NEW YORK CITY BAR

MODERNIZE THE ADMINISTRATION OF CLASS ACTIONS

A.8034 (AM Dinowitz) / S.6334-A (Sen. Hoylman)(OCA 58)

CPLR Art. 9 is outdated and needs significant update

- The administration of class actions in New York's courts has not materially changed since the enactment of Art. 9 in 1975. While New York legislative proposals were the basis for Rule 23 of the Federal Rules of Civil Procedure in 1966, the federal rules have been amended several times since then.
- Outdated and often confusing class action procedures lead to, among other things, (i) New York courts missing opportunities to entertain complex class actions due to forum shopping in the federal courts, (ii) wasteful briefing because of artificial deadlines for certification motions not suitable for contemporary practice, (iii) arbitrary decisions regarding class counsel due to lack of statutory guidance, and (iv) difficulty in concluding settlements because of a rule requiring notice even where a class has not been certified and no non-party would be bound.

What the Bill would do

- Amend CPLR 901(b) to permit class certification for actions demanding a statutory penalty or minimum measure of recovery
  - ⇒ **Impact:** Responds to the Supreme Court's *Shady Grove* decision that 901(b) does not govern class actions in federal court, thereby discouraging forum shopping and providing greater certainty in administration of the law
- Add language to overrule a judicially-developed rule that disfavors class actions against governmental entities
  - ⇒ **Impact:** This rule has been slowly eroded over the past fifteen years, and now just adds unnecessary confusion to administration of class actions. The most recent decisions of the Court of Appeals and Appellate Divisions evaluate motions for class certification in such cases under the general criteria laid out in Article 9 and the Federal Rules.
- Amend CPLR 902(a) to adopt language stating that motions for class certification be made "at an early practicable time" rather than within 60-days
  - ⇒ **Impact:** Better reflects the complexity of contemporary class action practice, where substantial discovery is often necessary and avoid unnecessary *pro forma* motions which deprive the court of a substantive supporting brief.
- Add CPLR 902(b) to provide guidance with specified factors to be considered in appointing class counsel
  - ⇒ **Impact:** Such guidance will aid the Court, the parties and the attorneys.
- Amend CPLR 908 to eliminate the notice requirement for settlement of cases pleaded as a class action where no class has been certified, which follows a 2003 amendment to the comparable federal rule and eliminates the need for class notice to persons not bound by the proposed settlement. Unlike the Federal Rule 23(e), however, the proposed amendment would retain the longstanding New York rule requiring judicial approval.
  - ⇒ **Impact:** Help avoid substantial and often unnecessary expenses while providing greater flexibility and discretion to the courts.

KEEP READING TO SEE WHO SUPPORTS THE BILL AND WHAT THE COURTS ARE SAYING ⇨

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Supporters

The bill has the support of the New York County Lawyers, New York State Bar Association, New York State Trial Lawyers Association and Office of Court Administration.

What the courts are saying

Shady Grove Orthopedic Associates, PA. v. Allstate Insurance Company, 559 U.S. 393, 397 (2010). The U.S. Supreme Court 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.

Borden v. 400 East 55th St. Assocs., 24 N.Y.3d 382 (2014); *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 212 (2007). Recent state court decisions that have led to confusion over (i) what constitutes a penalty, and (ii) whether it can be waived to permit class certification.

City of New York v. Maul, 14 N.Y. 3d 499 (2010). The Court stated that CPLR Article 9 was designed "to set up a flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions." *Id.* at 509 (quoting a 1975 Judicial Conference report.) 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).

Hurrell-Haring v. State, 81 A.D.3d 69, 75 (3d Dep't 2011), cited *Maul* in reversing the trial court's application of the government operations rule, holding that a class action was superior to other methods of adjudication because certification would eliminate multiple lawsuits with duplicative claims and potentially inconsistent rulings, and because the court could not find "a single case involving claims of systemic deficiencies which seek widespread, systematic reform that has not been maintained as a class action". Earlier, *Watts v. Wing*, 308 A.D.2d 391, 392 (1st Dep't 2003), held the government operations rule inapplicable where the putative class was composed of both those for whom harm is prospective and those for whom the harm already had occurred and "precedent in an individual plaintiff's favor would be of no assistance to the remaining plaintiffs."

Desrosiers v. Perry Ellis Menswear, 2017 NY Slip. Op. 08620, 2017 WL 6327106 (Ct. App., Dec. 12, 2017). The Court of Appeals issued a divided 4-3 decision addressing notice and judicial approval requirements. The Court discussed the practical difficulties of giving notice to an uncertified class (which often neither side wants), but noted that the Legislature had not acted on proposals to do so, citing the 2003 and 2015 City Bar Reports and A.9573 from 2016.

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