after a responsive pleading. This 60-day rule also was not part of the original proposal for CPLR 902. The rule does not reflect the complexity of contemporary class action practice, where substantial discovery is often necessary on the feasibility and suitability of class certification. In addition, the 60-day rule often results in a *pro forma* motion, depriving the court of a substantive supporting brief. Part IV of this Report recommends adoption of the language from Fed. R. Civ. P. 23(c)(1)(A), stating that motions shall be made "at an early practicable time . . . ."

[9] Homburger, *State Class Actions*, at 631 (citing Laws 1962, c. 318).

[10] Laws 1975, c. 207 & c. 474.

- Article 9 addresses the adequacy of class counsel only indirectly, as implicit in the CPLR 901(a)(4) prerequisite to certification that "the representative parties will fairly and adequately protect the interests of the class." Federal studies recognized the inadequacy of this language (appearing in Fed. R. Civ. P. 23(a)(4)), and in 2003 a new Rule 23(g) was adopted that specified factors to be considered in appointing class counsel. Part V of this Report proposes a new CPLR 902(b)(2) to provide comparable guidance.

- The current CPLR 908 provides that a class action is not to be dismissed, discontinued or compromised without judicial approval and notice to the class, even before certification. Class notice imposes substantial and often unnecessary expenses; this Report recommends a more flexible notice provision, requiring notice only where class members would be bound or where the court concludes that notice is necessary to protect the interests of the members of the class. While the 2003 amendments removed from the federal rule the requirement of judicial approval of pre-certification settlements, Part VI of this Report recommends retaining the longstanding New York rule requiring such approval.

II. CPLR 901(b) SHOULD BE AMENDED TO REMOVE THE PROHIBITION OF CLASS ACTIONS TO COLLECT STATUTORY PENALTIES

A. New York's Unique Rule Should be Repealed as an Historical Anachronism

New York is "unique amongst class action rules whether state or federal" in prohibiting class certification for claims seeking statutory penalties or statutory minimum damages.[11] Section 901(b) of the CPLR provides:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

In the early 1970's the Legislature had undertaken a comprehensive overhaul of the CPLR's class action rules, prompted partly by Court of Appeals' criticism that the former state

[11] Thomas A. Dickerson, "*Borden": A Welcome Sea Change on New York State Class Actions*, N.Y.L.J. June 29, 2015 (hereinafter, "Dickerson, *Sea Change*"); *see* Thomas A. Dickerson, Leonard B. Austin & Brian Zucco, *New York State Class Actions: Making it Work –Fulfilling the Promise: Some Recent Positive Developments and Why CPLR 901(b) Should be Repealed*, 77 Alb. L. Rev. 59, 68 n.60 (2014) (hereinafter, "Dickerson, et al., *Recent Positive Developments*") (noting other exceptions for taxpayer suits and parens patriae actions); Thomas A. Dickerson & Leonard B. Austin, *State Class Actions 2013 and Call to Repeal CPLR 901(b)*, N.Y.L.J., Dec. 24, 2013 (hereinafter, "Dickerson, *State Class Actions 2013*").

class action statute (CPLR 1005) had become "judicially restricted over the years" and was producing "inconsistent results." *Moore v. Metro. Life Ins. Co.*, 33 N.Y.2d 304, 313 (1973). As originally drafted by the New York State Judicial Conference, the provision governing class action prerequisites (CPLR 901(a)) would have tracked the corresponding federal class action provision, defining the prerequisite elements as numerosity, predominance, typicality, adequacy of representation, and superiority. Fed. R. Civ. P. 23(a).[12] In legislative hearings, however, "various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty or minimum measure of recovery." *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 211 (2007) (summarizing legislative history). The addition of paragraph (b) to CPLR 901"was the result of a compromise among competing interests." *Id.*[13]

Critics have noted that the Legislature did not have the benefit of any studies or scholarly analysis supporting the position of these advocacy groups or demonstrating the need for CPLR 901(b),[14] and the drafters of this Report found no other state following New York's approach. Of greater current significance, however, are the developments discussed below: The U.S. Supreme Court decided that CPLR 901(b) is a rule of state procedure that the federal courts are not to

[12] Fed. R. Civ. P. 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." While chronologically the Judicial Conference's draft of Article 9 followed the adoption of Fed. R. Civ. P. 23 in 1966, the federal rule was actually modeled on an earlier draft prepared for the New York Judicial Council. *See* Homburger, *State Class Actions*, 71 Col. L. Rev. at 629-31.

[13] Various groups had advocated for an amendment to CPLR 901 based on concerns that permitting the aggregation of statutory penalties in addition to actual damages would result produce excessively harsh, "annihilating" punishments of class action defendants. *See* V. Alexander, Practice Commentaries, C901: 11, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 104 (2006); *see also* Dickerson, et al., *Recent Positive Developments*, 77 Alb. L. Rev. at 68 n.58 (citing submissions to Legislature). These groups further argued that, unlike plaintiffs pursuing individual lawsuits, class action litigants do not need economic incentives to pursue actions in which the amounts involved might otherwise be too small. *See* Sponsor's Mem., Bill Jacket, L. 1975, ch. 207.

[14] Dickerson, *Sea Change*, at n. 10 and accompanying text.

follow, and the Court of Appeals and other state courts are finding ambiguity in the meaning of "penalty" or are permitting certification where plaintiffs waive the statutory penalties and seek actual damages instead. Given the impetus to forum shop and the state courts steadily limiting the application of CPLR 901(a), this Report recommends that this unique New York rule be repealed as an historical anachronism.

B. The Supreme Court's Holding CPLR 901(b) Inapplicable in Federal Courts Invites Forum Shopping

Until 2010 federal courts sitting in diversity traditionally treated CPLR 901(b) as "substantive and appl[ying] with equal force in federal litigation."[15] The "game changer" came in the U.S. Supreme Court's decision in *Shady Grove Orthopedic Associates, PA. v. Allstate Insurance Company*, 559 U.S. 393, 397 (2010).[16] In *Shady Grove*, the plaintiffs had received an assignment of insurance benefits for providing medical care and filed a New York Insurance Law cause of action for failure to pay interest on the delayed insurance benefits. The named plaintiff's claim was about $500. The plaintiff commenced a federal diversity action in the U.S. District Court for the Eastern District of New York and moved for class certification. The Second Circuit affirmed a District Court dismissal of the case, holding that CPLR 901(b) was a substantive rule of law that applied to the claim under the *Erie* doctrine and prevented certification of a class under Fed. R. Civ. P. 23. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 549 F.3d 137, 143-44 (2d Cir. 2008).

The Supreme Court reversed. The Court posed the rhetorical question whether Fed. R. Civ. P. 23 allowed the claim to be maintained as a class action in federal court. "If [Rule 23]

[15] *Leider v. Ralfe*, 387 F. Supp. 2d 283, 291 (S.D.N.Y. 2005) (federal courts should "avoid application of federal law [that] would significantly encourage forum shopping . …"); *Weber v. U.S. Sterling Secs.*, 924 A.2d 816, 827-28 & n.7 (Conn. 2007) (applying CPLR 901(b) as a rule of substantive law in a diversity case, under forum's choice of law rules; court stated if it failed to apply CPLR 901(b) "we would encourage forum shopping").

[16] *Shady Grove* was described as a "game changer" in Thomas A. Dickerson, *State Class Actions: Game Changer*, N.Y.L.J., Apr. 6, 2010, at 6 (hereinafter, "Dickerson, *Game Changer*").

does, it governs – New York's [CPLR 901(b)] notwithstanding – unless [Rule 23] exceeds statutory authorization or Congress's rulemaking power." 559 U.S. at 398. The Court concluded that Rule 23 did not exceed either statutory authorization or Congress's rulemaking power. *Id.* at 406-10. Because CPLR 901(b) "attempts to answer the same question – *i.e.*, it states that Shady Grove's suit 'may *not* be maintained as a class action' because of the relief it seeks – it cannot apply in diversity suits …." *Id.* at 399 (Court's emphasis).

In reaching this conclusion, the Court acknowledged the inevitable forum shopping that would result from the decision:

> We acknowledge the reality that keeping the federal court door open to class actions that cannot proceed in state court will produce forum shopping …. But divergence from state law with the attendant consequence of forum shopping, is the inevitable (indeed one might say the intended) result of a uniform system of federal procedure.

559 U.S. at 415-16.[17]

Scholars, practitioners, and judges promptly predicted that the *Shady Grove* decision would encourage federal forum shopping by plaintiffs to avoid the limiting effects of Rule 901(b).[18] In fact, an empirical study done several years after *Shady Grove* was decided found "evidence of large shifts in the patterns of original filings and removals in federal courts in New

[17] This appears to be the view of the majority of the Court. Chief Justice Roberts and Justices Thomas and Sotomayor specifically joined in the portion of Justice Scalia's opinion containing the quoted language, and Justice Stevens's concurring opinion appeared to accept the forum shopping risk as articulated in the opinion by Justice Scalia. *See* 559 U.S. at 436.

[18] *See, e.g.*, Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in A Shady Grove*, 79 Geo. Wash. L. Rev. 448, 479–80 (2011); Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 Notre Dame L. Rev. 987, 1028 (2011) (*Shady Grove* "will produce forum shopping, as the federal courts become more hospitable to class actions than some states."); Elizabeth Guidi, *Shady Grove: Class Actions in the Context of Erie*, 77 Brook. L. Rev. 783, 811 (2012) ("The Court's decision in *Shady Grove* . . . violates the twin aims of *Erie* because it will increase forum shopping and the inequitable distribution of the laws."); Aaron D. Van Oort & Eileen M. Hunter, *Shady Grove v. Allstate: A Case Study in Formalism Versus Pragmatism*, 11 Engage 105, 109 (Sept. 2010) ("As the dissent emphasizes, the plurality's formalist approach—and the concurrence's measured formalist approach as applied in this case—will increase forum-shopping . . . ."); Dickerson, *Recent Positive Developments*, 77 Alb. L. Rev. at 60 ("[I]t is now useless in prohibiting class actions seeking a statutory penalty or minimum recovery since such a class action can now be brought in federal court.").

York that are consistent with the predicted forum shopping response to *Shady Grove.*"[19] The *Shady Grove* decision presents the most compelling reason for the repeal of CPLR 901(b): "CPLR 901(b) has become relatively useless in prohibiting penalty class actions and encourages forum shopping because such class actions can now be brought in federal court instead."[20] Indeed, it appears that when the rule is applied it serves only to penalize citizens of New York having no federal jurisdiction for their claim.

C. State Court Decisions Finding "Penalty" Ambiguous and Permitting Waivers Make Application of CPLR 901(b) Inconsistent

Even before the forum-shopping issue made possible by the *Shady Grove*, the decisions of the New York courts reflect considerable difficulty in reconciling CPLR 901(b) with the general purposes underlying Article 9. The first interpretive problem is in determining what constitutes a "penalty" and, as a dissenting Court of Appeals opinion notes, the fact that "the statute says it is a [penalty] does not necessarily mean it is." *Borden v. 400 East 55th St. Assocs.*, 24 N.Y.3d 382, 406 (Smith, J., dissenting). *Borden* opens the door to inconsistent applications of CPLR 901(b) by encouraging a case-by-case contextual analysis of what constitutes a "penalty."

At issue in *Borden* were rent overcharges in violation of § 26-516(a) of the Rent Stabilization Law, which states that in such cases a landlord "shall be liable to the tenant for a penalty equal to three times the amount of such overcharge." The use of that term in the statute, the Court said, is not dispositive.

> Judge Cardozo eruditely observed that although a statute spoke of a payment due "as a penalty," it is only so "in a loose sense" and "[f]orms and phrases of this kind, accurate enough for rough identification or convenient description, do not carry us very far"

[19] William H.J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts* 4 & 6, Univ. of Chi. Law Sch. Coase-Sandor Inst. For Law & Econ., Research Paper No. 642, 2013, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263481.

[20] Dickerson, *Recent Positive Developments*, at 69-70.

> in determining the statutory meaning . … Continuing, he cautioned us "to remember that the same provision may be penal as to the offender and remedial as to the sufferer" and [t]he nature of the problem will determine whether we are to take one viewpoint or the other."

Borden, 24 N.Y.3d at 396 (internal citations omitted). The Court concluded that "the first third" of the treble damage award to which an individual plaintiff is entitled under the Rent Stabilization Law "merely compensates the tenant" and that CPLR 901(b) did not bar certification of a class for such "a nonpunitive claim." *Id.* at 397.

Borden is not the first case in which the New York Court of Appeals sidestepped the question what constitutes a "penalty" within the meaning of CPLR 901(b); the Court previously has noted that the determination may "vary depending on the context." *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 212 (2007) ("we have never construed the term 'penalty' within the meaning of CPLR 901(b)"). In *Sperry*, the Court determined that the treble damages provision of General Business Law § 340(5) is a statutory penalty and thus denied class certification in an action alleging price-fixing under the Donnelly Act. 8 N.Y.3d at 214. While in *Sperry* the Court declined to reach the issue of whether the plaintiff could maintain a class action under the Donnelly Act by foregoing treble damages in favor of actual damages (8 N.Y.3d at 215), in *Borden* the Court answered that question affirmatively (24 N.Y.3d at 391-92).

CPLR 901(b) may have been a useful experiment when it was "engrafted onto an otherwise modern class action statute."[21] However, in light of the ambiguities found by the state courts and the forum shopping problems described above, the experiment has not been successful. Repealing CPLR 901(b) would streamline and modernize New York State class

[21] Thomas A. Dickerson & Leonard B. Austin, *New York State Class Actions 2014: CPLR 901(b) Clarified Again*, N.Y.L.J., Dec. 22, 2014, at 4, col. 1 (hereinafter, "Dickerson, *State Class Actions 2014"*).

action certification procedures, bringing them into conformity with the practice in federal courts and the courts of other states.[22]

III. A NEW CPLR 901(b) SHOULD BE ENACTED TO OVERRULE THE NON-STATUTORY PROHIBITION OF CLASS ACTIONS AGAINST GOVERNMENTAL DEFENDANTS

In its 2003 Report recommending amendments to Article 9,[23] the City Bar recommended the Legislature repeal the "governmental operations rule," under which class-action certification can be denied in cases involving governmental operations on the theory that governmental compliance and *stare decisis* will adequately protect subsequent litigants. *Jones v. Berman*, 37 N.Y. 2d 42, 57 (1975); s*ee Rivera v. Trimarco*, 36 N.Y.2d 747, 749 (1975) (abuse of discretion to grant class relief because of governmental operations rule); *Matter of Martin v. Lavine*, 39 N.Y.2d 72, 75 (1976) (class certification reversed where, in part, future litigants could rely on court's decision). Legal developments since *Jones v. Berman* and its progeny were decided demonstrate this judicially-created rule has become obsolete and should be laid to rest.

Even before the 2003 Report, courts in a number of decisions either carved out exceptions to the government operations rule or declined to follow it. One category in which the government operations rule has not prevented class certification includes cases in which large numbers of persons individually are seeking small sums of money in government entitlements and the other prerequisites of CPLR 901 are satisfied. *See, e.g.*, *Seittelman v. Sabol*, 158 Misc. 2d 498, 512 (Sup. Ct. N.Y. Co. 1993), *aff'd*, 217 A.D.2d 523 (1st Dep't 1995), *aff'd as modified*, 91 N.Y.2d 618 (1998) (governmental operations rule inapplicable where under *stare decisis* numerous lawsuits would have to be brought in the future by indigent, aged or disabled class

[22] THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES (2015).

[23] Council on Judicial Administration, *Three Proposed Amendments to Article 9 of the Civil Practice Law & Rules*, 58 The Record 316, at 317-25 (the "2003 Report"), *available at* http://www2.nycbar.org/Publications/record/2003.pdf.

members seeking retroactive benefits); *Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d 856, 859 (1991) (class of rent-stabilized tenants properly certified notwithstanding governmental operations rule, where continuing presence of defendants could aid in implementing systemic relief); s*ee also Holcomb v. O'Rourke*, 255 A.D.2d 383 (2d Dep't 1998) ("the rule does not apply since the potential petitioners . . . are a large, readily definable class seeing relatively small damages" and predominant issue was whether county improperly abolished their jobs); *Tosner v. Town of Hempstead*, 12 A.D.3d 589 (2d Dep't 2004) (citing *Holcomb*, 255 A.D.2d 383) ("the purported class consists of a large number of identifiable individuals seeking monetary damages"); *Graves v. Doar*, 62 A.D.3d 874 (2d Dep't 2009) (citing *Holcomb*, 255 A.D.2d 383) ("the rule does not apply where . . . the members of the class are 'seeking relatively small sum[s] of damages' as a result of the challenged governmental action").

In *New York City Coalition to End Lead Poisoning v. Giuliani*, 245 A.D.2d 49 (1st Dep't 1997), the court stated other exceptions to the governmental operations rule. The rule is not a bar to class certification where the governmental entity has not complied with court orders; the entity does not propose any form of relief to protect the plaintiffs; the plaintiffs' ability to commence individual actions is compromised; or where the condition sought to be remedied by the plaintiffs poses an immediate threat to them. 245 A.D.2d at 51. Since *N.Y.C. Coalition to End Lead Poisoning v. Giuliani*, the courts have been more willing to certify classes where the harm being suffered by putative class members is urgent and immediate, whether or not "governmental operations" are involved.

Practical considerations of judicial economy also have helped weaken the old rule, and a significant breakthrough came in *City of New York v. Maul*, 14 N.Y.3d 499 (2010). This lawsuit originally was brought by the City against a state agency, and was joined by individual

intervenors who moved for class certification against both city and state agencies. *Id*. at 504-05. The suit alleged systemic governmental violations over a long period involving the failure to provide adequate and prompt referral and treatment for developmentally disabled children and young adults in the foster care system. *Id*. at 505. Plaintiffs sought extensive injunctive relief against both City and State. Class certification was granted by the trial court, and the First Department affirmed and certified the case for review. 14 N.Y.3d at 503-04.

The Court of Appeals noted that the Legislature intended CPLR Article 9 to be "a liberal substitute" for the narrow class action legislation that preceded it (and under which *Jones v. Berman*, *supra*, was decided). 14 N.Y.3d at 509. The Court quoted the Judicial Conference's statement to the Legislature that the new law was designed "to set up a flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions." *Id*. (quoting Thirteenth Annual Report of the Judicial Conference to the Legislature on the CPLR, *reprinted in* 1975 McKinney's Session Laws of New York at 1493). The City of New York argued that class certification was inappropriate because each case must be treated individually and there were no common questions that could be adjudicated; the Association of Counties, as *amicus curiae*, argued that the only "true question to be determined" was whether an abuse of discretion occurred "in each solitary case." 14 N.Y.3d at 503 (Reporter's summary of Points of Counsel). The Court rejected defendants' argument that the litigation was "beyond the limits the Legislature set for class actions," and concluded that common allegations "transcend and predominate over any individual matters." 14 N.Y.3d at 511-12. Notable by its absence from the decision is any reference to the governmental operations rule, indicating that the Court no longer believes the rule should be applied in this type of litigation.

The Appellate Division, Third Department, cited *Maul* in reversing a denial of class certification to the plaintiffs in *Hurrell-Haring v. State*, 81 A.D.3d 69 (3d Dep't 2011), an action challenging systemic denial of counsel to indigent defendants in several upstate counties. The Court gave Article 9 a "liberal construction" and said any possible error should be resolved in favor of granting certification. The Court explicitly declined to adopt the government operations rule, holding that "a class action is superior to other available methods for obtaining a fair and efficient adjudication of this controversy." *Id*. at 75. The Court cited the undesirability of multiple lawsuits addressing duplicative claims and the significant discovery challenges that would result from denial of class certification, two concerns that featured prominently in the Council's 2003 Report. Finally, the Court said, "and in our view not insignificantly, our research has failed to identify a single case involving claims of systemic deficiencies which seek widespread, systematic reform that has not been maintained as a class action." *Id.*

The five prerequisites to a class action set forth in CPLR 901 can be applied, as the Court demonstrated in *Maul*, just as effectively in suits against the government as in class actions against private parties. In situations where governmental entities can prove they actively are seeking to remedy the alleged systemic problems identified by the plaintiffs, the courts can employ the class action device flexibly, bearing in mind the goal should be the quickest, fairest, most consistent and efficient resolution of the underlying issues. In cases where the governmental entity is doing nothing to resolve systemic issues, the government operations rule thwarts this goal and, as a common law doctrine predating Article 9, should be abolished by the proposed CPLR 901(b). *See Smith v. Berlin*, Index No. 400903/2010, at 16 (Sup. Ct. New York Co.) (governmental operations rule inapplicable where the relief accorded individual petitioners would provide no relief for the alleged harm affecting the whole class or would not effectively

operate as precedent for the class); *Watts v. Wing*, 308 A.D.2d 391, 392 (1st Dep't 2003) (governmental operations rule inapplicable where putative class composed of those for whom harm is both prospective (continuing) and already has occurred).

As the 2003 Report further pointed out, CPLR Article 9 is modeled after Rule 23 of the Federal Rules of Civil Procedure, and the federal courts regularly permit class certification where plaintiffs seek to require governmental defendants to take affirmative steps to remedy unlawful conditions and implement lawful operations, and a wide-ranging course of conduct encompassing various practices may be involved. Fed. R. Civ. P. 23(b)(2). Additionally, class certification protects against mootness, a particular threat in litigation against governmental defendants who are well positioned to make an exception for the named plaintiff in order to avoid judicial review of the challenged practice or procedure. By protecting against mootness, class certification promotes judicial economy by making it unnecessary to bring repeated actions to adjudicate the same issues.

These cases demonstrate that the government operations rule is outdated and should be legislatively abolished, so that parties can direct their attention to the statutory criteria spelled out in CPLR 901 without the need to haggle over whether the old judge-made rule still applies. Indeed, it is hard to see what is accomplished by retaining the rule except obstruction, delay and inefficiency.

IV. CPLR 902's 60-DAY REQUIREMENT FOR MOVING FOR CLASS CERTIFICATION SHOULD BE AMENDED TO CONFORM WITH THE PREVAILING NATIONAL RULE

CPLR 902 currently requires the plaintiffs of a putative class to move for a class certification order "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action . . . ." This mandatory

60-day motion requirement is virtually unique in American class action procedure. The vast majority of the States follow one of two versions of Rule 23 of the Federal Rules of Civil Procedure.[24] Most follow Rule 23 as it existed prior to 2003, which provided that the court shall address class certification "as soon as practicable after commencement of an action." A minority of states, but steadily growing since the 2003 Amendments to Rule 23, have followed the federal lead and conformed their equivalent rule to state that the court shall address class certification "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1).[25] *See generally* Section of Litigation, American Bar Association, *Fifty-State Survey: The Law of Class Action (2011-2012)* (compiling the state rules on class certification).

This Report recommends that New York align itself with the federal courts by adopting the "at an early practicable time" language, which was itself designed to more closely align the federal rules with the "prevailing practice" at the time. Fed. R. Civ. P. 23, Adv. Comm. Notes, 2003 Amendments. Further, this Report anticipates that the "at an early practicable time" language will be adopted over time by those states whose rules mirror the federal rules.[26] This

[24] Only four jurisdictions are like New York in requiring a motion for class certification by a mandatory date: Louisiana (within 90 days of service of the initial class pleading, Louisiana Code of Civ. P. Art. 592), Michigan (within 91 days after filing of complaint with class allegations, Michigan Court Rule 3.501 (B)(1)(a)), Pennsylvania (within 30 days after pleadings close or after the last required pleading is due, Pennsylvania Court Rule 1707(a)), and the District of Columbia (within 90 days after the filing of a complaint, District of Columbia Superior Court Rule 23-I(b)(1)). However, three of these jurisdictions' court rules also explicitly provide for extension of the mandatory filing date by stipulation or by motion for good cause shown. *See* Louisiana Code of Civ. P. Art. 592(a)(1); Michigan Court Rule 3.501(B)(1)(b); Pennsylvania Court Rule 1707(a). In the District of Columbia, court rules provide that the court may take whatever "preliminary procedures … appear appropriate and necessary in the circumstance." *See* District of Columbia Superior Court Rule 23-I(b)(3). In practical effect, extensions by stipulation or court order are routine in each of these jurisdictions.

[25] As of 2012, seven jurisdictions had updated their rules to use the current language of Federal Rule 23, while over thirty jurisdictions continued to use the pre-2003 language. Of the remaining jurisdictions, several either do not have a class action scheme or do not have any analogous time limitation set by rule. *See generally* Section of Litigation, American Bar Association, *Fifty-State Survey: The Law of Class Action 2011-2012*.

[26] The 2003 Report recommended that the Legislature adopt the "as soon as practicable" language rather than the newly adopted, but not yet effective, "at an early practicable time" language, in part because of the number of states that followed the former language rather than the latter. The growing number of states who have adopted the 2003 language, and length of time that has passed since that language was adopted in the Federal Courts, have informed our recommendation of the language in the current Federal Rule.

recommendation would not only bring New York's practice in line with other jurisdictions and eliminate a rule often ignored by both courts and litigants, but would promote equity by allowing class certification determinations on a more complete and unhurried record. Furthermore, as discussed below, the model on which the 60-day requirement was based (a local rule of the Southern District of New York) has itself been changed to conform with Federal Rule 23, and the concerns that supported such a time requirement have been mitigated by other jurisprudence since CPLR 902 was adopted.

A. The Rationale for CPLR 902's 60-Day Requirement

Underlying CPLR 902's mandatory time requirement is the concern expressed by the Supreme Court for Nassau County that class members may lose their independent claims because of a statute of limitations running while a motion for class certification is pending. In adopting CPLR 902, the Legislature combined Rule 23 with the 60-day requirement of then-applicable Rule 11A of the United States District Court for the Southern District of New York. *Independent Investors Protective League v. Options Clearing House Corp.*, 107 Misc. 2d 43, 45 (Sup. Ct. Nassau Co. 1980). The rationale for these 60-day requirements was that a delay in class determination could cause class members to be "led by the very existence of the lawsuit to neglect their rights until after a negative ruling on this question – by which time it may very well be too late for the filing of independent actions." 107 Misc. 2d at 44 (quoting Frankel, *Some Preliminary Observations Concerning Civil Rule* 23, 23 F.R.D. 39, 40). As discussed below, however, the judicial adoption of a toll on an individual's statute of limitations while a putative class remains pending in another action has addressed this concern.

B. The Rule in Practice

CPLR 902's 60-day mandate has received little judicial attention. Although several reported decisions have strictly enforced it,[27] on other occasions courts have read it somewhat broadly to avoid dismissing class allegations. In *Caesar* v. *Chemical Bank*, 118 Misc. 2d 118, 119 (Sup. Ct. N.Y. Co. 1983), for instance, the court found a motion for class certification timely where the motion was made within sixty days of the Appellate Division affirming dismissal of one of the causes of action even though an answer had been filed simultaneously with the motion to dismiss that cause of action. The court reasoned that until a determination was reached as to the scope of the claims, a determination as to certification was not feasible.

The same approach was taken in *Independent Investors Protective League*, *supra*, where defendants moved to strike class allegations from a complaint where, in the four years following the action's commencement, the plaintiff had not moved for certification. Without a specific basis in Article 9 for doing so, aside from CPLR 908's provision that class actions should not be dismissed or discontinued without notice to the class, the court denied the motion, expressing concern that "plaintiffs' indolence" may have caused class members to lose meritorious claims by the running of a statute of limitations. 107 Misc. 2d at 45. Instead, the court ordered notice to the putative class members, and provided leave to defendant to resubmit a motion to strike that would address the "potential prejudice to class members." 107 Misc. 2d at 45-46.[28] In effect, the court sought a way to sidestep the strict consequences of CPLR 902 for what it perceived might be a meritorious case. Similarly, in *DeBlasio v. City of New York*, 24 Misc. 3d 789, 798

[27] *See, e.g., O'Hara* v. *Del Bello*, 47 N.Y.2d 363, 368 (1979); *Shah v. Wilco Sys., Inc.*, 27 A.D.3d 169, 173-74 (1st Dep't 2005); *Kensington Gate Owners, Inc.* v. *Kalikow*, 99 A.D.2d 506 (2d Dep't 1984); *Globe Surgical Supply v. Allstate Ins. Co.*, 929 N.Y.S.2d 199 (Sup. Ct. Nassau Co. 2011) (slip op.).

[28] The court also faulted defendants for waiting years to file their motion to strike, referring to the then-extant Rule 11A of the United States District Court for the Southern District of New York, which not only had a similar 60-day provision (as discussed below), but also required the defendant to move within thirty days after the 60-day period to dismiss the class allegations. *Id.* Rule 11A has since been repealed.

(Sup. Ct. N.Y. Co. 2009), the court held simply that "it would be unfair" to hold plaintiffs to the 60-day standard given the case's long inactivity prior to defendants filing an answer.

Finally, in *Argento v. Wal-Mart Stores, Inc.*, 66 A.D.3d 930 (1st Dep't 2009), the trial court allowed months of class certification discovery, set a number of scheduling orders governing such discovery, and was advised by plaintiff at the first status conference under these orders that the plaintiff would be seeking class certification. 66 A.D.3d at 932. The trial court then dismissed the case for failure to meet the 60-day requirement of CPLR 902. The First Department reversed, relying upon CPLR 2004 as a basis for allowing the late filing due to "good cause shown" and the "liberal" construction of CPLR Art. 9. 66 A.D.3d at 932-33.

C. CPLR 902's Requirement In Practice

In actual use, CPLR 902's 60-day requirement has become unreasonably short. Litigants often have ignored it (as have the courts) or have stipulated to extend the time (sometimes without a court order – a tactic not provided for by the rule and, accordingly, possibly of no effect). As Justice Lewis Friedman noted in 1996, "the established practice [is] that substantial litigation, such as limited discovery or motions pursuant to CPLR 3211, will occur prior to the making of the class certification motion." *Mazzocki* v. *State Farm Fire & Cas. Co.*, 170 Misc. 2d 70, 72 (Sup. Ct. N.Y. Co. 1996). A common approach is for plaintiffs to file a *pro forma* motion for certification within the sixty days, followed by discovery and motion practice, with the substantive briefing on the motion then consisting of the opposition and reply papers on the motion.

Experience has shown that it is the rare case in which sixty days will permit the development of a record on which a reasoned class certification decision can or will be based. A hurried period of pre-certification discovery may be unjust to both plaintiffs and defendants: the

court may either approve certification on an incomplete record or deny certification because the plaintiff has not developed the case on behalf of the putative class. Nor is the pro forma solution commendable – in addition to being effectively an end-run around a provision of the CPLR, such a procedure causes the initial certification motion itself to be filed upon an incomplete and bare record. Class certification determinations – from initial briefing to judicial determination – should be upon a complete record.

Just as importantly, the rationale for the 60-day requirement now is undercut by jurisprudence since the adoption of CPLR 902 concerning the running of statutes of limitations while a class action is pending. Through the seminal decision in *American Pipe* & *Constr. Co.* v. *Utah,* 414 U.S. 538 (1974), and its progeny, especially *Crown, Cork* & *Seal Co.* v. *Parker,* 462 U.S. 345, 353-54 (1983), an individual's right to file a claim is tolled from the commencement of a putative class action through the determination of a class certification motion. *See In re Agent Orange Prod. Liability Litig.,* 818 F.2d 210, 213 (2d Cir. 1987) (toll applies so long as an absent member is encompassed by a putative class, even if particular state law holds that the pendency of a class action did not effect such a toll); *Swierkowski* v. *Consol. Rail Corp.,*168 F. Supp. 2d 389, 394 (E.D. Pa. 2001) (citing cases) ("It is well settled that filing of a class action tolls the running of the statute of limitations otherwise applicable to all class members in their individual capacities.").

New York courts also have specifically adopted the *American Pipe* tolling rule. *See Yollin v. Holland Am. Cruises, LLC.*, 97 A.D.2d 720, 720 (1st Dep't 1983) (citing *American Pipe*) ("a timely commencement of the action by plaintiff herein satisfied the purpose of the contractual limitation period as to all persons who might subsequently participate in the suit as members of a class" because the alternative would be the filing of multiple lawsuits); *Clifton*

Knolls Sewerage Disposal Co., Inc. v. *Aulenbach*, 88 A.D.2d 1024, 1025 (3rd Dep't 1982); *cf. Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 432 (1993) (implicitly recognizing a toll); *Paru v. Mut. of Am. Ins. Co.*, 52 A.D.2d 346, 348 (1st Dep't 2008) (*dicta*); *Cullen* v. *Margiotta*, 811 F.2d 698, 719-20 (2d Cir. 1987) (citing cases) ("New York courts have, in the interest of avoiding 'court congestion, wasted paper and expense,' long embraced the principles of *American Pipe.*"); *but cf. Singer* v. *Eli Lilly* & *Co.*, 153 A.D.2d 210, 213-21(1st Dep't 1990) (the *American Pipe* toll did not apply to a suit under New York's DES revival statute because the one-year revival period was a condition precedent to a claim under the statute, not a statute of limitations; because the plaintiffs in the case were not members of putative class actions filed during the revival period; and because the policy behind *American Pipe* was not applicable in such a situation as a revival statute). Accordingly, a short time limit for certification is no longer needed to protect the rights of individuals who may be delaying in bringing an individual action in reliance on an extant class pleading.

D. Conclusion

The 60-day requirement in CPLR 902 is an artifact no longer serving a purpose: it is no longer necessary in order to protect the rights of absent class members from the running of statutes of limitations; the Southern District of New York no longer has its similar local rule; and determinations of class certification motions should be made on a full record, fairly reflecting the merits of certification. A strict timing requirement for a class certification motion – particularly such a limited 60-day period – does not make jurisprudential sense. Accordingly, this Report proposes that CPLR 902 be amended to read as follows:

> § 902. Order allowing class action <u>and appointing class counsel</u>. [Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine

whether it is to be so maintained.] a. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

Because of a proposed CPLR 902(b) discussed below, this CPLR 902 should be designated CPLR 902(a).

V. CPLR 902 SHOULD BE AMENDED TO PROVIDE GREATER GUIDANCE FOR THE SELECTION OF CLASS COUNSEL

Article 9 of the Civil Practice Law & Rules provides only skeletal criteria for the appointment of class representatives and virtually none for the appointment of class counsel. CPLR 901(a)(4) prescribes as one of the "prerequisites to a class action" that the plaintiffs may sue on behalf of a class "if . . . the representative parties will fairly and adequately protect the interests of the class." CPLR 907(2) authorizes a court to require notice to provide class members with "the opportunity . . . to signify whether they consider the representation fair and adequate." As far as they go these provisions warrant no criticism; they have been in the CPLR since enactment of the new Article 9 in 1975, and parallel language has existed in the Federal Rules of Civil Procedure since the current rules were adopted in the mid-1960's.[29]

Under these rules New York courts traditionally have held that the factors to be considered in determining adequacy of representation are "whether any conflict exists between the representative and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel." [30] A representative was adequate if he or she had a "general awareness of the claims and the

[29] Rules 23(a)(4) and 23(d)(B)(iii), respectively, of the current Federal Rules of Civil Procedure. *See* Homburger, *State Class Actions*, 71 Col. L. Rev. at 658-59 (1971) (discussing Fed. R. Civ. P. 23 after adoption of the 1966 amendments).

[30] *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 202 (1st Dep't 1998).

litigation"[31] and had retained counsel that was "competent and zealous."[32] Prior to amendments to Rule 23 of the Federal Rules of Civil Procedure in 2003, the approach of the federal courts was essentially the same.[33]

Applying these two rules of the CPLR left a great deal of room for subjective judgment calls. For example, in *Ackerman v. Price Waterhouse* (n.30 above), the trial court criticized the proposed class representative as being "an unsophisticated investor" who failed to understand the claims of the case, but on appeal the First Department reversed the finding of inadequacy and found the representative adequate based on her "general awareness of the claims and the litigation, as demonstrated in her deposition." 252 A.D.2d at 201-02. The trial court in *Ackerman* also sanctioned class counsel for making the class certification motion, but on appeal the First Department found the sanctioned class counsel to have "amply demonstrated its experience and skill in class action litigation," vacated the sanctions, and certified a limited class. *Id.* These antipodal conclusions on the same record demonstrate a need for greater statutory clarity.

Studies prepared in support of Fed. R. Civ. P. 23(g) in 2002 also recognized that the courts would benefit from greater guidance. In a 2002 report to the Chief Justice of the Supreme Court, the Committee on Rules of Practice and Procedure of the Federal Judicial Conference acknowledged that "adequacy of counsel has been considered only indirectly as part of the Rule 23(a)(4) determination whether the named class representatives will fairly and adequately protect the interests of the class" (referring to the language also found in CPRL 901(a)(4)). That report

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[31] *Id.*

[32] *Willson v. New York Life Ins. Co.*, 1995 N.Y. Misc. LEXIS 652 (Sup. Ct. N.Y. Co. 1995).

[33] *E.g.*, *Hoxworth v. Blinder, Robinson*, 980 F.2d 912, 923 (3d Cir. 1992); X L. LOSS, ET AL., SECURITIES REGULATION 4647 (3d ed. 2005).

proposed the new Rule 23(g) to "build on experience under Rule 23(a)(4) and fill the gap by articulating the responsibility of class counsel and providing an appointment procedure."[34] This Report proposes as a new CPLR 902(b) an adaptation of that new federal rule.[35]

The proposed CPLR 902(b)(1), like Fed. R. Civ. P. 23(g)((1), states that the court certifying a class "shall appoint class counsel" at the time of certification. This Report recommends this language as ancillary to CPLR 901(a)(4), the prerequisite that the representatives will "fairly and adequately protect the interests of the class," with the selection of class counsel being one measure of the adequacy of protection. Under the language this Report proposes for the new CPLR 902(b)(1), in appointing class counsel the Court also "shall consider:

> (A) the work counsel has done in identifying or investigating potential claims in the action;
>
> (B) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (C) counsel's knowledge of the applicable law; and
>
> (D) the resources that counsel will commit to representing the class …."[36]

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[34] Judicial Conference, Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the Supreme Court and Members of the Judicial Conference*, Sept. 2002, at 17 (the "2002 Federal Judicial Conf. Report"), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2002.

[35] The new Federal Rule 23(g)(1)(A) states that in certifying a class the court "must appoint class counsel," and in appointing class counsel that court "must consider":

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A).

[36] The federal rule uses the term "must consider," while this Report proposes "shall consider," which is used elsewhere in Article 9 (*e.g.*, CPLR 902(a), 903, 904(c) & 905). This Report intends no interpretative difference in the two terms.

The provisions do have some overlap. Paragraph (A) is intended to have the certifying court consider counsel's role in investigating the claim, which is likely to overlap with the court's consideration under paragraph (C) of the expertise of counsel in the substantive law to be applied. Paragraph (B) will require the court to consider counsel's experience in class action practice and "the types of claims asserted in the action," which again overlaps with paragraph (C).

But overall these new rules, like their federal counterparts, are intended to broaden the criteria for the selection of class counsel and are designed to ensure that the appointment criteria would not "fence out counsel whose knowledge of the law and experience in the subject matter of the litigation promise effective class representation despite a lack of class-action experience." Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure, May 20, 2002 (rev. June 11, 2002), at 3 (the "2002 Fed. Civ. R. Adv. Comm. Report").

> Concern that consideration of counsel's experience in class actions and complex litigation might contribute to entrenchment of a small specialized bar led to the addition of two new considerations: experience in handling claims of the type asserted in the action (recognizing that counsel who have litigation individual actions of this type may provide better representation than counsel who specialize in class litigation generally), and knowledge of the applicable law. It is hoped that these new considerations will facilitate appointment of good attorneys who will expand the ranks of class-action counsel.

Id. at 130. The Advisory Committee also expressly noted that the attorney who filed the initial action was not presumptively class counsel:

> [N]o single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the

> applicant's existing attorney-client relationship with the proposed class representative.

Id. at 3. In approving the Report, the Standing Committee also called attention to the Advisory Committee's conclusion that the new criteria recognized the possible importance of "an existing attorney-client relationship between the class representative and counsel."[37]

Recent state class certification decisions suggest that New York courts may already be giving greater scrutiny to class certification motions and focusing on the experience of counsel in both the substantive law at issue and procedural experience in class action practice. For example, reflecting the criteria in both paragraphs (B) and (C), in two cases seeking certification of classes for wage and hour claims courts in New York and Albany counties noted specifically that plaintiffs' counsel were well versed in *both* wage and hour law and in class action law. *Ryan v. Volume Servs*, No. 652970/2012, 2013 N.Y. Misc. LEXIS 932 (Sup. Ct., N.Y. Co. Dec. 7, 2013); *Picard v. Bigsbee Ent.*, No. 1984/2013, 2014 N.Y. Slip. Op. 51113(U) at *1, 44 Misc. 2d 1214(A) (Sup. Ct., Albany Co. June 24, 2014).[38] In appointing three firms as class counsel, *Arroyo v. State of New York*, 12 Misc. 3d 1197(A) at *6 (N.Y. Ct. Cl. 2006), also noted their "substantial experience in either food-borne or waterborne illness claims," the criterion in paragraph (C). Reflecting the criterion set forth in paragraph (A), the *Ryan* court also recognized

[37] 2002 Federal Judicial Conf. Report, at 18.

[38] Counsel's experience in handling class actions may also support a conclusion of lack of qualification. In one recent decision a law firm was found to be "ill-suited to be class counsel." *City Trading Fund v. Nye*, 46 Misc. 3d 1206(A), 2015 WL 93894, at *18-20 (Sup. Ct. N.Y. Co. 2015). The court determined that the firm in question had a history of working with one or more professional plaintiffs, who would purchase a "nominal amounts of shares in publicly traded companies," and "[t]hen, when one of the companies announces a merger, . . . [the firm would] file a merger tax lawsuit." *Id.* at *8-9. The court noted that the firm had been sanctioned several years earlier by the Delaware Court of Chancery, which found that the firm "was filing lawsuits on behalf of 'a web of small investment partnerships for the sole purpose of bringing stockholder lawsuits,'" and the firm's activities there constituted "a pattern of unethical conduct, including making false statements to the court, which were compounded by further false statements made to hide the original inaccuracies." *Id.* at *9. While the *City Trading* court decided the case under the existing CPLR 901(a)(4) "adequacy of representation" criterion, the language this Report proposes for a new CPLR 902(b)(1)(B) provides more explicit guidance.

that counsel had done "substantial work identifying, investigating, litigating, and settling Plaintiff's and other class members' claims." *Ryan*, 2013 N.Y. Misc. LEXIS 932 at *9.

Paragraph (D) reflects a change in accepted practices since Article 9 was adoped in 1976. While in the past "the ability and willingness of *a class plaintiff* to bear the cost of litigation is relevant to a determination of whether the plaintiff will adequately protect the interests of the class" (*Pruit v.Rockefeller Cntr. Props.*, 167 A.D.2d 14, 25 (1st Dep't 1991) (emphasis added)), that rule was developed when the Code of Professional Responsibility permitted a lawyer to advance expenses for a client only where the client recognized that it was "ultimately liable for such expenses" (DR 5-103(B) of the former Code of Professional Responsibility). The current Rules of Professional Conduct adopted in 2009 brought New York into alignment with most other states in permitting a lawyer to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." Jud. L., R. Prof. Cond. 1.8(e)(1). In 2003, Fed. R. Civ. P. 23(g)(1)(A)(iv) was adopted and made the resources the putative class counsel was prepared to commit to representing the class a criterion for the selection of counsel. Reflecting the adoption of Rule 1.8(e)(1), this Report proposes the same criterion for New York practice.[39]

The three remaining paragraphs of the proposed CPLR 902(b) are self-explanatory. Subdivision (e) makes explicit what may be implied in CPLR 901(a)(4), which is that class counsel along with the class representative must fairly and adequately represent the interests of the class. If only one law firm seeks the appointment, the proposed paragraph (c) states that the putative counsel must still meet the considerations set forth in subdivision (b) discussed above and must also demonstrate that it will provide fair and adequate representation under subdivision

[39] The Second and Third Departments of the Appellate Division appear already to have sanctioned this approach. *Wilder v. May Dep't Stores Co.*, 23 A.D.3d 646, 648-49 (2005); *Morrissey v. Nextel Partners*, 22 Misc. 2d 1124(A), *aff'd*, 72 A.D.3d 209 (3d Dep't 2010).

(e). Subdivision (d) makes explicit that the court may designate interim counsel to act on behalf of the putative class. Motions to dismiss or for summary judgment may be made before motions for class certification; complex cases may require discovery to support the certification determination; and there may be competition among counsel for the role of lead counsel. Providing the court with explicit authority to appoint interim lead counsel makes clear that the lawyer who filed the action is not presumed to be the interim lead counsel. *See* 2002 Fed. Civ. R. Adv. Comm. Report at 130-31 (noting these considerations in proposing the same language for Fed. R. Civ. P. 23(g)(3)).

VI. PRE-CERTIFICATION DISMISSALS SHOULD RECEIVE JUDICIAL SCRUTINY, BUT NOTICE SHOULD BE REQUIRED ONLY ON A FINDING THAT NOTICE IS NECESSARY TO PROTECT THE INTERESTS OF MEMBERS OF THE PUTATIVE CLASS

A. Introduction

Class allegations in a complaint have immediate effects, even before a certification motion, dismissal motion, or answer. Absent class members benefit from a tolling of the statute of limitations.[40] The named plaintiff assumes duties that are sometimes described as fiduciary obligations.[41] The named plaintiff and the defendant lose control over any settlement of the litigation, which (regardless of any agreement between them) cannot be dismissed without judicial approval.[42]

CPLR 908 provides as follows:

> **Dismissal, discontinuance or compromise.** A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal,

[40] *See, e.g., Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Yollin v. Holland Am. Cruises*, 97 A.D. 2d 720, 720-21 (1st Dep't 1983).

[41] *Avena v. Ford Motor Co.*, 85 A.D.2d 149, 156 (1st Dep't 1982).

[42] CPLR 908.

> discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

The pre-2003 Rule 23(e) of the Federal Rules of Civil Procedure, from which CPLR 908 derives,[43] was not materially different from CPLR 908.[44]

CPLR 908's plain language requires notice to the class in a court-approved manner, even if the dismissal is sought before certification, and even if no litigant wants it.[45] This set of circumstances that led the New York City Bar's Council on Judicial Administration to undertake preparation of the 2003 Report; a Commercial Division justice of the New York County Supreme Court suggested an evaluation of this issue after he observed on several occasions that both plaintiffs' and defendants' counsel often appear surprised that CPLR requires notice even where no class has been certified.

The rule about notice is more demanding than its pre-1975 predecessor, and (as discussed below) the legislative history indicates that the Legislature intended it to be so; in sponsoring the new Article 9 of the CPLR three years later, the Judicial Conference explicitly noted: "The proposed provision [CPLR 908] is stricter than the present law. In addition to court approval, it

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[43] Homburger, *State Class Actions*, 71 Colum. L. Rev. at 657-59

[44] *Avena v. Ford Motor Co.*, 85 A.D.2d 149, 152 (1st Dep't 1982) ("Federal Rule 23(e) is substantially identical" to CPLR 908). The use of the word "discontinuance" in the 1975 amendments that added Article 9, which does not appear in Federal Rule 23(e), was a carryover from prior law. CPLR 1005(c)) (McKinney 1963), enacted by Laws 1962, c. 318. Use of the term is appropriate because CPLR 3217 uses the term "discontinuance" for voluntary dismissals (with or without a court order), while Rule 41 of the Federal Rules of Civil Procedure uses the term "dismissal."

[45] This Report does not address the method of class notice, which is within the court's discretion. The court may order that notice to the class be by mail, publication, or both. *See Meshel v. City of Long Beach*, 49 A.D.2d 706 (2d Dep't 1975) (ordering notice of class settlement by publication); *In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154 (1st Dep't 1990) (affirming notice to stockholder class by publication); *Michels v. Phoenix Home Life Mut. Ins. Co.*, 1997 WL 1161145 (Sup. Ct. N.Y. Co., Jan. 7, 1997) (notice by a combination of individual mailing and publication). In determining the method of notice, the court is required by CPLR 904(c) to consider the cost of notice by the various methods, the parties' resources, and the likelihood that class members will seek to opt out of the class. The court may determine this likelihood by ordering notice to a random sampling of the class. CPLR 904(c)(III); *see Fiala v. Metro. Life Ins. Co.*, 2007 N.Y. Slip Op. 51797(U) at *2, 17 Misc. 3d 1102(A) (class notice by publication and by mail to a random sample of class members).

requires in all cases notice to the members of the class in such manner as the court directs."[46]

As discussed below, the rule was designed to protect absent members of the putative class and to prevent abuse of the class action device. It also provides a measure of protection to class representatives and lowers the risk of multiple challenges to the settlement in courts other than the one responsible for the case. At this stage of the litigation, however, adversaries may have developed a common interest in the dismissal of a settled case, and it is likely both sides will argue that notice is not necessary. In addition, a court finding that a settlement is not prejudicial to members of the putative class may view notice as a burdensome expense with no apparent value.

This Report recommends that any settlement of a case pleaded as a class action be subject to judicial review, but that the statutory requirement of notice to the class at the pre-certification stage, often unenforced in any case, should be eliminated.[47] In reaching this conclusion, the contributors to this Report considered the development and administration of the New York rule, its evolution from the former Rule 23(e) of the Federal Rules of Civil Procedure, the recent work of the Federal Judicial Conference committees, and recent litigation.

B. Policies Favoring the Present CPLR 908

1. Protecting Absent Class Members

An early illustration of how the New York courts apply the notice rule for the benefit of absent class members is found in a case that predated the 1975 amendments to the CPLR. In *Borden v. Guthrie*, 42 Misc. 2d 879 (Sup. Ct., N.Y. Co. 1964), a corporate defendant in a

[46] 1973 Judicial Conference Report at 211 (comment to proposed CPLR 908).

[47] The 2003 amendments to the Rule 23 of the Federal Rules of Civil Procedure eliminated the requirement of judicial approval of cases settled at the pre-certification stage. Fed. R. Civ. P. 23(e) (referring to settlement of the "claims, issues, or defenses *of a certified class*") (emphasis added).

stockholder's derivative action, based on a joint stipulation with plaintiff's counsel, moved to discontinue the derivative action against two of the five defendants. The moving defendant wanted to avoid paying the attorneys' fees of the dismissed defendants, for which it was responsible. The plaintiff's attorney concurred, apparently believing the remaining defendants could satisfy any judgment. 42 Misc. 2d at 881.

Former CPLR § 1005(c) (the predecessor to CPLR 908) and Bus. Corp. L. § 626(d) then required court approval for the discontinuance of class and derivative actions, respectively, but notice was not mandatory as it is under the current CPLR 908. The *Borden* court denied the motion, and thus did not rule on the notice issue, but the court appeared troubled that "it does not appear, nor is it conceded, that there is no cause of action against these two defendants as distinguished from the remaining defendants . . . ," and stated that "in such actions the court may order that notice be given to those whose interests may be affected." 42 Misc. 2d at 881. The plain implication is that the court would have required notice had the court granted the discontinuance.

Borden illustrates how a trial court is expected to act under the current CPLR 908 when presented with a pre-certification motion to dismiss, discontinue, or approve a settlement of a class action. Since the discontinuance against the two defendants would have preserved the action against the other defendants, the risk appeared not to be collusion between the named plaintiff and the remaining defendants, but rather prejudice to absent class members. The court could find no basis for granting the discontinuance, which would have resulted in the beneficiaries of the derivative pleading – the corporation and its shareholders – losing a potential source of recovery. The argument favoring notice in such circumstances is that the court is likely to depend on the litigants for guidance, and the notice requirement provides class members

with an opportunity to present arguments that might not otherwise be made. In this case, however, the court found *sua sponte* that a discontinuance was inappropriate and, in light of that conclusion, found notice unnecessary.

2. Protecting Class Representatives

Pre-1975 case law also suggests that the notice of dismissal to class members was intended to protect class representatives. In *Sonnenschein v. Evans*, 21 N.Y.2d 563 (1968), an objector to a class action settlement sued the named plaintiff, charging him with having betrayed the interests of the class for a personal "wrongful profit." 21 N.Y.2d at 566. The named plaintiff had commenced a combined derivative and class action in federal court protesting a merger. After denial of his motion for a preliminary injunction, in which the federal judge indicated he "rejected" the plaintiff's underlying contentions (21 N.Y.2d at 565), the shareholder brought an individual action asserting appraisal rights and ultimately negotiated a settlement with the defendant at $22.51 per share, which was a greater value than the other shareholders received in the merger. As part of the settlement the plaintiff dismissed his derivative and class action. *Id.*

The federal court plaintiff, as defendant in a state court action, won dismissal in the Supreme Court and the Appellate Division. 27 A.D.2d 905 (1st Dep't 1967). The Court of Appeals affirmed the dismissal. The court accepted that a class member may sue a class representative who has settled his individual claim for consideration not benefiting the entire class, and also found that the right to plead derivatively "is an extremely valuable one, not merely to the party prosecuting the action, but also to the non-appearing members of the class . . . ." 21 N.Y.2d at 569. In approving the dismissal of the challenge, however, the Court of Appeals found that the federal court had been responsible for supervising the class representative's performance and noted that Rule 23(e) of the Federal Rules of Civil Procedure required notice to

the class members of any settlement. The notice requirements of Rule 23(e), at that time the same as CPLR 908, established an obligation of the plaintiff pleading a class action, but the Court's view was that compliance offered the plaintiff a measure of protection by protecting him from the need to defend his performance in multiple courts. The plaintiff, the Court concluded, "ought not to run the risk of having to answer in an unlimited number of actions and in an unlimited number of courts for his performance of these obligations." 21 N.Y.2d at 569-70.

3. Preventing Abuse of the Class Action Device

The leading decision interpreting the notice requirements under the post-1975 CPLR 908 is *Avena v. Ford Motor Co.*, 85 A.D.2d 149 (1st Dep't 1982). This case also illustrates how the rule is intended to discourage an individual plaintiff's possible abuse of the class action device.

In the 1970's Ford Motor Company provided an extended warranty covering cracked engine blocks. The three named plaintiffs in *Avena* were denied coverage under this warranty, and brought a class action on behalf of other car owners denied coverage. Ford reached a settlement with the individual plaintiffs, under which Ford replaced their engine blocks and paid their attorneys' fees. The settlement was without prejudice to the any class member's right to bring a later claim, but

> as a condition of the compromise Ford required that the order of discontinuance contain no provision for notice to putative members of the alleged but uncertified class and that if the court determines that such notice is necessary, then Ford shall withdraw from the settlement agreement.

85 A.D.2d at 151. The First Department noted that "[f]or some reason plaintiffs' attorneys did not apply for court approval." *Id.* Ford did, however, and approval was denied. Ford appealed, arguing that CPLR 908 did not require notice because the class had not yet been certified, citing the leading federal court decision accepting that argument, *Shelton v. Pargo*, 582 F.2d 1298 (4th

Cir. 1978).[48] The First Department rejected this logic, holding that notice was required even in the case of "a without prejudice (to the class) settlement and discontinuance of a purported class action before certification or denial of certification." 85 A.D.2d at 152. The court emphasized CPLR 908's role in preventing abuse of the class action device.

> Clearly some control of settlement or discontinuance of a purported class action is necessary. The abuses which have developed incident to the beneficent widened availability of class actions and the potential for abuse in a private settlement even before certification are widely recognized. The requirement of notice to the class makes settlement more difficult, perhaps even impossible in some cases. But of course Rule 908 intends to make settlement of class actions somewhat more difficult as part of the price of preventing abuse. And by the very act of asking for court approval, which would otherwise not be necessary, the parties recognize that such settlements are subject to greater control and thus more difficult than the settlement of a purely individual lawsuit.

85 A.D.2d at 153.

The First Department further noted the role that dissenters would play in any hearing on the settlement's fairness and the importance of notice in bringing contrary points of view to the court considering a settlement.

> In our adversary system of justice the court must rely on adversary attorneys to produce the necessary facts. But here, without some notice to the outside world and to possible other members of the class and their representatives (or at least the appointment of a special guardian), who is to find and present to the court considerations that may cast doubt upon the agreement of the attorneys for defendant and for the named plaintiffs for a settlement without notice?

85 A.D.2d at 155. In giving CPLR 908 a reading that the court acknowledged was more rigid

[48] Other federal cases are consistent with *Avena* and in conflict with *Shelton*. *See, e.g., Magana v. Platzer Shipyard*, 74 F.R.D. 61, 69 (S.D. Tex. 1977) ("as a general rule . . . class notice of the individual compromise is necessary to prevent the use of the class allegation as a coercive device"); *Rothman v. Gould*, 52 F.R.D. 494, 498 (S.D.N.Y. 1971) ("some reasonable form of notice" is required); *Philadelphia Elec. v. Anaconda American Brass*, 42 F.R.D. 324, 326-27 (E.D. Pa. 1967) (same).

than *Shelton* and its progeny, the court warned putative class counsel: "Fiduciary obligations should not be lightly assumed and cannot be lightly discarded." *Id.* at 156.

Other New York courts have followed *Avena*, but not without questioning its continued validity. Most recently Justice Kornreich of the Supreme Court for New York County noted that CPLR 908 "has been questioned by many, including the CPLR commentary." *Vasquez v. Nat'l Secs.*, 2015 WL 19673675 at *2 (Sup. Ct., N.Y. Co., May 1, 2015). Consistent with *Avena*, however, Justice Kornreich found notice was required.

> While defendants and respected commentators persuasively argue why the holdings in *Avena* (a First Department case) and *Naposki* (a Second Department case) are outdated and do not reflect the current state of federal class action practice, it is up to the appellate courts or legislature to undo clear New York precedent and change policy.

Id. at *2.

In the Supplemental Practice Commentaries to CPLR 908 (McKinney 1982), Judge Joseph M. McLaughlin suggested that if the class is not bound by a settlement, then an order for notice may be of questionable value. (An analogy is found in the case settled after a court has denied a motion for class certification, which would not require notice to the class.[49]) Judge McLaughlin also suggested that notice for discontinuance of actions pleaded but not yet certified as class actions could lead to "half-hearted motions to certify the class" or burdening litigants with the costs of unnecessary notice. He recommended legislative review of the notice rule, but the rule has remained unchanged since his 1982 Commentary.

CPLR 908 has not been the subject of a major appellate decision since Avena. The paucity of authority suggests that the fears of greater abuse of the class action device without a

[49] *In re Empire Blue Cross & Blue Shield Customer Litig.*, 1995 WL 594723 (Sup. Ct. N.Y. Co. 1995) (Cahn, J.) (citing *Beaver Assocs. v. Cannon*, 59 F.R.D. 508, 510 (S.D.N.Y. 1973)).

notice requirement for uncertified classes have been exaggerated. It is thus time to reevaluate the rule, as the federal courts have done.

C. Federal Rule 23(e) No Longer Requires Notice for Pre-Certification Dismissals

While Rule 23(e) of the Federal Rules of Civil Procedure, as adopted in 1966, was the model for CPLR 908, the federal rule has been changed since then. This Report proposes that CPLR 908 be amended, but not to adopt the federal approach in its entirety.

The 2003 amendments to Federal Rule 23(e) adopted a revised rule that calls for greater judicial scrutiny of class action settlements and dismissals, but only where a class has been certified and not for pre-certification settlements. Fed. R. Civ. P. 23(e). The 2003 amendments abandoned the language in the former Federal Rule 23(e) (and the current CPLR 908) that would require notice of a dismissal, and adopted instead a general rule that notice to the class is required "only when class members would be bound by the proposal."[50] (The language now appears in Fed. R. Civ. P. 23(e)(1).) While the proposed amendments addressed notice requirements in other contexts, this proposal adopted in 2003 removed the requirement of notice for dismissal of pre-certification cases and "focuse[d] on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements." Report of the Civil Rules Adv. Comm. to the Standing Comm. on Rules of Practice & Proc., May 14, 2001 (rev. July 31, 2001), at 30-31. The Advisory Committee's initial approach in 2001 was to retain the requirement of judicial approval for dismissal of class actions that had not been certified and to remove only the notice requirement. At that time the Advisory Committee stated:

> New Rule 23(e)(1)(A) makes clear what many courts have required, but what lawyers and other courts often fail to appreciate: a court must approve the pre-certification settlement, voluntary

[50] 2001 Civ. R. Adv. Comm. Report at 31.

> dismissal, or withdrawal of class claims. Although the amendment requires court approval of a settlement, voluntary dismissal, or withdrawal of class claims, even before certification is sought or achieved, the detailed notice, hearing, and review provisions of Rule 23(e) apply only if a class has been certified.

Id. at 31.

After receiving public comment, the Advisory Committee changed its approach and eliminated the requirement of judicial approval for dismissal of class actions that had not been certified (the requirement this Report proposes be retained in CPLR 908). Taking into account public comments after the proposed rule was published, the Advisory Committee reported:

> As published, Rule 23(e)(1) required court approval for voluntary dismissal or settlement before a determination whether to certify a class. Testimony and comments underscored earlier doubts whether there is much that a court can do when the only parties before it are unwilling to continue with the action. This provision is amended *to require court approval only for voluntary dismissal or settlement of the claims, issues or defenses of a certified class.*[51]

This change was made by adding the phrase "of a certified class" to the opening paragraph of Rule 23(e), as quoted below.[52] While in its 2001 comments (quoted above) the Advisory

[51] 2002 Civ. R. Adv. Comm. Report at 2-3 (emphasis added).

[52] The current Rule 23(e) reads as follows:

> **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses *of a certified class* may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> (1) The court must direct notice in a reasonable manner to all class members *who would be bound by the proposal*.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e)(with emphasis added). Stylistic changes were made to Rule 23(e) in 2004-05. The opening

Committee concluded that judicial approval of pre-certification settlements was required, in its 2002 report the Advisory Committee said only that the present Federal Rule 23(e) "could be read" to require court approval of pre-certification settlements. No explanation for the change in reading was given, but in any event the proposed revision, now found in Rule 23(e)(1), requires notice only "to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1).

> Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be – and at times was – read to require court approval of settlements with putative class representatives that resolved only individual claims . . . .[53] The new rule requires approval only if the claims, issues or defenses *of a certified class* are resolved by a settlement, voluntary dismissal, or compromise.
>
> Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required *when the settlement binds only the individual class representatives.* Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.[54]

This Report concludes that CPLR 908 should be amended, but does not agree with all the language of the proposed Rule 23(e) of the Federal Rules of Civil Procedure.

D. CPLR 908 Should Continue to Require Judicial Approval of Dismissals of Pre-Certification Class Actions

When Article 9 was adopted, it carried over the rule from the former CPLR 1005

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paragraph was Rule 23(e)(1)(A) as originally adopted and the present Rule 23(e)(1) was originally Rule 23(e)(1)(B). Report of the Civil Rules Advisory Committee, Dec. 17, 2004, at 20. The changes were intended to be non-substantive. *Id.* at 1.

[53] This "could be read" conclusion is contrary to what the same committee stated in 2001, as quoted in the prior indented paragraph. Other sources also do not find the ambiguity the Advisory Committee found in 2002 but not in 2001. *See, e.g.*, I James W. Moore & Kevin Shirey, Moore's Federal Rules Pamphlet 313 (referring to the "understanding of most courts that approval was required irrespective of whether certification of the class has already occurred").

[54] 2002 Civ. R. Adv. Comm. Report at 102-03 (emphasis added).

requiring judicial approval for any settlement of a class action. The legislative history indicates only that the new CPLR 908 was intended to add a notice requirement to the existing rule that an action pleaded as a class action be dismissed only with judicial approval.

> The proposed revision [CPLR 908] is stricter than the present law. In addition to court approval, it requires in all cases notice to members of the class in such manner as the court directs.

1973 Judicial Conference Report, at 211 (comment on the proposed CPLR 908). Other sources are silent on why judicial approval is required for cases pleaded as class actions but not yet certified.[55] Professor Siegel suggested that this requirement was intended to "make[] it harder to buy the plaintiffs off with a settlement advantageous to the representatives but not necessarily to the class itself," and also to "prevent the defendants from getting off too cheaply in the bargain."[56]

The Federal Judicial Conference was not troubled by these concerns over the potential abuse of the class action device. In its report to the Chief Justice and the Judicial Conference, the Committee on Rules of Practice and Procedure said simply that, under the new Rule 23(e)(1) of the Federal Rules of Civil Procedure, court approval of the settlement of an action pleaded as a class action but not certified is not required: "Approval is not required if class allegations are withdrawn as part of a disposition reached before a class is certified since putative class members are not bound by the settlement." 2002 Federal Judicial Conf. Report, at 13. The Civil Rules Advisory Committee report, on which the Judicial Conference Report was based, said simply that the judicial approval requirement was removed after comments were received on the first proposal for an amended Rule 23(e), which "underscored earlier doubts whether there is

[55] *See, e.g.*, Homburger, *State Class Actions*, 71 Col. L. Rev. at 651-55 (section-by-section commentary on initial draft of statute); 1971 Judicial Conference Report, at 2157-19 (summary of presentation at the Tenth Annual Judicial Conference Institute in 1971)

[56] D.D. Siegel, New York Practice § 147 at 265 (5th ed. 2011).

much that a court can do when the only parties before it are unwilling to continue with the action." 2002 Civ. R. Adv. Comm. Report, at 2-3.

In preparing this Report, the drafters concluded that two recent trial court decisions support the retention of New York's longstanding requirement of judicial approval of settlements, even where no class had been certified, to prevent abuse of the class action device. Both cases involved requests for preliminary, pre-certification judicial approval of settlements. In both cases approval was denied.

The first is an unreported decision released earlier this year by the Supreme Court for New York County, *City Trading v. Nye*, No. 651668/2014, 2015 WL 93894, 2015 NY Slip. Op. 50008 (Sup. Ct. N.Y. Co. Jan. 7, 2015). The complaint challenged the adequacy of a proxy statement disclosure soliciting approval of a merger between Martin Marietta Materials, Inc. and Texas Industries, Inc. On the eve of a preliminary injunction hearing, the parties settled the case on the basis of supplemental disclosures regarding the settlement and an agreement for the payment of attorneys' fees. *Id.* at *2.

The court found that defendants had agreed to the supplemental disclosures and the payment of attorneys' fees because of "significant and irreparable" costs that would be incurred by delays. *Id.* at *1. The court had already criticized the terms of a release as originally proposed, because it might have precluded claims such as breach of fiduciary duty that were not raised in the complaint. *Id.* at *1 & 10 n.11. Even with a more limited release, however, the court found the supplemental disclosures not material and found the litigation "frivolous". *Id.* at *20. The court denied the motion for certification of a settlement class and approval of the settlement, and directed defendants to answer the complaint or move to dismiss. *Id.* at *22. The docket indicates that case was dismissed on the merits, while preserving for plaintiffs a right to

appeal the order disapproving the settlement. *See City Trading v. Nye*, N.Y. Co. Index No. 651668/2014, Docket Nos. 112 & 113. The court concluded that the plaintiff was "essentially a fictitious entity," and that "where a proposed class representative appears to be a fiction, there is the concern that it has no accountability, either to the class or to the court," and could not "act as a check on the attorneys" in order to ensure that "the interests of the members of the class will take precedence over those of the attorneys." *Id.* The court agreed with defense counsel that, as a "fictitious entity," the plaintiff had interests that conflicted with the interests of the class, and that this "fundamental conflict" caused class counsel "to advance meritless claims … resulting in awards of attorneys' fees that are wholly out of proportion to any real benefit conferred on shareholders." *Id.* at *9.

A similar decision supporting the retention of the judicial approval requirement is *Gordon v. Verizon*, N.Y. Co. Index No. 653084/2013, 2014 WL 7250212, 2014 N.Y. Slip Op. 33367(U) (Sup. Ct., N.Y. Co., Dec. 19, 2014). Like the *City Trading* case, *Gordon* involved a challenge to disclosure materials seeking shareholder approval of Verizon's acquisition of a minority interest in Verizon Wireless. A proposed settlement, once again based on supplemental disclosures (with no monetary recovery) and the payment of attorneys' fees, had received preliminary approval. Objections made by two shareholders "moved the court to take a second look" at the settlement "and more closely scrutinize it as part of the court's final determination of whether it truly is fair, adequate, reasonable and in the best interests of class members." *Id.* As in *City Trading*, the court in *Verizon* was concerned that the class "was being divested of valuable rights in the form of a broad release of claims" proposed as part of the settlement, and the divestiture of these rights "cannot be justified by trivial disclosure adjustments" that did not provide material additional information about the transaction. *Id.* at *4.

After detailed review, the court found that the supplemental disclosures did not "materially enhance the shareholders' knowledge about the merger …, [and] provide[d] no legally cognizable benefit to the shareholder class …." *Id*. at *11-12. While the court did not address directly the adequacy of the class representative or its counsel, criticism was implicit in the court's quoting authority on "the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant" to a settlement involving "a meager recovery for the class" but legal fees for class counsel and a broad release provided to the defendant. *Id.* at *8-9 (citing *Creative Montessori Learning Ctrs. v Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir 2011). The court rejected the proposed settlement. *Id.* at *14.

This Report concludes that the potential for abuse of the class action device warrants continuing the requirement that any action pleaded as a class action should be dismissed only with court approval. Article 9 should reserve for the court the discretion to order notice, but only where the court expressly finds notice is necessary to protect of members of the putative class.

E. CONCLUSIONS

- CPLR 908 is designed to require notice of a pre-certification, dismissal, discontinuance, or compromise of an action pleaded as a class action, as was the pre-2003 Federal Rule 23(e).

- The courts do not uniformly require notice in these circumstances, the language of the Rule notwithstanding.

- Current case law suggests that the pre-certification dismissal of an action pleaded as a class action should remain subject to judicial approval, but that notice to the class should not be required unless the court finds that notice is necessary to protect the interests of the members of the putative class.

- CPLR 908 should be amended as provided in the draft that follows in Exhibit A.

November 2015

WORKING GROUP ON CLASS ACTIONS IN THE NEW YORK COURTS

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EXHIBIT A

STATE OF NEW YORK

2016-2017 Regular Sessions

AN ACT to amend Article 9 of the civil practice laws and rules related to class actions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of section 901 of article 9 of the civil practice laws and rules is REPEALED and a new paragraph (b) is added to read as follows:

§ 901. Prerequisites to a class action. a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. [Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may

not be maintained as a class action.][1] Once the other prerequisites under section 901(a) have been satisfied, class certification shall not be considered an inferior method for fair and efficient adjudication on the grounds that the action involves a governmental party or governmental operations.[2]

§ 2. Section 902 of article 9 of the civil practice laws and rules is amended to read as follows:

§ 902. Order allowing class action and appointing class counsel. [Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained.][3] a. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

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[1] **Comment**: Purpose is to eliminate a rule that restricts NY State Courts but is not followed by NY Federal Courts for NY Cases. See *Shady Grove v. Allstate*, 130 S.Ct. 1431, (2010); see also T.A. Dickerson, *State Class Actions: Game Changer*, N.Y.L.J., Apr. 6, 2010).

[2] **Comment**: This language was previously proposed in New York City Bar's 2003 Report, State Class Actions: Three Proposed Amendments to Article 9 of the CPLR (Sept. 2003) ("CJA Report"), and has been approved by the Association. 58 The Record 317-25 (2003).

[3] **Comment**: This language is proposed to track F.R.C.P. 23(c)(1).

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action.

b. Unless a statute provides otherwise, the order permitting a class action shall appoint class counsel. In appointing class counsel, the court:

1. shall consider:

A. the work counsel has done in identifying or investigating potential claims in the action;

B. counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

C. counsel's knowledge of the applicable law; and

D. the resources that counsel will commit to representing the class;

2. may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

3. may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

4. may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under rule 909; and

5. may make further orders in connection with the appointment.

c. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under subdivisions (b) and (e) of this section. If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

d. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

e. Class counsel must fairly and adequately represent the interests of the class.[4]

[4] **Comment**: This proposed language tracks the new F.R.C.P. 23(g). It was not addressed in the CJA Report in 2003.

§3. Sections 903, 904, 905 and 906, and Rule 907 of article 9 of the civil practice laws and rules are NOT AMENDED:

§ 903. Description of class. The order permitting the class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice.

§ 904. Notice of class action. (a) In class actions brought primarily for injunctive or declaratory relief, notice of the pendency of the action need not be given to the class unless the court finds that notice is necessary to protect the interests of the represented parties and that the cost of notice will not prevent the action from going forward.

(b) In all other class actions, reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.

(c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider

I. the cost of giving notice by each method considered

II. the resources of the parties and

III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

(d) I. Preliminary determination of expenses of notification. Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

II. Final determination. Upon termination of the action by order or judgment, the court may, but shall not be required to, allow to the prevailing party the expenses of notification as taxable disbursements under article eighty-three of the civil practice law and rules.

§ 905. Judgment. The judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

§ 906. Actions conducted partially as class actions. When appropriate,

1. an action may be brought or maintained as a class action with respect to particular issues, or

2. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this article shall then be construed and applied accordingly.

Rule 907. Orders in conduct of class actions. In the conduct of class actions the court may make appropriate orders:

1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action;

3. imposing conditions on the representative parties or on intervenors;

4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;

6. dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

§ 4. Rule 908 of article 9 of the the civil practice laws and rules is amended to read as follows:

Rule 908. Dismissal, discontinuance, [or] compromise, or settlement. A class action shall not be dismissed, discontinued, [or] compromised, or settled without the approval of the court. [Notice of the proposed dismissal, discontinuance, or compromise

shall be given to all members of the class in such manner as the court direct] The following procedures apply to a proposed dismissal, discontinuance, compromise or settlement:

1. In class actions other than those actions described in subdivision (2) below, notice of the proposal need not be given unless the court finds that notice is necessary to protect the interests of the represented parties and the cost of notice will not prevent resolution of the action.

2. In all actions where a class has been certified and the action was not brought primarily for injunctive or declaratory relief, reasonable notice of the proposal shall be given in such manner as the court directs, to all class members who would be bound by such resolution of the action.

3. The content of the notice and the expenses of notification shall be governed by section 904(c) and (d).

4. If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

5. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

6. If the class action was not brought primarily for injunctive or declaratory relief, the court may refuse to approve a dismissal, discontinuance, compromise, or settlement unless it affords a new opportunity to request exclusion from the class to individual class members who had an earlier opportunity to request exclusion but did not do so.

7. Any class member may object to the proposal if it requires court approval under this rule; the objection may be withdrawn only with the court's approval.[5]

§ 5. Rule 909 of article 9 of the civil practice laws and rules is NOT AMENDED:

[5] **Comment**: Stricken language is revised by ¶¶ 1-3, which adopts the concepts of F.R.C.P. 23(e)(1) & (2), and follows the form and terminology of CPLR 904(a) and (b). For an interpretation of the existing rule, requiring notice even if the class has not been certified, see *Avena v. Ford Motor*, 85 A.D.2d 149, 156 (1st Dep't 1982), and *Vasquez v. National Securities*, 2015 WL 19673675 at *2 (N.Y.Sup., N.Y.Co. 2015). This notice issue was the subject of Part III of the 2003 Report. For a recent example of reliance on "such manner as the court directs," *see Fiala v. Metropolitan Life Ins. Co.*, 27 Misc. 3d 599, 608 n.6 (N.Y. Co. 2010).

Rule 909. Attorneys' fees. 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 and/or[6] to any other person that the court finds has acted to the benefit 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.

§ 6. This act shall take effect immediately.

[6] **Comment**: The clause "and/or to any other person that the court finds has acted to the benefit of the class" was added in 2011 and signed into law by Governor Cuomo on September 23, 2011. The language was derived from the dissenting opinion of Judge Smith (with Chief Judge Lippman concurring) in *Flemming v. Barnwell Nursing Home*, 15 N.Y.2d 375, 380 (2010).