New York State Bar Association
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Memorandum in Support

April 29, 2024

A. 9425 By: M. of A. Dinowitz
S. 7113 By: Senator Hoylman-Sigal
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: 1st day of January next succeeding the date on which it shall have become a law.

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

LAW AND SECTIONS REFERRED TO: CPLR Section 901.

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES

SUPPORTS THIS LEGISLATION

The New York State Bar Association's Committee on the Civil Practice Law and Rules (the "Committee") supports the enactment of S.7113/A.9425 ("the Bill"), which would modernize the administration of class actions. The Committee engaged in a careful review of the initial proposal developed by the New York City Bar and collaborated in preparing the current bill. The comparable federal rule, Rule 23 of the Federal Rules of Civil Procedure, has been amended numerous times since its adoption in the mid-1960's. In contrast, Article 9 of the CPLR has not been materially amended since its enactment in 1975, and the amendments proposed in the Bill are long overdue.[1]

HOW WOULD THE AMENDMENTS CHANGE NEW YORK LAW

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. Since the Supreme Court decided in 2010 that it was a procedural and not a substantive rule of law,

[1]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/judiciaryslegislative/pdfs/2022%20CPLR%20Annual%20Report%20Final%20Draft%20with%20Cover.pdf.

it applies only in state court.[2] The Committee believes that CPLR 901(b) both is outdated and promoted forum-shopping.

- The proposed new CPLR 901(b) would overrule a judicially-developed rule from prior to the adoption of Article 9 in 1975, which prohibits class actions against governmental entities. The existing common law rule is largely a source of confusion now, having been made subject to numerous exceptions in recent years.[3] Section 1 of the Bill recommends a new CPLR 901(b) to formally rescind the rule (and in lieu of the current CPLR 901(b)).

- Section 2 of the Bill will incorporate into CPLR 902 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 The current CPLR 901(a)(4) states that a class may be certified when the court finds that "the representative parties will fairly and adequately protect the interests of the class." Federal studies recognized the inadequacy of this language (Rule 23(a)(4)), 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).

- 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. The Court of Appeals has recognized the desirability of this change, but has held that because of precedent change should come from the legislature.[4] Class notice imposes substantial and often

[2] *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*").

[3] *See City of New York v. Maul*, 14 N.Y. 3d 499, 509 (2010) (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"); *Hurrell-Haring v. State*, 81 A.D.3d 69, 75 (3d Dep't 2011) (reversing the trial court's application of the government operations rule, concluding that all cases "involving claims of systemic deficiencies which seek widespread, systematic reform" were class actions); *Watts v. Wing*, 308 A.D.2d 391, 392 (1st Dep't 2003) (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).

[4] 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)

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 necessary to protect the interests of the members of the class. While the 2003 amendments to Federal Rule 23 removed the requirement of judicial approval of pre-certification settlements, this Bill retains the longstanding New York rule requiring such approval.

- 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.

CONCLUSION

The New York State Bar Association's Committee on Civil Practice Law and Rules **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.