



NEW YORK  
CITY BAR

**REPORT ON LEGISLATION BY THE  
STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE,  
COUNCIL ON JUDICIAL ADMINISTRATION AND LITIGATION COMMITTEE**

**A.9425  
S.7113**

**M. of A. Dinowitz  
Sen. Hoylman-Sigal**

AN ACT to amend the civil practice law and rules, in relation to class actions

**THIS BILL IS APPROVED**

The State Courts of Superior Jurisdiction Committee, the Council on Judicial Administration and the Litigation Committee of the New York City Bar Association support the enactment of A.9425 / S.7113 (“the Bill”), which would modernize the administration of class actions. The Committees engaged in a three-year effort to develop the proposed legislation<sup>1</sup> and their report and proposed amendments have been endorsed by the Advisory Committee on Civil Practice of the Office of Court Administration and the Committee on Civil Practice Law and Rules of the New York State Bar Association.<sup>2</sup>

**REASON FOR THE BILL**

The State of New York traditionally was the leader in the United States in developing class action procedures. New York’s statute was the model for state statutes from the mid-19<sup>th</sup> to the mid-20<sup>th</sup> Century, and a revision developed in New York in the 1950’s, while not adopted in its home state, was the basis for the first modern class action statute, Rule 23 of the Federal Rules of

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<sup>1</sup> The committees’ full report is available at: <http://www2.nycbar.org/pdf/report/uploads/20072985-ClassActionsProposedAmendsArt9CPLRJudicialAdminLitigationStateCourtsReportFINAL11515.pdf> (all websites last visited May 30, 2023).

<sup>2</sup> The proposal was most recently endorsed in “Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York,” at 113 (Jan. 2022), available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciary/legislative/pdfs/2022%20CPLR%20Annual%20Report%20Final%20Draft%20with%20Cover.pdf>; the proposal has been endorsed by the Committee on Civil Practice Law and Rules of the New York State Bar Association, May 31, 2023, available at <https://nysba.org/app/uploads/2023/06/CPLR-2-Support-S.7113-of-2023-24.pdf>.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

Civil Procedure as adopted in 1966.<sup>3</sup> In 1975 New York enacted its current Article 9 for class actions.<sup>4</sup> While Rule 23 of the Federal Rules has been amended several times since its adoption in 1966, with major amendments in 2003, New York’s Civil Practice Law and Rules’ (CPLR) Article 9 has not been updated since its adoption. Maintaining New York’s outdated and often confusing class action procedures has led 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,<sup>5</sup> 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. Forty years after enactment, the time is right for modernizing the administration of class actions by the New York courts.

## SUMMARY OF SPECIFIC PROVISIONS

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 state class action statutes. In 2010 the United States 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.<sup>6</sup> Recent state court decisions also have led to confusion over (i) what constitutes a penalty, and (ii) whether it can be waived to permit class certification.<sup>7</sup> To discourage forum shopping and to provide for greater certainty in administration of the law, section 1 of the Bill removes 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. 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.<sup>8</sup> Section 1 of the Bill

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<sup>3</sup> 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*”).

<sup>4</sup> Laws 1975, c. 207 & c. 474.

<sup>5</sup> In one case, an appellate court found counsel qualified and skilled after a trial court had sanctioned the same counsel for making the motion at issue. *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 201-02 (1<sup>st</sup> Dep’t 1998).

<sup>6</sup> *Shady Grove Orthopedic Associates, PA. v. Allstate Insurance Company*, 559 U.S. 393, 397 (2010). *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*”).

<sup>7</sup> *Borden v. 400 East 55<sup>th</sup> St. Assocs.*, 24 N.Y.3d 382 (2014); *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 212 (2007).

<sup>8</sup> See *City of New York v. Maul*, 14 N.Y. 3d 499 (2010). The Court said there 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

recommends a new CPLR 901(b) to formally rescind the rule (and in lieu of the current CPLR 901(b)).<sup>9</sup>

- 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 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 rule often results in a *pro forma* motion just to meet the deadline, and in complex cases deprives the court of a substantive supporting brief. Section 2 of the Bill adopts the language from Rule 23(c)(1)(A) of the Federal Rules, stating that motions shall be made “at an early practicable time...”
- The adequacy of class counsel is addressed in Article 9 of the CPLR only indirectly, in CPLR 901(a)(4), which states a 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 (in Rule 23(a)(4) of the Federal Rules), and in 2003 a new Rule 23(g) was adopted that specified factors to be considered in appointing class counsel. Section 2 of the Bill proposes a new CPLR 902(b) to provide guidance comparable to that now provided by Federal Rule 23(g). Such guidance will aid the Court, the parties and the attorneys.
- 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.<sup>10</sup> Class notice imposes substantial and often unnecessary expenses. Section 3 of the Bill adopts a more flexible notice provision, requiring notice only where class members would be bound or where the court concludes that notice is

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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).

<sup>9</sup> *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.”

<sup>10</sup> This construction of CPLR 908 dates to *Avena v. Ford Motor Co.*, 85 A.D.2d 149 (1st Dep’t 1982). Courts in other jurisdictions have not been consistent in the construing this language. Schager, *Judicial Approval, Class Notice Required for Settlement of Uncertified Class Actions*, N.Y. Law J., January 24, 2018. In December 2017 the Court of Appeals acknowledged the difficulties presented by this construction. *Desrosiers v. Perry Ellis Menswear*, 30 N.Y.3d 488 (Ct. App. 2017). However, in rejecting an appeal to overrule the 35-year-old First Department precedent, a divided Court described changes proposed for CPLR 908 in two Reports of the New York City Bar and in A.9573 (2016), and concluded that legislative action was the proper approach to change the existing reading of the rule. 30 N.Y.3d at 397-98. A strong dissent criticized this construction as essentially requiring notice that “would essentially inform putative class members that an individual claim – of which they received no prior notice – was being resolved by an agreement that was not binding on them.” 30 N.Y.3d at 503 (Stein, J., dissenting).

necessary to protect the interests of the members of the class. While the 2003 amendments to Rule 23 of the Federal Rules removed the requirement of judicial approval of pre-certification settlements, the Bill retains the longstanding New York rule requiring such approval. Under the legislation CPLR 908(a) imposes an affirmative requirement of notice of settlement where a class has been certified and members of the class would be bound by the proposed settlement. CPLR 908(a) is derived from the introductory paragraph of F.R.C.P. 23(e) and subparagraph (e)(1) (and CPLR 904(a)) and states when notice *must* be provided. Subparagraph (b) then reserves for courts the discretion to order notice in all other circumstances when necessary to protect the interests of members of the class, parallel to the discretion to order notice of pendency under CPLR 904(a).

- Section 4 of the Bill adds to CPLR 909 the phrase “to the extent not otherwise limited by law,” to confirm that where a specific statute authorizes or imposes limits on a fee award to be paid by a defendant, the standards of that more specific statute govern eligibility for and the amount of any award, and not the general fee provision of CPLR 909.

## HISTORICAL BACKGROUND

The basic philosophy behind class actions, “unchanged through the centuries,” is that “self-interest, the motivating force that sparks the adversary system,” warrants expansion of the traditional rules of joinder where there is a commonality of interests.<sup>11</sup>

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.<sup>12</sup>

This basic philosophy was behind New York’s first class action statute, enacted as an amendment to the Field Code in 1849<sup>13</sup> and drawn from both English common law and Justice

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<sup>11</sup> 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 17<sup>th</sup> century).

<sup>12</sup> Homburger, *State Class Actions*, at 610 (with a draft of Article 9 at 655-57). This article, essentially the legislative history of Article 9, is cited in both the Tenth Annual Report of the Judicial Conference to the Legislature, *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, *reprinted in* Report of the Administrative Board of the Judicial Conference of the State of New York, Legis. Doc. No. 90, at 206 (1975).

<sup>13</sup> 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.

Joseph Story’s writings on equity practices.<sup>14</sup> Until the 1938 adoption of the Federal Rules of Civil Procedure, the New York approach was followed in most states and became the American standard provision for class actions.<sup>15</sup>

In 1962 the New York Legislature enacted an amendment to the CPLR class action article,<sup>16</sup> adopting an approach that was more innovative than the 1938 Federal Rule, and which actually became the basis for the major amendments to Federal Rule 23 in 1966. For reasons not recorded the Legislature repealed the 1962 approach and reverted to the prior Field Code rules.<sup>17</sup> It was not until 1975 that the current Article 9 was enacted.

Aside from an amendment to CPLR 909 in 2011, Article 9 is unchanged since enactment. Modernizing the Article to match the complexity of contemporary litigation is overdue, and this Bill is a step in the right direction.

## CONCLUSION

The New York City Bar Association supports this important Bill, which will bring the CPLR’s class action procedures up to date and continue the trend in recent years to improve and modernize the administration of justice in New York.

Council on Judicial Administration  
Fran R. Hoffinger, Chair

State Courts of Superior Jurisdiction Committee  
Amy D. Carlin, Chair

Litigation Committee  
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<sup>14</sup> Homburger, *State Class Actions*, at 612-13 (citing J.Story, Commentaries on Equity § 97 (1838)).

<sup>15</sup> Homburger, *State Class Actions*, at 613.

<sup>16</sup> Laws 1962, c. 308.

<sup>17</sup> Homburger, *State Class Actions*, at 631 (citing Laws 1962, c. 318, and referring to “the seemingly indestructible Field Code rule”).

\* Committee members serve in their individual, personal capacities. They do not represent any organization or employer and nothing in this report should be attributed to an organization or employer with which a committee member was or is affiliated.

*This legislation was developed in November 2015 during the terms of the following committee chairs and members:*

Committee on State Courts of Superior Jurisdiction  
Adrienne B. Koch, Chair

Council on Judicial Administration  
Steven M. Kayman, Chair

Committee on Litigation  
Cary B. Samowitz, Chair

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