SUMMARY OF ARTICLE 9 CLASS ACTIONS IN 2005

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Last year the Court of Appeals ruled on the meaning of " annual premium " and " risk free " insurance in three consumer class actions. In addition, the Appellate Divisions and numerous trial Courts ruled on a variety of class actions in 2005.

" Risk Free " Insurance

In Goldman v. Metropolitan Life Insurance Company[i] the Court

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of Appeals addressed the issue of " whether there is a breach of an (life) insurance contract when a policy date is set prior to an effective date and the insured, in the first year of the policy, must pay for days that are not covered " in three class actions. The classes of insureds had chosen to pay the first premium at the time of delivery of the policy which did not become effective until receipt of payment. The classes claimed breach of contract, unjust enrichment and violation of G.B.L. § 349 in that use of " the word ' annual ' to describe premium payments is ambiguous as to coverage because the insured, in the first year, receives less than 365 days of coverage ". The Court of Appeals reviewed similar cases from other jurisdictions[ii] and dismissed all three class actions finding no contractual ambiguity [" There is nothing in the ' Risk Free ' period suggesting that coverage will start from the policy date without the payment of a premium "], deception or unjust enrichment[iii].

Monopolistic Business Practices

In Cox v. Microsoft[iv] the Court granted certification to a consumer class action seeking damages arising from Microsoft's alleged " monopoly in the operating system market and in the applications systems software market " notwithstanding an earlier decision[v] dismissing a Donnelly Act claim as being prohibited by

C.P.L.R. § 901(b). The Court certified a previously sustained[vi] G.B.L. § 349 claim [" plaintiffs allege that Microsoft was able to charge inflated prices for its products as a result of its deceptive actions and that these inflated prices [were] passed to consumers "] and unjust enrichment claim [" individual issues regarding the amount of damages will not prevent class action certification "]. Lastly, the Court noted that " the difficulty and expense of proving the dollar amount of damages an individual consumer suffered, versus the comparatively small amount that any one consumer would expect to recover, indicates that the class action is a superior method to adjudicate this controversy ".

In Ho v. Visa U.S.A., Inc.[vii], a class of consumers claimed violations of the Donnelly Act and G.B.L. § 349 by credit card issuers in forcing retailers to accept " defendants' debit cards if they want to continue accepting credit cards ". The Court dismissed both claims as too " remote and derivative ", unmanageable because damages " would be virtually impossible to calculate " and covered by an earlier settlement of a retailers' class action[viii] [" Thus, (defendants) have been subjected to judicial remediation for their wrongs and any recovery here would be duplicative "].

In Cunningham v. Bayer, AG[ix], a class of consumers charged the defendant with violations of the Donnelly Act. The Court

denied class certification and granted summary judgment for the defendant relying upon its reasoning in Cox v. Microsoft[x] [" we decline to revisit those precedents "].

Forum Shopping: The Donnelly Act Goes To Federal Court

Consumer class actions alleging violations of the Donnelly Act have not been certified because of C.P.L.R. 901(b)'s prohibition against class actions seeking penalties or minimum recoveries[xi]. Can C.P.L.R. § 901(b)'s prohibition be circumvented by asserting a Donnelly Act claim in federal court and seeking class certification pursuant to F.R.C.P. 23? In Leider v. Ralfe[xii], a consumer class action setting forth " federal and state claims based on De Beers alleged price-fixing, anticompetitive conduct and other nefarious business practices " the Court answered in the negative concluding " that N.Y. C.P.L.R. § 901(b) must apply in a federal forum because it would contravene both of these mandates to allow plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court " and would encourage forum-shopping[xiii].

Fruity Booty Settlement Rejected

In Klein v. Robert's American Gourmet Food, Inc.[xiv], the Appellate Division rejected a proposed discount coupon settlement[xv] of a consumer class action alleging

misrepresentations of the fat and caloric content of Pirate's Booty, Fruity Booty and Veggie Booty [" Where as here the action is primarily one for the recovery of money damages, determining the adequacy of a proposed settlement generally involves balancing the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation...The amount agreed to here was $3.5 million to be issued and redeemed by the defendants, over a period of years, in the form of discount coupons good toward future purchases of Robert's snack food. Settlements that include fully assignable and transferable discount coupons that can be aggregated and are distributable directly to class members have been approved because such coupons have been found to provide ' real and quantifiable value to the class members '...Here, however, there is no indication that the discount coupons have any intrinsic cash value, or that they may be assigned, aggregated or transferred in any way "].

Listerine As Effective As Floss?

After Pfizer was enjoined[xvi] under the Lanham Act from advertising that " Listerine's as effective as floss " a class of New York consumers alleged in Whalen v. Pfizer[xvii], violations of G.B.L § 349 and unjust enrichment " for false statements and

misrepresentations in Pfizer's marketing and advertising communications ". In denying class certification the Court noted that the plaintiff could not recall " seeing any of Pfizer's alleged deceptive marketing ads " and " continues to use Listerine as her daily mouthwash and will probably do so throughout this litigation ". The Court also found a predominance of individual issues in the G.B.L. § 349 claim [individual proof needed of exposure to the advertising[xviii], " the various bases for liability and damages " and causation " of actual harm "] and a failure to demonstrate any unjust enrichment [" no evidence that Pfizer increased the price of Listerine before, during or after the alleged false advertisements were made or otherwise received any inequitable financial gain from the product "].

Cable TV

In Saunders v. AOL Time Warner, Inc.[xix] a class of cable TV subscribers claimed inadequate " notice of the circumstance that access to Basic service cable television programming does not require rental of a cable converter box ". In dismissing the action the Court found that the plaintiff was inadequate since " she was not aggrieved by the complained of conduct ", the notice was in compliance with F.C.C. regulations [47 CFR

76.1622(b)(1)] and claims alleging fraud [“ Assuming without deciding that the representations in the notice are somewhat exaggerated, they do not amount to a predicate for a claim for fraud “], negligent misrepresentation [“ absence of special relationship “], breach of contract, unjust enrichment [“ existence of valid and enforceable cable subscriber contracts defeats the unjust enrichment cause of action “] and an accounting [“ absence of a confidential or fiduciary relationship “]. The G.B.L. § 349 claim was dismissed without prejudice to re-filing against the proper defendant.

In Samuel v. Time Warner, Inc.[xx], a class of cable television subscribers claimed a violation of G.B.L. § 349 and the breach of an implied duty of good faith and fair dealing because defendant allegedly “ is charging its basic customers for converter boxes which they do not need, because the customers subscribe only to channels that are not being converted ...(and) charges customers for unnecessary remote controls regardless of their level of service “. In sustaining the G.B.L. § 349 claim based, in part, upon “ negative option billing “[xxi], the Court held that defendant’s “ disclosures regarding the need for, and/or benefits of, converter boxes and...remote controls are buried in the Notice, the contents of which are not specifically brought to a new subscriber’s attention...a claim for violation of GBL § 349 is stated “.

In Tepper v. Cable Vision Systems Corp.,[xxii] a class action by cable TV subscribers was dismissed and plaintiffs' motion for class certification denied as moot, the Court finding no private right of action under Public Service Law §§ 224-a or 226 and, further, that plaintiffs did not have standing to seek redress for alleged violations of the provisions of franchise agreements to which they were not parties.

Illegal Telephone " Slamming "

In Baytree Capital Associates, LLC v. AT&T Corp.[xxiii] a class of consumers charged defendant with " ' illegal ' slamming[xxiv] of telephone service " and alleged fraud, tortious interference with its contract with Verizon, unjust enrichment and violation of G.B.L. § 349. The Court dismissed the G.B.L. § 349 claim finding the corporate plaintiff not to be a " consumer " [" Under New York law, ' the term ' consumer ' is consistently associated with an individual or natural person who purchases goods, services or property primarily for ' personal, family or household purposes '"][xxv], the unjust enrichment claim [" failed to allege that AT&T was enriched at the expense of Baytree "] and the class allegations finding an absence of commonality and typicality [" Class allegations may be dismissed[xxvi] where questions of law and fact affecting the particular class members would not be common to the class proposed...Here, the proposed class, as broadly defined... lacks commonality with respect to the specific

fraudulent conduct with which each individual putative class member's service was changed improperly or illegally "].

Rental Cars

In Goldberg v. Enterprise Rent-A-Car Company[xxvii], a class of rental car customers claimed that defendant violated former G.B.L. § 396-z and G.B.L. § 349. In denying class certification and granting summary judgment for defendant the Court found that G.B.L. § 396-z did not provide consumers with a private right of action [" claims for restitution were properly dismissed as an effort to circumvent the legislative preclusion of private lawsuits for violation of this state "] and the G.B.L. § 349 claims were inadequate for a failure to allege actual harm [" Plaintiffs do not allege they were charged for any damage to the rented vehicles, they made no claims on the optional insurance policies they purchased, and their security deposits were fully refunded. There is no allegation that they received less than they bargained for under the contracts "].

Document Preparation Fees

In Fuchs v. Wachovia Mortgage Corp.[xxviii], a class of mortgagors claimed that defendant mortgagor's " document

preparation fee of $100...constitutes the unlawful practice of law in violation of Judiciary Law §§ 478, 484 and 495(3) “ and a violation of G.B.L. § 349. The Court dismissed the Judiciary Law §§ 478, 484 claims because the defendant is a corporation, the G.B.L. § 349 claim because “ No (G.B.L. § 349) claim can be made...when the allegedly deceptive activity is fully disclosed “, the Judiciary Law § 495(3) claim because defendant did not provide
“ specific legal advise relating to the refinancing of “ mortgages and claims for breach of contract, unjust enrichment and conversion. The Court also found that “ any New York statute (which) purports to prevent federally chartered banks from collecting such a fee...(is) preempted by federal statutes and regulations “.

Tax Assessments

In Neama v. Town of Babylon[xxix], a class of commercial property owners sought to recover “ a portion of a special tax assessment “. The Court denied certification relying upon the governmental operations rule and for failing to show that a majority of the class “ paid the disputed tax assessment under protest “[xxx]. The Court also noted that the filing of a class action complaint “ is not a sufficient indication of protest by

each proposed " class member[xxxi].

Arbitration Clauses & Class Actions

The enforceability of mandatory arbitration clauses in consumer contracts including provisions waiving the right to bring a class action has been considered recently by several Courts[xxxii]. In Heiko Law Offices, P.C. v. AT&T Wireless Services, Inc.[xxxiii] a class of cellular telephone users claimed breach of contract and fraud involving the imposition of " additional roaming charges ". The Court enforced the mandatory arbitration agreement and stayed the prosecution of the class action[xxxiv] [" plaintiff agreed to be bound by the agreement by using the cellular telephone and the valid arbitration clause encompassed both contract and fraud claims "]. The plaintiffs' cross motion seeking class certification was denied without prejudice [" Whether the action should proceed as a class action is for the arbitrator to decide "][xxxv].

In Investment Corp. v. Kaplan[xxxvi], a derivative action on behalf of a partnership was stayed and an arbitration agreement enforced with the Court ruling that federal law controls and " the issue of whether plaintiffs' claims are barred by the statute of limitations is one for the arbitrator ".

Vanishing Premiums

In DeFilippo v. The Mutual Life Ins. Co.[xxxvii], the latest case involving " vanishing premium " life insurance policies[xxxviii], the Court decertified a class of insureds alleging violations of G.B.L. § 349 because such claims " would require individualized inquiries into the conduct of defendants' sales agents with respect to each individual purchaser "[xxxix].

Labor Disputes

In Jacobs v. Macy's East, Inc.[xl], the Court, which had earlier sustained a cause of action under Labor Law § 193[xli], certified a class of commissioned sales persons seeking wages wrongfully withheld arising from defendant's practice of " deducting ' unidentified returns ' from their commissions after the sales ". The Court also rejected the contention that " CPLR 901(b) bars certification "[xlii] and awarded $5,000 in sanctions against defendants for " misleading representations concerning the existence of critical computer tapes and paper files necessary to support...plaintiffs' motion (seeking) class action certification ".

In Wilder v. May Department Stores Company[xliii], a class of commissioned sales persons sought recovery of amounts deducted for ' unidentified returns '[xliv] from their commissions. The Court

granted certification finding adequacy of representation in that plaintiff had sufficient financial resources[xlv] and " a general awareness of the nature of the underlying dispute, the ongoing litigation and the relief sought on behalf of the class ".

In Gawez v. Inter-Connection Electric, Inc.[xlvi], a class of employees charged defendants with failing " to pay or...insure payment, at the prevailing rates of wages and supplemental benefits for work plaintiffs performed on numerous public works projects " and sought the " enforcement of various labor and material payment bonds ". The Court denied class certification because of a lack of numerosity [31 of the 47 workers had settled their claims] and superiority and granted summary judgment on the grounds of federal preemption [" no private right of action exists to enforce contracts requiring payment of federal Davis-Bacon Act prevailing wages "].

In Shelton v. Elite Model Management, Inc.[xlvii], models charged modeling agencies with a unfair labor and business practices including " undisclosed kickbacks to modeling agencies ",
" circumventing the employment agency law by using ' captive ' affiliates ", " price gouging of models ", " double-dipping ", and " collusion among model agencies to set fees ". Some of the claims were withdrawn against some defendants as a result of the settlement of a federal class action[xlviii] and the action dismissed

“ because none of the remaining named plaintiffs allege a relationship with any of the remaining non-settling defendants ”[xlix].

In North Shore Environmental Solutions, Inc. v. Glass,[l] the action arose from an underlying class action to recover damages for the underpayment of wages by North Shore Environmental Solutions, Inc. pursuant to Labor Law § 220. In the underlying class action, plaintiffs retained certain accountants to compute the amount of the underpayment. After the parties entered into a settlement agreement to discontinue the action, North Shore commenced this action to recover damages from the defendants for making allegedly fraudulent calculations in the underlying class action. The Court subsequently granted the defendants' motion to dismiss the complaint finding that North Shore should have sought such relief by “ moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent procurement, not [by] a second plenary action collaterally attacking the judgment in the original action. ”

In Colgate Scaffolding and Equipment Corp. v. York Hunter City Services, Inc.[li], a class of plaintiffs consisting of potential beneficiaries of a statutory trust imposed by Article 3-A of the Lien Law brought an action alleging that certain funds required to be segregated under that law were diverted by the defendants. Plaintiffs sought documents relating to several contracts for which one of the defendants functioned as construction manager, including documents generated by SCA's Inspector General in connection with such investigation. In opposition to the motion, SCA argued that the documents produced by the office of the Inspector General were protected by the law enforcement privilege and the public interest privilege. The Appellate Division ordered the Supreme

Court to review the requested documents in camera and to redact confidential and personal information not factually relevant to plaintiffs' case . In Cox v. NAP Construction Company,[lii] a class of laborers brought an action against NAP Construction Company for alleged failure to pay prevailing wage rates, supplemental benefits and overtime. The public works contracts provided that, *inter alia*, NAP would pay all laborers not less than the wages prevailing in the locality of the project, as predetermined by the Secretary of Labor of the United States pursuant to the Davis-Bacon Act, 40 U.S.C. §§ 276a – 276a-5. Plaintiffs also asserted causes of action for breach of contract, quantum merit, fraud, unjust enrichment, overtime compensation under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, Labor Law § 655 and 12 N.Y.C.R.R. 142-3.2, failure to pay wages and benefits and overtime rates under Labor Law §§ 190, 191 and 198-c, and personal liability under Business Corporation Law § 630 and § 230 of the Fair Labor Standards Act. The Court dismissed some of the claims because no private right of action existed to enforce contracts under the Davis-Bacon Act.

In Mete v. New York State Office of Mental Retardation and Developmental Disabilities,[liii] a class of employees alleged age discrimination. The Court granted summary judgment dismissing plaintiffs' causes of action for disparate treatment and disparate impact.

Retiree Benefits

In Jones v. Board of Education of the Watertown City School District,[liv] a

class of retired employees moved for class certification. The Court found that (1) the proposed class of approximately 250 to 331 members was large enough to warrant class action status, (2) the vast majority of the class members would be affected by the same questions of law and fact, (3) the claims of the representative parties were typical of the class, (4) the representative parties would fairly and adequately protect the interests of the class, and (5) the class action would be a superior method to prosecute the case.

In Rocco v. Pension Plan of New York State Teamsters Conference Pension and Retirement Fund,[lv] retirees sought class certification and the defendants cross-moved pursuant to CPLR 501 and 510(3), transferring the matter to Onondaga County as a more convenient forum. The Court granted the cross-motion to transfer to Onondaga County because of a governing contractual forum selection clause.

Mortgages

In Wint v. ABN Amro Mortgage Group, Inc.,[lvi] a mortgagor brought suit against a mortgage lender to recover damages for fraud and for the alleged violation of a criminal statute prohibiting commercial bribery based on the lender's payment of yield spread premium to a non-party mortgage broker. The Court denied class certification because the issue of whether the yield spread premium paid to the mortgage broker was improper under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, raised a question of fact according to guidelines issued by the Department of Housing and Urban Development that precluded class certification.

Tenants

In Chavis v. Allison & Co.,[lvii] plaintiff commenced an action to recoup damages for a rent increase affecting all the residents of a building in which he resided. The rent increase was instituted by the defendant pursuant to a grant obtained and authorized by the New York State Division of Housing and Community Renewal for alleged capital improvements made to the plaintiffs' residence. The Court dismissed the complaint because plaintiff's action implicated a rent increase pursuant to governmental operations and the class members could not circumvent the requirement that they exhaust their administrative remedies by the mechanism of class certification.

Document Preservation

In Weiller v. New York Life Ins. Co.,[lviii] a class action alleging improper claims handling by several disability insurance carriers, the plaintiffs sought defendants' compliance with a proposed order for the preservation of documents. The Court granted the motion but narrowed the scope of the proposed Preservation Order by excluding a provision requiring defendants to produce and preserve documents relating to insurers not named as parties to the action.

Shareholder's Suit

In Adams v. Banc of America Securities LLC,[lix] plaintiffs brought an action as both a shareholder derivative action and as a class action seeking to enforce rights under both an underwriting agreement and a shareholder's agreement. The Court dismissed the actions finding most of the allegations to be frivolous. [" a complaint that confuses a shareholder's derivative claim with claims based upon individual rights is to be dismissed "].

Corporate Merger

In Higgins v. New York Stock Exchange, Inc.,[lx] a class of seatholders of the New York Stock Exchange ("NYSE") brought an action against members of the NYSE's Board of Directors regarding a proposed merger with Archipelago Holdings, LLC, a competitor to NYSE. Plaintiffs also brought claims against Goldman Sachs Group, a securities broker, for allegedly aiding and abetting the breach of fiduciary duty. Various defendants moved to dismiss the complaint arguing (1) the complaint stated only derivative claims and therefore the plaintiffs lacked standing to pursue a direct action, (2) the business judgment rule precluded plaintiffs from maintaining their action inasmuch as the complaint failed to allege facts of bad faith or fraud necessary to overcome the rule, and (3) plaintiffs' claim against Goldman Sachs Group for aiding and abetting the breach of fiduciary duty was insufficient because plaintiffs had failed to plead that claim with the requisite particularity.

The Court held that plaintiffs had standing to assert direct causes of action

against the defendants for breach of fiduciary duty and sustained some claims [breach of fiduciary duty of due care and good faith and for aiding and abetting] and dismissed others [breach of fiduciary duty of loyalty against NYSE Board members].

Partnership Dispute

In Morgado Family Partners, LP v. Lipper et al,[lxi] a class of limited partners brought an action against the partnership's auditor for professional malpractice in failing to detect an overvaluation of the assets and the general partner's resultant taking of excessive incentive compensation. The Court stayed part of the plaintiffs' claims finding that the claim of alleged excessive compensation was essentially the same claim as alleged by the partnership's liquidating trustee in his own action against the auditor, and judicial economy would be served if only one lawsuit proceeds.

Notice Issues

In Drizin v. Sprint Corp[lxii], the Court, which had earlier sustained claims for fraud and a violation of G.B.L. § 349[lxiii] and certified[lxiv] a New York class " of all persons who were charged for a credit card call...by the defendant through any of the numbers that are deceptively similar ' knock offs ' to toll free calls services operated by other telephone companies ", ordered the defendant to provide the names and addresses of class

members[lxv], approved the content and methods of notice consisting of publication in both English and Spanish language newspapers, bill stuffers or separate letters, the costs of which were to be borne by the plaintiff [“ Plaintiff offers absolutely no reason why the Court [C.P.L.R. 904©[lxvi]] should exercise its discretion and require the Defendant to bear the necessary costs “].

In Naposki v. First National Bank of Atlanta[lxvii], the defendants claimed that “ during the pendency of this appeal “ they entered into a settlement of a California nationwide class action of which appellant was a member and, hence, his claims should be dismissed. The Court not only imposed a $5,000 sanction on defendant’s attorneys for “ withholding information regarding the...settlement and their intent to move to dismiss “ but held that “ the issue of whether the plaintiff received notice of the proposed settlement...requires further inquiry “ by the trial court. The Court also held that defendant’s efforts to moot plaintiff’s claim by refunding his “ late payment fee “ was unavailing “ as the defendant had not yet served an answer, and the plaintiff had not yet moved or was required to move for class certification “.

In Hibbs v. Marvel Enterprises[lxviii], the Court rejected the use of opt-in notice[lxix], a “ procedure favored by the Commercial Division “, for a proposed settlement because “ There is no legal

or constitutional principle that mandates the use of the opt-in method. In fact, we have regularly approved class action settlements which incorporate an opt-out method under circumstances similar to those here “.

In Williams v. Marvin Windows[lxx], the plaintiffs who had purchased 60 windows “ treated with a chemical preservative which apparently failed to prevent the window frames from rotting and decaying “ and who had failed to opt-out of the settlement of a Minnesota state court nationwide class action seeking damages for all purchasers of defendant’s defective windows and doors, challenged the adequacy of settlement notice claiming they had never received it nor notice of the general release. The Court found the Minnesota class action notice adequate, enforced the release and dismissed plaintiffs’ claims on grounds of res judicata [“ ‘ Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice ‘”[lxxi]].

Telephone Consumer Protection Act

The federal Telephone Consumer Protection Act [TCPA] was enacted in 1991 “ to address telemarketing abuses by use of telephones and facsimile machines...mak(ing) it unlawful for any

person to send an unsolicited advertisement to a telephone facsimile machine belonging to a recipient within the United States "[lxxii]. TCPA grants consumers a private right of action over which " state courts (have) exclusive jurisdiction " and " creates a minimum measure of recovery and imposes a penalty for wilful or knowing violations ". In Rudgayser & Gratt v. Cape Canaveral Tour & Travel, Inc.[lxxiii], Leyse v. Flagship Capital Services Corp.[lxxiv], Ganci v. Cape Canaveral Tour & Travel, Inc.[lxxv], Weber v. Rainbow Software, Inc.[lxxvi] and Bonime v. Discount Funding Associates, Inc.[lxxvii], the Courts held that class action treatment of TCPA claims is inappropriate under C.P.L.R. § 901(b)'s prohibition of class actions seeking a penalty[lxxviii] since TCPA

" does not specifically authorize a class action (and was enacted) to provide for such private rights of action only if, and then only to the extent, permitted by state law "[lxxix].

Residential Electricity Contracts

In Emilio v. Robison Oil Corp.[lxxx], a class of residential electric supply customers challenged the enforceability of contracts that provided " for their automatic yearly renewals unless the defendant is otherwise notified by its customers " as deceptive in violation of G.B.L. § 349 and G.O.L. § 5-903(2). The

latter statute prohibits such renewal provisions unless the customer receives notice 15 to 30 days prior “ calling the attention of that person to the existence of such provision in the contract “. Even assuming the viability of the G.B.L. § 349 claim the Court denied class certification because “ there is no nexus between this violation and the damages claimed “ and “ Moreover, any money damages of (class members) is so individualized that a class action would be unmanageable “[lxxxi].

Oil & Gas Royalty Payments

In Cherry v. Resource America, Inc.[lxxxii], the Court, relying upon its earlier decision in Freeman v. Great Lakes Energy Partners[lxxxiii], certified a class of 471 landowners with interests in oil and gas leases seeking compensatory and punitive damages arising from defendant’s “ alleged common use of a methodology to manipulate the figure upon which plaintiffs’ royalties were based “.

Street Vendors Unite

In Ousmane v. City of New York[lxxxiv] a class of some 20,000 licensed and unlicenced New York City street vendors who had

received Notices of Violations [NOVs] from the Environmental Control Board [ECB] challenged the promulgation of higher fines. Notwithstanding the governmental operations rule which discourages class actions against governmental entities[lxxxv], the Court granted class certification finding " this threat to governmental efficiency does not exist. The Court will...not burden this largely disadvantaged and disenfranchised sector of society with the obligation to wade, as individuals, through a city bureaucracy daunting enough to individuals with advanced degrees and a command of the English language, no less a recent immigrant with few resources. These vendors, aggrieved by the City's failure to notify them of a penalty increase that would inflict great hardship upon them and their ability to pursue a life in this country, are entitled to relief in one swift stroke ".

Inmates

In Brad H. v. City of New York,[lxxxvi] the Court initially granted a preliminary injunction requiring defendants to provide discharge planning to members of the class who were or would be inmates of New York City jails treated for mental illness while incarcerated for 24 hours or longer. The action was subsequently settled pursuant to a stipulation of settlement, which required, the appointment of two compliance monitors to monitor defendants' compliance with the terms of the settlement. Defendants later

moved for an order declaring unreasonable and vacating the compliance monitors' determination that inmates housed in the forensic units of several New York City hospitals were class members and therefore subject to the provisions of the settlement agreement. The Court denied defendants' motion because the terms of the settlement agreement unambiguously provided for discharge planning of the inmates in the forensic units at the relevant hospitals.

Legal Aliens

In Khrapunskiy v. Doar[lxxxvii], a class of legal aliens (" most of whom emigrated from Ukraine ") who " are indigent, and elderly, disabled or blind " challenged the denial of SSI benefits. The Court granted summary judgment for the class and granted certification notwithstanding the governmental operations rule [class actions unnecessary because " the government will abide by court rulings in future cases...under the principals of *stare decisis* "] because class members " are indigent and aged and disabled and therefore are less able to bring individual lawsuits ".

Shelter Allowances

In Jiggetts v. Dowling,[lxxxviii] a class consisting of recipients of public

assistance who resided in New York City commenced an action in 1987 challenging the adequacy of an A.F.D.C. shelter allowance. After a trial, judgment was entered in favor of plaintiffs. The Court denied a motion to intervene finding that the proposed intervenors were not asserting the same rights, based on the same facts, as the named class plaintiffs and that allowing intervention would contravene the policy behind intervention, which is to improve judicial economy.

ENDNOTES

i. Goldman v. Metropolitan Life Insurance Company, 2005 WL 3091088 (N.Y. Ct. App. 2005).

ii. For cases rejecting premiums based on a policy date versus a coverage date see Semler v. Guardian Life Ins. Co., Case No. 990637 (Cal. Sup. Ct. 2002); Semler v. First Colony Life Ins. Co., Case No. 984902 (Cal. Super. 1999); Braustein v. General Life Ins. Co., Case No. 01-985-CIV, Slip Op. (S.D. Fla. 2002). For cases permitting premiums that are based upon a policy date rather than a coverage date see Life Ins. Co. of the Southwest v. Overstreet, 580 S.W. 2d 929 (Tex. App. 1980); Travelers Ins. Co. v. Castro, 341 F. 2d 882 (1st Cir. 1965).

iii. Goldman v. Metropolitan Life Insurance Company, 2005 WL 3091088 (N.Y. Ct. App. 2005)(" Here, in each case, there was no unjust enrichment because the matter is controlled by contract "). See also: Clark-Fitzpatrick, Inc. v. Long Island Railroad Co., 70 N.Y. 2d 382, 388 (1987)(" the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter ").

iv. Cox v. Microsoft, 10 Misc. 3d 1055(A) (N.Y. Sup. 2005).

v. Cox v. Microsoft, 290 A.D. 2d 206, 737 N.Y.S. 2d 1 (1st Dept. 2002).

vi. Cox v. Microsoft, 8 A.D. 3d 29, 778 N.Y.S. 2d 147 (1st Dept. 2004).

vii. Ho v. Visa U.S.A., Inc., 16 A.D. 3d 256, 793 N.Y.S. 2d 8 (1st Dept. 2005).

viii. In re Visa Check/Mastermoney Antitrust Litigation, 297 F. Supp. 2d 503 (E.D.N.Y. 2003).

ix. Cunningham v. Bayer, AG, __A.D. 3d __, 804 N.Y.S. 2d 924 (1st Dept. 2005).

x. Cox v. Microsoft, 290 A.D. 2d 206, 737 N.Y.S. 2d 1 (1st Dept. 2002).

xi. 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 of CPLR 901(b) "). See 3 W.K.M. New York Civil Practice CPLR § 901.23[11].

xii. Leider v. Ralfe, 387 F. Supp. 2d 283 (S.D.N.Y. 2005).

xiii. See In re Relafen Antitrust Litigation, 221 F.R.D. 260, 285 (D. Mass. 2004)(reasoning that a failure to " apply C.P.L.R. 901(b) would clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain ' substantial advantages ' of class actions ").

xiv. Klein v. Robert's American Gourmet Food, Inc., __A.D. 3d__, New York Law Journal, February 9, 2006, p. 18 (2d Dept. 2006).

xv. See 3 W.K.M. New York Civil Practice CPLR § 908.06.

xvi. McNeil-PPC, Inc. v. Pfizer, Inc., 351 F. Supp. 2d 226 (S.D.N.Y. 2005).

xvii. Whalen v. Pfizer, 9 Misc. 3d 1124(A) (N.Y. Sup. 2005).

xviii. See 3 W.K.M. New York Civil Practice CPLR §§ 901.23[5], 901.23[6].

xix. Saunders v. AOL Time Warner, Inc., 18 A.D. 3d 216, 794 N.Y.S.

2d 342 (1st Dept. 2005).

xx. Brissenden v. Time Warner Cable, 10 Misc. 3d 537, __N.Y.S. 2d__(N.Y. Sup. 2005).

xxi. Brissenden v. Time Warner Cable, __Misc. 3d__, 2005 WL 2741952 (N.Y. Sup. 2005)(" ' negative option billing ' (violates) 47 USA § 543(f), which prohibits a cable company from charging a subscriber for any equipment that the subscriber has not affirmatively requested by name, and a subscriber's failure to refuse a cable operator's proposal to provide such equipment is not deemed to be an affirmative request ").

xxii. Tepper v. Cable Vision Systems Corp., 19 A.D.3d 585, 797 N.Y.S.2d 131 (2d Dep't 2005).

xxiii. Baytree Capital Associates, LLC v. AT&T Corp., 10 Misc. 3d 1053(A)(N.Y. Sup. 2005).

xxiv. Id. (" ' Slamming ' is defined by the (F.C.C.) as the practice of changing a consumer's traditional (wired) telephone service provider, including local, state-to-state, in-state and international long distance service, without the consumer's permission (www.fcc.gov/slamming ...FCC public notice DA 00-2427 (Oct. 27, 2000). Slamming is illegal (id.; 27 USC 258)").

xxv. Do corporations and other non-consumers have standing to assert claims under G.B.L. § 349? In Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA, Inc.,, 3 N.Y. 3d 200, 207, 2004 WL 2339565 (2004) the Court of Appeals held that " In concluding that derivative actions are barred, we do not agree with plaintiff that precluding recovery here will necessarily limit the scope of section 349 to only consumers, in contravention of the statute's plain language permitting recovery by any person injured ' by reason of ' any violation (see e.g., Securitron Magnalock Corp., v. Schnabolk, 65 F. 3d 256, 264 (2d Cir. 1995, cert. denied 516 US 1114 (1996)(allowing a corporation to use section 349 to halt a competitor's deceptive consumer practices ".

xxvi. See 3 W.K.M. New York Civil Practice CPLR §§ 901.09[4][a] (" As a general rule, consideration by a court of the certifiability of a class action requires some factual input through pre-certification discovery...However, a defendant's motion to dismiss class allegations may be appropriate when it is clear that as a matter of law the action cannot be certified as a

class regardless of the facts such as failing to timely move for class certification ").

xxvii. Goldberg v. Enterprise Rent-A-Car Company, 14 A.D. 3d 417, 789 N.Y.S. 2d 114 (1st Dept. 2005).

xxviii. Fuchs v. Wachovia Mortgage Corp., 9 Misc. 3d 1129(A) (Nassau Sup. 2005).

xxix. Neama v. Town of Babylon, 18 A.D. 3d 836, 796 N.Y.S. 2d 644 (2d Dept. 2005).

xxx. See 3 W.K.M. New York Civil Practice CPLR § 901.06[1].

xxxi. See 3 W.K.M. New York Civil Practice CPLR § 901.06[2].

xxxii. See e.g., Tsadilas v. Providian National Bank, 13 A.D. 3d 190 (1st Dept. 2004)(mandatory arbitration agreement waiving right to bring class action enforced); Johnson v. Chase Manhattan Bank USA, N.A., 2 Misc. 3d 1003(A), 784 N.Y.S. 2d 921 (N.Y. Sup. 2004)(arbitration agreement enforced); Spector v. Toys 'R' US, N.Y.L.J., April 1, 2004, p. 20, col. 1 (Nassau Sup. 2004)(arbitration agreement in third party contract not applied to protect defendant).

xxxiii. Heiko Law Offices, P.C. v. AT&T Wireless Services, Inc., 6 Misc. 3d 1040(A)(N.Y. Sup. 2005).

xxxiv. See 3 W.K.M. New York Civil Practice CPLR §§ 901.06[4], 901.11.

xxxv. See 3 W.K.M. New York Civil Practice CPLR §§ 901.06[4],[5].

xxxvi. Investment Corp. v. Kaplan, 6 Misc. 3d 1031(A) (N.Y. Sup. 2005).

xxxvii. DeFilippo v. The Mutual Life Ins. Co., 13 A.D 3d 178, 787 N.Y.S. 2d 11 (1st Dept. 2004).

xxxviii. See e.g., Gaidon v. Guardian Life Ins. Co., 94 N.Y. 2d 330 (1999); Goshen v. Mutual Life Ins. Co., 98 N.Y. 2d 314 (2002).

xxxix. See 3 W.K.M. New York Civil Practice CPLR §§ 901.23[5].

xl. Jacobs v. Macy's East, Inc., 17 A.D. 3d 318, 792 N.Y.S. 2d 574 (2d Dept. 2005).

xli. Jacobs v. Macy's East, Inc., 262 A.D. 2d 607, 693 N.Y.S. 2d 164 (2d Dept. 1999).

xlii. C.P.L.R. § 901(b)'s prohibition against class actions seeking a penalty or a minimum recovery has been applied in class actions alleging violations of the Donnelly Act, G.B.L. § 340 [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 of CPLR 901(b) ")] and violations of the federal Telephone Consumer Protection Act [see e.g., Rudgayser & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005)] but not in class actions alleging violations of G.B.L. § 349 if actual damages are waived and class members are informed and given the right to opt-out of the proposed class action [see e.g., Cox v. Microsoft Corp., 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (1st Dept. 2004); Ridge Meadows Homeowner's Association, Inc. V. Tara Development Co., Inc., 242 A.D. 2d 947, 665 N.Y.S. 2d 361 (4th Dept. 1997)]. See 3 W.K.M. New York Civil Practice CPLR §§ 901.23[11], 901.23[6].

xliii. Wilder v. May Department Stores Company, 23 A.D. 3d 646, 804 N.Y.S. 2d 423 (2d Dept. 2005).

xliv. Id (" merchandise returned to a store by a customer without documentation identifying any particular salesperson as having generated the sale ").

xlv. Id (" the plaintiff's attorney promises to assume responsibility for litigation expenses (hence) the plaintiff's personal financial condition becomes irrelevant ").

xlvi. Gawez v. Inter-Connection Electric, Inc., 9 Misc. 3d 1107(A) (Kings Sup. 2005).

xlvii. Shelton v. Elite Model Management, Inc., 2005 WL 3076316 (N.Y. Sup. 2005).

xlviii. Fears v. Wilhelmina Model Agency, Inc., 2005 U.S. Dist. Lexis 7961 (S.D.N.Y.

2005).

xlix. See 3 W.K.M. New York Civil Practice CPLR §§ 901.06[1] (" Individual standing also means that the class representative must have a cause of action against the same defendant against whom the members of the class have the same claim ").

l. North Shore Environmental Solutions, Inc. v. Glass, 17 A.D.3d 427, 792 N.Y.S.2d 610 (2d Dep't 2005).

li. Colgate Scaffolding and Equipment Corp. v. York Hunter City Services, Inc., 14 A.D.3d 345, 787 N.Y.S.2d 305 (1st Dep't 2005).

lii. Cox v. NAP Construction Company, 9 Misc. 3d 958, 804 N.Y.S.2d 622 (N.Y. Sup. 2005).

liii. Mete v. New York State Office of Mental Retardation and Developmental Disabilities, 21 A.D.3d 288, 800 N.Y.S.2d 161 (1st Dep't. 2005).

liv. Jones v. Board of Education of the Watertown City School District, 6 Misc. 3d 1035(A), 800 N.Y.S.2d 348 (Table), 2005 WL 562747 (N.Y. Sup. 2005).

lv. Rocco v. Pension Plan of New York State Teamsters Conference Pension and Retirement Fund, 5 Misc. 3d 1027(A), 799 N.Y.S.2d 163 (Table), 2004 WL 2889139 (N.Y. Sup. 2004).

lvi. Wint v. ABN Amro Mortgage Group, Inc.,19 A.D.3d 588, 800 N.Y.S.2d 411, 2005 WL 1460543 (2d Dep't. 2005).

lvii. Chavis v. Allison & Co., 7 Misc. 3d 1001(A), 801 N.Y.S.2d 231 (Table), 2005 WL 709338 (N.Y. Sup. 2005).

lviii. Weiller v. New York Life Insurance Company, 6 Misc. 3d 1038(A), 800 N.Y.S.2d 359 (Table), 2004 WL 3245345 (N.Y. Sup. 2005).

lix. Adams v. Banc of America Securities LLC, 7 Misc. 3d 1023(A), 801 N.Y.S.2d 229 (Table), 2005 WL 1148693 (N.Y. Sup. 2005).

lx. Higgins v. New York Stock Exchange, Inc., 10 Misc. 3d 257, 2005 WL 2140168 (N.Y. Sup. 2005).

lxi. Morgado Family Partners, LP v. Lipper et al, 19 A.D.3d 262, 800 N.Y.S.2d 128 (1st Dep't 2005).

lxii. Drizin v. Sprint Corp., 7 Misc. 3d 1018(A) (N.Y. Sup. 2005).

lxiii. Drizin v. Sprint Corp., 3 A.D. 3d 388, 771 N.Y.S. 2d 82 (1st Dept. 2004)(common law fraud and G.B.L. § 349 claims stated). See 3 W.K.M. New York Civil Practice CPLR §§ 901.23[5], 901.23[6].

lxiv. Drizin v. Sprint Corp., 12 A.D. 3d 245, 785 N.Y.S. 2d 428, (1st Dept. 2004)(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 ").

lxv. Drizin v. Sprint Corp., 7 Misc. 3d 1018(A) (N.Y. Sup. 2005) (" the Court finds it implausible that a telephone company cannot identify the relevant addresses. A member of the public, let alone a telephone company, may simply call directory assistance and after submitting a published number, may obtain the address using that number ").

lxvi. Drizin v. Sprint Corp., 7 Misc. 3d 1018(A) (N.Y. Sup. 2005) (" CPLR § 904© requires the court to consider the cost of giving notice by each method considered, the resources of the parties, and the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to be excluded from the class "). For cases discussing cost shifting see 3 W.K.M. New York Civil Practice CPLR §§ 904.09.

lxvii. Naposki v. First National Bank of Atlanta, 18 A.D. 3d 835, 798 N.Y.S. 2d 62 (2d Dept. 2005).

lxviii. Hibbs v. Marvel Enterprises, 19 A.D. 3d 232, 797 N.Y.S. 2d 463 (1st Dept. 2005).

lxix. See also: Kern v. Siemens Corp., 393 F. 3d 120 (2d Cir. 2004)(" The District Court's certification of an ' opt-in ' class in this case was error...we cannot envisage any circumstances that Rule 23 would authorize an ' opt-in ' class in the liability stage of litigation ").

lxx. Williams v. Marvin Windows, 15 A.D. 3d 393, 790 N.Y.S. 2d 66 (2d Dept. 2005).

lxxi. Williams v. Marvin Windows, supra, at 790 N.Y.S. 2d 68 (" Where, as here, the method of notice ordered is reasonably calculated to reach the plaintiffs, and diligent efforts were made to comply with the prescribed method, the plaintiffs' mere non-receipt is insufficient to remove them from the class "). See also 3 W.K.M. New York Civil Practice CPLR §§ 901.13 (" In response to the defendant's motion to dismiss a state court class action because of a settlement entered in a competing class action, the plaintiff's counsel may seek to collaterally attack the settlement claiming a lack of notice and/or a lack of adequate representation by the representative or class counsel ").

lxxii. Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005).

lxxiii. Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005).

lxxiv. Leyse v. Flagship Capital Services Corp., 22 A.D. 3d 426, 803 N.Y.S. 2d 52 (1st Dept. 2005).

lxxv. Ganci v. Cape Canaveral Tour & Travel, Inc., 21 A.D. 3d 399, 799 N.Y.S. 2d 737 (2d Dept. 2005).

lxxvi. Weber v. Rainbow Software, Inc., 21 A.D. 3d 411, 799 N.Y.S. 2d 428 (2d Dept. 2005).

lxxvii. Bonime v. Discount Funding Associates, Inc., 21 A.D. 3d 393, 799 N.Y.S. 2d 418 (2d Dept. 2005).

lxxviii. C.P.L.R. § 901(b)'s prohibition against class actions seeking a penalty or a minimum recovery has been applied in class actions alleging violations of the Donnelly Act, G.B.L. § 340 [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 of CPLR 901(b) ")] and violations of the federal Telephone Consumer Protection Act [see e.g., Rudgayser & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005)] but not in class actions alleging violations of G.B.L. § 349 if actual damages are waived

and class members are informed and given the right to opt-out of the proposed class action [see e.g., Cox v. Microsoft Corp., 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (1st Dept. 2004); Ridge Meadows Homeowner's Association, Inc. V. Tara Development Co., Inc., 242 A.D. 2d 947, 665 N.Y.S. 2d 361 (4th Dept. 1997)]. See 3 W.K.M. New York Civil Practice CPLR §§ 901.23[11], 901.23[6].

lxxix. Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005).

lxxx. Emilio v. Robison Oil Corp., 15 A.D. 3d 609, 790 N.Y.S. 2d 535 (2d Dept. 2005).

lxxxi. For a discussion of manageability issues involving the calculation and distribution of damages see 3 W.K.M. New York Civil Practice CPLR § 902.04.

lxxxii. Cherry v. Resource America, Inc., 15 A.D. 3d 1013, 788 N.Y.S. 2d 911 (4th Dept. 2005).

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

lxxxiv. Ousmane v. City of New York, 7 Misc. 3d 1016(A) (N.Y. Sup. 2005).

lxxxv. See 3 W.K.M. New York Civil Practice CPLR §§ 901.23[10].

lxxxvi. Brad H. v. City of New York, 7 Misc. 3d 1015(A), 801 N.Y.S.2d 230 (Table), 2005 WL 937660 (N.Y. Sup. 2005).

lxxxvii. Khrapunskiy v. Doar, 9 Misc. 3d 1109(A) (N.Y. Sup. 2005).

lxxxviii. Jiggetts v. Dowling, 21 A.D.3d 178, 799 N.Y.S.2d 460 (1st Dep't. 2005).