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HISTORICAL ANALYSIS OF JUDICIAL INTERPRETATIONS OF CPLR 901(b) FROM 1978 THROUGH 2014

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Introduction

CPLR 901(b), which is unique amongst class rules whether state 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 [see

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Moore v. Metropolitan Life Ins. Co., 33 NY2d 304, 313 (1973)] 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 that "Penalties and class actions simply do not mix" [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].

CPLR 901(b) is inconsistent with the trend in federal and other state courts 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 CPLR 901(b) should never have been enacted and, certainly, should be repealed as soon as possible [Dickerson, Austin & Zucco, *New York State Class Actions: Making It Work-Fulfilling The Promise: Some Recent Positive Developments And Why CPLR 901(b) Should Be Repealed*, 77.1 Albany L.R. 59 (2014)].

Until repeal, however, CPLR 901(b) may be ameliorated under appropriate circumstances. In that regard we have collected most of the court decisions dealing with CPLR 901(b) rendered by trial courts and appellate courts from 1978 through 2014 noting

(1) the early years [1975-1987] when all class actions alleging a violation of a statute imposing a "penalty" were denied class certification [see cases cited in Lennon and Rudgayser, infra], (2) the introduction [1987] of the concept of waiving the penalty in order to certify a General Business Law 349 class action [see cases cited in Cox, infra], and (3) the proliferation of the waiver concept into Labor Law class actions [1998][Pesantz, infra], tenant class actions [2014][Borden, infra] and other areas [2014][Pires, infra]. General Business Law 340 class actions have yet to be certified. However, a close reading of Sperry, infra, and Borden, infra, suggests that the Court of Appeals may be signaling that the waiver concept may be viable in GBL 340 class actions.

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 [see Dickerson, *New York State Class Actions: Make It Work-Fulfill The Promise*, 74.2 Albany L.R. 711 [2010]].

Reported Cases By Statute

Antitrust Cases: General Business Law 340 [Donnelly Act]

1] Russo & Dubin v. Allied Maintenance Corp., 95 Misc. 2d 344 (N.Y. Sup. 1978)(cites Blumenthal v. American Socy. Of Travel Agents, 1977 WL 18392 (N.Y. Sup. 1977) that "'If liability is proven treble damages is the minimum damages. The statute is mandatory. Its very purpose is the imposition of this penalty'"; "Plaintiffs later waived the treble damages asserted in their complaint. Such waiver may well cast in doubt plaintiffs' capacity to fairly and adequately protect the interest of the class (CPLR 901(a)(4)").

2] Lennon v. Philip Morris Cos., 189 Misc. 2d 577 (N.Y. Sup. 2001)(notwithstanding federal cases finding that treble damages are remedial in nature under Sherman and Clayton Acts, CPLR 901(b) bars class actions alleging violations of GBL 340 citing New York cases finding that treble damages are punitive in nature [Fults v. Munro, 202 NY 34, 41 (1911)] and that treble damages are the minimum damages under GBL 340 [Rubin v. Nine W Group, 1999 WL 1425364 (West. Sup. 1999); Blumenthal v. American Socy. Of Travel Agents, 1977 WL 18392 (N.Y. Sup. 1977); Russo & Dubin v. Allied Maintenance Corp., 95 Misc. 2d 344 (N.Y. Sup. 1978)]; regarding waiver of treble damages the court stated that "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 or any other statutory provision...Although a more realistic and accurate view of the antitrust laws is that they perform both remedial and policing functions, New York's class action procedures and the prevailing interpretation of the word 'penalty' require that plaintiffs identify express authorizing language (cf., Carter v. Frito-Lay, Inc., 74 AD2d 550, 551 (1st Dept 1980)), or otherwise be barred from maintaining this claim").

3] Asher v. Abbott Labs., 280 AD2d 208 (1st Dept. 2002)("Private persons cannot bring a class action under the Donnelly Act because the treble damages remedy provided in (GBL 340(5)) is a 'penalty' within the meaning of CPLR 901(b), the recovery of which in a class action is not specifically authorized and the imposition of which cannot be waived (citing Rubin, supra; Russo & Dubin, supra; Blumenthal, supra and McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C901:7").

4] Cunningham v. Bayer AG, 24 AD3d 216 (1st Dept. 2005)(class claims brought under GBL 340 dismissed citing Asher, supra).

5] Ho v. Visa USA, Inc., 16 A.D. 3d 256 (1st Dept. 2005) ("Plaintiffs are without standing to pursue the Donnelly Act claim (GBL 340) which also fails because of remoteness...

Furthermore, these credit card issues were the subject of an action brought by the retailers, which was settled. Thus, they have been subjected to judicial remediation for their wrongs, and any recovery here would be duplicative").

6] Paltre v. General Motors Corp., 26 AD3d 481 (2d Dept. 2006) ("The treble damages provision (in GBL 340) is a penalty within the meaning of CPLR 901(b). The plaintiffs' Donnelly Act class action claims may not be maintained because the Donnelly Act does not specifically authorize the recovery of this penalty in a class action").

7] Sperry v. Crompton Corp., 8 NY 3d 204 (2007)("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, we have articulated various rules regarding the identification of penalties in other contexts (citing Bogartz v. Astor, 293 NY 563, 565 (1944)(double payment recoverable under Workmen's Compensation Law not a penalty because statute refers to double compensation); Cox v. Lykes Bros., 237 NY 376, 379 (2924)(double payment available to seaman for late wages not a penalty)...

We have also indicated that the determination of whether a certain provision constitutes a penalty may vary depending on the

context. In Cox, then Judge Cardozo wrote: 'We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer. The nature of the problem will determine whether we are to take one viewpoint or the other'...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...The antitrust treble damages statute also does not state that such damages are compensatory (compare Bogartz, 293 NY ay 565). Nor does its legislative history clearly indicate a compensatory purpose. Read together, we conclude that Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned. Although one third of the award unquestionably compensates a plaintiff for actual damages, the remainder necessarily punishes antitrust violations, deters such behavior (the traditional purpose of penalties) or encourages plaintiffs to commence litigation-or some combination of all

three...

Where a statute is already designed to foster litigation through an enhanced award, CPLR 901(b) acts to restrict recoveries in class actions absent statutory authorization... Finally, we decline to reach the issue of whether Sperry may maintain a class action under the Donnelly Act by forgoing treble damages in favor of actual damages. This issue is not properly before us").

Telephone Consumer Protection Act (47 USC 227)

8] Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc., 22 AD3d 148 (2d Dept. 2005)("The issue presented is whether this class action may be maintained for alleged violations of the federal Telephone Consumer Protection Act of 1991...in light of CPLR 901(b). We hold that it may not...The plaintiff asserts that CPLR 901(b) is not applicable by its terms because, under federal case law, a class action is permitted unless otherwise expressly prohibited...However the courts of this state have not interpreted silence on the issue of class actions in state or federal statutes to be, by implication, 'specific authorization' to commence a class action within the meaning of CPLR 901(b) (citing 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)).

Consumer Cases: General Business Law 349

9] Cox v. Microsoft Corp., 8 AD3d 39 (1st Dept. 2004)("A cause of action under (GBL 349) is stated by plaintiffs' allegations that Microsoft engaged in purposeful, deceptive monopolistic (GBL 340 cause of action not asserted) business practices...and that such practices resulted in artificially inflated prices for defendant's products and denial of consumer access to competitors' innovations, services and products...

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

Nassau County Hotel Taxes

10] County of Nassau v. Expedia, Inc., 120 AD3d 1181 (2d Dept. 2014)("the 'waiver' exception to CPLR 901(b) does not apply where a penalty is mandatory and cannot be waived (citing Asher, supra). Here, the plaintiff (County of Nassau) cannot obtain class certification of this action because, under the plaintiff's own Hotel Tax law, it is required to recover a 'penalty' of 5% of the amount of the tax allegedly due from the appellants within the meaning of CPLR 901(b), the recovery of which in a class action is not specifically authorized in the Hotel Tax law, and the imposition of which cannot be waived").

Arts And Cultural Affairs Law 25.33

11] Pires v. Bowery Presents, LLC, 44 Misc. 3d 704 (N.Y. Sup. 2014)("There is no dispute between the parties that Arts and Cultural Affairs Law 25.33 provides a minimum level of recovery to an injured consumer in the amount of $50...'any person injured

by an article 25 violation 'may...recover...actual damages or [$50], whichever [amount] is greater'. Pires claims she may bring this class action, however, because she had waived her right to the minimum level of recovery and she seeks only actual damages on behalf of herself and the class. In certain instances, our courts have recognized plaintiff's right to waive statutory penalties or minimum levels of recovery in order to maintain a class action...

Based on the statutory language found in Arts and Cultural Affairs Law 25.33-which is nearly identical to the language in (GBL) 349(h) in providing that a plaintiff may 'recover his actual damages or fifty dollars, whichever is greater'-I am compelled to find that Pires may waive the statutory minimum level of recovery and seek the lesser amount of actual damages in a class action").

Labor Law

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

13] Galdamez v. Biordi Constr. Corp., 50 AD2d 357 (1st Dept. 2008)("The provision in CPLR 901(b) does not bar a class action t recover unpaid wages and benefits due pursuant to the applicable prevailing rate of wages and supplemental benefits, so long as putative class members are afforded the opportunity to opt-out of the class to pursue the statutory remedy for liquidated damages and penalties").

14] Picard v. Bisbee Enters.,Inc., 40 Misc. 3d 1240 (Albany Sup. 2013)(penalty under Labor Law 198(1-a) waived).

15] Thomas v. Meyers Associates, L.P., 39 Misc. 3d 1217 (N.Y. Sup. 2013)(Labor Law 190 penalties waivable).

16] Krebs v. The Canyon Club, Inc., 22 Misc. 3d 1125 (West. Sup. 2009)("New York law allows plaintiffs to waive their liquidated damages claim for overtime wage class actions 'as long as putative class members are given the opportunity to opt out of the class in order pursue their own liquidated damages claims'...This Court therefore concludes that the fact that Krebs has waived for herself claims to statutory liquidated damages does not render her an inadequate class representative, provided that the notice to be sent to the class informs class members of their right to opt-out, informs them of their right to seek

liquidated damages by opting-put, informs them that they may preserve their claims for liquidated damages by opting-out and gives them instructions on how to opt-out").

17] Moreno v. Future Care Health Services, Inc., 43 Misc. 3d 1202 (N.Y. Sup. 2014)(home health care workers allege that 'defendants have improperly classified (them) as 'live-in' employees, paying them a flat-rate that does not satisfy the minimum wage and overtime pay requirements for all of the hours they worked"; various statutory violations alleged; "plaintiffs contend that they permitted, and have waived, the right to seek liquidated damages thus falling outside the prohibition of CPLR 901(b)").

Tenants: Rent Stabilization Law 26-516(a)

18] Dugan v. London Terrace Gardens, L.P., 45 Misc. 3d 362 (N.Y. Sup. 2013)("The Rent Stabilization Law and Rent Control Law and their implementing regulations provide for treble damages as a penalty for a wilful rent overcharge...Plaintiffs elect to waive the penalty on behalf of the class, however, seeking only compensatory relief for the actual amounts of overcharges plus interest. Class members may opt out of the class to pursue the statutory penalty against defendant. Contrary to defendant's insistence that a class representative may not forgo the class's

claim for a statutory penalty to circumvent CPLR 901(b), a waiver is permitted as long as (1) the penalty is neither mandatory nor the sole measure of recovery and (2) class members retain the right to opt out of the class to pursue the punitive relief...the treble damages provision in Administrative Code 26-413(d)(2) and 26-516(a) and 9 NYCRR 2206.8(b)(1) and 2526.1(a) supplement the recovery of overcharges and may be awarded only upon a finding of willfulness or bad faith.

Therefore the treble damages are neither a sole means of recovery for rent overcharge claims nor mandatory and may be waived on behalf of a class...Consequently, plaintiffs' waiver of treble damages and allowance for class members to opt out of the class permit plaintiffs to proceed as a class action despite CPLR 901(b)'s prohibition against a class action that seeks a statutory penalty...Although Administrative Code 26-516(a) and 9 NYCRR 2526.1(a) denominate plaintiffs' class wide claims for rent overcharges plus interest and attorneys' fees a 'penalty' such a term alone is not dispositive. Interest and attorneys' fees, as well as reimbursement of overcharges, are in fact, compensatory forms of relief and thus do not bar class certification under CPLR 901(b)").

19] Borden v. 400 E. 55th St. Assoc., L.P., 24 N.Y.3d 382 (2014)("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...'if the members of a class who would be entitled to a penalty sue only for their actual damages, they may do so in a class action'(Mem of St Consumer Protection Bd at 4, Bill Jacket, L 1975, ch 207). 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...The legislature paid particular attention to the Bankers Association and Empire State Chamber of Commerce when devising CPLR 901(b) and their fear that plaintiffs would receive penalties far above their 'actual damages sustained'...The legislature added CPLR 901(b) specifically to address this fear, intending to limit class actions to actual damages. 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...Regardless of the nomenclature, even if the Administrative Code and Policy Statement had consistently called the compensatory overcharge a penalty, the Administrative Code's terminology alone would not be dispositive. Judge Cardozo eruditely observed that although a statute spoke of a payment due 'as a penalty' it is only so 'in a loose sense' and '[f]orms and phrases of this kind, accurate enough for rough identification or convenient description, do not carry us very far' in determining the statutory meaning (Cox v. Lykes Bros., 237 NY 376, 380 (1924)). Continuing, he cautioned us 'to remember that the 'same provision may be penal as to the offender and remedial as to the sufferer' and '[t]he nature of the problem will determine whether we are to take one viewpoint or the other'...

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 waiver 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].