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CPLR 901: Class Action Denied in Products Liability Case Where Common Questions of Design Defect and Misleading Advertising Held Not to Predominate Over Individual Questions of Causation and Reliance

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ARTICLE 9 — CLASS ACTIONS

CPLR 901: Class action denied in products liability case where common questions of design defect and misleading advertising held not to predominate over individual questions of causation and reliance

Enacted in 1975, article 9 of the CPLR expanded the applicability of the class action device in New York and removed certain judicially imposed barriers to its use.[67] Under CPLR 901, a plenary

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Co., 231 F. Supp. 160 (S.D.N.Y. 1964). The purpose of allowing ancillary cross-claims is to expedite the judicial process by determining the rights of all related parties in one action. *See* Meisner v. Healey, 18 App. Div. 2d 368, 239 N.Y.S.2d 352 (1st Dep't 1963).

The assertion of an independent cross-claim under CPLR 3019(b) by a person not otherwise subject to personal jurisdiction has been held to constitute a waiver of jurisdictional defenses. *See* Goodman v. Solow, 27 App. Div. 2d 920, 279 N.Y.S.2d 377 (1st Dep't) (mem.), *leave to appeal denied*, 20 N.Y.2d 646, 231 N.E.2d 789, 285 N.Y.S.2d 1026 (1967). *See also* CPLR 320, commentary at 379 (1972 & Supp. 1978-1979). Support for the conclusion that the assertion of an ancillary cross-claim by a nonresident defendant is ineffective to invoke jurisdiction under CPLR 303 may be found in the analogous situation where a defendant asserts a counterclaim that is related to the subject matter of the complaint. The courts have held that this will not waive a defendant's jurisdictional defenses. *See, e.g.*, Italian Colony Restaurant, Inc. v. Wershals, 45 App. Div. 2d 841, 358 N.Y.S.2d 448 (2d Dep't 1974) (mem.) (dicta); M. Katz & Son Billiard Prods., Inc. v. G. Correale & Sons, Inc., 26 App. Div. 2d 52, 270 N.Y.S.2d 672 (1st Dep't 1966), *aff'd mem.*, 20 N.Y.2d 903, 232 N.E.2d 864, 285 N.Y.S.2d 871 (1967).

[67] TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in EIGHTEENTH ANN. REP. N.Y. JUD. CONFERENCE A27, A35-36 (1973); *see* EIGHTEENTH ANN. REP. N.Y. JUD. COUNCIL 217, 229-34 (1952). *See generally The Survey*, 50 ST. JOHN'S L. REV. 179, 189 (1975). Article 9 of the CPLR replaced the former class action statute, ch. 308, § 1, [1962] N.Y. LAWS (McKinney) (repealed by ch. 207, § 2, [1975] N.Y. LAWS (McKinney)), which required that privity exist between class members as a condition for maintaining a class action. *See* D. SIEGEL, NEW YORK PRACTICE § 140, at 176-77 (1978); 2 WK&M ¶ 901.02, at 9-6 to 7; Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971), *reprinted in* TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in EIGHTEENTH ANN. REP. N.Y. JUD. CONFERENCE 242, 245-48 (1972). Under this provision, the proposed class action had to be based on a "legal relation or unity of interest among the individual members of the group in relation to the subject matter of the action or the right asserted, or, at least a community of interest in relation to the relief demanded." EIGHTEENTH ANN. REP. N.Y. JUD. COUNCIL 217, 229 (1952) (CIV. PRAC. ACT. § 195 (renumbered CPLR 1005)). The privity requirement was included to avoid situations in which non-participating class members would be bound by a judgment in the absence of a common tie. *See* Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 236-37, 11 N.E.2d 890, 893 (1937); Homburger, *supra*, at 613-17. Thus, the courts frequently held that "[s]eparate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged." Hall v. Coburn Corp., 26 N.Y.2d 396, 400, 259 N.E.2d 720, 721, 311 N.Y.S.2d 281, 283 (1970) (quoting Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939); *see* Richards v. Kaskel, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973). The strict construction of the former class action statute limited its utility to situations involving a common fund or legal relationship arising from "trusts, partnership, or joint ventures, and ownership of corporate stock." TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in EIGHTEENTH ANN. REP.

class action may be maintained by a representative plaintiff on behalf of a defined class if certain statutory prerequisites are satisfied.[68] In addition, where particular common issues can be isolated, CPLR 906 allows the court to treat the case as a partial class action.[69] Since the enactment of the revised class action statute, how-

N.Y. JUD. CONFERENCE A26, A36 (1973); *see* Hall v. Coburn Corp., 26 N.Y.2d 396, 402, 259 N.E.2d 720, 722, 311 N.Y.S.2d 281, 284 (1970). Moreover, the courts tended to allow class actions only where the relief sought was injunctive or declaratory or where a common fund was involved. *See, e.g.*, Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 18 N.E.2d 287 (1938); Onofrio v. Playboy Club, 20 App. Div. 2d 3, 6-8, 244 N.Y.S.2d 485, 488-90 (1st Dep't) (Stevens, J., dissenting), *rev'd mem.*, 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965). Such restrictive and inconsistent interpretations contributed to the deterioration of the law of class actions in New York into a "chaotic and incomprehensible state." CPLR 901, commentary at 322 (McKinney 1976). Although by 1974 the Court of Appeals had undertaken a judicial expansion of the class action device, it expressed a preference for legislative revision of the statute. Ray v. Marine Midland Trust Co., 35 N.Y.2d 147, 156, 316 N.E.2d 320, 325, 359 N.Y.S.2d 28, 35 (1974) (Wachtler, J., concurring); *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); D. SIEGEL, NEW YORK PRACTICE § 139, at 174 (1978).

Ultimately, the legislature enacted article 9 in an effort to expand the availability of the class action device and render it more flexible. *See* TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in SEVENTEENTH ANN. REP. N.Y. JUD. CONFERENCE 215, 217-19 (1972); 2 WK&M ¶¶ 901.01-.02. Under the new statutory scheme, the privity requirement was eliminated in favor of the familiar requirement that common questions of law or fact "predominate" over individual questions. CPLR 901; *see* note 68 *infra*. With the adoption of article 9, New York's class action statute now parallels the federal statutory scheme governing class actions. *See* FED. R. CIV. P. 23; 2 WK&M ¶¶ 901.03, .08. *See generally* Homburger, *The 1975 New York Judicial Conference Package: Class Actions and Comparative Negligence.* 25 BUFFALO L. REV. 415, 415-30 (1976) [hereinafter cited as *1975 Conference Package*].

[68] CPLR 901(a) provides:

> a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
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> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, 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 the claims or defenses of the class;
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> 4. the representative 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.

[69] CPLR 906(1) (1976). In determining whether partial class treatment under CPLR 906 is appropriate, the court must evaluate the suit in light of the criteria delineated in CPLR 901. *See* 2 WK&M ¶ 906.04, at 9-118. In addition, the court may deny partial class status if, after considering the factors enunciated in CPLR 902 (1976), it finds that the class suit would not serve the best interests of all concerned parties. Among the factors to be weighed are:

> 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> 2. The impracticability or inefficiency of prosecuting or defending actions.
>
> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

ever, the availability of these provisions in mass tort litigation has remained uncertain.[70] Recently, in *Rosenfeld v. A.H. Robins Co.*,[71] the Appellate Division, Second Department, adopted a narrow view of article 9, holding that a class action is not a suitable method for adjudicating mass products liability claims since the common questions of design defect and misleading advertising did not predominate over individual questions of causation, reliance and affirmative defenses.[72]

In *Rosenfeld,* the plaintiff instituted a products liability suit against the manufacturer of a contraceptive device (IUD),[73] seeking to recover damages for personal injuries resulting from its use.[74] In

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action. CPLR 902 (1976); *see* D. SIEGEL, NEW YORK PRACTICE § 142, at 181-82 (1978).

[70] The legislative history of article 9 of the CPLR does not indicate whether the new class action device was intended to be utilized in mass tort cases. *See* TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in EIGHTEENTH ANN. REP. N.Y. JUD. CONFERENCE A27, A35 (1973). Proponents of the measure, however, noted that "class actions are useful in a wide variety of legal contexts, including . . . *mass torts.*" Memorandum of the State Consumer Protection Bd. to Counsel to the Governor, May 29, 1975 (emphasis added); *see* Governor's Message on Approval of ch. 207, *reprinted in* [1975] N.Y. Laws 1748 (McKinney); D. SIEGEL, NEW YORK PRACTICE § 142, at 182-83 (1978); 2 WK&M ¶ 901.02, at 9-7. *But see* CPLR 901, commentary at 21 (Supp. 1978-1979). Dean McLaughlin has stated that "[i]t would be an unusual 'mass accident' case that would qualify for class action treatment, although it would not be amiss to consider isolating the liability issue for such treatment." CPLR 901, commentary at 327 (1976); *see* CPLR 906, commentary at 345 (1976). Moreover, Professor Siegel considers article 9 "uniquely appropriate" for litigating mass torts arising from a common disaster. D. SIEGEL, NEW YORK PRACTICE § 142, at 183 (1978); *see* 2 WK&M ¶ 906.02, at 9-116. *But see* Kanon v. Brookdale Hosp. Medical Center, 87 Misc. 2d 816, 386 N.Y.S.2d 274 (Sup. Ct. Kings County 1975). *See also* 2 WK&M ¶ 901.08, at 8-30 to 34.

[71] 63 App. Div. 2d 11, 407 N.Y.S.2d 196 (2d Dep't 1978).

[72] *Id.* at 20, 407 N.Y.S.2d at 201.

[73] The device, known as the "Dalkon Shield," originally was tested and marketed by its inventor, Dalkon Corporation, in 1969. The defendant, A.H. Robins, Co., Inc., acquired all rights to the Dalkon Shield on June 12, 1970 and simultaneously commenced marketing and testing. *In re* A.H. Robins Co., Inc., "Dalkon Shield" IUD Prods. Liab. Litigation, 406 F. Supp. 540, 540-41 (J.P.M.L. 1975) (per curiam). Between 1970 and 1974, the device had been sold to approximately 2.2 million women. 63 App. Div. 2d at 13, 407 N.Y.S.2d at 197. The device could be obtained only through a licensed physician, whose responsibility it was to explain the relative advantages and disadvantages of the device before inserting it. *Id.* at 22, 407 N.Y.S.2d at 203 (Shapiro, J., dissenting). The defendant had advertised the Dalkon Shield in various medical journals and product literature issued to the prospective user through her physician. *Id.* at 13, 18, 407 N.Y.S.2d at 197, 200.

[74] 63 App. Div. 2d at 13, 407 N.Y.S.2d at 197. The plaintiff in *Rosenfeld* had the Dalkon Shield fitted and inserted by her physician in September 1972. In March 1975, she was hospitalized for uterine complications allegedly resulting from the IUD. As a result of her injuries, she was required to undergo a hysterectomy one month later. *Id.* at 22, 407 N.Y.S:2d at 203 (Shapiro, J., dissenting). After an FDA investigation and several medical reports revealed that the device was "unsafe and ineffective," the defendant voluntarily and permanently discontinued the distribution of the product in January 1975. *Id.* at 13, 407 N.Y.S.2d at 197.

her complaint, the plaintiff alleged defective product design and breach of express and implied warranties of fitness for use.[75] Proposing to represent approximately 2,525 prospective suitors,[76] the plaintiff moved under CPLR 902 for an order permitting her to maintain the action on behalf of all "New York women who suffered 'pelvic infection, uterine abscessing and/or perforation, and related or incidental hemorrhaging' as a consequence of the use of the [IUD]."[77] The Supreme Court, Nassau County, denied the application for class action status, finding that the potential for the class action to degenerate into "multiple fact trials within the framework of the primary . . . action" militated against the conclusion that common questions predominated over individual questions of law and fact.[78]

The appellate division affirmed. Justice Gulotta,[79] writing for a divided panel, stated that, unlike a case involving a single-disaster mass tort, a products liability suit with inherently complex questions of fact is not conducive to a class-wide determination.[80] While issues of defective design and falsity of the representations might be proper subjects for class treatment,[81] the court observed that the

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[75] *Id.* at 12, 407 N.Y.S.2d at 196-97.

[76] The parties agreed that 2,525 was an accurate estimate of the size of the proposed plaintiff class. *Id.* at 23, 407 N.Y.S.2d at 203 (Shapiro, J., dissenting). At the time of the *Rosenfeld* suit, 670 product liability suits involving the Dalkon Shield had been commenced nationwide. *Id.* at 13, 407 N.Y.S. 2d at 197. Seventy-two actions were brought in New York with 55 still pending. *Id.* at 23, 407 N.Y.S.2d at 203 (Shapiro, J., dissenting).

[77] *Id.* at 12-13, 407 N.Y.S.2d at 197. The class was limited to those New York women who, as patients of gynecologists in New York, had the Dalkon Shield implanted during the period between June 12, 1970 and June 28, 1974. *Id.* at 22-23, 407 N.Y.S.2d at 203 (Shapiro, J., dissenting).

[78] *Id.* at 26, 407 N.Y.S.2d at 205 (Shapiro, J., dissenting) (quoting Special Term Sup. Ct. Nassau County (Burstein, J.)). In view of the large number of pending actions involving the Dalkon Shield and the numerous parties who would have to be joined as defendants, the lower court found the class suit not to be the superior method of adjudication. *Id.*; *see* CPLR 902 (1976).

[79] Presiding Justice Titone and Justice Cohalan joined Justice Gulotta in the majority opinion. Justice Shapiro dissented in a separate opinion.

[80] 63 App. Div. 2d at 20, 407 N.Y.S. 2d at 201.

[81] In drafting Rule 23, the federal class action statute, the advisory committee noted that the class device is particularly unsuited for mass accident litigation. The advisory committee assumed that individual questions of damages, liability and defenses to liability "would degenerate in practice into multiple lawsuits separately tried." *Advisory Committee's Note to Proposed Rule 23 of the Federal Rules of Civil Procedure*, 30 F.R.D. 98, 103 (1966); *see* 3A L. FRUMER & M. FRIEDMAN § 46A.02 [4] (1978). *But see* Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 560 (S.D. Fla. 1974) (class action available in mass disaster litigation where causation and negligence subject to clear-cut determination), *aff'd mem.*, 507 F.2d 1278 (5th Cir. 1975); 3B MOORE'S FEDERAL PRACTICE ¶ 23.45 [3], at 23-811 (2d ed. 1978); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1783, at 116-18 (1970). Noting that the New York class action statute is modeled on its federal counterpart, *see* TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 192-94 (1976); D. SIEGEL, NEW YORK PRACTICE § 141,

concomitant questions of causation, reliance and affirmative defenses as to each class member would have to be resolved on an individual basis.[82] Justice Gulotta noted that a determination that the IUD had been defectively designed would not permit an inference of causation since the close relationship between the alleged design defects and an individual's injury would require further factual inquiry.[83] Moreover, Justice Gulotta reasoned, because the purportedly misleading advertisements were made to the physicians rather than directly to the members of the proposed class, a ruling on the breach of warranty question would leave for adjudication the further

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at 178 (1978), the *Rosenfeld* court nevertheless concluded that New York courts are not bound by the restrictive federal view of the use of the class action device in mass disaster suits. In an appropriate case, the *Rosenfeld* court stated, a single mass tort might form the basis of a class action under CPLR 901. 63 App. Div. 2d at 16, 407 N.Y.S.2d at 199.

But see Vincent Petrosino Seafood Corp. v. Consolidated Edison, Inc., 97 Misc. 2d 110, 410 N.Y.S.2d 746 (Sup. Ct. N.Y. County 1978). The *Vincent Petrosino* court denied class treatment in a suit for damages resulting from a mass utility power failure in the New York metropolitan area. The plaintiff's representative alleged breach of the power company's warranty to provide continuous service, and negligent failure to "shed load" and thereby avoid a major blackout. In denying class status, the court reasoned that the common questions did not predominate over individual fact questions such as reliance and the form and dates of the warranties. 97 Misc. 2d 111, 410 N.Y.S.2d 747.

[82] 63 App. Div. 2d at 16, 407 N.Y.S.2d at 199. The court observed that, in addition to raising the statute of limitations and contributory negligence as affirmative defenses, the *Rosenfeld* defendant could argue that the individual plaintiffs' physicians caused the injury by inserting the device improperly or providing inadequate instructions regarding its use. *Id.* at 16-17 & n.2, 407 N.Y.S.2d at 199 & n.2. It should be noted, however, that, in a proper case, the court's authority under CPLR 906(2) to divide a class into subclasses and treat each subclass as a class could be used to create subclasses to correspond with any statute of limitation questions. The plenary class action would then be held in abeyance until the subclass issues were resolved.

[83] 63 App. Div. 2d at 17, 407 N.Y.S.2d at 199-200. The *Rosenfeld* court observed that a variety of intervening variables, including a patient's peculiar physical characteristics, could have been the proximate cause of the personal injuries. *Id.; see* Kanon v. Brookdale Hosp. Medical Center, 87 Misc. 2d 816, 386 N.Y.S.2d 274 (Sup. Ct. Kings County 1975). Justice Gulotta cited Vincent v. Thompson, 50 App. Div. 2d 211, 377 N.Y.S.2d 118 (2d Dep't 1975), as an illustration of the difficulties inherent in establishing causation in cases involving defective pharmaceutical products. 63 App. Div. 2d at 17, 402 N.Y.S.2d at 179. Despite a prior ruling that a vaccine manufactured by the defendant was dangerously defective, Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969), the *Vincent* court held that the defendant was not collaterally estopped from relitigating the issue of defectiveness. Since the *Vincent* plaintiff's injuries could have been caused by a different component of the vaccine than the component which caused the injuries in the earlier federal suit, the *Vincent* court found that the underlying issues were not identical and, consequently, the collateral estoppel doctrine could not be invoked. 50 App. Div. 2d at 218-19, 377 N.Y.S.2d at 126. *See generally* Rosenberg, *Collateral Estoppel in New York,* 44 ST. JOHN'S L. REV. 165, 182-95 (1965). The difficulties confronting the *Vincent* plaintiff were also present in *Rosenfeld;* in both cases, different features of the product in question were associated with different types of injuries. *Compare* 50 App. Div. 2d at 219, 377 N.Y.S.2d at 126-27, *with* 63 App. Div. 2d at 24, 407 N.Y.S.2d at 204 (Shapiro, J., dissenting).

issue of individual reliance.[84] Finally, the court refused to permit even partial class treatment for the common issues of defective design and misleading advertising under CPLR 906.[85] Noting that a separate trial of these narrow issues would not produce substantial savings of time or expense for either the litigants or the courts,[86] Justice Gulotta concluded the common issues were so "thoroughly intertwined" with the individual questions as to preclude a partial class action.[87]

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[84] 63 App. Div. 2d at 18, 407 N.Y.S.2d at 200; *see* Ross v. Amrep Corp., 57 App. Div. 2d 99, 393 N.Y.S.2d 410 (1st Dep't 1977); Viders v. Pennsylvania Handicapped Workers, Inc., 90 Misc. 2d 579, 395 N.Y.S.2d 128 (Sup. Ct. Nassau County 1977). *But see* Guadagno v. Diamond Tours & Travel, Inc., 89 Misc. 2d 697, 392 N.Y.S.2d 783 (Sup. Ct. N.Y. County 1976). The court noted that additional difficulties were presented by "the fact that different types of advertisements were printed at various times in various [medical] journals." 63 App. Div. 2d at 18, 407 N.Y.S.2d at 200.

[85] 63 App. Div. 2d at 20, 407 N.Y.S.2d at 201.

[86] *Id.* The court noted that many of the potential class members already were participating in the joint discovery procedures that had been instituted in the federal Dalkon Shield litigation. *Id.* Under a voluntary agreement among attorneys, the Dalkon Shield plaintiffs could obtain a group discovery package, including master interrogatories, documentation and depositions, in return for a fee based on a proportionate share of the cost. *Id.* at 20-21 n.3, 407 N.Y.S.2d at 201-02 n.3; *see* Rheingold, *The Mer/29 Story—An Instance of Successful Mass Disaster Litigation,* 56 CAL. L. REV. 116 (1968). *See also* Goldblatt v. William S. Merrell Co., 22 App. Div. 2d 886, 254 N.Y.S.2d 938 (1st Dep't 1964) (per curiam). The court further stated that those plaintiffs who did not participate in the group discovery might rely on the doctrine of collateral estoppel to preclude relitigation of certain common issues. 63 App. Div. 2d at 20-21, 407 N.Y.S.2d at 202. This suggestion, however, appears somewhat questionable in light of the *Rosenfeld* court's analogy between the issues before it and those presented in Vincent v. Thompson, 50 App. Div. 2d 211, 377 N.Y.S.2d 118 (2d Dep't 1975), in which the plaintiff's attempt to invoke collateral estoppel was rejected. *See* note 83 *supra. See also* Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 BUFFALO L. REV. 433, 448-49 (1960).

[87] 63 App. Div. 2d at 20, 407 N.Y.S.2d at 201. The *Rosenfeld* court relied heavily on the reasoning in a prior second department decision, Strauss v. Long Island Sports, Inc., 60 App. Div. 2d 501, 401 N.Y.S.2d 233 (2d Dep't 1978). The plaintiffs in *Strauss* brought a class action seeking to rescind their purchases of season tickets for the New York Nets basketball team games. The proposed class included all purchasers who relied on advertisements promising that a star player, Julius Erving, would be playing the oncoming season. Erving had been traded, however, prior to the season's start. The court held that individual questions of reliance on the advertising predominated and, despite the severable class issue of misrepresentation, no substantial benefit would be conferred by granting partial class treatment. *Id.* at 503, 401 N.Y.S.2d at 235; *see* Vincent Petrosino Seafood Corp. v. Consolidated Edison Inc., 97 Misc. 2d 110, 410 N.Y.S.2d 746 (Sup. Ct. N.Y. County 1978). It should be noted, however, that the *Strauss* holding was based in part on its finding that the limited number of pending lawsuits indicated a "paucity of litigants" in the proposed plaintiff class. 60 App. Div. 2d at 506, 401 N.Y.S.2d at 238; *see* CPLR 901(a)(1). *But see* Guadagno v. Diamond Tours & Travel, Inc., 89 Misc. 2d 697, 392 N.Y.S. 2d 783 (Sup. Ct. N.Y. County 1976). The use of the *Strauss* reasoning in *Rosenfeld,* in which there were approximately 2,500 potential plaintiffs, suggests that the court will be reluctant in the future to afford partial class treatment in all cases where " 'common exposure to — or reliance upon — alleged misleading advertisements cannot be readily inferred . . . .' " 63 App. Div. 2d at 19, 407 N.Y.S.2d at 220 (quoting Comment, *Litigating the Antitrust Conspiracy Under Amended Rule 23,* 54 VA. L. REV. 314, 318 (1968).

In a dissenting opinion, Justice Shapiro argued that the common questions of defective design and misleading advertising should be afforded partial class treatment under CPLR 906.[88] He contended that since the legislature did not demonstrate an intention to foreclose partial class treatment in products liability cases, the court should not limit the utility of the new class action statute by superimposing such a restriction.[89] Noting that the majority conceded the potential applicability of the class device to a single mass disaster, the dissent emphasized that the need for class relief is even more compelling in the case of a products liability action, where the high cost of litigation might deter individuals from bringing suit.[90] Justice Shapiro concluded that where mass litigation and its accompanying expenses can be avoided or reduced through the vehicle of a single class action, the court should invoke its power under article 9 of the CPLR to sever common issues for class treatment.[91]

Notwithstanding the liberal remedial purposes underlying the enactment of article 9,[92] the *Rosenfeld* court's restrictive construction of CPLR 901 seems justifiable in a products liability suit where the common issues of design defect and product misrepresentation may not predominate over individual questions of causation and reliance. Even partial class treatment of the design defect issue under CPLR 906 appears inappropriate since this question could not be resolved without reference to the individual injuries caused by the defective product design.[93] Nevertheless, it is submitted that the *Rosenfeld* court extended this reasoning too far in refusing to sever

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[88] 63 App. Div. 2d at 33, 407 N.Y.S.2d at 209 (Shapiro, J., dissenting).

[89] *Id.*

[90] *Id.* at 33-34, 407 N.Y.S.2d at 210 (Shapiro, J., dissenting).

[91] *Id.* at 32, 407 N.Y.S.2d at 209 (Shapiro, J., dissenting); *see* D. SIEGEL, NEW YORK PRACTICE § 141, at 180 (1978). *See generally* 2 WK&M ¶¶ 601.01, 602.02, 602.17, 603.07, 1002.05.

[92] The legislative objective underlying the enactment of article 9 was to "infuse the pertinent law with practical flexibility, so that it may accomodate a pressing need for an effective, but controlled group remedy in situations where neither actual joinder of a numerous class nor the maintenance of individual actions is practicable . . . ." TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in EIGHTEENTH ANN. REP. N.Y. JUD. CONFERENCE A27, A35 (1973); *see* Governor's Memorandum on Approval of ch. 207, N.Y. Laws, *reprinted in* [1975] N.Y. LAWS 1748 (McKinney). *See also* TWENTIETH ANN. REP. N.Y. JUD. CONFERENCE 206-10 (1975); *1975 Conference Package, supra* note 67, at 415-30.

[93] It is evident that, in the case of a products liability suit involving pharmaceuticals or medical devices, a determination of defective design may not be possible without inquiry into the causal connection to the alleged injuries. *See* Vincent v. Thompson, 50 App. Div. 2d 211, 377 N.Y.S.2d 118 (2d Dep't 1975). Moreover, in cases such as *Rosenfeld,* where more than one design defect is alleged to have caused a variety of injuries to members of the proposed plaintiff class, *see* 63 App. Div. 2d at 24, 407 N.Y.S.2d at 204 (Shapiro, J., dissenting), a single common issue of defective design is not presented.

the common fact question of misleading advertising for class-wide determination. In limiting the availability of CPLR 906, the *Rosenfeld* court apparently assumed that a partial class action may not be maintained unless the entire issue of the defendant's liability is capable of being resolved on a class-wide basis.[94] This assumption, however, appears untenable in light of the express statutory provision for severing specific issues for class treatment where such treatment is feasible and would promote judicial economy. Indeed, the court's authority under CPLR 906 to isolate an issue for class-wide determination would seem to obviate the need for the court to inquire into whether common questions predominate over individual questions.[95]

It is hoped that the Court of Appeals will take the earliest opportunity to consider the issues presented in *Rosenfeld* and establish clear guidelines for the application of article 9 consistent with the underlying remedial legislative intent. Cases involving misleading advertising seem particularly amenable to adjudication under CPLR 906. Moreover, while the design defect at issue in *Rosenfeld* was not conducive to class-wide determination, an extension of the *Rosenfeld* reasoning to foreclose use of the class action device in all products liability cases would seem premature. In some instances, most notably cases involving mechanical failures, the defective product design can be established without reference to the individual injuries it caused. In such cases, it is suggested, partial class treatment is feasible and appropriate, since the "sophisticated proof" required to sustain complex factual bases may be beyond the financial resources of the individual plaintiff.[96]

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[94] 63 App. Div. 2d at 18-19, 407 N.Y.S.2d at 200; *see* Kindel v. Kaufman and Broad Homes, Inc., 413 N.Y.S.2d 199 (2d Dep't 1979) (per curiam); Strauss v. Long Island Sports, Inc., 60 App. Div. 2d 501, 503, 401 N.Y.S.2d 233, 235 (2d Dep't 1978). *But see* Vickers v. Home Federal Sav. & Loan Ass'n, 62 App. Div. 2d 1171, 404 N.Y.S.2d 201 (4th Dep't 1978); Guadagno v. Diamond Tours & Travel, Inc., 89 Misc. 2d 697, 392 N.Y.S.2d 783 (Sup. Ct. N.Y. County 1976).

[95] *See* CPLR 906; 2 WK&M ¶ 906.04, at 9-118.

[96] 63 App. Div. 2d at 33, 407 N.Y.S.2d at 210 (Shapiro, J., dissenting). The class action device allows the class members to seek relief where "insurmountable" litigation expenses might otherwise deter the individual from bringing suit and permit the tortfeasor to benefit from the enormity of his tort. D. SIEGEL, NEW YORK PRACTICE § 139, at 173 (1978). One commentator has noted that "even for a single badly injured plaintiff, the preparation of a complex products liability . . . case is an extremely expensive undertaking." Rabin, *Dealing With Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 STAN. L. REV. 281, 295 (1978); *see* 63 App. Div. 2d at 29, 407 N.Y.S.2d at 207 (Shapiro, J., dissenting). *But see id.* at 20-21 n.3, 407 N.Y.S.2d at 201 n.3.