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CPLR 1005: Court of Appeals Liberalizes Availability of Class Action

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ARTICLE 10 — PARTIES GENERALLY

CPLR 1005: Court of Appeals liberalizes availability of class actions.

CPLR 1005 authorizes a representative suit "[w]here the question is one of a common or general interest of many . . . ."[130] Although the social utility of class suits has long been recognized,[131] the restrictive case law development of class action procedure has nonetheless operated as a bar to its employment in the public interest fields.[132] While legislative action would be preferable in reforming class action law,[133] the continued efforts of the Judicial Conference to enact proposed article nine, which would substantially revise class action procedure to accord with practice under the Federal Rules of Civil Procedure, have been unavailing.[134] Accordingly, the Court of Appeals has undertaken the task of liberalization in *Ray v. Marine Midland Grace Trust Co.*[135]

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is reputed for generosity in its judgments. *See* Simpson v. Loehmann, 21 N.Y.2d 305, 316, 234 N.E.2d 669, 675, 287 N.Y.S.2d 633, 641 (1967) (Breitel, J., concurring).

130 CPLR 1005(a) provides:

> 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.

Although the use of the disjunctive "or" seems to authorize a class suit in two separate instances, the practice of the courts has been to construe the provision in the conjunctive. *See* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971).

131 *See generally* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Weinstein, *The Class Action is Not Abusive*, 167 N.Y.L.J. 84, May 1, 1972, at 1, col. 3.

132 The doctrine of separate wrongs, *see* notes 143-46 and accompanying text *infra*, has consistently precluded the utilization of the class action as a remedy in the fields of consumer and civil rights. For example, in Hall v. Coburn Corp., 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970), a class action was brought to recover the statutory penalty for illegal credit service charges. Alleging that the contracts the defendant finance company acquired were illegal in that certain printed parts of the contracts were less than the required size, the class was comprised of parties who made separate agreements with different sellers but pursuant to the same written installment form. The Court of Appeals dismissed the representative action. Adhering to the doctrine of separate wrongs, the Court held that the mere allegation of identical facts was not sufficient to create a common right. *Id.* at 400, 259 N.E.2d at 721, 11 N.Y.S.2d at 282-83.

133 *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), wherein the Court stated:

> Because . . . [legislative action] would assure limitations and safeguards which would be highly desirable in broadening the jurisdiction of the courts of this State over class actions, legislation in this area is highly preferable to the alternative of judicial development . . . .

134 Article nine of the CPLR has been proposed annually by the Judicial Conference since 1972. *See* TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, *appearing in* 2 N.Y. SESS. LAWS 1797-1803 (McKinney 1974) [hereinafter cited as TWELFTH ANNUAL REPORT]. On January 21, 1975, numerous state senators and assemblymen reintroduced article nine to the 1975 Legislature. *See* N.Y.S. 1309, N.Y.A. 1252, 1975-76 Sess. At present, the outcome of the proposal remains uncertain.

135 35 N.Y.2d 147, 316 N.E.2d 320, 359 N.Y.S.2d 28 (1974).

In *Ray*, a representative action was instituted on behalf of owners of certain debentures against the defendant indenture trustee. The defendant, charged with breach of trust, gross negligence, and conflict of interests, moved to dismiss the representative portion of plaintiffs' complaint. In affirming the order of the Appellate Division, First Department, which had authorized the class suit,[136] the Court ostensibly adopted a liberal posture toward the employment of representative actions. Recognizing that the class device was a creature of equity, the Court noted that its development should comport with expanding equitable considerations.[137]

In authorizing the class action, many of the basic criteria adopted by the Court appear patterned after the liberal statutory framework of the federal provision[138] and proposed article nine of the CPLR.[139] These standards include: (1) predomination of common issues of law or fact; (2) impracticality of joinder; (3) adequate representation; (4) similar claims among the class; and (5) the preferability of adjudicating the controversy through the class action device.[140] Moreover, in a further

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136 Ray v. Marine Midland Grace Trust Co., 41 App. Div. 2d 906, 342 N.Y.S.2d 641 (1st Dep't 1973).

137 It would be anomalous to regard the statute, progressive in content, as intended to restrict the scope of equity or to freeze its development. It has, therefore, always remained for the courts to give meaning to the remedy, based on substantive and developing equitable considerations.
35 N.Y.2d at 152, 316 N.E.2d at 323, 359 N.Y.S.2d at 32.

138 *See* FED. R. CIV. P. 23(a), (b)(3).

139 Section 901 of the proposed article provides:

One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

TWELFTH ANNUAL REPORT, *supra* note 134, at 1799.

140 35 N.Y.2d at 154-55, 316 N.E.2d at 324, 359 N.Y.S.2d at 33-34.

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Supreme Court held that where a class action is based on common questions of law and fact, rule 23(c)(2) of the Federal Rules of Civil Procedure mandates that individual notice of the commencement of the suit be sent to all reasonably identifiable class members. Because CPLR 1005(b) does not require such notice, the Court in *Ray* felt that *Eisen* would not be relevant to class action procedure in New York. 35 N.Y.2d at 155, 316 N.E.2d at 325, 359 N.Y.S.2d at 34. However, a question arises as to whether the Supreme Court's ruling in *Eisen* is one of constitutional construction, *i.e.*, whether due process mandates individual notice to the members of a class whose self-appointed representatives have instituted litigation of common factual and legal issues. In this respect, the *Eisen* requirement may be binding on those class suits which are maintained under the liberal criteria adopted in *Ray*. 35 N.Y.2d at 156, 316 N.E.2d at 325-26, 359 N.Y.S.2d at 36 (Wachtler, J., concurring).

stride toward conforming class action procedure with the federal rules and proposed article nine, the Court expanded the role of the tribunal in managing class litigation. Though CPLR 1005(b) merely provides that the court may impose such terms as protect the interests of the class,[141] the *Ray* Court ruled that in administering a representative action, the court may, in its discretion, reconsider the availability of the class suit when complications involving management, appropriateness, or representation arise.[142]

Prior to *Ray*, where the interrelationship among the class members had consisted merely of common factual or legal issues, the courts held the requisite common interest to be lacking.[143] Furthermore, although individual wrongs may have been committed by a common plan, a class action would be unavailable if its utilization would subject the adverse party to defenses available against some members of the class but not all.[144] In *Ray*, the Court specifically abrogated this requirement of common defenses. Noting that various defenses raise complications involving management of class litigation, the Court felt that any difficulties generated can be alleviated "by various procedural

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141 CPLR 1005(b) provides:

> The court at any stage of the action may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given in a prescribed manner:
> 1. of a proposed settlement; or
> 2. of entry of a judgment.

142 35 N.Y.2d at 155, 316 N.E.2d at 324-25, 359 N.Y.S.2d at 34-35. The protections afforded by the Court in *Ray* can be found in rule 907 of proposed article nine which provides:

> In the conduct of class actions the court may make appropriate orders:
> 1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;
> 2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action;
> 3. imposing conditions on the representative parties or on intervenors;
> 4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;
> 5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;
> 6. dealing with similar procedural matters.
>
> The orders may be altered or amended as may be desirable from time to time.

TWELFTH ANNUAL REPORT, *supra* note 134, at 1802.

143 Separate 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.

Society Milion Athena v. National Bank, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939).

144 Gaynor v. Rockefeller, 15 N.Y.2d 120, 129-30, 204 N.E.2d 627, 631, 256 N.Y.S.2d 584, 589-90 (1965).

devices as are now common in actions and proceedings embracing many diverse claimants . . . ."[145]

Despite the expansive trend evidenced by *Ray*, the status of many of the earlier restrictive notions regarding class action procedure remains uncertain. If a court felt that a class suit would deprive the class members of their choice of remedies or repudiate the only tie the class has in common, a class action could not be maintained.[146] Because the Court in *Ray*, for the most part, leaves prior case law intact, the representative device may still be limited to those instances where the relief sought would satisfy the claims of all class members,[147] or where the object of the litigation is a limited common fund in which a ratable distribution is to be made,[148] or where the litigation arises out of trust, partnership, or corporate ownership.[149]

The Court in *Ray* has apparently conformed much of the present class action procedure to the liberal statutory provisions found in the federal rule and proposed article nine. Thus, the decisional law of the federal courts and jurisdictions with similar provisions could provide adequate guidelines to the New York courts in future class litigation. Nevertheless, the Court's affirmation of prior New York case law engenders ambiguity since the extent of its continued viability was not ascertained. Consequently, clarity in class action law will be conclusively established only by legislative adoption of article nine or judicial abrogation of the restrictive concepts which have confined the utilization of the class device.*

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[145] 35 N.Y.2d at 155, 316 N.E.2d at 324, 359 N.Y.S.2d at 34. Although the Court did not specify which devices would be available, the device commonly utilized in multi-tort litigation is a severance. CPLR 603 provides:

> In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

[146] In Onofrio v. Playboy Club, 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965), *rev'g on dissenting opinion below* 20 App. Div. 2d 3, 7-8, 244 N.Y.S.2d 485, 489-90 (1st Dep't 1963), a class action was brought to recover the membership fees which were collected for the building of a private club but actually used for the construction of a public restaurant. The class action was denied for two reasons. First, some members of the class may not have consented to a dissolution of the enterprise in order to have the funds dispersed; thus, allowing a class suit would deprive these members of their choice of remedies. Second, the only common tie among the class consisted of the public restaurant formed by the members' contributions. A class suit to recover the contributions may have necessitated the liquidation of the restaurant, thereby dissolving the only tie the class had in common.

[147] *See, e.g.*, Kovarsky v. Brooklyn Gas Co., 279 N.Y. 304, 18 N.E.2d 287 (1938).

[148] *See, e.g.*, Guffanti v. National Sur. Co., 196 N.Y. 452, 90 N.E. 174 (1909).

[149] *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).

* *Editor's Note.* Prior to publication, the New York State Legislature passed proposed article nine of the CPLR, thus repealing section 1005 and the law developed thereunder. The bill, N.Y.S. 1309, N.Y.A. 1252, 198th Sess. (1975), codifying the liberal criteria outlined

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3012(b): Retention of untimely complaint for 18 days held not to constitute a waiver of right to move for dismissal.

CPLR 3012(b) provides that where the plaintiff elects to serve only a summons, the defendant may properly demand a copy of the complaint. Thereafter, failure of the plaintiff to serve the complaint within 20 days of the demand can result in the dismissal of the action.[150] Any such dismissal is discretionary with the court.[151] In passing upon a CPLR 3012(b) dismissal motion, the court must consider (1) the length of time of the delay, and (2) whether the motion for dismissal was made prior or subsequent to the receipt of the late complaint.[152]

In *Johnson v. Johnson*,[153] the Appellate Division, Third Department, affirmed a ruling of the Supreme Court, Montgomery County, which had granted defendants' motion to dismiss the complaint pursuant to CPLR 3012(b).[154] The action was based on an alleged breach of a warranty deed, fraud, and deceit. No complaint was served with the summons, and the defendants served a notice of appearance with a demand for the complaint. Four months after defendants' demand, plaintiff served the complaint. Defendants did not reject the com-

by the Court of Appeals in *Ray*, has been signed into law and will be effective Sept. 1, 1975. *See* N.Y. Times, June 19, 1975, at 42, col. 3.

150 CPLR 3012(b) provides:

> If the complaint is not served with the summons, the defendant may serve a written demand for the complaint. If the complaint is not served within twenty days after service of the demand, the court upon motion may dismiss the action. A demand or motion under this section does not of itself constitute an appearance in the action.

Unlike CPA 257, CPLR 3012(b) does not require that service of the demand for the complaint be made within 20 days of the service of the summons.

151 When the defendant makes a motion to dismiss pursuant to CPLR 3012(b), the plaintiff, to prevent dismissal, must demonstrate to the court that there was a valid excuse for the delay in serving the complaint and that he has a meritorious cause of action. 3 WK&M ¶ 3012.15.

In the exercise of its discretion, the court need not dismiss the action if the failure to serve the complaint is unavoidable and no delay in prosecution has occurred. However, an inadequate explanation of the delay will result in a dismissal of the action. *Id. Compare* Ferrentino v. Farragut Gardens No. 5, Inc., 35 App. Div. 2d 815, 316 N.Y.S.2d 673 (2d Dep't 1970) (mem.) (dismissal granted where attorney allegedly misplaced plaintiff's file and no meritorious claim was demonstrated), *with* McDonald v. King's Dep't Store, Inc., 27 App. Div. 2d 597, 275 N.Y.S.2d 707 (3d Dep't 1966) (per curiam) (dismissal denied where attorney encountered research problems and defendant failed to show prejudice).

152 *See generally* 3 WK&M ¶ 3012.15. Although filing the motion to dismiss after receiving the untimely complaint will not in and of itself require denial of the motion, it has been suggested that the defendant's motion for dismissal will be muted, at least psychologically, by such a delay. 7B MCKINNEY'S CPLR 3012, commentary at 590 (1974).

153 45 App. Div. 2d 899, 357 N.Y.S.2d 208 (3d Dep't 1974) (mem.).

154 *Id.* at 900, 357 N.Y.S.2d at 209. Plaintiff had sought by cross-motion to compel defendants to accept the complaint. *Id.* at 899, 357 N.Y.S.2d at 208.