STATE CLASS ACTIONS

Three Proposed Amendments to Article 9 of the Civil Practice Law & Rules

Under the sponsorship of the Council on Judicial Administration, a working group of representatives from the Council and the Association's Committees on Consumer Affairs, Litigation, State Courts of Superior Jurisdiction, and Federal Courts considered ways to improve the administration of class actions in state courts. Based on the working group's research, the Council proposes three amendments to the New York Civil Practice Law and Rules (CPLR) that would bring New York class action law into greater harmony with principles adopted in other states and by the federal courts. If accepted by the Legislature, these amendments would

(i) overrule a common law presumption that disfavors class actions against governmental entities and officials;

(ii) remove from CPLR 902 the requirement that class certification motions be brought within sixty days after expiration of the time for a responsive pleading, and substitute the "as soon as practicable" standard currently used in federal practice and in most other jurisdictions; and

(iii) clarify that the settlement of any action pleaded as a class action requires judicial approval, even if no class has been certified, but eliminate the current requirement of CPLR 908 that notice be given to the putative class of pre-certification settlements, leaving such notice to judicial discretion.

I. CPLR ARTICLE 9 SHOULD BE AMENDED TO PERMIT CLASS ACTIONS AGAINST GOVERNMENTAL DEFENDANTS.

A. Introduction

While class certification in actions against governmental defendants often affords the most effective remedy, New York courts have denied or delayed class certification until it is too late to be effective based on the "governmental operations rule." This judicially created rule presumes that class certification is not the "superior" method for "fair and efficient adjudication." CPLR 901(a)(5). Thus the governmental operations rule severely restricts class actions 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, 371 N.Y.S.2d 422, 433 (1975).

Rivera v. Trimarco, 36 N.Y.2d 747, 749, 368 N.Y.S.2d 826, 827 (1975), first propounded the government operations rule, without citing any prior authority, and *Jones* immediately adopted it, citing *Rivera*. The rule persisted even though both decisions predated the new Article 9 enacted in 1975. Once the new Article 9 became effective, the governmental operations rule articulated in *Jones* and *Rivera* should have been obsolete. *E.g.*, *Long Is. Coll. Hosp. v. Whalen,* 84 Misc. 2d 637, 639, 377 N.Y.S.2d 890, 892 (Sup. Ct. Albany Co. 1975). Yet the New York courts have not recognized the rule's demise; many courts simply have reiterated the rule that class certification against governmental defendants is unnecessary, just assuming that they will apply a ruling in an individual action to all persons similarly situated. Conspicuously absent is any explication of or support for this conclusion.

The new Article 9 was modeled specifically after Federal Rule of Civil Procedure 23. Under Rule 23, however, the federal courts have routinely granted class certification at the outset of litigation involving governmental operations, so long as the usual class action criteria have been met.

B. The Federal Courts' Rejection of the Governmental Operations Rule

In applying Rule 23, federal courts have rejected the proposition that class certification against governmental defendants is unnecessary because any relief granted in an individual case has classwide effect. *E.g.*, *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391 (S.D.N.Y. 2000); *Brown v. Giuliani*, 158 F.R.D. 251, 269 (E.D.N.Y. 1994); *Cutler v. Perales*, 128 F.R.D. 39, 46 (S.D.N.Y. 1989). As the federal courts have observed, the assumption that class certification is unnecessary is particularly inapplicable 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. *Reynolds v. Giuliani*, 118 F. Supp. 2d at 391; *Monaco v. Stone*, 187 F.R.D. 50, 63 (E.D.N.Y. 1999); *Cutler v. Perales*, 128 F.R.D. at 46; *Ashe v. Board of Elections*, 124 F.R.D. 45, 51 (E.D.N.Y. 1989). Class certification has been considered a useful vehicle for presenting the court broader information concerning the practices to be remedied and thus defining the parameters of effective relief. *Ashe v. Board of Elections*, 124 F.R.D. at 51; *Koster v. Perales*, 108 F.R.D. 46, 54-55 (E.D.N.Y. 1985).

Even if the relief is not aimed at affirmatively changing governmental practices, but would by its nature inure to the benefit of others similarly situated, class certification is more than a formality. First, when a plaintiff seeking declaratory and injunctive relief obtains a

favorable ruling, others similarly situated may use the ruling as precedent, but that tool is a far cry from the ability, as class members, to use the ruling as an enforceable order in their favor. *Brown v. Giuliani*, 158 F.R.D. at 269.

Second, class certification protects against mootness, a particular threat in litigation against governmental defendants. *Greklek v. Toia*, 565 F.2d 1259, 1261 (2d Cir. 1977); *Reynolds v. Giuliani*, 118 F. Supp. 2d at 391-92; *Monaco v. Stone*, 187 F.R.D. at 63; *Jane B. v. New York City Dep't of Soc. Servs.*, 117 F.R.D. 64, 72 (S.D.N.Y. 1987). Governmental defendants are particularly well positioned to make an exception for the named plaintiff to avoid judicial review of the challenged practice or procedure. The government's ability to moot individual claims to avoid addressing systemic deficiencies in governmental practices demonstrates why class actions are especially necessary in cases involving governmental operations. *Brown v. Giuliani*, 158 F.R.D. at 269. Moreover, Plaintiffs aggrieved by an encounter with government are likely to be a fluid class whose subjection to unlawful governmental conduct may be transitory, yet severely harmful. *Monaco v. Stone*, 187 F.R.D. at 60; *Koster v. Perales*, 108 F.R.D. at 54. Class certification, by protecting against mootness, promotes judicial economy by preventing subsequent actions to adjudicate the same issues. *Greklek v. Toia*, 565 F.2d at 1261; *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y. 1986).

In sum, *stare decisis* does not adequately protect putative class members for it does not guarantee that governmental defendants will change standards or procedures to ensure compliance with a judgment on behalf of potential plaintiffs. *Morel v. Giuliani*, 927 F. Supp. 622, 634 (S.D.N.Y. 1995). A single judgment is not an effective way to afford relief to all similarly situated persons, because governmental defendants may not be counted on, any more

than other defendants, to conform their conduct for all persons in response to a judgment for one individual. This is especially true where the governmental "defendants deny liability and deny that any unlawful policies exist or that any lawful policies are implemented in an improper manner." *Koster v. Perales*, 108 F.R.D. at 54 & n.8. Rather, to enforce rights based on *stare decisis*, future plaintiffs typically must bring independent actions. *Cutler v. Perales*, 128 F.R.D. at 46.

Only when defendants withdraw a challenged policy or procedure or change it to remedy ongoing illegality will a classwide judgment be unnecessary. Otherwise, however, a class action is the preferable means to guarantee all class members easy enforcement of any judgment and prompt relief. *Bacon v. Toia*, 437 F. Supp. 1371, 1383 n.11 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1044 (2d Cir. 1978); *Brown v. Giuliani*, 158 F.R.D. at 269; *Cutler v. Perales*, 128 F.R.D. at 47; *Koster v. Perales*, 108 F.R.D. at 54-55 & n.8.

C. The State Courts' Perpetuation of the Governmental Operations Rule

The governmental operations rule rejected by the federal courts, but followed by the New York courts, rests on two presumptions. First, it is presumed that government is a special litigant, imbued with a public trust, who will voluntarily apply court rulings to similarly situated persons. Second, it is presumed that, should governmental behavior not fulfill this expectation, the aggrieved individuals will possess the knowledge and means to obtain relief in court through reliance on *stare decisis*. *Jiggetts v. Grinker*, 148 A.D.2d 1, 21, 543 N.Y.S.2d 414, 425 (1st Dep't 1989), *rev'd on other grounds*, 75 N.Y.2d 411, 554 N.Y.S.2d 92 (1990); *McCain v. Koch*, 117 A.D.2d 198, 221, 502 N.Y.S.2d 720, 754 (1st Dep't 1986). The federal courts, by contrast, do not recognize these presumptions or require their rebuttal.

Yet in the state courts just as often as in the federal courts, such presumptions prove unwarranted. Only in hindsight is it evident that the state court should not have applied the governmental operations rule, but should have granted class certification at the outset of the litigation.

1. Governmental Disobedience

The first presumption, of governmental willingness to obey court decisions, may be overcome by proof of unwillingness and of actual, prior, usually repeated, disobedience to court orders. *E.g., Chalfin v. Sabol*, 247 A.D.2d 309, 311, 669 N.Y.S.2d 45, 46 (1st Dep't 1998); *Varshavsky v. Perales*, 202 A.D.2d 155, 156, 608 N.Y.S.2d 184, 185 (1st Dep't 1994); *Lamboy v. Gross*, 126 A.D.2d 265, 273-74, 513 N.Y.S.2d 393, 398 (1st Dep't 1987); *Davis v. Perales*, 137 Misc. 2d 649, 655, 520 N.Y.S.2d 925, 929 (Sup. Ct. Kings Co. 1987).

> The governmental operations rule assumes that government officials will understand that they are bound by *stare decisis* and will follow precedent. Nevertheless, when the basis for this assumption is found to be shaky, if not completely missing, then the hesitancy of the court to treat the matter as a class action begins to disappear.

Ode v. Smith, 118 Misc. 2d 617, 619-20, 461 N.Y.S.2d 684, 686 (Sup. Ct. Wyoming Co. 1983).

The New York courts impose an unduly high standard for demonstrating unwillingness to follow legal mandates. Governmental defendants must have actually flouted prior court orders. *Legal Aid Soc. v. New York City Police Dep't*, 274 A.D.2d 207, 213, 713 N.Y.S.2d 3, 8 (1st Dep't 2000).

Ironically, plaintiffs need classwide disclosure to establish defendants' "pervasive pattern of failure" to obey court ordered mandates. *Heard v. Cuomo*, 142 A.D.2d 537, 539, 531

N.Y.S.2d 253, 254 (1st Dep't 1988), *aff'd*, 80 N.Y.2d 684, 594 N.Y.S.2d 675 (1993). Yet classwide disclosure will not be forthcoming without class certification. Thus, without certification in the first place, plaintiffs cannot even take the steps to show the classwide violations necessary to class certification.

Beyond disclosure, the governmental operations rule further poses an impediment to any monitoring of whether government is applying *stare decisis*. Without class certification a court is unlikely to impose any monitoring and reporting obligations, whereas a judgment for a plaintiff class may provide for monitoring and reporting to ensure that the required relief in fact is afforded to class members.

2. Inadequate Protection Afforded by *Stare Decisis*

The second presumption, that individuals will be adequately protected by *stare decisis* when governmental recalcitrance necessitates resort to litigation, may be overcome by showing that individual actions are impracticable. To surmount this second hurdle, an individual plaintiff must demonstrate that claims at issue are too small to justify litigation, *Tindell v. Koch*, 164 A.D.2d 689, 695, 565 N.Y.S.2d 789, 792 (1st Dep't 1991); *Ammon v. Suffolk County*, 67 A.D.2d 959, 960, 413 N.Y.S.2d 469 (2d Dep't 1979), or that the would-be plaintiffs "are not likely to seek help or gain access to the courts because of socio-economic factors," such as age, poverty, or disability. *Davis v. Perales*, 137 Misc. 2d at 655, 520 N.Y.S.2d at 929. *See Tindell v. Koch*, 164 A.D.2d at 695, 565 N.Y.S.2d at 792; *Lamboy v. Gross*, 126 A.D.2d at 274, 513 N.Y.S.2d at 398; *Brown v. Wing*, 170 Misc. 2d 554, 560, 649 N.Y.S.2d 988, 991-92 (Sup. Ct. Monroe Co. 1996), *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025 (4th Dep't 1997); *Goodwin v. Gleidman*, 119 Misc. 2d 538, 544 (Sup. Ct. N.Y. Co. 1983).

Thus the individual plaintiffs, although representatives of a putative class who by definition face barriers to prosecuting or defending their rights, must on their own amass a record of governmental intransigence and unwillingness to comply with the law. All the while, the putative class members remain uniquely ill-situated to take advantage of *stare decisis* to obtain compliance and have little meaningful recourse to the judicial process apart from the ongoing action. *Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d 856, 859, 527 N.Y.S.2d 743, 745 (1988); *Seittelman v. Sabol*, 217 A.D.2d 523, 526, 630 N.Y.S.2d 296, 298-99 (1st Dep't 1995). By the time class certification is achieved, if ever, irreparable damage may well have been done.

D. An Example

N.Y.C. Coalition to End Lead Poisoning v. Giuliani, 245 A.D.2d 49, 668 N.Y.S.2d 1 (1st Dep't 1997) ("*NYCCELP*"), is but one poignant example. The members of the class, repeatedly denied certification until over 12 years into the litigation, were children 0-6 years old. Disproportionately, they belonged to racial or ethnic minorities and New York City's poorest populations. It was undisputed that hundreds of thousands already had been poisoned by exposure to lead paint -- the very danger from which the litigation successfully protected the individual plaintiffs. At the same time, new poisonings occurred in the city at the rate of 10,000-15,000 per year.

Moreover, lead poisoning, except at the higher levels of toxicity, does its damage silently. It produces few symptoms readily identifiable as caused by lead exposure or does so only late in the disease process, after extensive irremediable damage has been done.

Stare decisis did nothing to prevent children's lead poisoning. For children already poisoned, even the most successful invocation of the doctrine has serious shortcomings as a

remedy. Reliance on the governmental defendants' obedience to the law in such a case entrusted the health and safety of hundreds of thousands of children to parties whose willingness and ability to obey was unproved.

The plaintiffs in *NYCCELP* sought to remedy a condition that posed an immediate threat, particularly to children under six years old. *Id.*, 245 A.D.2d at 52, 668 N.Y.S.2d at 1. *See Brown v. Wing*, 170 Misc. 2d at 560, 649 N.Y.S.2d at 991-92, *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025. They could not await either individual determinations or the 12 years it took to obtain repeated injunctions, show repeated disobedience to them, and defend each of these rulings on appeal, before they obtained the necessary classwide relief. *NYCCELP*, 245 A.D.2d at 51-52, 668 N.Y.S.2d at 1.

Heeding the lesson taught by *NYCCELP*, the court in *Brad H. v. City of New York*, 185 Misc. 2d 420, 425, 712 N.Y.S.2d 336, 341 (Sup. Ct. N.Y. Co.), *aff'd*, 276 A.D.2d 440, 716 N.Y.S.2d 852 (1st Dep't 2000), at the outset of the litigation, certified a class of mentally ill prison inmates requiring discharge planning before their release and granted a preliminary injunction, because they faced "an immediate threat from the condition for which a remedy is sought."

> If the class plaintiffs are not afforded the relief sought, . . . without any adequate discharge planning, they face the immediate threat of psychological relapse, with a greater likelihood of the concomitant return to lives of drug and/or alcohol abuse, homelessness, lawlessness, and danger to themselves and/or others.

Id.

E. The Solution

Isolated instances of persistent, herculean litigation have made inroads into the governmental operations rule. Carving out exceptions to the rule, however, does not solve the problem. Exceptions are made with little consistency and no more authority than when the Court of Appeals first announced the rule. *E.g., Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d at 859, 527 N.Y.S.2d at 745. The rule and exceptions to it are applied inconsistently. In *Seittelman v. Sabol*, 217 A.D.2d at 526, 630 N.Y.S.2d at 298-99, for example, the First Department concluded:

> The government operations rule does not prohibit class certification where . . . defendants have failed to propose any other form of relief that even purports to protect the right of indigent Medicaid recipients to retroactive reimbursement of which they have been wrongfully deprived.

Likewise, in *Mitchell v. Barrios-Paoli*, 253 A.D.2d 281, 283, 687 N.Y.S.2d 319, 321 (1st Dep't 1999), the First Department found that the New York City Department of Social Services assigned an alleged class of public assistance recipients to Work Experience Program ("WEP") jobs incompatible with the recipients' disabilities, while failing to give the recipients adequate notice of their rights to challenge the assignments. *Id.*, 253 A.D.2d at 290, 687 N.Y.S.2d at 325. This practice led to wrongful discontinuance of assistance for WEP noncompliance. *Id.*, 253 A.D.2d at 283, 288, 687 N.Y.S.2d at 321, 324. Although the relief ordered, to provide adequate notices and minimize incompatible assignments in the future, did nothing to protect recipients' rights to retroactive reimbursement of the assistance wrongfully discontinued, the court decertified the class, concluding class certification was "unnecessary in this context." *Id.*, 253 A.D.2d at 283, 687 N.Y.S.2d at 521. The court failed to explain how "the injunctive relief we uphold . . . and any future relief which may be awarded" to the named plaintiffs would

adequately provide retroactive reimbursement "in like situations." *Id.*, 253 A.D. 2d. at 292, 687 N.Y.S.2d at 324.

Moreover, the identified premise for denying class certification is that both *stare decisis* and class relief ensure the same result, "that all similarly situated persons will receive the relief ordered by the court." *Id*. Yet *stare decisis* provides no means for identifying persons similarly situated.

Despite a few exceptions like *Seittelman*, state courts remain unwilling to certify a class where governmental operations are involved, reasoning simply as in *Mitchell* that the doctrine of *stare decisis* provides adequate protection to putative class members. The rule fashioned by the Court of Appeals, that in cases against governmental defendants a class action is *not* "superior to other available methods for the fair and efficient adjudication of the controversy," CPLR 901(a)(5), will continue unless changed by statute. *Jones v. Berman*, 37 N.Y.2d at 57, 371 N.Y.S.2d at 453. Recent decisions confirm the rule's ongoing influence and continue to frustrate enforcement of individuals' rights against the government, especially where the poor are affected. *Jamie B. v. Hernandez*, 274 A.D.2d 335, 336-37, 712 N.Y.S.2d 91, 92-93 (1st Dep't 2000); *Legal Aid Soc. v. New York City Police Dep't*, 274 A.D.2d at 213, 713 N.Y.S.2d at 8. Only an amendment to CPLR Article 9, prohibiting denial of class certification based on this rule, will allow the courts to monitor and control the conduct of the parties in the litigation.

1. Retroactive Relief

Even where a judgment in favor of the individual plaintiff may in fact protect *subsequent* or *future* litigants under *stare decisis*, it will be of little help to persons who were previously adversely affected by a governmental policy. *See Tindell v. Koch*, 164 A.D.2d at 695, 565

N.Y.S.2d at 793. *Stare decisis*, of course, is available only after the final determination has been reached in any action not certified as a class action. Potential class members adversely affected by the policy while the action is pending obtain no relief, unless they commence individual actions to preserve their rights to the relief sought in the pending action. *See Lamboy v. Gross*, 126 A.D.2d at 274, 513 N.Y.S.2d at 398. Thus class certification is superior to *stare decisis* in ensuring relief to members of the proposed class who already have been or will be affected by a governmental policy before a final decision in the action because it is the *only* vehicle to implement retroactive relief to persons similarly situated. *Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d at 859, 527 N.Y.S.2d at 745; *Seittelman v. Sabol*, 217 A.D.2d at 526, 630 N.Y.S.2d at 298-99; *Dudley v. Kerwick*, 84 A.D.2d 884, 885, 444 N.Y.S.2d 965, 967 (3d Dep't 1981); *Brown v. Wing*, 170 Misc. 2d at 560, 649 N.Y.S.2d at 991-92, *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025.

Often the persons similarly situated to the plaintiff are children or elderly persons, poor, or disabled – unable because of their physical or financial condition to pursue individual actions. Even where proposed class members do not fall into these vulnerable categories, most individuals simply do not have the wherewithal to commence or prosecute their own actions. The amount collectively at stake may be great, but the amount for each may be small and too costly to litigate. For these reasons as well, a class action is the best method to protect these potential class members.

2. Judicial Economy

Even if children or elderly, poor, or disabled persons obtain legal representation for their individual claims, the refusal to certify a class invites a multiplicity of parallel lawsuits seeking

identical relief, producing potentially inconsistent rulings by different judges, and causing an unnecessary expenditure of time and resources, "an affront to basic principles of judicial economy." *Brown v. Wing*, 170 Misc. 2d at 561, 649 N.Y.S.2d at 992, *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025. Government lawyers, legal services, other members of the bar, and the courts repeatedly are forced to litigate and decide the same legal issues. *See Greklek v. Toia*, 565 F.2d at 1261; *Alston v. Coughlin*, 109 F.R.D. at 612. The court system, the bar, and the public must engage in repeated and duplicative separate actions to recover each affected individual's share of the same relief. *Dudley v. Kerwick*, 84 A.D.2d at 885, 444 N.Y.S.2d at 967.

These inefficiencies outweigh the time and expense attributed to class actions many times over. Since, absent class certification, separate actions are the only means for potential class members to safeguard their rights, certification is vastly more efficient. *See New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 206, 616 N.Y.S.2d 1, 6-7 (1994). Since efficiency is a primary purpose for class action litigation, an amendment to the rule should be embraced, rather than resisted.

3. Equal Treatment of All Class Action Litigants, Both the Government and the Public

Finally is the reality is that, despite the courts' assumption that governmental parties follow the rules of law laid down by court decisions, governmental entities typically apply plaintiffs' successes in non-class actions only to the named plaintiff(s) rather than to others similarly situated. Application of the governmental operations rule assumes that litigation against the government concerns a disputed interpretation of the law, rather than noncompliance

with established law. Ordering the government to comply with the law is useless when the government continually disobeys it.

All empirical data from litigation against governmental defendants demonstrates no reason to distinguish between the government and other defendants in certifying class actions. No supportable rationale dictates that members of the public affected by governmental operations should be afforded less protection than parties affected by private conduct.

On the other hand, every reason why governmental defendants are entitled to protection against unnecessary class actions is addressed by the prerequisites that must be met, and factors that must be considered before class certification in any action. CPLR 901(a)(1)-(5), 902(1)-(5). Any situation that fails to meet one or more of the prerequisites will not be accorded class status.

G. Conclusion

Eliminating the government operations rule would not affect the government's right to defend against class certification. All the means necessary to curtail unwarranted or abusive class actions against the government are available based the statutorily mandated criteria for class certification.

Because the assumptions on which the governmental operations rule is premised are not valid for all the reasons discussed above, an amendment to CPLR 902 is warranted:

> 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.

II. CPLR 902's 60-DAY TIME REQUIREMENT FOR FILING A MOTION FOR CLASS CERTIFICATION SHOULD BE AMENDED TO CONFORM WITH THE

PREVAILING NATIONAL RULE.

CPLR 902 begins by providing that "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in a action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." This mandatory 60-day motion requirement is virtually unique in American class action procedure. The vast majority of states follow Federal Rule of Civil Procedure 23, which provides that the court shall address class certification "[a]s soon as practicable after the commencement of an action brought as a class action." Fed. R. Civ. P. 23(c)(1). *See generally* Section of Litigation, American Bar Association, *Survey of State Class Action Law* (1999) (compiling the state rules on class certification).[1] The Council's recommendation is that New York align itself with the vast majority of American courts by adopting the "as soon as practicable" language used by the rest of the country. This 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

[1] Only three 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 3.401(B)(1)(a)), and Pennsylvania (within 30 days after pleadings close or after the last required pleading is due, Pennsylvania Court Rule 1707(a)). However, each of these three 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 practical effect, extensions by stipulation or court order are routine in each of these jurisdictions.

such a time requirement have been mitigated by other jurisprudence since Rule 902 was adopted.[2]

[2] The Federal Rule itself is to change as of December 2003 from "as soon as practicable" to "at an early practicable time." The proposal here is to conform New York's rule to the present Federal Rule 23(c)(1), which is closer to the present mandatory New York practice and which most states will continue to follow.

A. The Rule in Practice

CPLR 902's 60-day mandate has received little judicial attention. Several reported decisions have strictly enforced it. *E.g.*, *O'Hara v. Del Bello*, 47 N.Y.2d 363, 368, 418 N.Y.S.2d 334, 336 (1979); *Kensington Gate Owners, Inc. v. Kalikow*, 99 A.D.2d 506, 471 N.Y.S.2d 11 (2d Dep't 1984). On one or two occasions, however, courts have read it somewhat broadly to avoid dismissing class allegations.

In *Caesar v. Chemical Bank*, 118 Misc. 2d 118, 119, 460 N.Y.S.2d 235, 237 (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.

Similarly, in *Independent Investors Protective League v. Options Clearing House Corp.*, 107 Misc. 2d 43, 432 N.Y.S.2d 1007 (Sup. Ct. Nassau Co. 1980), the court faced a motion 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 Rule 908's provision that class actions should not be dismissed or discontinued without notice to the class, the court feared that "plaintiff's indolence" may have caused class members to lose meritorious claims by the running of a statute of limitations and denied defendant's motion to strike the class allegations. *Id.*, 107 Misc. 2d at 45, 432 N.Y.S.2d at 1009. Instead, the court ordered notice to the putative class members, and the court provided

leave to defendant to resubmit a motion to strike, but one that addressed the "potential prejudice to class members." *Id.*, 107 Misc.2d at 45-46, 432 N.Y.S.2d at 1009.[3] In effect, the court sought a way to sidestep the strict consequences of Rule 902 for what it perceived might be a meritorious case.

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

The concern in *Independent Investors Protective League* of class members' losing their claims because of a statute of limitations running underlies CPLR 902's mandatory time requirement. While earlier versions of the proposed CPLR 902 followed Federal Rule 23's "as soon as practicable" language, the Legislature adopted the 60-day requirement of then-applicable Rule 11A of the United States District Court for the Southern District of New York. *Id.*, 107 Misc. 2d at 45, 432 N.Y.S.2d at 1008. 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 be too late for the filing of independent actions." *Id.*, 107 Misc. 2d at 44, 432 N.Y.S.2d at 1008 (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.

[3] 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.*

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 with, sometimes without, court order – a tactic not provided for by the rule and, accordingly, possibly of no effect). Justice Lewis Friedman wrote that the 60-day rule suggests "as is the established practice, 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, 649 N.Y.S.2d 656, 658 (Sup Ct. N.Y. Co. 1996). Far more often, however, the practice is for plaintiffs to file a pro forma motion for certification within the sixty days, and the disclosure will commence thereafter. As a consequence, the substantive briefing on the motion is only 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, also it 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. Consolidated Rail Corp.*, 168 F. Supp. 2d 389, 394 (E.D. Pa. 2001) ("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.") (citing cases). In addition, the Southern District of New York has abrogated former Rule 11A.

New York courts also have specifically adopted the *American Pipe* tolling rule. *See Yollin v Holland America Cruises, Inc.*, 97 A.D.2d 720, 720, 468 N.Y.S.2d 873, 875 (1st Dep't 1983) ("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) (citing *American Pipe*); *Clifton Knolls Sewerage Disposal Co., Inc. v. Aulenbach*, 88 A.D.2d 1024, 1025, 451 N.Y.S.2d 907, 908 (3rd Dep't 1982); *cf. Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 432, 599 N.Y.S.2d 515, 516 (1993) (implicitly recognizing a toll); *Cullen v. Margiotta*, 811 F.2d 698, 719-20 (2d Cir. 1987) ("New York courts have, in the interest of avoiding 'court congestion, wasted paper and expense,' long embraced the principles of *American Pipe*.") (citing

cases); *but cf. Singer v. Eli Lilly & Co.*, 153 A.D.2d 210, 213-21, 549 N.Y.S.2d 654, 656-60 (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). Thus, even if individuals have relied on a class action to protect their rights, those individual rights are, indeed, protected.

D. Conclusion

The 60-day requirement in CPLR 902 is an artifact that no longer has 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 and mandatory requirement for a class certification motion – particularly such a limited 60-day period – does not make jurisprudential sense. Accordingly, the Council proposes that CPLR 902 be amended as follows:

> As soon as practicable after the commencement of an action brought as a class action, the plaintiff shall move for an order to determine whether the action is to be so maintained.

III. PRE-CERTIFICATION DISMISSALS SHOULD RECEIVE CAREFUL JUDICIAL SCRUTINY, BUT NOTICE OF THEM SHOULD NOT BE REQUIRED UNDER ALL CIRCUMSTANCES.

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.[4] The named plaintiff assumes a fiduciary obligation.[5] 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.[6]

In addition to requiring court approval of any dismissal, discontinuance, or compromise, CPLR 908 states:

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

Notwithstanding this language, upon presentation of a pre-certification settlement for court approval, litigants sometimes express surprise that class action provisions in a pleading impose a duty on the named plaintiff under CPLR 908 to give"[n]otice of the proposed dismissal, discontinuance, or compromise . . . to all members of the class . . . ."[7] At this stage of the

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[4] *Eg., American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Yollin v. Holland America Cruises*, 97 A.D. 2d 720, 720-21, 468 N.Y.S.2d 873, 875 (1st Dep't 1983).

[5] *Avena v. Ford Motor Co.*, 85 A.D. 2d 149, 156, 446 N.Y.S. 2d 278, 281 (1st Dep't 1982).

[6] CPLR 908.

[7] The Council on Judicial Administration considered the CPLR 908 notice requirements at the suggestion of one of the justices of the Commercial Division of the Supreme Court, New York County. This justice observed that both plaintiffs' and defendants' counsel often appear surprised that CPLR requires notice even where no class has been certified.

litigation, of course, adversaries may have developed a common interest in the dismissal of a settled case. It is likely both sides will argue that notice is not necessary, and expressing surprise at such a reading may be only the first step in arguing that notice is not required.

CPLR 908's plain language requires notice to the class in a court-approved manner, even if the dismissal is sought before the court has considered certification. This rule is more demanding than its predecessor, and the legislative history indicates that the Legislature intended it to be so. The rule apparently 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.

Notwithstanding CPLR 908's plain language, as well as the present Rule 23(e) of the Federal Rules of Civil Procedure, the federal counterpart of CPLR 908, not all courts require notice for dismissal of an action at the pre-certification stage. Indeed, the Judicial Conference of the United States has approved and transmitted to the U.S. Supreme Court for final action the report of the Conference's Standing Committee on Rules of Practice and Procedure, recommending that Rule 23(e) be amended (1) to eliminate the need for judicial scrutiny of pre-certification settlements and (2) to remove the requirement of notice when no class has been certified.

Given the lack of enforcement of CPLR 908's notice requirement and several reasons for excusing it, the Council has concluded that CPLR 908 should be revised. The Council has not, however, found wisdom in the approach of the federal Judicial Conference. The Council recommends that any settlement of a case pleaded as a class action be carefully scrutinized by

the courts, but that the statutory requirement of notice to the class at the pre-certification stage, often unenforced in any case, should be eliminated.

In reaching this conclusion, the Council considered the development and administration of the New York rule, its evolution from Rule 23(e) of the Federal Rules of Civil Procedure, and the recent work of the Judicial Conference committees.

B. Method of Notice

The method of class notice is within the court's discretion. Thus, 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, 373 N.Y.S.2d 526 (2d Dep't 1975) (ordering notice of class settlement by publication); *In re Colt Industries Shareholder Litigation*, 155 A.D.2d 154, 553 N.Y.S.2d 138 (1st Dep't 1990) (affirming notice to stockholder class by publication); *Michels v. Phoenix Home Life Mutual Ins. Co.*, 1997 WL 1161145 (Sup. Ct., N.Y. Co., Jan. 7, 1997) (notice by a combination of individual mailing and publication).[8] The New York courts are free to develop whatever method of notice is suitable to the particular facts and circumstances, limited only by reasonableness and the need to reach the class members.

In determining the method of notice, CPLR 904(c) requires the court 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). CPLR 904(d) states that, unless otherwise

[8] Federal authorities provide comparable flexibility. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971) (where notice to a class of several million odd-lot traders was ordered to be published in multiple papers, announced by a press release and sent to 2000 identifiable traders and a random selection of others); *In re Prudential Securities*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (notice by mailing to reasonably ascertainable class members along with publication).

ordered, the plaintiff must bear the cost of notice. The court is empowered, "if justice so requires," to require the defendant to pay all or part of the notice expense and may even conduct a preliminary hearing to determine how the cost of notice should be apportioned. *Id.*

C. Evolution of CPLR 908 from Rule 23(e) of the Federal Rules

CPLR 908 provides as follows:

> **Rule 908. 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, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Rule 23(e) of the Federal Rules of Civil Procedure, from which CPLR 908 derives,[9] does not use the term "discontinuance" and does not have the notice portion of the rule in a separate sentence. The federal rule provides as follows:

> **(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

In the settlement context, the Council has not found great significance in the minor differences in language; nor did the First Department in the leading decision construing CPLR 908.[10]

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[9] David R. Kochery, Practice Commentary (to CPLR 1005), (McKinney 1963).

[10] *Avena v. Ford Motor Co.*, 85 A.D.2d 149, 152, 447 N.Y.S.2d 278, 279 (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."

Use of the term also may have been influenced by Section 626(d) of the New York Business Corporation Law, which required court approval for a derivative action to be "discontinued, compromised or settled." Unlike the current CPLR 908, however, notice under Bus. Corp. L. § 626(d) is completely discretionary with the court, even after a finding of a possible adverse effect on the interests of the shareholders (on whose behalf the derivative action indirectly has been

The provision that became CPLR 908 was first proposed to the Legislature in 1971. In that year the Judicial Conference of the State of New York sponsored the Tenth Annual Conference for Supreme Court Judges, one session of which was devoted to class actions under the CPLR. According to the report of the session, one commentator discussed the existing statute's inadequacy, and a second commentator criticized current legislative proposals as "impish . . . because of their failure to include any workable guidelines for use by the courts."[11] This commentator, Professor Adolf Homburger, had just published an article advocating liberalization of the CPLR's class action provisions, reprinted in the 1971 Judicial Conference Report.[12] One of the "workable guidelines" proposed by Professor Homburger was the current CPLR 908, which he patterned on Rule 23(e) of the Federal Rules.[13] While Professor Homburger did not discuss this proposed rule in his article, 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 requires in all cases notice to the members of the class in such manner as the court directs.[14]

D. Policies Favoring the Present CPLR 908

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commenced).

[11] Report of the Administrative Board of the Judicial Conference of the State of New York, 1970-71, Legislative Doc. No. 90, at 215, 217-218 (1972) ("1972 Judicial Conference Report"). The commentators were Supreme Court Justice Mario Pittoni of Nassua County and Professor Adolf Homburger of the State University of New York at Buffalo.

[12] Adolf Homburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609 (1971) *reprinted in* 1972 Judicial Conference Report, *supra*, at 242.

[13] 71 Colum. L. Rev. at 657-59.

[14] Twelfth Annual Report of the Judicial Conference to the Legislature on the Civil Practice Law and Rules (1973), *appearing in* Report of the Administrative Board of the Judicial Conference of the State of New York,

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, 248 N.Y.S.2d 913 (Sup. Ct. N.Y. Co. 1964), a corporate defendant in a 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 the attorneys' fees of these defendants, for which it was responsible. The plaintiff's attorney concurred, apparently believing the remaining defendants could satisfy any judgment. *Id.*, 42 Misc. 2d at 881, 248 N.Y.S.2d at 914.

As noted in footnote 10 above, 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." *Borden v. Guthrie*, 42 Misc. 2d at 881, 248 N.Y.S.2d at 914. 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

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1973-74, Legislative Doc. No. 90 (1975) ("1975 Judicial Conference Report").

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, 289 N.Y.S.2d 609 (1968), an objector to a class action settlement sued the named plaintiff in the class action, charging the representative with having betrayed the interests of the class for a personal "wrongful profit." *Id.*, 21 N.Y.2d at 566, 289 N.Y.S.2d at 610. The objecting class member charged the named plaintiff with "breach[ing] his fiduciary obligation to plaintiff and other members of a class he represented as a plaintiff in a derivative action . . . ." *Id.* The named plaintiff had commenced a combined derivative and class action, and his preliminary injunction motion was denied before a determination of the derivative or class basis for the action. Shortly after the court denied injunctive relief, the lead plaintiff made an "appraisal rights" demand and received $22.51 per share in the settlement of his individual appraisal action. Other shareholders

received $17.50 per share; thus the named plaintiff received 23 percent more than the members of the class he sought to represent. Having agreed to sell his shares, the named plaintiff (the defendant in *Sonnenschein*) no longer had standing to maintain the derivative or class action, and it was dismissed with prejudice without notice to members of the class. *Id.*, 21 N.Y.2d at 567, 289 N.Y.S.2d at 611.

The Court of Appeals accepted that a class member may sue a representative who has settled his individual claim for consideration not benefiting the entire class. The Court 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 . . . ." *Id.*, 21 N.Y.2d at 569, 289 N.Y.S.2d at 613. In approving the dismissal of the challenge, however, the Court of Appeals noted that the federal court had been responsible for supervising the class representative's performance and also cited with approval Federal Rule 23(e), which the Court noted required notice to the class members of any settlement. The Court concluded:

> Under the circumstances presented here of failure to provide notice, it would appear that under the Federal rules the District Court would have no choice but to vacate its earlier order, provide the required notice and, if objection is made, determine anew whether dismissal of the class action is called for.

Id., 21 N.Y.2d at 570, 289 N.Y.S.2d at 614.

The court's decision was based largely on the view that a class representative should not be required to defend his conduct in multiple courts.

> The party prosecuting the action is in truth the champion of the nonappearing class members, and . . . he 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 . . . .

Id., 21 N.Y.2d at 569-70, 289 N.Y.S.2d at 613. While this decision offers class representatives protection from multiple challenges in different courts, the holding, that challenges to a class action must be addressed in the court before which the action was pending, is unrelated to how the absent class member receives notice of the dismissal, discontinuance or compromise he wants to challenge.

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, 447 N.Y.S.2d 278 (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.

Id., 85 A.D.2d at 151, 447 N.Y.S.2d at 279. 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).[15] 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." *Id.*, 85 A.D.2d at 152, 447 N.Y.S.2d at 280. 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.

Id., 85 A.D.2d at 153, 447 N.Y.S.2d at 280.

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.

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[15] Other federal cases are consistent with *Avena* and in conflict with *Shelton*. *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 Electric v. Anaconda American Brass*, 42 F.R.D. 324, 326-27 (E.D. Pa. 1967) (same).

> 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?

Id., 85 A.D.2d at 155, 447 N.Y.S.2d at 281. In giving CPLR 908 a reading that the court acknowledged was more rigid than *Shelton* and its progeny, the court warned putative class counsel: "Fiduciary obligations should not be lightly assumed and cannot be lightly discarded." *Id.*, 85 A.D.2d at 156, 447 N.Y.S.2d at 281.

Other New York courts have followed *Avena*, although the comments of the Supreme Court Justice that were the catalyst for this inquiry[16] suggest that trial courts and class litigants commonly ignore *Avena*, and it has not escaped criticism. 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 may be drawn to the case settled after a court has denied a motion for class certification, which would not require notice to the class.[17]) 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.

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[16] See footnote 7 above.

[17] *In re Empire Blue Cross and 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)).

CPLR 908 has not been the subject of a major appellate decision since *Avena*; nor has the Legislature seen fit to modify the notice portion of the rule. The paucity of authority suggests that the fears of abuse of the class action device have been exaggerated. It is thus time to reevaluate the rule, as the federal courts are doing.

E. Proposed Amendments to Federal Rule 23(e) Remove the Notice Requirements for Pre-certification Dismissals

As noted above, Federal Rule 23(e) was the model for CPLR 908. The Judicial Conference, however, has recommended to the Supreme Court a significant change in approach from the current Rule 23(e). The Council proposes that CPLR 908 be amended, but not to adopt the federal approach in its entirety.

In June 2001 the Committee on Rules of Practice and Procedure approved the recommendations of Civil Rules Advisory Committee and published for comment proposed amendments to Federal Rule 23, including Rule 23(e) and a report of the Advisory Committee dated July 31, 2001. The Advisory Committee report did not address the conflict among the federal courts as to whether the present Federal Rule 23(e) requires notice to the class for pre-certification dismissal,[18] but instead (i) adopted a revised rule that calls for greater judicial scrutiny of all class action settlements and dismissals, (ii) abandoned the language in Federal Rule 23(e) that would require notice of a dismissal, and (iii) adopted a general rule that notice to the class is required "only when class members would be bound by the settlement."[19] While the

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[18] Compare *Shelton v. Page*, 582 F.2d 1298 (4th Cir. 1978), with cases cited in footnote 15 above.

[19] Report of the Civil Rules Advisory Committee (Memorandum from David F. Levi, Advisory Committee Chair, to Hon. Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure), July 31, 2001, *reprinted in* Proposed Amendments Published for Public Comments, Text of the Proposed Amendments, August 2001, at 31. (The comments can be found at http://www.uscourts.gov/federalrulemaking.)

proposed amendments addressed notice requirements in other contexts, this 2001 proposed revision to Rule 23 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." *Id*. at 30-31. 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 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 (emphasis supplied).

After receiving public comment, the Advisory Committee changed its approach and eliminated the requirement of judicial approval for dismissal of pre-certification class actions. Taking into account comments on the proposed rule, the Civil Rules 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*.[20]

[20] Report of the Civil Rules Advisory Committee (Memorandum from David F. Levi, Advisory Committee Chair, to Hon. Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure), May 20, 2002 (revised to account for action taken by the Standing Committee at its June 10-11 meeting), *reprinted in* Pending Rules Amendments Awaiting Final Action, Proposed Amendments to Take Effect December 1, 2003, at p. 2-3, with emphasis added. (The comments can be found at http://www.us.courts.gov/federalrulemaking.)

The text of the new proposed Federal Rule 23(e) appears below.[21] While the Civil Rules Advisory Committee this time suggested only that the present Federal Rule 23(e) "could be read" to require court approval of pre-certification settlements, the Committee correctly noted that this second proposed revision to Rule 23(e)(1)(B), in addition to eliminating the notice requirement, makes judicial review mandatory only where class members "would be bound by a proposed settlement, voluntary dismissal, or compromise."

> 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. . . . 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.

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[21] Proposed Rule 23(e) reads as follows:

(e) Settlement, Voluntary Dismissal, Compromise, and Withdrawal.

(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action 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.

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

> 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.[22]

The Council has concluded 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. Any action pleaded as a class action should be dismissed only after the court's approval, to provide a judicial safeguard against abuse of the class action device. 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. Such protection might be necessary, for example, if the court finds class members likely relied on the pending action in deferring their own actions.

F. Conclusions

- CPLR 908, like the current Federal Rule 23(e), is designed to require notice of a pre-certification, dismissal, discontinuance, or compromise of an action pleaded as a class action.
- The courts do not uniformly require notice in these circumstances, the language of the Rule notwithstanding.

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[22] Advisory Committee Note on Federal Rule 23(e), Report of the Civil Rules Advisory Committee (Memorandum from David F. Levi, Advisory Committee Chair, to Hon. Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure), May 20, 2002 (revised to account for action taken by the Standing Committee at its June 10-11 meeting), *reprinted in* Pending Rules Amendments Awaiting Final Action, Proposed Amendments to Take Effect December 1, 2003, at p. 102-03, with emphasis added. (The comments can be found at http://www.us.courts.gov/federalrulemaking.)

· Current studies suggest that the pre-certification dismissal of an action pleaded as a class action should be subject to greater judicial scrutiny, but that notice to the class should be optional.

· CPLR 908 should be amended as follows:

Proposed CPLR 908

Dismissal, Discontinuance or Compromise

(1) (A) A person who sues or is sued as a representative of a class may dismiss, discontinue, or compromise all or part of the class claims, issues, or defenses, but only with the court's approval.

(B) The court must direct notice in a reasonable manner to all classmembers who would be bound by a proposed dismissal, discontinuance, or compromise. The court may direct notice in a reasonable manner to all class members or members of a putative class, even if they would not be bound by a dismissal, discontinuance or compromise, if the court finds that such notice is necessary to protect their interests.

(C) The court may approve a dismissal, discontinuance, or compromise that would bind class members only after a hearing and on finding that the dismissal, discontinuance, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a dismissal, discontinuance, or compromise under the provisions of this article must file a statement identifying any agreement made in connection with the proposed dismissal, discontinuance, or compromise.

September 2003

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* Council member who abstains from voting on Part I of the Report.

** Council members who dissent from Part I of the report because they believe that the governmental operations rule is not merely a matter of procedure or judicial administration, but rather a considered determination by the Court of Appeals as to the proper threshold showing required to invoke class-wide judicial supervision of governmental operations, and that the necessary showing has not been made to justify legislative abrogation of the balance struck by the Court of Appeals.

*** Drafters of the Report.