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AUTOMATIC STAYS AND GOVERNMENTAL OPERATIONS: HOW NEW YORK STATE PROTECTS THE GOVERNMENT FROM THE POOR

*Jack E. Pace III**

Procedural justice for the poor is a matter of life and death. For the poor plaintiff, a lawsuit typically involves the basic means of survival for the plaintiff's family.[1] Fair procedures, therefore, are necessary to ensure that a court does not unjustly deny a poor family its subsistence.[2]

Two New York state procedural rules endanger the poor by giving special treatment to the defendant whom low income plaintiffs most often face in court.[3] The New York Civil Practice Law and Rules ("CPLR") allows the government an automatic stay, pending appeal, of all proceedings to enforce an adverse judgment or order.[4] The New York Court of Appeals' "governmental operations"[5] rule creates a presumption against certifying class actions when the challenged action is a governmental operation. Neither rule exists in federal court.[6]

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1. As Justice Brennan wrote in *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970), "termination of aid . . . may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate."

2. *Id.* at 261 ("'[T]o cut off a welfare recipient in the face of . . . "brutal need" without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.'") (quoting Kelly v. Wyman, 294 F. Supp. 893, 899-900 (S.D.N.Y. 1968), *aff'd*, 397 U.S. 254 (1970)).

3. As this Note shows, the frequency with which these rules come into play, along with the importance of the class action device for the poor, makes the two rules significant limitations on the legal access of low income plaintiffs. For a discussion of additional New York rules favoring government defendants, see Marcia Robinson Lowry, *Justice's Rusted Wheels*, MANHATTAN LAWYER, Nov. 29, 1988, at 12.

4. N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1996).

5. Rivera v. Trimarco, 36 N.Y.2d 747, 749, 329 N.E.2d 661, 661, 368 N.Y.S.2d 826, 827 (1975).

6. *See infra* Parts I.A.3 and I.B.3, describing relevant federal practice.

A New York plaintiff with little or no income likely will face at least one of these two rules in the course of a lawsuit. First, a poor person who does not receive the assistance to which she is entitled under a government program[7] must get a judgment or order against the government to recover. Second, a class action is often the only available means of court access for a poor plaintiff unable to afford legal services.[8] As a result, in addition to creating procedural disparity with federal courts,[9] New York rules postponing

7. Many poor people depend on government programs to supplement, albeit meagerly, their incomes. For example, in 1991, sixty percent of children in poverty, and forty nine percent of all people in poverty, received benefits from the Aid to Families with Dependant Children ("AFDC") program. 1994 GREEN BOOK 399 tbl. 10-26 (1994). The reader should note, however, that public assistance benefits do not even raise a family's income to the poverty line. *See* Peter T. Kilborn, *Welfare All Over the Map*, N.Y. TIMES, Dec. 8, 1996, at E3. In addition, benefit levels have consistently decreased since 1970. *See id.*

8. The level of unmet legal need among the poor is great. According to a recent legal needs study,

> 40.5% of all poor households in New York City reported having at least one unmet need in the housing category; 21.3% reported at least one problem involving public benefits for which they were unable to obtain legal assistance; and 15.3% reported at least one consumer problem for which they were unable to obtain counsel.

The Steering Committee on Legal Assistance, *Lawyers and the Poor in New York City-1996: The Association of the Bar of the City of New York's Civil Justice Crisis Plan*, 51 THE RECORD 708, 711 (citing NEW YORK STATE BAR ASSOCIATION, THE NEW YORK LEGAL NEEDS STUDY (1993) (defining an "unmet legal need" as a need arising from a problem which would merit an attorney's professional attention and for which no legal assistance had been obtained)).

In addition, recent laws preventing lawyers at organizations receiving Legal Services Corporation funds from representing clients participating in class actions further decrease poor people's access to legal services. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321 (1996) ("None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that initiates or participates in a class action suit.").

9. This disparity raises a serious issue beyond the scope of this Note. In addition to their effect on the poor, the automatic stay and governmental operations rule illustrate a flaw in the reasoning behind restrictions on federal court access. The United States Supreme Court has justified such restrictions with the assumption that state courts protect individual rights as well as federal courts do. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452, 460-61 (1974) (stressing the need to avoid the "unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States'") (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)); Martin H. Redish, *Reassessing the Allocation of Judicial Business between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1825 (1992) ("[T]he modern Supreme Court has long premised its structuring of federal and state judicial relations on the assumptions that state and federal courts are fungible.").

judgments against the government, or limiting class actions, deny relief to plaintiffs who must rely on such judgments or actions.

This Note examines the automatic stay and the governmental operations rule and argues that they unfairly limit the ability of poor plaintiffs to recover against the government in New York state courts. Part I defines the automatic stay and governmental operations rule. Part II describes the impact of the rules on the poor, including the inadequacy of the existing means of relief under the rules. Part III considers several alternatives to the rules and proposes that the New York Legislature repeal the automatic stay and that the New York Court of Appeals eliminate the governmental operations rule. The Note concludes that the harm caused to poor plaintiffs overshadows any purported benefit of applying these two unique rules.

I. The Rules

A. The Government's Automatic Stay

CPLR 5519(a)(1)[10] grants an automatic stay to a governmental entity[11] appealing an adverse judgment or order.[12] Service by the government of the notice or affidavit required for an appeal stays automatically all proceedings to enforce the judgment or order ap-

However, state court rules, which do not exist in federal courts, inhibiting a party's ability to obtain relief call into question this adequacy assumption. For New York plaintiffs challenging a government practice, unique state rules favoring government defendants make state courts inadequate substitutes for federal courts.

For a discussion of New York state court rules, nonexistent in federal courts, that restrict plaintiffs' ability to pursue constitutional claims, see Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 737-47 (1981). For discussions of additional factors that give plaintiffs in federal court an advantage over their state court counterparts, see Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995), and Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

10. N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1996).

11. The automatic stay applies to all governmental entities, including: school districts, *see* Koch v. Webster Cent. Sch. Dist. Bd. of Educ., 112 Misc. 2d 10, 445 N.Y.S.2d 874 (Sup. Ct. Monroe County 1981), the Metropolitan Transit Authority and its subsidiary the Long Island Railroad, *see* Grant v. MTA, 96 Misc. 2d 683, 409 N.Y.S.2d 570 (Sup. Ct. N.Y. County 1978), the city commissioner of public welfare, *see* Rexford v. Miller, 143 Misc. 303, 256 N.Y.S. 449 (Sup. Ct. Schenectady County 1932), and the manager of a town building department, *see* Wuttke v. O'Connor, 202 Misc. 550, 115 N.Y.S.2d 852 (Sup. Ct. Queens County 1952).

12. The section reads in part:

> (a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

pealed from.[13] Non-governmental appellants wishing to obtain a stay must either fit into an enumerated category[14] or apply for a discretionary stay.[15]

Section 5519(a)(1) stays only "proceedings to enforce"[16] a judgment or order appealed from. During the stay, the prevailing party may not use available legal methods[17] to force the government to obey the judgment or order. Most departments of the Appellate Division hold that trial and pretrial proceedings, after the government appeals an order denying its motion to dismiss or for summary judgment, are not proceedings to enforce.[18] An order denying a motion to dismiss or for summary judgment is "self-executing."[19] The order needs no enforcement because, upon entry, it

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1. the appellant or moving party is the state or any political subdivision of the state or any officer of the state or of any political subdivision of the state

. . . .

Id.

13. *Id.*

14. The categories include judgments or orders for: the payment of a sum of money, the assignment or delivery of personal property, the execution of any instrument, the conveyance or deliverance of real property in the possession or control of the appellant or moving party, the sale of any mortgaged property and the payment of any deficiency, and the performance of two or more of the above acts. *See* § 5519(a)(2-7). To get the stay, the appellant must both fit into one of these categories and give the undertaking specified by the relevant subparagraph. *See id.* In addition, § 5519(b) provides for an automatic stay in an action defended by an insurer. *See* § 5519(b).

15. In cases that do not fall under subdivision (a) or (b), subdivision (c) allows either the court of original instance or the court from or to which the appeal is taken to stay enforcement proceedings pending appeal or determination on the motion for permission to appeal. *See* § 5519(c).

16. N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1996).

17. *See, e.g.*, N.Y. CIV. PRAC. L. & R. art. 51 (entitled "Enforcement of Judgments and Orders Generally").

18. *See* Pokoik v. Dep't of Health Servs., 220 A.D.2d 13, 641 N.Y.S.2d 881 (2d Dep't 1996) (per curiam); Schwartz v. New York City Hous. Auth., 219 A.D.2d 47, 641 N.Y.S.2d 885 (2d Dep't 1996) (per curiam); Pickerell v. Town of Huntington, 219 A.D.2d 24, 641 N.Y.S.2d 887 (2d Dep't 1996) (per curiam); Shorten v. City of White Plains, 216 A.D.2d 344, 631 N.Y.S.2d 519 (2d Dep't 1995) (mem.).

The Third and Fourth departments also hold that the automatic stay does not apply to trial and pretrial proceedings. *See* Baker v. Bd. of Educ. of W. Irondequoit Sch. Dist., 152 A.D.2d 1014, 544 N.Y.S.2d 258 (4th Dep't 1989) (holding that school district's filing of a notice of appeal from an order denying its motion for summary judgment did not automatically stay the trial); Walker v. Delaware & Hudson R.R., 120 A.D.2d 919, 503 N.Y.S.2d 173 (3d Dep't 1986) (holding that statutory stay did not prevent trial following the partial denial of a motion for summary judgment).

The First Department, however, has held to the contrary. *See* Cabreaja v. New York City Health and Hosps. Corp., 201 A.D.2d 319, 607 N.Y.S.2d 633 (1st Dep't 1994) (reversing and vacating order denying motion to dismiss in case where appeal from order stayed the trial).

19. *Pokoik*, 220 A.D.2d at 17, 641 N.Y.S.2d at 885.

terminates the government's motion.[20] Trial and pretrial proceedings do not enforce these orders. Rather, these proceedings are the results of such orders.[21] Therefore, section 5519(a)(1) does not stay trial and pretrial proceedings.[22] To stay these proceedings the state must move for a discretionary stay under subdivision (c).[23]

In *State v. Town of Haverstraw*,[24] the Second Department of the Appellate Division held that prohibitory orders are self-executing and outside the scope of the automatic stay.[25] The court held that CPLR 5519(a)(1) did not automatically stay an order prohibiting the state from closing a landfill.[26] Because the prohibitory order directed the state to do nothing, it required no execution.[27] In addition, the prohibitory order performed the function of a stay, which is to maintain the status quo.[28] Executory[29] orders, on the other hand, which command a party to act, usually change the status quo.[30] The court held that CPLR 5519(a)(1) automatically stays only executory orders.[31] Therefore, the automatic stay did not apply to the order prohibiting the landfill closure.[32] Applica-

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20. *Id.*

21. *Id.*

22. *Pokoik*, 220 A.D.2d at 15, 641 N.Y.S.2d at 884; *Schwartz*, 219 A.D.2d at 48, 641 N.Y.S.2d at 886; *Pickerell*, 219 A.D.2d at 26, 641 N.Y.S.2d at 888; Burlaka v. Greece Cent. Sch. Dist., 167 Misc. 2d 281, 639 N.Y.S.2d 673 (Sup. Ct. Monroe County 1996).

23. *See* § 5519(c).

24. 219 A.D.2d 64, 641 N.Y.S.2d 879 (2d Dep't 1996) (per curiam).

25. *See id.*

26. *See Haverstraw*, 219 A.D.2d 64, 641 N.Y.S.2d 879.

27. *Id.* at 65, 641 N.Y.S.2d at 881 ("Prohibitory injunctions are self-executing and need no enforcement procedure to compel inaction on the part of the person or entity restrained."); *see* Sixth Ave. R.R. v. Gilbert Elevated R.R., 71 N.Y. 430, 433-34 (1877) ("The judgment, so far as it enjoined the defendant, needed no execution."); New York Mail & Newspaper Transp. Co. v. Shea, 30 A.D. 374, 375, 52 N.Y.S. 5, 5 (2d Dep't 1898) ("[T]he injunction is of affirmative prohibitive force and executes itself.").

28. *See infra* notes 42-44 and accompanying text.

29. The court also described orders that require a party to affirmatively do something as "mandatory" orders. *Haverstraw*, 219 A.D.2d at 65, 641 N.Y.S.2d at 881.

30. *Id.*

31. *See id.* at 65-66, 641 N.Y.S.2d at 880-81.

32. *Id.* The *Haverstraw* court pointed out, however, that it desired a change in the status quo. The landfill closure order had been confirmed by the state Supreme Court and upheld on appeal. As a result, the reviewing court stated that "[t]he landfill is open and it should be closed." *Id.* at 66, 641 N.Y.S.2d at 881. Therefore, though the court held that the automatic stay did not apply to the order prohibiting the landfill closure, it vacated the order. *See id.*

Another possible basis for the idea that CPLR 5519(a)(1) does not stay prohibitory orders lies in the New York state court decisions emphasizing that the automatic stay does not vacate the order appealed from. *See, e.g.*, Crane v. New York Council 66, 101 A.D.2d 682, 683, 475 N.Y.S.2d 165, 167 (3d Dep't 1984) ("[S]tay may only be used

tion of the rule in *Haverstraw*, however, has so far been limited to the Second Department.[33]

Finally, the automatic stay applies only to appeals from state trial courts to state appellate courts.[34] When appealing to federal court, state appellants must file a bond to obtain a stay.[35] When appealing from a lower appellate court to a higher appellate court, the state must file motion papers, instead of only an affidavit of intention to appeal.[36]

1. *Existing Means of Relief from the Automatic Stay*

Private parties subject to the automatic stay of CPLR 5519(a)(1) have two means of relief from the stay. Small business entities may enforce their judgments or orders against the government after only fifteen days.[37] Non-small-business parties may move to the court to which the appeal is taken for a vacatur of the stay.[38]

Parties seeking vacatur of the government's automatic stay face two difficulties that parties bound by other stays do not encounter. First, they have a more limited choice of courts to which they may ask for relief from the stay.[39] Second, since the automatic stay reflects a public policy of protecting the government from the effects of adverse determinations pending appeal,[40] it is "not lightly to be vacated."[41]

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as a shield, not a sword . . . ."); Dep't of Hous. Preservation and Dev. of N.Y. v. Vanway, 123 Misc. 2d 372, 374, 473 N.Y.S.2d 741, 743 (N.Y. Civ. Ct. 1984) ("[T]he lower court order survives . . . as the law of the case and remains binding until overturned.") (preventing appellant Department of Housing Preservation and Development from imposing housing standards even though order enjoining the standards was automatically stayed by CPLR 5519(a)(1)); *cf.*, Danziger v. Gottlieb, 156 A.D. 571, 571, 141 N.Y.S.2d 361, 361 (1st Dep't 1913) (holding private defendant in contempt for using an enjoined word in connection with one of its products after the order enjoining the word's use was stayed). Because a stayed order still exists, these courts have prevented the appellants from violating stayed, prohibitory orders.

33. *See, e.g.*, DeLury v. City of New York, 48 A.D.2d 405, 370 N.Y.S.2d 600 (1st Dep't 1975) (CPLR 5519(a)(1) automatically stayed order prohibiting City of New York from laying off union members).

34. Fed. Ins. Co. v. County of Westchester, 921 F. Supp. 1136 (S.D.N.Y. 1996); Town of Orangetown v. Magee, 216 A.D.2d 343, 631 N.Y.S.2d 41 (2d Dep't 1995).

35. *Fed. Ins. Co.*, 921 F. Supp. at 1136.

36. *Town of Orangetown*, 216 A.D.2d at 343, 631 N.Y.S.2d at 41-42.

37. N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1996).

38. *See* § 5519(c).

39. Parties subject to a § 5519(a)(1) stay may apply only to the court *to which* the appeal is taken for vacatur of the stay. *Id.* Parties subject to any other § 5519 stay may ask the court *from or to which* the appeal is taken to vacate the stay. *Id.*

40. *See infra* notes 42-44 and accompanying text.

41. DeLury v. City of New York, 48 A.D.2d 405, 405, 370 N.Y.S.2d 600, 602 (1st Dep't 1975) (denying motion to vacate automatic stay of preliminary injunction that

2. *The Purpose of the Automatic Stay*

By maintaining the status quo[42] pending appeal, the automatic stay stabilizes the effect of an adverse decision on the government.[43] The stay "preserve[s] public assets" by holding the judgment in abeyance without requiring an undertaking or extra motion practice.[44] The government, however, may not frivolously appeal to take advantage of the statutory stay, even if it claims that an "unprecedented financial condition" prevents it from fulfilling its obligations to the petitioner.[45]

Although the New York Legislature enacted the current automatic stay to continue a long-standing[46] New York practice,[47] the

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prohibited the City of New York from laying off union workers). The First Department later reversed the injunction against the City. *See DeLury*, 48 A.D.2d 595, 378 N.Y.S.2d 49 (1975).

42. A possible challenge to some automatic stays lies in the definition of "status quo." In cases in which plaintiffs challenge an ongoing state practice, one can argue that "status quo" refers to the plaintiffs' situation *before* the state began the practice deemed illegal by the trial court. *See, e.g.*, McCain v. Giuliani, N.Y. L.J., May 16, 1996, at 28 (Sup. Ct. N.Y. County 1996) (homeless families applying for shelter challenged state practice of forcing them to wait overnight in a welfare office), *aff'd*, 653 N.Y.S.2d 556 (1st Dep't 1997). A possible state response is that, since the stay is meant to protect "public assets," Plowden v. Manganiello, 143 Misc. 2d 446, 449, 540 N.Y.S.2d 1020, 1022 (N.Y. Sup. Ct. 1989), the "status quo" is the existing state practice, since holding otherwise would force the state to pay the costs of changing its policy. Such a response would be consistent with the purpose of § 5519(a)(1) unless ending the prohibited policy has only minimal costs.

43. *In re* Willoughby Nursing Home v. Axelrod, 113 A.D.2d 617, 619, 498 N.Y.S.2d 497, 498 (3d Dep't 1986) (holding that § 5519(a)(1)'s purpose of protecting the government after an adverse determination warrants applying the automatic stay to adverse orders that are nonfinal, as well as final); Grant v. MTA, 96 Misc. 2d 683, 686-87, 409 N.Y.S.2d 570, 572-73 (Sup. Ct. N.Y. County 1978) (to protect the Metropolitan Transit Authority's continued mass transportation policy, staying automatically a requirement that the Authority post a large security bond); *DeLury*, 48 A.D.2d at 405, 370 N.Y.S.2d at 602 (1st Dep't 1975) (§ 5519(a)(1) "expresses a public policy designed to protect 'a political subdivision of the state.'") (quoting N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1996)).

44. *Plowden*, 143 Misc. 2d at 449, 540 N.Y.S.2d at 1022.

45. *In re* Troy Police Benevolent and Protective Ass'n, 223 A.D.2d 995, 995-96, 636 N.Y.S.2d 499, 500-01 (3d Dep't 1996).

46. New York State's automatic stay traces back to §§ 1313 and 1314 of the Code of Civil Procedure ("CCP"). *See* Act of June 2, 1876, ch. 12, §§ 1313 ("Upon an appeal taken by the people of the State, or by a State officer, or board of State officers, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking or other security."), 1314 (same for municipal corporations), 1876 N.Y. Laws 254; *see also* People *ex rel.* Ames v. Judson, 59 Misc. 538, 539-40, 112 N.Y.S.2d 408, 409-10 (Sup. Ct. Monroe County 1908) (appeal by State Commissioner of Excise of order to issue liquor tax certificate stayed the order without the giving of any security).

The automatic stay later appeared in the Civil Practice Act ("CPA"). *See* Act of May 21, 1920, ch. 925, §§ 570, 571, 1920 N.Y. Laws 201-02. The stay was eventually

Legislature has amended the stay provision a number of times to protect private plaintiffs affected by the stay. Section 5519 "unambiguous[ly] grant[s] . . . authority to the courts to control stays and the terms on which they may be enjoyed."[48] The Civil Practice Act ("CPA") was unclear about both whether courts had the power to control stays, and if they did, what that power entailed.[49] The current law enables the court from or to which the appeal is taken to either grant a stay, if one is not automatically provided for, or vacate, limit or modify any stay.[50] Under the current law courts may even vacate, limit or modify the government's automatic stay under section 5519(a)(1).[51] Only the court to which the appeal is taken may do this.[52] By allowing a court to alter the government's automatic stay, the Legislature created a way for courts to protect private parties that did not exist in former practice.[53] Section 5519(c) was intended to prevent unnecessary hardship to private plaintiffs after a judgment in their favor is stayed.[54]

The original version of section 5519(a)(1) limited the government's automatic stay to money judgments and orders for the transfer of real or personal property.[55] Legislative committees added this limitation in 1962 to "prevent the state's acquiring an unfair advantage on appeals,"[56] even though the Code of Civil Procedure ("CCP"),[57] CPA and Advisory Committee's drafts applied the stay to all judgments and orders.[58]

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included in the CPLR, which replaced the CPA in 1962. *See* Act of Apr. 4, ch. 308, § 5519(a)(1), 1962 N.Y. Laws 1461.

47. MEM. OF CITY OF NEW YORK, Act of July 2, 1965, ch. 744, 1965 Legis. Ann. 36, 37.

48. WEINSTEIN, KORN & MILLER, 7 NEW YORK CIVIL PRACTICE ¶ 5519.02, at 55-181 (Bender 1996) [hereinafter NEW YORK CIVIL PRACTICE].

49. *See id.*

50. N.Y. CIV. PRAC. L. & R. § 5519(c) (McKinney 1996).

51. *Id.*

52. *Id.*

53. NEW YORK CIVIL PRACTICE, *supra* note 48, ¶ 5519.15, at 55-201.

54. *Id. Compare* Clark v. Cuomo, 105 A.D.2d 451, 480 N.Y.S.2d 716 (3d Dep't 1984) (granting motion to vacate stay), *with* Wuttke v. O'Connor, 202 Misc. 550, 115 N.Y.S.2d 852 (Sup. Ct. Queens County 1952) (holding that, in the event of undue delay following a statutory stay, private party's only remedy was to move to the appellate court to dismiss the appeal).

55. Included in the original § 5519(a)(1) were the limiting words: "and the judgment or order directs either the payment of a sum of money, the assignment or delivery of personal property, or the conveyance of real property." N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1962).

56. *Id.* (citing 1962 Sen. Fin. Comm. Rep. 525).

57. *See* Ames v. Judson, 59 Misc. 538, 539-40, 112 N.Y.S.2d 408, 409-10 (Sup. Ct. Monroe County 1908).

58. *See* NEW YORK CIVIL PRACTICE, *supra* note 48, ¶ 5519.03, at 55-183.

This concern for government opponents, however, could not defeat the New York State Attorney General's intent to conform the stay to prior practice. A 1965 amendment, adopted at the request of the Attorney General,[59] removed the limitation, allowing the state to obtain a stay that applied to all judgments and orders without applying for a court order.[60]

Finally, in 1988, the Legislature softened the consequences of the automatic stay for small businesses.[61] The automatic stay provision now provides that where a court, in CPLR 7803(4) proceedings,[62] orders reinstatement of a license to a corporation of less than six stockholders and eleven employees, a partnership of less than six partners and eleven employees, a proprietorship, or a natural person, the automatic stay shall last only fifteen days.[63] This exception to the automatic stay, along with the unambiguous grant of authority to courts and the attempted limit of the stay to money and property judgments, all reflect a concern among legislators for private parties affected by the stay.

3. *Automatic Stays in Federal Court*

In federal court, the government does not get a special automatic stay when it appeals an adverse judgment. Federal Rule of Civil Procedure ("FRCP") 62(a)[64] stays for ten days proceedings to enforce judgments against all parties. The rule, however, exempts a number of orders from even this limited automatic stay. In appeals from interlocutory or final judgments in an action for an injunction or a receivership, or a judgment or order for an accounting in a patent infringement action, the automatic stay does not apply.[65] To stay an order granting, dissolving, or denying an injunction, the government must move for a discretionary stay.[66] A court will grant a discretionary stay only after balancing the potential harm to the party whose judgment is stayed with the potential harm to the party applying for the stay.[67]

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59. *See id.*

60. *See* Act of July 2, 1965, ch. 744, § 5519(a)(1), 1965 N.Y. Laws 1770-71.

61. *See* Act of Aug. 1, 1988, ch. 493, § 5519(a)(1), 1988 N.Y. Laws 2696-97.

62. N.Y. CIV. PRAC. L. & R. § 7803(4) (McKinney 1996) (allowing a party proceeding against a body or officer to challenge whether a determination against the party was supported by substantial evidence).

63. N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1996).

64. FED. R. CIV. P. 62(a).

65. *Id.*

66. FED. R. CIV. P. 62(c).

67. WRIGHT, MILLER & KANE, 11 FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2904, at 501 (West 1994).

Unlike in New York courts, government defendants in federal court do not get a special automatic stay when they appeal. To obtain a stay longer than ten days, or to obtain any stay of an injunction or other order listed in Rule 62(a), government appellants must apply for a court order. The government may only get special treatment if it succeeds in obtaining a discretionary stay. If a government defendant gets such a stay, the government is exempt from paying a bond or other security to the court.[68]

B. The Governmental Operations Rule Against Class Actions

The New York Court of Appeals holds that class certification is generally inappropriate when a number of plaintiffs challenge a governmental operation.[69] Under CPLR 901,[70] one or more parties may sue or be sued as representatives of a class if, among other things,[71] "a class action is superior to other available methods for the fair and effective adjudication of the controversy."[72] Although

68. *See* FED. R. CIV. P. 62(e).

69. *See, e.g.*, Martin v. Lavine, 39 N.Y.2d 72, 346 N.E.2d 794, 382 N.Y.S.2d 956 (1976) (denying class status to chronically ill patients challenging state Department of Social Services Commissioner's determination that they were not entitled to "pass along" granted by Congress); Jones v. Berman, 37 N.Y.2d 42, 332 N.E.2d 303, 371 N.Y.S.2d 422 (1975) (state Aid to Dependant Children recipients challenging denial of emergency aid when destitution is due to loss, theft or diversion of past grant); Rivera v. Trimarco, 36 N.Y.2d 747, 329 N.E.2d 661, 368 N.Y.S.2d 826 (1975) (petitioners challenging denial of manual stenographic record (rather than a mechanically recorded record) of court proceedings) (dictum) (per curiam).

70. N.Y. CIV. PRAC. L. & R. § 901 (McKinney 1996).

71. Parties seeking class certification must also meet the following requirements: numerosity of the class; commonality of the class's questions of law or fact; typicality of the representative parties' claims or defenses; and fair and adequate representation by the representative parties. *Id.* at § 901(a)(1-4). The rule also makes an exception for actions to recover a penalty or minimum measure of recovery under a statute. *See id.*

72. *Id.* at § 901(a)(5). CPLR 901 is based on FRCP 23, with a few differences. *See* Brandon v. Chefetz, 106 A.D.2d 162, 485 N.Y.S.2d 55 (1st Dep't 1985) ("CPLR Article 9 is modeled on Rule 23 of the Federal Rules of Civil Procedure."). First, while section 901 includes all of the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy of the named representatives), *see* FED. R. CIV. P. 23(a), Rule 23 requires, *in addition*, that the action fit into one of the 23(b) categories: separate actions would risk inconsistent or varying adjudications (23(b)(1)(a)); one class member's judgment would hurt the others' ability to protect their interests because of multiple claimants to a limited fund (23(b)(1)(b)); injunctive or declaratory, class-wide relief is appropriate (23(b)(2)); common questions predominate so that the class action is superior to other methods of adjudication (23(b)(3)). *See* FED. R. CIV. P. 23(b).

Next, to avoid this classification scheme and any overlapping that may occur within it, 2 NEW YORK CIVIL PRACTICE, *supra* note 48, ¶ 901.02, at 9-10 (citing *N.Y.S. Judicial Conference Report to the 1975 Legislature in Relation to the C.P.L.R.*, Leg. Doc. 251 (1975) [hereinafter *N.Y.S. Judicial Conference Report*], § 901 does not categorize

CPLR 901 does not explicitly mandate that class actions against the government are inferior to individual actions, courts that deny class status to parties suing the government generally hold that class actions are not "superior" to other methods of proceeding.[73]

New York courts have held that these class actions are not superior because the doctrine of stare decisis renders them unnecessary.[74] A successful individual challenge to a governmental

class actions like Rule 23(b), but rather it contains as further prerequisites to class status Rule 23(b)'s predominance and superiority requirements. *See* N.Y. CIV. PRAC. L. & R. § 901(a)(2), (a)(5) (McKinney 1996). Interpreting the superiority requirement, the New York Court of Appeals, in *Rivera*, 36 N.Y.2d 747, 329 N.E.2d 661, 368 N.Y.S.2d 826, created the governmental operations rule against class actions.

73. Use of this doctrine has been widespread in New York. *See, e.g.*, Conrad v. Hackett, 184 A.D.2d 995, 584 N.Y.S.2d 241 (4th Dep't 1992) (denying class status to institutionalized Medicaid recipients whose income the state Department of Social Services had refused to allocate to recipient's spouse for maintenance needs); Brady v. State, 172 A.D.2d 17, 576 N.Y.S.2d 896 (3d Dep't 1991) (nonresidents unlawfully required to file joint tax returns with their nonresident taxpayer spouses); McCain v. Koch, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1st Dep't 1986) (homeless families with children denied emergency shelter), *rev'd on other grounds*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987); Suffolk Hous. Servs. v. Town of Brookhaven, 69 A.D.2d 242, 418 N.Y.S.2d 452 (2d Dep't) (residents of low income housing units challenging racially exclusionary zoning practices), *appeal dismissed*, 48 N.Y.2d 652, 421 N.Y.S.2d 202 (1979), *appeal dismissed*, 49 N.Y.2d 799, 426 N.Y.S.2d 735 (1980); Mazzie v. Staszak, 85 Misc. 2d 24, 379 N.Y.S.2d 624 (Sup. Ct. Schenectady County 1975) (home relief recipients denied emergency assistance without an immediate or preferred hearing).

74. *See, e.g.*, Jiggetts v. Grinker, 148 A.D.2d 1, 21, 543 N.Y.S.2d 414, 425 (1st Dep't 1989) (denying class certification to AFDC recipients challenging social service agencies' policy and practice of denying grants to families whose monthly rent exceeded their monthly shelter allowances), *rev'd on other grounds*, 75 N.Y.2d 411, 553 N.E.2d 570, 554 N.Y.S.2d 92 (1990); Cohen v. D'Elia, 55 A.D.2d 617, 389 N.Y.S.2d 406 (2d Dep't 1976) (supplemental security income recipients challenging officials' practice of requiring recipients to reestablish their Medicaid eligibility prior to admission into a nursing home); Darns v. Sabol, 165 Misc. 2d 77, 84, 627 N.Y.S.2d 526, 531 (Sup. Ct. N.Y. County 1995) (HIV-infected housing assistance applicants seeking declaration that they were entitled to emergency assistance).

For a discussion criticizing the use of stare decisis as a substitute for class certification, see Daan Braveman, *Class Certification in State Court Welfare Litigation: A Request for Procedural Justice*, 28 BUFF. L. REV. 57 (1979).

Braveman points out that applying the stare decisis rationale of *Rivera*, 36 N.Y.2d 747, 329 N.E.2d 661, 368 N.Y.S.2d 826, the first case in which the Court of Appeals used the governmental operations rule, to later cases ignores an important difference between *Rivera* and the later cases. The defendants in *Rivera* were judges, who were bound by stare decisis to follow the rules of the Court of Appeals. Braveman, *supra*, at 64. The defendants in Jones v. Berman, 37 N.Y.2d 42, 332 N.E.2d 303, 371 N.Y.S.2d 422 (1975), which was the second case in which the Court of Appeals used the governmental operations rule, were welfare officials. Braveman, *supra*, at 64. Stare decisis will not bind these officials until the plaintiffs excluded from the original suit bring a separate action based on the holding in the original suit. *Id.* at 64-65. In *Rivera*, stare decisis forced the defendants to apply the relief to all affected parties.

operation changes the government practice at issue.[75] Courts have held that, under stare decisis, individual relief will flow to others similarly situated[76] because the government should apply its policies equally to all citizens.[77]

1. *Existing Means of Relief from the Governmental Operations Rule*

Plaintiffs seeking class certification against a government defendant must fit into one of the judicial exceptions to the governmental operations rule. New York courts have established four exceptions[78] for situations in which stare decisis will not adequately protect potential plaintiffs. Courts have certified class actions over governmental operations where: (1) the plaintiffs are elderly individuals with limited ability to pursue separate actions;[79] (2) plaintiffs show that the state is unlikely to comply with the order coming from the individual suit;[80] (3) the government defendant is joined in the lawsuit with a private party;[81] and (4) plaintiffs seek not only

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Id. at 64. In *Jones*, however, stare decisis forced the defendants to apply the relief to only those parties who were able to pursue separate actions against the government. *Id.* at 65.

75. *See* 2 NEW YORK CIVIL PRACTICE, *supra* note 48, ¶ 901.20, at 9-97.

76. *See* Martin v. Lavine, 39 N.Y.2d 72, 75, 346 N.E.2d 794, 796, 382 N.Y.S.2d 956, 958 (1976).

77. *See* 2 NEW YORK CIVIL PRACTICE, *supra* note 48, ¶ 901.20, at 9-97 (citing *Martin*, 39 N.Y.2d 72, 346 N.E.2d 794, 382 N.Y.S.2d 956).

78. A possible fifth exception exists for cases involving numerous government agencies or officials, each one of which would not necessarily be bound by a judgment against the other. The court in Rivera v. Bane, N.Y. L.J., Oct. 15, 1993, at 22, n.1 (Sup. Ct. N.Y. County 1993), referred to this exception in a footnote. In addition, the Second Circuit Court of Appeals used the rationale behind this exception to justify certifying a class in Marcera v. Chinlund, 595 F.2d 1231 (2d Cir.) (certifying a class of pretrial detainees suing a defendant class consisting of all New York state counties and sheriffs not permitting contact visits who were not involved in related past or concurrent litigation), *vacated on other grounds*, 422 U.S. 915 (1979). No New York state court, however, has ever certified a class on this basis.

79. *See* Tindell v. Koch, 164 A.D.2d 689, 565 N.Y.S.2d 789 (1st Dep't 1991); Kuppersmith v. Perales, 145 A.D.2d 1005, 535 N.Y.S.2d 510 (1st Dep't 1988); Brown v. Wing, 649 N.Y.S.2d 988 (Sup. Ct. Monroe County 1996).

80. *See* Lamboy v. Gross, 126 A.D.2d 265, 513 N.Y.S.2d 393 (1st Dep't 1987); Eisenstark v. Anker, 64 A.D.2d 924, 408 N.Y.S.2d 129 (2d Dep't 1978).

81. *See* Bryant Ave. Tenants' Ass'n v. Koch, 71 N.Y.2d 856, 522 N.E.2d 1041, 527 N.Y.S.2d 743 (1988) (holding that low income, rent-stabilized tenants may pursue a class action to challenge the validity of a statutory rent adjustment provision against their landlords, the City of New York and various city departments); Goodwin v. Gleidman, 119 Misc. 2d 538, 463 N.Y.S.2d 693 (Sup. Ct. N.Y. County 1983) (certifying a class of plaintiffs suing both the Department of Housing Preservation and Development and a private corporation over the termination of plaintiffs' right to remain in a

declaratory and injunctive relief but also money damages for each member of the class.[82]

Despite the liberal purpose of CPLR 901,[83] courts have applied the exceptions narrowly.[84] For example, the court in *Rivera v. Bane*[85] refused to certify a class of public assistance recipients challenging the New York State Department of Social Services' refusal to supply them with access to their case records.[86] Although plaintiffs were "indigent, disadvantaged individuals, many of whom [were] elderly,"[87] they did not satisfy the exception for parties with limited ability to pursue separate actions.[88] In addition, despite a documented history of denials of access to case records, the plaintiffs did not meet the required showing of agency noncompliance.[89]

2. *The Purpose of the Governmental Operations Rule*

The purpose of the governmental operations rule is to prevent unnecessary costs to the government. When the Legislature enacted CPLR 901, government officials assumed class actions would apply to them.[90] They also believed class actions would be expensive.[91] Along with the anticipated increase in the number of class actions under section 901,[92] officials feared the expensive attorneys' fees possible in class actions.[93] Despite a general legislative

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housing shelter, because otherwise plaintiffs would have to bring two separate actions).

82. *See* Dudley v. Kerwick, 84 A.D.2d 884, 444 N.Y.S.2d 965 (3d Dep't 1981).

83. *See infra* note 94.

84. This narrow use of the exceptions may reflect the historic hostility to class actions. "[F]ew procedural devices have been the subject of more widespread criticism and more sustained attack - and equally spirited defense - [than class actions have] . . . ." American Bar Association, *Report of Pound Conference Follow-up Task Force*, 74 F.R.D. 159, 194 (1976). Some have even characterized class actions as devices to promote "leftist-socialist causes." H.R. No. 247, 93d Cong., 2d Sess. 26, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3872, 3894 (minority view of Rep. Landgrebe).

85. N.Y. L.J., Oct. 15, 1993, at 22 (Sup. Ct. N.Y. County 1993).

86. *See id.*

87. *Id.*

88. The court distinguished Kuppersmith v. Perales, 145 A.D.2d 1005, 535 N.Y.S.2d 510 (1st Dep't 1988), a case certifying a class of elderly plaintiffs: "Unlike the proposed class members here, the home care recipients in *Kuppersmith* presented such an extreme case that the court found their situation to constitute an exception to the government operations rule." *Rivera*, N.Y. L.J. at 22.

89. *See id.*

90. Braveman, *supra* note 74, at 67.

91. *Id.*

92. *See infra* note 94.

93. Braveman, *supra* note 74, at 67. At the time of CPLR 901's enactment, counsel in class actions generally received fees calculated as a percentage (within the range

climate of expanding class actions,[94] the New York Court of Appeals believed that class actions against the government were unnecessary[95] and that preventing these actions against the government would save money and avoid other administrative costs associated with class actions.[96]

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of ten to thirty percent) of the judgment or settlement. According to one commentator, this approach typically resulted in a "windfall to plaintiff's counsel." Joseph M. McLaughlin, *Supplementary Practice Commentaries*, N.Y. CIV. PRAC. L. & R. § 909, at 125 (McKinney Supp. 1990). Though New York courts eventually began to detract from this approach, *see* Washington Fed. Sav. and Loan Ass'n v. Village Mall Townhouses, Inc., 90 Misc. 2d 227, 394 N.Y.S.2d 772 (Sup. Ct. Queens County 1977) (trial court held full evidentiary hearing to approve the fee award, which was based on the hourly rates plus incidental costs), class certification could still increase attorneys' fees, because it allowed plaintiffs who would be excluded from the individual suit to recover attorneys' fees. *See* Suffolk Hous. Servs. v. Town of Brookhaven, 69 A.D.2d 242, 418 N.Y.S.2d 452 (2d Dep't 1979) (denying class status when the only practical purpose of a class would be to recover attorneys' fees), *appeal dismissed*, 48 N.Y.2d 652, 421 N.Y.S.2d 202 (1979), *appeal dismissed*, 49 N.Y.2d 799, 426 N.Y.S.2d 735 (1980).

Today, the rationale of avoiding class action fee awards by preventing class actions over governmental operations no longer applies. In 1989, the New York Legislature enacted the "Equal Access to Justice Act," which provides for an award of attorneys' fees to parties suing the state. N.Y. CIV. PRAC. L. & R. §§ 8600-05 (McKinney 1997).

94. CPLR 901 was meant to expand the availability of class actions. It was a liberal response to past, restrictive treatment of class actions. The section's immediate predecessor, CPLR 1005, was interpreted narrowly by the courts and thus prevented many uses of the class action that are important today. Courts interpreted the statute as preventing: "'the use of the class action device in the adjudication of such typically modern claims as those associated with mass exposure to environmental offenses, violations of consumer rights, civil rights cases, the execution of adhesion contracts and a multitude of other collective activities reaching virtually every phase of human life.'" 2 NEW YORK CIVIL PRACTICE, *supra* note 48, ¶ 901.01, at 9-8 (quoting *N.Y.S. Judicial Conference Report*, *supra* note 72, at Leg. Doc. 90, 232, 248).

In light of the need for "a more liberal procedure," Moore v. Metropolitan Life Ins. Co., 33 N.Y.2d 304, 313, 307 N.E.2d 554, 558, 352 N.Y.S.2d 433, 439 (1973), the Legislature enacted a new Article 9 entitled "Class Actions." Act of June 17, 1975, ch. 207, 1975 N.Y. Laws 313 (McKinney). The drafters of the new law intended it to provide the necessary flexibility to courts so that "class actions could qualify without the present undesirable and socially detrimental restrictions." *N.Y.S. Judicial Conference Report*, *supra* note 72, at 250. Thus, courts were supposed to "liberally construe[]" Article 9. 2 NEW YORK CIVIL PRACTICE, *supra* note 48, ¶ 901.01, at 9-9.

For detailed discussions of New York class action procedure before the Legislature enacted CPLR 901, see Adolf Homburger, *The 1975 New York Judicial Conference Package: Class Actions and Comparative Negligence*, 25 BUFF. L. REV. 415 (1976), and Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971).

95. *See supra* notes 74-77 and accompanying text.

96. *See* Martin v. Lavine, 39 N.Y.2d 72, 75, 346 N.E.2d 794, 796, 382 N.Y.S.2d 956, 958 (1976) (holding that "there is no compelling need to grant class action relief . . . in light of the enormity of the administrative problem which would be posed in implementing this decision and the fact that future petitioners may rely on our determination").

3. *Class Actions over Governmental Operations in Federal Court*

Federal rules do not bar class actions over governmental operations. In federal court, actions challenging government practices need not pass a superiority requirement. Actions for injunctive relief are Rule 23(b)(2) actions,[97] which are not subject to the superiority requirements of Rule 23(b)(3).[98]

Although some federal courts have held that class actions were unnecessary in suits against public officials for injunctive or declaratory relief,[99] federal courts have rejected the governmental operations rule as a *per se* bar to class status.[100] Federal courts that have denied class certification in challenges to a governmental operation have required the government defendant to affirmatively assure the court that the judgment would apply to all potential plaintiffs affected by the challenged policy.[101] In contrast, New York state courts have denied class certification even in cases where a public official does not assure the court that the final judgment would apply to all potential class members.[102]

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97. FED. R. CIV. P. 23(b)(2).

98. *See* FED. R. CIV. P. 23(b)(3).

99. *See* United Farmworkers v. City of Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974); Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

100. *See* Morel v. Giuliani, 927 F. Supp. 622, 634 (S.D.N.Y. 1995) (holding that the government's argument that stare decisis would protect future plaintiffs "ignores the many cases allowing class actions to seek injunctive relief against government agencies") (citing Robidoux v. Celani, 987 F.2d 931 (2d Cir. 1993) (certifying class of public assistance recipients challenging state delays in processing applications) and Cutler v. Perales, 128 F.R.D. 39 (S.D.N.Y. 1989) (Medicaid recipients challenging timeliness of city's compliance with state fair hearing decisions)); Barnett v. Brown, 794 F.2d 17 (2d Cir. 1986) (certifying class of Social Security Disability claimants who had suffered substantial delays in the scheduling and issuance of decisions); Brown v. Giuliani, 138 F.R.D. 251 (E.D.N.Y. 1994) (AFDC recipients challenging city's failure to process AFDC grants in a timely fashion); Jane B. v. New York City Dep't of Social Servs., 117 F.R.D. 64 (S.D.N.Y. 1987) (juveniles challenging conditions at centers for adolescent girls with behavioral and emotional problems); *see also* Haskins v. Stanton, 794 F.2d 1273 (7th Cir. 1986) (food stamp recipients suing state and county agencies for violating federal standards for timeliness and bilingual assistance).

101. *See, e.g.*, Hurley v. Ward, 584 F.2d 609, 611 (2d Cir. 1978); Bacon v. Toia, 437 F. Supp. 1371, 1383 n.11 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1044 (2d Cir. 1978).

102. *See, e.g.*, Martin v. Lavine, 39 N.Y.2d 72, 346 N.E.2d 794, 382 N.Y.S.2d 956 (1976).

II. The Impact of New York's Automatic Stay and Governmental Operations Rule on the Poor[103]

A. The Government's Automatic Stay

Even though many automatically-stayed orders are preliminary injunctions and temporary restraining orders,[104] where a trial court necessarily finds that plaintiffs will suffer irreparable harm if they do not get relief immediately,[105] the automatic stay usually postpones relief for a long period of time. Three departments of the Appellate Division give parties nine months to file all papers necessary for an appeal,[106] and the Second Department, the one with the largest backlog, gives parties six months.[107] These generous periods, which the court often extends,[108] are much longer than federal time periods[109] and are often too long for low income plaintiffs to survive without relief.

The automatic stay often leaves poor plaintiffs without shelter or subsistence benefits for six to nine months. In *McCain v. Giuliani*,[110] homeless families with children challenged New York

103. This Note focuses on the impact of the two New York rules on plaintiffs with little or no income, both because these plaintiffs have such a great likelihood of facing the rules in court, and because these plaintiffs are the most vulnerable ones who face the two rules. *See supra* notes 7-8 and accompanying text.

Some of the problems with the two rules, however, affect all plaintiffs. For example, it forces all plaintiffs suing the government to prove their cases twice. After a plaintiff proves her case against the government and wins at trial, she must prove it again to an appellate judge to avoid the stay. In most other cases, however, after a plaintiff has proved her case at trial, the defendant has the burden to prove its case if it wishes to prevail. Thus, appeals from most judgments assume that the trial court is correct. Appeals from a judgment against the government assume the trial court is incorrect.

104. *See, e.g.*, Rent Stabilization Ass'n of N.Y. v. Higgins, 164 A.D.2d 283, 562 N.Y.S.2d 962 (1st Dep't 1990) (CPLR § 5519(a)(1) automatically stayed order (deemed a preliminary injunction) extending temporary restraining order prohibiting appellant from implementing housing regulation), *aff'd*, 83 N.Y.2d 156, 630 N.E.2d 626, 608 N.Y.S.2d 930 (1993), *cert. denied*, 114 S. Ct. 2693 (1994).

105. *See* DeLury v. City of New York, 48 A.D.2d 405, 405, 370 N.Y.S.2d 600, 602 (1st Dep't 1975) ("[T]he prospect of irreparable harm, [is] *sine qua non* for injunction pending trial.").

106. These are the First, Third and Fourth departments. *See* N.Y. CT. RULES, §§ 600.11(a)(3) (1st Dep't), 800.12 (3d Dep't), 1000.3(b)(2)(i) (4th Dep't) (West 1997).

107. *See* N.Y. CT. RULES, § 670.8(e).

108. Lowry, *supra* note 3, at 12. Also, the time period may be further lengthened if the nine month period would end in the summer. Since appellate courts usually do not sit over the summer, the period would be extended until the new term begins.

109. *Id.*

110. N.Y. L.J., May 16, 1996, at 28 (Sup. Ct. N.Y. County 1996), *aff'd*, 653 N.Y.S.2d 556 (1st Dep't 1997).

City's policy of housing them overnight in a dangerous welfare office (the Emergency Assistance Unit ("EAU")).[111] The New York Supreme Court ordered the City to place all eligible families in suitable emergency shelter within twenty four hours.[112] However, even though the courts in *McCain* have agreed that the harm to a family kept in the EAU is irreparable,[113] CPLR 5519(a)(1) stayed the order. The automatic stay forced the plaintiffs to suffer severe food[114] and sleep[115] deprivations, along with general stress and anxiety,[116] while they were kept in the EAU.[117]

1. Inadequacy of Plaintiff's Existing Means of Relief

Plaintiffs affected by the automatic stay have two possible means of relief: the small business exception and vacatur.[118] Both remedies, however, are inadequate to protect poor plaintiffs whose recovery is threatened by the stay. First, low income plaintiffs do not get the benefit of the small business exception;[119] only small businesses whose license reinstatement is stayed may use this exception.[120] The New York Legislature, recognizing in the small business exception the potentially harsh consequences of the automatic stay on small businesses, fails to provide similar protection to low income plaintiffs.

Vacatur is also an inadequate remedy for low income plaintiffs. Plaintiffs challenging the automatic stay face a heightened bur-

111. *See id.*

112. *See id.*

113. *See* McCain v. Koch, 117 A.D.2d 198, 211-16, 502 N.Y.S.2d 720, 727-31 (1st Dep't 1986), *rev'd on other grounds*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987).

114. For example, fifty three percent of mothers surveyed ate no more than once a day while being kept at the EAU. ANNA LOU DEHAVENON, ACTION RESEARCH PROJECT ON HUNGER, HOMELESSNESS, AND FAMILY HEALTH, OUT IN THE COLD: THE SOCIAL EXCLUSION OF NEW YORK CITY'S HOMELESS FAMILIES IN 1995 67-68 (1995).

115. For example, fifty three percent of the parents surveyed had not slept more than three hours a night for the three nights before being surveyed. *Id.* at 72.

116. *Id.* at 77-78.

117. The plaintiffs' desperate situation in *McCain* illustrates a criticism of the New York Legislature's removal of the provision limiting the automatic stay to money and property judgments. *See supra* notes 55-60 and accompanying text. One commentator has called this removal "most unfortunate." 7 NEW YORK CIVIL PRACTICE, *supra* note 48, ¶ 5519.03, at 55-183. Without the limit, the stay risks harm to parties like the families in *McCain* where, were the court to balance the equities, a court would deny a motion for the stay. *Id.* at 55-183-84.

118. *See supra* Part I.A.1.

119. *See supra* note 37 and accompanying text.

120. N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1996).

den[121] because of the policy of stabilizing the government after an adverse judgment or order.[122] Because of this policy, stays under CPLR 5519(a)(1) are "not lightly to be vacated."[123] In addition, by permitting only the court to which the appeal is taken to vacate an automatic stay, CPLR 5519(c) makes it more difficult for section 5519(a)(1) plaintiffs to vacate a stay than it is for all other plaintiffs. After the defendant gets a stay, non-5519(a)(1) plaintiffs may return to the judge who granted the original relief and ask that judge to preserve her own order by vacating the stay.[124] Section 5519(a)(1) plaintiffs, however, may only try to meet the heightened vacatur standard in front of an appellate judge, who is less likely to be as familiar as the trial judge with the facts necessitating the original injunction.

Finally, a common result of a motion to vacate the automatic stay is a grant of the motion unless the government expedites its appeal.[125] The stay of the plaintiff's order actually remains in effect while the state may perfect its appeal in a time period still longer than the time allowed to perfect a federal appeal.[126]

B. The Governmental Operations Rule Against Class Actions

By limiting class actions, the governmental operations rule restricts court access to many poor people who are unable to afford individual representation. Once denied participation in a class action, a poor plaintiff may be unable to obtain the legal services necessary to take advantage of the protections of stare decisis.[127] In addition, even if a plaintiff obtains legal services, the governmental operations rule postpones the plaintiff's relief by forcing plaintiffs to rely on government compliance with the decision from

121. *See supra* note 41 and accompanying text.

122. *See supra* notes 42-44 and accompanying text.

123. DeLury v. City of New York, 48 A.D.2d 405, 405, 370 N.Y.S.2d 600, 602 (1st Dep't 1975).

124. These plaintiffs, however, face the difficulty of challenging stays that have already been deliberated on by a court. Although such stays may have more merit in the balance of the equities than automatic stays, these plaintiffs still have a greater right to challenge a stay than § 5519(a)(1) plaintiffs, who may only ask the appellate court to vacate a stay.

125. *See, e.g.*, Rent Stabilization Ass'n of N.Y. v. Higgins, 164 A.D.2d 283, 290, 562 N.Y.S.2d 962, 966 (1st Dep't 1990), *aff'd*, 83 N.Y.2d 156, 630 N.E.2d 626, 608 N.Y.S.2d 930 (1993), *cert. denied*, 114 S. Ct. 2693 (1994).

126. *See id.* (April order provided that statutory stay would be vacated unless the state perfected its appeal for the October term).

127. *See supra* note 8 and accompanying text, discussing the unmet legal need and restrictions on legal services that illustrate the great likelihood that a poor plaintiff will be unable to obtain legal services.

the original lawsuit, allowing them to sue only if the government fails to comply. By the time a plaintiff can take advantage of stare decisis and recover based on the original lawsuit, the plaintiff will have suffered irreparable harm.[128]

1. *Inadequacy of Plaintiff's Existing Means of Relief*

Plaintiffs wishing to challenge a governmental operation as a class may do so if they fit into one of four exceptions.[129] Poor plaintiffs seeking only to change a governmental policy do not fit into the exception for cases in which a private party joins the government as a defendant,[130] nor the exception for actions seeking money judgments.[131] Nonetheless, though the elderly plaintiff exception and the agency noncompliance exception may be more relevant to the poor, both provide insufficient protection to potential class members.

The elderly exception is unnecessarily narrow and too accepting of state noncompliance. In *Tindell v. Koch*,[132] a group of senior citizens challenging New York City's method of calculating rent increases for rent stabilized apartments fit into this exception.[133] However, the New York County Supreme Court, in *Rivera v. Bane*,[134] refused to apply the exception to indigent plaintiffs, many of whom were elderly, challenging the State's noncompliance with laws requiring it to provide access to public assistance records.[135] The court refused to include poor plaintiffs in the exception covering parties unable to pursue separate actions. The court gave no reason why an elderly plaintiff would necessarily have a more difficult time bringing a separate lawsuit than a poor plaintiff. By as-

128. *See supra* notes 110-17 and accompanying text, discussing the irreparable harm homeless families suffer each day the City of New York forces them to stay in the EAU.

129. *See supra* notes 79-82 and accompanying text.

130. *See supra* note 81 and accompanying text.

131. *See supra* note 82 and accompanying text.

132. 164 A.D.2d 689, 565 N.Y.S.2d 789 (1st Dep't 1991).

133. *See id.* at 698, 565 N.Y.S.2d at 794.

134. N.Y. L.J., Oct. 15, 1993, at 22 (Sup. Ct. N.Y. County 1993).

135. *See id.* The court pointed out that, even under *Tindell*, class certification was unnecessary as to the claim that the agency failed to adequately notify plaintiffs of their rights to access their case records. *Id.* The *Tindell* court did not certify a class on the claim alleging failure to adequately publicize the Senior Citizen Rent Increase Exemption ("SCRIE") program. 164 A.D.2d at 695-96, 565 N.Y.S.2d at 793.

On the claim that the agency did not allow access to case records, the *Rivera* court held that the plaintiffs failed to show that either they were unable to pursue separate actions or that the agency was unlikely to comply with an order from the individual suit. N.Y. L.J., Oct. 15, 1993, at 22.

suming that all non-elderly plaintiffs are able to sue the government separately, the court ignored the huge amount of unmet legal need that exists for all the poor.[136] In addition, by interpreting the elderly exception narrowly, the court contradicted the liberal intent of CPLR 901.[137]

This exception also unnecessarily accepts government noncompliance. Under the rationale behind the governmental operations rule, once a court orders a governmental entity to change its policy, that policy should apply to all others similarly situated under stare decisis.[138] Arguing that non-elderly plaintiffs do not deserve class certification because they can sue to enforce a court order readily accepts the noncompliance that disproves the rationale behind the governmental operations rule.[139]

In addition, courts have not clearly defined the showing required to meet the noncompliance exception. Successful showings have included an agency's own records demonstrating its noncompliance with orders directing it to place homeless families in suitable shelter[140] and court records demonstrating a prison's history of noncompliance with both court orders and its own regulations.[141] An example of an unsuccessful showing, however, highlights the potential inconsistencies in applying the noncompliance exception. In *Rivera*, plaintiffs claimed that the defendant failed to comply with laws requiring it provide access to case records.[142] A copy of a notice from the defendant failing to mention a right to receive documents by mail, along with affidavits from several legal services organizations documenting defendant's history of refusing and/or failing to provide access to case records failed to represent a sufficient showing.[143] Thus, no clear standard exists that defines when courts should apply the noncompliance exception.

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136. *See supra* note 8.

137. *See supra* note 94.

138. *See supra* notes 74-77 and accompanying text.

139. *See* Seittelman v. Sabol, 158 Misc. 2d 498, 601 N.Y.S.2d 391 (Sup. Ct. N.Y. County 1993) (dicta) (certifying a class of Medicaid recipients challenging an aspect of the Medicaid program where agency did not show it would comply with an order coming from an individual suit).

140. *See* Lamboy v. Gross, 126 A.D.2d 265, 513 N.Y.S.2d 393 (1st Dep't 1987).

141. *See* Ode v. Smith, 118 Misc. 2d 617, 461 N.Y.S.2d 684 (Sup. Ct. Wyo. County 1983).

142. N.Y. L.J., Oct. 15, 1993, at 22 (Sup. Ct. N.Y. County 1993).

143. *Id.*

III. Proposals For Reform

The automatic stay and the governmental operations rule deny recovery to low income plaintiffs without providing them adequate means of relief from the rules. The automatic stay risks causing serious harm to poor plaintiffs by postponing needed court relief.[144] The small business exception and the vacatur remedy, while representing a concern for private parties, do not adequately protect plaintiffs needing immediate recovery.[145] The governmental operations rule restricts needed court access to many plaintiffs unable to pursue individual lawsuits.[146] The exceptions for elderly plaintiffs and cases of likely noncompliance, however, exclude many plaintiffs who are unable to force compliance on their own.[147] To remedy the harsh effects of these two rules, the Legislature and courts should consider two proposals for reform.[148]

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144. *See supra* notes 104-117 and accompanying text.

145. *See supra* Part II.A.1.

146. *See supra* note 8 and accompanying text.

147. *See supra* Part II.B.1.

148. An additional proposal, beyond the scope of the New York State Legislature and Court of Appeals, is to increase federal court access. Such a proposal, however, is an inadequate solution to the problems caused by the two rules.

Increasing access to federal courts would allow more New York plaintiffs to avoid the automatic stay and the governmental operations rule. Plaintiffs in federal court face a stay longer than ten days only when the government proves to the court that the need for a stay outweighs the plaintiffs' need for immediate relief. *See supra* Part I.A.3. If the plaintiffs' relief takes the form of an injunction, then the government will not get even the ten day stay unless it proves to the court that the balance of the equities favors granting a stay. *See supra* Part I.A.3. For plaintiffs seeking to sue the government as a class, a federal court would not deny class certification simply because a governmental operation is at issue. *See supra* Part I.B.3. As long as these plaintiffs satisfied the other general requirements for class actions, they would be able to obtain class-wide relief against a government defendant. *See supra* Part I.B.3.

Simply allowing more plaintiffs to sue in federal court, however, is neither an adequate nor realistic proposal. Increasing federal court access does not help the many plaintiffs who would still be forced to sue in New York state courts. In addition, the current trend is to restrict, rather than increase, federal court access. Such restrictions include the creation and expansion of federal abstention doctrine, *see* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), and limits on: subject matter jurisdiction, *see* Redish, *supra* note 9, at 1787-1810; Congress' power to create a federal cause of action, *see* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996); federal courts' power to award injunctive relief against state officers on the basis of state law, *see* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984); and federal courts' power to order state officials to pay retroactive benefits to a recipient under a federal program, *see* Edelman v. Jordan, 415 U.S. 651 (1974). Proposals to increase access, therefore, are likely to fail.

A. Improving Poor Person's Exceptions

Improving exceptions for the poor would increase the situations in which deserving poor plaintiffs may find relief from the automatic stay or governmental operations rule. If the Legislature created a poor person's exception to the automatic stay, similar to the small business exception,[149] poor plaintiffs would obtain relief much sooner than under current law.[150] In addition, if courts applied the executory/prohibitory distinction,[151] sometimes used to exempt trial and pretrial proceedings from the automatic stay, to exempt all prohibitory orders, many low income plaintiffs would be able to avoid the stay.[152]

In cases where poor plaintiffs seek to pursue a class action against the government, courts could extend to the poor existing exceptions for either elderly plaintiffs or cases of likely governmental noncompliance.[153] First, because the rationale behind the elderly plaintiff exception is these plaintiffs' inability to pursue separate lawsuits,[154] courts could exempt from the governmental operations rule all poor plaintiffs who cannot afford to bring a separate lawsuit. Second, courts could clarify the standard necessary for a plaintiff to show a likelihood of governmental noncompliance.[155] Courts would apply the noncompliance exception more consistently and poor plaintiffs would be more aware of the proof needed to fit into the exception.

Creating exceptions to the rules, however, fails to provide an adequate solution. Carving out a poor person's exception to the automatic stay will create an unnecessary procedural step. In cases where the balance of the equities favors granting the government a stay, the government will first have to litigate the question whether the automatic stay or the exception applies, and then, if the exception applies, the government will have to apply for a discretionary

149. *See supra* note 37 and accompanying text.

150. Under the small business exception, the automatic stay lasts only fifteen days. *See supra* note 37 and accompanying text. Under current practice, the automatic stay lasts as long as nine months. *See supra* notes 106-07 and accompanying text.

151. *See supra* notes 17-32 and accompanying text.

152. Cases against the government often result in prohibitory orders that CPLR 5519(a)(1) stays. *See, e.g.*, Rent Stabilization Ass'n of N.Y. v. Higgins, 164 A.D.2d 283, 562 N.Y.S.2d 962 (1st Dep't 1990) (section 5519(a)(1) stayed order prohibiting defendant from implementing its emergency housing rules), *aff'd*, 83 N.Y.2d 156, 630 N.E.2d 626, 608 N.Y.S.2d 930 (1993), *cert. denied*, 114 S. Ct. 2693 (1994).

153. *See supra* Part I.B.1.

154. *See supra* note 79 and accompanying text.

155. *See supra* notes 140-42 and accompanying text.

stay.[156] Simply letting a court decide if the government deserves a discretionary stay, in the first place, would avoid the unnecessary intermediate step of ruling on the automatic stay. In addition, the executory/prohibitory distinction is an inadequate solution. Because a court can easily phrase the same order in either executory or prohibitory language, a significant likelihood exists that courts may apply a prohibitory exception to the automatic stay inconsistently.[157]

Exceptions are also inadequate alternatives to the current governmental operations rule. The elderly plaintiff exception, even if it applied to poor people, accepts and relies on governmental noncompliance.[158] Additionally, although clarifying the standard used in the noncompliance exception would undoubtedly benefit poor plaintiffs, no exception to the governmental operations rule could cure the basic flaw in the way courts have applied the rule. When a court denies class status on the belief that a changed government policy will affect all potential class members, the court assumes the lawsuit is a dispute about the interpretation of a law, rather than noncompliance with a law.[159] Courts applying the governmental operations rule rely on the premise that, in the case before them, they will make a "determination . . . [upon which all] future petitioners may rely."[160] If the plaintiffs challenge the very fact that

156. *See* N.Y. CIV. PRAC. L. & R. § 5519(c) (McKinney 1996).

157. Some courts have been hesitant to apply automatic stays based on the semantic executory/prohibitory distinction. While the court in *Paramount Pictures Corp. v. Davis*, 228 Cal. App. 2d 827 (1964), phrased in prohibitory terms the order enjoining actress Bette Davis from working for any other company, the appellate court held that the order was executory in purpose and effect. *See id.* The order would have compelled Davis to *do* something (work for Paramount, the company with whom she had signed a contract), rather than forcing her to *stop doing* something (working for another company). *Id.*

158. *See supra* notes 138-39 and accompanying text.

159. Federal courts, lacking a governmental operations rule, do not encounter this problem. When a plaintiff challenges the government's noncompliance, the court does not apply a rule that assumes the case will settle some dispute over interpretation. Rather, in noncompliance cases that meet the requirements of Rule 23, *see* FED. R. CIV. P. 23, federal courts allow class actions to force compliance benefiting the whole class.

For example, the court in Brown v. Giuliani, 158 F.R.D. 251 (E.D.N.Y. 1994), certified a class of AFDC recipients challenging New York City's failure to process their grants in a timely fashion. The court added that "stare decisis is especially inappropriate as grounds for denying class certification where the defendants have not indicated whether they will abide by a court's decision should that court decide in favor of nonclass plaintiffs." *Id.* at 269; *see also* Morel v. Giuliani, 927 F. Supp. 622 (S.D.N.Y. 1995) (certifying a class of AFDC recipients challenging the failure of New York City and New York State to provide aid continuing benefits in a timely manner).

160. *Rivera*, N.Y. L.J. at 22.

the state is not complying with the law, however, a legal interpretation is not at stake. Rather, the challenge requires an order that simply directs the state to comply with existing law.[161] The governmental operations rule, even with exceptions for poor plaintiffs, will prevent class actions in noncompliance cases by viewing them as interpretation cases.

B. Abolishing the Rules

Abolishing both rules is the better proposal to protect low income plaintiffs. Legislators have tried several times to eliminate the automatic stay.[162] Lawyers for low income plaintiffs have also challenged the governmental operations rule by continuing to seek class certification in lawsuits challenging governmental operations.[163] Recent restrictions on legal services for the poor[164] make it essential that the Legislature and the Court of Appeals abolish both rules now. Preventing the government from postponing needed relief will be crucial for the growing number of plaintiffs who will be unable to obtain legal services. Allowing class certification against the government is also important because poor plaintiffs denied class status will be even less able than in the past to pursue separate lawsuits and benefit from the protections of stare decisis. If New York continues to apply these two rules, it will cause severe hardship to an increasing number of poor plaintiffs.

1. Abolishing the Government's Automatic Stay

The New York Legislature should repeal the automatic stay provision. If the government wishes to stay an adverse judgment, it may apply for a discretionary stay under CPLR 5519(c). The court

161. In *Rivera*, although the plaintiffs sought declaratory relief, their central charge was that the agency was not complying with laws requiring it to provide applicants and recipients access to case records. As a result, plaintiffs sought an order that, among other things, directed the agency to give them access to their records. *Id.*

162. *See* 1995 N.Y. A.B. 1783, introduced Jan. 25, 1995 (Assemblyman Seabrook) (proposing elimination of the automatic stay); 1993 N.Y. A.B. 10701, introduced March 29, 1994 (Seabrook) (elimination); 1991 N.Y. A.B. 1207, introduced Jan. 9, 1991 (Assemblyman Nadler) (proposing replacement of the automatic stay with a preference in hearing the government's appeal when the discretionary stay is denied).

163. *See, e.g.*, Darns v. Sabol, 165 Misc. 2d 77, 627 N.Y.S.2d 526 (Sup. Ct. N.Y. County 1995) (refusing to certify a class of HIV-infected housing applicants seeking declaration that they were entitled to emergency housing assistance).

164. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 U.S. Stat. 1321 (1996) (restricting use of funding to the Legal Services Corporation).

hearing the application will weigh the equities and grant a stay based on the relative potential harms to each party.[165]

Abolishing the automatic stay may have two possible negative consequences. First, the government may incur new costs from the motion practice or security required for a stay. Second, the government may need to cut important social programs to pay the costs of immediate compliance. Despite these two possible consequences, abolishing the automatic stay is still the best solution. The government can avoid the costs of posting security by applying for a discretionary stay.[166] If a court believes that the costs to the government outweigh the potential harm to plaintiffs, it will grant the government a discretionary stay. A court may also grant a discretionary stay if the government's fiscal situation would force it to cut other necessary programs.[167] Finally, by decreasing the amount of times the automatic stay will cause irreparable harm to poor plaintiffs, the Legislature will further the purpose of protecting vulnerable private parties.[168]

2. *Abolishing the Governmental Operations Rule*

The New York Court of Appeals should eliminate its governmental operations rule. The Court should rule that, under the persuasive authority of federal case law,[169] class actions challenging a government practice are not necessarily inferior to other methods of adjudication. As a result, courts will no longer apply the governmental operations bar to class actions because they are not "superior."[170] Courts will be able to grant or deny such an action based

165. *See* N.Y. CIV. PRAC. L. & R. § 5519(c) (McKinney 1996).

166. *See id.*

167. At first glance, Mayor Rudolph Giuliani's recent actions concerning McCain v. Giuliani, N.Y. L.J., May 16, 1996, at 28 (Sup. Ct. N.Y. County 1996), *aff'd*, 653 N.Y.S.2d 556 (1st Dep't 1997), might seem to be an example of the government cutting necessary services to pay the costs of compliance. After the court prohibited the Mayor from forcing homeless families to stay at the EAU longer than a day or two, he tightened the shelter eligibility rules to reduce the number of families entering the EAU at all. This, however, is no reason to stay the order in *McCain*. Even after changing the eligibility rules at the EAU, the Mayor has failed to place homeless families with children into suitable shelter within the required time period. Also, the budget surplus of fiscal year 1996 shows that the City of New York could have afforded to comply.

168. *See supra* notes 46-63 and accompanying text, discussing amendments to the automatic stay that reflect an intention to protect private parties.

169. *See, e.g.*, Morel v. Giuliani, 927 F. Supp. 622 (S.D.N.Y. 1995); Brown v. Giuliani, 158 F.R.D. 251 (E.D.N.Y. 1994).

170. N.Y. CIV. PRAC. L. & R. § 901(a)(5) (McKinney 1996).

on whether the facts of the case fit into CPLR 901,[171] regardless of whether the defendant is the government.

Two negative consequences may result from abolishing the governmental operations rule: it may cause unnecessary class actions and the government may incur new costs from the increase in class actions. Neither consequence, however, renders abolishing the governmental operations rule an inadequate solution. Abolishing the rule will not create unnecessary class actions because the court will still have the discretion to deny class status in cases where stare decisis actually will force the defendants to comply.[172] In addition, at least in the case of attorneys' fees, the government will not incur new costs from additional class actions[173] because the Equal Access to Justice Act[174] already provides for these fees in governmental operations cases.[175]

Conclusion

The automatic stay and the governmental operations rule unjustly limit the ability of poor plaintiffs to recover in court. The automatic stay postpones needed relief to plaintiffs who often depend on court orders for their subsistence. The governmental operations rule denies court access to plaintiffs who often cannot afford legal services. Neither rule provides an adequate means of relief to vulnerable plaintiffs who deserve an exception.

The best alternative to these two rules is to completely abolish them. Simply improving poor person's exceptions to the rules does not adequately solve all the problems the two rules have caused. Abolishing the rules, on the other hand, gives courts the discretion to choose, based on the merits of the case and public policy concerns, when the poor and the government deserve protection. Armed with this discretion, a court can protect low income plaintiffs from the delays of the automatic stay and the denials of the governmental operations rule. If, however, the Legislature and the Court of Appeals continue to force New York courts to apply these harsh, automatic rules that favor the government, poor plaintiffs

171. *See supra* notes 70-72 and accompanying text, discussing § 901's requirements for class status.

172. *See* Rivera v. Trimarco, 36 N.Y.2d 747, 329 N.E.2d 661, 368 N.Y.S.2d 826 (1975) (defendants were Civil Court judges who would be bound by stare decisis to follow the orders of the Court of Appeals).

173. *See supra* notes 92-93 and accompanying text, discussing government officials' early fear that CPLR 901 would cost the government a lot of money in attorneys' fees.

174. N.Y. CIV. PRAC. L. & R. §§ 8600-05 (McKinney 1997).

175. *See supra* note 93.

will continue to suffer. Denying immediate relief to poor plaintiffs who need it, and court access to those who lack it, denies poor plaintiffs the procedural justice they rely on to survive.