

NEW YORK STATE CLASS ACTIONS: MAKE IT WORK—FULFILL THE PROMISE[†]

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The purpose of this article is to demonstrate that New York's class action statute, Article 9 of the Civil Practice Law and Rules ("CPLR"), is underutilized and has been during its entire thirty-five-year history. This article identifies what types of class actions are presently certifiable and what types of class actions are not, but should be, given the broad legislative history of CPLR Article 9, and the needs of New York State residents for a meaningful group remedy. In that regard, this article focuses on three types of class actions which can be, and should be, certifiable: mass torts involving physical injuries and/or property damage, class actions challenging governmental operations, and class actions otherwise prohibited by CPLR 901(b), such as antitrust actions alleging a violation of General Business Law ("GBL") section 340 ("Donnelly Act"), and the Federal Telephone Consumer Protection Act. And, lastly, the article encourages the New York State Court of Appeals to continue to take a more active role in choosing to hear appeals in class action cases involving a variety of issues, including the granting or denial of class certification (CPLR 901, 902).

[†] The views expressed in this article are solely those of the author and not of the Appellate Division of the New York State Supreme Court, Second Department.

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I. PERSPECTIVE

I have been writing on the subject of New York State class actions for thirty-one years, including articles in various legal publications¹

¹ See Thomas A. Dickerson, *Class Actions Under Article 9 of the CPLR*, N.Y. L.J., Dec. 26, 1979, at 1; Thomas A. Dickerson, *Jurisdiction Over Nonresidents; Forum Non Conveniens: Class Actions Under CPLR Article 9*, N.Y. L.J., July 14, 1980, at 1; Thomas A. Dickerson, *Class Actions Under Article 9 of CPLR*, N.Y. L.J., Aug. 18, 1980, at 1; Thomas A. Dickerson, *Class Actions Under Article 9 of CPLR—Decision Reviewed*, N.Y. L.J., Feb. 3, 1981, at 1; Thomas A. Dickerson, *Class Actions Under Art. 9 of CPLR—A New Beginning*, N.Y. L.J., Aug. 7, 1981, at 1; Thomas A. Dickerson, *Pre-Certification Discovery in Class Actions Under CPLR*, N.Y. L.J., Nov. 13, 1981, at 1; Thomas A. Dickerson, *Class Actions Under Article 9 of C.P.L.R.—The Dynamic Duo*, N.Y. L.J., Mar. 15, 1982, at 1; Thomas A. Dickerson, *Class Actions Under Article 9 of the CPLR*, N.Y. L.J., Mar. 18, 1983, at 1; Thomas A. Dickerson, *A Review of Class Actions Under C.P.L.R. Article 9*, N.Y. L.J., Mar. 14, 1984, at 1; Thomas A. Dickerson, *Class Actions Under Article 9 of the CPLR*, 13 N.Y. ST. B.A. INS., NEGL. & COMPENSATION L. SEC. J. 8 (1984); Thomas A. Dickerson, *Class Actions Under Article 9 of C.P.L.R.—Faith Restored*, N.Y. L.J., Feb. 8, 1985, at 1; Thomas A. Dickerson, *Class Actions Under Article 9 of CPLR—'85 Was Good Year*, N.Y. L.J., Feb. 7, 1986, at 1; Thomas A. Dickerson, *Review of 1986 Decisions of Article 9 Class Actions*, N.Y. L.J., Jan. 21, 1987, at 1; Thomas A. Dickerson, *Article 9 Class Actions—Year-End Review of Decision*, N.Y. L.J., Dec. 30, 1987, at 1; Thomas A. Dickerson, *Consumer Class Actions—An Introduction*, 16 N.Y. ST. B.A. INS., NEGL. & COMPENSATION L. SEC. J. 3 (1987); Thomas A. Dickerson, *Outside Counsel: Article 9 Class Actions—A Review of Decisions in 1988*, N.Y. L.J., Jan. 26, 1989, at 1; Thomas A. Dickerson, *Outside Counsel: Article 9 Class Actions: A Review of 1989*, N.Y. L.J., Jan. 4, 1990, at 1; Thomas A. Dickerson, *Outside Counsel: A Review of Article 9 Class Actions in 1990*, N.Y. L.J., Jan. 28, 1991, at 1; Thomas A. Dickerson, *Outside Counsel: Article 9 Class Actions in 1991*, N.Y. L.J., Jan. 16, 1992, at 1; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Article 9 Class Actions in 1992*, N.Y. L.J., Jan. 6, 1993, at 1; Thomas A. Dickerson, *Outside Counsel: Article 9 Class Actions in 1994*, N.Y. L.J., Jan. 23, 1995, at 1; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Article 9 Class Actions in 1995*, N.Y. L.J., Jan. 30, 1996, at 1; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Article 9 Class Actions in 1996*, N.Y. L.J., Feb. 6, 1997, at 1; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: A Summary of Article 9 Class Actions in 1997*, N.Y. L.J., Jan. 12, 1998, at 1; Thomas A. Dickerson & Kenneth Manning, *Outside Counsel: Summary of Article 9 Class Actions in 1998*, N.Y. L.J., Feb. 11, 1999, at 1; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Summary of Article 9 Class Actions in 1999*, N.Y. L.J., Jan. 7, 2000, at 1; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Reviewing Article 9 Class Actions in 2000*, N.Y. L.J., Apr. 18, 2001, at 1; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Summarizing Article 9 Class Actions in 2001*, N.Y. L.J., Feb. 19, 2002, at 1; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: A Summary of Article 9 Class Actions in 2002*, N.Y. L.J., Jan. 29, 2003, at 4; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: A Summary of Article 9 Class Actions in 2003*, N.Y. L.J., Apr. 7, 2004, at 4; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Summary of Article 9 Class Actions in 2004*, N.Y. L.J., Apr. 25, 2005, at 4; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Summary of Article 9 Class Actions in 2005*, N.Y. L.J., Feb. 28, 2006, at 4; Thomas A. Dickerson, *Class Warfare: Aggregating and Prosecuting Claims as Class Actions—Part I*, N.Y. ST. B. ASS'N J., July–Aug. 2005, at 18; Thomas A. Dickerson, *Consumer Class Actions in New York State Courts*, 26 CLASS ACTION REP. 395 (2005); Thomas A. Dickerson, *Class Warfare: Aggregating and Prosecuting Consumer Claims as Class Actions—Part II*, N.Y. ST. B. ASS'N J., Oct. 2005, at 36; Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Summary of Article 9 Class Actions in 2006*, N.Y. L.J., Jan. 24, 2007, at 4; Thomas A. Dickerson & Kenneth A. Manning, *New York State Class Actions in 2006*, 28 CLASS ACTION REP. 113 (2007); Thomas A. Dickerson &

and my annually-updated treatise on Article 9 of Weinstein, Korn & Miller's *New York Civil Practice: CPLR*.² I also write about class actions in other states as well.³ And, on occasion, I have given lectures on class actions to law students and members of the bench and bar.

Before becoming a judge, I spent fifteen years (1978–1993) as a solo practitioner in Manhattan, prosecuting consumer class actions before various state and federal courts. In fact, my experience with CPLR Article 9 really began in 1975, just a few months after its enactment, when I was a young associate attorney with the law firm of Shea & Gould in Manhattan. I vividly recall my experience during a vacation to the infamous and wildly misrepresented Club Islandia in Jamaica, and the subsequent consumer class action litigation brought on behalf of 250 victimized travelers, which led to the first certified consumer fraud class action under CPLR Article 9.⁴

Kenneth A. Manning, *Outside Counsel: Class Actions Under CPLR Art. 9 in 2007*, N.Y. L.J., Jan. 18, 2008, at 4; Thomas A. Dickerson, *New York State Consumer Protection Law and Class Actions in 2007—Part I*, N.Y. ST. B. ASS'N J., Feb. 2008, at 42; Thomas A. Dickerson, *New York State Consumer Protection Law and Class Actions—Part II*, N.Y. ST. B. ASS'N J., May 2008, at 39; Thomas A. Dickerson & Kenneth A. Manning, *Class Actions Under CPLR Article 9 in 2007*, 29 CLASS ACTION REP. 111 (2008); Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Courts Rule on Class Actions Under CPLR Article 9 in 2008*, N.Y. L.J., Feb. 27, 2009, at 4; Thomas A. Dickerson & Kenneth A. Manning, *New York State Class Actions in 2008*, 30 CLASS ACTION REP. 97 (2009); Thomas A. Dickerson & Kenneth A. Manning, *Outside Counsel: Rulings in 2009 in Class Actions Under CPLR Article 9*, N.Y. L.J., Feb. 25, 2010, at 4; Thomas A. Dickerson, *State Class Actions: Game Changer*, N.Y. L.J., Apr. 6, 2010, at 6; Thomas A. Dickerson, *New York State Consumer Protection Law and Class Actions in 2009: Part I*, N.Y. ST. B. ASS'N J., Mar.–Apr. 2010, at 40; Thomas A. Dickerson, *New York State Consumer Protection Law and Class Actions in 2009: Part II*, May 2010, at 24; Thomas A. Dickerson & Kenneth A. Manning, *Summary of New York State Class Actions in 2009*, 31 CLASS ACTION REP. 95 (2010).

² See 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE: CPLR §§ 901–909 (David L. Ferstendig ed., 2d ed. 2010).

³ See THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES (2011) [hereinafter CLASS ACTIONS: THE LAW OF 50 STATES].

⁴ See *Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697, 392 N.Y.S.2d 783 (Sup. Ct. N.Y. Cnty. 1976) (granting motion for class action certification for case involving claims of conspiracy, fraudulent misrepresentation, and breach of contract in connection with travel tours); *In Brief . . . Decisions of Interest: Guadagno v. Diamond Tours & Travel, Inc.*, N.Y. L.J., May 13, 1977, at 1 (summarizing grant of partial summary judgment on the breach of contract cause of action). For a discussion of travel consumer class actions, see TRAVEL LAW § 6.01 (Law Journal Press 2011); see also Thomas A. Dickerson, *Travel Consumer Fraud: Rip-Offs and Remedies*, 28 SYRACUSE L. REV. 847 (1977) (discussing travel fraud, class actions, and remedies); Thomas A. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights*, 28 TUL. MAR. L.J. 447 (2004) (discussing travel law as it pertains to cruise ships).

II. 1975—ENACTMENT OF CPLR ARTICLE 9: THE PROMISE

After prodding from the Court of Appeals in *Moore v. Metropolitan Life Ins. Co.*⁵ and *Ray v. Marine Midland Grace Trust*,⁶ from legal scholars,⁷ and the New York State Judicial Conference,⁸ CPLR Article 9 was enacted in 1975 to infuse New York's moribund class action remedy (CPLR 1005)⁹ with modern procedures.

In recommending passage, then Assembly Majority Leader Stanley Fink stated that:

In its present form the statute fails to accommodate pressing needs for an effective, flexible and balanced group remedy in vital areas of social concern, such as claims arising from exposure of numerous persons[] to environmental offenses, violation of consumer interests, invasion of civil rights, execution of adhesion contracts, and many other collective activities reaching virtually every phase of human life. While the substantive law applicable in these cases may be generally adequate, there exists no workable remedy when neither relief on an individual basis nor actual joinder of the class is economically or administratively feasible.¹⁰

⁵ *Moore v. Metro. Life Ins. Co.*, 33 N.Y.2d 304, 313, 307 N.E.2d 554, 558, 352 N.Y.S.2d 433, 439 (1973) ("[The Court] notes, however, that the restrictive interpretation in the past of CPLR 1005 and its predecessor statutes no longer has the viability it may once have had. The [C]ourt is also aware that there was pending before the Legislature last year and will be again this year a comprehensive proposal to provide a broadened scope and a more liberal procedure for class actions, an objective shared by the members of this court." (citations omitted)).

⁶ *Ray v. Marine Midland Grace Trust Co.*, 35 N.Y.2d 147, 155–56, 316 N.E.2d 320, 325, 359 N.Y.S.2d 28, 35 (1974).

⁷ See Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 612–13 (1971).

⁸ See N.Y. STATE JUDICIAL CONFERENCE, THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR: PROPOSALS RELATING TO CLASS ACTIONS, Leg. Doc. 90, 198th Sess., at 248–49 (1976), reprinted in 1975 N.Y. SESS. LAWS 1493 (McKinney) [hereinafter THIRTEENTH ANNUAL REPORT] (encouraging reform to facilitate "the use of the class action device in the adjudication of such typically modern claims as those associated with mass exposure to environmental offenses, violations of consumer rights, civil rights cases, the execution of adhesion contracts and a multitude of other collective activities reaching virtually every phase of human life").

⁹ See WEINSTEIN, KORN & MILLER, *supra* note 2, § 901.01(2)(a), (b).

¹⁰ Memorandum from Assemblyman Stanley Fink, N.Y. State Assembly, A. 1252-B, L. 1975 ch. 207, reprinted in 1975 N.Y. State Legislative Annual 9 (N.Y. Legislative Serv., Inc. 1975). See also *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 210–11, 863 N.E.2d 1012, 1014–15, 831 N.Y.S.2d 760, 762–63 (2007) ("The Legislature enacted CPLR article 9 (§§ 901–909) in 1975 to replace CPLR 1005, the former class action statute . . . , which . . . had been judicially restricted over the years and was subject to inconsistent results. . . . Consequently, in 1975, the Judicial Conference proposed a new class action statute that was designed 'to set up a

And, in approving the proposed legislation, then Governor Hugh Carey noted that

[i]n many instances, an individual's own damages resulting from a pattern of illegal behavior by another may not be sufficient to justify the costs of litigation although the aggregate damages of all others similarly injured by the illegal behavior certainly would. Under present law, unless the individual thus injured is willing and able to press his legal claim as a matter of principle despite the financial loss, there is no economic deterrent to poor workmanship, deceptive or unconscionable trade practices and illegal conduct.¹¹

III. 2010—THIRTY-FIVE YEARS LATER: CPLR ARTICLE 9'S FULL POTENTIAL HAS YET TO BE REACHED

Notwithstanding the broad language in the legislative history of CPLR Article 9, New York courts have not implemented this salutary statute as broadly as they might have.¹² As a remedial vehicle, CPLR Article 9 is operating at approximately forty percent of its intended potential.

A. *Guidance Was Needed*

It is ironic, indeed, that while the New York State Court of Appeals recognized the need for a modern class action statute, and

flexible, functional scheme whereby class actions could qualify without the present undesirable and socially detrimental restrictions.” (citation omitted)).

¹¹ Memorandum from Governor Hugh L. Carey, Governor of the State of N.Y., A. 1252-B, L. 1975 ch. 207, *reprinted in* 1975 New York State Legislative Annual 426 (N.Y. Legislative Serv., Inc. 1975). *See also* Memorandum from the State Consumer Protect. Bd. (May 29, 1975), A. 1252-B, L. 1975 ch. 207 (“The twin facts that the class suit can benefit persons with little knowledge of the law and that it renders economical the litigation of modest claims make its availability a strong deterrent to unlawful activity. Class actions are useful in a wide variety of legal contexts, including environmental litigation, civil rights and civil liberties cases, labor law actions, antitrust suits, stock fraud cases and mass torts. But the most important potential use of the class action device is in the field of consumer protection, for in that area, most typically, violations of the laws involve claims which amount to less than a thousand dollars of each individual adversely affected, but which, in the aggregate, can total many thousands or even millions of dollars.”).

¹² *See* *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 144–45, 871 N.Y.S.2d 263, 274–75 (App. Div. 2d Dep’t 2008) (affirming lower court’s dismissal of plaintiff medical supplier’s proposed class action suit as plaintiff failed to show that it was an adequate representative of the proposed class under CPLR 901(a)(4)); *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 91, 434 N.Y.S.2d 698, 703–04 (App. Div. 2d Dep’t 1980) (discussing the modest application of Article 9 by New York courts).

encouraged the legislature to enact such a salutary statute,¹³ it did not, in the early years (1975–1986), give the appellate divisions and trial courts needed guidance on the proper interpretation of CPLR Article 9,¹⁴ the rationale being that orders granting or denying class certification are non-final.¹⁵ As a result, the appellate divisions¹⁶ enunciated policies regarding the implementation of CPLR Article 9, which on their face seem contrary to the legislative history, and

¹³ *Ray v. Marine Midland Grace Trust Co.*, 35 N.Y.2d 147, 155–56, 316 N.E.2d 320, 324–25, 359 N.Y.S.2d 28, 34–35 (1974); *Moore v. Metro. Life Ins. Co.*, 33 N.Y.2d 304, 313, 307 N.E.2d 554, 558, 352 N.Y.S.2d 433, 439 (1973).

¹⁴ See Thomas A. Dickerson, *Consumer Class Actions—An Introduction*, 16 N.Y. ST. B.A. INS., NEGL. & COMPENSATION L. SEC. J. 4 (1987) (“The primary issue in class action litigation is whether or not the action will be certified as a class action by the court. In order to obtain class status the named plaintiff must meet the requirements set forth in C.P.L.R. §§ 901-902. A reading of these provisions reveals broad and ambiguous language which may be interpreted in any number of ways. In essence, the issue of class certification involves an extraordinary degree of judicial discretion.”).

¹⁵ See, e.g., *Goldberg Weprin & Ustin, LLP v. Tishman Constr. Corp.*, 96 N.Y.2d 769, 748 N.E.2d 1071, 725 N.Y.S.2d 275 (2001). Orders granting or denying class certification should be appealable as of right to the Court of Appeals. See, e.g., *Farmers Union Mut. Ins. Co. v. Robertson*, No. 09-619, 2010 WL 2006406 (Ark. 2010) (order granting class certification appealable); *Garcia v. Medved Chevrolet, Inc.*, 240 P.3d 371, 376 (Colo. App. 2009) (“We . . . conclude that immediate review of the class certification [order] is appropriate.”); *Neese v. Satellite Mgmt. Co.*, No. E044336, 2009 WL 498669, at *3 (Cal. Ct. App. 2009) (“Orders denying class certification are appealable. . . . [T]he order is appealable if it effectively terminates the entire action as to the class, in legal effect being tantamount to a dismissal of the action as to all members of the class other than plaintiff. The appeal is allowed, as a matter of state law policy, because the order has the death knell effect of making further proceedings in the action impractical.” (internal quotations and citations omitted)); *Sellers v. El Paso Indus. Energy, L.P.*, 8 So.3d 723, 724 (La. Ct. App. 2009) (denial of class certification appealable); *Crooks v. LCS Corr. Services, Inc.*, 994 So.2d 101 (La. Ct. App. 2008) (“An appeal may be taken as a matter of right from an order or judgment certifying a class.”); *Assoc. Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 681 (Ind. 2005) (appeal of order certifying class); *Starko, Inc. v. Cimarron Health Plan, Inc.*, 110 P.3d 526, 529 (N.M. Ct. App. 2005) (appeals of trial order granting or denying class certification permitted); *Werlinger v. Champion Healthcare Corp.*, 598 N.W.2d 820, 825 (N.D. 1999) (order certifying class is appealable); *Bunch v. KMart Corp.*, 898 P.2d 170, 170 (Okla. Civ. App. 1995) (order certifying class appealable); *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 366 (Iowa 1989) (appeals permitted as of right from a grant or denial of class certification); *Amato v. Gen. Motors Corp.*, 423 N.E.2d 452, 456 (Ohio 1981) (order granting certification is a final, appealable order); *Bell v. Beneficial Consumer Disc. Co.*, 348 A.2d 734, 736 (Pa. 1975). See also CLASS ACTIONS: THE LAW OF 50 STATES, *supra* note 3, § 5.04.

¹⁶ Thomas A. Dickerson, *Class Actions Under Art. 9 of CPLR—A New Beginning*, N.Y. L.J., Aug. 7, 1981, at 1 (“It has become clear in the past two years that the Court of Appeals has decided to let the Appellate Divisions decide the manner in which the class action statute is to be implemented. Despite many requests from both the courts themselves and legal scholars the Court of Appeals has, as a general rule, refused to hear appeals directed towards the issue of certification. Typically, when a notice of appeal is filed the parties will receive a letter from the Court of Appeals stating that the appeal will be dismissed, *sua sponte*, unless it can be shown that the decision appealed from is not ‘non-final.’ . . . For this reason the Appellate Divisions are, in fact, the ‘hot’ courts of this state and act as the final court of review on the issue of class certification.”).

some policies which have since faded in significance.¹⁷

It is fair to state that until very recently (with a few exceptions such as *Weinberg v. Hertz Corp.*,¹⁸ *In re Colt Industries Shareholder Litigation*,¹⁹ *Small v. Lorillard Tobacco Co.*,²⁰ and *Mahoney v.*

¹⁷ See Dickerson, *Consumer Class Actions*, *supra* note 14, at 4–5:

In terms of the receptivity of the Courts of New York State, the history of Article 9 of the C.P.L.R. from 1975 to 1987 may be divided into three different phases. In the first phase (1975–1977) the courts seemed receptive to a variety of class actions, particularly, those asserting common law fraud within the context of consumer transactions. Class actions involving travel vacation frauds and misrepresentations by a vanity publisher were warmly received as appropriate vehicles for the vindication of violated consumer rights. The primary rationale for granting class status was by reference to the broad and liberal legislative history underlying Article 9. . . . Notwithstanding these encouraging cases, the courts entered a dark period only two years after the enactment of Article 9 which resulted in a host of denials of class status. In the second phase (1977–1981) the courts . . . discouraged the prosecution of class action litigation of any kind. This “discouragement” was generated through the active creation of *ad hoc* requirements which plaintiffs had to meet in order to obtain class status.

Id. (citations omitted). These *ad hoc* requirements included: (1) some demonstration of the merits on a motion for class certification, or requiring plaintiffs to somehow demonstrate that their proposed class action was neither “spurious [nor] sham,” *see* *Seligman v. Guardian Life Ins. Co. of Am.*, 59 A.D.2d 859, 399 N.Y.S.2d 121, 122 (App. Div. 1st Dep’t 1977); (2) encouraging motions to dismiss class allegations prior to pre-certification discovery, *see* *Wojciechowski v. Republic Steel Corp.*, 67 A.D.2d 830, 830, 413 N.Y.S.2d 70, 71 (App. Div. 4th Dep’t 1979); (3) requiring plaintiffs to demonstrate the size and nature of the class, yet limiting pre-certification discovery, *see* *Smith v. Atlas Int’l Tours*, 80 A.D.2d 762, 763–64, 436 N.Y.S.2d 722, 723–24 (App. Div. 1st Dep’t 1981).

The third phase (1981–1987) in the judicial interpretation of Article 9 of the C.P.L.R. began in 1980 with a direct attempt by the Appellate Division, Second Department and an indirect attempt by the Appellate Division, First Department to shead [sic] the restrictive approach taken to class action litigation during the previous four years and return, at least in spirit, to the more accommodating days immediately following the enactment of Article 9 in 1975.

Dickerson, *Consumer Class Actions*, *supra* note 14, at 6 (citations omitted).

¹⁸ *Weinberg v. Hertz Corp.*, 69 N.Y.2d 979, 509 N.E.2d 347, 516 N.Y.S.2d 652 (1987), *aff’g* 116 A.D.2d 1, 499 N.Y.S.2d 693 (App. Div. 1st Dep’t 1986) (granting class action certification for consumer class action (2.8 million members) challenging rental car company’s charges).

As a practical matter, a class action is not only a superior method of adjudication, but the only method available for determining the issues raised, for “the damages that may have been sustained by any single [customer] will almost certainly be insufficient to justify the expenses inherent in any individual action, and the number of individuals involved is too large, and the possibility of effective communication between them too remote, to make practicable the traditional joinder of action.”

Weinberg, 116 A.D.2d at 5, 499 N.Y.S.2d at 696 (citation omitted).

¹⁹ *In re Colt Indus. S’holder Litig.*, 77 N.Y.2d 185, 186, 194–95, 566 N.E.2d 1160, 1161, 1164–655, 565 N.Y.S.2d 755, 756, 759–60 (1991), *aff’g* 155 A.D.2d 154, 553 N.Y.S.2d 138 (App. Div. 1st Dep’t 1990). In this shareholder action alleging breach of fiduciary duty in merger negotiations, and seeking both equitable relief and monetary damages, the Court of Appeals addressed the due process considerations in preventing class members from opting-out of certain types of lawsuits. The Court of Appeals held that due process does not prevent the trial court from limiting the right to opt out in actions which are equitable in nature. In essence, mandatory class actions which seek declaratory and injunctive relief are permitted. The Court held, however, that class members must be permitted to opt out of those actions seeking monetary damages, in whole or in part. The Court also noted the flexibility of CPLR

*Pataki*²¹), the New York State Court of Appeals has heard those class action appeals which typically only involve the viability of a cause of action.²²

Article 9, and its similarity to FED. R. CIV. P. 23. *Id.*

²⁰ *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55, 720 N.E.2d 892, 897, 698 N.Y.S.2d 615, 620 (1999), *aff'g* 252 A.D.2d 1, 679 N.Y.S.2d 593 (App. Div. 1st Dep't 1998) (affirming the lower court's decertification of five classes alleging, inter alia, fraud and violation of GBL 349).

Plaintiffs allege that defendants used deceptive commercial practices to sell their cigarettes to New Yorkers and that they would not have bought these cigarettes had they known that nicotine is an addictive drug; that the tobacco companies controlled the level of nicotine in their cigarettes to cause or maintain nicotine addiction; and, that the companies secretly used chemicals to enhance the addictive propensities of nicotine. *Id.* at 51, 720 N.E.2d at 895, 698 N.Y.S.2d at 617–18.

²¹ *Mahoney v. Pataki*, 98 N.Y.2d 45, 772 N.E.2d 1118, 745 N.Y.S.2d 760 (2002), *aff'g* 283 A.D.2d 1036, 726 N.Y.S.2d 309 (App. Div. 4th Dep't 2001). The Court denied class certification of defense attorneys in capital cases seeking greater compensation, noting that “declaratory relief [was sought]. As such, the precedential value of this determination should adequately address future claims.” *Id.* at 55, 772 N.E.2d at 1124, 745 N.Y.S.2d at 766.

²² *See, e.g., Hurrell-Harring v. State*, 15 N.Y.3d 8, 15, 26, 930 N.E.2d 217, 219, 227, 904 N.Y.S.2d 296, 299, 306 (2010) (holding that plaintiffs stated a claim of constructive denial of Sixth Amendment rights under the United States Constitution, and stating that “[i]n New York, the Legislature has left the performance of the State’s obligation under *Gideon* to the counties, where it is discharged, for the most part, with county resources and according to local rules and practices. Plaintiffs . . . contend that this arrangement, involving what is in essence a costly, largely unfunded and politically unpopular mandate upon local government, has functioned to deprive them . . . of constitutionally and statutorily guaranteed representational rights. . . . Assuming the allegations of the complaint to be true, there was considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel” (citation omitted)); *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 489, 890 N.E.2d 184, 185, 860 N.Y.S.2d 422, 423 (2008) (upholding the complaint of a class of small business owners claiming lessor used deceptive practices and fraud); *Boss v. Am. Express Fin. Advisors, Inc.*, 6 N.Y.3d 242, 244, 247, 844 N.E.2d 1142, 1142–43, 1144, 811 N.Y.S.2d 620, 620–21, 622 (2006) (holding forum selection clause valid, and dismissing the class action complaint brought by financial advisors challenging expenses paid by each advisor for maintenance of office space and overhead expenses as violating New York Labor Law); *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572, 841 N.E.2d 742, 746–47, 807 N.Y.S.2d 583, 587–88 (2005) (dismissing three class action complaints brought by insureds, finding no contractual ambiguity, deception, or unjust enrichment); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 206, 208, 818 N.E.2d 1140, 1144, 1145, 785 N.Y.S.2d 399, 403, 404 (2004) (dismissing GBL claim brought by insurance company against tobacco company as too remote to provide standing because “an insurer or other third-party payer of medical expenditures may not recover derivatively for injuries suffered by its insured”); *Bynog v. Cipriani Group, Inc.*, 1 N.Y.3d 193, 196, 196 n.1, 802 N.E.2d 1090, 1091, 1091 n.1, 770 N.Y.S.2d 692, 693, 693 n.1 (2003) (dismissing complaint of temporary banquet waiters seeking payment of gratuities under Labor Law section 196-d); *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 N.Y.2d 525, 526, 790 N.E.2d 1155, 1156, 760 N.Y.S.2d 726, 727 (2003) (dismissing complaint brought by a purported class action of television subscribers challenging a \$5 late fee as an unlawful penalty; complaint was barred by the voluntary payment doctrine); *Paynter v. State*, 100 N.Y.2d 434, 437–39, 797 N.E.2d 1225, 1226–28, 765 N.Y.S.2d 819, 820–22 (2003) (dismissing complaint of Rochester school children, purporting to represent a class of all children, charging the state with failing to honor its promise contained in the education article of the state constitution “to afford its children the opportunity for a sound basic education” (citation omitted)); *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 324–25, 774 N.E.2d 1190, 1195–96, 746 N.Y.S.2d 858, 863–64 (2002)

B. More Active Role Taken

Recently, however, the New York State Court of Appeals has taken a more active role in interpreting various provisions of CPLR Article 9 by choosing to hear appeals in *Sperry v. Crompton Corp.*,²³ *Wyly v. Milberg Weiss Bershad & Schulman*,²⁴ *City of New York v. Maul*,²⁵ and *Flemming v. Barnwell Nursing Home and Health*

(reinstating claims of New York plaintiffs, 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,” while holding that GBL section 349 requires that “the transaction in which the consumer is deceived must occur in New York”); *R/S Assoc. v. N.Y. Job Dev. Auth.*, 98 N.Y.2d 29, 32–33, 771 N.E.2d 240, 241–43, 744 N.Y.S.2d 358, 359–61 (2002) (dismissing putative class action complaint where commercial borrowers challenged interest payments on loans received from the New York Job Development Authority); *Aliessa v. Novello*, 96 N.Y.2d 418, 422, 436, 754 N.E.2d 1085, 1088–89, 1098, 730 N.Y.S.2d 1, 5, 15 (2001) (holding applicable statute unconstitutional and a violation of equal protection guarantees in a class action brought by aliens challenging termination of Medicaid benefits, and noting that the Supreme Court had deferred its decision on class certification and the issue was not addressed); *Gaidon v. Guardian Life Ins. Co.*, 96 N.Y.2d 201, 210, 750 N.E.2d 1078, 1083, 727 N.Y.S.2d 30, 35 (2001) (holding the GBL claims of class action of insurers were not time-barred as the three-year statute of limitations accrues when the consumer “has been injured by a deceptive act”); *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 503, 754 N.E.2d 1099, 1111, 730 N.Y.S.2d 15, 28 (2001) (holding that lesbian medical students refused housing with respective partners in school-owned residential facilities stated a claim for disparate impact on the basis of sexual orientation); *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000) (dismissing GBL claim brought by individuals and “all persons similarly situated” in an attempt to challenge \$275 mortgage refinancing fee); *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 712 N.E.2d 662, 690 N.Y.S.2d 495 (1999) (denying review of the order denying class certification, but allowing plaintiffs to pursue their claim under GBL against operators of an in vitro fertilization program which claimed false success rates); *Gaidon v. Guardian Life Ins. Co.*, 94 N.Y.2d 330, 341–42, 725 N.E.2d 598, 602, 704 N.Y.S.2d 177, 181 (1999) (holding class action plaintiffs stated a claim under GBL section 349 based on defendant life insurance company’s claims of a “vanishing premium”).

²³ *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 210–14, 863 N.E.2d 1012, 1014–17, 831 N.Y.S.2d 760, 762–65 (2007), *aff’g* 26 A.D.3d 488, 810 N.Y.S.2d 498 (App. Div. 2d Dep’t 2006) (concluding that treble damages available in GBL section 340 are not recoverable in class actions after analyzing the legislative histories of CPLR Article 9 and GBL section 340, and stating, “[r]ead together, we conclude that Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned”); *see infra* text accompanying note 54.

²⁴ *Wyly v. Milberg Weiss Bershad & Schulman, LLP*, 12 N.Y.3d 400, 402–03, 412, 908 N.E.2d 888, 889–90, 896, 880 N.Y.S.2d 898, 899–900, 906 (2009), *aff’g* 49 A.D.3d 85, 850 N.Y.S.2d 14 (App. Div. 1st Dep’t 2007) (holding that an absent class member does not have a presumptive right of access to case files of class counsel when the representation has been terminated, stating, “[i]n a class action, however, an absent class member does not possess a ‘broad right[]’ of access to the files of a class counsel dismissed by the trial court during the litigation’s pendency”).

²⁵ *City of N.Y. v. Maul*, 14 N.Y.3d 499, 509, 512, 929 N.E.2d 366, 372, 374, 903 N.Y.S.2d 304, 310, 312 (2010), *aff’g* 59 A.D.3d 187, 873 N.Y.S.2d 540 (App. Div. 1st Dep’t 2009) (providing a discussion of many class action issues). The Court stated,

[t]he Appellate Division likewise “is vested with the same discretionary power [as the trial court] and may exercise that power, even when there has been no abuse of discretion as a matter of law by the *nisi prius* court.” Our standard of review, however,

*Facilities, Inc.*²⁶

IV. WHAT'S CERTIFIABLE & WHAT'S NOT, BUT SHOULD BE

Today, it is fair to state that some types of class actions are generally certifiable, and some types of class actions are not, but should be, given the broad legislative history discussed above.

A. *Unfulfilled Uniform Promises*

Class actions based upon uniform printed contracts, solicitation materials, a common core of contractual promises, or misrepresentations in different documents are typically certifiable. This type of class action may assert causes of action alleging breach of contract,²⁷ fraud,²⁸ negligent misrepresentation,²⁹ violation of

is far more limited. Where, as here, the Appellate Division affirms a Supreme Court order certifying a class, we may review only for an abuse of discretion as a matter of law.

....

... [W]e cannot say, at this early juncture, that the Appellate Division abused its discretion as a matter of law in affirming the class certification order.

Id. (citations omitted).

²⁶ *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 15 N.Y.3d 375, 2010 WL 4116615 (2010) (holding that counsel fees and expenses for objector's counsel are not recoverable under CPLR 909). The Court stated,

[t]he language of CPLR 909 permits attorney fee awards only to "the representatives of the class," and does not authorize an award of counsel fees to any party, individual or counsel, other than class counsel. . . . Although federal courts have awarded counsel fees to objectors in certain situations under Federal Rule 23(h), New York's statute is only in part modeled on that federal provision.

Id. at *3. The dissent noted, however, that

the majority today holds that a class member's lawyer who opposes the fee application, even if he does so successfully, must work for free or be paid entirely from the resources of the person who hired him. This result is bad policy; it is contrary to New York's common law; and it is not required by any statute. . . . Whatever the faults and virtues of the class action device, no one disputes the need to control class counsel's fees—and nothing furnishes so effective a check on those fees as an objecting lawyer. . . . And usually, class counsel can be sure that no one will object to a fee application if a class member does not.

Id. at *3 (Smith, J., dissenting). *See generally* WEINSTEIN, KORN & MILLER, *supra* note 2, §§ 908.08, 908.14[5], 909.01–.07 (discussing the awarding of attorneys fees and costs to class counsel and objector's counsel, and the awarding of incentive payments to class representatives and objectors).

²⁷ *See, e.g.*, *Beller v. William Penn Life Ins. Co.*, 37 A.D.3d 747, 748, 830 N.Y.S.2d 759, 760 (App. Div. 2d Dep't 2007) (affirming the class certification of insureds claiming insurer breached its policies); *Wilder v. May Dep't Stores Co.*, 23 A.D.3d 646, 650, 804 N.Y.S.2d 423, 426 (App. Div. 2d Dep't 2005) (certifying class action of commissioned sales representatives seeking recovery of commission deductions); *Cherry v. Res. Am., Inc.*, 15 A.D.3d 1013, 1013, 788 N.Y.S.2d 911, 911 (App. Div. 4th Dep't 2005) (affirming class certification granted to landowners with oil and gas leases bringing a breach of contract cause of action, among others); *Englade v. HarperCollins Publishers, Inc.*, 289 A.D.2d 159, 159, 734 N.Y.S.2d 176, 177 (App. Div. 1st Dep't 2001) (certifying class of authors alleging breach of contract by

GBL sections 349 and 350,³⁰ quasi-contractual claims, such as unjust enrichment,³¹ economic duress,³² breach of implied covenant of good faith,³³ bad faith dealings, and money had and received.³⁴

Recent examples of the certification of this type of class action include: (1) *Emilio v. Robison Oil Corp.*, involving unilateral changes of fixed-price electricity contracts (three different versions), and alleging breach of contract, breach of the covenant of good faith,

publisher); *Liechtung v. Tower Air, Inc.*, 269 A.D.2d 362, 364, 702 N.Y.S.2d 111, 112 (App. Div. 2d Dep't 2000) (affirming class certification of airline passengers seeking damages for airline's refusal to deplane during flight delay).

²⁸ See, e.g., *Cherry*, 15 A.D.3d at 1013, 788 N.Y.S.2d at 911 (certifying class of landowners with oil and gas leases alleging fraud); *Drizin v. Sprint Corp.*, 3 A.D.3d 388, 389, 771 N.Y.S.2d 82, 84 (App. Div. 1st Dep't 2004) (denying motion to dismiss class of telephone users' claims for common law fraud and violation of GBL section 349 for "fat fingers" scheme, which routed users to an unintended long distance provider); *Branch v. Crabtree*, 197 A.D.2d 557, 557, 603 N.Y.S.2d 490, 490 (App. Div. 2d Dep't 1993) (affirming class certification alleging deceptive and illegal sales and financial practices); *King v. Club Med, Inc.*, 76 A.D.2d 123, 125, 430 N.Y.S.2d 65, 66 (App. Div. 1st Dep't 1980) (affirming the grant of class certification to travelers alleging fraudulent misrepresentations by travel agency).

²⁹ See, e.g., *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 183–84, 683 N.Y.S.2d 179, 183 (App. Div. 1st Dep't 1998) (granting class certification to New York taxpayers alleging negligent rendering of tax advice); *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D.2d 25, 26–27, 704 N.Y.S.2d 44, 45–46 (App. Div. 1st Dep't 2000) (affirming certification of class of insureds alleging breach of contract, negligent misrepresentation, and improper termination of coverage).

³⁰ See, e.g., *Broder v. MBNA Corp.*, 281 A.D.2d 369, 369, 722 N.Y.S.2d 524, 525–26 (App. Div. 1st Dep't 2001) (affirming class certification of credit card users alleging violation of GBL section 349 for deceptive promotions by credit card issuer).

³¹ See, e.g., *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40, 778 N.Y.S.2d 147, 149 (App. Div. 1st Dep't 2004) (holding that plaintiff stated a cause of action for unjust enrichment based on Microsoft's alleged deceptive practices that caused them to pay artificially-inflated prices); *Anonymous v. CVS Corp.*, 293 A.D.2d 285, 285, 739 N.Y.S.2d 565, 565 (App. Div. 1st Dep't 2002) (affirming class certification granted to pharmacy customers challenging sale of confidential information, and claiming breach of fiduciary duty or breach of implied contract); *Meachum v. Outdoor World Corp.*, 273 A.D.2d 209, 209, 709 N.Y.S.2d 449, 449 (App. Div. 2d Dep't 2000) (granting class certification for misrepresentation in campground membership contracts).

³² See, e.g., *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 85–86, 434 N.Y.S.2d 698, 700, 702 (App. Div. 2d Dep't 1980) (affirming grant of class certification to class alleging economic duress resulting from forced payment of mortgage recording tax).

³³ See, e.g., *Freeman v. Great Lakes Energy Partners, LLC*, 12 A.D.3d 1170, 785 N.Y.S.2d 640 (App. Div. 4th Dep't 2004) (affirming class certification granted to landowners with oil and gas leases, seeking compensation for the withholding of royalties, and asserting a claim of breach of implied covenant to market in good faith, among others); *Broder*, 281 A.D.2d at 370–71, 722 N.Y.S.2d at 526 (affirming certification of class of credit card holders alleging breach of implied covenant of good faith).

³⁴ See, e.g., *Dowd v. Alliance Mortgage Co.*, 74 A.D.3d 867, 869, 903 N.Y.S.2d 104, 107 (App. Div. 2d Dep't 2010) (holding that class certification was properly granted for plaintiffs' claims under New York GBL and Real Property Law, but denying class certification for claims based upon money had and received because it is "an affirmative defense based on the voluntary payment doctrine, . . . [which] necessitates individual inquiries of class members"); *Friar*, 78 A.D.2d at 97–98, 434 N.Y.S.2d at 707 (affirming additional claim of money had and received class action involving mortgage recording tax).

and violation of GBL section 349;³⁵ (2) *Argento v. Wal-Mart Stores, Inc.*, involving the backdating of renewal memberships wherein members who renewed after their membership expiration date were required to pay the full annual fee for less than a full year's membership, and alleging violation of GBL section 349;³⁶ (3) *Morrissey v. Nextel Partners, Inc.*, involving a contract for the provision of cellular telephone services, and alleging violations of GBL sections 349 and 350 regarding a Bonus Minute subclass and a Spending Limit subclass, the former being denied certification because of the high extent of individual inquiry necessary, and the latter being certified based on the common question of law and fact regarding the disclosure under GBL section 349;³⁷ and (4) *Pludeman v. Northern Leasing Systems, Inc.*, involving lease agreements for equipment, and challenging the enforceability of concealed microprint disclaimers and waivers, and alleging breach of contract.³⁸

B. Uniform Misconduct

Class actions based upon uniform misconduct are generally certifiable. This type of class action may assert causes of action alleging breach of fiduciary duty,³⁹ negligence,⁴⁰ violation of a

³⁵ *Emilio v. Robison Oil Corp.*, 63 A.D.3d 667, 667–69, 880 N.Y.S.2d 177, 178–79 (App. Div. 2d Dep't 2009) (“We note . . . that class actions are uniformly certified in breach of contract actions, notwithstanding differing damages to individual class members where, as here, there is a uniformity of contractual agreements.” (citations omitted)).

³⁶ *Argento v. Wal-Mart Stores, Inc.*, 66 A.D.3d 930, 932–34, 888 N.Y.S.2d 117, 117–19 (App. Div. 2d Dep't 2009) (“The defendant’s admission that Sam’s Club received \$940 million in membership fees for the 2006 fiscal year supports a finding that there are numerous class members . . . [that] share common questions of fact or law with regard to the defendant’s alleged policy of backdating renewal memberships” (citations omitted)).

³⁷ *Morrissey v. Nextel Partners, Inc.*, 72 A.D.3d 209, 215–17, 895 N.Y.S.2d 580, 586–88 (App. Div. 3d Dep't 2010) (“Plaintiffs allege, however, that the small typeface and inconspicuous location of the spending limit fee increase disclosures were deceptive and misleading in a material way and that they were injured by this conduct.” (citations omitted)). The court, however, held plaintiffs failed to assert a claim under GBL section 350. *Id.*

³⁸ *Pludeman v. N. Leasing Sys., Inc.*, 74 A.D.3d 420, 421, 424, 904 N.Y.S.2d 372, 375, 378 (App. Div. 1st Dep't 2010) (The Court stated that class certification is appropriate because “in this case, liability could turn on a single issue. Central to the breach of contract claim is whether it is possible to construe the first page of the lease as a complete contract because of the merger clause, signature lines, and the space for the detailing of fees. Resolution of this issue does not require individualized proof, and is capable of being determined solely upon examination of the first page of the lease.”). See also *Pludeman v. N. Leasing Sys., Inc.*, 27 Misc. 3d 1203(A), 2010 WL 1254550, at *7 (Sup. Ct. N.Y. Cnty. 2010) (granting partial summary judgment to the class on the breach of contract cause of action).

³⁹ See, e.g., *Anonymous v. CVS*, 293 A.D.2d 285, 285, 739 N.Y.S.2d 565, 565 (App. Div. 1st Dep't 2002) (affirming grant of class certification to pharmacy customers alleging breach of

statute,⁴¹ and quasi-contractual claims.⁴²

Recent examples of the certification of this type of class action include: (1) *Dowd v. Alliance Mortgage Co.*, involving the assessment of a “priority handling fee” of \$20 for providing a requested mortgage note payoff statement regarding the sale of a house;⁴³ (2) *Ramirez v. Mansions Catering, Inc.*, involving a claim by waitstaff employees for the payment of gratuities collected from customers pursuant to Labor Law section 196-d;⁴⁴ (3) *Galdamez v. Biordi Construction Corp.*, involving an action by employees seeking to recover “the prevailing rate of wages and supplemental benefits pursuant to Labor Law section 220”;⁴⁵ (4) *Nawrocki v. Proto Construction & Development Corp.*, involving an action by employees on public works projects seeking wages at the prevailing rate, supplemental benefits, and overtime pay, and alleging “breach of public works contracts, violation of New York’s overtime compensation [statutes], quantum meruit and unjust enrichment”;⁴⁶

fiduciary duty for the sale of confidential medical information); *Conolly v. Universal Am. Fin. Corp.*, 21 Misc. 3d 1109(A), 873 N.Y.S.2d 232, 2008 WL 4514098, at *4 (Sup. Ct. Westchester Cnty. 2008) (“Here, Plaintiffs complain of common injuries that, if sustained, would have been sustained by all members as a result of the claimed breach of fiduciary duty”); *Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc. 2d 941, 944–45, 404 N.Y.S.2d 258, 261–62 (Sup. Ct. N.Y. Cnty. 1978) (granting class certification of class customers claiming breach of fiduciary duty by their stockbroker).

⁴⁰ See *supra* note 29.

⁴¹ See, e.g., *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 145–46, 871 N.Y.S.2d 263, 275–76 (App. Div. 2d Dep’t 2008) (denying class certification without prejudice after finding an adequate class representative in action alleging violation of no-fault insurance law); *ADCO Elec. Corp. v. McMahon*, 38 A.D.3d 805, 806–07, 835 N.Y.S.2d 588, 589 (App. Div. 2d Dep’t 2007) (“Although an action to enforce a trust pursuant to Lien Law § 77 must be brought as a class action, the failure to do so is not fatal [P]laintiffs should have been granted an extension of time to seek class certification.”); *Jacobs v. Macy’s East, Inc.*, 17 A.D.3d 318, 319–20, 792 N.Y.S.2d 574, 575–76 (App. Div. 2d Dep’t 2005) (affirming lower court’s grant of class certification for claim under Labor Law section 193 for wages wrongly withheld); *Fleming v. Barnwell Nursing Home & Health Facilities, Inc.*, 309 A.D.2d 1132, 1132–34, 766 N.Y.S.2d 241, 243–44 (App. Div. 3d Dep’t 2003) (granting certification of class of nursing home residents claiming violation of Public Health Law section 2801-d, “which provides a private right of action for nursing home residents to recover for the deprivation of certain rights”); *Duffy v. Longo*, 207 A.D.2d 860, 861, 616 N.Y.S.2d 760, 761 (App. Div. 2d Dep’t 1994) (dismissing cause of action under General Municipal Law section 51 brought by class of taxpayers, and alleging violation of municipal waste statute, for failure to state a claim).

⁴² See *supra* note 31–34.

⁴³ *Dowd v. Alliance Mortgage Co.*, 74 A.D.3d 867, 868, 869, 903 N.Y.S.2d 104, 106 (App. Div. 2d Dep’t 2010) (affirming the grant of class certification for claims based on Real Property Law section 274-a and GBL section 349(a)).

⁴⁴ *Ramirez v. Mansions Catering, Inc.*, 74 A.D.3d 490, 491, 905 N.Y.S.2d 148, 149 (App. Div. 1st Dep’t 2010).

⁴⁵ *Galdamez v. Biordi Constr. Corp.*, 50 A.D.3d 357, 357, 855 N.Y.S.2d 104, 105 (App. Div. 1st Dep’t 2008).

⁴⁶ *Nawrocki v. Proto Constr. & Dev. Corp.*, No. 104229/2007, 2010 WL 1540027 (Sup. Ct.

and (5) *Krebs v. Canyon Club, Inc.*, involving an action by employees seeking retained service charges gratuities, allegedly misrepresented to customers as gratuities meant for employees, and alleging a violation of Labor Law section 196-d.⁴⁷

C. Declaratory and Injunctive Relief, and Governmental Operations

Class actions seeking declaratory and/or injunctive relief are generally certifiable⁴⁸ unless they challenge governmental operations. In that case, they may not be certifiable,⁴⁹ but could be certifiable under appropriate circumstances.⁵⁰

N.Y. Cnty. 2010) (unpublished trial order) (“Plaintiffs have sufficiently alleged that they, and the putative class of employees, have a viable claim against the Defendants for engaging in purportedly improper pay practices in connection with the Public Works Projects.”).

⁴⁷ *Krebs v. Canyon Club, Inc.*, 22 Misc. 3d 1125(A), 880 N.Y.S.2d 873, 2009 WL 440903, at *1, *21 (Sup. Ct. Westchester Cnty. 2009) (unpublished table decision) (granting class certification for employees of the Canyon Club). The court noted that plaintiff “alleges that she has worked since July 2007 as a waitress or food server at the Club. The Club is a private golf and country club which is available to the general public as a site for catered events, such as weddings, bar/bat mitzvahs and other functions. She alleges that the Club imposed on customers a service charge which customers were led to believe was a gratuity intended for employees but which the Club retained for itself” *Id.* at *1 (citations omitted).

⁴⁸ *See, e.g.*, *City of Rochester v. Chiarella*, 65 N.Y.2d 92, 96, 479 N.E.2d 810, 811, 490 N.Y.S.2d 174, 175 (1985) (affirming partial summary judgment to a subclass of taxpayers in a suit where the City was requesting the court to declare taxes not unconstitutional); *Dudley v. Kerwick*, 84 A.D.2d 884, 885, 444 N.Y.S.2d 965, 967 (App. Div. 3d Dep’t 1981) (granting class certification to both plaintiffs, as a class of taxpayers, and defendants, as a class of property owners); *Watts v. Wing*, 308 A.D.2d 391, 391, 765 N.Y.S.2d 18, 18 (App. Div. 1st Dep’t 2003) (affirming class certification granted to taxpayers challenging the withholding of tax refunds to pay debts the taxpayer owed to state agency as a violation of due process); *Huff v. C.K. Sanitary Sys. Inc.*, 260 A.D.2d 892, 688 N.Y.S.2d 801 (App. Div. 3d Dep’t 1999) (affirming judgment for class of homeowners in an action for declaratory judgment action regarding defendant’s duty to maintain sewage grinder pumps).

⁴⁹ *See, e.g.*, *Mahoney v. Pataki*, 98 N.Y.2d 45, 49, 55, 772 N.E.2d 1118, 1119–20, 1124, 745 N.Y.S.2d 760, 761, 766 (2002) (holding that Judiciary Law has set an appropriate fee schedule, and denying class certification to court-appointed capital defense attorneys seeking greater compensation); *Martin v. Lavine*, 39 N.Y.2d 72, 75, 346 N.E.2d 794, 796, 382 N.Y.S.2d 956, 958 (1976) (“Although this proceeding has been styled as a class action, we think that there is no compelling need to grant class action relief in this case . . . where governmental operations are involved, and where subsequent petitioners will be adequately protected under the principles of *stare decisis*.”).

⁵⁰ *See* WEINSTEIN, KORN & MILLER, *supra* note 2, § 901.23[10].

Over the years, the governmental operations rule . . . has been rejected by the federal courts in the Second Circuit [sic], criticized by [t]he Council on Judicial Administration, and has been the subject of numerous exceptions, including (1) “where the government[al] entity ha[s] repeatedly failed to comply with court orders affecting the proposed class, rendering it doubtful that *stare decisis* will operate effectively”; (2) “where the entity fails to propose any form of relief that purports to protect the plaintiff”; (3) “where the plaintiffs’ ability to commence individual suits is highly compromised, due to indigency or otherwise”; (4) where “the condition sought to be remedied by the plaintiff[s] poses some immediate threat that cannot await individual determination[s]”;

Recent examples of the certification of this type of class action challenging governmental operations are: (1) *City of New York v. Maul*, involving a class of developmentally-disabled children and young adults who are or have been in New York City's foster care system, and who allege that defendants failed to fulfill their statutory obligations;⁵¹ and (2) *Hurrell-Harring v. State*, involving a constitutional challenge by criminal defendants to the manner in which localities provide funding for lawyers to represent indigent defendants.⁵²

D. CPLR 901(b): Game Changer

Class actions alleging violations of the Donnelly Act and the Federal Telephone Consumer Protection Act⁵³ are not yet certifiable, in light of CPLR 901(b)'s prohibition against class actions seeking a penalty or minimum damages imposed by statute. The New York Court of Appeals in *Sperry v. Crompton Corp.*, a price-fixing class action alleging violations of GBL sections 340 and 349, and asserting unjust enrichment, noted that “[w]here a statute is already designed to foster litigation through an enhanced award, CPLR 901(b) acts to restrict recoveries in class actions absent statutory authorization.”⁵⁴ However, class actions alleging violations of GBL section 349, which also has a minimum damage award and penalty provisions, albeit discretionary, are certifiable as long as the named plaintiff waives treble damages, with notice to class members, so they may opt out and pursue an individual action

(5) where the individual damages are small.

Id. (citations omitted) (quoting *N.Y. City Coal. to End Lead Poisoning v. Giuliani*, 245 A.D.2d 49, 51, 668 N.Y.S.2d 1, 3 (App. Div. 1st Dep't 1997)).

⁵¹ *City of N.Y. v. Maul*, 14 N.Y.3d 499, 503–04, 514, 929 N.E.2d 366, 368, 376, 903 N.Y.S.2d 304, 306, 314 (2010) (affirming class certification); *see supra* note 24.

⁵² *Hurrell-Harring v. State*, 15 N.Y.3d 8, 15–16, 930 N.E.2d 217, 219–20, 904 N.Y.S.2d 296, 298–99 (2010) (reinstating plaintiffs' claim).

⁵³ *See, e.g.,* *Giovanniello v. Carolina Wholesale Office Mach. Co.*, 29 A.D.3d 737, 815 N.Y.S.2d 248 (App. Div. 2d Dep't 2006); *Bonime v. Avaya, Inc.*, 547 F.3d 497, 500 (2d Cir. 2008) (“Because the TCPA does not specifically authorize recovery of statutory damages in a class action, New York state courts have held that C.P.L.R. 901(b) bars class actions for statutory damages under the TCPA.”); *cf. Holster v. Gatco, Inc.* 618 F.3d 214, 217–18 (2d Cir. 2010). The Court held that CPLR 901(b)'s bar is irrelevant if the requirements of Rule 23 are met and federal jurisdiction exists, but in regard to the TCPA specifically, “Congress intended to give states a fair measure of control over solving the problems that the TCPA addresses. The ability to define when a class cause of action lies and when it does not is part of that control.” *Id.*

⁵⁴ *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 209, 214, 863 N.E.2d 1012, 1014, 1017, 831 N.Y.S.2d 760, 762, 765 (2007).

seeking such damages.⁵⁵ The same concept applies to class actions alleging violations of Labor Law sections 220 and 196-d.⁵⁶

The game changer is that now class actions alleging antitrust violations under GBL section 340 may be certifiable in federal court under Federal Rule of Civil Procedure (“FRCP”) 23. In order to avoid the prohibitions of CPLR 901(b), some antitrust class actions alleging violations of GBL section 340 have been brought in federal court under FRCP 23, which contains no such prohibition. Until recently, however, the federal courts in New York, whether on the grounds of comity or to discourage forum shopping, have routinely referred to CPLR 901(b) and denied class certification.⁵⁷

Recently, Justice Scalia, writing for the plurality in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, held that CPLR section 901(b) could no longer trump FRCP 23, and noted that “Rule 23 provides a one-size-fits-all formula for deciding the class-action question.”⁵⁸ The net effect of *Shady Grove* is threefold. First, there may be an increase in the number of class actions brought in federal court seeking to avoid CPLR 901(b).⁵⁹ Second, some defendants may not be so anxious to remove a class action to federal court under the Class Action Fairness Act.⁶⁰ And third, the legislature may repeal CPLR 901(b) as, inter alia, contrary to the legislative history of CPLR Article 9 (antitrust suits).⁶¹

E. Mass Torts

Notwithstanding a clear mandate in the legislative history of CPLR Article 9 (“mass exposure to environmental offenses”⁶²), class

⁵⁵ See *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40, 778 N.Y.S.2d 147, 148–49 (App. Div. 1st Dep’t 2004); *Ridge Meadows Homeowner’s Ass’n v. Tara Dev. Co.*, 242 A.D.2d 947, 947, 665 N.Y.S.2d 361, 361 (App. Div. 4th Dep’t 1997).

⁵⁶ See, e.g., *Pesantez v. Boyle Envtl. Servs., Inc.*, 251 A.D.2d 11, 12, 673 N.Y.S.2d 659, 660 (App. Div. 1st Dep’t 1998) (certifying class of past and present employees, but remanding for an administrative proceeding and development of a reviewable record); *Galdamez v. Biordi Constr. Corp.*, 50 A.D.3d 357, 357–58, 855 N.Y.S.2d 104, 105 (App. Div. 1st Dep’t 2008) (affirming class certification for claim under Labor Law section 220); *Krebs v. Canyon Club, Inc.*, 22 Misc. 3d 1125(A), 880 N.Y.S.2d 873, 2009 WL 440903, at *14–15 (Sup. Ct. Westchester Cnty. 2009) (granting class certification for claim under Labor Law section 196-d).

⁵⁷ *Bonime*, 547 F.3d at 500, 501–02; *Leider v. Ralfe*, 387 F. Supp. 2d 283, 287–89 (S.D.N.Y. 2005).

⁵⁸ *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010); see Thomas A. Dickerson, *State Class Actions: Game Changer*, N.Y. L.J., Apr. 6, 2010, at 6.

⁵⁹ Dickerson, *supra* note 58, at 6.

⁶⁰ *Id.* See WEINSTEIN, KORN & MILLER, *supra* note 2, § 901.10[3].

⁶¹ Dickerson, *supra* note 58, at 6; see *supra* note 10 and accompanying text.

⁶² THIRTEENTH ANNUAL REPORT, *supra* note 8, at 248; see *supra* notes 8, 10–11 and

action mass torts involving personal injuries or property damage are, with a few exceptions,⁶³ not certifiable, whether based on negligence, negligent misrepresentation, trespass, nuisance, strict products liability, or a violation of GBL section 349.⁶⁴ Mass torts

accompanying text.

⁶³ See, e.g., *Godwin Realty Assocs. v. CATV Enters., Inc.*, 275 A.D.2d 269, 269, 712 N.Y.S.2d 39, 40 (App. Div. 1st Dep't 2000) (granting class certification to building owners claiming misappropriation and conversion of electricity, and physical damage to buildings, resulting from installation of cable television equipment); *Arroyo v. State*, 12 Misc. 3d 1197(A), 824 N.Y.S.2d 767, 2006 WL 2390619, at *1, *5 (N.Y. Ct. Cl. 2006) (unpublished table decision) (granting class certification to class of "Spraypark" patrons alleging negligence for failure to "adequately maintain or monitor the sanitary conditions," resulting in contamination by a highly contagious waterborne parasite); Justice Freedman, *Court Decisions: First Judicial Department—Cunningham v. American Home Products Corp.*, N.Y. L.J., Sept. 21, 1999, at 26 (granting class certification of individuals prescribed diet drug and seeking medical monitoring as a remedy); Justice Baisley, *Court Decisions: Suffolk County Supreme Court—Friedman v. Northville Industries, Corp.*, N.Y. L.J., Dec. 27, 1991, at 27 (approving settlement in an action where class members alleged property damage resulting from oil spill); Justice Copertino, *Court Decisions: Suffolk County Supreme Court—Leo v. General Electric Co.*, N.Y. L.J., Jan. 25, 1989, at 29 (granting certification to class of commercial fisherman claiming economic losses because of PCB poisoning of striped bass in the Hudson River).

⁶⁴ See, e.g., *Fleming v. Barnwell Nursing Home & Health Facilities, Inc.*, 309 A.D.2d 1132, 1133, 766 N.Y.S.2d 241, 243 (App. Div. 3d Dep't 2003) (denying class certification of class of nursing home residents as to their negligence claim, but granting class certification for their claim under Public Health Law section 2801-d in a medical malpractice action); see *supra* note 40; *Rallis v. City of N.Y.*, 3 A.D.3d 525, 526, 770 N.Y.S.2d 736, 737 (App. Div. 2d Dep't 2004) (denying certification of a class alleging property damage from flooding); *Catalano v. Heraeus Kulzer, Inc.*, 305 A.D.2d 356, 759 N.Y.S.2d 159 (App. Div. 2d Dep't 2003) (affirming the denial of class certification for claims in regard to defective dental restorations); *Lieberman v. 293 Mediterranean Mkt. Corp.*, 303 A.D.2d 560, 560–61, 756 N.Y.S.2d 469, 469 (App. Div. 2d Dep't 2003) (affirming denial of class certification in an action for personal injury damages from alleged food poisoning at restaurant); *Geiger v. Am. Tobacco Co.*, 277 A.D.2d 420, 420, 716 N.Y.S.2d 108, 108 (App. Div. 2d Dep't 2000) (affirming denial of certification of smokers' class action); *Goldberg Weprin & Ustin, L.L.P. v. Tishman Constr. Corp.*, 275 A.D.2d 614, 614, 713 N.Y.S.2d 57, 58 (App. Div. 1st Dep't 2000) (dismissing class action economic loss claim for collapse of elevator tower); *Apra v. Hazeltine Corp.*, 247 A.D.2d 564, 564, 669 N.Y.S.2d 61, 61 (App. Div. 2d Dep't 1998) (denying certification of mass tort claim for emission of hazardous waste); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 18, 679 N.Y.S.2d 593, 605–06 (App. Div. 1st Dep't 1998), *aff'd*, 94 N.Y.2d 43, 57, 720 N.E.2d 892, 899, 698 N.Y.S.2d 615, 621 (1999) (decertifying smokers' mass tort class action); *Karlin v. IVF Am., Inc.*, 239 A.D.2d 562, 562, 657 N.Y.S.2d 460, 460 (App. Div. 2d Dep't 1997) (denying certification to class alleging violation of GBL section 349 and medical malpractice for misrepresentation of success rates of in vitro fertilization); *Morgan v. A.O. Smith Corp.*, 233 A.D.2d 375, 375, 650 N.Y.S.2d 748, 749 (App. Div. 2d Dep't 1996) (denying certification of class of farmers alleging defendant misrepresented quality of grain silos); *Komoneci v. Fields*, 232 A.D.2d 374, 374–75, 648 N.Y.S.2d 151, 151–52 (App. Div. 2d Dep't 1996) (denying class certification for medical malpractice claim alleging plaintiff improperly performed colonoscopies); *Robertson v. E. Smalis Painting Co.*, 134 A.D.2d 881, 881, 522 N.Y.S.2d 53, 53 (App. Div. 4th Dep't 1987) (decertifying class of homeowners alleging property damage resulting from negligent painting of bridge); *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 131, 139, 477 N.Y.S.2d 242, 244, 248 (App. Div. 4th Dep't 1984) (affirming denial of class certification in a toxic tort action in regard to a chemical waste dump); *Evans v. City of Johnstown*, 97 A.D.2d 1, 2, 470 N.Y.S.2d 451, 451–52 (App. Div. 3d Dep't 1983) (decertifying

should be certifiable under CPLR Article 9, and have been certified in many other states.⁶⁵

A recent example of a class action is *Osarczuk v. Associated Universities, Inc.*⁶⁶ In an earlier decision, the Appellate Division, Second Department, held that some eight hundred homeowners living near the Brookhaven National Laboratory stated a claim for personal injuries and property damage from exposure to non-nuclear hazardous materials emitted into the air, soil, and groundwater.⁶⁷ The complaint alleged negligence, abnormally dangerous activity, gross negligence, private nuisance, and medical monitoring.⁶⁸ Thereafter, the trial court certified two of six proposed subclasses, including: (1) homeowners who suffered a diminution of real property value, or may have lost enjoyment or use; and (2) persons who suffered economic loss, such as being unable to use private wells, and being required to hook up to public water systems.⁶⁹ The trial court, however, denied certification to

class alleging injuries from sewage plant construction, operation, and maintenance); *Wojciechowski v. Republic Steel Corp.*, 67 A.D.2d 830, 830, 413 N.Y.S.2d 70, 71 (App. Div. 4th Dep't 1979) (dismissing class action alleging defendant negligently released air pollution).

⁶⁵ See, e.g., *Robichaux v. State Dep't of Health & Hosp.*, 952 So. 2d 27, 31, 41–42 (La. Ct. App. 2006) (granting certification to class of homeowners claiming damages from release of toxic chemicals); *Guillory v. Union Pac. R.R. Co.*, 915 So. 2d 1034, 1035 (La. Ct. App. 2005) (granting certification to class of residents alleging negligence and requesting damages for lost property following a chemical spill from train derailment); *Williams v. Stewart*, 112 P.3d 281, 283–84, 289 (N.M. Ct. App. 2005) (noting that class certification may be appropriate in action involving exposure of body parts to plutonium levels without consent); *Aspinall v. Philip Morris Co.*, 813 N.E.2d 476, 479, 480 (Mass. 2004) (granting class certification to class of smokers alleging deceptive advertising); *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 58, 76 (W. Va. 2003) (granting certification of class action alleging drug increased risk of liver cancer); *Shea v. Chi. Pneumatic Tool Co.*, 990 P.2d 912, 913, 917 (Or. Ct. App. 1999) (certifying products liability class action); *N. Ind. Pub. Serv. Co. v. Bolka*, 693 N.E.2d 613, 615, 620 (Ind. Ct. App. 1998) (granting certification of class alleging damages caused by emissions from power generating plant); *Naef v. Masonite Corp.*, 681 So. 2d 1068, 1069 (Ala. 1996) (denying motion to decertify class alleging defective exterior siding caused damages); *Meighan v. U.S. Sprint Comm'n Co.*, 924 S.W.2d 632, 635, 637 (Tenn. 1996) (granting class certification for claim of unauthorized cable installation); *McDonald v. Washington*, 862 P.2d 1150, 1151, 1158 (Mont. 1993) (affirming grant of certification to class of water consumers alleging water contamination); *In re Cadillac V8-6-4 Class Action*, 461 A.2d 726, 739 (N.J. 1983) (noting that class action certification is appropriate for defective engine claims in a claim alleging personal injuries and emotional distress); *Danyo v. Great Lakes Steel Corp.*, 286 N.W.2d 50, 52, 55 (Mich. Ct. App. 1979) (affirming grant of class certification for class claiming negligence for air pollution); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 171, 176–77 (Iowa 1977) (granting class certification to class of farmers alleging damages from defective seed corn).

⁶⁶ *Osarczuk v. Assoc. Univs., Inc.*, 26 Misc. 3d 1209(A), 907 N.Y.S.2d 102 (Sup. Ct. Suffolk Cnty. 2009).

⁶⁷ *Osarczuk*, 36 A.D.3d 872, 830 N.Y.S.2d 711 (App. Div. 2d Dep't 2007).

⁶⁸ *Id.*

⁶⁹ *Osarczuk*, 26 Misc. 3d 1209(A), 907 N.Y.S.2d 102.

the personal injury subclass and the medical monitoring subclass.⁷⁰ Recently, the Appellate Division, Second Department, reversed the trial court and denied class certification.

V. CONCLUSION

After thirty-five years of underutilizing CPLR Article 9, it is time to follow the mandates of its legislative history. Simply stated, it is time for the courts to start certifying class action mass torts alleging personal injury and property damage, and class actions challenging governmental operations. As for certifying class actions under the Donnelly Act and the Federal Telephone Consumer Protection Act, otherwise prohibited by CPLR 901(b), this may require legislative action.

⁷⁰ *Id.*