

CONSUMER CLASS ACTIONS IN NEW YORK STATE COURTS 2004

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Last year we discussed the New York consumer's rights and remedies under a variety of consumer protection statutes for claims arising from misrepresented and

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defective goods and servicesⁱ. This year's article discusses how some of these consumer claims may be aggregated and prosecuted as consumer class actions under Article 9 of the C.P.L.R.

Types Of Consumer Class Action Claims

Over the last 10 yearsⁱⁱ the Courts have addressed consumer class actionsⁱⁱⁱ brought pursuant to Article of 9 of the C.P.L.R. involving a variety of misrepresented or defective goods and services:

Baby Makers [e.g., misrepresented in vitro fertilization rates^{iv}],

Bail Bonds [e.g., excessive and unlawful fees^v],

Books [e.g., author of novel " Chains of Command " misrepresented^{vi}, underpayment of royalties^{vii}, misrepresented annual rates of return in " The Beardstown Ladies' Common-Sense Investment Guide "^{viii}],

Cars, Cars, Cars [e.g., defective single recliner mechanisms^{ix}, deceptive engine oil disposal surcharge^x, defective Lincoln Continentals^{xi}, failure to reduce lease payments^{xii}, misrepresented Automatic Ride Control^{xiii}, deceptive pricing of identical Octane gasolines^{xiv}, misrepresented low prices, low finance charges and guaranteed minimum trade-in allowances^{xv}, failure to disclose alternative rental car arrangements at lower rates^{xvi}, misrepresented rental car replacement gasoline, personal accident insurance and collision damage waivers^{xvii}],

CDs & DVDs [e.g., inflated shipping and handling charges from music club^{xviii}],

Computers, Software & Internet Services [e.g., creating an software applications barrier^{xix}, misrepresented DSL services^{xx}, misrepresented services by Internet provider^{xxi}, unauthorized renewal of domain names registration^{xxii}, failure to police chat rooms^{xxiii}, misrepresented ink jet printers^{xxiv}, defective Microsoft IntelliMouse Explorers^{xxv}, improper billing for unlimited AOL service^{xxvi}, failure to provide 24 hour technical support^{xxvii}, failure to provide promised service^{xxviii}, misrepresenting computer upgradability^{xxix}, vibration problems^{xxx}],

Dental Products [e.g., defective polymer-based dental restorations^{xxxii}],

Drugs [e.g., price fixing^{xxxiii}],

Entertainment [e.g., obstructed view of Michael Jackson concert^{xxxiiii}, heavy weight fight stopped because Mike Tyson bites off opponent's ear^{xxxiv}],

Food & Drink [e.g., misrepresentations that soft drink would “ improve memory “^{xxxv}, food poisoning^{xxxvi}, misrepresented fat and coloric content in Pirate's Booty & Fruity Booty^{xxxvii}, fat content of Power Bars misrepresented^{xxxviii}, misrepresented baby food and cooking wine^{xxxix}, spoiled, stale and tasteless soft drinks^{xl}],

Gambling [e.g., racetrack bettors challenge rounding down of winnings^{xli}],

Grain Silos [e.g., misrepresentations of prevention of oxygen exposure^{xlii}],

Hospitals [e.g., overbilling^{xliii}],

Household Goods [e.g., disclosure of “ effective economic interest rate “^{xliiv}, misrepresentations of amount of water purified by water filters^{xlv}],

Insurance [e.g., failure to charge statutorily approved title insurance premium rates^{xlvi}, vanishing premium life insurance policies^{xlvii}, coverage and COD payments^{xlviii}, termination of coverage without notice^{xlix}, medical fees in excess of Medicare rules^l, failure to increase benefits^{li}, improper deduction of contractor's profit and overhead^{lii}, misrepresented Optional Premiums^{liii}, excess and unwarranted rate increases^{liv}],

Loans/Credit Cards/Debit Cards [e.g., illegal credit card/debit card tie-in^{lv}, high pressure sales^{lvi}, payment allocation for cash advances^{lvii}, misrepresented credit insurance^{lviii}, excessive interest on payday loans^{lix}],

Mortgages [e.g., improper fax fees, quote fees & satisfaction fees^{lx}, improper recording and fax fees^{lxi}, improper mortgage refinancing fees^{lxii}, illegal loan application processing fees^{lxiii}, unnecessary private mortgage insurance^{lxiv}, improperly inflating escrow payments for realty taxes^{lxv}],

Newspaper Subscriptions [e.g., changing the terms of a promotional offer after subscriptions purchased^{lxvi}],

Nursing Homes [e.g., mistreatment and malpractice^{lxvii}],

Personal Products [e.g., misrepresented sun tan lotion^{lxviii}, different prices for chemically identical contact lens^{lxix}, failure to reveal known side effects of hair loss product^{lxx}, misrepresented Doan's Pills^{lxxi}],

Privacy [e.g., bank used unauthorized photo of employees^{lxxii}, pharmacy sells customer records and medical histories^{lxxiii}, bank sells customer names and phone numbers to telemarketing firm^{lxxiv}],

Shippers [e.g., refunds of “ an improperly collected Federal tax “ sought from Federal Express^{lxxv}],

Tax Advice [e.g., unneeded and unwanted refund anticipation loans from tax preparer^{lxxvi}; negligent tax advice^{lxxvii}],

Telephones, Cell Phones & Faxes [e.g., unsolicited telephone calls and faxes^{lxxviii}, failure to honor Qualcomm \$50 rebate^{lxxix}, “ fat fingers “ toll-free call services^{lxxx}, improperly credited cell phone calls^{lxxxi}, misrepresented cell phone rates^{lxxxii}, inadequate cell phone service^{lxxxiii}, malfunctioning 800 numbers^{lxxxiv}, illegal automatic cell phone renewal clause^{lxxxv}, failure to implement All Call Restrict service^{lxxxvi}, rounding up to whole minute increments^{lxxxvii}, defective cell phone service^{lxxxviii}],

Tobacco Products [e.g., price fixing^{lxxxix}, addictive nature of nicotine misrepresented^{xc}],

Toys [e.g., shipping dates misrepresented^{xcii}],

Travel [e.g., misrepresented campground sites^{xcii}, flight misrepresented as “ non-stop “^{xciii}. school trips cancelled^{xciv}, deceptive cruise port charges^{xcv}, airline overbooking^{xcvi}],

TV & Cable [e.g., cable TV late fees^{xcvii}].

Consumer Law Theories Of Liability

Consumer class actions, typically, assert common law theories of liability and/or violations of consumer protection statutes.

Common Law Claims

Breach Of Contract: Breach of contract claims are, generally, certifiable under

Article 9 of the C.P.L.R.

[e.g., insurance^{xcviii}, oil and gas royalties^{xcix}, book publishing^c, air transportation services^{ci}, credit card agreements^{cii}, campground sites^{ciii}, Michael Jackson concert tickets^{civ}, \$50 cell phone rebates^{cv}, employment agreements^{cvi}, failure to credit mortgage commitment fees^{cvi} and tour packages^{cviii}] when they are based upon uniform^{cix}, printed offers, solicitations or contracts which have been breached in a similar manner without regard to the quantitative differences in class member damages^{cx}. While oral representations^{cx} may be sufficient for class certification, printed contracts are, generally, necessary.

Quasi Contractual Claims: Breach of quasi-contractual obligations^{cxii} are certifiable claims if the misconduct is uniform in its impact upon class members. Such claims include:

Unjust Enrichment [e.g., artificially inflated prices for Microsoft software^{cxiii}, sale of confidential medical and prescription information^{cxiv}, sale of campground sites^{cxv}, caller identification services^{cxvi}, obstructed concert view^{cxvii}, overpayments for title insurance^{cxviii}],

Money Had And Received [e.g., automatic renewal of domain name registrations^{cxix}, mortgage recording taxes^{cxx}],

Bad Faith Dealings [e.g., overcharges for rental car replacement gasoline, collision damage waivers and personal accident insurance^{cxxi}, book publisher's accounting of sales to foreign affiliates^{cxii}, failure to give notice of 30-day insurance policy grace period^{cxiii}, underpayment of movie and video royalties^{cxiv}],

Breach Of An Implied Covenant Of Good Faith [e.g., underpayment of oil and gas royalties^{cxxv}, renewal of domain name registrations^{cxxvi}, allocating credit card payments to cash advances^{cxxvii}, marketing credit cards with hidden fees^{cxxviii}],

Unconscionability [e.g., sale of campground sites^{cxxix}, sale of rental car replacement gasoline^{cxxx}],

Economic Duress [e.g., mortgage recording taxes^{cxxxi}],

Penalties [e.g., cable TV payment late fees^{cxxxii}, service charges for checks returned because of insufficient funds^{cxxxiii}]. It should be noted that Article 9 class actions seeking the imposition of a statutory minimum or the trebling of damages are usually^{cxxxiv}, but not always^{cxxxv}, not certifiable as being prohibited by C.P.L.R. § 901(b).

Breach Of Warranty claims are difficult to certify as class actions [e.g., defective dental restorations^{cxxxvi}, defective recliner mechanism^{cxxxvii}, defectively designed Lincoln Continentals^{cxxxviii}, defective grain silos^{cxxxix}, defective Microsoft IntelliMouse Explorers^{cxli}, defective computer software^{cxli}, misrepresented bottled soft drinks^{cxlii}]. For example, the breach of an express warranty class action is rarely certified under Article 9 because proof of individual reliance may be required, some courts finding that individual reliance issues predominate over common questions^{cxliii}.

Fraud claims are, generally, certifiable [e.g., fat fingers business^{cxliv}, campground sites^{cxlv}, improper termination of insurance coverage^{cxlvi}, method of amortizing mortgage principal balances^{cxlvii}, telephone caller identification services^{cxlviii}, marketing of Hyundai cars^{cxlix}, travel services^{cl}, failure of title insurers to charge mandated discounted rates for refinancing^{cli}, obstructed view for Michael Jackson

concert^{clii}, failure to honor \$50 cellphone rebate^{cliii}, overpriced Burger King fast food^{cliv}] if the representations are uniform and printed^{clv}. Usually^{clvi}, but not always^{clvii}, New York courts are willing to presume reliance in common law fraud class actions.

Breach Of Fiduciary Duty claims are, generally, certifiable [e.g., unauthorized sales of pharmacy customer's medical and prescription information^{clviii}, withholding of brokerage funds for 24 hours^{clix}] if there is a special relationship and uniform misconduct [e.g., unneeded overpriced tax preparer refund anticipation loans^{clx}].

Negligence claims which seek economic damages are, generally, certifiable [e.g., negligent misrepresentations about the amount of water which can be purified^{clxi}, the nature of a student tour^{clxii}, the availability of a \$50 cell phone rebate^{clxiii}, failure to give notice of 30 day insurance policy grace period^{clxiv}, negligent rendering of tax advice^{clxv}] unless they involve mass torts arising from physical injury or property damage claims. Generally, mass torts are not certifiable under Article 9 of the C.P.L.R.^{clxvi}

Statutory Theories Of Liability

There are a variety of consumer protection statutes which have been asserted in Article 9 consumer class actions. Some of them are

G.B.L. §§ 349, 350: The most popular consumer protection statute is General Business Law [“ G.B.L. “] § 349. As we discussed earlier^{clxvii} G.B.L. § 349 is a statutory compliment to or substitute for a common law fraud claim. G.B.L. § 349 covers a broad and growing spectrum of goods and services “ appl(ying) to virtually all economic

activity^{clxxviii} and is broader than common law fraud [no proof of reliance or scienter^{clxxix} required but must prove causation^{clxxx}] and “ encompasses a significantly wider range of deceptive business practices that were ever previously condemned by decisional law^{clxxxi}. The Courts have been willing to certify G.B.L. § 349 and § 350 [false advertising^{clxxxii}] claims [e.g., in 2004 G.B.L. § 349 class actions were certified involving “ fat fingers “ telephone service^{clxxxiii}, overpayments for title insurance^{clxxxiv}, obstructed views of a Michael Jackson concert^{clxxxv}, hair loss product misrepresented as having no known side effects^{clxxxvi} and failure to honor a Qualcomm 2700 \$50 rebate program^{clxxxvii}], usually, but not always^{clxxxviii}, limited to a class of New York residents [upon whom the deceptive act was performed in New York State^{clxxxix}]. The deceptive acts must be consumer oriented^{clxxxx} and based upon uniform printed misrepresentations^{clxxxxi} or uniform omissions of material fact^{clxxxii} or a common course of conduct^{clxxxiii}. Although C.P.L.R. § 901(b) prohibits a class action seeking a minimum recovery or treble damages such damages may be waived in a G.B.L. § 349 class action^{clxxxiv} as long as class members are notified and given a chance to opt-out^{clxxxv}.

G.B.L. § 340 claims alleging a violation of the Donnelly Act, New York’s antitrust statute, have, generally, not been certified^{clxxxvi} on the grounds that the treble damages provision constitutes a penalty and is prohibited by C.P.L.R. § 901(b).

Telephone Consumer Protection Act [TCPA] claims may be uncertifiable as well since some courts have held that the \$500 minimum damages and the TCPA treble damages provision constitute penalties which are also prohibited by C.P.L.R. § 901(b)^{clxxxvii}.

Public Health Law claims under § 2801-d involving the mistreatment of residents of residential care facilities are certifiable^{clxxxviii} and claims involving overcharges for hospital medical records may be certifiable under § 18(2)(e)^{clxxxix}.

Tenant Security Deposit claims may be certifiable^{cxc} as long as they involve uniform misconduct by landlords in failing to properly handle security deposits.

Privacy claims are certifiable based upon a violation of **Civil Rights Law § 51**^{cxci} or common law theories such as breach of fiduciary duty^{cxcii}.

No Fault Insurance coverage claims are certifiable, especially, when the class action seeks to enforce a decision on the merits in a non-class action^{cxci}.

Real Property Law § 274 claims may be certifiable[e.g., fax fee, quote fee and satisfaction fee^{cxci}, recording and fax fees^{cxci}].

Mandatory Arbitration Agreements & Class Actions

Manufacturers and sellers of goods and services have with increasing frequency used contracts with clauses requiring aggrieved consumers to arbitrate their complaints instead of bringing lawsuits, particularly, class actions^{cxci}. The language in such an agreement seeks to extinguish any rights customers may have to litigate a claim before a court of law. The U.S. Supreme Court^{cxci} has addressed the enforceability of contractual provisions requiring mandatory arbitration, including who decides arbitrability and the application of class procedures, the court or the arbitrator^{cxci}. New York Courts have, generally, enforced arbitration agreements.

Class Wide Arbitration

Mandatory arbitration agreements are considered to be a viable means by which to counteract class actions since some courts may view these two procedural devices, arbitration and class actions, as competing and contradictory devices. In fact arbitration and the class action device are complimentary and seek greater efficiencies than otherwise available to individual litigants. Class wide arbitration should be encouraged and can enhance the overall effectiveness of arbitration proceedings. Class wide arbitration and the enforceability of contractual clauses prohibiting class actions and class-wide arbitration have been considered by federal and New York courts^{CXCIX}. Permitting class actions to be litigated within the context of arbitration proceedings is appropriate^{CC}.

Conclusion

New York Courts are, generally, receptive, to consumer class actions involving misrepresented or defective good and services and involving common law claims and/or violations of consumer protection statutes.

ENDNOTES

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- i. Dickerson, New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes, New York State Bar Association Journal, Vol. 76, No. 7, Sept. 2004, p. 10.
- ii. For a description of Article 9 consumer class action cases from 1976 to 1995 see Dickerson, Consumer Class Actions, INCL Journal, N.Y.S.B.A., Dec. 1987 Issue (various authors) and Justice Dickerson's annual class action summaries published in the New York Law Journal. See e.g., Dickerson & Manning, A Summary of Article 9 Class Actions in 2003, N.Y.L.J., April 7, 2004, p. 1.
- iii. For more on New York State class actions see Dickerson, Class Actions: The Law of 50 States, Law Journal Press, N.Y., 1988-2005 and Justice Dickerson's soon to be published revision of Article 9 of New York Civil Practice, CPLR (Weinstein, Korn & Miller).
- iv. Karlin v. IVF America, Inc., 93 N.Y., 2d 282, 690 N.Y.S. 2d 495, 712 N.E. 2D 662 (1999) (G.B.L. § 349 claim sustained).
- v. McKinnon v. International Fidelity Ins. Co., 182 Misc. 2d 517, 704 N.Y.S. 2d 774 (N.Y. Sup. 2000) (fraud and G.B.L. § 349 claims sustained)
- vi. Rice v. Penguin Putnam, Inc., 2001 WL 1606752 (2d Dept. 2001) (complaint dismissed).
- vii. Englade v. HarperCollins Publishers, Inc., 2001 WL 1637491 (1st Dept. 2001) (certification granted).
- viii. Lacoff v. Buena Vista Publishing, Inc., 183 Misc. 2d 600, 705 N.Y.S. 2d 183 (N.Y. Sup. 2000) (complaint dismissed).
- ix. Frank v. DaimlerChrysler Corp., 292 A.D. 2d 118, 741 N.Y.S. 2d 9 (1st Dept. 2002) (complaint dismissed); Banks v. Carroll & Graf Publishers, Inc., 1999 WL 1126501 (1st Dept. 1999) (certification denied).
- x. Farino v. Jiffy Lube International, Inc., N.Y.L.J., Aug. 14, 2001, p. 22, col. 3 (Suff. Sup.) (claims sustained; G.B.L. § 349 does not require an underlying private right of action).
- xi. Gordon v. Ford Motor Co., 260 A.D. 2d 164, 687 N.Y.S. 2d 369 (1st Dept. 1999) (certification denied).

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- xii. *Drogin v. General Electric Capital*, 238 A.D. 2d 272, 657 N.Y.S. 2d 28 (1st Dept. 1996) (settlement approved).
- xiii. *Faden Bayes Corp. v. Ford Motor Corp.*, Index Number 601076/97, N.Y. Sup.) (complaint dismissed).
- xiv. *Jurman v. Sun Company, Inc.*, N.Y.L.J., Aug. 8, 1997, p. 21, col. 4 (N.Y. Sup.) (complaint dismissed; federal preemption).
- xv. *Branch v. Crabtree*, 197 A.D. 2d 557, 603 N.Y.S. 2d 490 (2d Dept. 1993)(certification granted)
- xvi. *Gershon v. Hertz Corp.*, 215 A.D. 2d 202, 626 N.Y.S. 2d 80 (1st Dept. 1995) (complaint dismissed).
- xvii. *Weinberg v. Hertz Corp.*, 116 A.D. 2d 1, 499 N.Y.S. 2d 692 (1st Dept. 1986), aff'd 69 N.Y. 2d 979, 516 N.Y.S. 2d 652, 509 N.E. 2d 347 (1987)(certification granted); *Lewis v. Hertz Corp.*, 212 A.D. 2d 476, 624 N.Y.S. 2d 800 (1st Dept. 1995) (class decertified); *Super Glue Corp. v. Avis Rent-A-Car System, Inc.*, 132 A.D. 2d 604, 517 N.Y.S. 2d 764 (2d Dept. 1987)(no affirmative cause of action available for bad faith dealings or unconscionability).
- xviii. *Zuckerman v. BMG Direct Marketing, Inc.*, N.Y.L.J., July 13, 2000, p. 28, col. 1 (N.Y. Sup.)(complaint dismissed)
- xix. *Cox v. Microsoft Corp.*, 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (1st Dept. 2004)(unjust enrichment and G.B.L. § 349 claims sustained).
- xx. *Scott v. Bell Atlantic*, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002)(G.B.L. § 349 class actions limited to New York residents exposed to deceptive act in New York State); *Solomon v. Bell Atlantic Corp.*, 9 A.D. 3d 49, 777 N.Y.S. 2d 50 (1st Dept. 2004)(class decertified).
- xxi. *Truschel v. Juno Online Services, Inc.*, N.Y.L.J., Dec. 12, 2002, p. 21, col. 4 (N.Y. Sup.)(G.B.L. § 349 claim dismissed).
- xxii. *Wornow v. Register.Com, Inc.*, 8 A.D. 3d 59, 778 N.Y.S. 2d 25 (1st Dept. 2004)(money had and received claim sustained).
- xxiii. *Gates v. AOL Time Warner Inc.*, 2003 WL 21375367 (N.Y. Sup. 2003)(Virginia forum selection enforced).
- xxiv. *Strishak v. Hewlett Packard Company*, 300 A.D. 2d 608, 752 N.Y.S. 2d 200 (2d

Dept. 2002)(complaint dismissed).

xxv. *Ades v. Microsoft Corp.*, N.Y.L.J., Oct. 9, 2001, p. 27, col. 1 (Kings Sup.)(claims for breach of contract and injunctive relief sustained).

xxvi. *DiLorenzo v. America Online, Inc.*, N.Y.L.J., February 8, 1999, p. 28, col. 5 (N.Y. Sup.) (complaint dismissed; forum selection clause enforced)

xxvii. *Brower v. Gateway 2000, Inc.*, 246 A.D. 2d 246, 676 N.Y.S. 2d 569 (1st Dept. 1998) (forum selection clause and arbitration clause enforced in part).

xxviii. *Brummel v. Leading Edge Products, Inc.*, N.Y.L.J., Feb. 19, 1998, p. 28, col. 1 (N.Y. Sup.) (summary judgment for defendant; certification denied).

xxix. *Daex Corp. v. I.B.M.*, N.Y.L.J., Dec. 14, 1998, p. 29, col. 3 (N.Y. Sup.)(plaintiffs strike class allegations).

xxx. *Brown v. Ford Motor Co.*, N.Y.L.J., April 17, 1998, p. 26, col. 6 (N.Y. Sup.) (complaint dismissed).

xxxi. *Catalano v. Heraeus Kulzer, Inc.*, 305 A.D. 2d 356, 759 N.Y.S. 2d 159 (2d Dept. 2003)(certification denied); *Rivkin v. Kulzer*, 2001 WL 1557814 (1st Dept. 2001)(certification denied).

xxxii. *Asher v. Abbott Laboratories*, 290 A.D. 2d 208, 737 N.Y.S. 2d 4 (1st Dept. 2002)(class allegations dismissed).

xxxiii. *Gross v. Ticketmaster LLC*, 5 Misc. 3d 1005(A)(N.Y. Sup. 2004)(certification granted).

xxxiv. *Castillo v. Tyson*, 268 A.D. 2d 336, 701 N.Y.S. 2d 423 (1st Dept. 2000) (complaint dismissed).

xxxv. *Donohue v. Ferolito, Vultaggio & Sons*, 2004 WL 2749313 (1st Dept. 2004)(complaint dismissed).

xxxvi. *Lieberman v. 293 Mediterranean Market Corp.*, 303 A.D. 2d 560, 756 N.Y.S. 2d 469 (2d Dept. 2003)(certification denied).

xxxvii. *Klein v. Robert's American Gourmet Foods*, No. 006956/02 (Nassau Sup. Jan.

14, 2003)(settlement approved).

xxxviii. *Morelli v. Weider Nutrition Group, Inc.*, 275 A.D. 2d 607, 712 N.Y.S. 2d 551 (1st Dept. 2000)(claims not preempted).

xxxix. *Bernard v. Gerber Food Products Co.*, 938 F. Supp. 218 (S.D.N.Y. 1996)(remanded to state court); *McGowan v. Cadbury Schwepps, PLC*, 941 D. Supp. 344 (S.D.N.Y. 1996)(case remanded to state court).

xl. *Heller v. Coca-Cola Co.*, 230 A.D. 2d 768, 646 N.Y.S. 2d 524 (1st Dept. 1996) (complaint dismissed; federal preemption).

xli. *Zoll v. Suffolk Regional OTB*, 259 A.D. 2d 696, 686 N.Y.S. 2d 858 (1st Dept. 1999) (complaint dismissed).

xlii. *Morgan v. A.O. Smith Corp.*, 233 A.D. 2d 375, 650 N.Y.S. 2d 748 (4th Dept. 1996) (certification denied).

xliii. *Meraner v. Albany Medical Center*, 211 A.D. 2d 867, 621 N.Y.S. 2d 208 (3d Dept. 1995) (certification denied).

xliv. *Colon v. Rent-A-Center, Inc.*, 2000 N.Y. App. Div. LEXIS 11269 (1st Dept. 2000) (G.B.L. § 349 claim sustained)

xlv. *Hazelhurst v. Brita Products Co.*, 295 A.D. 2d 240, 744 N.Y.S. 2d 31 (1st Dept. 2002)(class decertified).

xlvi. *Matter of Coordinated Title Insurance Cases*, 2 Misc. 3d 1007(A) (Nassau Sup. 2004)(certification granted).

xlvii. *Goshen v. The Mutual Life Ins. Co.*, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002)(G.B.L. § 349 class actions should be limited to New York residents exposed to deceptive act in New York State); *Gaidon v. Guardian Life Ins. Co.*, 96 N.Y. 2d 201, 727 N.Y.S. 2d 30, 750 N.E. 2d 1078 (2001)(G.B.L. § 349 claims governed by three year statute of limitations in CPLR § 214(2)); *DeFilippo v. Mutual Life Ins. Co.*, 2004 WL 2902570 (1st Dept. 2004)(class decertified); *Russo v. Massachusetts Mutual Life Ins. Co.*, 192 Misc. 2d 349, 746 N.Y.S. 2d 380 (2002)(certification denied).

xlviii. *Goldman v. Metropolitan Life Ins. Co.*, 2004 WL 2984366 (1st Dept. 2004)(claims dismissed).

xlix. *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D. 2d 24, 704 N.Y.S. 2d 44 (1st Dept. 2000)(certification granted).

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- i. Sterling v. Ackerman, 244 A.D. 2d 170, 663 N.Y.S. 2d 842 (1st Dept. 1997) (claims sustained; discovery on class issues).
- li. Kenavan v. Empire Blue Cross, 248 A.D. 2d 42, 677 N.Y.S. 2d 560 (1st Dept. 1998) (certification granted; summary judgement for class).
- lii. Mazzocki v. State Farm Fire & Casualty Co., 170 Misc. 2d 70, 649 N.Y.S. 2d 656 (N.Y. Sup. 1996) (motion to change venue granted).
- liii. Tuchman v. Equitable Companies, Inc., N.Y.L.J., July 18, 1996, p. 26, col. 5 (N.Y. Sup.) (complaint dismissed).
- liv. Empire Blue Cross Customer Litigation, N.Y.L.J. Oct. 12, 1995, p. 28, col. 6 (N.Y. Sup.) (certification denied).
- lv. Ho v. Visa USA, Inc., 3 Misc. 3d 1105(A)(N.Y. Sup. 2004) (class certification not appropriate; G.B.L. §§ 340, 349 claims dismissed).
- lvi. Sims v. First Consumers National Bank, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (1st Dept. 2003)(G.B.L. § 349 claim sustained).
- lvii. Broder v. MBNA, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001 (certification granted); Broder v. MBNA, N.Y. Sup. Index No: 605153/98, J. Cahn, Decision April 10, 2003 (settlement approved).
- lviii. Taylor v. American Banker's Insurance Group, 267 A.D. 2d 178, 700 N.Y.S. 2d 458 (1st Dept. 1999) (certification granted to nationwide class).
- lix. Hayes v. County Bank, 2000 WL 1410029 (N.Y. Sup. 2000) (arbitration clause not enforced pending discovery on unconscionability).
- lx. Dougherty v. North Fork Bank, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2d Dept. 2003)(summary judgment for plaintiffs on fax and quote fees).
- lxi. Negrin v. Norwest Mortgage, Inc., 293 A.D. 2d 726, 741 N.Y.S. 2d 287 (1st Dept. 2002)(certification denied); Trang v. HSBC Mortgage Corp., N.Y.L.J., April 17, 2002, p. 28, col. 3 (N.Y. Sup.)(defendant's summary judgment motion denied).
- lxii. Stutman v. Chemical Bank, 95 N.Y. 2d 24, 709 N.Y.S. 2d 892, 731 N.E. 2d 608 (2000) (complaint dismissed; reliance not a

necessary element of G.B.L. § 349 claim).

lxiii. Kidd v. Delta Funding Corp., 270 A.D. 2d 81, 704 N.Y.S. 2d 66 (1st Dept. 2000)(motion to change venue granted); Kidd v. Delta Funding Corp., 2000 N.Y. Misc. LEXIS 378 (N.Y. Sup. 2000) (certification granted).

lxiv. Walts v. First Union Mortgage Corp., N.Y.L.J., April 25, 2000, p. 26, col. 1 (N.Y. Sup. 2000) (certification granted); Bauer v. Mellon Mortgage Co., N.Y.L.J., Aug. 14, 1998, p. 21, col. 5 (N.Y. Sup.)(breach of contract and G.B.L. § 349 claims sustained).

lxv. LeRose v. PHH US Mortgage Corp., 170 Misc 2d 858, 652 N.Y.S. 2d 484 (N.Y. Sup. 1996) (settlement disapproved).

lxvi. Abramovitz v. The New York Times, Index No. 114272/96, N.Y. Sup., J. Ramos, Decision July 2, 1997 (certification denied; claims mooted by receipt of credit).

lxvii. Fleming v. Barnswell Nursing Home, 309 A.D. 2d 1132, 766 N.Y.S. 2d 241 (3d Dept. 2003)(certification granted to Public Health Law § 2801-d claim).

lxviii. Archer v. Schering-Plough Corp., Index No. 603336/97, N.Y. Sup. (complaint dismissed)

lxix. Kramer v. Bausch & Lomb, 264 A.D. 2d 596, 695 N.Y.S. 2d 553 (1st Dept. 1999) (claims not preempted by federal Food, Drug and Cosmetics Act); Lattig v. Bausch & Lomb, N.Y.L.J., Jan. 7, 1997, p. 26, col. 4 (N.Y. Sup.)(fraud and G.B.L. § 349 claims sustained).

lxx. Mountz v. Global Vision Products, Inc., 3 Misc. 3d 171 (N.Y. Sup. 2003)(motion to strike class allegations denied).

lxxi. Samuel v. Ciba-Geigy Corp., N.Y.L.J., May 20, 1997, p. 26, col. 1 (N.Y. Sup.) (complaint dismissed; FTC primary jurisdiction).

lxxii. Caesar v. Chemical Bank, 66 N.Y. 2d 698, 496 N.Y.S. 2d 418, 487 N.E. 2d 275 (1985)(unauthorized use of pictures of employees; certification granted).

lxxiii. Anonymous v. CVS Corp., 293 A.D. 2d 285, 739 N.Y.S. 2d 565 (1st Dept. 2002)(certification granted).

Ixxiv. *Smith v. Chase Manhattan Bank USA*, 293 A.D. 2d 598, 741 N.Y.S. 2d 100 (1st Dept. 2002)(complaint dismissed).

Ixxv. *Strategic Risk Management, Inc. v. Federal Express Corp.*, 253 A.D. 2d 167, 686 N.Y.S. 2d 35 (1st Dept. 1999) (complaint dismissed).

Ixxvi. *Carnegie v. H & R Block, Inc.*, 269 A.D. 2d 145, 703 N.Y.S. 2d 27 (1st Dept. 2000)(certification denied; breach of fiduciary duty claim dismissed).

Ixxvii. *Ackerman v. Price Waterhouse*, 1998 WL 851946 (N.Y. App. Div. 1998) (certification granted).

Ixxviii. *Ganci v. Cape Canaveral Tour And Travel, Inc.*, 4 Misc. 3d 1003(A) (Kings Sup. 2004)(certification denied); *Giovanniello v. Hispanic Media Group USA*, 4 Misc. 3d 440, 780 N.Y.S. 2d 720 (Nassau Sup. 2004)(certification denied).

Ixxix. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027(A)(N.Y. Sup. 2004).

Ixxx. *Drizin v. Sprint Corp.*, 2004 WL 2591249 (1st Dept. 2004) (certification granted).

Ixxxi. *Peck v. AT&T Corp.*, N.Y.L.J., August 1, 2002, p. 18, col. 3 (N.Y. Sup.)(settlement approved).

Ixxxii. *Ranieri v. Bell Atlantic Mobile*, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (1st Dept. 2003)(class certification stayed pending arbitration).

Ixxxiii. *Naevus v. AT&T Corp.*, 282 A.D. 2d 171, 724 N.Y.S. 2d 721 (1st Dept. 2001) (failure to extend credit claims not preempted).

Ixxxiv. *Judicial Title Insurance Agency v. Bell Atlantic*, N.Y.L.J., July 1, 1999, p. 35, col. 1 (West. Sup.) (certification granted).

Ixxxv. *Kahn v. Bell Atlantic NYNEX Mobile*, N.Y.L.J., June 4, 1998, p. 29, col. 2 (N.Y. Sup.) (settlement disapproved).

Ixxxvi. *Lauer v. New York Telephone Co*, 231 A.D. 2d 126, 659 N.Y.S. 2d 359 (1st Dept. 1997) (certification granted).

Ixxxvii. *Porr v. MYNEX Corp.*, 230 A.D. 2d 564, 660 N.Y.S. 2d 440 (

1st Dept, 1997) (complaint dismissed)

lxxxviii. *Sirica v. Cellular Telephone Co.*, 231 A.D. 2d 470, 647 N.Y.S. 2d 219 (1st Dept. 1996)(certification denied).

lxxxix. *Lennon v. Philip Morris Co.*, 2001 WL 1535877 (N.Y. Sup. 2001)(price fixing claim under Donnelly Act dismissed; certification denied pursuant to C.P.L.R. § 901(b)).

xc. *Small v. Lorillard Tobacco Co.*, 94 N.Y. 2d 43, 698 N.Y.S. 2d 615, 720 N.E. 2d 892 (1999) (certification denied; G.B.L. § 349 claim dismissed).

xc. *Castellucci v. Toys "R" US, Inc.*, N.Y.L.J., Aug. 9, 2001, p. 21, col. 5 (West. Sup.) (certification denied).

xcii. *Colbert v. Rank America, Inc.*, 295 A.D. 2d 302, 742 N.Y.S. 2d 905 (2d Dept. 2002)(motion to decertify denied).

xciii. *Liechtung v. Tower Air, Inc.*, 269 A.D. 2d 363, 702 N.Y.S. 2d 111 (2d Dept. 2000) (certification granted)

xciv. *Dunleavy v. New Hartford Central School*, 266 A.D. 2d 931, 697 N.Y.S. 2d 446 (4th Dept. 1999) (summary for defendant granted)

xcv. *Cronin v. Cunard Line Limited*, 250 A.D. 2d 486, 672 N.Y.S. 2d 864 (1st Dept. 1998) (complaint dismissed).

xcvi. *Parra v. Tower Air, Inc.*, N.Y.L.J., July 22, 1999, p. 30, col. 1 (N.Y. Sup. 1999) (claims preempted).

xcvii. *Dillon v. U-A Columbia Cablevision*, 100 N.Y. 2d 525, 760 N.Y.S. 2d 726, 790 N.E. 2d 1155 (2003)(complaint dismissed).

xcviii. *Mazzocki v. State Farm Fire & Casualty Corp.*, 1 A.D. 3d 9, 766 N.Y.S. 2d 719 (3d Dept. 2003)(certification denied).

xcix.

Freeman v. Great Lakes Energy Partners, 12 A.D. 3d 1170, 785 N.Y.S. 2d 640 (4th Dept. 2004)(certification granted).

c. *Englade v. HarperCollins Publishers, Inc.* 289 A.D. 2d 159, 734 N.Y.S. 2d 176 (1st Dept. 2001)(certification granted); *Stellema v. Vantage Press, Inc.*, 109 A.D. 2d 423, 492 N.Y.S. 2d 390 (1st Dept. 1985)(certification granted).

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- ci. *Liechtung v. Tower Air, Inc.*, 269 A.D. 2d 363, 702 N.Y.S. 2d 111 (1st Dept. 2000)(certification granted).
- cii. *Broder v. MBNA Corp.*, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(certification granted).
- ciii. *Colbert v. Rank America, Inc.*, 273 A.D. 2d 209, 709 N.Y.S. 2d 449 (2d Dept. 2000)(certification granted).
- civ. *Gross v. Ticketmaster*, 5 Misc. 3d 1005(A) (N.Y. Sup. 2004)(certification granted).
- cv. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027(A) (Kings Sup. 2004)(certification granted).
- cvi. *Jacobs v. Bloomingdales, Inc.*, N.Y.L.J., May 27, 2003, p. 23, col. 1 (Nassau Sup. 2003) (certification granted to unpaid wage claim).
- cvii. *Mimnorm Realty v. Sunrise Federal*, 83 A.D. 2D 936, 442 N.Y.S. 2d 780 (2d Dept. 1981)(certification granted).
- cviii. *Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697, 392 N.Y.S. 2d 783 (N.Y. Sup. 1976)(certification granted).
- cix. See e.g., *DeFilippo v. Mutual Life Ins. Co.*, 2004 WL 2902570 (1st Dept. 204)(vanishing life insurance premium class action decertified because oral sales presentations created a predominance of individual issues); *Broder v. MBNA Corp.*, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(“ Plaintiff’s allegations of deceptive acts are based on identical written solicitations “); *Carnegie v. H & R Block, Inc.*, 269 A.D. 2d 145, 703 N.Y.S. 2d 27 (1st Dept. 2000)(“ oral communications that allegedly induced [consumers] to obtain RALs cannot be proven on a class basis, but would require individualized proof “); *Taylor v. American Bankers Insurance Group*, 267 A.D. 2d 178, 700 N.Y.S. 2d 458, 459 (1st Dept. 1999)(“ Although defendants contend that they used a variety of forms and promotions...the solicitations in question did not differ materially...given the uniformity of defendant’s offers of coverage, any matters relating to individual reliance and causation are relatively insignificant “).
- cx. See e.g., *Mazzocki State Farm Fire & Casualty Corp.* 1 A.D. 3d 9, 766 N.Y.S. 2d 719,(3d Dept. 2003)(“ the individualized damages of the resulting class members would not preclude class certification “); *Broder v. MBNA Corp.*, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(“ Plaintiff alleges that defendant’s practice of allocating credit card payment to cash advances, which were subject to a promotional annual percentage rate (APR) before the balance generated by purchases, which was

subject to a significantly higher APR, deprived credit cardholders of the full benefit of the promotional rate, thereby rendering the promotion deceptive... allegations of deceptive acts are based on identical written solicitations and the particular damages of each class member can be easily computed “; certification granted); *Englade v. HarperCollins Publishers, Inc.*, 289 A.D. 2d 159, 734 N.Y.S. 2d 176 (1st Dept. 2001)(“ That individual authors may have differing levels of damages does not defeat class certification “); *Puckett v. Sony Music Entertainment*, New York Law Journal, August 8, 2002, p. 18, col. 2 (N.Y. Sup. 2002)(“ The class members’ differing royalties may require individualized calculations of damages. However, it does not appear at this juncture that these calculations would be unduly difficult and so this fact will not prevent the certification of a class action “); *Gilman v. Merrill Lynch Pierce Fenner & Smith*, 93 Misc. 2d 941, 944, 404 N.Y.S. 2d 258 (N.Y. Sup. 1978)(“ While the amounts potentially recoverable by each member of the class may differ, such circumstance is not sufficient to warrant denial of class status “); *Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697, 392 N.Y.S. 2d 783,(N.Y. Sup. 1996)(“ That there may also exist individual questions with regard to...damages is not dispositive “).

cxii. See e.g., *Compact Electra Corp. v. Paul*, 98 Misc. 2d 807, 403 N.Y.S. 2d 611 (N.Y.A.T. 1997)(fraud counterclaim class action may be certifiable if the oral misrepresentations were based on ‘ canned ‘ techniques).

cxiii. See e.g., *Friar v. Vanguard Holding Corp.*, 78 A.D. 2d 83, 87-88, 434 N.Y.S. 2d 696 (2d Dept. 1986)(“ The doctrine of quasi contract embraces a wide spectrum of legal actions resting ‘ upon the equitable principal that a person shall not be allowed to enrich himself unjustly at the expense of another...[I]t is not a contract or promise at all...[but] an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience, he ought not to retain...and which ex aequo et bono belongs to another “).

cxiii. *Cox v. Microsoft Corp.*, 8 A.D. 3d 39, 40, 778 N.Y.S. 2d 147 (1st Dept. 2004)(“ plaintiffs’ allegations that Microsoft’s deceptive practices caused them to pay artificially inflated prices for its products state a cause of action for unjust enrichment “).

cxiv. *Anonymous v. CVS Corporation*, 293 A.D. 2d 285, 739 N.Y.S. 2d 565 (1st Dept. 2002)(certification granted).

cxv. *Colbert v. Rank America, Inc.*, 273 A.D. 2d 209, 709 N.Y.S. 2d 449 (1st Dept. 2000)(certification granted).

cxvi. *Lauer v. New York Telephone Co.*, 231 A.D. 2d 126, 659 N.Y.S. 2d 359 (3d Dept. 1997)(certification granted).

cxvii. *Gross v. Ticketmaster*, 5 Misc. 3d 1005 (N.Y. Sup. 2004)(certification granted).

cxviii. *Matter of Coordinated Title Insurance Cases*, 2 Misc. 3d 1007(A) (N.Y. Sup. 2004)(certification granted).

cxix. *Wornow v. Register.Co, Inc.*, 8 A.D. 3d 59, 778 N.Y.S. 2d 25 (1st Dept. 2004)(money had and received claim sustained).

cxx. *Friar v. Vanguard Holding Corp.*, 78 A.D. 2d 83, 97-99, 434 N.Y.S. 2d 696 (2d Dept. 1986)(duress in paying mortgage recording tax; certification granted).

cxxi. *Weinberg v. Hertz Corp.*, 116 A.D. 2d 1, 499 N.Y.S. 2d 692 (1st Dept. 1986), aff'd 69 N.Y. 2d 979, 516 N.Y.S. 2d 652, 509 N.E. 2d 347 (1987)(certification granted); *Super Glue Corp. V. Avis Rent-A-Car System, Inc.*, 132 A.D. 2d 604, 517 N.Y.S. 2d 764 (2d Dept. 1987)(no affirmative cause of action available for bad faith dealings or unconscionability).

cxxii. *Englade v. HarperCollins Publishers, Inc.*, 289 A.D. 2d 159, 734 N.Y.S. 2d 176 (1st Dept. 2001)(certification granted).

cxxiii. *MaKastchian v. Oxford Health Plans, Inc.*, 370 A.D. 2d 25, 704 N.Y.S. 2d 44 (1st Dept. 2000)(certification granted).

cxxiv. *Western New York Public Broadcasting Ass'n. V. Vestron, Inc.*, 238 A.D. 2d 929, 661 N.Y.S. 2d 555 (4th Dept. 1997)(certification granted).

cxxv. *Freeman v. Great Lakes Energy Partners*, 12 A.D. 3d 1170, 785 N.Y.S. 2d 640 (4th Dept. 2004)(certification granted).

cxxvi. *Wornow v. Register.Co, Inc.*, 8 A.D. 3d 59, 778 N.Y.S. 2d 25 (1st Dept. 2004)(breach of covenant of good faith dismissed because “ plaintiff received full benefit of that agreement “).

cxxvii. *Broder v. MBNA Corp.*, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(certification granted).

cxxviii. *Sims v. First Consumers National Bank*, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (1st Dept. 2003)(claim stated for breach of implied duty of good faith and fair dealing).

cxxix. *Colbert v. Rank America, Inc.*, 273 A.D. 2d 209, 709 N.Y.S. 2d 449 (2d Dept. 2000)(certification granted).

cxxxx. *Super Glue Corp. V. Avis Rent-A-Car System, Inc.*, 132 A.D. 2d 604, 517 N.Y.S.

2d 764 (2d Dept. 1987)(no affirmative cause of action available for bad faith dealings or unconscionability).

cxxxix. *Friar v. Vanguard Holding Corp.*, 78 A.D. 2d 83, 97-99, 434 N.Y.S. 2d 696 (2d Dept. 1986)(certification granted).

cxxxii. *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 N.Y. 2d 525, 760 N.Y.S. 2d 726, 790 N.E. 2d 1155 (2003)(claims of Westchester County cable TV subscribers challenging \$5.00 late fees as an “ unlawful penalty “ dismissed because the voluntary payment doctrine which “ bars recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law “).

cxxxiii. *Clark v. Marine Midland Bank, Inc.*, 80 A.D. 2d 761, 426 N.Y.S. 2d 711 (1st Dept. 1981)(certification granted; penalty violation of U.C.C. § 1-106).

cxxxiv. See e.g., ; *Asher v. Abbott Laboratories*, 290 A.D. 2d 208, 737 N.Y.S. 2d 4 (1st Dept. 2002)(“ private persons are precluded from bringing a class action under the Donnelly Act...because the treble damage remedy...constitutes a ‘ penalty ‘ within the meaning CPLR 901(b) “); *Cox v. Microsoft Corp.*, 290 A.D. 2d 206, 737 N.Y.S. 2d 1 (1st Dept. 2002); *Ganci v. Cape Canaveral Tour And Travel, Inc.*, 4 Misc. 3d 1003(A), 2004 WL 1469372 (N.Y. Sup. 2004)(motion to dismiss class allegations in action alleging violation of Telephone Consumer Protection Act (TCPA); motion to dismiss class allegations granted “ since plaintiff’s action sought to recover a minimum measure of recovery created and imposed by the TCPA, CPLR 901(b) specifically prohibited its maintenance as a class action “); *Giovanniello v. Hispanic Media Group USA, Inc.*, 4 Misc. 3d 440, 780 N.Y.S. 2d 720 (Nassau Sup. 2004)(“ the allowance of treble damages under the TCPA is punitive in nature and constitutes a penalty “; certification denied as violative of C.P.L.R. § 901(b)); *Ho v. VISA U.S.A. Inc.*, 3 Misc. 3d 1105(A), 2004 WL 1118534 (N.Y. Sup. 2004) (“ plaintiffs’ alleged injury is far too remote to provide antitrust standing under the Donnelly Act “ and is dismissed).

cxxxv. See e.g., *Cox v. Microsoft Corp.*, 8 A.D. 3d 39, 40, 778 N.Y.S. 2d 147 (1st Dept. 2004)(“ We also reject Microsoft’s argument that plaintiffs are not entitled to class action relief under General Business Law § 349 since the statutorily prescribed \$50 minimum damages to be awarded for a violation of that section constitutes a ‘ penalty ‘ within the meaning of CPLR 901(b). Inasmuch as plaintiffs in their amended complaint expressly seek only actual damages...CPLR 901(b) which prohibits class actions for recovery of minimum or punitive damages, (is) inapplicable “); *Ridge Meadows Homeowners’s Association, Inc. V. Tara Development Company, Inc.*, 242 A.D. 2d 947, 665 N.Y.S. 2d 361

(4th Dept. 1997)(“ On appeal...plaintiffs consent to strike that portion of the sixth cause of action seeking (minimum and treble damages pursuant to GBL § 349(h)) and to limit their demand to actual damages. Thus, CPLR 901(b) is no longer applicable and that cause of action may be maintained as a class action...We further modify the order by providing that any class member wishing to pursue statutory minimum and treble damages...may opt out of the class and bring an individual; action “); Super Glue Corp. V. Avis Rent A Car System, Inc., 132 A.D. 2d 604, 517 N.Y.S. 2d 764 (2d Dept. 1987); Weinberg v. Hertz Corporation, 116 A.D. 2d 1, 499 N.Y.S. 2d 693 (1st Dept. 1986), aff’d 60 N.Y. 2d 979, 516 N.Y.S. 2d 652, 509 N.E. 2d 347 (1987); Burns v. Volkswagen of America, Inc., 118 Misc. 2d 289, 460 N.Y.S. 2d 410 (Monroe Sup. 1982)(“ as for actual damages, however, § 901(b) would not bar a class action “); Hyde v. General Motors Corp., New York Law Journal, October 30, 1981, p. 5 (N.Y. Sup.).

cxxxvi. Catalano v. Heraeus Kulzer, inc., 305 A.D. 2d 356, 759 N.Y.S. 2d 159 (1st Dept. 2003)(certification denied as to express warranty claim; predominance of causation and reliance); Rivkin v. Heraeus Kulzer GMBH, 289 A.D. 2d 27, 734 N.Y.S. 2d 31 (1st Dept. 2001)(class of dental patients seek damages for defective “ polymer dental restoration, bonded to metal...that had failed “; strict products liability claims dismissed since only economic losses were sought).

cxxxvii. Frank v. DaimlerChrysler Corp., 292 A.D. 2d 118, 741 N.Y.S. 2d 9 (1st Dept. 2002), appeal dismissed 99 N.Y.S. 2d 502 (2002)(claims dismissed in the absence of actual damages; manufacturer should not be “ indemnifier(s) for a loss that may never occur “ and finding that the best way to “ promote consumer safety (was) to petition the NHTSA for a defect investigation “).

cxxxviii. Gordon v. Ford Motor Co., 260 A.D. 2d 164, 687 N.Y.S. 2d 369 (2d Dept. 1999)(breach of implied warranty of merchantability and express warranty; certification denied).

cxxxix. Morgan v. A.O. Smith Corp., 233 A.D. 2d 375, 650 N.Y.S. 2d 748 (2d Dept. 1996)(certification denied).

cxl. Ades v. Microsoft Corp., N.Y.L.J., October 9, 2001, p. 27, col. 1 (Kings Sup. 2001)(cabling causing freezing, pausing, program crashes and slowed operation; claims for breach of contract and injunctive relief requiring notice of cable defect viable).

cxli. Brummel v. Leading Edge Products, Inc., New York Law Journal, February 19, 1998, p. 28, col. 4 (N.Y. Sup.)(certification denied; eight different warranties; reliance and choice of law issues).

cxlii. In Donahue v. Ferolito, 786 N.Y.S. 2d 153 (N.Y. App. Div.

1st Dept. 2004) a class of consumers sought an injunction “ against continued sale of certain bottled soft drinks “ because of misrepresentations that the products “ would improve memory, reduce stress and improve overall health “. The Court dismissed the complaint finding no actual harm was alleged, no warranty was promised and enforced a disclaimer of any health benefit.

cxliii. See e.g., *Catalano v. Heraeus Kulzer, inc.*, 305 A.D. 2d 356, 759 N.Y.S. 2d 159 (1st Dept. 2003)(certification denied; predominance of the individual “ issues of causation and

reliance “); *Hazelhurst v. Brita Products Company*, 295 A.D. 2d 240, 744 N.Y.S. 2d 31 (1st Dept. 2002)(certification denied;

” Reliance... may not be presumed where, as here, a host of individual factors could have influenced a class members’s decision (to purchase) the product...a variety of reasons for replacing their filters, including the lapse of time, taste and appearance of the water...reliance upon the alleged misrepresentations of Brita is an issue that varies from individual to individual “); *Morgan v. A.O. Smith Corp.*, 233 A.D. 2d 375, 650 N.Y.S. 2d 748 (2d Dept. 1996)(certification denied; “ Individual issues exist...[which] influenced their decision to purchase [the silos]”; *Brummel v. Leading Edge Products, Inc.*, N.Y.L.J., February 19, 1998, p. 28, col. 4 (N.Y. Sup.)(defective computer software; certification denied; eight different warranties; reliance and choice of law issues).

cxliv. *Drizin v. Sprint Corp.*, 2004 WL 2591249 (1st Dept. 2004)(certification granted to class of telephone users charging fraud by maintaining “ numerous toll-free call service numbers that were nearly identical (except for one digit) to the toll-free numbers of competing long distance telephone service providers...’ fat fingers ‘ business...customers allegedly unaware that they were being routed through a different long distance provider, ended up being charged rates far in excess of what they would have paid to their intended providers “).

cxlv. *Meachum v. Outdoor World Corp.*, 273 A.D. 2d 209, 709 N.Y.S. 2d 449 (2d Dept. 2000)(certification granted).

cxlvi. *MaKastchian v. Oxford Health Plans, Inc.*, 270 A.D. 2d 25, 704 N.Y.S. 2d 44 (1st Dept. 2000)(certification granted).

cxlvii. *Thompson v. Whitestone Savings & Loan Assoc.*, 101 A.D. 2d 833, 475 N.Y.S. 2d 491 (2d Dept. 1984)(certification granted).

cxlviii. *Lauer v. New York Telephone Co.*, 231 A.D. 2d 126, 659 N.Y.S. 2d 359 (3d Dept. 1997)(certification granted).

cxlix. *Branch v. Crabtree*, 197 A.D. 2d 557, 603 N.Y.S. 2d 490 (2d Dept. 1993)(certification granted).

cl. *Dunleavy v. Youth Travel Associates*, 199 A.D. 2d 1046, 608 N.Y.S. 2d 30 (2d Dept. 1993)(certification granted); *King v. Club Med, Inc.*, 76 A.D. 2d 123, 430 N.Y.S. 2d 65 (1st Dept. 1980)(certification granted); *Quadagno v. Diamond Tours & Travel Inc.* 89 Misc. 2d 697, 392 N.Y.S. 2d 783 (N.Y. Sup. 1976)(certification granted).

cli. *Matter of Coordinated Title Insurance Cases*, 3 Misc. 3d 1007(A), 2002 WL 690380 (N.Y. Sup. 2004)(certification granted).

clii. *Gross v. Ticketmaster*, 5 Misc. 3d 1005 (N.Y. Sup. 2004)(certification granted).

cliii. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027(A) (Kings Sup. 2004)(certification granted).

cliv. *Feldman v. Quick Quality Restaurants, Inc.*, N.Y.L.J., July 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983) (fluid recovery; certification granted)

clv. See e.g., *Solomon v. Bell Atlantic Corp.*, 9 A.D. 3d 49, 777 N.Y.S. 2d 50 (1st Dept. 2004)(class of DSL subscribers claimed that defendant misrepresented the speed [“ FAST, high speed Internet access “], connectivity [“ You’re always connected “ and ease of installation [“ self installation...in minutes “] of its services; class decertified because of a lack of uniform misrepresentations; “ the individual plaintiffs did not all see the same advertisements; some saw no advertisements at all before deciding to become subscribers “); *DeFilippo v. Mutual Life Ins. Co.*, 2004 WL 2902570 (1st Dept. 2004)(certification denied; oral sales presentations); *Zehnder v. Ginsburg Architects*, 254 A.D. 2d 284, 678 N.Y.S. 2d 376 (2d Dept. 1998)(certification denied; condo designs not uniform); *Strauss v. Long Island Sports*, 60 A.D. 2d 501, 401 N.Y.S. 2d 283 (2d Dept. 1978) (certification denied); *Russo v. Massachusetts Mutual Life*, 192 Misc. 2d 349, 746 N.Y.S. 2d 380 (N.Y. Sup. 2002)(certification denied; oral misrepresentations).

clvi. See e.g., *Ackerman v. Price Waterhouse*, 252 A.D. 2d 179, 683 N.Y.S. 2d 179 (1st Dept. 1998)(presumption of reliance; certification granted); *King v. Club Med, Inc.*, 76 A.D. 2d 123, 430 N.Y.S. 2d 65 (1st Dept. 1980)(reliance presumed; certification granted); *Matter of Coordinated Title Insurance Cases*, 3 Misc. 3d 1007(A), 2002 WL 690380 (N.Y. Sup. 2004) (“ In common law fraud claims, proof of plaintiff’s reliance is crucial...reliance has been presumed in certain cases involving material omissions...”); *Guadagno v. Diamond*

Tours & Travel, Inc., 89 Misc. 2d 697, 392 N.Y.S. 2d 783 (N.Y. Sup. 1976).

clvii. See e.g., *Small v. Lorillard Tobacco Co.*, 94 N.Y. 2d 43, 698 N.Y.S. 2d 615, 720 N.E. 2d 892 (1999)(smoker’s class action certification denied); *Hazelhurst v. Brita Products Company*, 295 A.D. 2d 240, 744 N.Y.S. 2d 31 (1st Dept. 2002)(certification denied ” Reliance is required...and such reliance may not be presumed where, as here, a host of individual factors could have influenced a class members’s decision (to purchase) the product...”); *Banks v. Carroll & Graf Publishers, Inc.*, 267 A.D. 2d 68, 699 N.Y.S. 2d 403 (1st Dept. 1999)(certification denied); *Morgan v. A.O. Smith Corp.*, 223 A.D. 2d 375, 650 N.Y.S. 2d 748 (2d Dept. 1996)(certification denied).

clviii. *Anonymous v. CVS Corp.*, 293 A.D. 2d 285, 739 N.Y.S. 2d 565 (1st Dept. 2002)(class certification granted; breach of fiduciary claim sustained at 188 Misc. 2d 616, 728 N.Y.S. 2d 333 (N.Y. Sup. 2001)).

clix. *Gilman v. Merrill Lynch Pierce Fenner & Smith*, 93 Misc. 2d 941, 944, 404 N.Y.S. 2d 258 (N.Y. Sup. 1978)(brokerage customers claim breach of fiduciary duty by brokers “ withholding funds due them for a period of 24 hours or more, thus permitting it to use such funds for a day or more for its own profit “; certification granted).

clx. *Carnegie v. H & R Block, Inc.*, 269 A.D. 2d 145, 703 N.Y.S. 2d 27 (1st Dept. 2000)(breach of fiduciary duty claim dismissed; certification of GBL § 349 claim denied since misrepresentations, if any, based on oral statements).

clxi. *Hazelhurst v. Brita Products Company*, 295 A.D. 2d 240, 744 N.Y.S. 2d 31 (1st Dept. 2002)(certification denied).

clxii. *Dunleavy v. New Hartford Central School District*, 266 A.D. 2d 931, 697 N.Y.S. 2d 446 (4th Dept. 1999)(parents seek to recover deposits paid for school trips; ““ In order to establish a claim for negligent misrepresentation, plaintiffs were required to demonstrate that defendant had a duty, based upon some special relationship with them, to impart correct information, that the information was false or incorrect and that plaintiffs reasonably relied upon the information provided ‘...we conclude that defendant established that its teachers did not provide any false information...’ ”).

clxiii. *Malfitano v. Sprint Corp.*, N.Y.L.J., June 24, 2004, p. 17 (Kings Sup.)(certification granted).

clxiv. *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D. 2d 25, 704 N.Y.S. 2d 44 (1st Dept. 2000)(certification granted).

clxv. *Ackerman v. Price Waterhouse*, 252 A.D. 2d 179, 683 N.Y.S. 2d 179 (1st Dept.

1998)(certification granted).

clxvi. See e.g., *Rallis v. City of New York*, 3 A.D. 3d 525, 770 N.Y.S. 2d 736 (2d Dept. 2004) (water damage from flooding; certification denied); *Catalano v. Heraeus Kulzer, Inc.*, 305 A.D. 2d 356, 759 N.Y.S. 2d 159 (1st Dept. 2003)(defective polymer-based system of dental restorations; certification denied); *Lieberman v. 293 Mediterranean Market Corp.*, 303 A.D. 2d 560, 756 N.Y.S. 2d 469 (2d Dept. 2002)(food poisoning at restaurant; certification denied); *Geiger v. American Tobacco Co.*, 277 A.D. 2d 420, 716 N.Y.S. 2d 108 (2d Dept. 2000)(smokers' mass tort class action; certification denied); *Weprin v. Fishman*, 275 A.D. 2d 614, 713 N.Y.S. 2d 57 (1st Dept. 2000)(collapse of elevator tower closes street; claims of class of businesses for economic losses dismissed); *Aprea v. Hazeltine Corp.*, 247 A.D. 2d 564, 669 N.Y.S. 2d 61 (2d Dept. 1998)(toxic emissions; certification denied); *Karlin v. IVF America, Inc.*, 239 A.D. 2d 562, 657 N.Y.S. 2d 460 (2d Dept. 2000)(misrepresentation of in vitro fertilization successful pregnancy rates; certification denied); mod'd on other grounds, 93 N.Y. 2d 282, 690 N.Y.S. 2d 495, 712 N.E. 2d 662 (1999); *Komonczi v. Gary Fields*, 232 A.D. 2d 374, 648 N.Y.S. 2d 151 (2d Dept. 1996)(improperly performed colonoscopies; certification denied); *McBarnette v. Feldman*, 153 Misc. 2d 627, 582 N.Y.S. 2d 900 (Suffolk Sup. 1992)(patients of AIDS-infected dentist seeks emotional distress damages; certification denied; mass torts not favored).

clxvii. Dickerson, *New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes*, New York State Bar Association Journal, Vol. 76, No. 7, September 2004, p. 10.

clxviii. *Karlin v. IVF America, Inc.*, 93 N.Y. 2d 282, 690 N.Y.S. 2d 495, 712 N.E. 2d 662 (1999).

clxix. *Gaidon v. Guardian Life Insurance Company*, 96 N.Y. 2d 201, 727 N.Y.S. 2d 30, 750 N.E. 2d 1078 (2001); *Stutman v. Chemical Bank*, 95 N.Y. 2d 24, 29, 709 N.Y.S. 2d 892, 731 N.E. 2d 608 (2000); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, NA*, 85 N.Y. 2d 20, 25, 647 N.Y.S. 2d 741, 623 N.E. 2d 529 (1995); *Anonymous v. CVS Corp.*, 293 A.D. 2d 285, 739 N.Y.S. 2d 565 (1st Dept. 2002)(class certification granted); *Broder v. MBNA Corp.*, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(certification granted to G.B.L. § 349 claim); *Coordinated Title Insurance Cases*, 3 Misc. 3d 1007(A), 2002 WL 690380 (N.Y. Sup. 2004)("...The Court of Appeals has held that reliance and scienter are not elements of a (GBL § 349) claim ").

clxx. *Solomon v. Bell Atlantic Corp.*, 9 A.D. 3d 49, 777 N.Y.S. 2d 50 (1st Dept. 2004)(" Individual trials also would be required to determine damages based on the extent of each plaintiff's injuries; certification denied); *DeFilippo v. Mutual Life Ins. Co.*, 2004 WL 2902570 (1st Dept. 2004)(class decertified a because a recent Court of Appeals' decision (*Goshen v. Mutual*

Life Ins. Co., 98 N.Y. 2d 314 (2002)) which held that " the deceptive acts or practices under GBL § 349 ' [are] not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer ' eliminated any doubt (such claims) would require individualized inquires into the conduct of defendants' sales agents with respect to each individual purchaser "); Hazelhurst v. Brita Products Company, 295 A.D. 2d 240, 744 N.Y.S. 2d 31 (1st Dept. 2002) (certification denied).

clxxi. Gaidon v. Guardian Life Insurance Company, 96 N.Y. 2d 201, 727 N.Y.S. 2d 30, 750 N.E. 2d 1078 (2001).

clxxii. Colbert v. Rank America, Inc., 295 A.D. 2d 300, 743 N.Y.S. 2d 150 (2d Dept. 2002)(GBL 349 claim sustained; GBL 350 claim dismissed); Colbert v. Rank America, Inc., 295 A.D. 2d 302, 742 N.Y.S. 2d 905 (2d Dept. 2002)(motion to decertify denied); People v. Lipsitz, 174 Misc. 2d 571, 663 N.Y.S. 2d 468, 475 (1997)(" the mere falsity of the advertising content is sufficient as a basis for the false advertising claim ").

clxxiii. Drizin v. Sprint Corp., 2004 WL 2591249 (1st Dept. 2004)(class of telephone users charged defendants with fraud and violation of G.B.L. § 349 by maintaining " numerous toll-free call service numbers that were nearly identical (except for one digit) to the toll-free numbers of competing long distance telephone service providers...' fat fingers ' business... customers allegedly unaware that they were being routed through a different long distance provider, ended up being charged rates far in excess of what they would have paid to their intended providers "; class certification granted but limited to New York State residents).

clxxiv. Matter of Coordinated Title Insurance Cases, 2 Misc. 3d 1007(A), 784 N.Y.S. 2d 919 (Nassau Sup. 2004)(classes of home buyers charged title insurance companies with fraud, unjust enrichment and violation of G.B.L. § 349 by failing to " comply with their own filed and state-approved title insurance premium rates "; certification granted).

clxxv. Gross v. Ticketmaster L.L.C., 5 Misc. 3d 1005(A) (N.Y. Sup. 2004)(class of purchasers of \$98.50 tickets for a concert " billed as ' Michael Jackson: 30th Anniversary Celebration, the Solo Years ' claimed obstructed views and charged defendant with fraud, breach of contract, unjust enrichment and violation of

G.B.L. § 349. After dismissing the fraud claim the Court granted class certification finding the " the class action form... superior to a large number of individual claimants having to pursue their respective rights to small refunds ").

clxxvi. *Mountz v. Global Vision Products, Inc.*, 3 Misc. 3d 171, 770 N.Y.S. 2d 603 (N.Y. Sup. 2003)(class of purchasers of Avacor, a hair loss treatment product, alleged fraudulent and negligent misrepresentations of " ` no known side effects ` (as being) refuted by documented minoxidil side effects... cardiac changes, visual disturbances, vomiting, facile swelling and exacerbation of hair loss "; G.B.L. §§ 349, 350 claims sustained but limited coverage to New York residents deceived in New York).

clxxvii. *Amalfitano v. Sprint Corp.*, 4 Misc. 3d 1027(A) (N.Y. Sup. 2004)(a class of purchasers of the Qualcomm 2700 wireless telephone charged defendant with fraud, breach of contract, negligent misrepresentation and violations of G.B.L. § 349 in failing to honor a \$50 rebate promotion. The Court dismissed the G.B.L. § 349 claim but certified the class).

clxxviii. *In Peck v. AT&T Corp.*, N.Y.L.J., August 1. 2002, p. 18, col. 2 (N.Y. Sup.) a GBL 349 consumer class action involving cell phone service which " improperly credited calls causing (the class) to lose the benefit of weekday minutes included in their calling plans ", approved a proposed settlement on behalf of residents in New York, New Jersey and Connecticut [" it would be a waste of judicial resources to require a different [GBL 349] class action in each state...where, as here, the defendants have marketed their plans on a regional (basis) "].

clxxix. *In Goshen v. The Mutual Life Ins. Co.*, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002) and *Scott v. Bell Atlantic Corp.*, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002), the Court of Appeals, not wishing to " tread on the ability of other states to regulate their own markets and enforce their own consumer protection laws " and seeking to avoid " nationwide, if not global application " , held that General Business Law [GBL] 349 requires that " the transaction in which the consumer is deceived must occur in New York " .

clxxx. Do corporations and other non-consumers have standing to assert claims under G.B.L. § 349? The Second Circuit Court of Appeals in *Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA Inc.*, 344 F. 3d 211, 217-218 (2d Cir. 2003), certified two questions to the New York Court of Appeals, the first of which was answered at *Blue Cross & Blue Shield of N.J. Inc. V. Philip*

Morris USA, Inc., 3 N.Y. 2d 200, 205 (2004). Relying upon the common law rule that “ an insurer or other third-party payer of medical expenditures may not recover derivatively for injuries suffered by its insured ” the Court of Appeals held, without deciding the ultimate issue of whether non-consumers are covered by G.B.L. § 349, that Blue Cross’s claims were too remote to provide it with standing under G.B.L. § 349 [“ Indeed, we have warned against ‘ the potential for a tidal wave of litigation against businesses that was not intended by the Legislature ‘ ”]).

clxxxix. *Gaidon v. The Guardian Life Ins. Co.*, 2 A.D. 3d 130, 767 N.Y.S. 2d 599 (1st Dept. 2003)(certification denied; oral misrepresentations require individual proof); *Solomon v. Bell Atlantic Corp.*, 9 A.D. 3d 49, 777 N.Y.S. 2d 50 (1st Dept. 2004)(“ Plaintiffs have not demonstrated that all members of the class saw the same advertisements; class action decertified); *Broder v. MBNA Corp.*, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(“ allegations of deceptive acts are based on identical written solicitations and the particular damages of each class member can be easily computed “; certification granted to G.B.L. § 349 claim).

clxxxix. *Gross v. Ticketmaster*, New York Law Journal, September 28, 2004, p. 18, col. 3 (N.Y. Sup.)(certification granted); *Matter of Coordinated Title Insurance Cases*, 3 Misc. 3d 1007(A), 2002 WL 690380 (N.Y. Sup. 2004)(certification granted; “ Because the allegations...involve largely omissions and not affirmative representations, no individual issues of what the defendants’ said will predominate “); *Broder v. MBNA Corp.*, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(“ allegations of deceptive acts are based on identical written solicitations and the particular damages of each class member can be easily computed “; certification granted to G.B.L. § 349 claim).

clxxxix. *Cox v. Microsoft Corp.*, 8 A.D. 3d 39, 40, 778 N.Y.S. 2d 147 (1st Dept. 2004)(“ A cause of action under General Business Law § 349 is stated by plaintiff’s allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors to inhibit competition and technological development, and creating an ‘ applications barrier ‘ in its Windows software that, unbeknownst to consumers, rejected competitors’ Inter-compatible PC operating systems, and that such practices resulted in artificially inflated prices for defendant’s products and denial on consumer access to competitors’ innovations, services and products).

clxxxix. *Cox v. Microsoft Corp.*, 8 A.D. 3d 39, 40, 778 N.Y.S. 2d 147 (1st Dept. 2004)(“ A cause of action under General Business Law § 349 is stated by plaintiff’s allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices...We

also reject Microsoft's argument that plaintiffs are not entitled to class action relief under General Business Law § 349 since the statutorily prescribed \$50 minimum damages to be awarded for a violation of that section constitutes a 'penalty' within the meaning of CPLR 901(b). Inasmuch as plaintiffs in their amended complaint expressly seek only actual damages...CPLR 901(b) which prohibits class actions for recovery of minimum or punitive damages, (is) inapplicable “); Super Glue Corp. V. Avis Rent Car System, Inc., 132 A.D. 2d 604, 517 N.Y.S. 2d 764 (2d Dept. 1987); Weinberg v. Hertz Corporation, 116 A.D. 2d 1, 499 N.Y.S. 2d 693 (1st Dept. 1986), aff'd 60 N.Y. 2d 979, 516 N.Y.S. 2d 652, 509 N.E. 2d 347 (1987); Burns v. Volkswagen of America, Inc., 118 Misc. 2d 289, 460 N.Y.S. 2d 410 (Monroe Sup. 1982)(“ as at actual damages, however, § 901(b) would not bar a class action “); Hyde v. General Motors Corp., New York Law Journal, October 30, 1981, p. 5 (N.Y. Sup.).

clxxxv. Ridge Meadows Homeowners's Association, Inc. V. Tara Development Company, Inc., 242 A.D. 2d 947, 665 N.Y.S. 2d 361 (4th Dept. 1997)(“ On appeal... plaintiffs consent to strike that portion of the sixth cause of action seeking (minimum and treble damages pursuant to GBL § 349(h)) and to limit their demand to actual damages. Thus, CPLR 901(b) is no longer applicable and that cause of action may be maintained as a class action...We further modify the order by providing that any class member wishing to pursue statutory minimum and treble damages...may opt out of the class and bring an individual; action “).

clxxxvi. Asher v. Abbott Laboratories, 290 A.D. 2d 208, 737 N.Y.S. 2d 4 (1st Dept. 2002)(“ private persons are precluded from bringing a class action under the Donnelly Act...because the treble damage remedy...constitutes a 'penalty' within the meaning CPLR 901(b) “); Cox v. Microsoft Corp., 290 A.D. 2d 206, 737 N.Y.S. 2d 1 (1st Dept. 2002); Ho v. VISA U.S.A. Inc., 3 Misc. 3d 1105(A), 2004 WL 1118534 (N.Y. Sup. 2004)(“ plaintiffs' alleged injury is far too remote to provide antitrust standing under the Donnelly Act “ and is dismissed); Rubin v. Nine West Group, Inc., 1999 WL 1425364 (N.Y. Sup. 1999)(“ Although plaintiff makes the general statement that ' CPLR 901(b) does not create a barrier to class actions under the Donnelly Act '...a reading of that statute and the Act establish the contrary “); Russo & Dubin v. Allied Maintenance Corp., 95 Misc. 2d 344, 407 N.Y.S. 2d 617 (N.Y. Sup. 1978)(“...even if plaintiff's contention that they are bringing this action for single damages were accepted and such an action was permitted, this action could nevertheless not proceed as a class action. Plaintiffs cannot be considered adequate class representatives since by demanding members of the class to waive their right to treble damages, they cannot be said to fairly and adequately protect the interest of the class “); Blumenthal v. ASTA, New York Law Journal, July 8, 1977, p. 5, col. 1 (N.Y. Sup.)(certification denied).

clxxxvii. In Ganci v. Cape Canaveral Tour and Travel, Inc., 4 Misc. 3d 1003(A)(Kings Sup. 2004) and Giovanniello v. Hispanic Media Group

USA, Inc., 4 Misc. 3d 440, 780 N.Y.S. 2d 720 (Nassau Sup. 2004) classes of consumers who received unsolicited telephone calls or commercial faxes claimed violations of the federal Telephone Consumer Protection Act [TCPA]. In denying class certification the Courts relied upon CPLR § 901(b). " The TCPA statute does not specifically provide for a class action to collect the \$500 damages and said \$500 damages is a ' penalty '...or a ' minimum measure of recovery '...the allowance of treble damages under the TCPA is punitive in nature and constitutes a penalty " .

clxxxviii. In Fleming v. Barnswell Nursing Home, 309 A.D. 2d 1132, 766 N.Y.S. 2d 241 (3d Dept. 2003), the survivor of a deceased nursing home resident commenced a mass tort class action against the nursing home and physician alleging medical malpractice, negligence and a violation of Public Health Law § 2801-d. Class certification was denied for the negligence claims but granted for the Public Health Law § 2801-d claims. " An action by residents of a residential health care facility for violating their rights or benefits created by statute...may be brought as a class action if the prerequisites to class certification set forth in CPLR article 9 are satisfied... violation of DOH rules affecting residents predominate...(claims of) inadequate heat and inedible food are typical " .

clxxxix. Feder v. Staten Island Hospital, 304 A.D. 2d 470, 758 N.Y.S. 2d 314 (1st Dept. 2003)(patients claim overcharges for copies of medical records as violative of Public Health Law § 18(2)(e); certification denied).

cx. Miller v. 14th Street Associates, N.Y.L.J., May 29, 1985, p. 12, col. 1 (N.Y. Sup. 1985), aff'd 115 A.D. 2d 1022, 495 N.Y.S. 2d 879 (1st Dept. 1985), motion for leave to appeal dismissed 67 N.Y. 2d 603, 500 N.Y.S. 2d 1025, 490 N.E. 2d 1231 (1986)(plaintiff class of 2 million tenants sue defendant class of New York City landlords seeking higher interest rates on security deposits; motion for summary judgment and dismissal of class allegations denied).

cxci. Caesar v. Chemical Bank, 66 N.Y. 2d 698, 496 N.Y.S. 2d 418, 487 N.E. 2d 275 (1985)(unauthorized use of pictures of employees; certification granted)

cxcii. Anonymous v. CVS Corp., 293 A.D. 2d 285, 739 N.Y.S. 2d 565 (1st Dept. 2002)(certification granted to privacy class action challenging the sale of confidential and/or prescription information without prior notice); Smith v. Chase Manhattan Bank USA, 293 A.D. 2d 598, 741 N.Y.S. 2d 100 (1st Dept. 2002)(bank customers challenge sale of their names, phone numbers and credit histories to telemarketing firm in return for which Chase would receive " a commission (of up to 24% of the sale) in the event that a product or service offered were purchased " ; complaint dismissed).

cxiii. Gurnee v. Aetna Life & Casualty Co., 104 Misc. 2d 840, 428 N.Y.S. 2d 992 (1980)(case dismissed), aff'd 79 A.D. 2d 860, 437 N.Y.S. 2d 944 (4th Dept. 1980), rev'd 55 N.Y. 2d 184, 433 N.E. 2d 128, 448 N.Y.S. 2d 145, cert. Denied 103 S. Ct. 83 (

1982); Gurnee v. Aetna Life & Casualty Co., New York Law Journal, November 28, 1983, p. 12, col. 4, aff'f 101 A.D. 2d 722, 477 N.Y.S. 2d 956 (1st Dept. 1984)(class certification granted)

(bilateral class action of insureds against automobile liability insurance companies over the coverage of no fault insurance).

cxci. In Dougherty v. North Fork Bank, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2d Dept. 2003) a class challenged a mortgagor's imposition of " a \$5 ' Facsimile Fee ' , a \$25 ' Quote Fee ' and a \$100 ' Satisfaction Fee ' for the preparation of (a mortgage) satisfaction "; summary judgment for plaintiffs on the facsimile fee and quote fee as a violation of Real Property Law § 274-a(2)(a) and summary judgment to defendant on the satisfaction fee).

cxcv. In Trang v. HSBC Mortgage Corp., N.Y.L.J., April 17, 2002, p. 28, col. 3 (N.Y. Sup.) and Negrin v. Norwest Mortgage, Inc., 293 A.D. 2d 726, 741 N.Y.S. 2d 287 (2002) classes of mortgagors claimed that recording and fax fees violated GBL 349 and Real Property Law 274-a. The Court in Trang denied defendant's motion for summary judgment and set a hearing date for plaintiff's class certification motion. The Court in Negrin reversed on class certification because the lower Court failed to determine if the plaintiff had standing to represent the class and " to analyze whether the action meets the statutory prerequisites for class action certification " .

cxvii. See Sternlight & Jensen, " Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse? ", 67 Law and Contemporary Problems, Duke University Law School, Winter/Spring 2004 Nos. 1 & 2, pp. 77-78

(" Companies are increasingly drafting arbitration clauses worded to prevent consumers from bringing class actions against them in either litigation or arbitration. If one looks at the form contracts she received regarding her credit card, cellular phone, land phone, insurance policies, mortgage and so forth, most likely, the majority of those contracts include arbitration clauses, and many of those include prohibitions on class actions. Companies are seeking to use these clauses to shield themselves from class action liability, either in court or in arbitration..

.numerous courts have held that the inclusion of a class action prohibition in an arbitration clause may render that clause unconscionable (reviewing cases) ").

cxviii. Green Tree Financial Corp. V. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)(class wide arbitration permissible unless expressly prohibited in arbitration agreement; remand for arbitrator's decision on whether class action procedures are available); Green Tree Financial Corp. V. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)(arbitration clause which is silent on fees and

costs in insufficient to render agreement unreasonable); Shearson American Express, Inc. V. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987).

cxcviii. Green Tree Financial Corp. V. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)(class wide arbitration permissible unless expressly prohibited in arbitration agreement; remand for arbitrator’s decision on whether class action procedures are available); Pacificare Health Systems, Inc. v. Book, 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003)(arbitrator should decide whether treble damages are prohibited by agreement’s limitation on recovery of punitive damages). See also: Pedcor Management Co. V. Nations Personnel of Texas, 2003 WL 21927036 (5th Cir. 2003)(“ we hold today that [following *Bazzle*]...arbitrators should decide whether class arbitration is available or forbidden “).

cxcix. See e.g.,

Supreme Court: Green Tree Financial Corp. V. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)(class wide arbitration permissible unless expressly prohibited in arbitration agreement; remand for arbitrator’s decision on whether class action procedures are available).

Second Circuit: Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654 (S.D.N.Y. 1997)(class wide arbitration barred unless provided for in agreement).

New York: In re Application of Correction Officer’s Benevolent Ass’n, 276 A.D. 2d 394, 715 N.Y.S. 2d 387 (1st Dept. 2000)(parties agreed to class wide arbitration in interpreting a clause in collective bargaining agreement providing military leaves with pay); Harris v. Shearson Hayden Stone, Inc., 82 A.D. 2d 87, 441 N.Y.S. 2d 70 (1981)(arbitration agreement enforced; class wide arbitration not appropriate).

cc. Johnson v. Chase Manhattan Bank, USA, N.A., 2 Misc. 3d 1003 ((A)(N.Y. Sup. 2004)(class bound by unilaterally added mandatory arbitration agreement and must submit to class arbitration pursuant to agreement and Federal Arbitration Act).