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AVAILABILITY OF A NEW YORK CLASS ACTION FOR RAILROAD COMMUTERS: DAVID V. GOLIATH

I. Introduction

Railroad commuters have the right to expect safe, adequate service, a sufficient number of train cars for their reasonable accommodation and reasonable adherence to publicized schedules.¹ They allege that railroad corporations such as the Long Island Railroad and Metro-North constantly breach the implied contract of carriage.² Schedule delays, overcrowded conditions and equipment failures are the most common complaints.³ When commuter railroads breach their implied carriage contracts, travelers receive less than the service they purchased.⁴ New York's Consumer Protection Board was established to promote and ensure high standards of responsibility and performance in the sale of consumer goods and services.⁵ Railroad corporations sell

1. See *infra* notes 13-82 and accompanying text for a discussion of the duties of common carriers.

2. See, e.g., *Dominianni v. Consolidated Rail Corp.*, 110 Misc. 2d 929, 443 N.Y.S.2d 334 (Civ. Ct. Westchester County 1981) (commuter brought action for breach of contract alleging delays, lack of heating and overcrowding). See N.Y. Times, Jan. 5, 1983, at B2, col. 4 (nine lawsuits by commuters accusing Conrail of poor service in Greenburgh, New York); *id.*, Feb. 6, 1983, § 22, at 1, col. 1 (twenty-six commuters in Westchester County, New York seek damages of up to \$1500 each against Conrail for alleged breach of implied contract).

3. See N.Y. Times, Oct. 31, 1982, at B54, col. 3 ("[a]ll available indicators suggest the system deteriorated rapidly from 1976 to 1981"; "[e]ven now it is edging down") (quoting New York State Comptroller, Edward V. Regan). On Metro-North, an average of 105,000 commuters per month had to stand during the first half of 1982 because 26% of Metro-North's railroad cars were inoperative. *Id.* at cols. 3-4 (citing audit by New York State Comptroller's office). "Metro-North said between 63 and 96 percent of its cars have the air-conditioners on." *Id.* July 20, 1983, at B6, col. 5. "But even as improvements are made, hardships persist for many commuters. On Metro-North, more than 5,000 regular riders continue to stand each day because of a lack of rail cars. Trains are chronically late, air-conditioning units often fail and railworkers do not have the tools to make repairs." *Id.*, July 25, 1983, at B2, col. 4.

4. See, e.g., *Dominianni*, 110 Misc. 2d at 936, 443 N.Y.S.2d at 340. The terms of the contract should be commensurate with the cost of plaintiff's commutation ticket. "While plaintiff is not entitled to luxury class passage, neither should he be relegated to steerage." *Id.* (passenger was entitled to refund of ten percent of his commutation ticket price because he received substandard service).

5. See N.Y. EXEC. LAW § 553(3)(j) (McKinney 1982). The Board has the power to "undertake activities to encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion and sale of consumer goods and services." *Id.*

consumer services⁶ and should be held to the same standards as other sellers.⁷ Individual lawsuits against the railroads for damages caused by breaches of the implied carriage contract have not deterred the railroad corporations from providing substandard performance.⁸ For example, in *Kessel v. Long Island Railroad*, the court awarded only one dollar in damages for the defendant's breaches of the carriage contract.⁹ A more effective remedy is needed.

One procedural device for redressing infringements of consumer rights, the class action,¹⁰ can be a potent deterrent of illegal conduct.¹¹ The New York class action statute, modeled upon Rule 23 of the Federal Rules of Civil Procedure (Federal Rule 23), was designed to add a major weapon to the consumer protection arsenal.¹² A class action is an appropriate procedural device for remedying the continual breaches of the commuter carriage contract.

6. See *Cohen v. Varig Airlines, S.A. Empresa de Viacao Aerea Rio Grandense*, 85 Misc. 2d 653, 380 N.Y.S.2d 450 (Civ. Ct. N.Y. County 1975) (successful breach of contract action to recover value of baggage lost by common carrier). "As consumers, the traveling vacationers are entitled to some realistic protection." *Id.* at 661, 380 N.Y.S.2d at 460. The length of transport has no bearing on the standard of care imposed by common law and statute on common carriers. See *infra* notes 15-69. Anyone who purchases a ticket from a common carrier is a consumer.

7. See, e.g., *State of New York by Abrams v. Citibank, N.A.*, 537 F. Supp. 1192, 1193 (S.D.N.Y. 1982) (Attorney General can seek damages for persistent fraud or illegality in the transaction); *City of New York v. Toby's Electronics, Inc.*, 110 Misc. 2d 848, 850, 443 N.Y.S.2d 561, 563 (Civ. Ct. N.Y. County 1981) (vendors cannot engage in deceptive or unconscionable trade practice when selling consumer goods).

8. See *infra* notes 71-83 and accompanying text.

9. See *Kessel v. Long Island R.R. Co.*, 107 Misc. 2d 1067, 436 N.Y.S.2d 684 (Dist. Ct. Nassau County 1981). Damages have been nominal in such actions and therefore do not provide an incentive to railroads to change their performance level. In *Dominianni*, the plaintiff only received \$13.80 or 10 percent of his commutation ticket for two months. 110 Misc. 2d at 936, 443 N.Y.S.2d at 340. In *Fendelman v. Conrail*, 119 Misc. 2d 302, 464 N.Y.S.2d 323, 330 (Civ. Ct. Westchester County 1983), the court awarded only \$1. In *Javeline v. Long Island Railroad*, 106 Misc. 2d 814, 818, 435 N.Y.S.2d 513, 516 (Civ. Ct. Queens County 1981), the court awarded \$29.90.

10. See N.Y. EXEC. LAW § 553(3)(c) (McKinney 1982). The commission has the power and duty to "cooperate with and assist consumers in class actions in proper cases." *Id.* For a discussion of consumer class actions, see *infra* note 163.

11. Memorandum of Gov. Carey, 1975 N.Y. LAWS 1748. The amended law is designed to change the old law, which provided "no economic deterrent to poor workmanship, deceptive or unconscionable trade practices and illegal conduct." *Id.*

12. *Id.* "While this bill adds a major weapon to the consumer protection arsenal, it also provides legitimate enterprises with a shield against its abuse . . . [It] provides a controlled remedy which recognizes and respects the rights of the class as well as those of its opponent." *Id.*

This Note will discuss whether the New York class action statute can be an effective method of recovering damages for breaches of the carriage contract. It concludes that commuter class actions would meet the five prerequisites of New York's class action statute.¹³ A class action would encourage railroad corporations to meet their statutory and common law obligations and also compensate commuters for receiving substandard service.¹⁴ The Note suggests that New York courts broaden their narrow interpretation of the class action device to conform with its legislative purpose.

II. Current Duties of the Common Carrier and Current Remedies for Breach of the Carriage Contract

A. The Common Law Duty of Common Carriers

A contract of carriage creates the relationship of carrier-passenger.¹⁵ This contract imposes numerous duties on the carrier, in addition to the obligation to transport the passenger to his destination.¹⁶ In *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*,¹⁷ the United States Supreme Court held that the common law requires that com-

13. See *infra* notes 164-75 and accompanying text for a discussion of the application of New York's class action statute to a suit by railroad commuters.

14. See *infra* notes 176-87 and accompanying text for a discussion of the policy behind allowing class actions to be used by aggrieved consumers.

15. See *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 9, 203 A.2d 796, 799 (1964) (duty of common carrier to passenger arises from contract of carriage) (citing *Pittsburgh Rys. Co. v. Givens*, 211 F. 885 (3d Cir. 1914)); *accord LaSota v. Philadelphia Transp. Co.*, 421 Pa. 386, 388, 219 A.2d 296, 297 (1966) ("[b]y taking her fare, common carrier committed itself to the responsibility of transporting her safely and *delivering* her safely"). See *generally* D. MOORE, *THE LAW OF CARRIERS* 545 (1906) (relationship between passenger and carrier commences when passenger puts himself in care of carrier with bona fide intention of being transported).

16. See *Owens v. Italia Societa Per Azione Navigazione-Genova*, 70 Misc. 2d 719, 723 334 N.Y.S.2d 789, 793 (Civ. Ct. N.Y. County 1972) (passenger's contract must be construed to embrace stipulation for such accommodations as are necessary for reasonable degree of comfort); *accord Nader v. Allegheny Airlines, Inc.*, 365 F.Supp. 128, 132 (D.D.C. 1973), *rev'd on other grounds*, 512 F.2d 527 (D.D.C. 1975) ("[d]efendant's legal duty is to provide the public with reliable . . . transportation") (case reversed because of erroneous legal conclusions concerning effect of carrier's adherence to priority rules). For a discussion of a common carrier's duties, see *infra* notes 15-69 and accompanying text.

17. 237 U.S. 121 (1915) (*Puritan Coal Mining Co.* brought action against *Pennsylvania Railroad* for damages caused by its failure to perform its duty under Pennsylvania law to furnish *Puritan* with its pro rata share of coal cars held for daily distribution; plaintiff also alleged that defendant discriminated in favor of another corporation).

mon carriers treat passengers reasonably.¹⁸ A carrier must use a high degree of care and prudence in all aspects of its operations.¹⁹ Although carriers need not insure their passengers' safety, they may not negligently endanger them.²⁰ In *Javeline v. Long Island Railroad*,²¹ a New York court held that the railroad owes its passengers the duty to provide them with comfort and safety.²²

In the carriage contract, the carrier impliedly guarantees that the vehicle is in sound and proper order and sufficient for the purpose for which it is employed.²³ This guarantee imposes an obligation on the carrier to use the proper equipment and maintain it in good condition.²⁴ The carriage contract also implies a duty of inspection.²⁵ Carriers must use a high degree of skill and foresight to guard against the possibility of accidents arising from the conditions of the road and the machinery used in the transportation of the passengers.²⁶

The common law duty to provide secure carriage for transportation extends to all of the carrier's equipment.²⁷ In *Fendelman v. Conrail*,²⁸

18. *Id.* at 133. ("[t]he law exacts only what is reasonable from such carriers—but, at the same time, requires that they should be equally reasonable in the treatment of their patrons").

19. See *LaSota*, 421 Pa. at 388-89, 219 A.2d at 297 ("[a] common carrier for hire owes to its passengers the highest degree of care and diligence in carrying them to their destination and [in] enabling them to alight safely and to avoid any possible danger while doing so") (citing *Lyons v. Pittsburgh Rys. Co.*, 301 Pa. 499, 501, 152 A. 687, 688 (1930) (citations omitted); accord *Palmer v. Delaware & Hudson Canal Co.*, 120 N.Y. 170, 174-75, 24 N.E. 302, 304 (1890) (common carrier cannot meet this duty without using utmost care and diligence which human foresight will allow)).

20. See *Griffith*, 416 Pa. at 8, 203 A.2d at 799 (1964). See also *Willis v. Long Island R.R. Co.*, 34 N.Y. 670, 679 (1866) (carrier must "exercise the highest degree of human foresight and skill to provide for the safety of [its] passengers").

21. 106 Misc. 2d 814, 435 N.Y.S.2d 513 (Civ. Ct. Queens County 1981).

22. *Id.* at 816, 435 N.Y.S.2d at 514.

23. See *Kessel*, 107 Misc. 2d at 1073, 436 N.Y.S.2d at 688 (by its contract of carriage, railroad assumes obligation towards its passenger to transport him safely and carefully to his destination).

24. *Id.* at 1076-77, 436 N.Y.S.2d at 690 (common carrier is required to provide and use best machinery and appliances known and in general practical use); accord *Perkins v. New York Cent. R.R. Co.*, 24 N.Y. 196, 219 (1862) ("[t]he defendants, as common carriers of passengers, impliedly warrant . . . that their locomotives and cars and all their appurtenances are constructed with the utmost care and skill and are kept in sound and proper order").

25. See *Javeline*, 106 Misc. 2d at 818, 435 N.Y.S.2d at 515 (carrier has duty to repair its equipment).

26. *Id.* at 816, 435 N.Y.S.2d at 514-15 (carrier must insure that its road and the appliances used in operating it are and remain in good condition and free from defects).

27. See *Kessel*, 107 Misc. 2d at 1074, 436 N.Y.S.2d at 688-89 (railroads have been held liable for failures of their heating appliances; passengers should reasonably expect benefits of many safety features built into vehicle).

28. 119 Misc. 2d 302, 464 N.Y.S.2d 323 (Civ. Ct. Westchester County 1983).

a New York court held that a lack of electricity and water facilities breaches the carriage contract.²⁹ The carrier is liable for the harm caused by its failure to furnish reasonable heat and air conditioning when necessary for the comfort and safety of its passengers.³⁰

The common law standard of care requires carriers to use the reasonable precautions which human judgment and foresight can determine are necessary to make the passengers' journey safe and comfortable.³¹ This standard extends to: maintaining its locomotives, equipping its railroad with a sufficient number of safe cars, providing its cars with safe and proper appliances and keeping its equipment in good order and repair.³² However, the carrier is not responsible for a latent defect against which no degree of human skill could guard.³³

The carrier is also duty-bound to carry the passenger to his destination without unreasonable delay or detention.³⁴ The publication of a timetable imposes the obligation to adhere to its schedule.³⁵ In *Becker v. Conrail*,³⁶ a New York small claims court held that delayed trains and errors in timetables violate the standard of performance a com-

29. *Id.* at 310, 464 N.Y.S.2d at 329.

30. See *Owen v. Rochester-Penfield Bus Co.*, 304 N.Y. 457, 461, 108 N.E. 2d 606, 608 (1952); accord *Humphries v. Stokes Bus Line*, 199 S.C. 132, 133, 18 S.E.2d 675, 676 (1942) (common law conferred right of action upon bus passenger who was injured through defendant's failure to heat bus properly in cold weather).

31. See *Scott v. Eastern AirLines, Inc.*, 399 F.2d 14, 20 (3d Cir. 1968) (law requires common carrier to exercise highest degree of care that human judgment and foresight are capable of, to make its passenger's journey safe) (quoting *Doughty v. Maine Cent. Transp. Co.*, 141 Me. 124, 129, 39 A.2d 758, 759, 157 A.L.R. 759, 761 (1944)); accord *Kessel*, 107 Misc. 2d at 1074, 436 N.Y.S.2d at 689 (heat has been required of common carriers for long time; air conditioning is not new feature on trains and other vehicles).

32. See J. ANGELL, A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS, BY LAND AND BY WATER 500-05 (1972) (common carrier must warrant to public that its carriage is "equal to the journey it undertakes"; similar warranty extends to the condition of the road) (emphasis in original). See generally *Kessel*, 107 Misc. 2d at 1077, 436 N.Y.S.2d at 690 (failure to secure necessary parts or changes will not be rational defense to breach of contract claim); accord *Javeline*, 106 Misc. 2d at 816, 435 N.Y.S.2d at 514-15 (railroad must use vigilance to keep equipment free from defects); D. MOORE, A TREATISE ON THE LAW OF CARRIERS 601-02 (1906) (appliances include cars, wheels, axles, safety beams, brakes, seats and headlights).

33. See *Javeline*, 106 Misc. 2d at 816, 435 N.Y.S.2d at 515.

34. See *Becker v. Conrail*, Westchester L. J., March 7, 1983, at 2, cols. 2-3 (New Rochelle City Court, Westchester County, Feb. 28, 1983); *Dominianni*, 110 Misc. 2d at 930, 443 N.Y.S.2d at 336 (trains must run at regular times).

35. See *Becker*, Westchester L. J., March 7, 1983, at 2, col. 3, 3, col. 1 (carrier "failed to reasonably adhere to its published time schedules"). New York statutes codify the common law duty of common carriers to start and run cars at regular intervals. See N.Y. R.R. LAW § 54 (McKinney 1952 & Supp. 1983-1984).

36. Westchester L. J., March 7, 1983, at 1, col. 1.

mon carrier owes to its passengers.³⁷ If the carrier breaches this duty, it will be liable for usual and ordinary damages, but only for those injuries which are attributable to the carrier's negligence.³⁸ A passenger may also recover for the inconvenience and indignity which he suffers during transportation.³⁹

B. Statutorily Imposed Duties and Liabilities

The common law duties implied by the carriage contract remain applicable today. New York codified many of these obligations in its Public Service, Railroad and Transportation Laws.⁴⁰ These statutory duties, however, are not regularly enforced.⁴¹ Commuter railroads continually breach the carriage contract through delays, cancellations and equipment failures.⁴²

New York's Transportation Law⁴³ requires every common carrier to furnish safe and adequate service and facilities.⁴⁴ The means of trans-

37. *Id.* at 2, cols. 2-3.

38. *See, e.g.,* Gerardy v. Louisville & Nashville R.R. Co., 52 Misc. 466, 467, 102 N.Y.S.2d 548, 549 (N.Y. App. Div. 1907) (publication of timetables creates legal obligation to start trains on time; but only negligent failure to adhere to timetables creates liability); *Becker*, Westchester L. J., March 7, 1983, at 2, cols. 2-3.

39. *See* Owens v. Italia Societa Per Azione Navigazione-Genova, 70 Misc. 2d 719, 723, 334 N.Y.S.2d 789, 793 (Civ. Ct. N.Y. County 1972) ("the law has evolved a liberal rule of damages where a passenger has been subjected to humiliating indifference and has been accorded treatment inferior to the class of treatment that he had bargained for"; "the rule was invoked that where a shipowner fails to fully perform, the passenger may recover . . . so much or all of the passage money necessary for rendition of exact justice"). "[W]hen a passenger sues a carrier for a breach of their agreement concerning accommodations, the 'inconveniences and discomforts which a passenger suffers . . . are to be considered in the assessment of the damages.'" *Odysseys Unlimited, Inc. v. Astral Travel Serv.*, 77 Misc. 2d 502, 505, 354 N.Y.S.2d 88, 91 (Sup. Ct. Nassau County 1974) (quoting N.Y. DAMAGES LAW § 624).

40. *See infra* notes 41-69 and accompanying text for a discussion of New York law pertinent to the duties of common carriers. N.Y. TRANSP. LAW § 96 (McKinney 1975) codified the common law standard of care required of common carriers. This statute also encompasses the duty to provide safe equipment and to make proper repairs. N.Y. R.R. LAW § 62 (McKinney 1952 & Supp. 1983-1984) codifies the common law duty to furnish a sufficient number of cars for commuters and the duty to have a regular time schedule.

41. *See supra* notes 15-40 and accompanying text for a discussion of railroad commuters asserting their rights. Such lawsuits have not forced the railroads to fulfill their statutory and common law duties. *See infra* notes 70-83 and accompanying text.

42. *See supra* note 3.

43. N.Y. TRANSP. LAW § 96 (McKinney 1975).

Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation,

portation must be reasonable in every respect.⁴⁵ *Dominianni v. Consolidated Rail Corporation*,⁴⁶ a 1981 action for breach of contract, held that New York's Transportation Law section 96 provides the standards of service to which a passenger is entitled.⁴⁷ The *Dominianni* court held that unreasonable filth, noxious odors, inadequate heating and excessive crowding violate this standard of service and constitute a breach of the carriage contract.⁴⁸

Reasonable and adequate service includes properly heating the trains during the winter months and providing air conditioning or open windows during the summer. Two recent cases, *Javeline v. Long Island Railroad*⁴⁹ and *Kessel v. Long Island Railroad Company*,⁵⁰ held that failure of the air conditioning equipment violated the carriage contract between the commuters and the railroad.⁵¹ *Javeline*⁵² held that the commuter railroad has a duty to provide air conditioning in cars with sealed windows.⁵³ New York's Transportation Law⁵⁴ gives the public service commissioner the power to enforce the standard imposed by New York's Transportation Law section 96.⁵⁵

New York's Railroad Law⁵⁶ requires railroad companies to furnish a sufficient number of cars for the reasonable accommodation of the

person or common carrier for the transportation of passengers or property or for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order of the commissioner and made as authorized by this chapter.

Id.

44. *Id.*

45. *Id.*

46. 110 Misc. 2d 929, 443 N.Y.S.2d 334 (Civ. Ct. Westchester County 1981).

47. *Id.* at 930, 443 N.Y.S.2d at 336.

48. *Id.* at 934-35, 443 N.Y.S.2d at 339.

49. 106 Misc. 2d 814, 435 N.Y.S.2d 513 (Civ. Ct. Queens County 1981).

50. 107 Misc. 2d 1067, 436 N.Y.S.2d 684 (Civ. Ct. Nassau County 1981).

51. 106 Misc. 2d at 818, 435 N.Y.S.2d at 515; 107 Misc. 2d at 1077, 436 N.Y.S.2d at 690.

52. 106 Misc. 2d 814, 435 N.Y.S.2d 513.

53. 106 Misc. 2d at 818, 435 N.Y.S.2d at 515.

54. N.Y. TRANSP. LAW § 115 (McKinney 1975).

55. See N.Y. TRANSP. LAW § 115(2) (McKinney 1975).

The commission shall have the general supervision of all common carriers, subject to its jurisdiction as hereinbefore defined, and shall have power to and shall examine the same and keep informed as to their general condition . . . and the manner in which their lines and property owned, leased, controlled or operated, are managed, conducted and operated, not only with respect to the adequacy, security and accommodations afforded by their service, but also with respect to their compliance with all provisions of law, orders of the commission and charter requirements.

Id.

56. N.Y. R.R. LAW § 54 (McKinney 1952 & Supp. 1983-1984). "Every railroad corporation shall start and run its cars for the transportation of passengers and

traveling public.⁵⁷ This is a codification of the common law duty to furnish passengers with seats.⁵⁸ *Becker v. Conrail*⁵⁹ held that shortages of equipment violate the standard of performance which Conrail owes to its passengers.⁶⁰ *Fendelman v. Conrail*⁶¹ held that a common carrier is legally required to provide a sufficient number of cars for its passengers.⁶² Overcrowded trains lacking standing room clearly violate this statutory duty.

New York's Transportation Law⁶³ authorizes the Public Service Commission to evaluate the practices, equipment, appliances and services of all New York common carriers and set standards for them.⁶⁴ The commission determines which of the carrier's services are unreasonable, unsafe, improper or inadequate.⁶⁵

If a common carrier fails to fulfill its obligations under the statutory law or regulations promulgated by the public service commissioner, it

property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers" *Id.*

57. N.Y. R.R. LAW § 54 (McKinney 1952 & Supp. 1983-1984). *See also* Pennsylvania R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 133 (1915) (petitioner was entitled to recover because "the carrier failed to comply with its common law liability to furnish it with a proper number of cars"). Although the case concerns the transportation of freight, the court refers to the common law duty which required "the carrier to receive all goods and passengers." *Id.* The common law duty to have an adequate number of carriages did not distinguish between carriers transporting passengers and those carrying freight. *See* J. ANGELL, A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS, BY LAND AND BY WATER 122-24, 492-93 (1972).

58. *See supra* note 57.

59. Westchester L. J., March 7, 1983, at 1, col.1 (New Rochelle City Ct. Westchester County Feb. 28, 1983).

60. *Id.* at 2, col. 3.

61. 119 Misc. 2d 302, 464 N.Y.S.2d 323 (Civ. Ct. Westchester County 1983).

62. *Id.* at 310, 464 N.Y.S.2d at 329.

63. N.Y. TRANSP. LAW § 119(2) (McKinney 1975).

64. *Id.*

Whenever the commission shall be of opinion . . . that the regulations, practices, equipment, appliances, or service of any such common carrier in respect to transportation of persons or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commissioner shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force, to be observed and to be used in such transportation of persons and property and so fix and prescribe the same by order to be served upon every common carrier to be bound thereby; and thereafter every common carrier shall observe and obey each and every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all of its officers, agents and employees.

Id.

65. *Id.*

will be liable for the resulting loss, damage or injury.⁶⁶ The *Kessel* court listed the obligations of a commuter railroad: (1) to provide the services it is capable of providing with the equipment it has purchased; (2) to keep such equipment in working order; and (3) to secure the necessary changes, modifications or spare parts for its equipment.⁶⁷ The *Javeline* court held that a common carrier must use vigilance to ensure that its equipment remains in excellent condition and free from defects.⁶⁸ Under New York Transportation Law section 111, the liability is the same for failure to perform a specific duty as it is for performance of a forbidden act.⁶⁹

C. Ineffectiveness of Individual Lawsuits

Although common law and statutory remedies are available to commuters,⁷⁰ individual lawsuits have little or no deterrent effect on the actions of common carriers.⁷¹ Only nominal damages have been awarded⁷² in commuter actions against railroad corporations for equipment failures, unreasonable delays and dirty conditons.⁷³ Since the monetary stake involved is small, commuters are discouraged from

66. N.Y. TRANSP. LAW § 111 (McKinney 1975).

In case a common carrier shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by law or by order of the commissioner, such common carrier shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom

Id. Although the statute does not state that common carriers will be held liable only for negligent acts, it seems likely that the courts would interpret the statute as a codification of the common law. Therefore, there would be no liability for non-negligent acts. See *supra* note 33 and accompanying text.

67. 107 Misc. 2d at 1076-77, 436 N.Y.S.2d at 690.

68. 106 Misc. 2d at 816, 435 N.Y.S.2d at 514-15.

69. N.Y. TRANSP. LAW § 111 (McKinney 1975).

70. See *supra* notes 65-68 and accompanying text.

71. See *Giummo v. Citibank, N.A.*, 107 Misc. 2d 895, 898, 436 N.Y.S.2d 172, 174 (Civ. Ct. N.Y. County 1981) (nuisance type suits are ineffective to change management's practices) (quoting 119 CONG. REC. 25,419) (daily ed. July 23, 1973) (statement of Sen. Hart)).

72. See *supra* note 9 and accompanying text.

73. See *supra* notes 1-40 and accompanying text for a discussion of the grievous conditions existing on the railroads. At times, 26% of Metro-North's railroad cars have been inoperative. N.Y. Times, Oct. 31, 1982, at 54, col. 4. According to Long Island Railroad's Assistant Chief Mechanical Officer in Charge of Operations, in the summer of 1980, the railroad's air conditioning systems had a 55 to 65% failure rate. *Kessel*, 107 Misc. 2d at 1069, 436 N.Y.S.2d at 686.

utilizing their legal remedies. Therefore, railroad corporations are not deterred from providing substandard service.⁷⁴

Although passengers may recover damages for the discomfort and inconvenience they suffer from a carrier's breach of contract,⁷⁵ recoveries ordinarily are limited to the passage price.⁷⁶ If aggravating circumstances exist, recoveries can be greater than the commutation price.⁷⁷ Additionally, the plaintiff has the burden of supplying the basis for computing damages which are certain and not speculative.⁷⁸ The difficulty plaintiffs have experienced in proving the actual amount of damages⁷⁹ discourages future litigants. The *Fendelman* court⁸⁰ noted that a "harried commuter" might not always seek monetary relief, but merely better service.⁸¹ The court then noted that remedies which go beyond a monetary judgment would be available in a higher state court.⁸² However, individual actions for small dam-

74. See *King v. Club Med, Inc.*, 76 A.D.2d 123, 430 N.Y.S.2d 65 (1st Dep't 1980) (class action against supplier of travel package alleged contract violations and fraudulent misrepresentation; hotel had provided sporadic electricity, no air conditioning and other substandard conditions). "[T]he damages that may have been sustained by any single participant . . . will almost certainly be insufficient to justify the expenses inherent in any individual action . . ." *Id.* at 128, 430 N.Y.S.2d at 68. Cf. *Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y. 1968) (individual suits are impractical where claim of each prospective plaintiff is small). See also *supra*, note 71 and accompanying text.

75. See, e.g., *Odysseys Unlimited, Inc., v. Astral Travel Service*, 77 Misc.2d 502, 505-06, 354 N.Y.S.2d 88, 91-92 (Sup. Ct. Nassau County 1974) ("[d]amages arising from a breach of the contract to carry, which results in inconvenience and indignity to the passenger while in transit, are not limited to the price of passage") (quoting *Ligante v. Panama R.R. Co.*, 147 App. Div. 97, 99-100 (2d Dep't 1911)); *Campbell v. Pullman Co.*, 182 App. Div. 931, 931 (2d Dep't 1918)) (passenger's discomfort and inconvenience resulting from breach was within contemplation of parties and so a proper element of damages).

76. *Dominianni*, 110 Misc. 2d at 935, 443 N.Y.S.2d at 339 (commuter ordinarily will not be able to receive damage award greater than passage money in absence of special circumstances).

77. *Id.*

78. See *Kessel*, 107 Misc. 2d at 1077, 436 N.Y.S.2d at 690; accord *Fendelman*, 119 Misc. 2d at 311-12, 464 N.Y.S.2d at 329.

79. See *Fendelman*, 119 Misc. 2d at 312, 464 N.Y.S.2d at 330 (plaintiff's computation of damages was disallowed by court because it was based on speculation; however, "[t]his does not mean that the plaintiff did not sustain any damages but only that they have not been proven to the satisfaction of the court under what it understands are the binding principles of substantive law").

80. 119 Misc. 2d 302, 464 N.Y.S.2d 323.

81. *Id.* at 312-13, 464 N.Y.S.2d at 330.

82. *Id.*

ages do not permit access to those courts.⁸³ Another procedural device is therefore necessary.

III. Availability of the Class Action as a Procedural Device

A. The Class Action Device: New York Law and Federal Influence

Accessibility to the class action device in state courts is crucial to the assertion of consumer, and therefore commuter, claims. The United States Supreme Court, in *Snyder v. Harris*,⁸⁴ held that the claims of the individual class members may not be aggregated to reach the requisite amount in controversy.⁸⁵ In *Zahn v. International Paper Co.*,⁸⁶ the Court foreclosed the possibility of allowing a class action to proceed unless each member alleged a claim that satisfied the \$10,000 amount in controversy.⁸⁷ By requiring each class member to meet the requisite amount in controversy and prohibiting aggregation of claims, these two cases completely prevent access to the federal courts through the use of commuter class actions. The class members' individual claims are simply too small.

In 1975, the New York legislature enacted a new class action statute, Article 9 of the Civil Practice Law and Rules (CPLR),⁸⁸ which repealed CPLR section 1005.⁸⁹ The changes in the class action statute

83. *Id.*

84. 394 U.S. 332 (1969) (Court considered only issue of whether separate and distinct claims presented by and for various claimants in class action may be added together to provide minimum \$10,000 jurisdictional amount in controversy).

85. *Id.* at 336.

86. 414 U.S. 291 (1973) (petitioners brought class action against respondent to recover damages for pollution of Lake Champlain from discharges of respondent's pulp and paper-making plant).

87. *Id.* at 301. Federal courts will have original jurisdiction of all civil actions where there is diversity of citizenship and "the matter in controversy exceeds the sum or value of \$10,000" 28 U.S.C. § 1332 (1976).

88. N.Y. CIV. PRAC. LAW art. 9 (McKinney 1976).

89. 1962 N.Y. LAW ch.318 § 4 (effective Sept. 1, 1963, repealed 1975). Under the old law, a plaintiff could qualify for class status only in three specific situations: (1) if the subject matter of the controversy was a limited fund or specific property; (2) if the satisfaction of the individual claims before the court automatically satisfied the claims of all the other class members; or (3) if a bond of "privity" existed among the multiple parties forming the class. See NEW YORK STATE JUDICIAL CONF., REPORT TO THE 1974 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS ADOPTED PURSUANT TO SECTION 229 OF THE JUDICIARY LAW 194, 205 (1975) [hereinafter cited as 1974 REPORT]. The class action, under the old law, was confined to the closely associated relationships growing out of trusts, partnerships, or joint ventures. *Id.* Under CPLR Section 1005, the New York courts would not countenance a class action for separate and distinct relief for individual

were intended to achieve two major goals: (1) to establish a flexible, functional scheme whereby class actions could be certified without the undesirable and socially detrimental restrictions that occurred under the old statute,⁹⁰ and (2) to prescribe basic guidelines for judicial management of class actions.⁹¹ Article 9 was a legislative attempt to provide a practical procedural device for those whose rights could not be vindicated without a class action.⁹²

New York courts have contravened the legislative purposes of Article 9 by narrowly interpreting the statute. The New York State legislature enacted Article 9 because CPLR section 1005 did not accommodate the pressing need for an effective, practical and flexible group remedy in areas of social concern.⁹³ Although the substantive law in these areas was adequate, no efficient procedural device existed when individual relief and joinder of the class were neither economically nor administratively feasible.⁹⁴ "[C]lass action status has been denied in 75 percent of the reported cases construing article 9 since its enactment in 1975 [A]nalysis of the cases indicates a continuing tendency toward narrow construction of the statute. The Court of Appeals has not yet revealed its own attitude on the subject."⁹⁵ The New York courts should broaden their interpretation of CPLR Article 9 to accomplish the intended legislative purpose.

The basic feature of the amended law is the abandonment of the privity requirement.⁹⁶ Instead of the amorphous privity concept, functional criteria that consider the expense of individual litigation and the unequal balance of power between individuals and large

members of the class, in the absence of a limited fund or substantive relationship among class members. See *Hall v. Coburn Corp. of America*, 26 N.Y.2d 396, 400, 311 N.Y.S.2d 281, 282, 259 N.E.2d 720, 721 (1970).

90. 1974 REPORT, *supra* note 89, at 205. For a discussion of the undesirable restrictions under CPLR Section 1005, see *supra* note 85 and *infra* notes 92 and 94.

91. *Id.*

92. N.Y. STATE LEGISLATIVE ANNUAL, ADMINISTRATION OF JUSTICE 9, 10 (1975) [hereinafter cited as 1975 LEGISLATIVE ANNUAL].

93. *Id.* at 10-11. For a list of the areas of social concern, see *infra* note 94 and accompanying text.

94. *Id.* See *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 434 N.Y.S.2d 698 (2d Dep't 1980). The criteria of CPLR section 901 should be broadly construed because it is apparent that the legislature intended Article 9 to be a liberal substitute for the narrow class action statute which preceded it. *Id.* at 91, 434 N.Y.S.2d at 703.

95. *Id.* at 92-93, 434 N.Y.S.2d at 704-05 (footnote omitted). "[I]t is apparent that the State's palpable tilt away from the broad use of the remedy has been significantly influenced by narrow interpretations of article 9." *Id.* at 95, 434 N.Y.S.2d at 706 (citations omitted).

96. N.Y. CIV. PRAC. LAW art. 9 at 319 (comment) (McKinney 1976). See 1974 REPORT, *supra* note 89, at 206.

corporations were substituted by the legislature.⁹⁷ At the same time, Article 9 assures adequate judicial control of the class action.⁹⁸ The former requirement that there be a substantial relationship among the class members prevented the use of class actions as a device to remedy violations of consumer rights.⁹⁹ CPLR Article 9 added a major weapon to the consumer protection arsenal.¹⁰⁰ The revised law creates a pragmatic, functional test to determine on a case by case basis whether the prospective class is more united by a mutual interest in the settlement of common questions than it is divided by the individual members' interests in matters peculiar to them.¹⁰¹

In enacting Article 9, the New York legislature adopted Federal Rule 23¹⁰² with some changes aimed at simplifying the structure and

97. *Id.* CPLR section 1005(a) provided: "Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." 1962 N.Y. LAWS ch.318, § 4, (effective Sept. 1, 1963, repealed 1975). *Brenner v. Title Guarantee & Trust Co.*, 276 N.Y. 230, 237-38, 11 N.E.2d 890, 893 (1937) was the "leading authority" for the proposition that "there is no community interest where the substantive law affords the members of the class a choice of remedies for in such a case no one member has the right to select which remedy the class will pursue." N.Y. CIV. PRAC. LAW § 901, at 323 (comment) (McKinney 1976). *Hall v. Coburn Corp. of Am.*, 26 N.Y.2d 396, 401, 311 N.Y.S.2d 281, 283, 259 N.E.2d 720, 721 (1970), held that there had to be an identical interest among the members of the class. Pre-1975 cases held that a class action would not lie for fraud; currently, if the question of fraud lies at the heart of the class action and clearly predominates over the uncommon questions, such as reliance and damages, a class action will be allowed. *See Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697, 698-99, 392 N.Y.S.2d 783, 784-85 (Sup. Ct. N.Y. County 1976).

98. *See* 1974 REPORT, *supra* note 89, at 206.

99. 1974 REPORT, *supra* note 89, at 205. CPLR section 1005 also precluded the class action device from being used in suits concerning environmental offenses, civil rights, and the execution of adhesion contracts. *Id.* *See Guadagno*, 89 Misc. 2d at 699, 392 N.Y.S.2d at 785 ("manifest legislative purpose [was] to expand the utilization of the class action device to encompass modern claims for relief, such as claims associated with the violation of consumer rights . . .").

100. *See supra* note 12. *Cf. Goldman v. Garofalo*, 96 Misc. 2d 790, 796, 409 N.Y.S.2d 684, 687 (Sup. Ct. Nassau County 1978), *modified*, 71 A.D.2d 650 (1979), *aff'd*, 50 N.Y.2d 851 (1980) (action by consumers against unlicensed laboratory was to vindicate public good). The purpose of the litigation is to discourage a supplier of consumer services from violating the law in the future. *Id.* at 796, 409 N.Y.S.2d at 687.

101. *See, e.g., Strauss v. Long Island Sports, Inc.*, 89 Misc. 2d 827, 832-33, 394 N.Y.S.2d 341, 345-46 (Sup. Ct. Nassau County 1977), *rev'd on other grounds*, 60 A.D.2d 501, 401 N.Y.S.2d 233 (2d Dep't 1978) (court reversed because it found that individual questions of reliance predominated over common questions). *See generally* 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE § 901.08 (1982) [hereinafter cited as WEINSTEIN].

102. FED. R. CIV. P. 23. Federal Rule 23 was amended in 1966. The amended Federal Rule describes in practical terms the occasions for maintaining class actions.

overcoming the limitation imposed upon the Federal Rule, particularly concerning notice.¹⁰³ CPLR Article 9 grants the court the discretion to direct notice to each member of the class so that he or she may request exclusion from the class within a specified time after notification.¹⁰⁴ Instead of the complex federal scheme of classification, CPLR section 901 provides a unitary system of prerequisites which is applicable to all class actions.¹⁰⁵ Since the New York statute is so similar to Federal Rule 23, New York courts look to interpretations of the federal rule for guidance in decisions implementing Article 9 of the CPLR.¹⁰⁶

The policies behind Federal Rule 23 favor maintenance of class actions and encourage a liberal interpretation of the Rule.¹⁰⁷ These policies are particularly strong in situations where denial of the class action application will effectively terminate further litigation.¹⁰⁸ The

Subdivision (a) states four prerequisites for maintaining any class action: (1) class must be so numerous as to make joinder impracticable; (2) existence of common questions of law or fact must exist; (3) the representatives' claims must be typical of the entire class; and (4) representative parties must fairly and adequately protect the class' interests. In addition to these requirements, subdivision (b) describes three situations in which a class action may be maintained. The first situation allows a class action if individual suits might establish incompatible standards to govern the opposing party's conduct or if judgment in a nonclass action would be dispositive of the rights of other members. The second situation occurs when final injunctive relief or corresponding declaratory relief with respect to the class as a whole is appropriate. The last situation occurs when the class action is superior to the other available means of adjudication of the controversy. *Id.*

103. See *infra* note 106 and accompanying text for explanation of the relationship between CPLR Article 9 and Federal Rule 23. The Supreme Court held: "Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). "[This] is not a discretionary consideration to be waived in a particular case." *Id.* at 176. "The usual rule is that a plaintiff must initially bear the cost of notice to the class." *Id.* at 178; *accord Stern v. Carter*, 97 Misc. 2d 775, 412 N.Y.S.2d 333 (Sup. Ct. Kings County 1979). CPLR section 904 is more liberal than Federal Rule 23 in regard to the expenses of notification. It allows the court to allocate part or all of the expense to defendant. See N.Y. CIV. PRAC. LAW § 904; *Stern*, 97 Misc. 2d at 777, 412 N.Y.S.2d at 335. Federal Rule 23(c)(2) states that the court shall direct to the member of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

104. N.Y. CIV. PRAC. LAW § 904 (McKinney 1976). Sections 904(a) and (b) do not mandate that individual notice be given to all the identifiable members. The court has discretion to decide the method of notice most appropriate to the specific class action. *Id.*

105. N.Y. CIV. PRAC. LAW § 901 (McKinney 1976). See *infra* note 126 for the prerequisites of New York's unitary system.

106. See, e.g., *Stern*, 97 Misc. 2d at 778, 412 N.Y.S.2d at 335-36. Federal interpretations of the prerequisites will be used when necessary to explain CPLR article 9.

107. *Friar*, 78 A.D.2d at 93, 434 N.Y.S.2d at 705.

108. *Id.* "The rationale for the expansive Federal attitude lies in two distinct theories—'therapeutic benefits' . . . and due process." *Id.* at 94, 434 N.Y.S.2d at 705

United States Supreme Court noted, in *Hawaii v. Standard Oil Company of California*,¹⁰⁹ that Federal Rule 23 “enhances the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”¹¹⁰ Essentially the same policy supports the New York statute; CPLR Article 9 enables individuals injured by a similar pattern of conduct to pool their resources and collectively seek relief.¹¹¹

One of the results of using Federal Rule 23 is to bind all those found to be members of the class at the time of judgment. This rule applies whether or not the judgment is favorable to the class.¹¹² To achieve this result, the New York legislature created several prerequisites under CPLR section 901 which refer to the adequacy of the class representative and his individual claim.¹¹³

(citations omitted). For a discussion of therapeutic benefits, see *supra* notes 96-98 and accompanying text. “The due process view is founded on the notion that the class action mechanism affords many individuals a quasi-constitutional right to litigate—to participate meaningfully in the legal process—which they otherwise would not have.” *Id.* at 94-95, 434 N.Y.S.2d at 705.

109. 405 U.S. 251 (1972). Hawaii alleged that respondents violated the Sherman Act by entering into unlawful contracts and by monopolizing the petroleum products industry. Hawaii sought to recover damages as the representative of all purchasers in Hawaii for identical overcharges. *Id.* at 253.

110. *Id.* at 266.

111. See *Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc. 2d 941, 947, 404 N.Y.S.2d 258, 264 (Sup. Ct. N.Y. County 1978) (greater conservation of judicial effort results when common questions of law or fact affecting class members are litigated in one forum).

112. See *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853) (class action by traveling preachers to recover their portion of a fund). The Court held: “For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.” *Id.* at 302. The Court reaffirmed this decision in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921) (class action brought by fraternal benefit association to determine rights of its members in trust fund) and *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (five hundred property owners wanted to bring class action to enforce restrictive covenant). Federal Rule 23 provides that all class actions maintained to the end as such will result in judgments binding on all those whom the court finds to be members of the class, whether or not the judgment is favorable to the class. Proposed Rules of Civil Procedure, 39 F.R.D. 69, 99 (1966) (Report of the Judicial Conference of the United States and Advisory Committee Notes).

113. See N.Y. CIV. PRAC. LAW § 901(a)(3),(4) (McKinney 1976). See also *Summers v. Wyman*, 64 Misc. 2d 67, 314 N.Y.S.2d 430 (Sup. Ct. Nassau County 1970) (petitioner sought class action status to compel Nassau County Commissioner of Social Services to withhold from monthly assistance grant sufficient funds to pay electricity bills; class status was denied). “Class actions are to be approached warily since by nature they deprive nonappearing parties, bound by the plaintiff [sic] position, of their separate personal day in court, as well as their choice of remedy.” *Id.* at 71, 314 N.Y.S.2d at 434.

B. Advantages and Disadvantages of New York's Class Action Statute

Article 9's advantages fall into three categories: economic, psychological and procedural.¹¹⁴ From an economic viewpoint, a combination of small claims creates the possibility of a substantial recovery, which might encourage an attorney to represent plaintiffs whose claims would otherwise go unresolved.¹¹⁵ If a class action is not allowed where individual claims are small, the litigation probably will not proceed.¹¹⁶ Courts have held that the class action is particularly appropriate where many consumers have been injured.¹¹⁷ Refusal to certify a class action in this situation would be tantamount to denying relief, not only to the plaintiff, but to all class members as well.¹¹⁸

A plaintiff also receives a psychological advantage when appearing in court as the representative of a numerous class.¹¹⁹ Even if the court is not impressed by the size of the class, such an action might result in creating public or political sympathy for the class.¹²⁰ The possibility of

114. WEINSTEIN, *supra* note 101, § 901.06. For a discussion of the advantages of a class action, see *infra* notes 115-25.

115. See *Gonsalves v. Roma Furniture Co., Inc.*, 107 Misc. 2d 186, 188 n.2, 443 N.Y.S.2d 559, 561 n.2 (Civ. Ct. N.Y. County 1980) (disallowance of class action would deny any real possibility of being made whole to those claimants whose damages are for sums too small to warrant an attorney's taking the case). See WEINSTEIN, *supra* note 101, § 901.06.

116. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (petitioner brought class action on behalf of all buyers and sellers of odd lots on New York Stock Exchange and alleged that respondents set excessive differentials on purchase price). "A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex . . . action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all." *Id.*

117. See *Goldman*, 96 Misc. 2d at 794, 409 N.Y.S.2d at 686 ("class action is particularly appropriate where a large number of persons has been injured but not sufficiently for them as individuals to commence individual actions"). See also Proposed Rules of Civil Procedure, 39 F.R.D. 69, 100 (1966) ("[t]he difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device").

118. *Friar*, 78 A.D.2d at 93, 434 N.Y.S.2d at 705 (legislative policy favors maintenance of class actions; this policy is especially strong where denial of class action device would effectively terminate other litigation).

119. See generally WEINSTEIN, *supra* note 101, § 901.06.

120. See *Friar*, 78 A.D.2d at 94, 434 N.Y.S.2d at 705 (class action against mortgage lender). The therapeutic benefits of the class action device are premised on the concept of collateral benefits which flow from the use of this device. *Id.* One benefit is the prevention of "legalized theft" by wealthy institutions. *Id.* at 94, 434 N.Y.S.2d at 706 (citing *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d. Cir. 1965); *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88-90 (7th Cir. 1941)).

a class action may be a powerful deterrent to a defendant in cases where an individual plaintiff would have no effect on defendant's behavior.¹²¹ The class action device is designed to allow a person to act in his own interests to achieve justice and procedural efficiency in mass litigation.¹²² It benefits both the representative plaintiff and all the members of the class. This procedural device relies on private initiative to vindicate public rights.¹²³

Procedurally, the most important advantage is the tolling of the statute of limitations for all class members when the plaintiff brings the class action, even if the application for class certification is denied.¹²⁴ In some cases, the burden of proof may be simpler because evidence involving non-parties becomes relevant.¹²⁵

121. *Friar*, 78 A.D.2d at 94, 434 N.Y.S.2d at 705.

The class action is seen as a means of inducing socially and ethically responsible behavior on the part of large and wealthy institutions, which will be deterred from carrying out policies or engaging in activities harmful to large numbers of individuals. Absent the class action lawsuit, the theory goes, these institutions will be permitted to operate virtually unchecked and continue to engage in 'legalized theft' which is perpetuated because the injured potential plaintiffs frequently are damaged in a small sum (often less than \$100) since, realistically speaking, our legal system inhibits the bringing of suits based upon small claims.

Id.

122. *Cf. Deposit Guaranty Nat'l Bank of Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980) (respondents held credit cards issued by petitioner and alleged, in class action, that petitioner made usurious finance charges against respondents' accounts).

We begin by identifying the interests to be considered . . . in the class-action context. First is the interest of the named plaintiffs: their personal stake in the substantive controversy and their related right as litigants in a federal court to pursue . . . their individual interests, is the responsibility of named plaintiffs to represent the collective interests of the putative class.

Id. at 331. *See generally* Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343 (1974).

123. *Cannon v. Equitable Life Assurance Soc'y of the United States*, 106 Misc. 2d 1060, 433 N.Y.S.2d 378 (Sup. Ct. Queens County 1980), *modified*, 87 A.D.2d 403, 451 N.Y.S.2d 817 (2d Dep't 1980) (court certified class consisting of discharged and demoted employees of defendant; class alleged that defendant engaged in discriminatory employment practices). The class action is also a means of vindicating the rights of absent members who are unable to personally prosecute claims. *Id.* at 1064, 1068, 433 N.Y.S.2d at 383, 385 ("[s]ince the interests of all class members coincide with respect to the merits of this suit, then, in advocating their own interests, the named parties will necessarily represent the interests of absentees as well") (citing *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682 (D.D.C. 1977)).

124. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1973). This rule is necessary to "insure effectuation of the purposes of litigative efficiency and economy that [Federal Rule 23 of Civil Procedure] was designed to serve." *Id.* at 555-56.

125. WEINSTEIN, *supra* note 101, § 901.06. For example, in a commuter class action, evidence of the substandard performance on a certain train line might be admissible even if the representative never traveled on it.

Of course, there are also disadvantages to the class action device. First, the court will have greater supervision over the suit.¹²⁶ Secondly, the class representative's freedom to settle the litigation is limited because of his fiduciary duty to the other class members.¹²⁷ Thirdly, individual class members who do not withdraw are deprived of their day in court.¹²⁸ Finally, the notice requirement may increase the costs of litigation and create excessive paper work if the court demands individual notice to all members.¹²⁹

C. The Prerequisites for Establishing a New York Class Action

New York's class action statute establishes a unified set of five prerequisites before a class action may be certified.¹³⁰ CPLR section

126. See *Rochester v. Chiarella*, 86 A.D.2d 110, 116, 449 N.Y.S.2d 112, 115 (4th Dep't), *aff'd*, 58 N.Y.2d 316 (1982), *cert. denied*, 104 S. Ct. 102 (1983) ("[t]he court in a class action has broad powers to control the course of the litigation"). See also N.Y. CIV. PRAC. LAW § 907 (McKinney 1976).

In the conduct of class actions the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify; (6) dealing with similar procedural matters.

Id.

127. *Stern v. Carter*, 97 Misc. 2d 775, 778, 412 N.Y.S.2d 333, 336 (Sup. Ct. Kings County 1979), *modified*, 82 A.D.2d 321, 441 N.Y.S.2d 717 (2d Dep't 1981) ("a representative has a fiduciary responsibility to see that the other class members relying on him are properly represented") (citing *Vallone v. Delpark Equities, Inc.*, 95 Misc. 2d 161, 168, 407 N.Y.S.2d 121, 126 (Sup. Ct. N.Y. County 1978)). See also N.Y. CIV. PRAC. LAW § 908 (McKinney 1976) ("class action shall not be dismissed, discontinued, or compromised without the approval of the court").

128. See *supra* note 113 and accompanying text.

129. See WEINSTEIN, *supra* note 101, § 901.06.

130. CPLR section 901(a) lists five prerequisites for the class action: (1) class must be so numerous that joinder of all the members is impracticable; (2) common questions of law or fact must predominate over those affecting individual members only; (3) claims of the representative parties must be typical of the entire class; (4) representatives must adequately and fairly represent interests of class; and (5) the class action must be superior to the other available means of adjudication of the controversy. N.Y. CIV. PRAC. LAW § 901(a) (McKinney 1976). Federal Rule 23 does

902 lists the factors which the court will consider before determining the propriety of maintaining the suit as a class action.¹³¹ Under CPLR section 901, Article 9's first prerequisite requires that the class be so numerous that joinder of all the members, whether required or permitted, is impracticable.¹³² The factors to consider include the number in the class, the residences of the class members and the economic reality of joining all the members.¹³³ Courts have certified class actions on behalf of as few as eighteen class members.¹³⁴ However, problems of manageability arise when the class becomes too numerous.¹³⁵ The purpose of preclass certification discovery¹³⁶ is to ascertain

not require this last prerequisite. However, Federal Rule 23(b)(3) lists such a situation as being appropriate for maintaining a class action. *See supra* note 102.

131. These factors are: (1) the interest of class members in individually litigating the action; (2) the impracticality of prosecuting separate actions; (3) the extent of any pertinent litigation already commenced by class members; (4) the desirability of concentrating litigation of claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action. N.Y. CIV. PRAC. LAW § 902 (McKinney 1976).

132. *See* N.Y. CIV. PRAC. LAW § 901, at 325 (comment) (McKinney 1976). *See also* *Strauss*, 89 Misc. 2d at 830-31, 394 N.Y.S.2d at 344. The numerosity prerequisite does not include a requirement that the exact number of members in the proposed class be made known to the court at the outset of the litigation. *Id.*

133. *See* WEINSTEIN, *supra* note 101, § 901.07. The Appellate Division, First Department has said in dicta that class actions under CPLR Article 9 should be limited to New York residents. *See* *Reis v. Club Med, Inc.*, 81 A.D.2d 793, 439 N.Y.S.2d 127 (1st Dep't 1981), *appeal dismissed*, 54 N.Y.2d 753 (1981); *Bloom v. Cunard Line, Ltd.*, 76 A.D.2d 237, 430 N.Y.S.2d 607 (1st Dep't 1980); *Simon v. Cunard Line, Ltd.*, 75 A.D.2d 283, 428 N.Y.S.2d 952 (1st Dep't 1980); *Tanzner v. Turbodyne Corp.*, 68 A.D.2d 614, 417 N.Y.S.2d 706 (1st Dep't 1979); *Gottlieb v. March Shipping Passenger Services, Inc.*, 67 A.D.2d 379, 413 N.Y.S.2d 679 (1st Dep't 1979). In an action against Long Island Railroad, only New York residents would be involved. If the existence of Connecticut residents in a commuter class action against Metro-North would pose problems, the class could be limited to only New York residents.

134. *See* *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, Inc.*, 375 F.2d 648, 653 (4th Cir. 1967). *See also* *Cannon*, 106 Misc. 2d at 1065, 433 N.Y.S.2d at 383 ("the trend has been to regard classes of approximately thirty or less as not being sufficiently numerous, although there are exceptions . . .") (quoting *Harris v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24, 45 (N.D. Cal. 1977)).

135. *See* *Gilman*, 93 Misc. 2d at 948-49, 404 N.Y.S.2d at 265. "Manageability should not be equated with sheer numbers. Rather, it should be considered together with the definition of the class and notice. Proper notice should breed efficient management." *Id.* (footnote omitted).

136. Preclass certification discovery is an exchange of information which takes place before the court certifies the suit as a class action. *See* *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356-57 (1978) (respondents brought action to recover amount they paid for shares in petitioner's fund). The court, in its discretion, may order the defendant to perform a task necessary to identify the class members. For example, the court may order the defendant to specify or turn over certain business

the size of the group that allegedly shares plaintiff's grievance, not to plant the seed of litigation in the minds of those who previously had given no indication that they wanted to sue.¹³⁷

The second prerequisite of Article 9 requires that common questions of law or fact must predominate over any issues affecting only individual members.¹³⁸ As stated above, the test under CPLR section 901(a)'s predecessor mandated that class members possess a substantive unity of interest. Under the amended law, the court need only determine whether the class seeks to remedy a common legal grievance.¹³⁹ If the defendant is alleged to have acted against the plaintiffs under a common scheme or single plan, it is usually a sufficient basis for finding that a class action is appropriate.¹⁴⁰ The common questions must be the focus of the lawsuit and not merely tangential issues.¹⁴¹ This latter requirement seeks to allow a class to achieve economies of time, effort, and expense and to promote uniform decisions for persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.¹⁴²

The third prerequisite of Article 9 requires that the claims of the representative parties must be typical of the claims of all the class

records that list class members' names. *Id.* "Since petitioners apparently have the right to control these records, and since the class members can be identified only by reference to them, the . . . Court acted within its authority under [Federal] Rule 23(d) in ordering petitioners to make . . . the records available to respondents." *Id.* at 359.

137. *Smith v. Atlas Int'l Tours*, 80 A.D.2d 762, 764 (1st Dep't 1981) (mem.).

138. See N.Y. CIV. PRAC. LAW § 901(a)(2) (McKinney 1976).

139. See *Vickers v. Home Fed. Sav. & Loan Ass'ns of East Rochester*, 87 Misc. 2d 880, 887, 386 N.Y.S.2d 291, 296 (Sup. Ct. Monroe County 1976), *modified* 56 A.D.2d 62, 390 N.Y.S.2d 749 (4th Dep't 1977) (in action against defendant for violation of Consumer Credit Act, all persons who received loans from defendant were granted class status under New York law). Now the test is whether predominant questions exist rather than the more restrictive test of substantive unity. *Id.*

140. Cf. *Bogosian v. Gulf Oil Corp.*, 62 F.R.D. 124, 135 (E.D. Pa. 1973). Cases have permitted class actions where there is a common course of conduct which is said to predominate. The existence of individual questions will not defeat the granting of class status. *Id.* If in later stages of the action, the grievances are varied and differ as to each member of the class, the court can determine that the action should not proceed on a class basis. See N.Y. CIV. PRAC. LAW § 902 (McKinney 1976).

141. N.Y. CIV. PRAC. LAW § 901 at 325 (comment to § 901(3)) (McKinney 1976). Cf. *City of Philadelphia v. Emhart Corp.*, 50 F.R.D. 232, 235 (E.D. Pa. 1970) (requisite preliminary showing should be minimal demonstration that complaint is sincere and aggregate group claim is substantial or demonstration that claim put forth on behalf of class is more than frivolous or speculative) (citing 3B MOORE'S FEDERAL PRACTICE, § 23.45[3]).

142. *Friar*, 78 A.D.2d at 97, 434 N.Y.S.2d at 707. Class actions protect the defendant from the risk that varying adjudications in individual lawsuits with members of a class might establish incompatible standards to govern defendant's behavior. FED. R. CIV. P. 23(b)(1)(A).

members.¹⁴³ It is essential that the absent class members be properly represented,¹⁴⁴ because each class member who does not withdraw will be bound by the res judicata effect of the judgment.¹⁴⁵ CPLR section 903¹⁴⁶ empowers the court to include in the class all those who do not affirmatively take steps to be excluded.¹⁴⁷ If class members are given the opportunity to withdraw from the class action and do not use it, they will be bound by the judgment. The representative must have an individual cause of action and his interests must be closely identified with the interests of all the other members of the class.¹⁴⁸ A properly chosen representative can offer more to the prosecution of the class action than the mere fulfillment of the procedural requirements.¹⁴⁹

The fourth prerequisite for class status mandates that the representative parties be capable of fairly and adequately protecting the interests of all class members.¹⁵⁰ The court seeks to determine whether or not the representatives will vigorously and effectively pursue the suit.¹⁵¹ In addition, the court must determine whether or not the

143. See N.Y. CIV. PRAC. LAW § 901(a)(3) (McKinney 1976).

144. See *Tanzer v. Turbodyne Corp.*, 68 A.D.2d 614, 417 N.Y.S.2d 706 (1st Dep't 1979) (class status was denied to stockholders because proposed representatives were relatives of class' lawyer and regularly made small investments in order to bring lawsuits on behalf of other stockholders).

145. *Id.* at 620, 417 N.Y.S.2d at 709 ("[c]lass actions are to result in judgments which will bind or inure to the benefit of many persons who have not expressly authorized suit on their behalf"). See *supra* note 124 and accompanying text.

146. NEW YORK CIV. PRAC. LAW § 903 (McKinney 1976)

147. *Id.*

148. See *Gilman*, 93 Misc. 2d at 945, 404 N.Y.S.2d at 262 (these requirements are "essence" of prerequisite of typicality); FED. R. CIV. P. 23(a)(3); WEINSTEIN, *supra* note 101, § 901.09. If a plaintiff who brings the case has a doubtful cause of action, the court should order joinder of other members or dismiss the class action feature of the suit. See *Stern*, 97 Misc. 2d at 780, 412 N.Y.S.2d at 337.

149. *Stern*, 97 Misc. 2d at 780, 412 N.Y.S.2d at 337 (citing *Goldchip Funding Co. v. 20th Century Corp.*, 61 F.R.D. 592, 594 (N.D. Pa. 1974)). Accord *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1177-78 (5th Cir. 1978) (representative plays major role in prosecution of class action; he has duty to appeal lower court judgment and to decide whether to settle).

150. See N.Y. CIV. PRAC. LAW § 901(a)(4) (McKinney 1976). This prerequisite derives from Federal Rule 23(a)(4); it is a due process requirement. See WEINSTEIN, *supra* note 101, § 901.15.

151. See *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969). The plaintiff cannot bring the action solely to satisfy his particular claim. The court must determine that the litigants are not involved in a collusive suit. *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968)). See also *Vickers*, 56 A.D.2d at 65, 390 N.Y.S.2d at 749. Federal cases hold that "the fact that the named plaintiffs seek damages in different amounts or even a remedy of a different character will not impair their ability fairly to represent the class. If at any stage of

representative has a substantial interest that is antagonistic to or conflicts with those of the other class members.¹⁵² In conjunction with this requirement, the court also considers the class' counsel's competence.¹⁵³ New York courts will deny class action status or decertify a class when counsel's conduct is found to be champertous.¹⁵⁴

The final prerequisite of CPLR section 901 is that the court find the class action device to be superior to the other available methods of adjudication.¹⁵⁵ The class representatives must show that the class suit is the best method of vindicating the rights of the class members.¹⁵⁶ The court must then evaluate all the alternatives to the class action.¹⁵⁷ The existence of difficulties in managing the litigation due to an excessively large class should not result in denial of class status where the only likely alternative to the class action would be denial of any relief.¹⁵⁸ Federal courts generally hold that if all the other prerequi-

the action a question should arise as to the adequacy of the class representation, the trial court can at that stage take appropriate action." *Id.* (citations omitted).

152. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (existence of antagonistic interests denied protection to absent class members); *accord Lichtyger v. Franchard Corp.*, 18 N.Y. 2d 526, 277 N.Y.S.2d 377 (1966).

153. See WEINSTEIN, *supra* note 101, § 901.10 ("qualifications of the attorney for the class are also considered of essential importance in determining the adequacy of the representation").

154. *Stern*, 97 Misc. 2d at 780, 412 N.Y.S.2d at 336 (court gives example of lawyer who attempted to stir up litigation and thereby prejudiced interests of class). Champertous describes a lawyer who provides money and services for the suit in consideration of his receiving a share of the recovery. BLACK'S LAW DICTIONARY 209 (rev. 5th ed. 1979).

155. See N.Y. CIV. PRAC. LAW § 901(a)(5) (McKinney 1976).

156. See WEINSTEIN, *supra* note 101, § 901.19 (proponent must always convince court that article 9 is applicable to situation and that class action is appropriate mode of adjudication). The "best method" means that the class action would achieve economies of time, effort and expense. *Id.*

157. See *Friar*, 78 A.D.2d at 99, 434 N.Y.S.2d at 708. The superiority requirement has been interpreted by federal courts as requiring the court to examine other adjudicative possibilities and compare them to the class action. See *Dolgow*, 43 F.R.D. at 482; *accord Kaufman v. Lawrence*, 76 F.R.D. 397 (S.D.N.Y. 1977) (class action sought on behalf of common stock holders was allowed because, under circumstances, it was "superior to other available methods for the fair and efficient adjudication of the controversy").

158. See *Friar*, 78 A.D.2d at 95, 434 N.Y.S.2d at 706 ("by construing the availability of class action relief narrowly, the judiciary is seen as denying access to the courts to thousands of individuals whose minimal damages are greatly outweighed by the prohibitive costs involved in prosecuting a lawsuit against a wealthy opponent"); *Gilman*, 93 Misc. 2d at 948, 404 N.Y.S.2d at 264 ("maximum damages recoverable by any single plaintiff would be at most . . . hardly enough . . . to conduct to completion the protracted and complicated litigation required to establish his claim").

sites have been met, the class action is the most effective means of proceeding.¹⁵⁹

D. Applicability of New York's Class Action Device to Commuter Litigation

1. *Fulfilling the Five New York Prerequisites*

In 1980, New York amended its Consumer Protection Act to create a private right of action for injuries caused by deceptive acts and practices.¹⁶⁰ Generally, the small amount of damages involved in most consumer fraud cases inhibits consumers from utilizing these statutes to bring their own actions.¹⁶¹ To ease the consumer's burden of individual litigation, the Consumer Protection Board can assist consumers with class actions when sellers do not maintain high standards of honesty and fair business practices.¹⁶² The New York legislature enacted CPLR Article 9 "to facilitate collective recovery for individuals whose claims are too small to justify the efforts and costs of litigation."¹⁶³ The class action device has been used in other consumer

159. See, e.g., *Richardson v. Coopers & Lybrand*, 82 F.R.D. 335, 348-50 (D.D.C. 1978) (substantial number of claimants and predominance of common questions make class action "superior mode of conducting . . . suits"); *In re Sugar Ind. Antitrust Litigation*, 73 F.R.D. 322, 357-58 (E.D. Pa. 1976) (given size of class and pervasiveness of common allegations, class action device is superior method of proceeding); *Elkind v. Liggett & Myers, Inc.*, 66 F.R.D. 36, 42 (S.D.N.Y. 1975) (case could most effectively be conducted as class action under Federal Rule 23 since there were numerous plaintiffs with small claims based upon predominating common questions).

160. N.Y. GEN. BUS. LAW § 349(h), 350-d(3) (McKinney Supp. 1983-1984). Section 349(h) provides:

In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice and to recover his actual damages or fifty dollars, whichever is greater.

Id.

161. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 185 (1974).

[I]n our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief.

Id. (Douglas, J., dissenting in part). See *supra* notes 74-83 and accompanying text for a discussion of how small awards discourage lawsuits.

162. See *supra* note 10 and accompanying text.

163. *Giummo v. Citibank, N.A.*, 107 Misc. 2d 895, 898, 436 N.Y.S.2d 172, 174 (Civ. Ct. N.Y. County 1981).

actions against manufacturers and suppliers of goods and services.¹⁶⁴ Railroad companies provide consumer services; and by selling sub-standard services, they violate consumers' rights. The class action device is appropriate in commuter litigation against railroads.¹⁶⁵

A class action by commuters against a specific railroad could meet the numerosity requirement.¹⁶⁶ For example, the Long Island Railroad has 140,000 round trip riders each day¹⁶⁷ while Metro-North has 180,000 daily round trip riders.¹⁶⁸ In a consumer action against an unlicensed laboratory, the court held that "the required numerosity is obviously present since it appears that there could be as many as 100,000 members of the class."¹⁶⁹ If the class is too large, however, the court could create subclasses.¹⁷⁰ Each of these could consist of riders from a specific railroad line. One approach to the formation of the class would be to consider only those purchasing monthly or weekly

164. See, e.g., *Simon*, 75 A.D.2d 283, 428 N.Y.S.2d 952 (1st Dep't 1980). The court granted class status to a consumer group which alleged that defendant provided it with inferior service and accommodations on a cruise ship. In *Ludmer v. Franklin Career Search Int'l, Inc.*, N.Y.L.J., Dec. 8, 1981, at 12, col. 6 (Sup. Ct. Kings County 1981), the court certified a class action in a lawsuit by consumers against the defendant for fraudulent advertising. The plaintiff-representative paid \$2,610 for the promised services to get a new job and defendant failed to perform as advertised. The court held that a private right of action exists to enforce consumer legislation. *Id.* at 13, col. 1 (quoting Memorandum of Assemblyman Harold L. Strelzin). In *Hyde v. General Motors*, N.Y.L.J., Oct. 30, 1981, at 5, col.3 (Sup. Ct. Kings County 1981), the court certified a class action in a lawsuit by consumers against General Motors for alleged breaches of express and implied warranties. The consumers alleged that General Motors had used improper materials in certain trucks and had failed to develop an appropriate design for the trucks. The court held that a class action may be used to recover actual damages. *Id.* at 5, col. 6. In *Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697, 392 N.Y.S.2d 783 (Sup. Ct. N.Y. County 1976), the court certified a class consisting of purchasers of travel tours to a Jamaican resort. The plaintiffs alleged fraudulent misrepresentation and breach of contract by defendant in supplying inferior services. The court held that the legislative purpose behind CPLR article 9 was to provide a procedural remedy for violations of consumer rights. *Id.* at 699, 392 N.Y.S.2d at 785.

165. The applicable statute for the railroad's liability is N.Y. TRANSP. LAW § 111 (McKinney 1975) and not New York General Business Law. This is an analogy to a situation where a class action is used to redress infringements of consumer rights.

166. See *supra* notes 132-37 and accompanying text for a discussion of the numerosity requirement.

167. N.Y. Times, Jan. 27, 1983, at B2, col. 6; cf. *Felder v. Foster*, 71 A.D.2d 71, 74, 421 N.Y.S.2d 469, 471 (4th Dep't 1979) (court held that 2000 member class is too large for joinder).

168. N.Y. Times, Jan. 1, 1983, at A1, col. 5. Joinder of potentially thousands of members is impractical. *Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc. 2d 941, 943, 404 N.Y.S.2d 258, 261 (Sup. Ct. N.Y. County 1978).

169. See *Goldman v. Garofalo*, 96 Misc. 2d 790, 793, 409 N.Y.S.2d 684, 686 (Sup. Ct. Nassau County 1978).

170. See N.Y. CIV. PRAC. LAW § 906(2) (McKinney 1976).

commutation tickets. These riders are subject to the same conditions daily and although such a class would omit infrequent riders, there would be fewer problems with predominant common questions. Furthermore, if the class action helps reform railroad service, all riders will benefit.

A commuter class action would not pose notice problems. Since individual notice is not required under CPLR Article 9,¹⁷¹ signs could easily be posted on all the trains and flyers distributed to passengers. A class action probably would not plant the seed of litigation in the commuters' minds, since many have already brought suits¹⁷² and others have already recorded complaints about the substandard service.¹⁷³ The numerosity requirement is satisfied when individual claims are so small that individual suit by class members is not economically feasible.¹⁷⁴

In a class composed of commutation ticketholders, common questions would clearly predominate. First, all class members have the same contract of carriage with the defendant. Second, no individual inducements by the railroad exist that would create varied individual questions of reliance. In *Simon v. Cunard Line*,¹⁷⁵ the court held that a common question existed among the passengers of a charter ship. Since all the passengers suffered common complaints while aboard the ship, the predominant common question requirement was whether the passengers received the cruise they purchased.¹⁷⁶ The same type of common question exists among weekday train commuters. They each endure the same standard of performance during the daily rush hours. These breaches of the carriage contract are the focus of the litigation; no individual questions would predominate.¹⁷⁷

171. See N.Y. CIV. PRAC. LAW § 904(b) (McKinney 1976); accord *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 266 (S.D.N.Y. 1971) ("where a class consists of a large number of claimants with relatively small individual claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required").

172. See *supra* note 2 and accompanying text for a discussion of the suits brought against Metro-North and the Long Island Railroad.

173. N.Y. Times, July 20, 1983, at B6, col. 5 (commuters complain about lack of airconditioning on commuter trains and subways).

174. See *Strauss*, 89 Misc. 2d at 829, 394 N.Y.S.2d at 345 (citing *Swanson v. American Consumer Indus.*, 415 F.2d 1326, 1333 (7th Cir. 1969)).

175. 75 A.D.2d 283, 428 N.Y.S.2d 952 (1st Dep't 1980).

176. *Id.* at 289, 428 N.Y.S.2d at 956.

177. See *Goldman*, 96 Misc. 2d at 793, 409 N.Y.S.2d at 686. The court held:

The questions of law and fact appear to be common to the class inasmuch as the action seeks only a refund of moneys paid These questions are the same for all members of the class and the only difference among

In a class action by commuters against a railroad, any commutation ticketholder would have a claim that is typical of the claims of all the class members. In *Eisen v. Carlisle & Jacquelin*¹⁷⁸, the Court of Appeals for the Second Circuit held that the claim of a purchaser of an odd lot on the New York Stock Exchange was typical of the claims of the class consisting of odd lot traders.¹⁷⁹ This representative, as well as the other class members, alleged an excessive price differential. "[A]ll members of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive."¹⁸⁰ Similarly, each commuter's claim results from the same breaches of the carriage contract: lengthy delays, cancelled trains and equipment failures.¹⁸¹ There are no different contractual provisions which pertain to various individuals.

In a class action against a railroad, one of several commuters could serve as a representative and adequately protect the interests of the entire class. The court would investigate the financial status of the chosen representative to ensure that adequate notice will be given to the class members.¹⁸² A financially secure representative would have the resources to assert vigorously the rights of the class members. The representative must also have the ability to protect adequately the class' interests.¹⁸³ If the representative were a commutation ticket holder, it is unlikely that the suit would be collusive or that the representative's interest would conflict with the interests of other class members.¹⁸⁴ Since the purpose of the class action is to provide a means

individual members would be as to the specific amount paid. That difference is an insufficient reason for a holding that there is not the required commonality of interest.

Id. Similarly, in a commuter lawsuit, the members of the class would only be seeking a refund of all or part of the money paid.

178. 391 F.2d 555 (2d Cir. 1968), *vacated*, 417 U.S. 156 (1974) (Court remanded because Second Circuit conducted preliminary inquiry into merits of suit in order to determine whether class could be certified). On remand, the District Court held that the suit could be maintained as a class action. 54 F.R.D. 565, 571 (S.D.N.Y. 1972), *rev'd*, 479 F.2d 1005 (2d Cir. 1973).

179. *Id.* at 562.

180. *Id.*

181. See *supra* note 3 and accompanying text.

182. See *Stern v. Carter*, 97 Misc. 2d 775, 777, 412 N.Y.S.2d 333, 335 (Sup. Ct. Kings County 1979). "[P]laintiff . . . must clearly demonstrate that he has and will use sufficient financial resources to fairly and adequately represent the class involved, and that his financial resources are adequate to pursue the suit to completion"
Id.

183. *Id.* at 780, 412 N.Y.S.2d at 337 ("plaintiff's knowledge and competency may be discovered in the process of inquiring as to how much he knows about his own case to enlighten the court in regard to his real ability to represent the class").

184. See *Eisen*, 391 F.2d at 562, for a discussion of this consideration.

of vindicating small claims, to deny class status because of the small amount of the representative's interest would be to ignore the spirit of Article 9.¹⁸⁵ If a class action is brought against the railroads, the attorney will have to be carefully chosen to ensure proper conduct. The court will deny class certification if the attorney appears to act for his own benefit.¹⁸⁶

In a commuter class action against railroads, the class action is superior to other methods of adjudication because it is the only practical and economically feasible procedural device. There are too many potential plaintiffs for joinder¹⁸⁷ and individual litigation is too expensive and time consuming when compared to the nominal damages normally awarded.¹⁸⁸ Federal courts have found that the class action is the superior method of adjudication when the facts show that there are numerous plaintiffs who have little incentive to enforce their rights individually and would not otherwise seek recovery.¹⁸⁹

2. *Subdivision of Classes as an Aid to Class Certification*

CPLR section 906¹⁹⁰ permits the court, in its discretion, to subdivide the class if it finds that the class is actually composed of two or

185. See *Dolgow v. Anderson*, 43 F.R.D. 472, 495 (E.D.N.Y. 1968) (discussing Federal Rule 23); accord *WEINSTEIN*, *supra* note 101, § 901.11.

186. See *supra* notes 153-54 and accompanying text for a discussion of the necessity of the attorney's honesty.

187. Federal Rule 19 states that a person

shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

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188. See *Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697, 698, 392 N.Y.S.2d 783, 784 (Sup. Ct. N.Y. County 1976) ("class action relief may well be necessary to vindicate the rights of members of the class, whose individual claims are otherwise too small (under \$500) to warrant independent litigation . . .").

189. See, e.g., *Korn v. Franchard Corp.*, 456 F.2d 1206, 1214 (2d Cir. 1972) (in determining that class action was superior, Court considered dispositive finding, on earlier motion, that plaintiff's action would go no further without designation as class); *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 103 (S.D.N.Y. 1981) (Federal Rule 23(b)(3) action is clearly superior when large number of members is involved, whose claims are too small to warrant individual suits); *Stavrides v. Mellon Nat'l Bank & Trust Co.*, 60 F.R.D. 634, 636 (W.D. Pa. 1973) (in suits, "where great numbers of people assert relatively small claims", denial of class status would decisively terminate litigation).

190. N.Y. CIV. PRAC. LAW § 906 (McKinney 1976)

more subclasses with different interests.¹⁹¹ This provision helps assure that all members of the class are adequately represented when different or conflicting interests exist and may prevent dismissal based solely on manageability problems.¹⁹² Subclasses may be appropriate in commuter class actions, if certain railway lines experience more delays and equipment failures than others. If such a situation exists, each subclass could present its own evidence and receive its own relief.

IV. Policy Considerations

A class action by commuters for damages against railroads for breach of the carriage contract can meet all the prerequisites of CPLR Article 9. Commuters on a specific line would be too numerous for joinder.¹⁹³ The common question of the railroad's liability for breaches caused by delays and equipment failures would predominate.¹⁹⁴ Since all commuters purchase the same type of ticket and are subject to the same conditions on the trains, the claim of the representative would be typical of the entire class' claims.¹⁹⁵ A carefully selected commuter representative could adequately protect the class' interests since he would argue for improved train service and reimbursement for the substandard service endured.¹⁹⁶ Finally, the class action device is superior to any other method of adjudication because it allows the prospective plaintiffs a forum they would otherwise not enjoy in which to adjudicate their claims under the substantive law.¹⁹⁸

Carriers have been isolated from full common law liability arising from delays and cancellations and equipment failures.¹⁹⁸ The railroads must deliver the services contracted for by passengers. These services include more than mere transportation between two locations.¹⁹⁹ A class action would combine small individual claims and

191. *Id.* § 906(2).

192. See WEINSTEIN, *supra* note 101, § 906.03.

193. See *supra* notes 167-70 and accompanying text for a discussion of the first prerequisite of the class action statute.

194. See *supra* notes 175-77 and accompanying text for a discussion of the second prerequisite of the class action statute.

195. See *supra* notes 178-81 and accompanying text for a discussion of the third prerequisite of the class action statute.

196. See *supra* notes 182-84 and accompanying text for a discussion of the fourth prerequisite of the class action.

197. See *supra* note 187-89 and accompanying text for a discussion of the fifth prerequisite of the class action.

198. See *supra* note 7 and accompanying text for a discussion of how nominal damages have been awarded for constant breaches of the carriage contract.

199. See *supra* notes 15-69 and accompanying text for a discussion of the duties of a carrier.

create the possibility of a substantial recovery. This aggregated claim would encourage an attorney to litigate the suit.²⁰⁰ If class action status were denied, relief for a grievous wrong would be denied to all members of the class and the public would suffer.

In addition to class members, the public will also benefit from class actions against railroads. The wrongs that give rise to a class action are public wrongs. An action in a small claims court by one individual has no deterrent effect on the defendant railroad's activities.²⁰¹ However, the large damage awards possible in a class action suit decrease the likelihood that a defendant will continue its wrongful practices.²⁰²

Opponents of a commuter class action argue against certification based on the ground that it would impose grievous hardships on railroad corporations.²⁰³ According to these opponents, if railroads are forced to remedy their statutory violations, they will cease operations or raise fares. It is unlikely that New York State would allow commuter rail service to end.²⁰⁴ New York commuters are dependent upon the railroads for transportation.²⁰⁵ The problems resulting from the

200. See *Cannon v. Equitable Life Assurance Soc'y of the United States*, 106 Misc. 2d 1060, 1069, 433 N.Y.S.2d 378, 385 (Sup. Ct. Queens County 1980), *modified*, 87 A.D.2d 403, 451 N.Y.S.2d 817 (2d Dep't 1980) (contingency fee held appropriate in class action context; "this . . . would seem to be a predictable element of any class action brought by plaintiffs with individually small damage claims or where their financial resources are limited"). "Substantial counsel fees may even be an acceptable incentive to encourage forceful prosecution of cases imbued with the public interest." *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 931 n.5 (7th Cir. 1972) (class action brought by grocery store owners alleging that defendant conspired with dairy products companies to restrain and monopolize interstate trade) (citing *Dolgow v. Anderson*, 43 F.R.D. 472, 494-95 (E.D.N.Y. 1968)).

201. See *Giummo v. Citibank, N.A.*, 107 Misc. 2d 895, 898, 436 N.Y.S.2d 172, 174 (Civ. Ct. N.Y. County 1981) ("prophylactic effect of the threat of class action exposure . . . elevates . . . a lawsuit . . . from the ineffective nuisance category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve compliance") (citing 119 CONG. REC. 25,419 (daily ed. July 23, 1983) (statement of Sen. Hart on Class Actions and Truth-in-Lending Act)); WEINSTEIN, *supra* note 101, § 901.06.

202. See *Class Actions*, 58 F.R.D. 299, 304-05 (1974) (excerpts from Symposium before Judicial Conference of 5th Judicial Circuit) (class action allows judge to rectify "institutional" problems; "there is no comparable deterrent to unlawful conduct . . ."). See also *Beekman v. City of New York*, 65 A.D.2d 317, 319, 411 N.Y.S.2d 620, 621 (1st Dep't 1979) (*per curiam*) (class action brings more prompt resolution of issues in question).

203. See *Berkman v. Sinclair Oil Corp.*, 59 F.R.D. 602, 608 (N.D. Ill. 1973) (federal courts have denied class action status where it "would result in absurdly high or ruinous damages, wholly unrelated to the actual harm caused by the violations").

204. See *infra* note 207 and accompanying text for former Governor Carey's view on the importance of our transit system.

205. N.Y. Times, Mar. 30, 1983, at B1, col. 1; *Id.*, Mar. 20, 1983, § 22, at 2, col. 3.

railroad strike in 1983 exemplify this.²⁰⁶ Furthermore, terminating commuter service contravenes New York's public policy to conserve energy. As former New York Governor Carey stated, "Our transportation system plays a pivotal role in strengthening our State's economy In a time of energy shortages, it is essential to provide a comprehensive program of energy conservation" ²⁰⁷ However, extensive inefficiency exists in railroad operations.²⁰⁸ A class action, combined with the media publicity that might arise, could pressure the railroads to discontinue wasteful practices and funnel their funds toward improving service. The only hardship that would be imposed on railroads by a class action would be the pressure to comply with statutory standards.

A class action enforces substantive rights which, in its absence, are meaningless because no other procedural device permits aggrieved persons to assert them.²⁰⁹ The Supreme Court has noted: "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government."²¹⁰ Without such a procedural device, the defendant railroads have no incentive to change. Decreased ridership might achieve the same result but riders are too dependent

206. N.Y. Times, Mar. 13, 1983, § 23, at 3, col. 1.

207. GOVERNOR'S APPROVAL MEMORANDUM ON TRANSPORTATION BOND ISSUE, C.369, APPROVAL #78, June 28, 1979.

208. N.Y. Times, July 25, 1983, at B2, col. 6. One example of the railroad's inefficiency is the millions of dollars that will be saved by installing automatic fare collectors. *Id.*

209. See *Deposit Guaranty Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 338 (1980) (there has been an "increasing reliance on the 'private attorney general' for the vindication of legal rights; obviously this development has been facilitated by [Federal] Rule 23"). See also N.Y.L.J., May 2, 1972, at 4, col. 3.

The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.

The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including . . . consumers . . .—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public. When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.

Id.

210. *Deposit Guaranty Nat'l Bank of Jackson*, 445 U.S. at 339.

on railroads for transportation for this to be considered a realistic answer.²¹¹ Class actions often utilize the threat of expensive litigation to compel settlement.²¹² However, they seek to vindicate the rights of the public and save time, effort and expense.²¹³

V. Conclusion

Commuter railroads continuously breach their carriage contracts and thereby violate the common law and statutory standards of performance imposed upon them. Individual litigation is not a practical way to enforce these standards because of the small amounts awarded commuters in actions against railroads. A more effective procedural device is needed to remedy these violations of law. The class action is such a device. Therefore, the narrow interpretation given CPLR Article 9 by the courts should be broadened to conform with its legislative purpose. New York courts should certify a commuter class action since it fulfills the five prerequisites under CPLR Article 9. By redressing violations of law by railroads, the class action device would achieve individual justice and would benefit the general public.

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211. See *supra* note 205 and accompanying text.

212. Class Actions-Useful Tool or Engine of Destruction, 55 F.R.D. 375, 389 (1972).

The class action device can be used to coerce a settlement even without filing suit. Most experienced defense counsel have participated in negotiations toward settlement of a dispute at which counsel for the potential plaintiff threatens to file a massive class action to intimidate the potential defendant into a favorable settlement.

Id. at 390. Many corporations would rather settle with the representative than face an expensive and unwieldy lawsuit. Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFF. L. REV. 343, 354 (1974) (no alternative to settlement exists in massive common question suits).

213. See *Mimnorm Realty Corp. v. Sunrise Fed. Sav. & Loan Ass'n*, 83 A.D.2d 936, 938, 442 N.Y.S.2d 780, 783 (2d Dep't 1981)(mem.) (class action certification will serve goals of economies of time and effort, and promote uniformity of decision).

