SEA CHANGE: NEW YORK STATE CLASS ACTIONS: MAKING IT WORK, FULFILLING THE PROMISE: PART III

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In this third installment of our ongoing analysis of class actions brought pursuant to CPLR article 9[1] we discuss the following developments.

First, in 2014 the Court of Appeals rendered a decision in *Borden v. 400 East 55th Street Associates, L.P.*[2] which clarified its strong commitment to enforcing the broad, liberal goals set forth in the legislative history of CPLR article 9.[3] In doing so, the Court of Appeals encouraged the appellate division and trial courts to take a more aggressive role in certifying a variety of class actions, particularly, those brought by tenants, consumers and employees.[4] As we shall see, the appellate division and the trial courts have responded accordingly.

Second, while the Court of Appeals was expanding the usefulness of CPLR article 9, the U.S. Supreme Court was closing the door on state court consumer class actions[5] with its decisions in *AT&T v.*

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1 *See* Thomas A. Dickerson, *New York State Class Actions: Make It Work–Fulfill the Promise*, 74 ALB. L. REV. 711 (2010) [hereinafter Dickerson, *Make It Work I*]; Thomas A. Dickerson et al., *New York State Class Actions: Making It Work–Fulfilling the Promise: Some Recent Positive Developments and Why CPLR 901(b) Should Be Repealed*, 77 ALB. L. REV 59 (2013) [hereinafter Dickerson, *Making It Work II*]; *see also* Thomas A. Dickerson, *Article 9: Class Action*, *in* 3 WEINSTEIN, KORN, MILLER, NEW YORK CIVIL PRACTICE (David L. Ferstendig ed., 2d ed. 2018) (providing further examples of the author's work regarding CPLR Article 9).

2 Borden v. 400 East 55th St. Assocs., L.P., 23 N.E.3d 997 (N.Y. 2014).

3 *See id.* at 1001.

4 *See id.*; Thomas A. Dickerson & Colleen D. Duffy, '*Borden*': A Welcome Sea Change on New York State Class Actions, N.Y.L.J., June 29, 2015, at 4, col. 1.

5 *See* THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES § 4.03(5)(b) (2019) [hereinafter DICKERSON, THE LAW OF 50 STATES].

Concepcion,[6] *American Express Co. v. Italian Colors Restaurant*,[7] and related cases which, relying on the Federal Arbitration Act (FAA), enforced mandatory arbitration clauses, class action waivers, and class arbitration waivers in consumer contracts.[8] To the extent the directives set forth by the U.S. Supreme Court may be circumvented[9] or ameliorated in state courts,[10] the First Department's bold decision in *Gold v. New York Insurance Co.*[11] expands that circumvention or amelioration to mandatory arbitration clauses in employment contracts.[12] Unfortunately, the U.S. Supreme Court recently decided to enforce mandatory arbitration clauses and class action waivers in employee contracts in *Epic Systems Corp. v. Lewis*[13] thus rendering the ruling in *Gold v. New York Insurance* problematic, at best.

Third, disclosure-only settlements, typically entered into pre-class certification, in mergers and acquisitions (M&A) and corporate governance class actions have been widely criticized.[14] In response

[6] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[7] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

[8] *See, e.g.*, *Am. Express Co.*, 570 U.S. at 238–39; *Concepcion*, 563 U.S. at 353.

[9] *See* Thomas A. Dickerson & Cheryl E. Chambers, *Challenging 'Concepcion' in New York State Courts; Outside Counsel*, N.Y.L.J., Dec. 29, 2015, at 1; *see also* DirectTV, Inc. v. Imburgia, 136 S. Ct. 463, 477 (2015) (Ginsburg, J., dissenting) ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.") (alteration in original).

[10] *See* Dickerson, *Article 9: Class Action*, *supra* note 1, ¶ 901.06(4); DICKERSON, THE LAW OF 50 STATES, *supra* note 5, § 4.03(5)(b).

[11] Gold v. N.Y. Life Ins. Co., 59 N.Y.S.3d 316 (App. Div. 2017), *rev'd*, 111 N.E.3d 321, 322 (2018); *see* Thomas A. Dickerson, *New York State Class Actions: Taking a Stand for Labor*, N.Y.L.J. (Aug. 10, 2017), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/08/10/new-york-state-class-actions-taking-a-stand-for-labor/ [hereinafter Dickerson, *Taking a Stand*].

[12] The U.S. Supreme Court heard oral argument on this issue in October of 2017. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted* 137 S. Ct. 809 (2017), *rev'd*, 138 S. Ct. 1612 (2018); Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2015), *cert. granted* 137 S. Ct. 809 (2017), *rev'd*, 138 S. Ct. 1612 (2018); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *cert. granted* 137 S. Ct. 809 (2017), *aff'd*, 138 S. Ct. 1612 (2018); *see also Supreme Court of the United States, October Term 2017: For the Session Beginning October 2, 2017*, U.S. SUPREME CT. (Sept. 25, 2017), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCal0tober2017.pdf [hereinafter *Supreme Court of the United States, October Term 2017*] (hearing oral argument for the consolidated cases of Lewis v. Epic Sys. Corp., Morris v. Ernst & Young, and Murphy Oil USA, Inc. v. NLRB on October 2, 2017).

[13] *Epic Sys. Corp.*, 138 S. Ct. 1612, 1632 (2018); *see also* Tsoflias v. Barclays Capital, Inc., No. 156559/2017, 2018 N.Y. Misc. LEXIS 2344 (N.Y. Sup. Ct. June 6, 2018) (following *Epic* and enforcing mandatory arbitration clause in employee contract).

[14] *See, e.g.*, City Trading Fund v. Nye, No. 651668/2014, 2015 N.Y. Misc. LEXIS 11, at *57–58 (Sup. Ct. Jan. 7, 2015), *rev'd*, 43 N.Y.S.3d 21 (App. Div. 2016); Gordon v. Verizon Commc'ns, Inc., No. 653084/13, 2014 N.Y. Misc. LEXIS 5642, at *19–20 (Sup. Ct. Dec. 19, 2014) ("An increasing body of commentary has decried the tsunami of litigation, and attendant suspect

the Appellate Division, First Department, in *Gordon v. Verizon Communications*[15] set forth two new factors, in addition to the five factors set forth in *Matter of Colt Industries Shareholders Litigation*,[16] which serve to guide trial courts in evaluating whether a proposed disclosure-only settlement is beneficial to shareholders and the corporations.[17]

Fourth, the Court of Appeals in *Desrosiers v. Perry Ellis Menswear, LLC*[18] addressed the issue of whether and to what extent notice should be given to purported class members pursuant to CPLR 908 when a purported class action is settled with court approval prior to class certification.[19]

Fifth, the Fourth Department in *DeLuca v. Tonawanda Coke Corp.*[20] and the First Department in *Roberts v. Ocean Prime, LLC*[21] have dramatically changed course and certified mass tort class actions alleging property damage and personal injuries.[22]

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disclosure-only settlements, associated with public acquisitions today. . . . A body of law meant to protect shareholder interests from the absence of due care by the corporation's managers has been turned on its head to diminish shareholder value by divesting them of valuable rights via the broad releases . . . ."), *rev'd* 46 N.Y.S.3d 557 (App. Div. 2017); *see also In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 895 (Del. Ch. 2016) ("Scholars have criticized disclosure settlements, arguing that non-material supplemental disclosures provide no benefit to stockholders and amount to little more than deal 'rents' or 'taxes,' while the liability releases that accompany settlements threaten the loss of potentially valuable claims related to the transaction in question or other matters falling within the literal scope of overly broad releases.").

[15] *See Gordon*,, 46 N.Y.S.3d at 567–68; *see also* Thomas A. Dickerson, *Disclosure-Only Settlements in State Courts*, N.Y.L.J. (Sept. 14, 2017), https://www.law.com/newyorklawjournal/almID/1202797993938/DisclosureOnly-Settlements-in-State-Courts/ [hereinafter Dickerson, *Disclosure-Only Settlements*] (noting that the First Department added two factors in *Gordon v. Verizon Communications*); Thomas A. Dickerson, *'For a Peppercorn and a Fee': Disclosure-Only Settlements No Longer Routine*, N.Y.L.J. (Mar. 22, 2018), https://www.law.com/newyorklawjournal/2018/03/22/for-a-peppercorn-and-a-fee-disclosure-only-settlements-no-longer-routine/ [hereinafter Dickerson, *'For a Peppercorn and a Fee'*] (discussing the enhanced standards laid out in *Gordon*).

[16] *In re* Colt Indus. S'holders Litig., 553 N.Y.S.2d 138, 141 (App. Div. 1990) (citing West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 740 (S.D.N.Y. 1970); Klurfeld v. Equity Enterprises, Inc., 436 N.Y.S.2d 303, 308–09 (App. Div. 1981)), *aff'd as modified sub nom.* Colt Indus. S'holder Litig. v. Colt Indus. Inc., 566 N.E.2d 1160 (N.Y. 1991).

[17] *See* Dickerson, *'For a Peppercorn and a Fee'*, *supra* note 15.

[18] *See* Desrosiers v. Perry Ellis Menswear, LLC, 90 N.E.3d 1262 (N.Y. 2017).

[19] *See id.* at 1264; Thomas A. Dickerson, *When Is a 'Class Action' a Real Class Action?*, N.Y.L.J. (Feb. 15, 2018), https://www.law.com/newyorklawjournal/2018/02/15/w hen-is-a-class-action-a-real-class-action/; Richard J. Schager Jr., *'Desrosiers': Judicial Approval, Class Notice Are Required for Settlement of Uncertified Class Actions*, N.Y.L.J. (Jan. 23, 2018), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/23/desro siers-judicial-approval-class-notice-are-required-for-settlement-of-uncertified-class-actions/.

[20] DeLuca v. Tonawanda Coke Corp., 22 N.Y.S.3d 768 (App. Div. 2015).

[21] Roberts v. Ocean Prime, LLC, 49 N.Y.S.3d 666 (App. Div. 2017).

[22] *See id.* at 667 (affirming the supreme court's class certification of commercial and residential tenants who suffered property damage from Superstorm Sandy, claiming negligence

Sixth, indirect tax payer class actions have been approved by the Third Department in *Matter of New Cingular Wireless PCS, LLC v. Tax Appeals Tribunal*.[23]

I. WE ASKED THE COURT OF APPEALS FOR GUIDANCE

In our 2010 article, *New York State Class Actions: Make It Work-Fulfill The Promise*,[24] we asked the Court of Appeals to take a more active role in providing necessary guidance to the appellate division and the trial courts regarding the use of CPLR article 9: "[a]nd, lastly, the article encourages the New York State Court of Appeals to continue to take a more active role in choosing to hear appeals in class action cases involving a variety of issues, including the granting and denial of class certification (CPLR 901, 902)."[25]

A. The Beginning of Change

In *Koch v. Acker, Merrall & Condit Co.*,[26] an individual consumer fraud action involving the sale of counterfeit wine, the Court of Appeals determined that both General Business Law ("GBL") section 349 (deceptive and misleading business practices prohibited) and GBL 350 (false advertising prohibited) are certifiable in consumer class actions.[27] In *Corsello v. Verizon New York*,[28] an inverse

in failing to prevent damage in advance of the storm and to repair damage after the storm); *DeLuca*, 22 N.Y.S.3d at 769–70 (affirming the supreme court's class certification of property owners and individuals suffering damages from defendant's negligent discharge of chemicals into the atmosphere); Thomas A. Dickerson, *NY Mass Tort Class Actions: A Sea Change*, N.Y.L.J. (June 29, 2018), https://www.law.com/newyorklawjournal/2018/06/29/070218ny_dickerson/; *see also* Menna v. Maiden Lane Props., LLC, No. 157710/15, 2018 N.Y. Misc. LEXIS 1482, at *15 (Sup. Ct. Apr. 23, 2018) (granting class certification in a case with a similar flooding issue).

[23] *See In re* New Cingular Wireless PCS, LLC v. Tax Appeals Tribunal, 59 N.Y.S.3d 846, 847 (App. Div. 2017).

[24] Dickerson, *Make It Work I*, *supra* note 1, at 711; *see also* Dickerson et al., *Making It Work II*, *supra* note 1, at 59–60 (discussing recent developments since the first article).

[25] Dickerson, *Make It Work I*, *supra* note 1, at 711. Traditionally, the Court of Appeals has declined to address the issue of orders granting or denying class certification on the grounds that such orders are non-final. *See* Goldberg Weprin & Ustin, LLP v. Tishman Constr. Corp., 748 N.E.2d 1071, 1071 (N.Y. 2001). Such orders should be appealable as of right to the Court of Appeals. *See* Dickerson, *Make It Work I*, *supra* note 1, at 711 n.15.

[26] *See* Koch v. Acker, Merrall & Condit Co., 967 N.E.2d 675 (N.Y. 2012).

[27] *See id.* at 675 (quoting City of New York v. Smokes-Spirits.Com, Inc., 911 N.E.2d 834, 838 (N.Y. 2009)) (citing Goshen v. Mut. Life Ins. Co. of N.Y., 774 N.E.2d 1190, 1195 n.1 (N.Y. 2002)); *see also* Thomas A. Dickerson et al., *Summary of New York State Class Actions in 2012*, N.Y.L.J. (Dec. 28, 2012), https://www.nycourts.gov/courts/9jd/TacCert_pdfs/Dickerson_Docs/summary.pdf (discussing how *Koch v. Acker, Merrall, & Condit* clarified the elements of consumer class action claims under General Business Law sections 349 and 350).

[28] Corsello v. Verizon N.Y., Inc., 967 N.E.2d 1177 (N.Y. 2012).

condemnation class action, the Court of Appeals held 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]

II. *BORDEN*: SEA CHANGE

In *Borden v. 400 East 55th Street Assocs.*, the Court of Appeals affirmed the certification of three class action lawsuits seeking rent overcharges.[30] The court cited violations of the Rent Stabilization Law of 1969 and made a strong policy statement noting:

> [P]ermitting plaintiffs to bring these claims as a class accomplishes the purpose of CPLR 901(b). . . . [T]he State Consumer Protection Board emphasized the importance of class actions: "The class action device responds to the problem of inadequate information as well as to the need for economies of scale" for "a person contemplating illegal action will not be able to rely on the fact that most people will be unaware of their rights—if even one typical person files a class action, the suit will go forward and the other members of the class will be notified of the action."[31]

A. Borden *and CPLR 901(b)*

In *Borden*, the Court of Appeals clarified the scope of CPLR 901(b) which provides, in part, that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" unless authorized by the statute creating the penalty.[32] The Court of Appeals held that in many class

[29] *Id.* at 1186.

[30] *See* Borden v. 400 E. 55th St. Assocs., L.P., 23 N.E.3d 997, 999 (N.Y. 2014) (citing Roberts v. Tishman Speyers Props., LP, 918 N.E.2d 900 (N.Y. 2009)).

[31] *Borden*, 23 N.E.3d at 1002 (citing Memorandum from the St. Consumer Prot. Bd., to Couns. to the Governor, Class Action Bill (A. 1252B, S. 1309B) (May 29, 1975), N.Y. Bill Jacket, 1975 S.B. 1309-B, 181st Leg. Reg. Sess. (1975), ch. 207 at 1).

[32] N.Y. C.P.L.R. 901(b) (McKinney 2018). CPLR 901(b), unique among state court class action rules, had been engrafted onto Article 9, an otherwise modern class action statute equal to or better than Federal Rule 23, at the request of the Empire State Chamber of Commerce asserting in 1975, without benefit of any studies or scholarly support that "[p]enalties and class actions simply do not mix." Memorandum from Sanford H. Bolz, Gen. Couns., Empire St. Chamber of Com., Memorandum in Opposition, N.Y. Bill Jacket, 1975 S.B. 1309-B, 181st Leg. Reg. Sess. (1975), ch. 207 at 1.

actions the penalty provisions of a statute may be waived as long as class members have an opportunity to opt out of the class and seek individual relief.[33] CPLR section 901(b) is no longer followed by the

[33] Regarding the history of the waiver concept, after reviewing court decisions related to CPLR Section 901(b) in the early years from 1975 to 1987, "nearly all class actions alleging the violation of a statute which provided for a 'penalty' were denied class certification." *Compare* Dickerson & Duffy, *supra* note 4; *see also* Klapak v. Pappas, 433 N.Y.S.2d 500, 501 (App. Div. 1980) (dismissing class action brought pursuant to Social Services Law § 131-o), *and* Carter v. Frito-Lay, Inc., 425 N.Y.S.2d 115, 116 (App. Div. 1980) (dismissing class action brought pursuant to Labor Law § 198), *and* Burns v. Volkswagen of Am., Inc., 460 N.Y.S.2d 410, 411, 414 (Sup. Ct. 1982), *aff'd*, 468 N.Y.S.2d 1017 (App. Div. 1983) (dismissing class action brought pursuant to General Business Law § 349), *with* Vickers v. Home Fed. Sav. & Loan Ass'n, 390 N.Y.S.2d 747, 748 (App. Div. 1977) (finding that the Truth-in-Lending Act is not at odds with CPLR 901(b) and permits class action to recovery). In addition, these cases denied plaintiff's attempt to waive the "penalty" and seek only actual damages such as in the case of *Lennon v. Philip Morris Cos.* in which the court stated, "[e]ven where treble damages are discretionary and need not be sought by the injured party, it is the court's understanding that no New York court has sustained such a claim either under the Donnelly Act [General Business Law § 340] or any other statutory provision." Lennon v. Philip Morris Cos., 734 N.Y.S.2d 374, 380 (Sup. Ct. 2001).

In *Super Glue Corp. v. Avis Rent A Car System, Inc.*, the court introduced the concept that a class action plaintiff could unilaterally waive a "penalty" with the proviso that absent class members be given the opportunity to opt out and seek individual statutory damages. *See* Super Glue Corp. v. Avis Rent A Car Sys., Inc., 517 N.Y.S.2d 764, 767 (App. Div. 1987) (citing Weinberg v. Hertz Corp., 499 N.Y.S.2d 693 (App. Div. 1986), *aff'd*, 509 N.E.2d 347 (N.Y.1987)); *see also* Ridge Meadows Homeowners' Ass'n v. Tara Dev. Co., 665 N.Y.S.2d 361, 361 (App. Div. 1997) (citing *Super Glue Corp.*, 517 N.Y.S.2d at 767) ("[P]laintiffs consent to strike that portion of the sixth cause of action seeking that relief and to limit their demand to actual damages. Thus, CPLR 901 (b) is no longer applicable and that cause of action may be maintained as a class action."). In *Cox v. Microsoft Corp.*, the First Department noted,

> We also reject Microsoft's argument that plaintiffs are not entitled to class action relief under General Business Law § 349 since the statutorily prescribed $50 minimum damages to be awarded for a violation of that section constitutes a "penalty" within the meaning of CPLR 901(b). Inasmuch as plaintiffs in their amended complaint expressly seek only actual damages, the motion court correctly found CPLR 901(b), which prohibits class actions for recovery of minimum or punitive damages, inapplicable.

Cox v. Microsoft Corp., 778 N.Y.S.2d 147, 148–49 (App. Div. 2004) (citing *Ridge Meadows Homeowners' Ass'n*, 665 N.Y.S.2d 361; *Super Glue Corp.*, 517 N.Y.S.2d at 767).

This concept of a waiver expanded beyond GBL § 349 "class actions to class actions brought by employees alleging violation of various Labor Law provisions." Dickerson & Duffy, *supra* note 4. For example, in *Pesantez v. Boyle Environmental Services*, the court stated, "[t]o 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." Pesantez v. Boyle Envtl. Servs., Inc., 673 N.Y.S.2d 659, 660 (App. Div. 1998) (citing *Weinberg*, 499 N.Y.S.2d at 695; *Super Glue Corp*, 517 N.Y.S.2d at 767). The waiver concept has also been applied in a class action alleging violation of the Arts and Cultural Affairs Law § 25.33 and Labor Law 663 but not in a class action brought by Nassau County seeking hotel taxes from online travel sellers. *Compare* Rutella v. Craig Scott Capital, LLC, No. 603120/14, slip op. at 5 (N.Y. Sup. Ct. 2015) (citing County of Nassau v. Expedia, Inc., 993 N.Y.S.2d 39 (App. Div. 2014)) ("Because liquidated damages for unpaid wages are a penalty, plaintiff may not recover liquidated damages in a class action."), *and* Pires v. Bowery Presents, LLC, 988 N.Y.S.2d 467, 474 (Sup. Ct. 2014) (citing *Cox*, 778 N.Y.S.2d at 148–49) ("Based on the statutory language found in Arts and Cultural Affairs Law § 25.33—which is nearly identical to the

federal courts[34] and should be repealed.[35]

III. DISCLOSURE-ONLY SETTLEMENTS

Disclosure-only settlements have been strongly criticized.[36] In *City Trading Fund v. Nye* the trial court noted,

> In sum, when the original alleged omissions and supplemental disclosures are closely scrutinized, it is clear that they are not only immaterial, they are grossly

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language found in General Business Law § 349(h) in providing that a plaintiff may 'recover his actual damages or fifty dollars, whichever is greater'—I am compelled to find that Pires may waive the statutory minimum level of recovery, and seek the lesser amount of actual damages in a class action."), *with Expedia, Inc.*, 993 N.Y.S.2d at 41 ("[T]he plaintiff cannot obtain class certification of this action because, under the plaintiff's own Hotel Tax law, it is required to recover a 'penalty' . . . within the meaning of CPLR 901(b) . . . .").

While the Court of Appeals first addressed CPLR Section 901(b) in *Sperry v. Crompton Corp.*, it was not until *Borden v. 400 E. 55th St. Assocs., L.P.* that the Court clarified its position on the waiver concept. *Borden*, 23 N.E.3d at 999 (citing *Roberts*, 918 N.E.2d 900); *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1013 (2007).

> The language of CPLR 901(b) itself says it is not dispositive that a statute imposes a penalty so long as the action brought pursuant to that statute does not seek to recover a penalty.
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> This view is bolstered by the legislative history of CPLR 901(b), which provides that the statute requires a liberal reading and allows class-action recovery of actual damages despite a statute's additional provision of treble damages. . . . Waiver does not circumvent CPLR 901(b); on the contrary, the drafters not only foresaw but intended to enable plaintiffs to waive penalties to recover through a class action.
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> . . . . It is abundantly clear that plaintiffs seek a refund, i.e. actual damages, which CPLR 901(b) did not intend to bar.
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> . . . .
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> Where a statute imposes a nonmandatory penalty, plaintiffs may waive the penalty in order to bring the claim as a class action . . . . Although CPLR 901(b) intended to restrict the types of cases that could be brought as class actions, in our cases the CPLR is not contravened by allowing waiver because plaintiffs will not receive a windfall. They will only receive compensatory damages in the form of rent overcharges.

Borden, 23 N.E.3d at 1001, 1002.

[34] *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 399–400 (2010) (holding that CPLR Section 901(b) not followed in federal courts); Thomas A. Dickerson, *State Class Actions: Game Changer*, N.Y.L.J., Apr. 6, 2010, at 6, col. 4.

[35] *See* Dickerson et al, *Making It Work II*, *supra* note 1, at 69–70; *see also* THE STATE COURTS OF SUPERIOR JURISDICTION COMM. ET AL., N.Y.C. BAR ASS'N, PROPOSED AMENDMENTS TO ARTICLE 9 OF THE CIVIL PRACTICE LAW AND RULES 5–6, 8 (2015), https://www2.nycbar.org/pdf/report/uploads/20072985-ClassActionsProposedAmendsArt9CPLRJudicialAdminLitigationStateCourtsReportFINAL11515.pdf (recommending that CPLR 901(b) be repealed as "an historical anachronism").

[36] *See In re* Walgreen Co. S'holder Litig., 832 F.3d 718, 725–26 (7th Cir. 2016) (quoting *In re* Trulia, Inc. Stockholder Litig.,129 A.3d 884, 898–99 (Del. Ch. 2016)) (disapproving a proposed disclosure-only settlement and adopting the standard in *In re Trulia, Inc. Stockholder Litigation*.).

> immaterial. None of the supplemental disclosures "significantly altered the 'total mix' of information made available."
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> . . . . [T]he ubiquity and multiplicity of merger lawsuits, colloquially known as a "merger tax", has caused many to view such lawsuits with a certain degree of skepticism. The lawsuits are filed only a relatively short time before the shareholder vote, and all it takes is a remote threat of injunction or delay to rationally incentivize settlement, even if defendants firmly and rightfully believe the lawsuit has no merit . . . .
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> . . . . The defendant corporation's cost-benefit calculus almost always leads the company to settle. Even a slight [chance] of an adverse outcome will induce a company to rationally settle given the costs. . . .
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> Yet, notwithstanding the current climate of merger litigation, this case still stands out. It stands out for its downright frivolity.[37]

A. Enhanced Standard

In *Gordon v. Verizon Communications, Inc.*, the First Department, after noting that "[m]ore than two decades of mergers and acquisitions litigation . . . have been informative as to the need to curtail excesses not only on the part of corporate management, but also on the part of overzealous litigating shareholders and their counsel,"[38] reviewed the proposed settlement applying the five factors in *Matter of Colt Industries Shareholders Litigation* (likelihood of success, the extent of support from the parties, the judgment of

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[37] City Trading Fund v. Nye, No. 651668/2014, 2015 N.Y. Misc. LEXIS 11, at *37–41 (Sup. Ct. Jan. 7, 2015) (quoting *In re* Cogent, 7 A.3d 487, 509 (Del. Ch. 2010), *rev'd*, 43 N.Y.S.3d 21 (App. Div. 2016); *see also* Gordon v. Verizon Commc'ns, Inc., No. 653084/13, 2014 N.Y. Misc. LEXIS 5642, at *19–20 (Sup. Ct. Dec. 19, 2014) ("An increasing body of commentary has decried the tsunami of litigation, and attendant suspect disclosure-only settlements, associated with public acquisitions today. . . . A body of law meant to protect shareholder interests from the absence of due care by the corporation's managers has been turned on its head to diminish shareholder value by divesting them of valuable rights via broad releases . . . ."), *rev'd*, 46 N.Y.S.3d 557 (App. Div. 2017); *In re* Allied Healthcare S'holders Litig., No. 652188/2011, 2015 N.Y. Misc. LEXIS 3810, at *3–5 (Sup. Ct. Oct. 23, 2015) ("In summary, this proposed settlement offers nothing to the shareholders except that attorneys they did not hire will receive a $375,000 fee and the corporate officers who were accused of wrongdoing, will receive general releases. . . . Putting aside any concerns of collusion, (and there are many), this practice of compensating class counsel no matter how meaningless the result is, creates the impression . . . that these actions are brought merely for the purpose of generating legal fees.").

[38] Gordon v. Verizon Commc'ns, Inc., 46 N.Y.S.3d 557, 567 (App. Div. 2017).

counsel, the presence of bargaining in good faith and the nature of the issues of law and fact) and added two more factors (class benefit and corporate benefit).[39] After reviewing the benefits of each of the four proposed disclosures in *Gordon*, the First Department noted that "[t]he most beneficial aspect of the proposed settlement to the shareholders . . . was [the] inclusion of a fairness opinion requirement . . . . This prospective corporate governance reform provided a benefit to Verizon shareholders in mandating an independent valuation, without restricting the flexibility of directors in making a pricing determination."[40] In addition, the First Department held that the proposed settlement would reflect Verizon's "direct input into the nature and breadth of the additional disclosures . . . and the corporate governance reform" and Verizon would not "hav[e] to incur additional legal fees and expenses of a trial."[41] "[W]e find that the proposed settlement meets the enhanced standard we announce here."[42]

IV. MANDATORY ARBITRATION CLAUSES

As the Court of Appeals and the appellate division were opening the door for consumers, tenants and employees to file class actions,[43] the U.S. Supreme Court was closing the same door for consumers[44]

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[39] *Id.* at 566–68 (citing Colt Indus. S'holder Litig. v. Colt Indus. Inc., 566 N.E.2d 1160, 1166 (N.Y. 1991); Rosenfeld v. Bear Stearns & Co., 655 N.Y.S.2d 473, 473 (App. Div. 1997); Maher v. Zapata Corp., 714 F.2d 436, 466 (5th Cir. 1983)).

[40] *Gordon*, 46 N.Y.S.3d at 569; *see also* Seinfeld v. Robinson, 676 N.Y.S.2d 579, 585 (App. Div. 1998) (citing United Operating Co. v. Karnes, 482 F. Supp. 1029, 1031, 1032 (S.D.N.Y. 1980)) (explaining the significance of corporate reforms in assessing a proposed settlement).

[41] *Gordon*, 46 N.Y.S.3d at 570.

[42] *Id.* A subsequent decision incorporating the First Department's enhanced standard is *Roth v. Phoenix Cos., Inc.* The trial court found the proposed remedial disclosures "outstanding. It provides for expeditious beneficial relief for the class that affords them material remedial disclosures without the need for protracted costly litigation. . . . [T]he gravamen of plaintiff's complaint is a challenge to the disclosure implications of the merger . . . . The terms of the settlement sufficiently remedy plaintiff's concerns." Roth v. Phoenix Cos., Inc., 50 N.Y.S.3d 835, 838 (Sup. Ct. 2017). In *In re Newbridge Bancorp Shareholder Litigation*, the Court found that "[s]upplemental disclosures were of only marginal benefit to the Class, a finding which is supported by the lack of substantial evidence that any of the supplemental disclosures were significant to a reasonable shareholder's decision in voting for the Proposed Transaction." *In re* Newbridge Bancorp S'holder Litig. No. 15 CVS 9251, 2016 WL 6885882, at *18 (N.C. Super. Ct. Nov. 22, 2016). As a consequence, the court found class counsel's fee request of $274,537.12 "excessive" and awarded $135,000 in fees. *Id.*; *see also In re* Med. Action Indus. S'holders Litig., 6 N.Y.S.3d 431, 442 (Sup. Ct. 2015) (demonstrating disclosures were approved but legal fees substantially were reduced to reflect marginal value of disclosures).

[43] *See* Borden v. 400 E. 55th St. Assocs., L.P., 23 N.E.3d 997, 999 (N.Y. 2014); Cox v. Microsoft Corp., 778 N.Y.S.2d 147, 148–49 (App. Div. 2004); Pesantez v. Boyle Envtl. Servs., Inc., 673 N.Y.S.2d 659, 661 (App. Div. 1998).

[44] *See* DirectTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (quoting Buckeye Check

and, perhaps, for employees.[45] One need only read Justice Ginsburg's dissent in *DirectTV, Inc.* and the *New York Times* article cited therein[46] to understand that meaningful consumer remedies have nearly been extinguished. Justice Ginsburg stated that "[t]hese decisions have predictably resulting in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws."[47]

A. Circumventing Concepcion

As noted by the California Supreme Court in *Sanchez v. Valencia Holding Company*,[48] *Concepcion* "reaffirmed that the FAA does not preempt 'generally applicable contract defenses, such as fraud, duress, or unconscionability.' Under the FAA, these defenses may provide grounds for invalidating an arbitration agreement if they are enforced evenhandedly and do not 'interfere[] with fundamental attributes of arbitration.'"[49] And, indeed, there are ways in which to

Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)) ("California's interpretation of the phrase 'law of your state' does not place arbitration contracts 'on equal footing with all other contracts.'"); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238 (2013) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011)) ("We specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"); *Concepcion*, 563 U.S. at 357 (abrogating *Discover Bank v. Superior Court* to the effect that consumer contracts containing clauses prohibiting class actions or class arbitrations were void as against public policy); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (emphasis omitted) ("[I]t follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003) (remanding the case so that the arbitrator may decide whether the arbitration agreement prohibits class arbitrations).

[45] *See* Dickerson & Chambers, *supra* note 9, at 4, col. 1.

[46] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html; *see also* Editorial Board, *Arbitrating Disputes, Denying Justice*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/08/opinion/sunday/arbitrating-disputes-denying-justice.html ("Such forced-arbitration clauses, found in the fine print of contracts, also typically bar aggrieved parties from pressing their claims as a group in a class action, often the only practical way for individuals to challenge corporations.").

[47] *Imburgia*, 136 S. Ct. at 477 (Ginsburg, J., dissenting); *see also* Press Release, Consumer Fin. Prot. Bureau, CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/ (announcing a rule that would ban companies from using mandatory arbitration clauses to prevent consumers from joining class actions; however, the rule is no longer in effect due to President signing a joint congressional resolution on November 1, 2017).

[48] Sanchez v. Valencia Holding Co., 353 P.3d 741 (Cal. 2015).

[49] *See id.* at 745–46 (quoting *Concepcion*, 563 U.S. at 334, 339).

circumvent *Concepcion* depending upon the facts of each case.[50]

B. What About Employees?

On October 2, 2017, the Supreme Court heard oral arguments regarding the legality of arbitration agreements in employment contracts requiring workers to waive their rights to sue in collective or class actions.[51] In *Gold v. New York Life Insurance Co.* the First Department

> consider[ed] an issue that we have never directly addressed before now: whether employees can be obliged to arbitrate collective disputes such as class actions regarding wage disputes with their employers. [The majority held] that plaintiffs cannot be required to arbitrate their disputes with defendant New York Life Insurance Company because that obligation would run afoul of the National Labor Relations Act.[52]

The plaintiffs in *Gold* alleged, *inter alia*, unlawful wage deductions for commission reversals in violation of Labor Law section 193, failure to pay overtime in violation of 12 NYCRR 142-2.2, and failure to pay the minimum wage in violation of Labor Law section 652.[53] The defendant sought to dismiss these claims and compel arbitration.[54] "Upon consideration . . . [the court] conclude[d] that the better view is that arbitration provisions such as the one . . .

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[50] *See* Dickerson & Chambers, *supra* note 9, at 4; DICKERSON, THE LAW OF 50 STATES, *supra* note 5, at § 4.03(5)(b).

[51] *See* NLRB v. Alt. Entm't Inc.,, 858 F.3d 393, 402 (6th Cir. 2017) *abrogated by* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Morris v. Ernst & Young LLP, 834 F.3d 975, 979, 980–81 (9th Cir. 2016), *rev'd sub nom. Lewis*, 138 S. Ct. 1612, *and vacated*, 894 F.3d 1093 (9th Cir. 2018); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151, 1157 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015, 1021 (5th Cir. 2015), *aff'd sub nom. Lewis*, 138 S. Ct. 1612; Sutherland v. Ernst & Young LLP, 726 F.3d 290, 292, 297 n.8 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1051, 1055 (8th Cir. 2013); *Supreme Court of the United States, October Term 2017*, *supra* note 12.

[52] *See* Gold v. N.Y. Life Ins. Co., 59 N.Y.S.3d 316, 317 (App. Div. 2017). The *Gold* majority departed from the First Department's historical enforcement of arbitration clauses. *See, e.g.*, Weinstein v. Jenny Craig Operations, Inc., 17 N.Y.S.3d 407, 408 (App. Div. 2015); State v. Philip Morris Inc., 813 N.Y.S.2d 71, 76 (App. Div. 2006); Tsadilas v. Providian Nat'l Bank, 786 N.Y.S.2d 478, 480 (App. Div. 2004). In fact, the *Gold* majority's decision is more consistent with the Court of Appeals decision in *Borden* expanding the application of CPLR Article 9 for class actions brought by consumers, employees and tenants. *See, e.g.*, Borden v. 400 E. 55th St. Assocs., L.P., 23 N.E.3d 997, 999 (N.Y. 2014).

[53] *See Gold*, 59 N.Y.S.3d at 319.

[54] *See id.*

[here], which prohibit class, collective, or representative claims, violate the National Labor Relations Act (NLRA) and thus, that those provisions are unenforceable."[55]

V. 2017: A VERY GOOD YEAR

In 2017, there were several noteworthy decisions. First, the First Department enhanced the standards for the approval of disclosure-only class action settlements.[56] Second, the First Department declined to enforce an arbitration agreement in an employment contract as violative of the National Labor Relations Act.[57] Third, trial courts certified numerous employee and independent contractor class actions[58] including the Buffalo Bills cheerleading team,[59] and consumers including Metropolitan Museum of Art fans.[60] Fourth, the Third Department recognized the viability of a tax refund claim brought on behalf of a class of taxpayers.[61] Fifth, a trial court applied the tolling doctrine as set forth in *American Pipe & Construction Co.*

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[55] *See id.* at 319–20.

[56] *See* Gordon v. Verizon Commc'ns, Inc., 46 N.Y.S.3d 557, 568 (App. Div. 2017); Dickerson, *Disclosure-Only Settlements*, *supra* note 15.

[57] *See Gold*, 59 N.Y.S.3d at 319–20; Dickerson, *Taking a Stand*, *supra* note 11.

[58] *See* Hosue v. Calypso St. Barth, Inc., No. 160400/2015, 2017 NY Misc. LEXIS 3440, at *3–4, *5, *11 (Sup. Ct. Sept. 11, 2017) (approving a settlement of employee class action (off-the-clock work), including service awards and attorney's fees and costs); G-Bowley v. Downtown LLC, No. 655513/2016, 2017 N.Y. Misc. LEXIS 3166, at *1–2 (Sup. Ct. Aug. 15, 2017) (granting class certification to hourly banquet servers seeking unpaid gratuities); Juarez v. USA Roofing Co., No. 651437/13, 2017 N.Y. Misc. LEXIS 2246, at *1–2, *14 (Sup. Ct. June 7, 2017) (allowing workers alleging that they were not paid prevailing wages, supplemental benefits and overtime compensation to reargue their motion for class certification); Picard v. Bigsbee Enters., Inc., No. 1984-13, 2017 N.Y. Misc. LEXIS 2052, at *1, *25 (Sup. Ct. May 23, 2017) (granting partial summary judgment for plaintiffs in a certified action of banquet servers); Clemons v. A.C.I. Found., Ltd, No. 154573/2015, 2017 N.Y. Misc. LEXIS 1788, at *3, *5, *8 (Sup. Ct. May 11, 2017) (approving a settlement of an employee class action, which included payments of service awards and attorney's fees and costs); Isufi v. Prometal Constr., Inc., No. 653265/2012, 2017 N.Y. Misc. LEXIS 1190, at *1, *6 (Sup. Ct. Apr. 3, 2017) (granting certification of a class action in which workers sought prevailing wages and supplemental benefits and overtime); Robinson v. Big City Yonkers, Inc., No. 600159/16, 2017 N.Y. Misc. LEXIS 188, at *1, *3–4, *15, *18 (Sup. Ct. Jan. 17, 2017) (certifying drivers misclassified as independent contractors as a "collective" action under the Federal Labor Standards Act and as class action under CPLR Article 9).

[59] *See* Ferrari v. Nat'l. Football League, 61 N.Y.S.3d 421, 422 (App. Div. 2017).

[60] *See* Saska v. Metro. Museum of Art, 975 N.Y.S.2d 605, 608 (Sup. Ct. 2013); *see also* Thomas A. Dickerson, *When Does "Free of Charge" Become "Pay What You Wish but You Must Pay Something"?*, N.Y. ST. B.J., Mar.-Apr. 2015, at 48, 48 (discussing *Saska v. Metropolitan Museum of Art* and whether there should be any admission charged to enter the museum at all).

[61] *See* New Cingular Wireless PCS, LLC v. Tax Appeals Tribunal, 59 N.Y.S.3d 846, 847 (App. Div. 2017); *see also* McClain v. Sav-On Drugs, 215 Cal. Rptr. 3d 416, 420 (Cal. Ct. App. 2017) ("We conclude that a court may create a new tax refund remedy . . . .").

v. Utah[62] and *Crown, Cork & Seal Co. v. Parker*[63] to successive class actions.[64]

A. CPLR 908 and Notice

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court" and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs."[65] In a recent four-to-three decision in *Desrosiers v. Perry Ellis Menswear, LLC*, the Court of Appeals noted,

> On this appeal, we must determine whether CPLR 908 applies only to certified class actions, or also to class actions that are settled or dismissed before the class has been certified. We conclude that CPLR 908 applies in the pre-certification context. As a result, notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given.[66]

The majority in *Desrosiers* relied, in part, on the reasoning of the First Department in its 1982 decision in *Avena v. Ford Motor Co.*[67] to be persuasive.

> In that case, the named plaintiffs settled with the defendant before class certification, and the settlement was without prejudice to putative class members. The trial court refused to approve the settlement without first providing notice to the putative class members. The Appellate Division affirmed that determination, concluding that CPLR 908 applied to

[62] Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974).

[63] Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353–54 (1983) (quoting *Am. Pipe & Constr. Co.*, 414 U.S. at 554).

[64] *See* Badzio v. Americare Certified Special Servs., Inc., No. 506155/16, 2017 NY Misc. LEXIS 2385, at *3–5, *7–8 (Sup. Ct. June 15, 2017) (citing *Am. Pipe & Constr. Co.*, 414 U.S. at 553, 554, 561; *Crown, Cork & Seal Co.*, 462 U.S. at 354–55); *cf.* China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1811 (2018) (explaining that *American Pipe* tolling principle does not apply to successive class actions); Lucker v. Bayside Cemetery, No. 161848/15, 2017 N.Y. Misc. LEXIS 1826, at *5 (Sup. Ct. May 12, 2017) (tolling does not apply to successive class actions for the court feared tolling successive class actions would lead to an unending statute of limitations period).

[65] N.Y. C.P.L.R. 908 (McKinney 2018).

[66] Desrosiers v. Perry Ellis Menswear, LLC, 90 N.E.3d 1262, 1264 (N.Y. 2017).

[67] Avena v. Ford Motor Co., 447 N.Y.S.2d 278 (App. Div. 1982).

> settlements reached before certification. The First Department reasoned that the "potential for abuse by private settlement at this stage is . . . obvious and recognized," and that the named plaintiffs had a fiduciary obligation to disclose relevant facts to putative class members.[68]

The majority also noted,

> This Court has never overruled *Avena* or addressed this particular issue, and no other department of the Appellate Division has expressed a contrary view. Consequently, for 35 years *Avena* has been New York's sole appellate judicial interpretation of whether notice to putative class members before certification is required by CPLR 908.[69]

B. Legislative Inaction

In addition, the *Desrosiers*' majority relied upon "legislative inaction" in circumstances where requests have been made to amend a statute.[70]

> Thus, "[w]hen the Legislature, with presumed knowledge of the judicial construction of a statute, [forgoes] specific invitations and requests to amend its provisions to effect a different result, we have construed that to be some manifestation of legislative approbation of the judicial interpretation, albeit of the lower courts." Stated another way, "it is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained." "The underlying concern, of course, is that public policy determined by the Legislature is not to be altered by a court by reason of its notion of what the public policy ought to be."[71]

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[68] *Desrosiers*, 90 N.E.3d at 1267 (alteration in original) (quoting *Avena*, 447 N.Y.S.2d at 280) (citing *Avena*, 447 N.Y.S.2d at 279).

[69] *Desrosiers*, 90 N.E.3d at 1267.

[70] *See id.* at 1267–68 (quoting Boreali v. Axelrod, 517 N.E.2d 1350, 1356 (1987)) (citing Clark v. Cuomo, 486 N.E.2d 794, 798 (N.Y. 1985)).

[71] *Id.* (first quoting Alonzo M. v. N.Y.C. Dep't of Prob., 532 N.E.2d 1254, 1257 (N.Y. 1988); then quoting Knight-Ridder Broad., Inc. v. Greenberg, 511 N.E.2d 1116, 1119 (N.Y. 1987)).

VI. RECOMMENDED CHANGES REJECTED

In 2003, the New York City Bar Association's Council on Judicial Administration recommended that CPLR 908's notice requirement be discretionary instead of mandatory and should be provided when necessary to protect the putative class.[72] In 2015, a similar request was made by, *inter alia*, the State Courts of Superior Jurisdiction Committee.[73]

> Notwithstanding these repeated proposals, and the legislature's awareness of this issue, the legislature has left CPLR 908 untouched from its original version as enacted in 1975. . . . [W]e conclude that the legislature's refusal to amend CPLR 908 in the decades since *Avena* was decided indicates that the *Avena* decision correctly ascertained the legislature's intent.[74]

VII. MASS TORT CLASS ACTIONS

Notwithstanding a clear mandate in the legislative history of CPLR Article 9 ("mass exposure to environmental offences"),[75] class action mass torts involving personal injuries and/or property damage have, until recently,[76] have not typically been certified but with a few exceptions.[77] It has sometimes been said that New York courts

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[72] *See* N.Y.C. Bar Ass'n, Council on Judicial Admin., *State Class Actions: Three Proposed Amendments to Article 9 of the Civil Practice Law and Rules*, 58 THE RECORD 316, 341–42 (2003).

[73] In 2015, a similar request was made by several Committees. *See* THE STATE COURTS OF SUPERIOR JURISDICTION COMM. ET AL., *supra* note 35, at 4.

[74] *Desrosiers*, 90 N.E.3d at 1268–69 (citing *Alonzo M.*, 532 N.E.2d at 1257; *Knight-Ridder Broad., Inc.*, 511 N.E.2d at 1119).

[75] *See* Dickerson, *Make It Work I*, *supra* note 1, at 727.

[76] *See* Roberts v. Ocean Prime, LLC, 49 N.Y.S.3d 666, 667 (App. Div. 2017) (affirming class certification in a case involving flooding); DeLuca v. Tonawanda Coke Corp., 22 N.Y.S.3d 768, 769–70 (App. Div. 2015) (affirming class certification in a case involving air pollution); Menna v. Maiden Lane Props., LLC, No. 157710/15, 2018 N.Y. Misc. LEXIS 1482, at *1, *15 (Sup. Ct. Apr. 23, 2018) (granting class certification in a case involving flooding).

[77] *See* Godwin Realty Assocs. v. CATV Enters., 712 N.Y.S.2d 39, 40 (App. Div. 2000) (granting class certification to building owners claiming misappropriations and conversion of electricity and physical damage to buildings resulting from installation of cable television equipment); Arroyo v. New York, 2006 N.Y. Misc. LEXIS 2227, at *4, *14 (Ct. Cl. June 29, 2006) (granting class certification to class of "Spraypark" patrons alleging negligence for failure to control the quality of the water resulting in contamination by a highly contagious waterborne parasite); Cunningham et al. v. Am. Home Prods. Corp., N.Y.L.J., Sept. 21, 1999, at 34, col. 4 (Sup. Ct. N.Y. Cnty 1999) (granting class certification of individuals prescribed diet drugs and seeking medical monitoring as a remedy); Friedman v. Northville Indus. Corp., N.Y.L.J., Dec. 27, 1991, at 10, col. 4 (Sup. Ct. Suffolk Cnty 1991) (approving settlement in an action where class members alleged property damage resulting from oil spill); Leo v. Gen. Elec. Co., N.Y.L.J.,

personal injury and property damage class actions are not suitable for certification.[78] In *McBarnette v. Feldman* the court explained, "Class certification is not favored in mass tort actions not only because damages would be individual to each of the proposed class member's case, but causality, proximate cause, knowledge and proof would also be individual to each member as well."[79]

A. Mass Tort Class Actions Rejected [1978-2015]

From 1978 to 2015, the courts in New York State have rejected applying CPLR Article 9 to mass torts involving personal injuries and/or property damage in a manner consistent with the legislature's intent, whether based on theories, *inter alia*, of negligence, negligent or fraudulent misrepresentation, trespass, nuisance, strict products liability or a violation of New York State General Business Law section 349 (GBL 349), and involving air pollution,[80] toxic waste dumps,[81] water and soil contamination,[82] hospital and nursing home mass tort class actions,[83] flooding,[84] electricity power failures,[85] pain medications,[86] food poisoning,[87] HIV,[88] smokers,[89] defective IUDs,[90]

Jan. 25, 1989, at 28201, col. 2 (Sup. Ct. Suffolk Cnty 1989) (granting certification to class of commercial fishermen claiming economic losses because of PCB poisoning of striped bass in the Hudson River).

[78] *See, e.g.*, McBarnette v. Feldman, 582 N.Y.S.2d 900, 907–08 (Sup. Ct. 1992).

[79] *Id.* at 907–08 (citing Robertson v. E. Smalis Painting Co., 1987 N.Y. App. Div. LEXIS 51072 (App. Div. Nov. 10, 1987); Snyder v. Hooker Chems. & Plastics Corp., 429 N.Y.S.2d 153 (Sup. Ct. 1980)).

[80] *See* Evans v. Johnstown, 470 N.Y.S.2d 451, 451–53 (App. Div. 1983); Wojciechowski v. Republic Steel Corp., 413 N.Y.S.2d 70, 71 (App. Div. 1979); Eisner v. City of New York, 461 N.Y.S.2d 216, 217 (Sup. Ct. 1983).

[81] *See* Askey v. Occidental Chem. Corp., 477 N.Y.S.2d 242, 244, 248 (App. Div. 1984).

[82] *See* Osarczuk v. Associated Univs., Inc., 918 N.Y.S.2d 538, 539, 540 (App. Div. 2011); Nicholson v. KeySpan Corp., 885 N.Y.S.2d 106, 107 (App. Div. 2009); Aprea v. Hazeltine Corp., 669 N.Y.S.2d 61, 61–62 (App. Div. 1998).

[83] *See* Westfall v. Olean Gen. Hosp., 17 N.Y.S.3d 572, 573 (App. Div. 2015); Fleming v. Barnwell Nursing Home & Health Facilities, Inc., 766 N.Y.S.2d 241, 242–44 (App. Div. 2003).

[84] *See* Rallis v. City of New York, 770 N.Y.S.2d 736, 737 (App. Div. 2004).

[85] *See* Prignoli v. Burke, No. 103100/12, 2014 N.Y. Misc. LEXIS 429 at *2–3, *18 (Sup. Ct. Feb. 3, 2014); Tegnazian v. Consol. Edison, Inc., 730 N.Y.S.2d 183, 184–85, 188 (Sup. Ct. 2000); Vincent Petrosino Seafood Corp. v. Consol. Edison Co., 410 N.Y.S.2d 746, 747, 749 (Sup. Ct. 1978).

[86] *See* Hurtado v. Purdue Pharma Co., No. 12648/03, 2005 N.Y. Misc. LEXIS 79, at *1 (Sup. Ct. Jan. 24, 2005).

[87] *See* Lieberman v. 293 Mediterranean Mkt. Corp., 303 A.D.2d 560, 561 (N.Y. App. Div. 2003); Reis v. Club Med, Inc., 439 N.Y.S.2d 127, 128 (App. Div. 1981).

[88] *See* McBarnette v. Feldman, 582 N.Y.S.2d 900, 908 (Sup. Ct. 1992).

[89] *See* Geiger v. Am. Tobacco Co., 716 N.Y.S.2d 108, 109 (App. Div. 2000); Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 597, 597, 606 (App. Div. 1998), *aff'd*, 720 N.E.2d 892 (N.Y. 1999).

[90] *See* Rosenfeld v. A.H. Robins Co., 407 N.Y.S.2d 196, 196–97 (App. Div. 1978).

defective dental restorations,[91] defective grain silos,[92] improperly performed colonoscopies,[93] cars damaged by falling paint from a bridge,[94] misrepresented fertility success rates and concealment of health risks,[95] and failure to warn of the dangers of hair-straightening product.[96]

B. Sea Change in Mass Tort Class Actions

Following the Court of Appeals' groundbreaking decision in *Borden v. 400 East 55th Street*, there appears to have been a sea change in the certifiability of mass tort property and physical injury class actions.[97] This bodes well for the full implementation of Article 9 of the CPLR although it has taken forty years for the courts to follow Article 9's legislative history regarding the need to address environmental harms and certify mass tort class actions.[98]

VIII. TAX PAYER CLASS ACTIONS

Most States prohibit class actions brought by taxpayers challenging tax statutes and/or seeking refunds.[99] Recently, however, some courts have considered the viability of such taxpayer class claims, if brought indirectly.[100] In *Matter of New Cingular Wireless PCS, LLC v. Tax Appeals Tribunal*, the Third Department noted that the Petitioner, an internet service provider:

> erroneously billed and collected sales tax from its customers . . . and those taxes, in turn, were remitted to the Department of Taxation and Finance. In 2009, 54 separate

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[91] *See* Catalano v. Heraeus Kulzer, Inc., 759 N.Y.S.2d 159, 160, 161 (App. Div. 2003).

[92] *See* Morgan v. A.O. Smith Corp., 650 N.Y.S.2d 748, 749 (App. Div. 1996).

[93] *See* Komonczi v. Fields, 648 N.Y.S.2d 151, 151–52 (App. Div. 1996).

[94] *See* Robertson v. E. Smalis Painting Co., 1987 N.Y. App. Div. LEXIS 51072, at *1 (App. Div. Nov. 10, 1987).

[95] *See* Karlin v. IVF Am., 657 N.Y.S.2d 460, 460–61 (App. Div. 1997), *aff'd on other grounds*, 712 N.E.2d 662 (N.Y. 1999).

[96] *See* Hooper v. HM Man Solutions, LLC, No. 103034/05, 2006 N.Y. Misc. LEXIS 1056, at *1–2, *6 (Sup. Ct. Mar. 15, 2006).

[97] *See* DeLuca v. Tonawanda Coke Corp., 22 N.Y.S.3d 768, 769–70 (App. Div. 2015); Menna v. Maiden Lane Props., LLC, No. 157710/15, 2018 N.Y. Misc. LEXIS 1482, at *1, *15 (Sup. Ct. Apr. 23, 2018); Roberts v. Ocean Prime, LLC, No. 150612/2013, 2018 N.Y. Misc. LEXIS 4762, at *1, *6 (Sup. Ct. Oct. 12, 2018).

[98] *See* Dickerson, *Make It Work I*, *supra* note 1, at 714, 715.

[99] *See* DICKERSON, THE LAW OF 50 STATES, *supra* note 5, at § 2.01(1)(a); *see also* City of Rochester v. Chiarella, 479 N.E.2d 810, 812, 815 (N.Y. 1985) (defendant classes of taxpayers).

[100] *See, e.g.*, McClain v. Sav-On Drugs, 215 Cal. Rptr. 3d 416, 428 (Ct. App. 2017) ("[A] court may create a new tax refund remedy . . . .").

> class action lawsuits were filed on behalf of petitioner's customers in 44 states . . . . Thereafter, in June 2011, the federal court approved a global settlement agreement . . . .[101]

The settlement required the petitioner to file a refund claim on behalf of its impacted customers and "each settlement class member consented to (1) petitioner filing a claim for refund . . . (2) payment of the refund by the taxing authority to petitioner . . . and (3) the distribution of the net settlement funds to the customers by the escrow agent under the supervision of the court."[102] In addition the "petitioner assigned all of its rights, title and interest in any refund it received to the settlement class customers."[103] In reversing and remanding the denial of petitioners' tax refund request by the Division of Taxation, the Third Department stated that "we acknowledge that the Division . . . indeed may adopt a mechanism and process for evaluating and resolving refund claims such as the one advanced by petitioner. . . . To our analysis, all that remains is the physical act of distributing the subject funds . . . in as expeditious a manner as possible."[104]

CONCLUSION

Since *Borden*, it is clear that consumers, employees and tenants have a much better chance of having their class actions certified and ultimately resolved on a class wide basis. In addition, the first certified mass tort class action in recent memory bodes well for the full implementation of CPLR article 9 pursuant to its legislative history and the wishes of the Court of Appeals in 1975.

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[101] New Cingular Wireless PCS, LLC. v. Tax Appeals Tribunal, 59 N.Y.S.3d 846, 847 (App. Div. 2017).

[102] *Id.*

[103] *Id.*

[104] *Id.* at 850.