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CPLR Art. 9: Statute Is to be Applied Liberally to Permit Class Certification of Plaintiff Shareholders with Substantially Similar Claims in Actions Against Corporate Directors

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CPLR Art. 9: Statute is to be applied liberally to permit class action certification of plaintiff shareholders with substantially similar claims in actions against corporate directors

Article 9 of the CPLR provides generally for the maintenance of class action suits.[1] In recent years, such litigation has attained greater importance as technological advancements and increasingly sophisticated financial transactions have resulted in common injuries to large numbers of persons.[2] The statutory framework gov-

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[1] *See* CPLR 901-909 (1976 & Supp. 1984-1985). CPLR 901 provides in pertinent part:

> a. One or more members of a class may sue . . . as representative parties on behalf of all if:
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> 1. the class is so numerous that joinder of all members, . . . is impracticable;
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> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
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> 3. the claims or defenses of the representative parties are typical of [those] of the class;
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> 4. the representative parties will fairly and adequately protect the interests of the class; and
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> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CPLR 901 (1976 & Supp. 1984-1985). Before a named plaintiff may proceed on behalf of a class, he must move for an order permitting the class action. CPLR 902 (1976 & Supp. 1984-1985). In making its determination, the court will consider:

> 1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;
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> 2. the impracticability or inefficiency of . . . separate actions;
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> . . . .
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> 4. the desirability . . . of concentrating the litigation . . . in the particular forum;
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> 5. the difficulties likely to be encountered in the management of a class action.

CPLR 902 (1976 & Supp. 1984-1985).

[2] *See* Black, *Class Actions Pursuant to Tennessee Rule of Civil Procedure 23*, 46 TENN. L. REV. 556, 604 (1979) (advent of "mass technology" renders the standard lawsuit between two parties ineffectual to resolve "widespread wrongs"); *cf.* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 610 (1971) (class actions evidenced as useful beyond expectations); Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1121 (1980) (class action developed into effective way to handle group claims). Several commentators have noted the diverse applications for class litigation. *See, e.g.*, Floyd, *Civil Rights Class Actions in the 1980's: The Burger Court's Pragmatic Approach to Problems of Adequate Representation and Justiciability*, 1984 B.Y.U. L. REV. 1, 1-2 (civil rights); Committee Report, *Consumer Protection - The Current Status of New York Class Actions*, 38 REC. A.B. CITY N.Y. 54, 71-72 (1983) (commercial transactions); Note, *Class Actions in New York: Recovery for Personal Injury in Mass Tort Cases*, 30 SYRACUSE L. REV. 1187, 1211 (1979) (tort actions).

Moreover, the class action is especially suited to situations in which the small size of a plaintiff's individual claim makes independent litigation impracticable. *See, e.g.*, Letter from Federal District Judge Gus J. Solomon to Sen. Warren G. Magnuson (Nov. 24, 1970),

erning class actions was revised in 1975,[3] theoretically ending more than a century of judicially imposed restrictions on class actions.[4]

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reprinted in 117 CONG. REC. 3915 (1971) ("[a] citizen with a valid justiciable claim of under $500 is faced with the prospect of having his expenses exceed any recovery obtainable in court"); T. BARTSH, F. BODDY, B. KING, P. THOMPSON, A CLASS-ACTION SUIT THAT WORKED: THE CONSUMER REFUND IN THE ANTIBIOTIC ANTITRUST LITIGATION 883 (1978) (multi-million dollar lawsuits involving large numbers of consumers can be effectively managed at acceptable costs). The class action device can be particularly appropriate in cases in which disasters cause injury to many persons. *See* Note, *supra*, at 1187. Despite purported utility of class actions, statistics indicate a decline in the number of class actions filed in federal court and a similar drop in the proportion of class actions to all civil claims, possibly evincing a decline in the impact of class action litigation. *See In Camera*, 7 CLASS ACTION REP. 253, 253 (1982).

[3] *See* CPLR 1005, ch. 308, § 4, [1962] N.Y. Laws 316 (repealed 1975) (current version at CPLR 901-909 (McKinney 1976 & Supp. 1984-1985)). New York's first civil practice statute, the Field Code, was amended in 1849 to provide for maintenance of class actions. *See* New York Civil Procedure (Field Code), ch. 438, § 119, [1849] N.Y. Laws 639. Changes were made in the original statute a quarter century later, *see* Code Civ. Proc., ch. 448, § 448, [1876] N.Y. Laws 85, and again in 1920, see Civ. Proc. Act, ch. 925, § 195, [1920] N.Y. Laws 85, but it was not until 1962 that class representatives were required to prosecute claims of the entire class, *see* CPLR 1005, ch. 318, § 4, [1962] N.Y. Laws 316 (repealed 1975).

[4] *See* H. NEWBERG, CLASS ACTIONS, A MANUAL FOR GROUP LITIGATION AT FEDERAL AND STATE LEVELS 346 (1977); Homburger, *supra* note 2, at 631-32; *see also* Gaynor v. Rockefeller, 15 N.Y.2d 120, 129, 204 N.E.2d 627, 631, 256 N.Y.S.2d 584, 590 (1965) (CPLR 1005 was merely "verbatim restatement" of former law, thus requiring denial of certification when separate wrongs were involved); Society Milion v. National Bank of Greece, 281 N.Y. 282, 292-93, 22 N.E.2d 374, 377 (1939) (court refused to permit class action despite similar injuries among members of plaintiff class); Booton v. City of Brooklyn, 15 Barb. 375, 391 (1853) (strictly applying class action device would render justice "unattainable" because concluding suit of almost 600 plaintiffs would be "utterly impossible"). By 1972, discontent with New York's law had reached large proportions. *See* Homburger, *supra* note 2, at 613. It was widely recognized that the New York rule did not reach the heights of the ambitious federal rule. *See* Moore v. Metropolitan Life Ins. Co., 33 N.Y.2d 304, 313, 307 N.E.2d 554, 558, 352 N.Y.S.2d 433, 439 (1973). While affirming a lower court's decision to dismiss a class action suit, the *Moore* Court indicated that the class action statute should be construed more broadly than it had in the past. *Id.* at 313, 307 N.E.2d at 558, 352 N.Y.S.2d at 439.

The new approach embodied in Article 9 was widely hailed as a modern, flexible substitute for its outmoded predecessor. *See* Evans v. City of Johnstown, 97 App. Div. 2d 1, 2, 470 N.Y.S.2d 451, 452 (3d Dep't 1983) (Article 9 provides "flexible" and "functional" method for conducting class actions); SIEGEL § 139, at 174 (Article 9 is "enlightened and powerful" statute). Governor Carey referred to the new law as an "historic advance" for the protection of New Yorkers. Governor's Memorandum (N.Y.S. 1309-B, N.Y.A. 1252-B, 198th Sess.), *reprinted in* [1975] N.Y. Laws 1748 (McKinney). Article 9 was designed to parallel the federal rule in its liberal allowance of class action suits. *See* Note, *supra* note 2, at 1191-92 & n.32; *see also* FED. R. CIV. P. 23; Memorandum of Assemblyman Fink 1, 3 (accompanying N.Y.S. 1309-B, N.Y.A. 1252-B, 198th Sess.) (1975) (proposed Article 9 would "embody the virtues of the federal rule in a simplified and more flexible version . . . with . . . guidelines for . . . judicial discretion").

Although it generally is stated that Article 9 is modeled on the federal rule, an unusual sequence of events shaped the concepts of Article 9. *See* [1974] N.Y. Laws 1798 (McKinney). The current version of Rule 23 was patterned after a 1952 New York proposal, and

However, since enactment of the new law, its application has been notably inconsistent,[5] and many courts have perceived Article 9 as little more than a reenactment of the former, more rigid statute.[6] Recently, in *Brandon v. Chefetz*,[7] the Appellate Division, First Department, held that Article 9 could not be invoked to bar certification of plaintiff shareholders who had substantially similar legitimate claims against corporate directors for breach of fiduciary duty involving, *inter alia*, failure to disclose material information relating to a pending tender offer.[8]

In *Brandon*, two controlling shareholders of Wells Management Corp. (Wells) allegedly diverted to themselves a significant portion of a tender offer by BIS, S.A. (BIS).[9] Plaintiffs sought certification to represent all shareholders who allegedly were defrauded by defendants' procurement of lucrative employment contracts with BIS, which, plaintiffs claimed, artificially diminished the price per share.[10] Plaintiffs claimed that defendants' failure to disclose details of the employment agreements was a breach of fiduciary duty.[11] The Supreme Court, in three orders spanning seven months, denied class certification with leave to renew the motion after additional discovery to evaluate whether New York was the most appropriate forum.[12] On appeal, the Appellate Division modified and granted certification.[13]

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part of Rule 23 is "substantially identical" to an earlier New York proposal. Homburger, *supra* note 2, at 631. *See generally The Survey*, 50 ST. JOHN'S L. REV. 189, 191 n.64 (1975) (similarities between Article 9 and Rule 23).

[5] *Compare* Rosenfeld v. A.H. Robins Co., 63 App. Div. 2d 11, 12-13, 407 N.Y.S.2d 196, 197-98 (2d Dep't) (certification refused because type of injuries might differ from one plaintiff to another), *dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1031, 413 N.Y.S.2d 374 (1978) *with* Vickers v. Home Fed. Sav., 56 App. Div. 2d 62, 65, 390 N.Y.S.2d 747, 749 (4th Dep't 1977) (different character or amount of remedies sought among different named plaintiffs will not affect their ability to represent class).

[6] *See, e.g.*, Brodsky v. Selden Sanitary Corp., 85 App. Div. 2d 612, 614-15, 444 N.Y.S.2d 949, 951 (2d Dep't 1981); Rosenfeld v. A.H. Robins Co., 63 App. Div. 2d 11, 29, 407 N.Y.S.2d 196, 207 (2d Dep't), *dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1031, 413 N.Y.S.2d 374 (1978).

[7] 106 App. Div. 2d 162, 485 N.Y.S.2d 55 (1st Dep't 1985).

[8] *Id.* at 168-70, 485 N.Y.S.2d at 59-61. The court relied largely on the proposition that Article 9 is to be construed liberally. *Id.* (quoting Friar v. Vanguard Holding Corp., 78 App. Div. 2d 83, 91-92, 434 N.Y.S.2d 698, 703 (2d Dep't 1980)).

[9] *Brandon*, 106 App. Div. 2d at 163-64, 485 N.Y.S.2d at 56-57. Wells, a New York corporation that traded on the over-the-counter market, was the subject of a takeover by BIS, S.A., a Delaware corporation. *Id.* at 163-64, 485 N.Y.S.2d at 56.

[10] *Id.* at 164-65, 485 N.Y.S.2d at 56-57.

[11] *Id.* at 164, 485 N.Y.S.2d at 57.

[12] *Id.* at 165-66, 485 N.Y.S.2d at 58.

[13] *Id.* at 172, 485 N.Y.S.2d at 62.

Writing for the court, Judge Asch gave great credence to an earlier case, *Friar v. Vanguard Holding Corp.*,[14] in which the Appellate Division, Second Department, stated that Article 9 should be "broadly construed."[15] The *Brandon* court reasoned that a narrow construction of Article 9 would effectively preclude injured parties from adjudicating their claims.[16] The court concluded that a named plaintiff's lack of reliance on the defendant's misconduct was of little relevance when the action was based upon breach of a simple duty owed to all class members.[17] The court further postulated that plaintiffs' failure to join two directors as defendants, with whom the named plaintiffs had personal or familial relationships, was irrelevant to the typicality of their claims or to the adequacy of the representation that they would provide.[18] Furthermore, the court ruled that discovery for the purpose of ascertaining the appropriateness of the forum should not be a prerequisite to certification.[19]

Although the court properly certified the class action to proceed, it is suggested that the court unduly emphasized the viability of the action absent certification, forfeiting an opportunity to establish guidelines for determining when class actions should be permitted. Despite the court's purported reliance on the "liberal" statute, it noted that denial of class certification of the plaintiffs in

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[14] 78 App. Div. 2d 83, 434 N.Y.S.2d 698 (2d Dep't 1980).

[15] *Brandon*, 106 App. Div. 2d at 168, 485 N.Y.S.2d at 59. (quoting Friar v. Vanguard Holding Corp., 78 App. Div. 2d 83, 91, 434 N.Y.S.2d 698, 703 (2d Dep't 1980)). The *Friar* court recognized that courts have been reluctant to effectuate a liberal class action policy, and that this reluctance has denied access to the courts to those whose damages are outweighed by the costs of litigation. *See* 78 App. Div. 2d at 92, 95, 434 N.Y.S.2d at 704, 706; *see also supra* note 2 (discussing benefits derived from class action suits to those litigants with relatively minor damages).

[16] *See Brandon*, 106 App. Div. 2d at 168-70, 485 N.Y.S.2d at 60-61 (citing *Friar*, 78 App. Div. 2d at 93-95, 434 N.Y.S.2d at 205-06). Narrow construction would especially harm plaintiffs in cases in which the aggregate sum of the class' injuries is substantial, but individually the damages would be too nominal to justify aggressive litigation. *Brandon*, 106 App. Div. 2d at 169, 485 N.Y.S.2d at 60 (quoting *Friar*, 78 App. Div. 2d at 94, 434 N.Y.S.2d at 705). This would close the doors of the courts to potential suits, thus condoning " 'legalized theft.' " *Brandon*, 106 App. Div. 2d at 169, 485 N.Y.S.2d at 60 (quoting *Friar*, 78 App. Div. 2d at 94, 434 N.Y.S.2d at 705).

[17] 106 App. Div. 2d at 167, 485 N.Y.S.2d at 58-59. The court asserted that defendants' breach of fiduciary duty affected all shareholders regardless of the extent of plaintiffs' knowledge of defendants' actions. *Id.* at 167, 485 N.Y.S.2d at 58. The question of reliance in such a case was "at best a matter of defense to be interposed with respect to individual claims after there has been a determination of liability." *Id.* at 168, 485 N.Y.S.2d at 59.

[18] *See id.* at 165, 170-71, 485 N.Y.S.2d at 57-58, 61.

[19] *Id.* at 171-72, 485 N.Y.S.2d at 61-62.

the instant case would likely bar any class action for the wrongdoings alleged because of the lack of a practical alternative.[20] It is suggested that such a consideration is actually a conservative analysis to apply in certifying a class action because only cases that would terminate but for class certification would be certified, contrary to the intended liberal application of the statute.[21]

Courts should apply the oft-ignored guidelines provided in CPLR 902, which expressly require courts to consider several specific factors when determining the propriety of class certification.[22] It is submitted that, although courts typically refer to this statute only for its provisions governing the required showing that the plaintiff must make to serve as a class representative,[23] courts, such as the one in *Friar v. Vanguard Holding Corp.*,[24] apply these factors without acknowledging their source.[25] In the interest of comity and to give effect to the liberal intentions of the drafters of

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[20] *See id.* at 167, 171, 485 N.Y.S.2d at 59, 61. Initially, the *Brandon* court stated that when the shareholders' failure to tender would have placed them in an untenable bargaining position, and when an attempt at a federal court injunction failed, class action was proper because "[a]ll the members of the class had no practical alternative." *Id.* at 167, 485 N.Y.S.2d at 59. Similarly, the court noted that, when other avenues of relief are blocked, a court should not bar a plaintiff/class recovery on technicalities. *See id.* Finally, the court stated that, if the present plaintiffs were not able to gain class certification, there probably would not be any class action commenced in this case. *See id.*

[21] *See, e.g.*, Brodsky v. Selden Sanitary Corp., 85 App. Div. 2d 612, 616, 444 N.Y.S.2d 949, 954 (2d Dep't 1981) (Lazer, J., concurring in part and dissenting in part) (majority lost sight of "clear intent" of Article 9); Shook v. Lavine, 49 App. Div. 2d 238, 243, 374 N.Y.S.2d 187, 193 (4th Dep't 1975) (statute vests discretion in court to determine whether class action is desirable and feasible); *see* SIEGEL § 139, at 174; *see also* CPLR 104 (requiring liberal construction of entire CPLR).

[22] *See supra* note 1 (text of CPLR 902).

[23] *See* Shook v. Lavine, 49 App. Div. 2d 238, 243, 374 N.Y.S.2d 187, 193 (4th Dep't 1975) (failure to make motion for class certification within 60-day period required by CPLR 902 can bar certification).

[24] 78 App. Div. 2d 83, 434 N.Y.S.2d 698 (2d Dep't 1980).

[25] *See id.* at 96-100, 434 N.Y.S.2d at 706-08. In certifying a class, the Appellate Division in *Friar* looked to the provisions of CPLR 901, and determined that all prerequisites to plaintiffs' classification as adequate class representatives were present. *Id.* However, the court failed to apply the criteria of CPLR 902, *see id.*, a step the court must take "only if [it] finds that the prerequisites under section 901 have been satisfied," CPLR 902. Thus, although the court mentioned the inefficiency of having 300 separate cases on the same issue, *see Friar*, 78 App. Div. 2d at 98-99, 434 N.Y.S.2d at 708, the fact that no other similar litigation had previously been commenced, *id.* at 99, 434 N.Y.S.2d at 708, and the fact that once the common issues were settled, the liability issues were "easily disposed of," *id.* at 98, 434 N.Y.S.2d at 707-08, the court neglected to note that these criteria actually stem from CPLR 902, subsections (2), (3), and (5), respectively, *see id* at 97-100, 434 N.Y.S.2d at 707-08.

Article 9, courts should cite and apply the CPLR 902 factors.[26]

Notwithstanding the plaudits of at least one segment of the New York legal community,[27] the *Brandon* court cannot be perceived as the ultimate arbiter of the rights of Article 9 litigants, especially because of the Court of Appeals' silence on the matter.[28] The *Brandon* decision should properly be read as merely one determination in a disparate litany of decisions observing the area of class certification.

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CRIMINAL PROCEDURE LAW

CPL § 210.20(2): Compliance with direction of trial judge does not excuse defendant's failure to make timely motion to dismiss grounded upon denial of statutory speedy trial right

Under section 210.20 of the Criminal Procedure Law of New York,[1] to obtain a dismissal of an indictment based upon an alleged denial of the right to a speedy trial,[2] a defendant must file a

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[26] The *Brandon* court cited CPLR 902 as the source for the trial court's decision to institute further discovery on the issue of the management of Brandon as a class action in a New York forum. *See* 106 App. Div. 2d at 166, 485 N.Y.S.2d at 58. Similarly, the court in Boulevard Gardens Tenants Action Comm., Inc. v. Boulevard Gardens Hous. Corp., 88 Misc. 2d 98, 388 N.Y.S.2d 215 (Sup. Ct. Queens County 1976), stated that a class could only be certified when the "considerations set forth in CPLR 901 and 902" are taken into account. *Id.* at 101, 388 N.Y.S.2d at 218. While these cases at least mention CPLR 902, the factors enumerated in CPLR 902 should be considered more carefully when making the class certification decision. *See* Long Island College Hosp. v. Whalen, 84 Misc. 2d 637, 638, 377 N.Y.S.2d 890, 891-92 (Sup. Ct. Albany County 1975) (plaintiffs had to comply with provisions of CPLR 902 prior to certification of class), *rev'd on other grounds*, 68 App. Div. 2d 274, 416 N.Y.S.2d 841 (3d Dep't 1979).

[27] *See* Dickerson, *Class Actions Under Article 9 of CPLR—Faith Restored*, N.Y.L.J., Feb. 8, 1985, at 1, col. 3. Dickerson hailed the *Brandon* court's statement regarding liberal construction of Article 9 as "the most exciting aspect" of the decision. *Id.* at 7, col. 2. Dickerson further stated that the "decision restores our personal faith in the utility of Article 9." *Id.* at 7, col. 2.

[28] *Id.* at 7, col. 1. Dickerson noted the "refusal" of the Court of Appeals to address questions of class certification and clarify "the substantial policy differences" between the various judicial departments. *Id.*

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[1] CPL § 210.20 (1982).

[2] *See id.* § 30.20 (1982). Unlike most other states, the right to a speedy trial in New York is not guaranteed in the state constitution, but instead is provided for by statute. *See id.*; BROWNELL, CRIM. PROC. N.Y., PT. I. 38:02, at 2-3 (3d ed. 1982). Section 30.20(1) provides