To borrow an analogy from Charles Dickens, New York’s Civil
Practice Law and Rules (“CPLR”) might appropriately be described
as the “tale of two faces.” Or perhaps the better allusion is to
Robert Louis Stevenson’s “Strange Case of Dr. Jekyll and Mr.
Hyde.” Certain provisions of the CPLR, as well as their
interpretations by appellate courts, are forgiving and flexible. In
fact, within its first four sections, the CPLR mandates a liberal
construction of its provisions to “secure the just, speedy and
inexpensive determination of every civil judicial proceeding.” The
CPLR also empowers the judiciary to correct mistakes, omissions,
and extend deadlines. On the other hand, there is no shortage of
cases where the CPLR has been interpreted with exacting rigidity,
leaving in their wake a host of unsuspecting practitioners and
litigants procedurally foreclosed from substantive relief. Recent
appellate decisions interpreting various CPLR provisions reflect
this continuing dichotomy, although the trend appears to be
towards the more flexible and liberal interpretation where the
circumstances of a particular case permit such a result. The
following is a review of several of those cases from 2009 and 2010,
as well as other notable cases involving the interpretation or
application of various provisions in the CPLR.

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1 CHARLES DICKENS, A TALE OF TWO CITIES (Andrew Sanders ed., Oxford Univ. Press
2 ROBERT LOUIS STEVENSON, STRANGE CASE OF DR. Jekyll and Mr. Hyde, in SHORTER
5 As we were preparing this article, the New York Law Journal published Decisions

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I. THE CPLR AS INTERPRETED IN 2009 & 2010: MORE JEKYLL THAN HYDE

A. CPLR 5511—Who Is an “Aggrieved Party”?

Since this article is within a publication dedicated to New York Appeals, perhaps the best place to begin is with an appellate issue. CPLR 5511 states: “An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party.” Generally, determining if a party is “aggrieved” within the meaning of CPLR 5511 is a fairly straightforward analysis. If a party who asked for relief in the lower court received all the relief he or she requested, that party is not aggrieved. On the other hand, if a party asks for relief and that relief is denied, the party is aggrieved. Two recent cases, however, were not so straightforward, requiring the courts to interpret the meaning of “aggrieved party” in CPLR 5511.

In Adams v. Genie Industries, Inc., a products liability case, the jury returned a verdict in favor of the plaintiff and awarded $500,000 in damages for total pain and suffering. The trial court denied the defendant’s motion to set aside the verdict, but granted the plaintiff’s motion for an additur increasing the pain and suffering award to $1.25 million. The defendant appealed and the Appellate Division affirmed. The defendant then stipulated to the additur and the Appellate Division granted leave to appeal to the Court of Appeals.

In the Court of Appeals, the defendant raised no issue concerning the additur, but argued that the evidence was insufficient to establish liability or, in the alternative, that a new trial should have been ordered. Before considering the merits of the appeal, the Court of Appeals addressed the issue of whether the defendant had a right to take an appeal from the Appellate Division’s order after


7 Id. at 540, 929 N.E.2d at 382, 903 N.Y.S.2d at 320.
8 Id.
9 Id.
10 Id.
11 Id. at 541, 929 N.E.2d at 383, 903 N.Y.S.2d at 321.
having stipulated to the additur.\textsuperscript{12} The plaintiff argued that the defendant did not have a right to appeal, relying on two prior Court of Appeals cases, \textit{Batavia Turf Farms v. County of Genesee} and \textit{Whitfield v. City of New York}.\textsuperscript{13} In \textit{Batavia} and \textit{Whitfield}, the Court had held that a party that stipulated to a reduction in damages in lieu of a new trial foreclosed all further review of other issues.\textsuperscript{14} The rationale underlying this result was that “the stipulation did not merely resolve an issue, but also fulfilled a condition for the existence of the order in question.”\textsuperscript{15}

In \textit{Adams}, however, the Court of Appeals found that the rule in \textit{Batavia} and \textit{Whitfield} was not justified. Instead, the Court found “[i]t is unfair to bar a party from raising legitimate appellate issues simply because that party has made an unrelated agreement on the amount of damages.”\textsuperscript{16} Thus, notwithstanding the defendant’s stipulation to the additur, the Court held that the defendant was an “aggrieved party” within the meaning of CPLR 5511.\textsuperscript{17}

Notably, the Court reached that determination without any reference to principles of statutory interpretation, or reliance on any other provisions in the CPLR. This was because “[w]hen the revisers of the laws on civil practice were in the process of creating the CPLR, they were unable to formulate a definition for the word ‘aggrievement’ and they determined to leave that definition to case law.”\textsuperscript{18} Thus, the definition of an “aggrieved party” is a judicial construct that can evolve, narrow, or expand based on the circumstances that are presented. Certainly, the rejection of the \textit{Batavia/Whitfield} rule in \textit{Adams} appears to be the more logical and appropriate result, in keeping with the mandate of CPLR 104 that the CPLR shall be liberally construed to achieve a “just” determination. Although the Court of Appeals ultimately rejected the defendant’s arguments and affirmed the order of the Appellate Division,\textsuperscript{19} \textit{Adams} opens the door to a new trial, or even an outright dismissal in a case where a defendant may consider it provident to

\textsuperscript{12} Id. at 540, 929 N.E.2d at 382, 903 N.Y.S.2d at 320.

\textsuperscript{13} Id. at 541, 929 N.E.2d at 383, 903 N.Y.S.2d at 321 (citing Batavia Turf Farms, Inc. v. Cnty. of Genesee, 91 N.Y.2d 906, 691 N.E.2d 1025, 668 N.Y.S.2d 1001 (1998); Whitfield v. City of N.Y., 90 N.Y.2d 777, 689 N.E.2d 515, 666 N.Y.S.2d 545 (1997)).

\textsuperscript{14} Batavia, 91 N.Y.2d at 908, 691 N.E.2d at 1025, 668 N.Y.S.2d at 1001; Whitfield, 90 N.Y.2d at 780, 689 N.E.2d at 517, 666 N.Y.S.2d at 547.

\textsuperscript{15} Adams, 14 N.Y.3d at 541, 929 N.E.2d at 383, 903 N.Y.S.2d at 321.

\textsuperscript{16} Id.

\textsuperscript{17} Id. at 542, 929 N.E.2d at 383, 903 N.Y.S.2d at 321.

\textsuperscript{18} Mixon v. TBV Inc., 76 A.D.3d 144, 147, 904 N.Y.S.2d 132, 135 (App. Div. 2d Dep't 2010) (citing N.Y. C.P.L.R. 5511 (Legislative Studies and Reports) (McKinney 1996)).

\textsuperscript{19} Adams, 14 N.Y.3d at 545, 929 N.E.2d at 386, 903 N.Y.S.2d at 324.
stipulate to an additur, and avoid the expense of a new trial on damages, but has a meritorious argument regarding the sufficiency of the evidence or the trial court’s evidentiary rulings.

Just one month after Adams was decided, the Second Department, in Mixon v. TBV, Inc., faced a more complex scenario, requiring the court to determine the scope and meaning of “aggrievement.” Mixon arose from a multi-car rear end accident involving an airport shuttle van, a limousine, and two other cars. The plaintiffs, who were passengers in the van, commenced an action against the owner and operator of the van, as well as the owner and operator of the limousine. The van defendants cross-moved for summary judgment dismissing the plaintiffs’ complaint, and for summary judgment on the cross-claims asserted by the limousine defendants. The Supreme Court granted both branches of the van defendants’ motion. The limousine defendants then appealed the order, seeking reinstatement of their cross-claims against the van defendants and reinstatement of the plaintiffs’ complaint against the van defendants. The plaintiffs did not file a notice of appeal, but attempted to file a brief seeking to reinstate the complaint against the van defendants.

The case raised two issues: (1) whether the limousine defendants were aggrieved by the dismissal of the plaintiffs’ complaint against the van defendants and, as such, could seek to have the plaintiffs’ complaint against the van defendants reinstated on the appeal; and (2) whether the plaintiffs, who failed to file a notice of appeal, could seek relief on the limousine defendants’ appeal. There was no issue as to whether the limousine defendants had the right to appeal from that part of the order which dismissed their cross-claims against the van defendants.

To answer the first question, the court analyzed whether aggrievement is concerned exclusively with the denial of relief, or whether it includes the adverse reasoning or rationale within the court’s decision. The court first looked at Stein v. Whitehead, decided before the adoption of CPLR article 14, which held that the
defendant Whitehead could argue on appeal that the judgment dismissing the plaintiff’s complaint against a co-defendant should be reversed.\textsuperscript{29} In addition, the court looked at a long line of cases decided after the adoption of CPLR article 14, which found that where a defendant did not assert a cross-claim, counterclaim, or third-party claim, the defendant could not appeal from an order dismissing the plaintiff’s complaint against a co-defendant.\textsuperscript{30}

To avoid throwing “any meaningful attempt to comprehensively define the concept of aggrievement into disarray,”\textsuperscript{31} the court in Mixon held that aggrievement is about relief, not reasoning. Thus, the court adopted a two-part test to determine if a party is aggrieved:

First, a person is aggrieved when he or she asks for relief but that relief is denied in whole or in part. Second, a person is aggrieved when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part.\textsuperscript{32}

Applying that test, the court determined that the limousine defendants were aggrieved by the portion of the order that dismissed their cross-claims against the van defendants. The limousine defendants were not, however, aggrieved by that portion of the order that dismissed the plaintiff’s complaint against the van defendants.\textsuperscript{33}

With respect to whether the plaintiffs could seek to reinstate their complaint against the van defendants, even though they did not file a notice of appeal, the court held that the plaintiffs could not seek such relief.\textsuperscript{34} The court made a point of noting, however, that this did not necessarily mean that the plaintiffs were without a remedy in the trial court on a motion for leave to reargue, or on a subsequent appeal from a final judgment.\textsuperscript{35}

Both of these cases are notable in that Adams took a broader approach to defining an aggrieved party, while Mixon appears to have endorsed a narrower view.\textsuperscript{36} Furthermore, in order to arrive

\textsuperscript{29} Id. at 149–51, 904 N.Y.S.2d at 137–38 (citing Stein v. Whitehead, 40 A.D.2d 89, 337 N.Y.S.2d 821 (App. Div. 2d Dep’t 1972)).

\textsuperscript{30} Id. at 151–55, 904 N.Y.S.2d at 138–41 (citations omitted).

\textsuperscript{31} Id. at 154, 904 N.Y.S.2d at 141.

\textsuperscript{32} Id. at 156–57, 904 N.Y.S.2d at 142 (emphasis omitted).

\textsuperscript{33} Id. at 157, 904 N.Y.S.2d at 142–43.

\textsuperscript{34} Id. at 157, 904 N.Y.S.2d at 143.

\textsuperscript{35} Id.

at their conclusions, both courts had to reject or limit prior decisions and chart a new path. Whether they charted the same path is open to debate—although the defendant in Adams would surely qualify as an aggrieved party under the Mixon test—and will probably be the subject of continued discussion in the years to come until the Court of Appeals adopts the Mixon test, or otherwise refines the definition of aggrievement.

B. CPLR 2103 & CPLR 5520—Service Pitfalls in Taking an Appeal

Another case with implications for appellate practitioners was M Entertainment, Inc. v. Leydier.37 Pursuant to CPLR 5513(a), “[a]n appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from” with notice of entry.38 An appellant “takes” an appeal by serving a notice of appeal on the adverse party and filing a copy with the clerk of the court in which the judgment or order has been made.39 CPLR 2103(b)(2) provides for service by mailing, which is defined as depositing the papers “in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state.”40 In M Entertainment, the plaintiffs appealed from an order which dismissed the complaint. The First Department dismissed the appeal as to one of the defendants because it was undisputed that the plaintiffs did not mail the notice of appeal by depositing it at a post office within New York State.41 The court found that noncompliance with the service requirement was a fatal jurisdictional defect.42

The Court of Appeals, however, subsequently reversed, relying on CPLR 5520(a).43 CPLR 5520(a) provides:

If an appellant either serves or files a timely notice of appeal . . . , but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the appeal is taken or the court of original instance may grant an extension of time for curing the

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42 Id. at 628, 880 N.Y.S.2d at 42.
omission.\textsuperscript{44} The Court held that because the plaintiffs properly \textit{filed} their notice of appeal, the Appellate Division was permitted to exercise its discretion under CPLR 5520 to extend time to cure the defect.\textsuperscript{45} On remand, the First Department then exercised its discretion to disregard the irregularity because the defendants had not been prejudiced.\textsuperscript{46} Once again, therefore, an overly rigid and narrow interpretation of a statutory provision that produced an irrational and unjust result was ultimately rejected.

Interestingly, the definition of “mailing” was added to CPLR 2103 as part of an amendment in 1989.\textsuperscript{47} At the same time, the Legislature added the ability to serve papers “by electronic means.”\textsuperscript{48} That method essentially enabled service via fax machine. In implementing this new method of serving papers, the Legislature did not add a territorial limitation. Thus, while service by postal mail must originate “within the state,”\textsuperscript{49} no such limitation is placed on service by fax.\textsuperscript{50} Assuming consent to fax, an attorney can serve papers from a fax machine in Perth, Australia (nearly the opposite side of the planet), but not by depositing them in a post office mailbox in Perth Amboy, New Jersey. In that regard, \textit{M Entertainment} is a good example of both the forgiving and unforgiving nature—the “Jekyll and Hyde” characteristics—of the CPLR. Fortunately, in this instance, Dr. Jekyll prevailed.

The lesson to be learned from \textit{M Entertainment} is that while on the one hand there is a tendency to adopt a strict interpretation of the statutory language, at times there is sufficient flexibility within the CPLR to cure a procedural defect, particularly where, as in \textit{M Entertainment}, there is no prejudice to the opposing party.\textsuperscript{51} \textit{M Entertainment} suggests a willingness by the courts to avoid the unfair or irrational result that a literal application of the statutory language would produce, by relying on savings provisions, such as CPLR 2001 and 5520. Practitioners who find themselves up against a seemingly unforgiving limitations provision or statutory definition

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\item \textsuperscript{44} N.Y. C.P.L.R. 5520(a) (McKinney 1995).
\item \textsuperscript{45} \textit{M Entm't}, 13 N.Y.3d at 828, 919 N.E.2d at 178, 891 N.Y.S.2d at 7.
\item \textsuperscript{46} \textit{M Entm't}, 71 A.D.3d 517, 518, 897 N.Y.S.2d 402, 404.
\item \textsuperscript{47} Service of Papers on Attorney or Party by Electronic Means (Fax), ch. 461, § 1, 1989 N.Y. Sess. Laws 932, 933 (codified as amended at N.Y. C.P.L.R. 2103 (1990)).
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} N.Y. C.P.L.R. 2103(0)(1) (McKinney 1997 & Supp. 2010).
\item \textsuperscript{50} N.Y. C.P.L.R. 2103(0)(2). \textit{See also} N.Y. C.P.L.R. 2103 (Practice Commentaries, C2103:3) (McKinney 1997).
\item \textsuperscript{51} \textit{M Entm't Inc.}, 71 A.D.3d at 520, 897 N.Y.S.2d at 405.
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should therefore look to these provisions, as well as the legislative history, to determine whether the Legislature left the definition of terms, such as the “time to take appeal” under CPLR 5513, or the definition of “service” under CPLR 2103, to the courts’ discretion. Furthermore, the courts have also relied on general principles of statutory construction, in addition to CPLR 104 and the savings provisions, as will be seen in some of the cases discussed below.

C. CPLR 304 & CPLR 2001—Salvaging a Defective Commencement by Filing

Prior to 1992, New York was a state where lawsuits were “commenced” by serving a summons and complaint. In 1992, New York switched Supreme Court and County Court practice to the commencement-by-filing method under the then CPLR 304, now embodied in CPLR 304(a). As a result, an action is considered “commenced” on the date that the summons and complaint are filed with the clerk of the court. One of the consequences of this system is that a party can commence a lawsuit without the opposing party’s knowledge. Another consequence is that a party can fail to properly commence a lawsuit while still having served a summons and complaint on the opposing party. A recent case from the Second Department addresses the latter circumstance when the error goes undiscovered until after the statute of limitations has run. In MacLeod v. County of Nassau, the Second Department analyzed and applied CPLR 2001, a saving statute, to correct the defective commencement.

The plaintiffs in MacLeod brought suit on August 14, 2007 to recover for personal injuries sustained in a trip-and-fall accident. Before initiating the personal injury action, however, the plaintiffs commenced a special proceeding to obtain pre-action disclosure pursuant to CPLR 3102(c). For the disclosure proceeding, the plaintiffs obtained an index number and filed the appropriate

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53 Id.; N.Y. C.P.L.R. 304 (McKinney 2010).
54 See N.Y. C.P.L.R. 203(c) (McKinney 2010); N.Y. C.P.L.R. 304(c) (McKinney 2010); N.Y. C.P.L.R. 2102(a) (McKinney 1997 & Supp. 2010).
56 Id. at 58, 903 N.Y.S.2d at 412.
57 Id. at 59, 903 N.Y.S.2d at 412–13.
58 Id. at 59, 903 N.Y.S.2d at 412.
initiatory paperwork. Approximately two months later, and before the plaintiffs filed the personal injury action, the trial court issued a judgment denying the petition and dismissing the disclosure proceeding.\textsuperscript{59}

Plaintiffs subsequently attempted to bring a personal injury action against the County by filing the summons and complaint with the clerk under the disclosure proceeding’s index number.\textsuperscript{60} They did not obtain a new index number or pay a new filing fee.\textsuperscript{61} The plaintiffs then served the summons and complaint on the County, and the County answered making no mention of the index number defect.\textsuperscript{62} The defect was not discovered until after one of the parties attempted to file a request for judicial intervention to schedule a preliminary conference.\textsuperscript{63} This prompted the plaintiffs to obtain a new index number on June 2, 2008 by filing a new summons and complaint, and paying the filing fee for an index number.\textsuperscript{64} June 2, 2008, however, was more than one year and ninety days after the occurrence of the underlying accident. Recognizing that the statute of limitations for the action against the County had already expired, plaintiffs’ counsel filed a motion to deem the papers filed as of the original filing date for the disclosure proceeding in 2007.\textsuperscript{65} The trial court denied the motion and the plaintiffs appealed.\textsuperscript{66}

The Second Department reversed, noting that CPLR 2001 was amended in 2007 “to provide a measure of judicial forgiveness for certain mistakes that a plaintiff or petitioner might make with respect to the commencement of an action or special proceeding.”\textsuperscript{67} The amendment to CPLR 2001 expressly addressed the filing procedure by adding the language in italics below:

At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a

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\textsuperscript{59} Id. at 59, 903 N.Y.S.2d at 412–13.
\textsuperscript{60} Id. at 59, 903 N.Y.S.2d at 413.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 60, 903 N.Y.S.2d at 413.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 58, 903 N.Y.S.2d at 412.
substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.68

The court noted that the Legislature amended CPLR 2001 in response to a long line of cases decided by the Court of Appeals that threw litigants out of court when they made “certain mistakes” in complying with the commencement-by-filing system.69 Thus, the Second Department reasoned that this case fell squarely within the amended saving statute.70

Applying the language of CPLR 2001, the Second Department concluded that given the fact that the parties acted as if the litigation were valid, including participating in discovery, there was no prejudice to the defendants.71 As an interesting aside, the Second Department relied on CPLR 2001 even though the plaintiffs did not expressly cite it in support of their motion.72 The court, however, entertained the argument raised for the first time on appeal because it found that the plaintiffs had argued “in sum and substance” before the Supreme Court that the remedies articulated and described in that statute should be applied to their action.73 For this reason, as well as its “result-oriented” approach, MacLeod is another example of both the “flexible and forgiving” aspect of the CPLR, and the liberal construction of its provisions by the courts.

D. CPLR 213-a—An “Escape Hatch” for Landlords in Overcharge Proceedings?

More problematic, and potentially inconsistent, are two recent cases interpreting CPLR 213-a. In Grimm v. State of New York Division of Housing and Community Renewal Office of Rent Administration, the First Department addressed the responsibility of the Division of Housing and Community Renewal (“DHCR”) “when a rent overcharge complainant makes a colorable argument that there are genuine issues that an owner committed fraud by charging an illegal rent, even if more than four years passed before the complaint was filed.”74 In 1999, the DHCR listed the monthly

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70 Id. at 65, 903 N.Y.S.2d at 417.
71 Id. at 64–65, 903 N.Y.S.2d at 416–17.
72 Id. at 63, 903 N.Y.S.2d at 415–16.
73 Id.
rent for the apartment in question as $578.96. When courting a prospective tenant in 2000, the landlord, through an agent, represented the rent as $2000 per month. The landlord “generously” offered the prospective tenants a reduction to $1450 per month if they would, at their own expense, paint and make repairs to the apartment. The prospective tenants accepted the offer.\footnote{Id.}

Four years later, on April 1, 2004, the petitioner, Grimm, moved into the apartment at the same illegal $1450 rent as the previous tenants.\footnote{Id. at 31, 886 N.Y.S.2d at 112.} The property owner gave neither the year 2000 tenants nor the petitioner a regulated lease or notice that the apartment was registered with DHCR.\footnote{Id. at 30–31, 886 N.Y.S.2d at 112.} On July 19, 2005, petitioner brought a rent overcharge complaint, but the DHCR denied the complaint because it was brought more than four years after the $1450 rent was first charged.\footnote{Id. at 31, 886 N.Y.S.2d at 112.} The applicable statute of limitations, CPLR 213-a, states that:

> [A] residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced.\footnote{N.Y. C.P.L.R. 213-a (McKinney 2003).}

Furthermore, the courts are “preclude[d]” from examining rental history prior to that four-year period.\footnote{Id.} Similarly, Rent Stabilization Law section 26-516(a) provides that “the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement.”\footnote{New York City, N.Y., Admin. Code § 26-516(a)(i) (1982).}

In Grimm, the majority held that while the four-year limitations period precluded the court from using the rental listing prior to the base date, where there is fraud or unlawful rent, the lease is rendered void.\footnote{Grimm, 68 A.D.3d at 32, 886 N.Y.S.2d at 113.} By making the lease void, there was no rental amount on the base date that could be used. The court held, therefore, that DHCR should reexamine the petitioner’s claim to determine if fraud occurred, and if so,
the legal rent should be established by using the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date.

... Sanctioning the owner's behavior on a statute of limitations ground "can result in a future tenant having to pay more than the legal stabilized rent for a unit, a prospect which militates in favor of voiding agreements such as this in order to prevent abuse and promote enforcement of lawful regulated rents."  

Thus, notwithstanding the explicit statutory language, the majority reached what it considered a fair and appropriate result under the circumstances.

Both the majority and dissent in Grimm cited to the decision of the Court of Appeals in Thornton v. Baron. Thornton involved tenants bringing suit against a property owner with whom they colluded to remove apartments from rent-stabilization. The majority in Thornton concluded that unscrupulous property owners should not be able to harm the public, by withdrawing apartments from rent-stabilization, merely because four years pass without a petition for a rent overcharge. In asserting that its decision "merely follows the holding in Thornton," the First Department in Grimm argued that a property owner should not be able to use fraud to hide behind the limitations period. Significantly, Grimm and Thornton are linked not only by the similar statutes involved, but also by the arguments used to interpret the statutes. The dissenting opinions in each case argued that the majority disregarded the express statutory language.

Thus, as a matter of statutory interpretation, Grimm reflects an inherent conflict between legislative intent and the objective of a "just" determination on the one hand, and textualism on the other hand. In asserting that the Legislature did not intend to permit the

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83 Id. at 32, 886 N.Y.S.2d at 113 (quoting Drucker v. Mauro, 30 A.D.3d 37, 40, 814 N.Y.S.2d 43, 46 (App. Div. 1st Dep't 2006)).
84 Id. at 33, 886 N.Y.S.2d at 113.
85 Id. at 32–34, 886 N.Y.S.2d at 113–14; Id. at 36–37, 886 N.Y.S.2d at 116 (Buckley, J., dissenting).
87 Id. at 181–182, 833 N.E.2d at 264–65, 800 N.Y.S.2d at 121–22.
89 Id. at 36, 886 N.Y.S.2d at 115 (Buckley, J., dissenting); Thoron, 5 N.Y.3d at 182, 833 N.E.2d at 265, 800 N.Y.S.2d at 122 (Smith, J., dissenting).
limitations period to be used as a shield to fraud, the majority would require in this instance that the DHCR examine the claim for fraud.90 The majority indicates that an uncritical analysis would mean a free pass for those who submit fraudulent rent registration statements. The dissent, however, which argues for a strict, literal interpretation of the statute, relies on a textual analysis of CPLR 213-a, much like the dissent that lost out in Thornton.91 In Thornton, Judge Smith of the Court of Appeals wrote, "[i]f I had written the statute, I would now be wondering what words I could possibly have used to make my meaning clearer."92

While the majority in Grimm adopted a result-oriented approach, several months later, in Rich v. East 10th Street Associates, a different panel of the First Department applied a stricter interpretation of CPLR 213-a and Rent Stabilization Law section 26-516(a).93 In Rich, the plaintiff moved into an apartment in March 1992 under a lease providing for $690 in rent.94 In 1994, the plaintiff filed a complaint with the DHCR and succeeded in obtaining an order reducing the rent to the level in effect prior to the most recent increase.95 The order also provided for no additional rent increases until a Rent Restoration Order had been issued.96 No such order was ever issued and yet the owner continued to increase the rent.97 In 2007, a new owner purchased the building and applied for the Rent Restoration Order which was denied.98

Rich then commenced an action seeking to recover rental overcharges for the four-year period preceding his complaint to the extent the rent exceeded the amount frozen under the 1994 order.99 Relying on CPLR 213-a and Rent Stabilization Law section 26-516(a), the landlord moved for summary judgment, arguing that the base rent should be determined by the amount in effect four years

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90 Grimm, 68 A.D.3d at 33–34, 886 N.Y.S.2d at 114.
91 Id. at 34–36, 886 N.Y.S.2d at 114–16 (Buckley, J., dissenting); Thornton, 5 N.Y.3d at 182, 833 N.E.2d at 265, 800 N.Y.S.2d at 122 (Smith, J., dissenting) (although Judge Smith advocated a strict construction of the Rent Regulation Reform Act of 1997).
92 Thornton, 5 N.Y.3d at 182, 833 N.E.2d at 265, 800 N.Y.S.2d at 122 (Smith, J., dissenting).
94 Id. at 66, 906 N.Y.S.2d at 28 (Tom, J.P., dissenting) (The facts of the case were only set forth in the dissenting opinion.).
95 Id.
96 Id.
97 Id.
98 Id. at 66, 906 N.Y.S.2d at 28 (Tom, J.P., dissenting).
99 Id.
prior to the filing of the complaint, which was $924.33.\textsuperscript{100} The Supreme Court denied the landlord’s motion, finding that the Legislature did not intend the statute of limitations to provide “an escape route” for landlords to avoid a court order.\textsuperscript{101}

The First Department reversed, holding that while the Legislature clearly recognized that in some instances the rent actually charged on the base date may not be the legally-regulated rent, it imposed a four-year statute of limitations that deemed the base rent to be the legal rent.\textsuperscript{102} The court held that by applying the rent that should have been charged on the base date instead of the actual amount charged on the base date, the motion court “ran afoul” of the statutes.\textsuperscript{103} The court reasoned that there is no provision for a toll of the statute of limitations where a rent reduction order has been violated and remains in effect, nor was there a finding that the owner committed fraud.\textsuperscript{104} Additionally, the court noted that while it had previously held that the four-year statute of limitations does not bar an overcharge complaint when a rent reduction order was issued prior to the four-year limitations period, it had also held that in calculating a rent overcharge, the DHCR could properly take notice of the rent reduction order in effect at the relevant time by freezing the base date rent, but not by reestablishing the base date rent pursuant to the rent reduction order.\textsuperscript{105} The court concluded that:

[A] rent reduction order issued beyond the limitations period but still in effect during that period may be considered . . . only insofar as that order is a continuing obligation, freezing the rent as of the base date but not reestablishing the base date rent, because applying the rent reduction order to readjust the base date rent would conflict with the express proscriptions set forth in [the relevant statutes].\textsuperscript{106}

An example is probably the best aid to understanding the implications of the court’s ruling. Imagine an administrative rent

\textsuperscript{100} Id. at 66–67, 906 N.Y.S.2d at 28–29.

\textsuperscript{101} Id. at 67, 906 N.Y.S.2d at 29 (quoting Rich v. E. 10th St. Assoc., 22 Misc.3d 1126(A), 881 N.Y.S.3d 366, 2009 WL 455384, at *6 (Sup. Ct. N.Y. Cnty. 2009)).

\textsuperscript{102} Id. at 62, 65, 906 N.Y.S.2d at 25, 27.

\textsuperscript{103} Id. at 62, 906 N.Y.S.2d at 25.

\textsuperscript{104} Id. at 64–65, 906 N.Y.S.2d at 26.

\textsuperscript{105} Id. at 64, 906 N.Y.S.2d at 27 (citing 462 Amsterdam, LLC v. N.Y. Div. of Hous. & Cmty. Renewal, 61 A.D.3d 653, 878 N.Y.S.2d 681 (App. Div. 1st Dep’t 2009); Cintron v. Calogero, 59 A.D.3d 345, 874 N.Y.S.2d 76 (App. Div. 1st Dep’t 2009), rev’d 2010 WL 4065445 (2010) (Cintron was subsequently overturned by the Court of Appeals, however, the Rich case cites only to the Cintron 1st Department opinion)).

\textsuperscript{106} Id. at 64–65, 906 N.Y.S.2d at 27.
reduction order that freezes rent at $1000. Imagine as well that in
direct violation of that order, a rent registration statement was filed
with a $2000 rent and a case is brought four years later. The
question is: what value does a court use to calculate a rent
overcharge?

According to the reasoning of the First Department in Rich, the
language of CPLR 213-a would cause a peculiar result with regard
to the rent reduction order. A rent overcharge cannot be based on
the $1000 figure from the rent reduction order. At the same time,
however, this does not mean that the order from more than four
years ago has no power. Rather, it has the power of a “continuing
obligation” to not raise rents, and thus freezes an improper rent
at whatever value the landlord filed on a form four years prior to
any action. Thus, the amount of lawful rent would freeze at $2000,
regardless of any increase in the rent that might otherwise have
been lawful.

Curiously, Grimm is not mentioned in Rich. Furthermore, Rich
seems inconsistent with that portion of Grimm which states “where
there is fraud or an unlawful rent, the lease is rendered void.”
Arguably, charging increases in rent in violation of an order could
be considered an “unlawful rent.” Rich, however, does not address
that issue, instead emphasizing that the owner’s conduct was not
fraudulent. Thus, while the First Department appears
comfortable bypassing the four-year statute of limitations in CPLR
213-a in cases of fraud, there is less clarity as to how the court will
approach future claims of overcharged rent not based on fraud. The
majority decisions in both cases provoked vigorous dissents, and
it is clear that the court is engaged in an ongoing struggle with the
plain language of a limitations provision, and the issue of when and
how the statutory language should be bypassed.

On a related note, in Hicks v. New York State Division of Housing
and Community Renewal, the First Department addressed the issue
of whether CPLR 213-a applies to rent-controlled apartments or to
administrative proceedings before the DHCR. At issue was the
meaning of “residential rent overcharge” within CPLR 213-a and,

107 Id.
108 Grimm, 68 A.D.3d at 32, 886 N.Y.S.2d at 113 (emphasis added).
110 Id. at 65, 906 N.Y.S.2d at 27 (Tom, J.P., dissenting); Grimm, 68 A.D.3d at 34, 886
N.Y.S.2d at 114 (Buckley, J., dissenting).
more specifically, whether CPLR 213-a applies to both rent-controlled apartments and rent-stabilized apartments.\textsuperscript{112} In the absence of a clear indication within the statute, the court looked to the legislative history finding that “the legislative history makes clear that [CPLR 213-a] applies only to rent-stabilized dwellings.”\textsuperscript{113} “[T]he failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended.”\textsuperscript{114} Since here the Legislature did not incorporate CPLR 213-a into the Rent Control Law, this was a “clear indication” that the Legislature did not intend CPLR 213-a to apply to rent-controlled apartments.\textsuperscript{115}

The court went on to hold that CPLR 213-a did not apply because the DHCR determination was an administrative proceeding, and “the CPLR is explicitly limited to judicial proceedings, whether brought in the form of an action or [a] special proceeding.”\textsuperscript{116} “Second, even before the courts, application of the CPLR is expressly restricted to matters not governed by another statute, thereby ‘enabling more specific statutes to govern in special situations or in courts with particularized functions.’”\textsuperscript{117} Since CPLR 213-a was “specifically made applicable to an ‘action on a residential rent overcharge,’” it did not apply to the DHCR’s administrative proceeding.\textsuperscript{118} Hicks, therefore, is significant not just for its interpretation of CPLR 213-a, but for its additional holdings regarding the application and interpretation of the CPLR as a whole.

II. OTHER NOTABLE CASES

A. The CPLR Cornucopia

In Tirado v. Miller, the plaintiff fell on property owned by defendants Samuel and Miriam Miller.\textsuperscript{119} After the accident, a Travelers Insurance Company adjuster allegedly spoke with Miriam Miller, who allegedly denied that the plaintiff or his company had

\textsuperscript{112} Id. at 131, 901 N.Y.S.2d at 189.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 132, 901 N.Y.S.2d at 190 (quoting People v. Finnegan, 85 N.Y.2d 53, 58, 647 N.E.2d 758, 761, 623 N.Y.S.2d 546, 549 (1996)).
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 133, 901 N.Y.S.2d at 190 (citing N.Y. C.P.L.R. 103(b) (McKinney 2003)).
\textsuperscript{117} Id. (quoting DAVID D. SIEGEL, NEW YORK PRACTICE § 2, at 2 (4th ed. 2005)).
\textsuperscript{118} Id. at 133–34, 901 N.Y.S.2d at 191.
been on the property on the date of the accident. 120 After filing the note of issue, the plaintiff served “a subpoena duces tecum and ad testificandum, demanding stated portions of Travelers’s claim file and a deposition of [Traveler’s claims adjuster] regarding his conversation(s) with Miriam Miller.” 121 The plaintiff alleged that Ms. Miller’s deposition testimony was inconsistent with her statements to Travelers’s claims adjuster. 122 The defendants and Travelers moved to quash the subpoena, and for a protective order as to Travelers’ claim file and the claims adjuster’s deposition. 123 They argued (1) “that the information sought . . . was privileged as attorney work product and as material prepared in anticipation of litigation”; and (2) “that the information sought was not relevant or material to the issues of the litigation.” 124

The Supreme Court granted the motion, but on a different ground. The Supreme Court found that the subpoenas were served post-note of issue, and that such discovery was not permitted post-note of issue. 125 On appeal, the plaintiff claimed that the Supreme Court did not have the authority to decide the motion on a ground not raised by the moving parties. 126 The Second Department rejected the plaintiff’s argument and affirmed the Supreme Court’s order. 127

According to the court, CPLR 3101 only governs pre-note of issue discovery. 128 Post-note of issue discovery is governed by 22 NYCRR 202.21. 129 “[O]nce method of obtaining post-note discovery is to vacate the note of issue within 20 days of its service.” 130 The second method, which applies beyond that twenty-day period, requires the movant to show “unusual or unanticipated circumstances and substantial prejudice’ absent the additional discovery.” 131 Since it was undisputed that the request was made more than twenty days post-note of issue, the plaintiff was required to demonstrate unusual or unanticipated circumstances and substantial

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120 Id. at 155, 901 N.Y.S.2d at 360.
121 Id.
122 Id.
123 Id.
124 Id. at 155–56, 901 N.Y.S.2d at 360-61.
125 Id. at 156, 901 N.Y.S.2d at 360-61.
126 Id. at 156, 901 N.Y.S.2d at 361.
127 Id.
128 Id. at 157, 901 N.Y.S.2d at 361.
129 Id.
130 Id.
131 Id. (citations omitted); N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21(d) (2008).
prejudice.\textsuperscript{132}  
Furthermore, the court held that, “in rendering decisions on motions, trial courts are not necessarily limited by the specific arguments raised by [the] parties in their submissions.”\textsuperscript{133} General relief clauses within motions (i.e., for “such other, further, or different relief”) enable the court “to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced.”\textsuperscript{134} Since here the relief granted was identical to the ultimate relief demanded, the court held that “the general relief clause in the [defendants’] notice of motion permitted the court to consider an alternative ground for granting the motion, consistent with the ultimate relief . . . requested.”\textsuperscript{135} 
The court’s analysis, however, did not end there. The court further noted that “there are circumstances . . . where trial courts may not order certain forms of relief without giving the parties an opportunity to be heard on the specifics.”\textsuperscript{136} According to the court, “these circumstances are typically identified in statutes,” citing CPLR 327(a), 511, 602(a), 2104, 3025(b), 3104(b), 3211(c), 4402, 5019(a), and 6401(a) as examples of statutes precluding the court from granting sua sponte relief.\textsuperscript{137} In contrast, “[n]o statute within the CPLR generally, or article 31 specifically, restricts a trial court’s reasoning on any discovery issue only to arguments specifically set forth by the parties, beyond the general notice requirements of CPLR 2214(b).”\textsuperscript{138} Thus, the court held that the Supreme Court properly exercised its discretion in granting that branch of the defendants’ motion seeking to quash the subpoena, and in effect granting their motion for a protective order on the basis that the plaintiff’s post-note of issue request for discovery was untimely.\textsuperscript{139}

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\textsuperscript{132} Tirado, 75 A.D.3d at 157, 901 N.Y.S.2d at 362.
\textsuperscript{133} Id. at 157–58, 901 N.Y.S.2d at 362.
\textsuperscript{134} Id. at 158, 901 N.Y.S.2d at 362 (citing Patrick M. Connors, Practice Commentaries, C2214:5, in N.Y. C.P.L.R. 2214 (McKinney 2010)).
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 158–60, 901 N.Y.S.2d at 362–63.
\textsuperscript{138} Id. at 160, 901 N.Y.S.2d at 364.
\textsuperscript{139} Id. at 161, 901 N.Y.S.2d at 364.
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B. CPLR 5003-a—Prompt Payment Following Settlement

In *Klee v. Americas Best Bottling Co.*, the parties agreed to settle the matter for $400,000.\(^{140}\) Along with a release, stipulation of discontinuance, and a tax ID number, the defendants’ attorney requested that the plaintiff’s attorney provide an IRS Form W-9. The plaintiff’s attorney refused.\(^{141}\) After the defendants failed to pay the $400,000 settlement within 21 days of the tender of the release and stipulation of discontinuance, the plaintiff entered judgment for the settlement amount, plus interest, costs, and disbursements, pursuant to CPLR 5003-a.\(^{142}\) The defendants then moved to vacate the judgment, arguing that the W-9 was a condition precedent to payment of the settlement.\(^{143}\) While the motion was pending, plaintiff’s attorney provided the defendants with the W-9, and the defendants paid the amount of the settlement, but not the interest, costs, or disbursements.\(^{144}\) The trial court, relying on the First Department’s decision in *Cely v. O’Brien & Kreitzberg*, vacated the judgment, finding that plaintiff’s attorney was required to provide the W-9 as a condition precedent to payment of the settlement proceeds.\(^{145}\) The Second Department, however, reversed, disagreeing with the First Department’s decision in *Cely*.\(^{146}\)

The Second Department held that neither CPLR 5003-a nor the parties’ settlement required the completion of a W-9.\(^{147}\) Furthermore, the court held that “the defendants made no showing that the portion of the personal injury settlement which the plaintiff’s attorney [might] be entitled to retain as a legal fee [was] actually a ‘reportable payment’ subject to the reporting requirements of the [IRS]”.\(^{148}\) The court also held that, “even assuming ... [an] insurance carrier is mandated to report payment of the settlement proceeds ... , the defendants [did not show that a] W-9 [was] the sole means by which [a] carrier [could] comply with

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\(^{141}\) Id. at 544, 907 N.Y.S.2d at 261.

\(^{142}\) Id. at 544–45, 907 N.Y.S.2d at 261.

\(^{143}\) Id. at 545, 907 N.Y.S.2d at 261.

\(^{144}\) Id.


\(^{146}\) Id.

\(^{147}\) Id. at 546, 907 N.Y.S.2d at 262.

\(^{148}\) Id. (citation omitted).
its reporting obligations.”

By contrast, the First Department in Cely held, “[a]lthough neither the open court settlement agreement nor CPLR 5003-a requires the submission of those documents as a condition of payment of the settlement amount, defendant’s request for them is supported by statute and case law.”

Thus, neither court read into CPLR 5003-a a requirement that the plaintiff provide a W-9 Form. Cely only found such a requirement in the IRS Code and prior case law. The result in Klee, however, appears to be more in keeping with the objective of CPLR 5003-a of effecting prompt payment following settlement.

C. CPLR 6212(a)—Attaching Property

In Hotel 71 Mezz Lender LLC v. Falor, the issue was whether the intangible property that the plaintiff sought to attach was subject to attachment under CPLR 6212. The plaintiff, Hotel 71 Mezz Lender LLC (“Hotel 71”), made a loan to a borrower for developing and renovating Hotel 71 in Chicago. The defendants, who did not reside in New York, guaranteed the loan and consented to jurisdiction in New York. When the borrower defaulted, the plaintiff commenced an action against the guarantors. After the defendants answered, the plaintiff applied for a CPLR 6201 prejudgment order of attachment on defendants’ interests in twenty-two limited liability companies owned outside of New York.

CPLR 6202 states that “[a]ny debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property

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149 Id.
151 Klee, 76 A.D.3d at 546, 907 N.Y.S.2d at 262.
153 Id. at 307, 926 N.E.2d at 1204, 900 N.Y.S.2d at 700.
154 Id. at 307–08, 926 N.E.2d at 1204–05, 900 N.Y.S.2d at 700.
155 Id. at 308, 926 N.E.2d at 1205, 900 N.Y.S.2d at 700–01.
or debt is the person designated in section 5201.” \(^{157}\) In addition, CPLR 5201(b) “authorizes a judgment creditor to reach for any property interest the judgment debtor may have, whether [real or personal], tangible or intangible, which could be assigned or transferred.” \(^{158}\) Applying a similar analysis used for CPLR 5201, the court held that “the intangible property plaintiff sought to attach—defendants’ ownership/membership interests in 22 out-of-state limited liability companies—is akin to intangible contract rights, and is clearly assignable and transferrable.” \(^{159}\) Thus, the ownership interests are “property” within CPLR 6202.

Notably, rather than look to the legislative history, the court looked to what it perceived as a similar or analogous statute to determine the scope and meaning of CPLR 6202. \(^{160}\) Therefore, in addition to looking at the legislative history and purpose of a statute, practitioners should consider the relationship between the statute and other statutes, or how the courts have interpreted similar terms in other statutes. Whether invoking the maxims of a “whole act” or “whole code” rule, or where relevant, an argument “in pari materia,” practitioners may better advocate for a presumption in favor of a particular reading of a statute by seeking out analogous law. Specifically, practitioners may highlight the same words in similarly-enacted statutes for the purpose of demonstrating an anomalous or inconsistent result that would follow from their opponent’s interpretation. Alternatively, practitioners may offer an interpretation that harmonizes or produces a consistent outcome when applied across statutes. The goal is to view statutory analysis as a holistic endeavor; while seemingly simple, making the argument, in addition to a textual argument, perhaps gives a judge one more reason to accept an interpretation in your client’s favor.

**D. CPLR Article 9—Flexible Approach to Class Action**

In *City of New York v. Maul*, the City commenced an action on behalf of seven children in foster care against the Commissioner of the Office of Mental Retardation and Developmental Disabilities

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159 *Id.* at 314, 926 N.E.2d at 1209, 900 N.Y.S.2d at 705.
160 *Id.* at 313–14, 926 N.E.2d at 1209, 900 N.Y.S.2d at 704–05.
("OMRDD"), the "state agency responsible for the development of 'comprehensive plans, programs, and services' for 'persons with mental retardation and developmental disabilities.'"\textsuperscript{161} In general, the City claimed that the Administration for Children's Services ("ACS") and OMRDD did not fulfill their statutory and regulatory duties with respect to certain children in ACS's foster care.\textsuperscript{162} Plaintiffs intervened, representing that at least 150 children with developmental disabilities were similarly injured by the ACS and OMRDD.\textsuperscript{163} At issue in the Court of Appeals was whether the Appellate Division abused its discretion in affirming a Supreme Court order granting class certification to the plaintiffs under CPLR article 9.\textsuperscript{164} "CPLR 901(a) sets forth five prerequisites for class certification ... commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority."\textsuperscript{165} The only prerequisite at issue in the Court of Appeals was commonality.\textsuperscript{166} According to the Court,

"Courts have recognized that the criteria set forth in CPLR 901(a) "should be broadly construed not only because of the general command for liberal construction of all CPLR sections,"\textsuperscript{167} but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it."\textsuperscript{168}

With that liberal construction in mind, the Court then looked at whether the Appellate Division abused its discretion, as a matter of law, in qualifying the action for class action status.\textsuperscript{169} Since the Appellate Division identified four common allegations that rose above all other claims, the Court found that the Appellate Division did not abuse its discretion in determining that common questions predominated under CPLR 901(a).\textsuperscript{170} The Court held that "predominance, not identity or unanimity," is the

\textsuperscript{161} City of N.Y. v. Maul, 14 N.Y.3d 499, 504, 929 N.E.2d 366, 368, 903 N.Y.S.2d 304, 306 (quoting N.Y. MENTAL HYG. LAW § 13.07(a) (McKinney 2006)).  
\textsuperscript{162} Id. at 504–05, 929 N.E.2d at 369, 903 N.Y.S.2d at 307.  
\textsuperscript{163} Id. at 506, 929 N.E.2d at 370, 903 N.Y.S.2d at 308.  
\textsuperscript{164} Id. at 503–04, 929 N.E.2d at 368, 903 N.Y.S.2d at 306.  
\textsuperscript{165} Id. at 508, 929 N.E.2d at 372, 903 N.Y.S.2d at 309.  
\textsuperscript{166} Id.  
\textsuperscript{167} N.Y. C.P.L.R. 104 (McKinney 2003).  
\textsuperscript{169} Id.  
\textsuperscript{170} Id. at 512, 929 N.E.2d at 374–75, 903 N.Y.S.2d at 312–13.
The Court, however, was quick to note that it was “not expressing an opinion on the merits,” and that “CPLR 902 allows [a] trial court to decertify [a] class at any time before a decision on the merits if it becomes apparent that class treatment is inappropriate.”

Judge Smith, writing for the dissent, argued that the case essentially involved a claim that there was a “systemic failure,” and that systemic failures should not qualify for class treatment as a matter of law. According to Judge Smith, suits alleging systemic failures will require the courts to craft remedies that are more properly the province of the legislative and executive branches. As such, those decisions should be left to the Legislature and the Executive, not the courts.

III. CONCLUSION

*Maul* represents yet another instance where the courts have relied on the liberal construction that should be applied in determining the scope and meaning of the CPLR. Thus, while it is true that a failure to comply with certain CPLR provisions can result in dismissal of an action, preclusion of a claim, or the inability to pursue discovery, cases such as *Maul*, *M Entertainment*, *MacLeod*, and *Tirado* suggest that the courts are adopting a more result-oriented approach, and showing a greater flexibility in the application of the CPLR’s procedural requirements, depending on the circumstances of the particular case. Of course, this does not mean that practitioners should be any less diligent in striving for complete and literal adherence to statutory requirements. As the dissent in *Grimm* and Judge

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171 Id. at 514, 929 N.E.2d at 376, 903 N.Y.S.2d at 314 (quoting Friar, 78 A.D.3d at 98, 434 N.Y.S.2d at 708).
172 Id. at 514, 929 N.E.2d at 375–76, 903 N.Y.S.2d at 313–14.
173 Id. at 517, 929 N.E.2d at 378, 903 N.Y.S.2d at 316 (Smith, J., dissenting).
174 Id.
175 Id. at 499, 929 N.E.2d at 366, 903 N.Y.S.2d at 304; see supra Part II.D.
178 MacLeod v. Cnty. of Nassau, 75 A.D.3d 57, 61, 903 N.Y.S.2d 411, 414 (App. Div. 2d Dep’t 2010); see supra Part I.C.
179 Tirado v. Miller, 75 A.D.3d 153, 154, 903 N.Y.S.2d 358, 360 (App. Div. 2d Dep’t 2010); see supra Part II.A.
Smith's comment in *Thornton*\textsuperscript{181} make clear, there are many judges who would follow the "textual" approach, notwithstanding the outcome. The safest course, therefore, is always to know the rules that apply to a particular case and proceed accordingly, thereby avoiding the harsher side of the CPLR's "Jekyll and Hyde" dichotomy.

\textsuperscript{181} Thornton v. Baron, 5 N.Y.3d 175, 182, 833 N.E.2d 261, 265, 800 N.Y.S.2d 118, 122 (2005) (Smith, J., dissenting); see supra Part I.D.