NEW YORK STATE CLASS ACTIONS: A WELCOME SEA CHANGE

June 8, 2015

By Thomas A. Dickerson[1]

As I noted in 2010 New York State's class action statute, Article 9 of the CPLR, "is underutilized and has been during its entire thirty-five year history" and "Notwithstanding the broad language in the legislative history of CPLR Article 9, New York courts have not implemented this salutary statute as broadly as they might have. As a remedial vehicle, CPLR Article 9 is operating as approximately forty percent of its intended potential"[1].

The Sea Change

Having spent nearly 40 years writing about and encouraging the intended and appropriate use of CPLR Article 9[2], 15 years of which were spent as a solo practitioner in Manhattan prosecuting

---

[1] Thomas A. Dickerson is an Associate Justice of the Appellate Division Second Department of the New York State Supreme Court and author of *Class Actions: The Law of 50 States*, Law Journal Press, (2015).

consumer class actions[3], I had almost given up hope that the citizens of our state would ever fully realize the intended remedial benefits of our class action statute. And then it happened. Starting in 2012 the Court of Appeals decided to take a role in encouraging the use of CPLR Article 9.

First, there was *Koch v. Acker, Merrall & Condit Co.*[4], a wine fraud case, wherein the Court of Appeals resuscitated General Business Law 350 (false advertising) by declaring that reliance is not an element of this statutory cause of action. This important decision made GBL 350 as available in consumer class actions as is GBL 349 (deceptive and misleading business practices)[5].

Second, there was *Corsello v. Verizon, New York*[6], an inverse condemnation class action, in which the Court of Appeals stated that the case "seems on its face well-suited to class action treatment" because "it would be reasonable to infer that the case will be dominated by class wide issues-whether Verizon's practice is lawful, and if not what the remedy should be" and that expert testimony could be used to "support an inference" of typicality.

And third, there was the important policy statement by the Court of Appeals in *Borden v. 400 East 55th Street Assoc. L.P.*[7]. "From a policy standpoint, permitting plaintiffs to bring these claims as a class accomplishes the purpose of CPLR 901(b)...The State Consumer Protection Board emphasized the importance of

class actions: 'The class action device responds to the problem of inadequate information as well as the need for economies of scale' for '...a person contemplating illegal action will not be able to rely on the fact that most people will be unaware of their rights-if even one typical person files a class action, the suit will go forward and the other members of the class will be notified of the action".

A Study In Justice Delayed

CPLR 901(b), which is unique amongst class rules whether state[8] or federal, provides, in relevant part, that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" unless authorized by the statute creating the penalty. In 1975, as the Legislature, at the urging of the Court of Appeals[9] was about to enact CPLR Article 9, CPLR 901(b) was engrafted onto an otherwise modern class action statute equal to or better than Federal Rule 23. The Empire State Chamber of Commerce requested enactment of CPLR 901(b) asserting without benefit of any studies or scholarly support that "Penalties and class actions simply do not mix"[10].

CPLR 901(b) is inconsistent with the trend in federal and other state courts[11] to enable citizens with small and/or complex

claims to seek and obtain adequate representation within the context of a class action lawsuit. CPLR 901(b) has prevented or delayed the salutary use of Article 9 of the CPLR by, *inter alia*, consumers, employees and tenants until very recently. CPLR 901(b) should be repealed as soon as possible[12].

No Penalty Class Actions Allowed

A review of court decisions dealing with CPLR 901(b) rendered by New York State courts from 1978 through 2014 reveals the following. In the early years from 1975 to 1987 nearly all class actions alleging the violation of a statute which provided for a "penalty" were denied class certification. In addition these cases denied plaintiff's attempt to waive the "penalty" and seek only actual damages. Typical of these cases[13] was *Lennon v. Philip Morris Cos.*(GBL 340)[14]. In *Lennon* the Court stated "Even where treble damages are discretionary and need not be sought by the injured party, it is this court's understanding that no New York court has sustained such a claim either under the Donnelly Act (GBL 340) or any other statutory provision".

Waiving The Statutory Penalty

The introduction of the concept that a class action

plaintiff could waive a "penalty" with the proviso that absent class members be given the opportunity to opt-out and seek individual statutory damages was first accepted in 1987 in a case involving GBL 349[15]. As noted by the Court in Cox v. Microsoft Corp.[16] "We also reject Microsoft's argument that plaintiffs are not entitled to class action relief under (GBL 349) since the statutorily prescribed $50 minimum damages to be awarded for a violation of that section constitutes a 'penalty' within the meaning of CPLR 901(b). In as much as plaintiffs in their amended complaint expressly seek only actual damages, the motion court correctly found CPLR 901(b) which prohibits class actions for recovery of minimum or punitive damages, inapplicable"[17].

Expansion Of The Waiver Concept

The waiver concept began to spread from GBL 349 class actions to class actions brought by employees alleging violation of various Labor Law provisions. For example, in the 1998 employee class action, *Pesantz v. Boyle Environmental Services, Inc.*[18], the Court stated "To the extent certain individuals may wish to pursue punitive claims pursuant to Labor Law 198(1-a) which cannot be maintained in a class action (CPLR 901(b)) they may opt out of the class action". In addition, the waiver concept has recently been applied in a class action alleging violation of

the Arts and Cultural Affairs Law 25.33[19] and Labor Law 663[20] but not in a class action brought by Nassau County seeking hotel taxes from online travel sellers.[21]

Sperry: An Economic Analysis

The Court of Appeals first addressed CPLR 901(b) in *Sperry v. Crompton Corp.*[22]. In *Sperry*, a class action alleging violation of GBL 340, the Court held "Although we never construed the term 'penalty' within the meaning of CPLR 901(b), nor have we had occasion to characterize the treble damages provision of the Donnelly Act...It is evident that by including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status. This makes sense, given that class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred". While this economic analysis may apply to corporations with potentially large individual damages it may not apply to consumers and small businesses that

may have small individual damage claims arising from, *inter alia*, pricing fixing.

Borden: A Legislative Analysis

In *Borden*, three class actions seeking to obtain rent overcharges under *Roberts v. Tishman Speyer Properties, L.P.*[23] and alleging violations of the Rent Stabilization Law of 1969, the Court seemed to take a more expansive view than it had in *Sperry*. "The language of CPLR 901(b) itself says it is not dispositive that a statute imposes a penalty so long as the action brought pursuant to that statute does not seek to recover the penalty. This view is bolstered by the legislative history of CPLR 901(b), which provides that the statute requires a liberal reading and allows class-action recovery of actual damages despite a statute's additional provision of treble damages...Waiver does not circumvent CPLR 901(b); on the contrary, the drafters not only foresaw but intended to enable plaintiffs to waive penalties to recover through a class action...It is abundantly clear that plaintiffs seek a refund, i.e., actual damages, which CPLR 901(b) did not intend to bar...Where a statute imposes a nonmandatory penalty plaintiffs may waive the penalty in order bring the case as a class action...Although CPLR 901(b) intended to restrict the types of

cases that could be brought as class actions, in our cases (before us) the CPLR is not contravened by allowing waiver because plaintiffs will not receive a windfall. They will only receive compensatory damages in the form of rent overcharges..."[24].

Conclusion

An appropriate question, of course, is why did it take so long for the waiver concept to be introduced and expanded upon until very recently. A clear example, perhaps, of justice delayed due to the unnecessary engrafting of CPLR 901(b) upon an otherwise well intended class action statute[25]. While there is still more to do in expanding the use of CPLR Article 9 to areas in which it was intended to be used [i.e., mass environmental, property and personal injury torts; governmental operations][26], the Court of Appeals has over the last three years breathed new life into New York State's underutilized class action statute.

ENDNOTES

1. See Dickerson, New York State Class Actions: Make It Work-Fulfill The Promise, 74.2 Albany L.R. 711 (2010/2011)(Make It Work I).

2. See Make It Work I, pp. 712-713 and Dickerson, Chapter on CPLR Article 9 in Weinstein Korn Miller, New York Civil Practice CPLR Lexis-Nexis (MB)(2015).

3. See Dickerson, Class Actions: The Law of 50 States, Law Journal Press (2015).

4. Koch v. Acker, Merrall & Condit Co., 18 N.Y. 3d 940 (2012).

5. See Dickerson, Chapter 98, Consumer Protection, Commercial Litigation In New York State Courts, 4th Edition, R. Haig, ed., Thomson Reuters West (2015).

6. Corsello v. Verizon, New York, 18 N.Y. 3d 777, 781-782 (2012).

7. Borden v. 400 East 55th Street Assoc. L.P., 24 N.Y. 3d 382 (2014).

8. See Dickerson, Class Actions: The Law of 50 States, Law Journal Press (2015).

9. See Moore v. Metropolitan Life Ins. Co., 33 NY2d 304, 313 (1973).

10. See Memo of Empire State Chamber of Commerce in Opposition to A. 1252-A, Feb. 14, 1975, N.Y. Bill Jacket, 1975 A.B. 1252-B, 198th Leg. Reg. Sess. (1975), ch. 207, at 3.

11. See Dickerson, Class Actions: The Law of 50 States, Law Journal Press (2015).

12. Dickerson, Austin & Zucco, *New York State Class Actions: Making It Work-Fulfilling The Promise: Some Recent Positive Developments And Why CPLR 901(b) Should Be Repealed*, 77.1 Albany L.R. 59 (2014)].

13. See e.g., Klapak v. Pappas, 79 AD2d 602 (1980)(dismissing class action brought pursuant to Social Services Law 131-o); Carter v. Frito-Lay, Inc., 74 AD2d 550 (1980)(dismissing class action brought pursuant to Labor Law 198); Burns v. Volkswagen of Am., 118 Misc. 2d 289 (1982), aff'd 97 AD2d 977 (1983)(dismissing

class action brought pursuant to (GBL) 349(h); Vickers v. Home Fed. Sav. & Loan Ass, 56 AD2d 62, 64 (1977)).

14. Lennon v. Philip Morris Cos., 189 Misc. 2d 577 (N.Y. Sup. 2001).

15. See Super Glue Corp. v. Avis Rent A Car Sys., 132 AD2d 604, 606 (2d Dept. 1987)].

16. Cox v. Microsoft Corp., 8 AD3d 39 (1st Dept. 2004).

17. Citing Ridge Meadows Homeowners' Ass. v. Tara Dev. Co., 242 AD2d 947 (4th Dept. 1997); Super Glue Corp. v. Avis Rent A Car Sys., 132 AS2s 604, 606 (2d Dept. 1987)].

18. Pesantz v. Boyle Environmental Services, Inc., 251 AD2d 11 (1st Dept. 1998).

19. Pires v. Bowery Presents, LLC, 44 Misc. 3d 704 (N.Y. Sup. 2014).

20. Rutella v. Craig Scott Capital, LLC, N.Y.L.J., N.Y. Sup., J. Bucaria, 5/21/2015 (class of unlicensed securities firm cold callers seeking minimum wages and overtime pay certified; "Because liquidated damages for unpaid wages are a penalty, plaintiff may not recover liquidated damages in a class action").

21. County of Nassau v. Expedia, Inc., 120 AD3d 1181 (2d Dept. 2014).

22. Sperry v. Crompton Corp. 8 N.Y. 3d (2007).

23. Roberts v. Tishman Speyer Properties, L.P., 13 N.Y. 3d 270 (2009).

24. A close reading of *Sperry* and *Borden* suggests that the Court of Appeals may be signaling that the waiver concept may be viable in GBL 340 class actions. "This Court signaled that the 'determination of whether a certain provision constitutes a penalty may vary depending on the context'(*Sperry*, 9 NY3d at 213). In *Sperry* where we found the treble damages provision of (GBL) 340(5) constituted a penalty, we also found that 'one third of the award unquestionably compensates a plaintiff for actual damages' while 'the remainder necessarily punishes...violations, deters such behavior (the traditional purposes of penalties) or encourages plaintiffs to commence litigation' (*Sperry*, 8 NY3d at 214). *We disallowed class action recovery in Sperry, but the*

plaintiff plainly sought treble damages, refusing to waive the penalty...Plaintiffs here seek that first third of the treble damages award, which we have determined is a compensatory form of relief") [emphasis added].

25. See Make It Work I, supra.

26. Id.