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CPLR Art. 9: Legislature Adopts Liberal Class Action Statute

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Although *Victorson* has resolved the controversy concerning the statute of limitations and time of accrual applicable to a remote user in a strict products liability action, the above discussion indicates the need for further clarification as to strict products liability. Such clarification can only be achieved by the legislature.[54] Until such time the practitioner seeking damages for injuries due to a defective product should plead his action alternatively on all possible theories of liability conceivably available.[55]

ARTICLE 9 — CLASS ACTIONS

CPLR art. 9: Legislature adopts liberal class action statute.

Article 9 of the CPLR, the new class action law,[56] promises to effect substantial changes in state litigation by opening judicial doors which heretofore have been virtually closed.[57] The new arti-

[54] Recently, the legislature indicated its concern with facilitating the recovery of injured plaintiffs by making changes in related areas of the law. *See* note 51 and accompanying text *supra*.

Another recent legislative change is the enactment of comparative negligence in New York. CPLR 1411-13. The new law applies to causes of action accruing on or after September 1, 1975. *Id.* 1413. CPLR 1411 states that recovery for personal injury or property damage shall not be barred on account of contributory negligence. Contributory negligence is a broad term, however, and must be narrowed in its application to actions in strict products liability. *See* Murphy, *supra* note 3, at 42; Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 105, 119 (1972). A strict products liability action is subject to the following defenses: the product was being improperly used, a reasonable inspection by the user would have revealed the defect and its danger, or the plaintiff with reasonable care could have avoided his injuries. *See* note 21 *supra*. A reading of the new statute and its legislative history reveals that CPLR 1411 was intended to apply to actions based on strict products liability as well as breach of warranty when brought to recover for personal injury or property damage. *See* THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, comment (a), *as appearing in* [1975] N.Y. Laws 1483 (McKinney) regarding N.Y. GEN. OBLIG. LAW § 10-101 (subsequently enacted as art. 14-A of the CPLR); Memorandum from Stanley Fink to N.Y. Assembly, *reprinted in* 173 N.Y.L.J. 78, Apr. 23, 1975, at 7, col. 1. For a discussion of situations where comparative negligence should or should not be applied in strict products liability actions, see Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974).

[55] Additionally, the practitioner should be aware that the injured consumer plaintiff may be able to bring a cause of action in the federal district courts under the Consumer Product Safety Act §§ 2 *et seq.*, 15 U.S.C. §§ 2051 *et seq.* (Supp. III, 1973). If the defective product is covered by the Act and the plaintiff is injured as the result of a knowing or willful violation of a rule or order of the Consumer Product Safety Commission, he may recover damages sustained, costs, and, at the discretion of the court, reasonable attorney fees. The plaintiff, however, must satisfy the requisite $10,000 amount in controversy. *Id.* § 23, 15 U.S.C. § 2072 (Supp. III, 1973), *discussed in* Note, *The Consumer Product Safety Act: A Federal Commitment to Product Safety*, 48 ST. JOHN'S L. REV. 126, 150-52 (1973).

[56] Ch. 207, § 1, [1975] N.Y. Laws 313 (McKinney), *as amended*, ch. 474, § 1, [1975] N.Y. Laws 713 (McKinney). The class action bill was signed by the Governor on June 17, 1975.

[57] *See* notes 61-63 and accompanying text *infra*.

cle 9 was enacted in order to infuse the pertinent law with a measure of practical flexibility and to accommodate pressing needs for an effective yet "balanced group remedy in vital areas of social concern."[58] Towards this end, the legislation has two basic goals:

> 1. to set up a flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions; and
> 2. to prescribe basic guidelines for judicial management of class actions.[59]

The most significant aspect of article 9 is that it casts the prerequisites for a class action suit in pragmatic and functional terms,[60] whereas the prior law determined class action status based primarily upon the substantive rights involved.[61] Thus, gone is the antiquated requirement of a "unity of interest,"[62] an amorphous

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[58] Memorandum by Assemblyman Stanley Fink in Support of N.Y.S. 1309-B, N.Y.A. 1252-B, at 1, 198th Sess. (1975), on file in St. John's Law Review Office [hereinafter cited as Fink]; *See also* TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, *as appearing in* [1974] N.Y. Laws 1797-1803 (McKinney) [hereinafter cited as TWELFTH ANNUAL REPORT].

For a general discussion of the nature of the class action suit see Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433 (1960).

[59] TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1797.

[60] *Id.*, comment at 1799; Fink, *supra* note 58, at 2.

[61] Article 9 repealed CPLR §1005, ch. 318, § 4, [1962] N.Y. Laws 2086, which provided in pertinent part:

> Where the question is one of a common or general interest of many persons or where the persons who might be made 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 all.

As interpreted by the courts,

> [n]either the procedural needs of the members of the class nor the inconvenience to the courts where many separate suits are combined were, alone, sufficient bases for a class action. . . . The courts required, in addition, an ill-defined and flexibly applied connection between the substantive rights of members of the class.

2 WK&M ¶ 1005.02, at 10-59.

[62] In the leading case of Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939), two depositors attempted to institute a class action to compel repayment of deposits by the defendant bank, alleging that the bank was not authorized to receive deposits. The Court of Appeals, in denying class status, enunciated the subsequently oft-quoted doctrine 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 were wronged." *Id.* at 292, 22 N.E.2d at 377. The Court added that "[l]audable desire to avoid multiplicity of actions by persons who have suffered wrong is insufficient unless those who would bring such actions are in some manner united in interest." *Id.* at 294, 22 N.E.2d at 377. As the Judicial Council noted, the Court reaffirmed this concept in subsequent cases.

> The New York courts seem to be satisfied that there is the requisite tie of interest among the members of the group when the right asserted by or against the class is joint or common, or when the subject matter of the controversy is a limited fund or specific property which is affected by the claims or defenses asserted in the action,

concept which continuously plagued the New York courts,[63] and in its place are substituted functional criteria reflecting modern societal needs.

The new class action law may be profitably compared to its federal counterpart, rule 23 of the Federal Rules of Civil Procedure.[64] Comparisons between the two procedural schemes are helpful, for the New York law has in many respects improved upon its precursor.[65]

Section 901 of the new law contains a unitary scheme of prerequisites for class actions.[66] These prerequisites are as follows:

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or when the relief sought is common to all in the sense that satisfaction of the individual claims of the parties before the court will also satisfy the claims of all others. . . .

However, when there is no limited fund and the rights are several and separate relief is sought the remedy is not available even though the basic issues of law or fact around which the controversy revolves are common to all.

18 JUD. COUNCIL REP. 230-31 (1952) (footnotes omitted).

[63] In Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 516-17 (1971), the Court of Appeals acknowledged that there has been inconsistency in its decisions. 26 N.Y.2d at 401, 259 N.E.2d at 721, 311 N.Y.S.2d at 283. Yet the Court proceeded to reaffirm "the existing New York rule" by denying class status in the case at bar. *Id.* at 404, 259 N.E.2d at 723, 311 N.Y.S.2d at 286. *Accord*, Onofrio v. Playboy Club, 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965); Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965); Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937).

In Moore v. Metropolitan Life Ins. Co., 33 N.Y.2d 304, 307 N.E.2d 554, 352 N.Y.S.2d 433 (1973), the Court stated that "[t]he restrictive interpretation in the past of CPLR 1005 . . . no longer has the viability it may once have had." 33 N.Y.2d at 313, 307 N.E.2d at 558, 352 N.Y.S.2d at 439. Nevertheless, the Court denied class status once again, noting a preference for legislative rather than judicial change in the law. *Id.* at 313, 307 N.E.2d at 558, 352 N.Y.S.2d at 439.

The overall confusion resulted in a situation where "class actions were not permitted where they should have been and were allowed where they should not have been." 2 WK&M ¶ 1005.02, at 10-60. That a class lacked the required common interest was a conclusion more often felt than articulated by the courts. 7B MCKINNEY'S CPLR 1005, commentary at 92 (Supp. 1975).

For a discussion of class actions in New York see Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 612-21 (1971) [hereinafter cited as Homburger]; Note, *Class Actions in New York:* Richards v. Kaskel, 38 ALBANY L. REV. 865 (1974); Comment, *Statutory Construction as as* [*sic*] *Means of Constriction*, 68 NW. U.L. REV. 1108 (1974).

[64] FED. R. CIV. P. 23. The amended rule 23 was adopted by Order of the Supreme Court on February 28, 1966, 383 U.S. 1031 (1966). For a discussion of the federal rule see Homburger, *supra* note 63, at 629-51; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967).

It is interesting to note that amended rule 23 was patterned after the original proposed draft of article 9 recommended by the Judicial Council. *See* 18 JUD. COUNCIL REP. 221-49 (1952). *See also* Fink, *supra* note 58, at 1; Homburger, *supra* note 63, at 631.

[65] In discussing article 9, reference will be made where applicable to judicial interpretations of rule 23.

[66] To compare the prerequisites under the federal rule, see FED. R. CIV. P. 23(a).

1. the class is so numerous[67] that joinder of all members, whether otherwise required or permitted,[68] is impracticable;[69]
2. there are questions of law or fact common to the class which predominate[70] over any questions affecting only individual members;[71]
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;[72]
4. the representative parties will fairly and adequately protect the interests of the class;[73] and

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[67] "The raison d'être of the class suit doctrine is necessity, which in turn depends upon the question of number." 3B J. MOORE, FEDERAL PRACTICE ¶ 23.05, at 23-271 (2d ed. 1975) [hereinafter cited as MOORE]. The "numerosity" requirement must be interpreted on the particular facts of each case. Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968); Davy v. Sullivan, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973) (per curiam); 2 H. KOOMAN, FEDERAL CIVIL PRACTICE § 23.04, at 498 (1969); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1762, at 592 (1972) [hereinafter cited as WRIGHT & MILLER]. Indeed, the federal courts have grappled with this requirement. *Compare* Lindsay v. Kissinger, 367 F. Supp. 949, 951 (D.D.C. 1973) (mem.) (10 members enough) *with* Moscarelli v. Stamm, 288 F. Supp. 453, 463 (E.D.N.Y. 1968) (class of 25 too small).

[68] This phrase regarding joinder is not to be found in FED. R. CIV. P. 23(a)(1) and was included "[t]o erase all doubt that class actions are not limited to compulsory joinder situations . . . ." Homburger, *supra* note 63, at 654.

[69] "Impracticable" does not mean impossible, but refers to the difficulty or inconvenience of joining all class members. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14 (9th Cir. 1964); Advertising Specialty Nat'l Ass'n v. FTC, 238 F.2d 108, 119 (1st Cir. 1956); MOORE, *supra* note 67, at 23-280; WRIGHT & MILLER, *supra* note 67, at 593-94.

[70] Under article 9, "predominance" is a prerequisite for all class actions. This differs from the federal rule, the latter requiring "predominance" only in a rule 23(b)(3) action. *See* FED. R. CIV. P. 23(b); note 75 and accompanying text *infra*.

[71] "The fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance." MOORE, *supra* note 67, ¶ 23.45[2], at 23-756. At least one court has required a common nucleus of operative facts affecting the entire class. *See* Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (N.D. Cal. 1967) (mem.), *petition for mandamus granted sub nom.* Chicken Delight, Inc. v. Harris, 412 F.2d 830 (9th Cir. 1969) (per curiam). Other courts have looked for an essential common factual link between the class members and the defendant. *See, e.g.*, DiCostanzo v. Chrysler Corp., 57 F.R.D. 495, 498 (E.D. Pa. 1972) (mem.). *See generally* Kohn, *Guidance Sought on Class Action Rule*, 173 N.Y.L.J. 101, May 27, 1975, at 1, col. 3.

[72] One commentator has questioned whether requiring that the representative have claims or defenses typical of those of the class is necessary in light of the other prerequisites. *See* MOORE, *supra* note 67, ¶ 23.06-2, at 23-325. Others express doubt as to the meaning of this requirement. *See* WRIGHT & MILLER, *supra* note 67, § 1764, at 611. At times, the difficulty in understanding this requirement may have led the opponent of a class to concede it. *See, e.g.*, Zeigler v. Gibralter Life Ins. Co. of America, 43 F.R.D. 169, 172 (D.S.D. 1967) (mem.).

[73] The interests of the representative parties cannot be antagonistic to or in conflict with the interests of the class. Hansberry v. Lee, 311 U.S. 32, 44-45 (1940); Schy v. Susquehanna Corp., 419 F.2d 1112, 1117 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 468 (S.D.N.Y. 1968). The court must consider, *inter alia*, whether the interest of the representative party is coextensive with the interests of the other members of the class, the proportion of those made parties to the total class membership, and any other factors relating to the ability of the named parties to speak for the rest of the class. MOORE, *supra* note 67, ¶ 23.07[1], at 23-352 to -353. Another essential ingredient is that the attorney for the representatives be qualified, experienced, and able to conduct the suit. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974); WRIGHT & MILLER, *supra* note 67, § 1766, at 632-33. *But see* Becker, *Introduction: Use and Abuse of Class*

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[74]

As enacted, article 9 appears to provide a more viable mechanism for the institution of class action suits than the more complex federal rule. The article, in essence, adopts the broad prerequisites of a rule 23(b)(3) action as its criteria for all class actions.[75]

Once the prerequisites are established, the new article mandates a threshold determination and order by the court as to whether the suit should proceed as a class action.[76] An order granting a class action must contain a description of the class.[77]

Actions Under Amended Rule 23, 68 NW. U.L. REV. 991, 995-96 (1974) [hereinafter cited as Becker], discussing the problem of attorneys competing to represent the class.

Some courts have held this "representative" requirement crucial so as not to deprive absent class members of due process, *e.g.*, Dierks v. Thompson, 414 F.2d 453, 456 (1st Cir. 1969).

[74] The prerequisite that a class action be superior to other means of adjudication is limited in the federal rule to the so-called (b)(3) action. *See* FED. R. CIV. P. 23(b)(3). Under article 9, however, this requirement is applicable to all class actions.

The question is whether the class action format "can serve its appropriate function satisfactorily, in the particular situation." MOORE, *supra* note 67, ¶ 23.45[3], at 23-801 (footnote omitted). The court must consider whether it will be profitable for the court and the parties to develop workable methods in conducting a class action and whether a class action would be just, not merely convenient. *Id.* at 23-801 to -802. This criterion tests whether, by virtue of a class action, economies of time, effort, and expense may be secured while promoting a uniformity of decisions as to persons similarly situated. *Id.* at 23-811. It has been suggested that one alternative to a class action is "test case." *See* Advisory Committee's Notes, *Proposed Rules of Civil Procedure, as reported in* 39 F.R.D. 73, 103.

Some commentators have implied yet another prerequisite, namely, that a class, in fact, exists. *See, e.g.*, WRIGHT & MILLER, *supra* note 67, § 1760, at 579. However, "[t]he class does not have to be so ascertainable that every potential member can be identified at the commencement of the action." *Id.* at 580, *citing* Gatling v. Butler, 52 F.R.D. 389, 392 (D. Conn. 1971).

The last consideration under § 901 is the prohibition contained in § 901(b). There, class status is denied when the action is brought under a statute imposing a minimum recovery or a penalty unless the statute specifically authorizes a class action.

[75] Article 9, with two variations has embraced the prerequisites of the federal rule. *See* FED. R. CIV. P. 23(a). Under the New York rule, common questions of law or fact must "predominate," *see* note 70 and accompanying text *supra*, and a class action must be "superior" to other methods of adjudication. *See* note 74 and accompanying text *supra*. Under the federal rule these prerequisites apply only in a rule 23(b)(3) action. *See* FED. R. CIV. P. 23(b)(3).

[76] CPLR 902. *See* TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1799-1800; Special Comm. on Consumer Affairs, N.Y.C.B. Ass'n, Report on the Proposed Class Action Legislation in New York, at 6, on file in the St. John's Law Review Office [hereinafter cited as Special Comm. Report].

[77] CPLR 903. This section also gives the court discretionary power to direct that class members be notified of their right to be excluded from the suit. It has been suggested that the court will exercise this power when representation of the entire class is not needed for disposition of the suit, when class members have a significant interest in individually controlling the action, and when such individual notice is feasible without imposing a severe financial or administrative burden on the parties. TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1800.

Opponents of the statute believe that the "opt-out" provision will allow the attorney for the class to include anyone he chooses in the class without their consent, forcing such

The court must consider, *inter alia,* the interests of class members in separate litigation, the impracticality or inefficiency of conducting separate actions, the pendency of any other litigation as to the instant controversy, the appropriateness of the particular forum, and any managerial difficulties likely to be encountered in a class action.[78] A determination of class status by the court may be conditional and may be varied at any time before reaching a decision on the merits.[79]

The notice provisions of section 904 signal a departure from the federal rule.[80] Notice, its content subject to court approval,[81] must be provided in such manner as the court directs, but need not be given where the action is primarily for injunctive or declaratory relief.[82] Additionally, section 904 requires the plaintiff to bear the

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individuals into affirmative action in order to request exclusion. Memorandum by The New York State Council of Retail Merchants, Inc. in Opposition to N.Y.S. 1252, at 2, 198th Sess. (1975), on file in St. John's Law Review Office [hereinafter cited as Retail Merchants]. *See also* Manual for Complex Litigation, *quoted in* Becker, *supra* note 73, at 993-94. In addition, opponents have contended that this feature will result in a large amorphous class, making for unmanageable class actions. Retail Merchants, *supra*, at 57. *But see* Special Comm. Report, *supra* note 76, at 8, arguing that requiring class members to express affirmative interest in participating, *i.e.* an "opt-in" provision, as opponents have suggested, would undermine the purpose of the class action, *viz* "to resolve the entire dispute in a single adjudication." *Id.*

[78] CPLR 902. As the commentators noted, this list is not exhaustive. For example, the court may also consider the apparent merits of the claims asserted. TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1800. *See also* Special Comm. Report, *supra* note 76, at 6.

[79] CPLR 902.

[80] *See* FED. R. CIV. P. 23(c)(2). The federal rule contains a notice scheme which is partially mandatory and partially discretionary. TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1800.

[81] Control over content is necessary to prevent transmission of improper or misleading information. TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1801. The problem of unauthorized communications has plagued the federal rule. *See* Becker, *supra* note 73, at 996.

[82] The Judicial Conference recommended that dispensation be granted sparingly, such as

> where notice would be burdensome and costly, the interests of the individual member of the class in controlling the litigation minimal, and effective representation of the class interests attainable without notification.

TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1801. *But see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974) (emphasis added), wherein the Supreme Court, relying on a literal interpretation of rule 23(b)(3), which specifies individual notice, declared that "notice *must* be provided to those . . . identifiable through reasonable effort." Although article 9 provides for a discretionary notice scheme apparently placing the new law outside of the narrow holding in *Eisen*, it has been suggested that *Eisen* represents a constitutional due process standard requiring notice in every case. *See* Section of Litigation, ABA, Class Actions: In the Wake of Eisen III, at 20 (July 1975), on file in St. John's Law Review Office.

Section 904 also requires the court, in determining the method by which notice is to be given, to consider the cost of each method considered, the financial resources of the parties, and the stake of each class member along with the likelihood that members would want to "opt-out" or appear individually. This last factor may be determined by sending notice to a random sample of the class. *See also* Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, in 58 F.R.D. 299, 302 [hereinafter cited as Weinstein], which suggested that radio and television, in addition to direct mailing, might be used to provide notice.

cost of notification to the class, although the court may, at its discretion, reallocate the expense.[83]

Pursuant to section 905, the judgment, whether or not favorable, embraces the entire class. Whether a nonappearing member is bound by an adverse judgment, however, may only be determined in a subsequent action.[84]

Section 906 adopts the federal practice of permitting a class action as to particular issues, allowing the court discretion to carve out subclasses when appropriate.[85]

Guidelines to assist the court in the management of the suit are set out in section 907.[86] In contrast to the federal rule, the court may exercise discretion in imposing conditions on "intervenors."[87] Additionally, the court has discretion to set the terms for payment of a judgment to a victorious class in accordance with the financial condition of the defendant.[88]

Section 908 proscribes dismissal, discontinuance, or compromise of a class action without court approval accompanied by ap-

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[83] Reallocation of the expense must be considered in light of competing policies: protecting the opponent of a class from harassment, on the one hand, and the accessibility of the courts to claimants, on the other. TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1801. Factors bearing on the court's discretionary use of reallocation include the merit of the claims of the class, the respective financial status of both parties, the interest of the opponent in obtaining a binding adjudication, and the availability of a less expensive means of notice to the opponent of the class. *Id. But see* Eisen v. Carlisle & Jacquelin, 417 U.S. at 177 (1974), wherein the Supreme Court held that the "petitioner must bear the cost of notice to the members of his class" in a rule 23(b)(3) action. *See also* Becker, *supra* note 73, at 994-95; Retail Merchants, *supra* note 77, at 3, which contended that lack of standards in the area of notice leaves the court with too much unguided discretion, creating uncertainty for both parties.

Section 904 also gives the court flexibility to allow the prevailing party to deduct as taxable disbursements the expenses of notification.

[84] TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1801. *See also* Becker, *supra* note 73, at 996-97 (discussion of determining damages for the individuals in a successful class); Weinstein, *supra* note 82, at 303 (discussion of awarding damages to the successful class).

[85] *Cf.* FED. R. CIV. P. 23(c)(4). Conflicts of interests between groups within a general class, a recurring problem under the federal rule, are ordinarily resolved at a preliminary hearing by a determination that the class be divided into subclasses. Becker, *supra* note 73, at 996.

[86] Section 907 attempts to give the court a blueprint for the management of class actions. It alerts the court to its special role in class action litigation. Fink, *supra* note 58, at 2-3.

[87] CPLR 907(3). For example, the court could require that any represented party seeking to intervene request judicial authorization to enter an appearance. TWELFTH ANNUAL REPORT, *supra* note 58, comment at 1802. The federal rule gives all represented parties the right to enter an appearance. *See* FED. R. CIV. P. 23(d); Fink, *supra* note 58, at 2.

[88] This provision allowing the court to consider the financial condition of the defendant when setting the judgment was designed to avoid the harsh economic results which could befall a defendant company. *See* Fink, *supra* note 58, at 3.

propriate notice to all class members in such manner as the court directs.[89]

Section 909 leaves room for experimentation by allowing the court in its discretion to assess attorneys' fees, based on the reasonable value of legal services rendered, against the opponent of a successful class. For public policy reasons, however, no reciprocal provision allowing the court to assess attorneys' fees against a losing class is included.[90]

In sum, the new class action law portends significant change in state litigation. Under the prior law,[91] with its restrictive judicial interpretation,[92] group claimants were often denied access to the courts. Now, claims involving environmental offenses, consumer interests, civil rights, adhesion contracts, and other collective activities may be championed in class form.[93]

The advantages of a class action are tripartite: economic, procedural, and psychological.[94] The latter is borne of the strength which comes with numbers. For "[e]ven if the court is not impressed, a favorable public or political reaction may be important."[95] The disadvantages focus around the potential for abuse.[96] An active judiciary, exercising its discretion[97] sagaciously in fashioning decisional guidelines, can obviate such potential.

ARTICLE 14-A — DAMAGE ACTIONS: EFFECT OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

CPLR art. 14-A: Legislature enacts comparative negligence statute.

The legislature has enacted a "comparative negligence" statute,[98] thus abandoning the traditional rule of tort law that any

[89] Section 908 is virtually identical to its federal counterpart. *See* FED. R. CIV. P. 23(e). For a discussion of the problems likely to be encountered were settlements allowed without court approval, see Becker, *supra* note 73, at 997.

[90] *See* Homburger, *supra* note 63, at 654. Class actions often are in the nature of "private attorney general" suits. The public is interested in aiding those who represent economically or socially disadvantaged groups. *Id. See also* Special Comm. Report, *supra* note 76, at 10. For a discussion of the problems encountered by awarding attorneys' fees, see 7B MCKINNEY'S CPLR 909, commentary at 71-72 (Supp. 1975), and Becker, *supra* note 73 at 997.

[91] CPLR 1005, ch. 318, § 4, [1962] N.Y. Laws 2086.

[92] *See* notes 61-63 and accompanying text *supra*.

[93] *See* Fink, *supra* note 58, at 1.

[94] 2 WK&M ¶ 1005.06, at 10-64.

[95] *Id.* at 10-66.

[96] *See generally* Weinstein, *supra* note 82; Retail Merchants, *supra* note 77; Becker, *supra* note 73.

[97] The new article, leaving much to the discretion of the court, places great reliance upon a strong and active judiciary. *See* Homburger, *supra* note 63, at 657. For a discussion of the various hardships a class action places upon the courts, see Weinstein, *supra* note 82, at 300-02.

[98] Ch. 69, § 1, [1975] N.Y. Laws 94 (McKinney). A comparative negligence statute had