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Class Actions in 2013 And Call to Repeal CPLR §901(b)

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We noted in last year's survey that there has been a noticeable and positive change in the receptivity of New York courts, especially the Court of Appeals,¹ in making our class action statute (CPLR §§901-909) more readily available to groups of litigants. This positive trend continued in 2013 with class actions brought by tenants, New York counties, catering hall servers, stockbrokers and models. In addition, it is time for the Legislature to consider shedding the unnecessary and vestigial CPLR §901(b) so as to make our class action statute as modern and relevant as those of most other states.²

Types of Actions

Luxury Decontrol of Apartments. In [Downing v. First Lenox Terrace](#),³ a class of tenants alleged that the landlords "unlawfully deregulated their apartments under the luxury decontrol provisions of Rent Stabilization Law (Administrative Code of City of NY) §26-501 et seq. (hereinafter RSL) while receiving tax incentive benefits under the City of New York's J-51 program."

Plaintiffs sought "a declaration that all apartments in the complex are subject to rent stabilization, injunctive relief and a money judgment." In denying defendant's motion to dismiss based upon CPLR §901(b), the Appellate Division, First Department, expanded the application of CPLR Article 9 to allow class actions seeking actual damages consisting of rent overcharges plus interest pursuant to RSL §26-516(a).

Taxing Internet Sales. In [County of Nassau v. Expedia](#),⁴ Nassau County sought to enforce its Hotel and Motel Tax Law and other similar taxing statutes on behalf of a class of 56 other local governmental agencies. The county alleged that the online sellers collect 3 percent hotel tax from consumers based on retail room rates but remit to the county only the portion of the tax based on defendants' lower "wholesale rate." Relying on [Overstock.com v. Dept. of Taxation and Finance](#)⁵ the trial court (Supreme Court, Nassau County) found a predominance of common questions concluding that the 'means and manner' of collecting the taxes is sufficiently similar among class members. Many other taxing authorities throughout the country have brought similar class actions.⁶

Banquet Servers Seeking Tips. In [Picard v. Bigsbee Enterprises](#),⁷ a class of catering hall servers challenged their employer's retention of a "20% Service Personnel Charge" imposed upon all customers. Alleging a violation of Labor Law §196-d ("No employer...shall...retain any part of a gratuity...purported to be a gratuity for an employee"), the trial court (Supreme Court, Albany County) accepted plaintiff's waiver of the statutory penalty (Labor Law §198(1-a) and denied defendant's motion to dismiss based on CPLR §901(b).

Stockbrokers Seeking Proper Compensation. In [Thomas v. Meyers](#),⁸ a class of stockbrokers alleged that defendants "engaged in a systemic practice of failing to properly compensate stockbrokers" in violation of Labor Law §50 by failing to pay overtime, making unlawful paycheck deductions, failing to pay on time and failing to pay the minimum wage.

The trial court (Supreme Court, New York County) certified the class action noting that the plaintiff waived "statutory penalty of liquidated damages for any of these claims damages." In an earlier motion by defendants seeking to compel

arbitration and enforce a class action waiver the court denied the motion noting that "The FINRA (Financial Industry Regulatory Authority) Code explicitly carves out claims brought as a class action as non- arbitrable."

Models Seeking Unpaid Fees. In *Raske v. Next Management*,⁹ a class of models sought additional compensation "for renewal or expansion of usage of [their] images made after expiration of the initial usage period." While dismissing the complaint as "flawed" but noting that the models, "are not left without a remedy," the trial court (Supreme Court, New York County) encouraged the models to seek class action relief. "If...modeling agencies fail to pay models...fees contractually owed to them [they] may sue to enforce their contract rights and may invoke class action procedures in proper cases."

Time to Repeal CPLR §901(b)

When CPLR Article 9 was enacted in 1975 the Legislature engrafted¹⁰ onto an otherwise modern class action statute, a limiting mechanism, relatively unique among the states,¹¹ i.e., CPLR 901(b), which provides:

Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.¹²

There are three reasons to repeal CPLR §901(b).¹³

First, it is now useless in prohibiting class actions seeking a statutory penalty or minimum recovery since such a class action can now be brought in federal court. In 2010, the U.S. Supreme Court in [Shady Grove Orthopedic Associates v. Allstate Insurance](#)¹⁴ rejected the notion that CPLR §901(b) should be applied by federal courts (and by implication in other state courts as well¹⁵) in class actions alleging violations of the General Business Law (GBL) §340 (the Donnelly Act) and brought under Federal Rule of Civil Procedure 23.

Second, CPLR §901(b) has led to inconsistent applications since some penalty class actions (in which plaintiffs waived the statutory penalties prior to class certification) have been certified under salutary statutes protecting consumers, workers and tenants (see e.g., General Business Law (GBL) §§349, 350, *Cox v. Microsoft*¹⁶), and violations of Labor Law §220 (*Pasantez v. Boyle Environmental Services*,¹⁷ *Galdamez v. Biordi Construction*¹⁸), Labor Law §198 (*Thomas v. Meyers Associates*,¹⁹ *Picard v. Bigsbee Enterprises*²⁰), Labor Law §196-b (*Krebs v. The Canyon Club*²¹) and Rent Stabilization Law §26-516(a) (*Downing v. First Lenox Terrace*,²² *Gudz v. Jemrock Realty*,²³ *Borden v. 400 East 55th Street Associates*²⁴), while others have not (General Business Law §340 (Donnelly Act), *Sperry v. Crompton*²⁵), and Telephone Consumer Protection Act (*Rudzazer & Gratt v. Cape Carnaveral Tour & Travel*²⁶).

And, third, in order to certify some penalty class actions, plaintiffs must, prior to certification, waive any claim for a penalty or minimum recovery.²⁷ Implicit in such a waiver is the adequacy of a class representative who decides to limit the relief that may be or should be sought on behalf of the class. The U.S. Supreme Court addressed this issue indirectly in [Standard Fire Insurance v. Knowles](#)²⁸ where a named plaintiff in an uncertified state court action sought to circumvent the Class Action Fairness Act of 2005 (CAFA).

The specific issue addressed by the Supreme Court "concerns a class-action plaintiff who stipulates, prior to certification of the class, that he, and the class he seeks to represent, will not seek damages that exceed \$5 million in total. Does that stipulation remove the case from CAFA's scope?" Answering in the negative, the Supreme Court noted that a precertification stipulation does not bind anyone but the plaintiff who has not reduced the value of the putative class member's claims. For jurisdictional purposes, "our inquiry is limited to examining the case 'as of the time it was filed in state court.'"

It appears that the U.S. Supreme Court's decision in *Standard Fire* may discourage New York courts from certifying any class action involving a potential penalty. This would be consistent with the concept that the class representative's fiduciary duty prevents him or her from limiting the damages which class members should be able to recover under common law or statutory claims. For example, in [Back Doctors v. Metropolitan Property and Casualty](#),²⁹ the U.S. Court of Appeals for the Seventh Circuit noted that stipulating to reduced damages may violate a class representative's fiduciary duty to members of the class. "A representative can't throw away what could be a major component of the class's recovery. Either a state or a federal judge might insist that some other person, more willing to seek punitive damages take over as representative. What Back Doctors is willing to accept thus does not bind the class."

Conclusion

As the concept of making CPLR Article 9 more readily available continues to gain support among the judiciary it would be helpful if the Legislature would streamline our class action procedures by repealing CPLR §901(b).

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Endnotes:

1. See e.g., the game changer decision in *Koch v. Acker, Merrall & Condit*, 18 N.Y. 3d 940 (2012) and the encouraging language in *Corsello v. Verizon New York*, 18 N.Y. 3d 777, 967 N.E. 2d 1177 (2012) (As for class certification, the court found that it "seems on its face well-suited to class action treatment" in that "it would be reasonable to infer that the case will be dominated by class-wide issues—whether Verizon's practice is lawful, and if not what the remedy should be" and that "expert testimony" could be used to "support an inference" of typicality).
2. Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press (2013) (hereinafter *Class Actions*).
3. *Downing v. First Lenox Terrace Associates*, 107 A.D.3d 86 (1st Dept. 2013).
4. *County of Nassau v. Expedia*, 41 Misc.3d 626 (Sup. Ct. Nassau Co. 2013).
5. *Overstock.com v. Dept. of Taxation and Finance*, 20 N.Y. 3d 586 (2013).
6. See e.g., *Hotels.Com v. Pine Bluff Advertising and Promotion Commission*, 2013 Ark. 392 (Ark. Sup. 2013) (certification granted).
7. *Picard v. Bigsbee Enterprises*, 40 Misc.3d 1240(A) (Sup. Ct. Albany Co. 2013). See also: *Barenboim v. Starbucks*, 21 N.Y.3d 460 (2013) (certified questions from U.S. Court of Appeals for the Second Circuit answered regarding scope of participation of supervisory personnel in employer-mandated tip pools).
8. *Thomas v. Meyers Associates*, 39 Misc.3d 1217(A) (Sup. Ct. N.Y. Co. 2013).
9. *Raske v. Next Management*, 40 Misc. 3d 1240(A) (Sup. Ct. N.Y. Co. 2013).
10. See *Sperry v. Crompton*, 8 N.Y. 3d 204, 211 (2007).
11. See *Class Actions* §4.03[6]. While it is true that other states limit the use of the class action device by, inter alia, taxpayers (see e.g., *Georgia Department of Revenue v. Roof*, 690 S.E. 2d 442 (Ga. App. 2010); *Chadwick 99 Associates v. Director, Division of Taxation*, 2007 WL 1470653 (N.J. Tax. 2007) and consumers alleging violations of state antitrust statutes (see *Gaebler v. New Mexico Potash*, 285 Ill. App. 3d 542, 211 Ill. Dec. 707, 676 N.E.2d 228 (1997); *General Supplies v. Southwire*, 275 S.E. 2d 579 (S.C. 1981), the language of CPLR §901(b) is relatively unique in prohibiting a broad class of class actions alleging the violation of any statute which provides for the imposition of a "penalty, or a minimum measure of recovery" not otherwise authorized by said statute.
12. CPLR 901(b) provides, "Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."
13. See *Class Actions* at 4.03(3)(c)(i). See also: Dickerson, "New York State Class Actions: Make It Work—Fulfill the Promise," 74 Albany Law Review 711, 725-726 (2010/2011).
14. *Shady Grove Orthopedic Associates v. Allstate Insurance*, 593 U.S. 393 (2010). See also: Dickerson, "State Class Actions: Game Changer," NYLJ, April 6, 2010, p. 6, col. 4 (hereinafter "Game Changer").
15. See e.g., *Weber v. U.S. Sterling Securities*, 924 A.2d 816 (Conn. Sup. 2007) ("We agree with the District Court's conclusion that if we were to determine that §901(b) did not apply to the plaintiff's claim, we would encourage forum shopping").
16. *Cox v. Microsoft*, 8 A.D.3d 39, 778 N.Y.S.2d 147 (1st Dept. 2004). As for the issue raised by defendant that GBL §349's \$50 minimum damages constituted a penalty within the meaning of CPLR §901(b) the court sidestepped the issue by approving of plaintiff's pre-certification decision to seek only actual damages relying upon, inter alia, *Super Glue v. Avis Rent A Car System*, 132 A.D.2d 604, 517 N.Y.S.2d 764 (2d Dept. 1987) which held that "the named plaintiff in a class action may waive that relief (penalty or minimum damages) and bring an action for actual damages only").
17. *Pasantez v. Boyle Environmental Services*, 251 A.D.2d 11, 673 N.Y.S.2d 659 (1st Dept. 1998) ("All proposed class members worked on the same project, were due the prevailing rate of wages and benefits and were allegedly underpaid...To the extent certain individuals may wish to pursue punitive claims pursuant to Labor Law §198(1-a) which cannot be maintained in a class action (CPLR 901(b)) they may opt out of the class action").

18. *Galdamez v. Biordi Construction*, 13 Misc.3d 1224 (2006), aff'd 50 A.D.3d 357, 855 N.Y.S.2d 104 (2008).
19. *Thomas v. Meyers Associates*, 39 Misc.3d 1217(A) (Sup. Ct. N.Y. Co. 2013)("The correct statement of the rule in New York is that liquidated damages under Labor Law 198 are discretionary and may be waived and certification of the class is permitted as long as class members are afforded the opportunity to opt out and pursue statutory remedies"). See also *Klein v. Ryan Beck Holdings*, 2007 WL 2059828 (S.D.N.Y. July 13, 2007) (waiver of liquidated damages necessary to bring New York Labor Law class actions).
20. *Picard v. Bigsbee Enterprises*, 40 Misc.3d 1240(A) (Albany Sup. 2013).
21. *Krebs v. The Canyon Club*, 22 Misc.3d 1125 (2009).
22. *Downing v. First Lenox Terrace Associates*, 107 A.D.3d 86 (1st Dept. 2013).
23. *Gudz v. Jemrock Realty*, 105 A.D.3d 625 (1st Dept. 2013).
24. *Borden v. 400 East 55th Street Associates*, 105 A.D.3d 630 (1st Dept. 2013).
25. *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 831 N.Y.S.2d 760 (2007). See also *Paltre v. General Motors*, 26 A.D. 3d 481, 810 N.Y.S.2d 496 (2d Dept. 2006), *Ho v. Visa*, 16 A.D.3d 256, 793 N.Y.S.2d 8 (1st Dept. 2005), *Cunningham v. Bayer*, 24 A.D.3d 216, 804 N.Y.S.2d 924 (1st Dept. 2005), *Asher v. Abbott Laboratories*, 290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dept. 2002).
26. *Rudgazer & Gratt v. Cape Carnaveral Tour & Travel*, 22 A.D.3d 148, 799 N.Y.S.2d 796 (2d Dept. 2005). See also *Giovanniello v. Carolina Wholesale Office Machine*, 29 A.D.2d 737, 815 N.Y.S.2d 248 (2d Dept. 2006); *Leyse v. Flagship Capital Services*, 22 A.D.2d 426, 803 N.Y.S.2d 52 (1st Dept. 2005).
27. The litigation strategy of seeking only actual damages, while waiving statutory penalties and giving class members the right to opt out to pursue such damages, as a means of circumventing CPLR §901(b) has been accepted by the Appellate Divisions. However, the Court of Appeals has yet to rule on it as it stated in *Sperry v. Crompton Corp.* 8 N.Y.3d 204, 831 N.Y.S.2d 760 (2007) "Finally, we decline to reach the issue of whether Sperry may maintain a class action under the Donnelly Act by forgoing treble damages in favor of actual damages."
28. *Standard Fire Insurance v. Knowles*, __U.S.__, 133 S. Ct. 1345 (2013).
29. *Back Doctors v. Metropolitan Property and Casualty Ins.*, 637 F.3d 827 (7th Cir. 2011). See also: *Evans v. Lasco Bathware*, 178 Cal. App. 4th 1417 (Cal. App. 2009), and *Bowden v. Phillips Petroleum*, 247 S.W. 3d 690 (Tex. Sup. 2004).

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