

NEW YORK STATE CLASS ACTIONS: MAKING IT WORK–
FULFILLING THE PROMISE: SOME RECENT POSITIVE
DEVELOPMENTS AND WHY CPLR 901(B) SHOULD BE
REPEALED

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I. INTRODUCTION

In 2010, *New York State Class Actions: Make It Work–Fulfill the Promise* (hereinafter “*Make It Work*”) was published.¹ *Make It Work* discussed the legislative history of Article 9 of New York’s Civil Practice Law & Rules (CPLR sections 901–909) and the less than enthusiastic implementation of this salutary statute by many New York courts over the last thirty-five years.² *Make It Work* encouraged the courts, especially the New York State Court of Appeals, to take a more active role in interpreting and

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¹ Thomas A. Dickerson, *New York State Class Actions: Make It Work–Fulfill the Promise*, 74 ALB. L. REV. 711 (2010) [hereinafter *Make It Work*].

² *Make It Work*, *supra* note 1, at 714–18.

implementing CPLR sections 901–909.³ *Make It Work* also discussed the need to repeal CPLR section 901(b).⁴

Since *Make It Work* was published there have been several positive developments in how New York state trial courts, the First Department and Second Department of the Appellate Division, and the Court of Appeals have interpreted and implemented CPLR sections 901–909.⁵ We will discuss several reported decisions suggesting a significant change in judicial attitude.

As far as CPLR section 901(b) is concerned, the United States Supreme Court in *Standard Fire Insurance Co. v. Knowles*⁶ has rendered yet another decision which, along with its earlier decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,⁷ supports the concept that this unnecessary limiting device should be repealed. First, it is now useless in prohibiting class actions seeking a statutory penalty or minimum recovery (hereinafter penalty class actions) since such a class action can now be brought in federal court.⁸ Second, CPLR section 901(b) has led to inconsistent applications since some types of penalty class actions have been certified while others have not.⁹ Third, in order to certify some penalty class actions, plaintiffs must, prior to certification, waive any claim for a penalty or minimum recovery thus raising important issues of adequacy of representation.¹⁰

II. RECENT POSITIVE DEVELOPMENTS¹¹

Since *Make It Work* was published in 2010, several New York trial courts, the First and Second Departments of the Appellate Division, and the New York State Court of Appeals have expanded the use of CPLR Article 9.

³ See *id.* at 729.

⁴ *Id.* at 725–26.

⁵ See *infra* Part II.

⁶ *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

⁷ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

⁸ See *infra* Part III.A.

⁹ See *infra* Part III.B.

¹⁰ See *infra* Part III.C.

¹¹ Versions of Part II of this article originally appeared in Thomas A. Dickerson et al., Summary of New York State Class Actions in 2012, N.Y.L.J., Dec. 28, 2012, at 4 col. 1 [hereinafter *Class Actions 2012*] and THOMAS A. DICKERSON, CONSUMER LAW 2013: THE JUDGE'S GUIDE TO FEDERAL AND NEW YORK STATE CONSUMER PROTECTION STATUTES 13–18 (2013), available at http://www.nycourts.gov/courts/9jd/TacCert_pdfs/Dickerson_Docs/CONSUMERLAW2013ONLINE.pdf [hereinafter *CONSUMER LAW*].

A. *The Rebirth of General Business Law Section 350*

In 1975 and 1980, the New York State Legislature enacted two important salutary statutes—the first procedural and the second substantive.¹² The first, Article 9 of the CPLR, pertains to class actions.¹³ The second created a private right of action for the enforcement of General Business Law (hereinafter “GBL”) section 349 (misleading and deceptive business practices) and GBL section 350 (false advertising).¹⁴ As was noted in *Make It Work*, however, the courts have not made CPLR Article 9 class actions readily available to consumers and others.¹⁵ Beginning in 1986 the courts imposed an individual reliance requirement onto consumer plaintiffs’ GBL section 349 and 350 claims.¹⁶ There is no statutory authority for this imposition yet it has effectively rendered GBL section 350 claims unavailable to consumers in class actions for over twenty-five years.¹⁷

In *Koch v. Acker, Merrall & Condit Co.*,¹⁸ the Court of Appeals

¹² See Act of June 17, 1975, ch. 207, 1975 N.Y. Sess. Laws 313 (McKinney) (codified at N.Y. C.P.L.R. 901–909); Act of June 19, 1980, ch. 346, sec. 1, § 349(h), 1980 N.Y. Laws 1303.

¹³ See 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE: CPLR ¶ 901.04 (David L. Ferstendig ed., 2d. ed. 2013).

¹⁴ Joseph Thomas Moldavan, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 BROOK. L. REV. 509, 509 (1982).

¹⁵ *Make It Work*, supra note 1, at 715 (“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 at approximately forty percent of its intended potential.” (footnote omitted)).

¹⁶ See *Dank v. Sears Holding Mgmt. Corp.*, 93 A.D.3d 627, 627–28, 940 N.Y.S.2d 648, 650 (App. Div. 2d Dep’t 2012); *Morrissey v. Nextel Partners, Inc.*, 72 A.D.3d 209, 217, 895 N.Y.S.2d 580, 588 (App. Div. 3d Dep’t 2010); *Klein v. Robert’s Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 72, 808 N.Y.S.2d 766, 773–74 (App. Div. 2d Dep’t 2006); *Gale v. IBM Corp.*, 9 A.D.3d 446, 447, 781 N.Y.S.2d 45, 47 (App. Div. 2d Dep’t 2004); *Gershon v. Hertz Corp.*, 215 A.D.2d 202, 203, 626 N.Y.S.2d 80, 81 (App. Div. 1st Dep’t 1995) (“Plaintiff’s cause of action under [GBL section] 350 for false advertising is legally insufficient absent an allegation that he relied upon or even knew of defendant’s advertising.”); *Bello v. Cablevision Sys. Corp.*, 185 A.D.2d 262, 264, 587 N.Y.S.2d 1, 2 (App. Div. 2d Dep’t 1992) (dismissing GBL section 349 and 350 claims “for failure to sufficiently demonstrate reliance”); *Butler v. Caldwell & Cook, Inc.*, 122 A.D.2d 559, 560, 505 N.Y.S.2d 288, 290 (App. Div. 4th Dep’t 1986) (affirming dismissal of plaintiffs’ GBL section 349 and 350 claims because plaintiffs failed to allege facts showing that they “relied to their detriment upon deceptive practices”); *Burns v. Volkswagen of Am., Inc.*, 118 Misc. 2d 289, 291–92, 460 N.Y.S.2d 410, 413 (Sup. Ct. Monroe County 1982), *aff’d*, 97 A.D.2d 977, 468 N.Y.S.2d 1017 (App. Div. 4th Dep’t 1983). The *Burns* court stated that “[a] necessary element of any action based upon deception is reliance.” *Id.* The court cited for authority, however, the 1978 class action case *Strauss v. Long Island Sports, Inc.*, 60 A.D.2d 501, 401 N.Y.S.2d 233 (App. Div. 2d Dep’t 1978), which concerned common law fraud claims and not GBL section 349 or 350 claims. See *id.* at 506, 401 N.Y.S.2d at 235.

¹⁷ See Thomas A. Dickerson & Jeffrey A. Cohen, *Ruling on Reliance in GBL §350 Claims Serves as Game Changer*, N.Y.L.J., Apr. 19, 2012, at 4, col. 1 [hereinafter *Game Changer II*].

¹⁸ *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 967 N.E.2d 675, 944 N.Y.S.2d 452

made it clear that justifiable reliance is not required to state a viable GBL section 350 claim.¹⁹ In *Koch*, the plaintiff alleged, *inter alia*, that the defendant auction house was selling certain wines, which it described as extraordinary.²⁰ The plaintiff claimed, however, that the wines it purchased were actually counterfeit.²¹ The Court of Appeals stated that the Appellate Division, First Department's imposition of a reliance requirement onto GBL section 349 and 350 claims was erroneous and that "[j]ustifiable reliance by the plaintiff is not an element of the statutory claim."²² The *Koch* decision appears to overrule those appellate division cases dating back to 1986 which had imposed such a reliance requirement.²³

For plaintiffs bringing consumer class actions claiming violations of GBL sections 349 and 350, the *Koch* decision is extremely important. Although courts have generally certified consumer class actions alleging violations of GBL section 349,²⁴ prior to the *Koch* decision, courts held that reliance was not subject to class-wide proof and therefore declined to certify GBL section 350 class actions.²⁵

B. Encouraging Language

In *Corsello v. Verizon New York, Inc.*,²⁶ defendant Verizon attached a box to plaintiffs' building which "transmit[ted] telephone communications to and from Verizon's customers in other buildings."²⁷ The Court of Appeals held that the plaintiffs stated a valid inverse condemnation cause of action, that their GBL section 349 claim was time-barred by the statute of limitations, and that

(2012).

¹⁹ *Id.* at 941, 967 N.E.2d at 676, 944 N.Y.S.2d at 453.

²⁰ See *Koch v. Acker, Merrall & Condit Co.*, No. 6012202008, 2009 WL 9115681, at *1 (Sup. Ct. New York County Apr. 8, 2009), *rev'd* 73 A.D.3d 661, 901 N.Y.S.2d 271 (App. Div. 1st Dep't 2010), *rev'd* 18 N.Y.3d 940, 967 N.E.2d 675, 944 N.Y.S.2d 452 (2012).

²¹ *Koch v. Acker, Merrall & Condit Co.*, 73 A.D.3d 661, 661, 901 N.Y.S.2d 271, 271 (App. Div. 1st Dep't 2010), *rev'd*, 18 N.Y.3d 940, 967 N.E.2d 675, 944 N.Y.S.2d 452 (2012).

²² *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941, 967 N.E.2d 675, 676, 944 N.Y.S.2d 452, 453 (2012) (citing *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55, 720 N.E.2d 892, 897, 698 N.Y.S.2d 615, 620 (1999)). Previously, the Court of Appeals had never expressly stated that GBL section 350 claims include a reliance requirement; however, the court did state that "[t]he standard for recovery under General Business Law 350, while specific to false advertising, is otherwise identical to section 349." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 324 n.1, 774 N.E.2d 1190, 1195 n.1, 746 N.Y.S.2d 858, 863 n.1 (2002).

²³ See cases cited *supra* note 16.

²⁴ See 3 WEINSTEIN, KORN & MILLER, *supra* note 13, ¶ 901.23[6][a].

²⁵ See *id.* ¶ 901.23[6][b] n.113.

²⁶ *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 967 N.E.2d 1177, 944 N.Y.S.2d 732 (2012).

²⁷ *Id.* at 781–82, 967 N.E.2d at 1179, 944 N.Y.S.2d at 734.

their unjust enrichment claim was legally insufficient.²⁸ In terms of class certification, the court 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.²⁹ The Court of Appeals, however, upheld the lower courts’ denial of class certification holding that the named plaintiff was an inadequate class representative because his claims were atypical and subject to waiver and therefore did not meet the “predominance” and “typicality” requirements of CPLR sections 901(a)(2) and 901(a)(3).³⁰

C. No Fault Insurance Claims & Sua Sponte Certification

In *Globe Surgical Supply v. GEICO Insurance Co.*,³¹ medical equipment suppliers brought a class action claiming that the defendant violated certain regulations promulgated “pursuant to the no-fault provisions of the Insurance Law, by systematically reducing its reimbursement for medical equipment and supplies.”³² Plaintiffs claimed that the reductions were improperly based on “the prevailing rate in the geographic location of the provider,” or “the reasonable and customary rate for the item billed.”³³ The Appellate Division, Second Department denied class certification holding that the named plaintiff was an inadequate class representative.³⁴ The denial, however, was without prejudice

²⁸ *Id.* at 782, 967 N.E.2d at 1179, 944 N.Y.S.2d at 734.

²⁹ *Id.* at 791, 967 N.E.2d at 1186, 944 N.Y.S.2d at 741.

³⁰ *Id.* at 792, 967 N.E.2d at 1186–87, 944 N.Y.S.2d at 741–42. A plaintiff must satisfy several prerequisites in order to bring a CPLR Article 9 class action. See N.Y. C.P.L.R. 901 (McKinney 2013). CPLR section 901(a)(2) requires that “there are questions of law or fact common to the class which predominate over any questions affecting only individual members.” C.P.L.R. 901(a)(2). CPLR section 901(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” C.P.L.R. 901(a)(3). The *Corsello* court stated

that individual issues predominated defeating typicality because, inter alia, plaintiff gave defendant “oral permission” to attach a terminal box. In addition, defendant produced a 1911 document stating “[p]ermission is hereby granted” for the attachment of a “[c]able with terminal box” on the rear wall of the building plaintiffs now own. Class Actions 2012, *supra* note 11, at 4, col. 1 (alterations in original) (quoting *Corsello*, 18 N.Y.3d at 792, 967 N.E.2d at 1186, 944 N.Y.S.2d at 741).

³¹ *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 871 N.Y.S.2d 263 (App. Div. 2d Dep’t 2008).

³² *Id.* at 130, 871 N.Y.S.2d at 264.

³³ *Id.*

³⁴ *Id.* at 144–45, 871 N.Y.S.2d at 274–75.

thereby allowing plaintiffs to reapply for class treatment once an adequate class representative could be located.³⁵

In *Amer-A-Med Health Products, Inc. v. GEICO Insurance Co.*³⁶ and *O'Brien v. GEICO Insurance Co.*,³⁷ the trial court certified the class *sua sponte* finding that the proposed intervenor was an adequate class representative.³⁸ The court noted that since the Appellate Division, Second Department already ruled that the plaintiff satisfied the criteria in CPLR sections 901 and 902,³⁹ requiring the plaintiff to bring a motion to demonstrate satisfaction of such criteria “would be illogical and redundant.”⁴⁰ The Appellate Division, Second Department approved on appeal the use of *sua sponte* class certification but remitted the matter to the trial court “for the entry of an order pursuant to CPLR 903 describing the certified class.”⁴¹

D. Helping Tenants

In *Downing v. First Lenox Terrace Associates*,⁴² the plaintiffs, which consisted of a class of tenants or former tenants of a residential complex, alleged that the owners “unlawfully deregulated their apartments under the luxury decontrol provisions of Rent Stabilization Law (Administrative Code of City of NY) 26-501 *et seq.*, [(hereinafter “RSL”)] while receiving tax incentive benefits under the City of New York’s J-51 program.”⁴³ Plaintiffs sought “a declaration that all apartments in the complex are subject to rent stabilization, injunctive relief, and a money judgment.”⁴⁴ Plaintiffs also waived their original request for treble damages pursuant to RSL section 26-516(a) and sought “only reimbursement of the alleged rent overcharges plus interest.”⁴⁵ The defendant moved to dismiss based on CPLR section 901(b) arguing that RSL

³⁵ *Id.* at 146, 871 N.Y.S.2d at 276.

³⁶ *Amer-A-Med Health Prods., Inc. v. GEICO Ins. Co.*, No. 9808/04, 2011 N.Y. Misc. LEXIS 1560 (Sup. Ct. Nassau County Apr. 4, 2011).

³⁷ *O'Brien v. GEICO Ins. Co.*, No. 009808/04 (Sup. Ct. Nassau County July 19, 2011).

³⁸ *Amer-A-Med Health Prods., Inc.*, 2011 N.Y. Misc. LEXIS 1560, at *12; *O'Brien*, No. 009808/04, slip op. at 2–3.

³⁹ *See Globe*, 59 A.D.3d at 135–46, 871 N.Y.S.2d at 268–76.

⁴⁰ *O'Brien*, No. 009808/04, slip op. at 2.

⁴¹ *O'Brien v. GEICO Ins. Co.*, 99 A.D.3d 683, 685, 951 N.Y.S.2d 725, 726 (App. Div. 2d Dep’t 2012).

⁴² *Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 965 N.Y.S.2d 9 (App. Div. 1st Dep’t 2013).

⁴³ *Id.* at 88, 965 N.Y.S.2d at 10.

⁴⁴ *Id.*

⁴⁵ *Id.*

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section 26-516(a)'s penalty provisions "are mandatory and cannot be waived."⁴⁶ The Appellate Division, First Department denied defendant's motion to dismiss and thereby expanded the application of CPLR Article 9 by permitting plaintiffs to waive RSL section 26-516(a)'s penalties by seeking only actual damages consisting of rent overcharges plus interest.⁴⁷

E. Internet Sales Tax

In *County of Nassau v. Expedia, Inc.*,⁴⁸ Nassau County sought on behalf of a class of fifty-six local governmental agencies to enforce its Hotel and Motel Tax Law and other similar taxing statutes throughout New York State against certain online sellers of hotel accommodations.⁴⁹ The defendants' businesses consist of purchasing "blocks of rooms from hotels and motels at discounted rates and then resell[ing] the rooms to members of the public via the internet."⁵⁰ According to the county, "the tax owed under the Hotel and Motel Tax Law is correctly calculated as a percentage of

⁴⁶ *Id.* at 89, 965 N.Y.S.2d at 11.

⁴⁷ *See id.* ("[E]ven where a statute creates or imposes a penalty, the restriction of CPLR 901(b) is inapplicable where the class representative seeks to recover only actual damages and waives the penalty on behalf of the class, and individual class members are allowed to opt out of the class to pursue their punitive damages claims." (citing *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40, 778 N.Y.S.2d 147, 148–49 (App. Div. 1st Dep't 2004); *Pesantez v. Boyle Envtl. Servs., Inc.*, 251 A.D.2d 11, 12, 673 N.Y.S.2d 659, 660 (App. Div. 1st Dep't 1998); *Ridge Meadows Homeowners' Ass'n v. Tara Dev. Co.*, 242 A.D.2d 947, 947, 665 N.Y.S.2d 361, 361 (App. Div. 4th Dep't 1997); *Super Glue Corp. v. Avis Rent A Car Sys.*, 132 A.D.2d 604, 606, 517 N.Y.S.2d 764, 767 (App. Div. 2d Dep't 1987).

See also *Casey v. Whitehouse Estates, Inc.*, No. 111723/11, 2012 N.Y. Misc. LEXIS 3729 (Sup. Ct. New York County Aug. 6, 2012), which involved a class of tenants seeking reimbursement stemming from defendants' alleged overcharging of rent. *Id.* at *2. Plaintiffs alleged that the landlord was deregulating its apartments pursuant to the RSL's luxury decontrol amendments and obtaining "tax abatements and exemptions for rehabilitative work done to [its] buildings" under the J-51 program. *Id.* at *1. Plaintiffs claimed that the landlord illegally charged them market rents "to keep the apartments rent stabilized" in violation of the J-51 program. *Id.* at *2. The court granted class certification, holding that CPLR section 901(b) did not prohibit class treatment, despite the RSL's penalty provisions, because plaintiffs could waive the penalty provisions and additionally the defendant's good faith prevented the triggering of the penalty provisions anyway. *Id.* at *5–9, *16. The court stated that the named plaintiffs and class members sought the common goal "that the landlord charge[] tenants . . . no more than the maximum legal rent." *Id.* at *13.

⁴⁸ *County of Nassau v. Expedia, Inc.*, No. 013818/11, 2013 N.Y. Misc. LEXIS 4189 (Sup. Ct. Nassau County Apr. 11, 2013); *see also* *County of Nassau v. Hotels.com, LP*, 594 F. Supp. 2d 251, 252, 258–59 (E.D.N.Y. 2007) (dismissing a related putative federal class-action lawsuit by Nassau and similarly situated counties against seventeen online sellers of hotel accommodations for lack of subject-matter jurisdiction), *vacated and remanded*, 577 F.3d 89 (2d Cir. 2009).

⁴⁹ *Expedia*, 2013 N.Y. Misc. LEXIS 4189, at *1.

⁵⁰ *Id.*

the price that occupants pay to the defendant resellers.”⁵¹ The county claimed, however, “that the online sellers collect the 3% hotel tax from consumers based on retail rooms rates but remit to the County only the portion of the tax based on defendants’ lower ‘wholesale’ rate.”⁵²

The trial court certified the class action relying upon the recent Court of Appeals’ decision in *Overstock.com, Inc. v. New York State Department of Taxation and Finance*⁵³ noting “that [although] there is some variation in the tax rate among the different taxing authorities[,] . . . the ‘means and manner’ of collecting the taxes is sufficiently similar.”⁵⁴ The court therefore found that the plaintiffs satisfied the predominance requirement of CPLR section 901(a)(2).⁵⁵

Throughout the United States, taxing authorities have similarly sought to impose sales taxes on Internet travel sellers⁵⁶ and

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, 20 N.Y.3d 586, 987 N.E.2d 621, 965 N.Y.S.2d 61 (2013).

⁵⁴ *Expedia*, 2013 N.Y. Misc. LEXIS 4189, at *3–4. See generally CONSUMER LAW, *supra* note 11, at 310 n.31 (“The increasing use of the Internet to market and sell goods and services to residents of this state is changing the way we look at the threshold issue of ‘presence’ both from the standpoint of the assertion of personal jurisdiction and the power to tax retail sales.”). For example, in *Overstock.com, Inc.*, plaintiffs challenged the constitutionality of Tax Law section 1101(b)(8)(vi) (the Internet tax). *Overstock.com, Inc.*, 20 N.Y.3d at 590, 987 N.E.2d at 622, 965 N.Y.S.2d at 62. The Court of Appeals rejected the constitutional challenge noting that the physical presence test may be outdated due to the dramatic technological changes over the last twenty years. *Id.* at 595, 987 N.E.2d at 625, 965 N.Y.S.2d at 65. The court stated that “[a]n entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet.” *Id.* The court, however, “relied upon a more traditional concept of ‘presence’ by the apparent agency of Overstock’s web ‘affiliates’ and Amazon’s web ‘associates’ through which the Court found that ‘Active, in-state solicitation that produces a significant amount of revenue qualifies as demonstrably more than a significant presence.’” CONSUMER LAW, *supra* note 11, at 311 n.31. (quoting *Overstock, Inc.*, 20 N.Y.3d at 595, 987 N.E.2d at 626, 965 N.Y.S.2d at 66). In dissent, Judge Smith “disagreed with the majority’s characterization of web affiliates and associates as ‘sales agents.’” CONSUMER LAW, *supra* note 11, at 311 n.31 (quoting *Overstock, Inc.*, 20 N.Y.3d at 598, 987 N.E.2d at 628, 965 N.Y.S.2d at 68 (Smith, J. dissenting)).

⁵⁵ *Expedia*, 2013 N.Y. Misc. LEXIS 4189, at *4.

⁵⁶ In fact, throughout the country plaintiffs have brought numerous cases on facts similar to *County of Nassau v. Expedia, Inc.* See, e.g.,

Federal Courts

Third Circuit: *Township of Lyndhurst v. Priceline.com, Inc.*, 657 F.3d 148, 150, 159 (3d Cir. 2011) (dismissing complaint on prudential grounds); *City of Philadelphia v. Hotels.com*, No. 05-4391, 2005 U.S. Dist. LEXIS 23354, at *2, *14 (E.D. Pa. Oct. 11, 2005) (remanding to Court of Common Pleas of Pennsylvania).

Fourth Circuit: *City of Charleston v. Hotels.com, LP*, 520 F. Supp. 2d 757, 762–63, 776 (D.S.C. 2007) (denying motion to dismiss complaint).

Fifth Circuit: *City of San Antonio v. Hotels.com*, No. SA-06-CA-381-OG, 2008 U.S. Dist. LEXIS 58793, at *3, *59 (W.D. Tex. May 27, 2008) (granting motion for class certification); *City of Orange v. Hotels.com, LP*, No. 1:06-CV-413, 2007 U.S. Dist. LEXIS 70482, at *3 (E.D.

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consumers have challenged Internet travel sellers' alleged misrepresentations of the purpose of certain tax charges and fees.⁵⁷

Tex. Sept. 21, 2007) (dismissing complaint with prejudice).

Sixth Circuit: Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com, L.P., 590 F.3d 381, 383, 390 (6th Cir. 2009); City of Findlay v. Hotels.com, L.P., 441 F. Supp. 2d 855, 857, 861 (N.D. Ohio 2006) (holding that if the city's allegations were true, the defendants had a duty "to remit the transient guest taxes they collected").

Seventh Circuit: Village of Rosemont v. Priceline.com, Inc., No. 09 C 4438, 2011 U.S. Dist. LEXIS 119231, at *2-3 (N.D. Ill. Oct. 14, 2011) (holding that Priceline.Com, Travelweb, LLC, Travelocity.com, Site 59.com LLC, Expedia, Inc., Hotels.com, and Hotwire, Inc. must pay full amount of local hotel tax); City of Fairview Heights v. Orbitz, Inc., No. 05-CV-840-DRH, 2008 U.S. Dist. LEXIS 25646, at *4, *12 (S.D. Ill. Mar. 31, 2008) (denying class certification).

Eighth Circuit: City of Goodlettsville v. Priceline.com, Inc., No. 3:08-cv-00561, 2011 U.S. Dist. LEXIS 45597, at *4-5 (M.D. Tenn. Apr. 27, 2011); City of Goodlettsville v. Priceline.com, Inc., 267 F.R.D. 523, 527, 536 (M.D. Tenn. 2010) (granting class certification).

Eleventh Circuit: County of Monroe v. Priceline.com, Inc., 265 F.R.D. 659, 663, 672 (S.D. Fla. 2010) (granting class certification); Brevard County v. Priceline.com, Inc., No. 6:09-cv-1695-Orl-31KRS, 2010 U.S. Dist. LEXIS 16458, at *2 n.1 (M.D. Fla. Feb. 24, 2010) ("Plaintiff's case is nearly identical to twelve other suits that have been brought by Florida municipalities . . . and is similar to some forty-five other cases that have been filed against Defendants and other online travel companies throughout the country."); Leon County v. Hotels.com, L.P., No. 06-21878-CIV-HUCK/SIMONTON, 2006 U.S. Dist. LEXIS 88253, at *3-4, *8 (S.D. Fla. Dec. 6, 2006) (denying motion to dismiss class action complaint).

State Courts

Georgia: Hotels.com, L.P. v. City of Columbus, 686 S.E.2d 91, 91-92 (Ga. 2009) (holding that, to the extent Hotels.com elects to collect hotel occupancy taxes, Hotels.com must remit the taxes to the city); Expedia, Inc. v. City of Columbus, 681 S.E.2d 122, 124-125, 127 (Ga. 2009) (holding that online travel company must remit hotel occupancy excise taxes collected from consumers to taxing authority).

Kentucky: City of Bowling Green v. Hotels.com, L.P., 357 S.W.3d 531, 532, 533-34 (Ky. Ct. App. 2011).

Missouri: St. Louis County v. Prestige Travel, Inc., 344 S.W.3d 708, 710, 714 (Mo. 2011) (holding that online travel company is not subject to hotel or tourism taxes).

New York: Expedia, Inc. v. City of New York Dep't of Fin., 89 A.D.3d 640, 641, 934 N.Y.S.2d 123, 124 (App. Div. 1st Dep't 2011) (holding that occupancy tax legislation did not allow for imposition of tax on service fees).

Pennsylvania: City of Philadelphia v. Hotels.com, 2006 Phila. Ct. Com. Pl. LEXIS 218, at *1 (C.P. Philadelphia County May 25, 2006) (dismissing complaint for lack of subject matter jurisdiction).

South Dakota: Choice Hotels Int'l, Inc. v. S.D. Dep't of Revenue & Regulation, 711 N.W.2d 926, 927 (S.D. 2006) (holding that travel agent commissions are exempt from sales taxes but fees collected by franchisor from franchisee for customer incentive programs are taxable).

⁵⁷ See e.g.,

Federal Courts

Second Circuit: Chiste v. Hotels.com L.P., 756 F. Supp. 2d 382, 395-96, 421 (S.D.N.Y. 2010) (sustaining GBL section 349 claim).

Ninth Circuit: Sneddon v. Hotwire, Inc., Nos. C 05-0951 SI, C 05-0952 SI, C 05-0953 SI, 2005 U.S. Dist. LEXIS 13257, at *2, *3 (N.D. Cal. June 29, 2005) (granting motion to remand).

State Courts:

Delaware: Marshall v. Priceline.com, Inc., No. 05C-02-195 WCC, 2010 Del. Super. LEXIS 104, at *1, *4 (Del. Super. Ct. Mar. 8, 2010) (granting summary judgment for defendant); Marshall v. Priceline.com, Inc., No. 05C-02-195 WCC, 2006 Del. Super. LEXIS 447, at *2, *20-21 (Del. Super. Ct. Oct. 31, 2006).

Texas: Okland v. Travelocity.com, Inc., No. 2-08-260-CV, 2009 Tex. App. LEXIS 4646, at *1-2 (Tex. Ct. App. June 18, 2009) (dismissing third amended petition for lack of subject matter

III. REASONS FOR REPEAL

A. *Shady Grove: CPLR Section 901(b) Circumvented*

In *Make It Work* we observed that the proponents of CPLR section 901(b), such as the Empire State Chamber of Commerce,⁵⁸ encouraged the New York State Legislature⁵⁹ in 1975 to engraft a unique “governor,”⁶⁰ that is, CPLR section 901(b),⁶¹ onto an

jurisdiction); *Hotels.com, L.P. v. Canales*, 195 S.W.3d 147, 149 (Tex. Ct. App. 2006) (reversing and remanding).

⁵⁸ See Memorandum 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. The Empire State Chamber of Commerce (“ESCC”) stated that “[a] class action statute should limit any monetary recovery . . . to the actual damages sustained. . . . Penalties and class actions simply do not mix.” *Id.* To support their position, ESCC cited *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972), wherein a penalty class action “caused a potential liability of \$130,000,000 although the actual damages to individual plaintiffs were zero!” *Id.* The ESCC stated that CPLR section 901(b) would mitigate this injustice by prohibiting penalty class actions “unless a statute creating or imposing a penalty or other minimum recovery specifically authorizes the recovery thereof in a class action.” *Id.*

⁵⁹ See *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 211, 863 N.E.2d 1012, 1015, 831 N.Y.S.2d 760, 763 (2007) (“While the Legislature considered the Judicial Conference report, various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty or minimum measure of recovery, except when expressly authorized in the pertinent statute. . . . These groups feared that recoveries beyond actual damages could lead to excessively harsh results, particularly where large numbers of plaintiffs were involved. . . . Responding to these concerns, the Legislature amended the legislation to include a new subdivision—CPLR 901(b) . . .”).

⁶⁰ See THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES § 4.03[6] (2013) [hereinafter CLASS ACTIONS]. While it is true that other states limit the use of the class action device by, *inter alia*, taxpayers, see, e.g., *Ga. Dep’t of Revenue v. Roof*, 690 S.E.2d 442, 443 (Ga. Ct. App. 2010) (“According to the Supreme Court of Georgia, ‘[t]he General Assembly has expressly refused to extend the waiver of sovereign immunity in an action for sales tax refund to a taxpayer acting in a representative capacity for fellow taxpayers.’” (alteration in original) (quoting *Sawnee Elec. Membership Corp. v. Ga. Dep’t of Revenue*, 608 S.E.2d 611, 614 (Ga. 2005))), *Chadwick 99 Assocs. v. Dir., Div. of Taxation*, 23 N.J. Tax 390, 410 (N.J. Tax Ct. 2007) (“[T]he weight of authority is that appeals of local property tax assessments may not be maintained as a class action, regardless of whether the action is brought as a conventional tax appeal or under a theory such as that relied upon by plaintiffs here.”), and consumers alleging violations of state antitrust statutes, see, e.g., *Gaebler v. N.M. Potash Corp.*, 676 N.E.2d 228, 230 (Ill. App. Ct. 1996) (holding that class action by indirect purchasers of potash cannot be brought under Illinois Antitrust Act; only the Attorney General may file such an action), *Gen. Supplies, Inc. v. Southwire Co.*, 275 S.E.2d 579, 580 (S.C. 1981) (“We thus have only one issue to deal with: Does [s]ection 39-3-30 of the South Carolina antitrust legislation allow prosecution of these actions as class actions? We conclude it does not.”). The language of CPLR section 901(b) is relatively unique in prohibiting a broad class of class actions alleging the violation of any statute which provides for the imposition of a “penalty, or a minimum measure of recovery” not otherwise authorized by said statute. N.Y. C.P.L.R. 901(b) (McKinney 2013).

⁶¹ CPLR section 901(b) provides: “Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.” C.P.L.R. 901(b).

otherwise healthy and modern class action statute fashioned by the Judicial Conference in 1975 under the leadership of Professor Homburger.⁶² This successful effort was rendered problematic by the U.S. Supreme Court in its 2010 decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*⁶³ which rejected the notion that CPLR section 901(b) should be applied by federal courts (and by implication in other state courts as well)⁶⁴ in class actions alleging violations of New York General Business Law section 340 (the “Donnelly Act”), a treble damages antitrust statute,⁶⁵ and brought under Federal Rule of Civil Procedure (“FRCP”) 23.⁶⁶ After *Shady Grove*, CPLR section 901(b) has become

⁶² Letter from Adolf Homburger to Hon. Judah Gribetz Counsel to the Governor, June 6, 1975, N.Y. Bill Jacket, 1975 A.B. 1252-B, 198th Leg. Reg. Sess. (1975), ch. 207, at 1. Professor Homburger stated that the original bill recommended to the legislature by the Judicial Conference of the State of New York was “based on a draft [bill] contained in” his Columbia Law Review article entitled *State Class Actions and the Federal Rule*. *Id.* Professor Homburger noted, however, that the modified bill deviates from the original draft in a few respects—one being that it now contains CPLR section 901(b)’s prohibition on penalty class actions unless statutorily authorized. *Id.*; see Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 655–57 (1971).

⁶³ See, e.g.,:

Second Circuit: *Morris v. Alle Processing Corp.*, No. 08-CV-4874 (JMA), 2013 U.S. Dist. LEXIS 90961, at *3–4, *5 (E.D.N.Y. Jun. 27, 2013) (“Post-*Shady Grove*, courts have consistently allowed plaintiffs to amend their pleadings to include claims for liquidated damages under sections 198 and 663 of [the New York Labor Law] that were previously barred by section 901(b). . . . I find that the case law clearly supports my Rule 23 Order allowing plaintiffs to maintain their liquidated damages claims in light of *Shady Grove*.”).

Third Circuit: *Landsman & Funk, P.C., v. Skinder-Strauss Assocs.*, No. 08-3610 (KSH), 2012 U.S. Dist. LEXIS 183249, at *24 (D.N.J. Dec. 19, 2012) (“[T]he state-law limitations embodied in New York’s CPLR 901(b) have no application in this federal-question case in federal court.”).

Sixth Circuit: *Small v. Kmart Holding Corp.*, No. 12-CV-11062, 2013 U.S. Dist. LEXIS 38419 (E.D. Mich. Mar. 20, 2013). In *Small*, defendants claimed that Michigan law barred plaintiffs’ class action alleging violations of the federal Telephone Consumer Protection Act (“TCPA”). *Id.* at *5–6. The TCPA permits private causes of action “if otherwise permitted by the laws or rules of court of a State, . . . in an appropriate court of that State.” *Id.* at *6 (quoting 47 U.S.C. § 227(b)(3) (2006)). Michigan Court Rule 3.501(A)(5) states that “[a]n action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action.” MICH. CT. R. 3.501(A)(5). The court held that “Rule 23 regulates procedure irrespective of its effect on state created rights. . . . Rule 3.501 is not a bar to this action.” *Small*, 2013 U.S. Dist. LEXIS 38419, at *9.

⁶⁴ See, e.g., *Weber v. U.S. Sterling Sec., Inc.*, 924 A.2d 816, 828 (Conn. 2007) (“We agree with the District Court’s conclusion that if we were to determine that 901(b) did not apply to the plaintiff’s claim, we would encourage forum shopping.”).

⁶⁵ N.Y. GEN. BUS. LAW § 340(5) (McKinney 2013).

⁶⁶ See *Shady Grove*, 559 U.S. at 399; Thomas A. Dickerson, *State Class Actions: Game Changer*, N.Y.L.J., Apr. 6, 2010, at 6 col. 4 [hereinafter *Game Changer I*]. *Game Changer I* noted that some plaintiffs have brought class actions in federal court under FRCP 23 in order to avoid CPLR section 901(b)’s prohibition on penalty class actions that are not statutorily authorized because FRCP 23 does not contain such a prohibition. *Id.* Federal courts, however, have routinely applied CPLR section 901(b) to bar such actions on the basis of

relatively useless in prohibiting penalty class actions and encourages forum shopping⁶⁷ because such class actions can now be brought in federal court instead. These developments are compelling reasons for repealing CPLR section 901(b).

B. Inconsistent Applications

A statute which is inconsistently applied should be modified or repealed. In terms of CPLR section 901(b), some New York courts have certified some penalty class actions while others have not.

1. GBL Section 340: The Donnelly Act

In *Sperry v. Crompton Corp.*, the plaintiff commenced a penalty class action seeking damages stemming from rubber-processing chemicals sold by the defendants since 1994.⁶⁸ According to Sperry,

upholding *Erie's* twin mandates of achieving consistent results in federal and state courts and discouraging forum shopping. *Id.*; see, e.g., *Leider v. Ralfe*, 387 F. Supp. 2d 283, 291–92 (S.D.N.Y. 2005). In *Shady Grove* the plaintiff brought a class action in federal court on a diversity basis seeking interest from defendant Allstate. *Shady Grove*, 559 U.S. at 397. The district court held that CPLR section 901(b)'s prohibition on penalty class actions deprived that court of jurisdiction. *Id.* The Second Circuit affirmed holding that CPLR section 901(b) is “substantive” and therefore must be applied by a federal court sitting in diversity in accordance with *Erie*. *Id.* at 398. The United States Supreme Court reversed stating:

The question in dispute is whether Shady Grove's suit may proceed as a class action. . . .

By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because 901(b) attempts to answer the same question—i.e., it states that Shady Grove's suit “may *not* be maintained as a class action” because of the relief it seeks—it cannot apply in diversity suits unless Rule 23 is ultra-vires. . . .

... Rule 23 automatically applies “in all civil actions and proceedings in the United States district courts.”

Id. at 398–99, 400 (quoting C.P.L.R. 901(b) and FED. R. CIV. P. 1.).

Game Changer I predicted that *Shady Grove* could have several possible effects on New York State class actions. Game Changer I, *supra*, at 6 col. 4. First, in order to avoid the impact of CPLR section 901(b), New York residents may increasingly bring class actions in federal rather than state court. *Id.* Second, it could reduce defendants' proclivity to remove CPLR Article 9 class actions to federal court under the Class Action Fairness Act. *Id.* And, third, it could cause the New York State Legislature to rethink the need for CPLR section 901(b). *Id.*

⁶⁷ William H.J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts* 4, 6 (Univ. of Chi. Law Sch. Coase-Sandor Inst. for Law & Econ., Research Paper No. 642, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263481 (noting that the plurality in *Shady Grove* along with scholars, practitioners, and state court judges predicted an increase in forum shopping after *Shady Grove* and finding that “[t]he data largely confirm these predictions”).

⁶⁸ *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 209, 863 N.E.2d 1012, 1013–14, 831 N.Y.S.2d

the “defendants entered into a price-fixing agreement, overcharging tire manufacturers for the chemicals, and [causing] the overcharges [to] trickle[] down the distribution chain to consumers.”⁶⁹ Sperry alleged that such price-fixing constituted a violation of GBL section 340 and sought treble damages pursuant to GBL section 340(5),⁷⁰ which provides that a successful antitrust plaintiff “shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys’ fees.”⁷¹ In deciding that the treble damages provision of GBL section 340(5) was a penalty⁷² for purposes of CPLR section 901(b), the Court of Appeals addressed the legislative history of CPLR Article 9 and also noted that the treble damages provision may provide a sufficient incentive to plaintiffs thus making a class action mechanism unnecessary.⁷³

2. Telephone Consumer Protection Act

In *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*,⁷⁴ the plaintiff claimed that defendants sent unsolicited faxes and sought to recover damages for himself and the class in the “minimum measure of recovery created by the TCPA for a violation (\$500), to be trebled upon a finding that the violation was made willfully or knowingly.”⁷⁵ The court noted that “although the TCPA creates a minimum measure of recovery and imposes a penalty for willful or knowing violations, and the plaintiff is seeking the same, the TCPA does not specifically authorize a class action.”⁷⁶ The court therefore dismissed Rudgayzer’s claim holding that CPLR section

760, 761–62 (2007).

⁶⁹ *Id.* at 209, 863 N.E.2d at 1014, 831 N.Y.S.2d at 762.

⁷⁰ *Id.*

⁷¹ GEN. BUS. LAW § 340(5).

⁷² See the discussion in *Sperry* as to what is or is not a penalty for purposes of CPLR section 901(b) and the court’s rejection of federal authority. *Sperry*, 8 N.Y.3d at 212–15, 863 N.E.2d at 1016–18, 831 N.Y.S.2d at 764–66. The court stated: “We are not persuaded that the outcome of this case is controlled by statements in United States Supreme Court decisions describing the federal antitrust treble damages counterpart as being remedial in nature.” *Id.* at 214–15, 863 N.E.2d at 1017–18, 831 N.Y.S.2d at 765–66.

⁷³ *Id.* at 210–13, 863 N.E.2d at 1014–17, 831 N.Y.S.2d at 762–765 (“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.”).

⁷⁴ *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 22 A.D.3d 148, 799 N.Y.S.2d 795 (App. Div. 2d Dep’t 2005).

⁷⁵ *Id.* at 152, 799 N.Y.S.2d at 798.

⁷⁶ *Id.*

901(b) prohibits a class action seeking a statutory “penalty, or minimum measure of recovery” such as the one provided by the TCPA.⁷⁷ As the Court of Appeals did in *Sperry*, the Court rejected federal authority to the effect that “under federal case law, a class action is permitted unless otherwise expressly prohibited.”⁷⁸ The court stated that “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[] authoriz[ation]’ to commence a class action within the meaning of CPLR 901(b).”⁷⁹

3. General Business Law Sections 349 & 350

GBL section 349 (deceptive acts and practices unlawful) gives consumers and others a private action of enforcement and provides for a monetary recovery of “actual damages or fifty dollars, whichever is greater, or both such actions.”⁸⁰ The statute gives courts discretion to “increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section.”⁸¹ GBL section 350 (false advertising unlawful) gives consumers and others a private right of enforcement and provides for a monetary recovery of “actual damages or five hundred dollars, whichever is greater, or both such actions.”⁸² Similar to section 349(h), section 350-e(3) provides the courts with discretion to “increase the award of damages to an amount not to exceed three times the actual damages, up to ten thousand dollars, if the court finds that the defendant willfully or knowingly violated this section.”⁸³

⁷⁷ *Id.* (quoting N.Y. C.P.L.R. 901(b) (McKinney 2013)) (internal quotation marks omitted).

⁷⁸ *Rudgayzer & Gratt*, 22 A.D.3d at 152, 799 N.Y.S.2d at 798 (citing *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979)).

⁷⁹ *Rudgayzer & Gratt*, 22 A.D.3d at 152, 799 N.Y.S.2d at 798 (alteration in original).

Here, the purpose and objectives of Congress as to private rights of action under the TCPA . . . was not to create a federal private right of action that could not be defeated by the forms of local practice. . . . Stated otherwise, it was to provide such private rights of action only if, and then only to the extent, permitted by state law. Thus, application of CPLR 901(b) to a private right of action under the TCPA would not “impose unnecessary burdens upon rights of recovery authorized by federal law” or “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Rather, it would be completely consistent with the same.

Id. at 155, 799 N.Y.S.2d at 800.

⁸⁰ N.Y. GEN. BUS. LAW § 349(h) (McKinney 2013).

⁸¹ *Id.*

⁸² *Id.* §§ 350, 350-e(3).

⁸³ *Id.* § 350-e(3).

In *Cox v. Microsoft Corp.*, the court found that the plaintiffs stated a viable GBL section 349 cause of action in that Microsoft allegedly

engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors to inhibit competition and technological development, and creating an ‘applications barrier’ in its Windows software that, unbeknownst to consumers, rejected competitors’ Intel-compatible PC operating systems, and that such practices resulted in artificially inflated prices for defendant’s products and denial of consumer access to competitors’ innovations, services and products.⁸⁴

As for the issue raised by the defendant that GBL section 349’s fifty dollar minimum damages provision constituted a penalty within the meaning of CPLR section 901(b), the court side-stepped the issue by approving of plaintiff’s precertification decision to seek only actual damages⁸⁵ relying upon, *inter alia*,⁸⁶ *Super Glue Corp. v. Avis Rent A Car System, Inc.*, which held that “the named plaintiff in a class action may waive that relief [penalty or minimum damages] and bring an action for actual damages only.”⁸⁷

4. Other Penalty Class Actions

This litigation strategy of seeking only actual damages, while waiving statutory damages whether styled as a penalty or minimum measure of damage and giving class members the right to opt out of the class action to pursue such damages, as a means of circumventing section 901(b) has been accepted by other courts in class actions. Such an approach was approved in class actions asserting violations of Labor Law sections 220,⁸⁸ 198,⁸⁹ and 196-b,⁹⁰

⁸⁴ *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40, 778 N.Y.S.2d 147, 148 (App. Div. 1st Dep’t 2004).

⁸⁵ *Id.* at 40, 778 N.Y.S.2d at 148–49.

⁸⁶ *See Ridge Meadows Homeowner’s Ass’n, Inc. v. Tara Dev. Co., Inc.*, 242 A.D.2d 947, 947, 665 N.Y.S.2d 361, 361 (App. Div. 4th Dep’t 1997).

⁸⁷ *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D.2d 604, 606, 517 N.Y.S.2d 764, 767 (App. Div. 2d Dep’t 1987).

⁸⁸ *See, e.g., Pesantez v. Boyle Envtl. Servs., Inc.*, 251 A.D.2d 11, 12, 673 N.Y.S.2d 659, 660 (App. Div. 1st Dep’t 1998) (“All proposed class members worked on the same project, were due the prevailing rate of wages and benefits and were allegedly underpaid 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.”); *Galdamez v. Biordi Constr. Corp.*, No. 107984/05, 2006 N.Y. Misc. LEXIS 2952, at

and Rent Stabilizing Law section 26-516(a).⁹¹

It should be noted, however, that although the appellate division may have accepted this method of pursuing class action status, the

*14–15 (Sup. Ct. New York County Oct. 17, 2006), *aff'd*, 50 A.D.3d 357, 855 N.Y.S.2d 104 (App. Div. 1st Dep't 2008).

⁸⁹ See *Thomas v. Meyers Assocs.*, No. 651720/2011, 2013 N.Y. Misc. LEXIS 1680, at *10 (Sup. Ct. New York County Apr. 18, 2013) (“The correct statement of the rule in New York is that liquidated damages under Labor Law 198 are discretionary and may be waived, and certification of the class is permitted as long as class members are afforded the opportunity to opt out and pursue statutory remedies.”); see also *Picard v. Bigsbee Enters., Inc.*, No. 1984-13, 2013 N.Y. Misc. LEXIS 4030, at *4–6 (Sup. Ct. Albany County Sept. 12, 2013) (permitting plaintiff to waive claim for liquidated damages under Labor Law section 198(1-a) on behalf of the class and allowing individual class members to opt out of the class and pursue individual claims for liquidated damages); *Klein v. Ryan Beck Holdings, Inc.*, No. 06 Civ. 3460 (WCC), 2007 U.S. Dist. LEXIS 51465, at *13–14 (S.D.N.Y. July 13, 2007) (noting that waiver of liquidated damages is necessary to bring New York Labor Law class actions).

⁹⁰ *Krebs v. Canyon Club, Inc.*, No. 10431/08, 2009 N.Y. Misc. LEXIS 340, at *37 (Sup. Ct. Westchester County Jan. 2, 2009) (“Consequently, the law is now well established in New York that, in the context of an action presenting allegations of Labor Law wage violations, ‘the correct rule’ is that, if the named plaintiff waives the statutory penalty, the action may be maintained as a class action as long as class members are afforded the opportunity of opting out so that they may pursue all statutory remedies.”); see also *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373–74 (S.D.N.Y. 2007) (observing that plaintiffs can waive their liquidated damages claim under New York law as long as class members are given the opportunity to opt out and pursue their own liquidated damages claims).

⁹¹ See, e.g., *Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 91, 965 N.Y.S.2d 9, 12–13 (App. Div. 1st Dep't 2013) (“[P]laintiffs, who have waived the penalty of treble damages, should be allowed to proceed by way of a class action to recover their actual damages plus interest, provided class members are allowed to opt out and pursue individual actions, and plaintiffs otherwise satisfy the criteria of CPLR 901(a).”); *Gudz v. Jemrock Realty Co.*, 105 A.D.3d 625, 625, 964 N.Y.S.2d 118, 119 (App. Div. 1st Dep't 2013). In *Gudz*, the court held that the “[p]laintiff’s rent overcharge claim did not seek a ‘penalty’ within the meaning of CPLR 901(b), because she waived her right to treble damages under . . . [RSL section 26-516(a)].” *Id.* The court stated that the waiver was effective because, unlike the Donnelly Act’s mandatory penalty, “treble damages are not the sole measure of recovery, and an owner found to have overcharged may submit evidence to overcome the statutory presumption of willfulness.” *Id.* Moreover, plaintiff’s claim for reimbursement for the alleged overcharges and interest, although denominated a penalty under the RSL, was not a penalty “because [such damages] lack a punitive, deterrent and litigation-incentivizing purpose and are, in fact, compensatory.” *Id.* at 626, 964 N.Y.S.2d at 119 (citation omitted). Furthermore, plaintiff’s request for attorneys’ fees did not constitute a penalty because

the general right to attorneys’ fees in landlord-tenant proceedings does not apply to administrative proceedings, and the RSL provision should be understood as having the same nonpunitive purpose as the statute applicable to actions and summary proceedings. Notably, the reference in Rent Stabilization Code (9 NYCRR) 2526.1(d) to attorneys’ fees as an “additional penalty,” while otherwise not dispositive, is absent from the attorney fee provision in the legislatively enacted RSL.

Id. (citations omitted); see also *Borden v. 400 E. 55th St. Assocs.*, 105 A.D.3d 630, 630, 964 N.Y.S.2d 115, 117 (App. Div. 1st Dep't 2013) (“Plaintiff has waived her right to treble damages under . . . [RSL section] 26-516(a), and individual class members will be allowed to opt out of the class to pursue their treble damages claims, should they believe there is a lawful basis for doing so. Although plaintiff did not waive her right to reimbursement for alleged overcharges and interest, and for attorneys’ fees, those claims do not render her action an action to recover a penalty for purposes of CPLR 901(b).” (citations omitted)).

Court of Appeals has yet to rule on it. As the court stated in *Sperry*, “[W]e 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.”⁹²

C. Adequacy of Representation

The United States Supreme Court has occasionally rendered profoundly impactful decisions pertaining to the viability of state court class actions,⁹³ including CPLR Article 9 class actions.⁹⁴ The Supreme Court’s recent decision issued on March 19, 2013, in *Standard Fire Insurance Co. v. Knowles*, is one such decision. At issue in *Standard Fire* was an attempt by a named plaintiff in an uncertified state court action to circumvent the Class Action Fairness Act of 2005 (“CAFA”)⁹⁵ which provides that federal district courts will have original jurisdiction of a civil class action if, inter alia, the “matter in controversy exceeds the sum or value of \$ 5,000,000.”⁹⁶

There are various grounds for remanding a removed class action back to state court, some successful and some not. The specific issue addressed by the Supreme Court was whether a class action plaintiff can effectively remove a class action from CAFA’s scope by making a precertification stipulation “that he, and the class he seeks to represent, will not seek damages that exceed \$5 million in total.”⁹⁷ In answering in the negative the Supreme Court noted that a precertification stipulation does not bind anyone but the plaintiff who “has not reduced the value of the putative class members’ claims.”⁹⁸ The Court stated that “[f]or jurisdictional purposes, our inquiry is limited to examining the case ‘as of the time it was filed

⁹² *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760, 766 (2007).

⁹³ See *Game Changer I*, *supra* note 66, at 6 col. 4. “[T]he Court has encouraged the expanded use of state court class action procedures, especially, for consumer class actions based on the common law and/or state statutory law as an alternative to bringing such actions in federal court.” *Id.* (citing cases where the Court expanded the use of state court class action procedures). “As a consequence many states enacted progressive class action statutes in the 1970s and 1980s many of which track FRCP 23 with some exceptions.” *Id.* See generally CLASS ACTIONS, *supra* note 60, at § 4.03[6] (discussing Supreme Court caselaw regarding state class actions).

⁹⁴ See *Make It Work*, *supra* note 1, at 726.

⁹⁵ See *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1347 (2013).

⁹⁶ 28 U.S.C. § 1332(d)(2) (2006).

⁹⁷ *Standard Fire*, 133 S. Ct. at 1347.

⁹⁸ *Id.* at 1349.

in state court.”⁹⁹ Implicit, of course, is the issue of the adequacy of a class representative who decides to limit the relief that may be or should be sought on behalf of the class.

1. Penalties May Be Unwaivable

As mentioned, consumers, tenants, and workers have been able to avoid the “death knell” impact of section 901(b) by agreeing to waive the treble damage and penalty provisions of GBL sections 349 and 350,¹⁰⁰ Labor Law sections 220, 198, and 196-b,¹⁰¹ and RSL section 26-516(a)¹⁰² and giving class members the opportunity to opt out if they prefer to seek treble damages individually. While this inconsistency¹⁰³ in the enforcement of section 901(b) has been most helpful to consumers, tenants, and workers, it appears that the Supreme Court’s decision in *Standard Fire* may discourage New York courts from certifying any class action involving a potential penalty.

This would be consistent with the concept that the class representative’s fiduciary duty prevents him or her from limiting the damages which class members should be able to recover under common law or statutory claims. For example, in *Back Doctors Ltd. v. Metropolitan Property & Casualty Insurance Co.*,¹⁰⁴ the Seventh Circuit Court of Appeals noted that stipulating to reduced damages may violate a class representative’s fiduciary duty to members of the class.¹⁰⁵ The court stated that:

A representative can’t throw away what could be a major component of the class’s recovery. Either a state or a federal judge might insist that some other person, more willing to seek punitive damages, take over as representative. What Back Doctors is willing to accept thus does not bind the class

⁹⁹ *Id.* (quoting *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 390 (1998)).

¹⁰⁰ *See supra* notes 80–87 and accompanying text.

¹⁰¹ *See supra* notes 88–91 and accompanying text.

¹⁰² *See supra* notes 42–47, 91 and accompanying text.

¹⁰³ *See, e.g., Rubin v. Nine W. Grp., Inc.*, 1999 N.Y. Misc. LEXIS 655, at *13–14 (Sup. Ct. Westchester County Nov. 5, 1999) (“[B]ecause of the mandatory nature of the treble damage provision of the Act, the ‘well settled [rule applies] that a plaintiff, by her pleading or otherwise, may not abjure a statutory remedy for the purpose of achieving compliance with procedural rules such as a statute of limitations, or as here, CPLR Section 901(b), the class action statute and its self-imposed inhibition against class actions for a penalty.” (alteration in original) (quoting *Blumenthal v. Am. Soc’y of Travel Agents, Inc.*, No. 16812/76, 1977 WL 18392, at *3 (Sup. Ct. New York County July 5, 1977))).

¹⁰⁴ *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827 (7th Cir. 2011).

¹⁰⁵ *See id.* at 830–31.

...¹⁰⁶

In *Evans v. Lasco Bathware, Inc.*,¹⁰⁷ a California trial court denied class certification on the grounds of, *inter alia*, inadequacy of representation.¹⁰⁸ On appeal the court held that it was “convinced the trial court acted within its discretion to the extent it denied class certification based on plaintiffs’ failure to raise those claims reasonably expected to be raised by members of the class.”¹⁰⁹

And in *Bowden v. Phillips Petroleum Co.*,¹¹⁰ the Texas Supreme Court remanded for further consideration on a plaintiff’s adequacy as a class representative noting that “a class representative’s decision to assert certain claims and abandon others affects the certification determination.”¹¹¹ The court stated that whether to pursue or abandon particular claims “is one relevant factor in evaluating the requirements for class certification such as typicality, superiority, and adequacy of representation.”¹¹² The court went on to say that in the trial court’s second certification order, it “acknowledged that the class limited its suit to a single claim for each subclass. On remand, it should consider the applicability of res judicata in future proceedings to abandoned claims in evaluating certifiability”¹¹³

IV. CONCLUSION

Although there have been several recent positive developments in how New York State courts have interpreted and implemented CPLR Article 9, CPLR section 901(b) is still problematic and should be repealed in order for CPLR Article 9 to realize its salutary purpose. CPLR section 901(b) is no longer viable in prohibiting penalty class actions. Furthermore, the courts have applied it inconsistently. In addition, CPLR section 901(b) may encourage class representatives to breach their fiduciary duty to the class in unilaterally limiting the class’s recoverable damages. And lastly CPLR section 901(b) presents the court with the dilemma of trying

¹⁰⁶ *Id.*

¹⁰⁷ *Evans v. Lasco Bathware, Inc.*, No. GIC861277, 2008 WL 7414562 (Cal. Super. Ct. Aug. 15, 2008).

¹⁰⁸ *Id.*

¹⁰⁹ *Evans v. Lasco Bathware, Inc.*, 101 Cal. Rptr. 3d 354, 369 (Cal. Ct. App. 2009).

¹¹⁰ *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690 (Tex. 2008), *aff’d in part, rev’d in part sub nom.* *Phillips Petroleum Co. v. Yarborough*, 405 S.W.3d 70 (Tex. 2013).

¹¹¹ *Id.* at 698.

¹¹² *Id.* (citing *Citizens Ins. Co. v. Daccah*, 217 S.W.3d 430, 448 (Tex. 2007)).

¹¹³ *Bowden*, 247 S.W.3d at 698.

to make penalty class available in some instances while ignoring the implications of inadequacy of representation. Repealing CPLR section 901(b) would streamline and make our class action statute more consistent with those similar class action statutes in other states.¹¹⁴

¹¹⁴ See generally CLASS ACTIONS, *supra* note 60, § 4.03[6] (identifying several states' approaches to limiting class standing).