CONSUMER LAW 2006 UPDATE

THE JUDGE'S GUIDE TO FEDERAL AND NEW YORK STATE CONSUMER PROTECTION STATUTES

June 1, 2006

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Ever since my days as a City Court Judge sitting in the Small Claims Part[ii] I have kept track of reported consumer law cases in New York State Courts. Causes of action alleging the violation of one or more Federal and/or New York State consumer protection statutes are frequently asserted in civil cases. This Paper, prepared annually for New York State Civil Court Judges, discusses those consumer protection statutes most frequently used in New York State courts, and, hopefully, will prove useful in resolving common consumer claims [See e.g., Dvoskin v. Levitz Furniture Co., Inc.[iii] (" The informal nature of the layman facilitated small claims process dispenses with written answers as well as the need for plaintiffs to articulate all requisite elements of causes of action and instead places the

responsibility upon the tribunal to ascertain from the proof what legal issues have been joined for disposition “)].

Arbitration, Forum Selection & Consumer Class Actions Too

In addition to reviewing recently reported New York State consumer law cases, this Paper discusses two new substantive and procedural topics. First, within the last seven years there has been a dramatic increase in the use of mandatory arbitration and forum selection clauses in consumer contracts, particularly, in agreements entered into over the Internet[iv]. The enforceability of such clauses raises several issues addressed herein. Second, Article 9 of the C.P.L.R.[v] allows consumers to aggregate similar claims into class actions. The fact patterns in such consumer class actions provide useful information on new areas of consumer law. The scope of New York State consumer class actions including a review of all New York State class actions reported between January 2005 to March of 2006 appears herein.

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[C] **15 U.S.C. § 1639** [Home Ownerships and Equity Protection Act of 1994 (HOEPA)];

[D] **15 U.S.C. §§ 2301 et seq** [Magnuson-Moss Warranty Act];

[E] **47 U.S.C. § 227** [Federal Telephone Consumer Protection Act Of 1991];

[F] **12 C.F.R. §§ 226.1 et seq** [Regulation Z].

2.1] **Recent New York State Consumer Law Articles**

Elsberg, Incorporation of Arbitration Clauses, New York Law Journal, January 6, 2006, p. 4, col. 3 (" Where the parties' contract has no arbitration clause, but refers or is related to a separate document that includes an arbitration clause, may one party compel the other to arbitrate? ").

Kesselman & Kirsch, Consumer Services Sector: Mandatory Arbitration End Threatened, New York Law Journal, November 18, 2005, p. 4, col. 3 (discussion of Ragucci v. Professional Construction Services, 25 A.D. 3d 43, 803 N.Y.S. 2d 139 (2005) (G.B.L. § 399-c's prohibition of the use of mandatory

arbitration clauses in some consumer contracts applied to contract for architectural services).

Karmel & Paden, Consumer Protection Law Claims in Toxic Torts Litigation, N.Y.L.J., August 23, 2005, p. 3 (discussion of whether " the claim that the plaintiff's exposure to a toxic substance is actionable (under) state consumer protection statutes ").

Samson, The Anticybersquatting Consumer Protection Act: Key Information, N.Y.L.J., September 9, 2005, p. 4 (ACPA " was intended to prevent ' cybersquatting ' an expression that has come to mean the bad faith, abusive registration and use of the distinctive trademarks of others as Internet domain names, with the intent to profit from the goodwill associated with those trademarks ").

Lesser, New York Consumer Law-Court Decisions in 2004, N.Y.L.J., July 27, 2005, p. 4 (" During recent years, an increasing division in the courts has appeared in § 349 jurisprudence as to the standard, on a motion to dismiss, as to whether a given practice is deceptive...the two upstate departments' view that determinations of deceptiveness present issues of fact stands in contrast to what has been, particularly,

the First Department's apparent willingness, particularly in consumer cases, to rule that alleged conduct was not deceptive- usually because that court concluded that a reasonable consumer would not have been misled by the allegedly deceptive conduct ").

3] **Deceptive & Misleading Business Practices: G.B.L. § 349**

The most popular of New York State's many consumer protection statutes is General Business Law § 349 [" G.B.L. § 349 "] which prohibits deceptive and misleading business practices[vi]. G.B.L. § 349 allows consumers and, possibly, businesses[vii] to sue for $50.00 or actual damages which may be trebled up to $1,000.00 upon a finding of a " wil(ful) or know(ing) violat(ion) ".[viii] An additional civil penalty not to exceed $10,000 may be imposed for a violation if the " conduct is perpetrated against one or more elderly persons "[ix]. Attorneys fees and costs may be recovered as well.

A] **Consumer Oriented Conduct**

To establish a violation of G.B.L. § 349 the consumer must demonstrate that the alleged misconduct has " a broad impact on consumers at large "[x] and constitutes " consumer-oriented

conduct "[xi].

B] **Stating A Cognizable Claim**

As stated in Small v. Lorillard Tobacco Co.[xii] " To state a claim...a plaintiff must allege that the defendant has engaged ' in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof '...Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim...However, proof that ' a material deceptive act or practice causes actual, although not necessarily pecuniary harm ' is required to impose compensatory damages ".

In Pelman v. McDonald's Corp.[xiii] the Court stated "...To state a claim for deceptive practices under section 349, a plaintiff must show: (1) that the act, practice or advertisement was consumer-oriented; (2) that the act, practice or advertisement was misleading in a material respect; and (3) that the plaintiff was injured as a result of the deceptive act, practice or advertisement...The standard for whether an act or practice is misleading is objective, requiring a showing that a reasonable consumer would have been misled by the defendant's conduct... Omissions, as well as acts, may form the basis of a deceptive practices claim...traditional showings of reliance and

scienter are not required under GBL § 349 ".

A well pled G.B.L. § 349 complaint need not particularize the deceptive practice but should, at a minimum, allege " that (defendants) engaged in consumer-related activity that effected consumers at large, utilized tactics that were deceptive and misleading in material respects, disseminated advertising through various mediums, that was false in material respects, and injury resulting from (defendants') business practices and advertising ") [Gabbay v. Mandel[xiv]]. In addition, a G.B.L. § 349 complaint should identify the deceptive advertising and explain why and how the challenged advertising is materially deceptive [Pelman v. McDonald's Corp.[xv]].

C] **Preemption**

G.B.L. §§ 349, 350 may be pre-empted by other consumer protection statutes[xvi] [Stone v. Continental Airlines[xvii](airline bumping G.B.L. § 349, 350 claims preempted by federal airline regulations); People v. Applied Card Systems, Inc.[xviii] (" We next reject...contention that (TILA) preempted petitioner's claims
(which) pertain to unfair and deceptive acts and practices ")].

D] **Actual Injury Necessary**

The complaint must allege actual injury arising from the alleged violations of G.B.L. § 349[xix] [Small v. Lorillard Tobacco Co.[xx](in order to make out a G.B.L. § 349 claim the complaint must allege that a deceptive act was directed towards consumers and caused actual injury); Shebar v. Metropolitan Life Insurance Co., 23 A.D. 3d 858, 807 N.Y.S. 2d 448 (2006)(" Inasmuch as plaintiff asserts that this consumer-oriented conduct was deceptive, material and caused him injury...these allegations sufficiently allege (a violation of G.B.L. § 349) "); Solomon v. Bell Atlantic Corp.[xxi] (" A deceptive act or practice is not ' the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer '...by which the consumer is ' caused actual, although not necessarily pecuniary, harm...'"); Ho v. Visa USA, Inc.[xxii] (consumers' G.B.L. § 349 claim arising from " retailers being required to accept defendants' debit cards if they want to continue accepting credit cards " dismissed because of " remoteness of their damages from the alleged injurious activity "]; Goldberg v. Enterprise Rent-A-Car Company[xxiii] (" 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 "); Thompson v.

Foreign Car Center, Inc.[xxiv](car purchaser charges dealer with " misrepresentations and non-disclosures concerning price, after-market equipment, unauthorized modification and compromised manufacturer warranty protect; G.B.L. § 349 claim dismissed because of failure " to demonstrate that they sustained an actual injury "); Wendol v. The Guardian Life Ins. Co.[xxv](" allegations that defendants engaged in a deceptive business practice by using Berkshire instead of Guardian to administer the claims of its policyholders are insufficient to state a claim under (G.B.L. § 349) in the absence of any allegation or proof that any misrepresentation regarding the entity administering the claims caused any actual injury "); Meyerson v. Prime Realty Services, LLC[xxvi], (" a privacy invasion claim-and an accompanying request for attorney's fees-may be stated under (G.B.L. § 349) based on nonpecuniary injury "); Sokoloff v. Town Sports International, Inc.[xxvii](" Such claim impermissibly ' sets forth deception as both act and injury ' "); Goldberg v. Enterprise Rent-A-Car Company, 14 A.D. 3d 417, 789 N.Y.S. 2d 114 (2005)(failure to allege actual harm from failure to disclose data in rental car agreement); Donahue v. Ferolito, Vultaggio & Sons[xxviii] (" (plaintiff) failed to establish any actual damages resulting from defendants' alleged deceptive practices and false advertising on the labels "); Levine v. Philip Morris Inc.[xxix](" plaintiff must offer evidence that defendant made a misrepresentation...which

actually deceived...and which caused her injury "); Han v. Hertz Corp.[xxx] (" proof that a material deceptive act or practice caused actual—albeit not necessarily pecuniary—harm is required to impose compensatory damages ")].

E] **Threshold Of Deception**

Initially G.B.L. § 349 had a low threshold for a finding of deception, i.e., misleading and deceptive acts directed to " the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions " [Guggenheimer v. Ginzburg][xxxi]. Recently, the Court of Appeals raised the threshold to those misleading and deceptive acts " likely to mislead a reasonable consumer acting reasonably under the circumstances " [Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.[xxxii]; Peabody v. Northgate Ford, Inc.[xxxiii](failure to demonstrate that defendants " engaged in practices which were ' likely to mislead a reasonable consumer acting reasonably under the circumstances '")].

F] **Scope Of G.B.L. § 349**

G.B.L. § 349 applies to a broad spectrum of goods and services [Karlin v. IVF America[xxxiv] (GBL 349... " on (its) face

appl(ies) to virtually all economic activity and (its) application has been correspondingly broad...The reach of (this) statute ‘ provides needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State ‘”)]. G.B.L. § 349 is broader than common law fraud [Gaidon v. Guardian Life Insurance Company[xxxv] (“ encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law “); State of New York v. Feldman[xxxvi] (G.B.L. § 349 “ was intended to be broadly applicable, extending far beyond the reach of common law fraud “)].

G] **Statute Of Limitations**

G.B.L. § 349 claims are governed by a three-year period of limitations [C.P.L.R. 241(2)]. G.B.L. § 349 claims accrue when the consumer “ has been injured by a deceptive act “[xxxvii].

H] **Application To Non-Residents**

G.B.L. § 349 does not apply to the claims of non-residents who did not enter into contracts in New York State [Goshen v.

Mutual Life Insurance Company[xxxviii]] or received services in New York State [Scott v. Bell Atlantic Corp.[xxxix]].

I] **No Independent Claim Necessary**

A G.B.L. § 349 claim " does not need to be based on an independent private right of action " [Farino v. Jiffy Lube International, Inc.[xl]].

J] **Territorial Limitations**

In Goshen v. The Mutual Life Ins. Co.[xli] [consumers of vanishing premium insurance policies] and Scott v. Bell Atlantic Corp.[xlii], [consumers of Digital Subscriber Line (DSL)[xliii] Internet services], the Court of Appeals, not wishing to " tread on the ability of other states to regulate their own markets and enforce their own consumer protection laws " and seeking to avoid " nationwide, if not global application " , held that G.B.L. § 349 requires that " the transaction in which the consumer is deceived must occur in New York ". Following this latest interpretation[xliv] of the " territorial reach " of G.B.L. § 349 the Court in Truschel v. Juno Online Services, Inc.[xlv], a consumer class action alleging misrepresentations by a New York based Internet service provider, dismissed the G.B.L. § 349 claim

because the named representative entered into the Internet contract in Arizona. Notwithstanding the Goshen territorial limitation, the Court in Peck v. AT&T Corp[xlvi]., a G.B.L. § 349 consumer class action involving cell phone service which " improperly credited calls causing (the class) to lose the benefit of weekday minutes included in their calling plans ", approved a proposed settlement on behalf of residents in New York, New Jersey and Connecticut [" it would be a waste of judicial resources to require a different [G.B.L. § 349] class action in each state...where, as here, the defendants have marketed their plans on a regional (basis) "].

K] **Goods, Services & Misconduct Covered By G.B.L. § 349**

The types of goods and services to which G.B.L. § 349 applies include the following:

[1] **Apartment Rentals** [Bartolomeo v. Runco[xlvii] and Anilesh v. Williams[xlviii] (renting illegal apartments); Yochim v. McGrath[xlix] (renting illegal sublets)];

[2] **Attorney Advertising** [People v. Law Offices of Andrew F. Capoccia[l](" The alleged conduct the instant lawsuit seeks to enjoin and punish is false, deceptive and fraudulent advertising practices "); Aponte v. Raychuk[li](deceptive

attorney advertisements [" Divorce, Low Fee, Possible 10 Days, Green Card "] violated Administrative Code of City of New York §§ 20-70C et seq)];

[3] **Aupair Services** [Oxman v. Amoroso[lii] (misrepresenting the qualifications of an abusive aupair to care for handicapped children)];

[4] **Arbitrator's Award; Refusal To Pay** [Lipscomb v. Manfredi Motors[liii] (auto dealer's refusal to pay arbitrator's award under G.B.L. § 198-b (Used Car Lemon Law) is unfair and deceptive business practice under G.B.L. § 349)];

[5] **Auctions; Bid Rigging** [State of New York v. Feldman[liv] (scheme to manipulate public stamp auctions comes " within the purview of (G.B.L. § 349) ")];

[6] **Automotive; Contract Disclosure Rule** [Levitsky v. SG Hylan Motors, Inc[lv]. (violation of G.B.L. § 396-p " and the failure to adequately disclose the costs of the passive alarm and extended warranty constitute a deceptive action (*per se* violation of G.B.L. § 349); Spielzinger v. S.G. Hylan Motors Corp.[lvi](failure to disclose the true cost of " Home Care Warranty " and " Passive Alarm ", failure to comply with

provisions of G.B.L. § 396-p and G.B.L. § 396-q; *per se* violations of G.B.L. § 349)];

[6.1] **Baldness Products** [Karlin v. IVF[lvii] (reference to unpublished decision applying G.B.L. § 349 to products for treatment of balding and baldness); Mountz v. Global Vision Products, Inc.[lviii] (" Avacor, a hair loss treatment extensively advertised on television...as the modern day equivalent of the sales pitch of a snake oil salesman "; allegations of misrepresentations of " no known side effects ' of Avacor is refuted by documented minoxidil side effects ")];

[6.2] **Bills, Automotive Repair** [Joyce v. SI All Tire & Auto Center[lix](" the invoice (violates G.B.L. § 349). Although the bill has the total charge for the labor rendered for each service, it does not set forth the number of hours each service took. It makes it impossible for a consumer to determine if the billing is proper. Neither does the bill set forth the hourly rate ")];

[7] **Budget Planning** [People v. Trescha Corp.[lx] (company misrepresented itself as a budget planner which " involves debt consolidation and...negotiation by the budget planner of reduced interest rates with creditors and the

cancellation of the credit cards by the debtors...the debtor agrees to periodically send a lump sum payment to the budget planner who distributes specific amounts to the debtor's creditors ")];

[7.1] **Cable TV** [In Samuel v. Time Warner, Inc.[lxi], 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 "[lxii], 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 "];

[8] **Cars** [People v. Condor Pontiac[lxiii] (used car dealer violated G.B.L. § 349 and V.T.L. § 417 in failing to disclose that used car was " previously used principally as a rental vehicle "; " In addition (dealer violated) 15 NYCRR §§

78.10(d), 78.11(12),(13)...fraudulently and/or illegally forged the signature of one customer, altered the purchase agreements of four customers after providing copies to them, and transferred retail certificates of sale to twelve (12) purchasers which did not contain odometer readings...(Also) violated 15 NYCRR § 78.13(a) by failing to give the purchaser a copy of the purchase agreement in 70 instances (all of these are deceptive acts) "); Spielzinger v. S.G. Hylan Motors Corp.[lxiv](failure to disclose the true cost of " Home Care Warranty " and " Passive Alarm ", failure to comply with provisions of G.B.L. § 396-p and G.B.L. § 396-q; per se violation of G.B.L. § 349)];

[9] **Cell Phones** [Naevus International, Inc. v. AT&T Corp.[lxv], (wireless phone subscribers seek damages for " frequent dropped calls, inability to make or receive calls and failure to obtain credit for calls that were involuntarily disconnected ")];

[9.1] **Checking Accounts** [Sherry v. Citibank[lxvi](" plaintiff stated (G.B.L. §§ 349, 350 claims) for manner in which defendant applied finance charges for its checking plus ' accounts since sales literature could easily lead potential customer to reasonable belief that interest would stop accruing once he made deposit to his checking account sufficient to pay

off amount due on credit line “)].

[10] **Clothing Sales** [Baker v. Burlington Coat Factory[lxvii] (refusing to refund purchase price in cash for defective and shedding fake fur)];

[10.1] **Computer Software** [Cox v. Microsoft Corp.[lxviii](“ allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors in inhibit competition and technological development and creating an ‘ applications barrier ‘ in its Windows software that...rejected competitors’ Intel-compatible PC operating systems, and that such practices resulted in artificially inflated prices for defendant’s products and denial of consumer access to competitor’s innovations, services and products “)

[11] **Credit Cards** [People v. Applied Card Systems, Inc.[lxix](misrepresenting the availability of certain pre-approved credit limits; “ solicitations were misleading...because a reasonable consumer was led to believe that by signing up for the program, he or she would be protected in case of an income loss due to the conditions described “); People v. Telehublink[lxx] (“ telemarketers told prospective customers that they were pre-

approved for a credit card and they could receive a low-interest credit card for an advance fee of approximately $220. Instead of a credit card, however, consumers who paid the fee received credit card applications, discount coupons, a merchandise catalog and a credit repaid manual "); Sims v. First Consumers National Bank[lxxi], (" The gist of plaintiffs' deceptive practices claim is that the typeface and location of the fee disclosures, combined with high-pressure advertising, amounted to consumer conduct that was deceptive or misleading "); Broder v. MBNA Corporation[lxxii] (credit card company misrepresented the application of its low introductory annual percentage rate to cash advances)];

[12] **Customer Information** [Anonymous v. CVS Corp.[lxxiii]

(CVS acquired the customer files from 350 independent pharmacies without customers' consent; the " practice of intentionally declining to give customers notice of an impending transfer of their critical prescription information in order to increase the value of that information appears to be deceptive ")];

[13] **Defective Automobile Ignition Switches** [Ritchie v. Empire Ford Sales, Inc.[lxxiv] (dealer liable for damages to used car that burned up 4 ½ years after sale)];

[14] **Defective Brake Shoes** [Giarrantano v. Midas Muffler[lxxv] (Midas Muffler fails to honor brake shoe warranty)];

[15] **Defective Dishwashers** [People v. General Electric Co., Inc[lxxvi](misrepresentations " made by...GE to the effect that certain defective dishwashers it manufactured were not repairable " was deceptive under G.B.L. § 349)];

[16] **Door-To-Door Sales** [New York Environmental Resources v. Franklin[lxxvii],(misrepresented and grossly overpriced water purification system); Rossi v. 21st Century Concepts, Inc.[lxxviii] (selling misrepresented and overpriced pots and pans)];

[17] **Educational Services** [People v. McNair [lxxix] (" deliberate and material misrepresentations to parents enrolling their children in the Harlem Youth Enrichment Christian Academy...thereby entitling the parents to all fees paid (in the amount of $182,393.00); civil penalties pursuant to G.B.L. 350-d of $500 for each deceptive act or $38,500.00 and costs of $2,000.00 pursuant to CPLR § 8303(a)(6)); Andre v. Pace University[lxxx] (failing to deliver computer programming course for beginners); Brown v. Hambric[lxxxi] (failure to deliver travel agent education program)];

[18] **Employee Scholarship Programs** [Cambridge v. Telemarketing Concepts, Inc.[lxxxii] (refusal to honor agreement to provide scholarship to employee)];

[19] **Excessive & Unlawful Bail Bond Fees** [McKinnon v. International Fidelity Insurance Co.[lxxxiii](misrepresentation of expenses in securing bail bonds)];

[19.1] **Excessive Modeling Fees** [Shelton v. Elite Model Management, Inc.[lxxxiv](models' claims of excessive fees caused " by reason of any misstatement, misrepresentation, fraud and deceit, or any unlawful act or omission of any licensed person " stated a private right of action under G.B.L. Article 11 and a claim under G.B.L. § 349)];

[20] **Exhibitions and Conferences** [Sharknet Inc. v. Telemarketing, NY Inc.[lxxxv] (misrepresenting length of and number of persons attending Internet exhibition)];

[20.1] **Extended Warranties** [" The extended warranty and new parts warranty business generates extraordinary profits for the retailers of cars, trucks and automotive parts and for repair shops. It has been estimated that no more than 20% of the

people who buy warranties ever use them... Of the 20% that actually try to use their warranties...(some) soon discover that the real costs can easily exceed the initial cost of the warranty certificate "[lxxxvi]; Dvoskin v. Levitz Furniture Co., Inc.[lxxxvii] (one year and five year furniture extended warranties; " the solicitation and sale of an extended warranty to be honored by an entity that is different from the selling party is inherently deceptive if an express representation is not made disclosing who the purported contracting party is. It is reasonable to assume that the purchaser will believe the warranty is with the Seller to whom she gave consideration, unless there is an express representation to the contrary. The providing of a vague two page sales brochure, after the sale transaction, which brochure does not identify the new party...and which contains no signature or address is clearly deceptive "); Kim v. BMW of Manhattan, Inc.[lxxxviii](misrepresented extended warranty; $50 statutory damages awarded under G.B.L. 349(h)); Giarratano v. Midas Muffler[lxxxix]

(Midas would not honor its brake shoe warranty unless the consumer agreed to pay for additional repairs found necessary after a required inspection of the brake system; " the Midas Warranty Certificate was misleading and deceptive in that it promised the replacement of worn brake pads free of charge and then emasculated that promise by requiring plaintiff to pay for

additional brake system repairs which Midas would deem necessary and proper "); Petrello v. Winks Furniture[xc] (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty)];

[20.2] **Food** [Pelman v. McDonald's Corp[xci]. (misrepresentation of nutritional value of food products); Matter of Food Parade, Inc. V. Office of Consumer Affairs[xcii] (the mere display and sale of expired food items in not a deceptive act under Nassau County Administrative Code § 21-10.2 which is not preempted by G.B.L. § 820 governing sale of outdated over-the-counter drugs); Matter of Stop & Shop Supermarket Companies, Inc. V. Office of Consumer Affairs of County of Nassau[xciii](" A supermarket's mere display and sale of expired items is not a deceptive trade practice under Nassau County Administrative Code § 21-10.2(b)(1)(d) ")];

[21] **Furniture Sales** [Petrello v. Winks Furniture[xciv] (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty); Walker v. Winks Furniture[xcv] (falsely promising to deliver furniture within one week); Filpo v. Credit Express Furniture Inc.[xcvi] (failing to inform Spanish speaking consumers of a three day cancellation period); Colon v. Rent-A-Center, Inc.[xcvii] (rent-to-own furniture; " an overly

inflated cash price " for purchase may violate G.B.L. § 349)];

[22] **Hair Loss Treatment** [Mountz v. Global Vision Products, Inc.[xcviii] (" marketing techniques (portrayed) as the modern day equivalent of the sales pitch of a snake oil salesman ", alleged misrepresentations of " no known side effects " without revealing documented side effects " which include cardiac changes, visual disturbances, vomiting, facial swelling and exacerbation of hair loss "; G.B.L. § 349 claim stated for New York resident " deceived in New York ")];

[23] **Home Heating Oil; Unilateral Price Increase** [State v. Wilco Energy Corp.[xcix] (home heating oil company's " conduct constituted a deceptive practice. It offered a fixed-price contract and then refused to comply with its most material term—an agreed-upon price for heating oil ")];

[24] **Home Inspections** [Ricciardi v. Frank d/b/a/ InspectAmerica Enginerring,P.C.[c] (civil engineer liable for failing to discover wet basement)];

[25] **In Vitro Fertilization** [Karlin v. IVF America, Inc. [ci] (misrepresentations of in vitro fertilization rates of success)];

[26] **Insurance Coverage** [Gaidon v. Guardian Life Insurance Co. & Goshen v. Mutual Life Insurance Co.[cii] (misrepresentations that " out-of-pocket premium payments (for life insurance policies) would vanish within a stated period of time "); Monter v. Massachusetts Mutual Life Ins. Co.[ciii] (misrepresentations with respect to the terms " Flexible Premium Variable Life Insurance Policy "); Skibinsky v. State Farm Fire and Casualty Co.[civ] (misrepresentation of the coverage of a " builder's risk " insurance policy); Brenkus v. Metropolitan Life Ins. Co.[cv](misrepresentations by insurance agent as to amount of life insurance coverage); Makastchian v. Oxford Health Plans, Inc.[cvi] (practice of terminating health insurance policies without providing 30 days notice violated terms of policy and was a deceptive business practice because subscribers may have believed they had health insurance when coverage had already been canceled)];

[26.1] **Insurance Claims Procedures** [Shebar v. Metropolitan Life Insurance Co.[cvii](" Allegations that despite promises to the contrary in its standard-form policy sold to the public, defendants made practice of ' not investigating claims for long-term disability benefits in good faith, in a timely fashion, and in accordance with acceptable medical standards... when the person submitting the claim...is relatively young and

suffers from a mental illness ‘, stated cause of action pursuant to (G.B.L.) § 349 “); Makuch v. New York Central Mutual Fire Ins. Co.[cviii] (“ violation of (G.B.L. § 349 for disclaiming) coverage under a homeowner’s policy for damage caused when a falling tree struck plaintiff’s home “); Acquista v. New York Life Ins. Co.[cix] (“ allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability “” may be said to fall within the parameters of an unfair or deceptive practice “); Rubinoff v. U.S. Capitol Insurance Co.[cx] (automobile insurance company fails to provide timely defense to insured)].

[27] **Internet Marketing & Services** [Zurakov v. Register.Com, Inc.[cxi](“ Given plaintiff’s claim that the essence of his contract with defendant was to establish his exclusive use and control over the domain name ‘ Laborzionist.org ‘ and that defendant’s usurpation of that right and use of the name after registering it for plaintiff defeats the very purpose of the contract, plaintiff sufficiently alleged that defendant’s failure to disclose its policy of placing newly registered domain names on the ‘ Coming Soon ‘ page was material “ and constitutes a deceptive act under G.B.L. § 349); People v. Network Associates, Inc.[cxii] (“ Petitioner argues that the use of the words ‘ rules and regulations ‘ in the restrictive clause (prohibiting testing

and publication of test results of effectiveness of McAfee antivirus and firewall software) is designed to mislead consumers by leading them to believe that some rules and regulations outside (the restrictive clause) exist under state or federal law prohibiting consumers from publishing reviews and the results of benchmark tests...the language is (also) deceptive because it may mislead consumers to believe that such clause is enforceable under the lease agreement, when in fact it is not...as a result consumers may be deceived into abandoning their right to publish reviews and results of benchmark tests "); People v. Lipsitz[cxiii] (failing to deliver purchased magazine subscriptions); Scott v. Bell Atlantic Corp.[cxiv], (misrepresented Digital Subscriber Line (DSL)[cxv] Internet services)];

[28] **" Knock-Off " Telephone Numbers** [Drizin v. Sprint Corp.[cxvi] (" defendants' admitted practice of maintaining numerous toll-free call service numbers identical, but for one digit, to the toll-free call service numbers of competitor long-distance telephone service providers. This practice generates what is called ' fat-fingers ' business, i.e., business occasioned by the misdialing of the intended customers of defendant's competing long-distance service providers. Those customers, seeking to make long-distance telephone calls, are, by

reason of their dialing errors and defendants' many ' knock-off ' numbers, unwittingly placed in contact with defendant providers rather than their intended service providers and it is alleged that, for the most part, they are not advised of this circumstance prior to completion of their long-distance connections and the imposition of charges in excess of those they would have paid had they utilized their intended providers. These allegations set forth a deceptive and injurious business practice affecting numerous consumers (under G.B.L. 349) ")];

[29] **Lasik Eye Surgery** [Gabbay v. Mandel[cxvii] (medical malpractice and deceptive advertising arising from lasik eye surgery)];

[29.1] **Layaway Plans** [Amiekumo v. Vanbro Motors, Inc.[cxviii](failure to deliver vehicle purchased on layaway plan and comply with statutory disclosure requirements; a violation of G.B.L. § 396-t is a *per se* violation of G.B.L. § 349];

[29.2] **Leases, Equipment** [Sterling National Bank v. Kings Manor Estates[cxix](" The defendants...claim that the equipment lease was tainted by fraud and deception in the inception, was unconscionable and gave rise to unjust enrichment...the bank plaintiff, knowing of the fraudulent

conduct, purchased the instant equipment lease at a deep discount, and by demanding payment thereunder acted in a manner violating...(G.B.L. § 349) “)];

[30] **Liquidated Damages Clause** [Morgan Services, Inc. v. Episcopal Church Home & Affiliates Life Care Community, Inc[cxx]. (it is deceptive for seller to enter “ into contracts knowing that it will eventually fail to supply conforming goods and that, when the customer complains and subsequently attempts to terminate the contract (seller) uses the liquidated damages clause of the contract as a threat either to force the customer to accept the non-conforming goods or to settle the lawsuit “)];

[31] **Loan Applications** [Dunn v. Northgate Ford, Inc.[cxxi]
(automobile dealer completes and submits loan application to finance company and misrepresents teenage customer’s ability to repay loan which resulted in default and sale of vehicle)];

[32] **Mislabeling** [Lewis v. Al DiDonna[cxxii](pet dog dies from overdose of prescription drug, Feldene, mislabeled “ 1 pill twice daily ‘ when should have been “ one pill every other day “)];

[32.1] **Monopolistic Business Practices** [Cox v. Microsoft Corporation[cxxiii] (monopolistic activities are covered by G.B.L. § 349; " allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors to inhibit competition and technological development and creating an ' applications barrier ' in its Windows software that...rejected competitors' Intel-compatible PC operating systems, and that such practices resulted in artificially inflated prices for defendant's products and denial of consumer access to competitor's innovations, services and products ");

[33] **Mortgages** [Kidd v. Delta Funding Corp.[cxxiv](" The defendants failed to prove that their act of charging illegal processing fees to over 20,000 customers, and their failure to notify the plaintiffs of the existence and terms of the settlement agreement, were not materially deceptive or misleading "); Walts v. First Union Mortgage Corp[cxxv]. (consumers induced to pay for private mortgage insurance beyond requirements under New York Insurance Law § 6503); Negrin v. Norwest Mortgage, Inc.[cxxvi] (mortgagors desirous of paying off mortgages charged illegal and unwarranted fax and recording fees); Trang v. HSBC Mortgage Corp., USA[cxxvii] ($15.00 special handling/fax fee for a faxed copy of mortgage payoff statement

violates R.P.L. § 274-a(2)(a) which prohibits charges for mortgage related documents and is deceptive as well)];

[34] **Motor Oil Changes** [Farino v. Jiffy Lube International, Inc.[cxxviii] (an " Environmental Surcharge " of $.80 to dispose of used motor oil after every automobile oil change may be deceptive since under Environmental Conservation Law § 23-2307 Jiffy was required to accept used motor oil at no charge)];

[35] **Movers; Household Goods** [Goretsky v. ½ Price Movers, Inc[cxxix]. (" failure to unload the household goods and hold them ' hostage ' is a deceptive practice under " G.B.L. § 349)];

[35.1] **Packaging** [Sclafani v. Barilla America, Inc.[cxxx](deceptive packaging of retail food products)];

[36] **Professional Networking** [BNI New York Ltd. v. DeSanto[cxxxi] (enforcing an unconscionable membership fee promissory note)];

[37] **Privacy** [Anonymous v. CVS Corp[cxxxii]. (sale of confidential patient information by pharmacy to a third party is " an actionable deceptive practice " under G.B.L. 349); Smith v.

Chase Manhattan Bank[cxxxiii] (same); Meyerson v. Prime Realty Services, LLC[cxxxiv], (" landlord deceptively represented that (tenant) was required by law to provide personal and confidential information, including... social security number in order to secure renewal lease and avoid eviction ")];

[38] **Pyramid Schemes** [C.T.V. Inc. v. Curlen[cxxxv] (selling bogus " Beat The System Program " certificates); Brown v. Hambric[cxxxvi] (selling misrepresented instant travel agent credentials and educational services)];

[39] **Real Estate Sales** [Gutterman v. Romano Real Estate[cxxxvii] (misrepresenting that a house with a septic tank was connected to a city sewer system); Board of Mgrs, of Bayberry Greens Condominium v. Bayberry Greens Associates[cxxxviii] (deceptive advertisement and sale of condominium units); B.S.L. One Owners Corp. v. Key Intl. Mfg. Inc.[cxxxix](deceptive sale of shares in a cooperative corporation); Breakwaters Townhouses Ass'n. v. Breakwaters of Buffalo, Inc.[cxl](condominium units); Latiuk v. Faber Const. Co.[cxli](deceptive design and construction of home); Polonetsky v. Better Homes Depot, Inc.[cxlii](N.Y.C. Administrative Code §§ 20-700 et seq (Consumer Protection Law) applies to business of buying foreclosed homes and refurbishing and reselling them as residential properties; misrepresentations

that recommended attorneys were approved by Federal Housing Authority deceptive)];

[40] **Securities** [Not Covered By G.B.L. § 349][Gray v. Seaboard Securities, Inc.[cxliii] (G.B.L. § 349 provides no relief for consumers alleging injury arising from the deceptive or misleading acts of a trading company); Yeger v. E* Trade Securities LLC,[cxliv](" Although plaintiffs argue that the statute on its face, applies to virtually all economic activity, courts have held that federally regulated securities transactions are outside the ambit of section 349 "); Fesseha v. TD Waterhouse Investor Services, Inc.[cxlv](" Finally, section 349 does not apply here because, in addition to being a highly regulated industry, investments are not consumer goods "); Berger v. E*Trade Group, Inc.[cxlvi] (" Securities instruments, brokerage accounts and services ancillary to the purchase of securities have been held to be outside the scope of the section "); But see Scalp & Blade, Inc. v. Advest, Inc.[cxlvii](G.B.L. § 349 covers securities transactions)];

[41] **Sports Nutrition Products** [Morelli v. Weider Nutrition Group, Inc.[cxlviii],(manufacturer of Steel Bars, a high-protein nutrition bar, misrepresented the amount of fat, vitamins, minerals and sodium therein)];

[42] **Termite Inspections** [Anunziatta v. Orkin Exterminating Co., Inc.[cxlix](misrepresentations of full and complete inspections of house and that there were no inaccessible areas are misleading and deceptive)];

[43] **Tobacco Products** [Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris Inc.,[cl](tobacco companies' scheme to distort body of public knowledge concerning the risks of smoking, knowing public would act on companies' statements and omissions was deceptive and misleading)];

[44] **Transportation Services, E-Z Passes** [Kinkopf v. Triborough Bridge & Tunnel Authority[cli] (E-Z pass contract fails to reveal necessary information to customers wishing to make a claim and " on its face constitutes a deceptive practice "), rev'd[clii] (toll is a use tax and not consumer oriented transaction)];

[45] **Travel Services** [Meachum v. Outdoor World Corp.[cliii]
(misrepresenting availability and quality of vacation campgrounds; Vallery v. Bermuda Star Line, Inc.[cliv]
(misrepresented cruise); Pellegrini v. Landmark Travel Group[clv]

(refundability of tour operator tickets misrepresented); People v. P.U. Travel, Inc.[clvi](Attorney General charges travel agency with fraudulent and deceptive business practices in failing to deliver flights to Spain or refunds)];

[46] **TV Repair Shops** [Tarantola v. Becktronix, Ltd[clvii].

(TV repair shop's violation of " Rules of the City of New York (6 RCNY 2-261 et seq)...that certain procedures be followed when a licensed dealer receives an electronic or home appliance for repair...constitutes a deceptive practice under (G.B.L. § 349)")];

[46.1] **Unfair Competition Claims** [Not Covered By G.B.L. § 349][In Leider v. Ralfe[clviii], an action involving control of the diamond market, the Court held that there was no violation of G.B.L. § 349 (" Plaintiffs contend that De Beers' broad-scale manipulation and pollution of the diamond market is deceptive unto itself. I see no principled distinction between this allegation and a generic antitrust scheme, albeit on a substantially larger scale than most. Plaintiffs cannot escape the fact that...New York has chosen not to include ' unfair competition ' or ' unfair ' practices in its consumer protection statute, language that bespeaks a significantly broader

reach “)];

[47] **Wedding Singers** [Bridget Griffin-Amiel v. Frank Terris Orchestras[clix] (the bait and switch[clx] of a “ 40-something crooner “ for the “ 20-something “ Paul Rich “ who promised to deliver a lively mix of pop hits, rhythm-and-blues and disco classics “)]. For broken engagements and disputes over wedding preparations, generally, see DeFina v. Scott[clxi].

4] **False Advertising: G.B.L. § 350**

Consumers who rely upon false advertising and purchase defective goods or services may claim a violation of G.B.L. § 350 [Scott v. Bell Atlantic Corp.[clxii] (defective ‘ high speed ‘ Internet services falsely advertised); Card v. Chase Manhattan Bank[clxiii] (bank misrepresented that its LifePlus Credit Insurance plan would pay off credit card balances were the user to become unemployed)]. G.B.L. § 350 prohibits false advertising which “ means advertising, including labeling, of a commodity...if such advertising is misleading in a material respect...(covers)....representations made by statement, word, design, device, sound...but also... advertising (which) fails to reveal facts material “[clxiv]. G.B.L. § 350 covers a broad spectrum of misconduct

[Karlin v. IVF America[clxv] (" (this statute) on (its) face appl(ies) to virtually all economic activity and (its) application has been correspondingly broad ")]. Proof of a violation of G.B.L. 350 is simple, i.e., " the mere falsity of the advertising content is sufficient as a basis for the false advertising charge " [People v. Lipsitz[clxvi] (magazine salesman violated G.B.L. § 350; " (the) (defendant's) business practice is generally ' no magazine, no service, no refunds " although exactly the contrary is promised "); People v. McNair [clxvii] (" deliberate and material misrepresentations to parents enrolling their children in the Harlem Youth Enrichment Christian Academy...thereby entitling the parents to all fees paid (in the amount of $182,393.00); civil penalties pursuant to G.B.L. 350-d of $500 for each deceptive act or $38,500.00 and costs of $2,000.00 pursuant to CPLR § 8303(a)(6))].

However, unlike a claim under G.B.L. § 349 plaintiffs must prove reliance on false advertising to establish a violation of G.B.L. § 350 [Pelman v. McDonald's Corp.[clxviii](G.B.L. § 350 requires proof of reliance); Leider v. Ralfe[clxix] (G.B.L. § 350 requires proof of reliance); Gale v. International Business Machines Corp.[clxx](" Reliance is not an element of a claim under (G.B.L. § 349)...claims under (G.B.L. § 350)...do require proof of reliance ")].

[A] **Unlawful Use Of Name Of Nonprofit Organization**

G.B.L. § 397 provides that " no person...shall use for advertising purposes...the name...of any non-profit corporation ...without having first obtained the written consent of such non-profit corporation ". In Metropolitan Opera Association, Inc. v. Figaro Systems, Inc.[clxxi] the Met charged a New Mexico company with unlawfully using its name in advertising promoting its " ' Simultext ' system which defendant claims can display a simultaneous translation of an opera as it occurs on a stage and that defendant represented that its system is installed at the Met ")].

5] **Cars, Cars, Cars**

There are a variety of consumer protection statutes available to purchasers and lessees of automobiles, new and used. A comprehensive review of five of these statutes [GBL § 198-b[clxxii]
(Used Car Lemon Law), express warranty[clxxiii], implied warranty of merchantability[clxxiv] (U.C.C. §§ 2-314, 2-318), Vehicle and Traffic Law [V&T] § 417, strict products liability[clxxv]] appears in Ritchie v. Empire Ford Sales, Inc.[clxxvi], a case involving a used 1990 Ford Escort which burned up 4 ½ years after

being purchased because of a defective ignition switch. A comprehensive review of two other statutes [GBL § 198-a (New Car Lemon Law) and GBL § 396-p (New Car Contract Disclosure Rules)] appears in Borys v. Scarsdale Ford, Inc.[clxxvii], a case involving a new Ford Crown Victoria, the hood, trunk and both quarter panels of which had been negligently repainted prior to sale.

[A] **Automotive Parts Warranty: G.B.L. § 617(2)(a)**

" The extended warranty and new parts warranty business generates extraordinary profits for the retailers of cars, trucks and automotive parts and for repair shops. It has been estimated that no more than 20% of the people who buy warranties ever use them... Of the 20% that actually try to use their warranties... (some) soon discover that the real costs can easily exceed the initial cost of the warranty certificate "[clxxviii]. In Giarratano v. Midas Muffler[clxxix], Midas would not honor its brake shoe warranty unless the consumer agreed to pay for additional repairs found necessary after a required inspection of the brake system. G.B.L. § 617(2)(a) protects consumers who purchase new parts or new parts' warranties from breakage or a failure to honor the terms and conditions of a warranty [" If a part does not conform to the warranty...the initial seller shall make repairs as are

necessary to correct the nonconformity "[clxxx]]. A violation of G.B.L. § 617(2)(a) is a per se violation of G.B.L. § 349 which provides for treble damages, attorneys fees and costs[clxxxi]. See also: **Kim v. BMW of Manhattan, Inc.**[clxxxii](misrepresented extended automobile warranty; G.B.L. § 349(h) statutory damages of $50 awarded).

[B] **Auto Repair Shop Duty To Perform Quality Repairs**

Service stations should perform quality repairs. Quality repairs are those repairs held by those having knowledge and expertise in the automotive field to be necessary to bring a motor vehicle to its premalfunction or predamage condition [Welch v. Exxon Superior Service Center[clxxxiii] (consumer sought to recover $821.75 from service station for failing to make proper repairs to vehicle; " While the defendant's repair shop was required by law to perform quality repairs, the fact that the claimant drove her vehicle without incident for over a year following the repairs indicates that the vehicle had been returned to its premalfunction condition following the repairs by the defendant, as required "); Shalit v. State of New York[clxxxiv](conflict in findings in Small Claims Court in auto repair case with findings of Administrative Law Judge under VTL § 398).

[C] **Implied Warranty Of Merchantability: U.C.C. §§ 2-314,**

2-318; Delivery Of Non-Conforming Goods: U.C.C. § 2-608

Both new and used cars carry with them an implied warranty of merchantability [U.C.C. §§ 2-314, 2-318][Denny v. Ford Motor Company[clxxxv]]. Although broader in scope than the Used Car Lemon Law the implied warranty of merchantability does have its limits, i.e., it is time barred four years after delivery [U.C.C. § 2-725; Hull v. Moore Mobile Homes Stebra, Inc[clxxxvi]., (defective mobile home; claim time barred)] and the dealer may disclaim liability under such a warranty [U.C.C. § 2-316] if such a disclaimer is written and conspicuous [Natale v. Martin Volkswagen, Inc.[clxxxvii] (disclaimer not conspicuous)]. A knowing misrepresentation of the history of a used vehicle may state a claim under U.C.C. § 2-608 for the delivery of non-conforming goods [Urquhart v. Philbor Motors, Inc.[clxxxviii]]

[D] **Magnuson-Moss Warranty Act & Leased Vehicles: 15 U.S.C. §§ 2301 et seq**

In Tarantino v. DaimlerChrysler Corp.[clxxxix], DiCinto v. Daimler Chrysler Corp.[cxc] and Carter-Wright v. DaimlerChrysler Corp.[cxci], it was held that the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq. applies to automobile lease transactions. However, in DiCintio v. DaimlerChrysler Corp.[cxcii], the Court of

Appeals held that the Magnuson-Moss Warranty Act does not apply to automobile leases.

[E] **New Car Contract Disclosure Rule: G.B.L. § 396-p**

In Borys v. Scarsdale Ford, Inc[cxciii], a consumer demanded a refund or a new car after discovering that a new Ford Crown Victoria had several repainted sections. The Court discussed liability under G.B.L. § 198-a (New Car Lemon Law) and G.B.L. § 396-p(5) (Contract Disclosure Requirements) [" gives consumers statutory rescission rights ' in cases where dealers fail to provide the required notice of prior damage and repair(s)' (with a) ' retail value in excess of five percent of the lesser of manufacture's or distributor's suggested retail price '"]. In Borys the Court dismissed the complaint finding (1) that under G.B.L. § 198-a the consumer must give the dealer an opportunity to cure the defect and (2) that under G.B.L. § 396-p(5) Small Claims Court would not have jurisdiction [money damages of $3,000] to force " defendant to give...a new Crown Victoria or a full refund, minus appropriate deductions for use ".

In Levitsky v. SG Hylan Motors, Inc[cxciv] a car dealer overcharged a customer for a 2003 Honda Pilot and violated G.B.L. 396-p by failing to disclose the " estimated delivery date and place of delivery...on the contract of sale ". The Court found

that the violation of G.B.L. § 396-p " and the failure to adequately disclose the costs of the passive alarm and extended warranty constitutes a deceptive act (in violation of G.B.L. § 349). Damages included " $2,251.50, the $2,301.50 which he overpaid, less the cost of the warranty of $50.00 " and punitive damages under G.B.L. § 349(h) bringing the award up to $3,000.00, the jurisdictional limit of Small Claims Court.

In Spielzinger v. S.G. Hylan Motors Corp.[cxcv](failure to disclose the true cost of " Home Care Warranty " and " Passive Alarm ", failure to comply with provisions of G.B.L. § 396-p (confusing terms and conditions, failure to notify consumer of right to cancel) and G.B.L. § 396-q (dealer failed to sign sales contract); *per se* violations of G.B.L. § 349 with damages awarded of $734.00 (overcharge for warranty) and $1,000 statutory damages).

And in Thompson v. Foreign Car Center, Inc.[cxcvi] a car purchaser charged a Volkswagen dealer with " misrepresentations and non-disclosures concerning price, after-market equipment, unauthorized modification and compromised manufacturer warranty protection ". The Court dismissed the claim under G.B.L. § 396-p (" While GBL § 396-p(1) and (2) state that a contract price cannot be increased after a contract has been entered into, the record reveals that defendants appear to have substantially complied with the alternative provisions of GBL § 396-p(3) by

providing plaintiffs with the buyers' form indicating the desired options and informing them they had a right to a full refund of their deposit "). However, claims under G.B.L. § 396-q and P.P.L. § 302 were sustained because defendants had failed to sign the retail installment contract.

[F] **New Car Lemon Law: G.B.L. § 198-a**

New York State's New Car Lemon Law [G.B.L. § 198-a] provides that " If the same problem cannot be repaired after four or more attempts; Or if your car is out of service to repair a problem for a total of thirty days during the warranty period; Or if the manufacturer or its agent refuses to repair a substantial defect within twenty days of receipt of notice sent by you...Then you are entitled to a comparable car or refund of the purchase price " [Borys v. Scarsdale Ford, Inc.[cxcvii]]. Before commencing a lawsuit seeking to enforce the New Car Lemon Law the dealer must be given an opportunity to cure the defect [Chrysler Motors Corp. v. Schachner[cxcviii] (dealer must be afforded a reasonable number of attempts to cure defect)]. The consumer may utilize the statutory repair presumption after four unsuccessful repair attempts after which the defect is still present[cxcix]. However, the defect need not be present at the time of arbitration hearing[cc]

[“ The question of whether such language supports an interpretation that the defect exist at the time of the arbitration hearing or trial. We hold that it does not “[cci]]. Civil Courts have jurisdiction to adjudicate Lemon Law refund remedy claims up to $25,000.[ccii]. Attorneys fees and costs may be awarded to the prevailing consumer [Kucher v. DaimlerChrysler Corp.[cciii](“ this court is mindful of the positive public policy considerations of the ‘ Lemon Law ‘ attorney fee provisions... Failure to provide a consumer such recourse would undermine the very purpose of the Lemon Law and foreclose the consumer’s ability to seek redress as contemplated by the Lemon Law “); DaimlerChrysler Corp. v. Karman[cciv]($5,554.35 in attorneys fees and costs of $300.00 awarded)].

[G] **Used Car Dealer Licensing: C.P.L.R. § 3015(e)**

In B & L Auto Group, Inc. v. Zilog[ccv] a used car dealer sued a customer to collect the $2,500.00 balance due on the sale of a used car. Because the dealer failed to have a Second Hand Automobile Dealer’s license pursuant to New York City Department of Consumer Affairs when the car was sold the Court refused to enforce the sales contract pursuant to C.P.L.R. § 3015(e).

[H] **Used Car Extended Warranty**

In Barthley v. Autostar Funding LLC[ccvi] the consumer purchased a 1993 Lexus with over 110,000 miles and an extended warranty on the vehicle. After the vehicle experienced engine problems and a worn cam shaft was replaced at a cost of $1,733.66 the consumer made a claim under the extended warranty. The claim was rejected by the warranty company " on the basis that a worn camshaft was a pre-existing condition ". The Court found this rejection unconscionable and awarded damages to cover the cost of the new camshaft. " In effect, the warranty company has chosen to warranty a ten year old car with over 110,000 miles on the odometer and then rejects a timely claim on the warranty on the basis that the car engine's internal parts are old and worn ", rev'd N.Y.L.J., April 26, 2005, p. 25, col. 3 (N.Y.A.T.) (" defendant was not a party to the warranty agreement ").

[I] **Used Car Lemon Law: G.B.L. § 198-b**

New York State's Used Car Lemon Law [G.B.L. § 198-b] provides limited warranty protection for used cars costing more than $1,500 depending upon the number of miles on the odometer [e.g., 18,000 miles to 36,000 miles a warranty " for at least 90 days or 4,000 miles ", 36,000 miles to 80,000 miles a warranty " for at least 60 days or 3,000 miles " and 80,000 miles to 100,000

miles a warranty " for 30 days or 3,000 miles "][Cintron v. Tony Royal Quality Used Cars, Inc.[ccvii] (defective 1978 Chevy Malibu returned within thirty days and full refund awarded)]. Used car dealers must be given an opportunity to cure a defect before the consumer may commence a lawsuit enforcing his or her rights under the Used Car Lemon Law[Milan v. Yonkers Avenue Dodge, Inc.[ccviii] (dealer must have opportunity to cure defects in used 1992 Plymouth Sundance)]. The Used Car Lemon Law does not preempt other consumer protection statutes [Armstrong v. Boyce[ccix]], does not apply to used cars with more than 100,000 miles when purchased[ccx] and has been applied to used vehicles with coolant leaks [Fortune v. Scott Ford, Inc.[ccxi]], malfunctions in the steering and front end mechanism [Jandreau v. LaVigne[ccxii], Diaz v. Audi of America, Inc.[ccxiii]], stalling and engine knocking [Ireland v. JL's Auto Sales, Inc.[ccxiv]] and vibrations [Williams v. Planet Motor Car, Inc.[ccxv]] . An arbitrator's award may be challenged in a special proceeding [C.P.L.R. 7502] [Lipscomb v. Manfredi Motors[ccxvi]]. Recoverable damages include the return of the purchase price and repair and diagnostic costs [Williams v. Planet Motor Car, Inc.[ccxvii] , Sabeno v. Mitsubishi Motors Credit of America, 20 A.D. 3d 466, 799 N.Y.S. 2d 527 (2005)(consumer obtained judgment in Civil Court for full purchase price of $20,679.60 " with associated costs, interest on the loan and prejudgment interest " which defendant refused to

pay [and also refused to accept return of vehicle]; instead of enforcing the judgment in Civil Court the consumer commenced a new action, two claims of which [violation of U.C.C. § 2-717 and G.B.L. § 349] were dismissed)].

[J] **Warranty Of Serviceability: V.T.L. § 417**

Used car buyers are also protected by Vehicle and Traffic Law § 417 [" V&T § 417 "] which requires used car dealers to inspect vehicles and deliver a certificate to buyers stating that the vehicle is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery. V&T § 417 is a non-waiveable, nondisclaimable, indefinite, warranty of serviceability which has been liberally construed [Barilla v. Gunn Buick Cadillac-GNC, Inc.[ccxviii]; Ritchie v. Empire Ford Sales, Inc.[ccxix] (dealer liable for Ford Escort that burns up 4 ½ years after purchase); People v. Condor Pontiac[ccxx] (used car dealer violated G.B.L. § 349 and V.T.L. § 417 in failing to disclose that used car was " previously used principally as a rental vehicle "; " In addition (dealer violated) 15 NYCRR §§ 78.10(d), 78.11(12), (13)...fraudulently and/or illegally forged the signature of one customer, altered the purchase agreements of four customers after providing copies to them, and transferred retail certificates of

sale to twelve (12) purchasers which did not contain odometer readings...(Also) violated 15 NYCRR § 78.13(a) by failing to give the purchaser a copy of the purchase agreement in 70 instances (all of these are deceptive acts) “]; recoverable damages include the return of the purchase price and repair and diagnostic costs [Williams v. Planet Motor Car, Inc.[ccxxi]].

[K] **Repossession & Sale Of Vehicle**

In Coxall v. Clover Commercials Corp.[ccxxii], the consumer purchased a “ 1991 model Lexus automobile, executing a Security Agreement/Retail Installment Contract. The ‘ cash price ‘ on the Contract was $8,100.00 against which the Coxalls made a ‘ cash downpayment ‘ of $3,798.25 “. After the consumers stopped making payments because of the vehicle experienced mechanical difficulties the Lexus was repossessed and sold. In doing so, however, the secured party failed to comply with U.C.C. § 9-611(b) which requires “ ‘ a reasonable authenticated notification of disposition ‘ to the debtor “ and U.C.C § 9-610(b) (“ the sale must be ‘ commercially reasonable ‘ “). Statutory damages awarded offset by defendant’s breach of contract damages.

6] **Homes**

[A] **Home Improvement Contracts & Frauds: G.B.L. §§ 771, 772**

G.B.L. § 771 requires that home improvement contracts be in writing and executed by both parties. A failure to sign a home improvement contract means it can not be enforced in a breach of contract action [Precision Foundations v. Ives[ccxxiii]].

G.B.L. § 772 provides homeowners victimized by unscrupulous home improvement contractors [who make " false or fraudulent written statements "] with statutory damages of $500.00, reasonable attorneys fees and actual damages [Udezeh v. A+Plus Construction Co.[ccxxiv] (statutory damages of $500.00, attorneys fees of $1,500.00 and actual damages of $3,500.00 awarded); Garan v. Don & Walt Sutton Builders, Inc.[ccxxv](construction of a new, custom home falls within the coverage of G.B.L. § 777(2) and not G.B.L. § 777-a(4))].

[B] **Home Improvement Contractor Licensing: C.P.L.R. § 3015(e); G.B.L. Art. 36-A; RCNY § 2-221**

Homeowners often hire home improvement contractors to repair or improve their homes or property. Home improvement contractors must, at least, be licensed by the Department of Consumer Affairs of New York City, Westchester County, Suffolk County, Rockland County, Putnam County and Nassau County if they are to perform

services in those Counties [C.P.L.R. § 3015(e)]. Should the home improvement contractor be unlicenced he will be unable to sue the homeowner for non-payment for services rendered [Goldman v. Fay[ccxxvi] (" although claimant incurred expenses for repairs to the premises, none of the repairs were done by a licensed home improvement contractor...(G.B.L. art 36-A; 6 RCNY 2-221). It would violate public policy to permit claimant to be reimbursed for work done by an unlicenced contractor "); Tri-State General Remodeling Contractors, Inc v. Inderdai Baijnauth[ccxxvii] [ccxxviii] (salesmen do not have to have a separate license); Altered Structure, Inc. v. Solkin[ccxxix](contractor unable to seek recovery for home improvement work " there being no showing that it was licensed "); Routier v. Waldeck[ccxxx] (" The Home Improvement Business provisions...were enacted to safeguard and protect consumers against fraudulent practices and inferior work by those who would hold themselves out as home improvement contractors "); Colorito v. Crown Heating & Cooling, Inc.[ccxxxi],(" Without a showing of proper licensing, defendant (home improvement contractor) was not entitled to recover upon its counterclaim (to recover for work done) " Cudahy v. Cohen[ccxxxii] (unlicenced home improvement contractor unable to sue homeowner in Small Claims Courts for unpaid bills); Moonstar Contractors, Inc. v. Katsir[ccxxxiii](license of sub-contractor can not be used by general contractor to meet licensing requirements)]. Obtaining a

license during the performance of the contract may be sufficient [Mandioc Developers, Inc. v. Millstone[ccxxxiv]] while obtaining a license after performance of the contract is not sufficient [B&F Bldg. Corp. V. Liebig[ccxxxv] (" The legislative purpose...was not to strengthen contractor's rights, but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor is licensed ")].

[C] **New Home Implied Warranty Of Merchantability : G.B.L. § 777**

G.B.L. § 777 provides, among other things, for a statutory housing merchant warranty[ccxxxvi] for the sale of a new house which for

(1) one year warrants " the home will be free from defects due to a failure to have been constructed in a skillful manner " and for (2) two years warrants that " the plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such systems in a skillful manner " and for (3) six years warrants " the home will free from material defects " [See e.g., Etter v. Bloomingdale Village Corp.[ccxxxvii](breach of housing merchant implied warranty claim regarding defective tub sustained; remand on damages)]. The statute also requires timely notice from aggrieved consumers [Biancone v. Bossi[ccxxxviii](plaintiff's breach

of warranty claim that defendant contractor failed " to paint the shingles used in the construction...(And) add sufficient topsoil to the property "; failure " to notify...of these defects pursuant to...(G.B.L. § 777-a(4)(a) "); Rosen v. Watermill Development Corp.[ccxxxix] (notice adequately alleged in complaint); Taggart v. Martano[ccxl](failure to allege compliance with notice requirements (G.B.L. § 777-a(4)(a)) fatal to claim for breach of implied warranty); Testa v. Liberatore[ccxli] (" prior to bringing suit (plaintiff must) provide defendant with a written notice of a warranty claim for breach of the housing merchant implied warranty "); Randazzo v. Abram Zylberberg[ccxlii](defendant waived right " to receive written notice pursuant to (G.B.L. § 777-1(4)(a) ")].

[D] **Movers, Household Goods: 17 N.Y.C.R.R. § 814.7**

In Goretsky v. ½ Price Movers, Inc[ccxliii] claimant asserted that a mover hired to transport her household goods " did not start
at time promised, did not pick-up the items in the order she wanted and when she objected (the mover) refused to remover her belongings unless they were paid in full ". The Court noted the absence of effective regulations of movers. " The biggest complaint is that movers refuse to unload the household goods

unless they are paid...The current system is, in effect, extortion where customers sign documents that they are accepting delivery without complaint solely to get their belongings back. This situation is unconscionable “. The Court found a violation of 17 N.Y.C.R.R. § 814.7 when the movers “ refused to unload the entire shipment “, violations of G.B.L. § 349 in “ that the failure to unload the household goods and hold them ‘ hostage ‘ is a deceptive practice “ and a failure to disclose relevant information in the contract and awarded statutory damages of $50.00. See also: Steer clear of online moving brokers, Consumer Reports, June 2005, p. 8 (“ hiring a broker may connect you with an incompetent mover who has been the target of complaints. At worst, the broker could be in league with rogue moving companies that lowball the initial quote, then jack it up at the destination, holding your possessions hostage until you pay the higher rate “).

[E] **Real Estate Brokers’ Licenses: R.P.L. § 441(b)**

In Olukotun v. Reiff[ccxliv] the plaintiff wanted to purchase a legal two family home but was directed to a one family with an illegal apartment. After refusing to purchase the misrepresented two family home she demanded reimbursement of the $400 cost of the home inspection. Finding that the real estate broker violated

the competency provisions of R.P.L. § 441(1)(b) (a real estate broker should have " competency to transact the business of real estate broker in such a manner as to safeguard the interests of the public "), the Court awarded damages of $400 with interest, costs and disbursements.

6.1] **Insurance**

A] **Insurance Coverage** [Gaidon v. Guardian Life Insurance Co. & Goshen v. Mutual Life Insurance Co.[ccxlv] (misrepresentations that " out-of-pocket premium payments (for life insurance policies) would vanish within a stated period of time "); Tahir v. Progressive Casualty Insurance Co.[ccxlvi](trial on whether " a no-fault health service provider's claim for compensation for charges for an electrical test identified as Current Perception Threshold Testing " is a compensable no-fault claim); Monter v. Massachusetts Mutual Life Ins. Co.[ccxlvii] (misrepresentations with respect to the terms " Flexible Premium Variable Life Insurance Policy "); Skibinsky v. State Farm Fire and Casualty Co.[ccxlviii] (misrepresentation of the coverage of a " builder's risk " insurance policy); Brenkus v. Metropolitan Life Ins. Co.[ccxlix](misrepresentations by insurance agent as to amount of life insurance coverage); Makastchian v. Oxford Health Plans, Inc.[ccl] (practice of terminating health insurance policies

without providing 30 days notice violated terms of policy and was a deceptive business practice because subscribers may have believed they had health insurance when coverage had already been canceled); Whitfield v. State Farm Mutual Automobile Ins. Co.[cccli](automobile owner sues insurance company seeking payment for motor vehicle destroyed by fire; " Civil Court in general, and the Small Claims Part is particular, may entertain " insurance claims which involve disputes over coverage).

B] **Insurance Claims Procedures** [Shebar v. Metropolitan Life Insurance Co.[cccliii](" Allegations that despite promises to the contrary in its standard-form policy sold to the public, defendants made practice of ' not investigating claims for long-term disability benefits in good faith, in a timely fashion, and in accordance with acceptable medical standards...when the person submitting the claim...is relatively young and suffers from a mental illness ', stated cause of action pursuant to (G.B.L.) § 349 "); Makuch v. New York Central Mutual Fire Ins. Co.[cccliii] (" violation of (G.B.L. § 349 for disclaiming) coverage under a homeowner's policy for damage caused when a falling tree struck plaintiff's home "); Acquista v. New York Life Ins. Co.[ccliv] (" allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability "" may be said to fall within the parameters of an

unfair or deceptive practice "); Rubinoff v. U.S. Capitol Insurance Co.[cclv] (automobile insurance company fails to provide timely defense to insured)].

7] **Loans & Credit**

[A] **Fair Credit Reporting Act: 15 U.S.C. §§ 1681 et seq**

[B] **Home Ownership and Equity Protection: 15 U.S.C. § 1639**

[C] **Real Estate Settlement Procedures Act: 12 U.S.C. § 2601**

[D] **Regulation Z: 12 C.F.R. §§ 226.1 et seq.**

[E] **Truth In Lending Act: 15 U.S.C. §§ 1601 et seq**

Consumers may sue for a violation of several federal statutes which seek to protect borrowers, e.g., including the (1) Truth In Lending Act, 15 U.S.C.A. §§ 1601-1665 [TILA[cclvi]], (2) the Fair Credit Reporting Act, 15 U.S.C. § 1681, (3) the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 [RESPA],(4) the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639 [HOEPA] and (5) Regulation Z, 13 C.F.R. §§ 226.1 et seq. and recover appropriate damages [See e.g., JP Morgan Chase Bank v. Tecl[cclvii] (" The purpose of the TILA is to ensure a meaningful disclosure of the cost of credit to enable consumers to readily compare the various terms available to them, and the TILA disclosure statement will be examined in the context of the other

documents involved “); Bank of New York v. Walden[cclviii] (counterclaiming borrowers allege violations of TILA, HOEPA and Regulation Z; “ mortgages were placed on...defendants’ properties without their knowledge or understanding. Not the slightest attempt at compliance with applicable regulations was made by the lenders. No Truth in Lending disclosures or copies of any of the loan documents signed at the closing were given to the defendants. Thus, plaintiffs did not comply with TILA and Regulation Z...It also appears that the lenders violated HOEPA and Regulation Z in that they extended credit to the defendant based on their collateral rather than considering their incomes...The lenders also violated Regulation Z which prohibits lenders from entering into a balloon payment note with borrowers on high-interest, high fee loans “; injunction preventing eviction issued); Community Mutual Savings Bank v. Gillen[cclix] (borrower counterclaims in Small Claims Court for violation of TILA and is awarded rescission of loan commitment with lender and damages of $400.00; “ TILA (protects consumers) from the inequities in their negotiating position with respect to credit and loan institutions...(TILA) requir(es) lenders to provide standard information as to costs of credit including the annual percentage rate, fees and requirements of repayment...(TILA) is liberally construed in favor of the consumer...The borrower is entitled to rescind the transaction ‘ until midnight of the third

business day following the consummation of the transaction or the delivery of the information and rescission forms required ... together with a statement containing the material disclosures required... whichever is later...The consumer can opt to rescind for any reasons, or for no reason "); Rochester Home Equity, Inc. v. Upton[cclx] (mortgage lock-in fee agreements are covered by TILA and RESPA; " There is nothing in the New York regulations concerning lock-in agreements that sets out what disclosures are required and when they must be made...In keeping with the trend toward supplying consumers with more information than market forces alone would provide, TILA is meant to permit a more judicious use of credit by consumers through a ' meaningful disclosure of credit terms '...It would clearly violate the purpose behind TILA and RESPA to allow fees to be levied before all disclosures were made...the court holds that contracts to pay fees such as the lock-in agreements must be preceded by all the disclosures that federal law requires "); Nova Information Systems, Inc. v. Labatto[cclxi](consumer seeks charge backs on two credit card payments for unsatisfactory dental work; TILA claim sustained); Tyk v. Equifax Credit Information Services, Inc.[cclxii] (consumer who recovered damages under the Fair Credit Reporting Act denied an award of attorneys fees (" more must be shown than simply prevailing in litigation. It must be shown that the party who did not prevail acted in bad faith or for purposes

of harassment ")]. TILA has been held to preempt Personal Property Law provisions governing retail instalment contracts and retail credit agreements [Albank, FSB v. Foland[cclxiii]], but not consumer fraud claims brought under G.B.L. §§ 349, 350 [People v. Applied Card Systems, Inc.[cclxiv] (" We next reject...contention that
(TILA) preempted petitioner's claims (which) pertain to unfair and deceptive acts and practices ")]; both TILA and RESPA have been held to " preempt any inconsistent state law "
[Rochester Home Equity, Inc. v. Upton[cclxv]) and " *de minimis* violations with ' no potential for actual harm ' will not be found to violate TILA "[cclxvi]. See also: Witherwax v. Transcare[cclxvii]
(negligence claim stated against debt collection agency)].

[F] **Fees For Mortgage Related Documents: R.P.L. § 274-a(2)(a)**

In Dougherty v. North Ford Bank[cclxviii] the Court found that the lender had violated R.P.L. § 274-a(2)(a) which prohibits the charging of fees for " for providing mortgage related documents " by charging consumer a $5.00 " Facsimile Fee " and a $25.00 " Quote Fee ". See also: Negrin v. Norwest Mortgage[cclxix].

[G] **Credit Card Cases: Standards Of Proof**

In Citibank (South Dakota), NA v. Martin[cclxx] the Court, after noting that " With greater frequency, courts are presented with summary judgment motions by credit card issuers seeking a balance due from credit card holders which motions fail to meet essential standards of proof and form in one or more particulars ", set forth much needed standards of proof regarding, *inter alia*, assigned claims, account stated claims, tendering of original agreements, requests for legal fees and applicable interest rates.

See also: CR Investigates Credit Cards, Consumer Reports, November 2005, p. 12 (" The effects on Americans' finances are showing. Average card debt per household with at least one credit card topped $9,300 in 2004. That's more than triple the average in 1990. Consumer bankruptcies have skyrocketed from 287,463 in 1980, the dawn of card-industry de-regulation, to just over 1.5 million in 2004 ").

See also: People v. Applied Card Systems, Inc.[cclxxi] (misrepresenting the availability of certain pre-approved credit limits; " solicitations were misleading...because a reasonable consumer was led to believe that by signing up for the program, he or she would be protected in case of an income loss due to the

conditions described “); People v. Telehublink[cclxxii]
(“ telemarketers told prospective customers that they were pre-approved for a credit card and they could receive a low-interest credit card for an advance fee of approximately $220. Instead of a credit card, however, consumers who paid the fee received credit card applications, discount coupons, a merchandise catalog and a credit repaid manual “); Sims v. First Consumers National Bank[cclxxiii], (“ The gist of plaintiffs’ deceptive practices claim is that the typeface and location of the fee disclosures, combined with high-pressure advertising, amounted to consumer conduct that was deceptive or misleading “); Broder v. MBNA Corporation[cclxxiv]
(credit card company misrepresented the application of its low introductory annual percentage rate to cash advances)].

H] **Debt Collection Practices: G.B.L. §§ 601, 602**

In American Express Centurion Bank v. Greenfield[cclxxv] the Court held that there is no private right of action for consumers under G.B.L. §§ 601, 602 [Debt Collection Practices]; See also Varela v. Investors Insurance Holding Corp[cclxxvi].

8] **Overcoats Lost At Restaurants: G.B.L. § 201**

“ For over 100 years consumers have been eating out at restaurants, paying for their meals and on occasion leaving without their simple cloth overcoats...mink coats...mink jackets...racoon coats...Russian sable fur coats...leather coats and, of course, cashmere coats...”[cclxxvii]. In DiMarzo v. Terrace View[cclxxviii], restaurant personnel encouraged a patron to remove his overcoat and then refused to respond to a claim after the overcoat disappeared from their coatroom. In response to a consumer claim arising from a lost overcoat the restaurant may seek to limit its liability to $200.00 as provided for in General Business Law § 201 [“ GBL § 201 “]. However, a failure to comply with the strict requirements of GBL § 201 [“‘ as to property deposited by...patrons in the...checkroom of any...restaurant, the delivery of which is evidenced by a check or receipt therefor and for which no fee or charge is exacted...’”[cclxxix]] allows the consumer to recover actual damages upon proof of a bailment and/or negligence[cclxxx]. The enforceability of liability limiting clauses for lost clothing will often depend upon adequacy of notice [Tannenbaum v. New York Dry Cleaning, Inc.[cclxxxi] (clause on dry cleaning claim ticket limiting liability for lost or damaged clothing to $20.00 void for lack of adequate notice); White v. Burlington Coat Factory[cclxxxii]($100 liability limitation in storage receipt enforced for $1,000 ripped and damaged beaver coat)].

9] **Pyramid Schemes: G.B.L. § 359-fff**

"' (a pyramid scheme) is one in which a participant pays money...and in return receives (1) the right to sell products, and (2) the right to earn rewards for recruiting other participants into the scheme '"[cclxxxiii]. Pyramid schemes are sham money making schemes which prey upon consumers eager for quick riches.

General Business Law § 359-fff [" GBL § 359-fff "] prohibits " chain distributor schemes " or pyramid schemes voiding the contracts upon which they are based. Pyramid schemes were used in Brown v. Hambric[cclxxxiv] to sell travel agent education programs [" There is nothing new ' about NU-Concepts. It is an old scheme, simply, repackaged for a new audience of gullible consumers mesmerized by the glamour of travel industry and hungry for free or reduced cost travel services "] and in C.T.V., Inc. v. Curlen[cclxxxv], to sell bogus " Beat The System Program " certificates. While, at least, one Court has found that only the Attorney General may enforce a violation of GBL 359-fff[cclxxxvi], other Courts have found that GBL 359-fff gives consumers a private right of action[cclxxxvii], a violation of which also constitutes a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs[cclxxxviii].

10] **Real Property, Apartments & Co-Ops**

[A] **Real Property Condition Disclosure Act: R.P.L. §§ 462-465**

With some exceptions [Real Property Law § 463] Real Property Law § 462 [" RPL "] requires sellers of residential real property to file a disclosure statement detailing known defects. Sellers are not required to undertake an inspection but must answer 48 questions about the condition of the real property. A failure to file such a disclosure statement allows the buyer to receive a $500 credit against the agreed upon price at closing [RPL § 465] . A seller who files such a disclosure statement " shall be liable only for a willful failure to perform the requirements of this article. For such a wilfull failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory relief " [RPL 465(2)]. For an excellent discussion of this statute see e.g., Malach v. Chuang[cclxxxix](improper completion of disclosure form regarding water damage caused by swimming pool; only monetary remedy available is $500 credit to purchaser; by accepting disclosure form with answers " unknown " purchasers waived claims of defects); Goldman v. Fay[ccxc] (statute held

unconstitutional as being violative of equal protection for excluding condominium and coop transactions; " More to the point, was not this statute drafted as consumer protection legislation to protect the purchasers of ' residential real estate ' from unscrupulous sellers? ")].

[B] **Warranty Of Habitability: R.P.L. § 235-b**

Tenants in Spatz v. Axelrod Management Co.[ccxci] and coop owners in Seecharin v. Radford Court Apartment Corp.[ccxcii] brought actions for damages done to their apartments by the negligence of landlords, managing agents or others, i.e., water damage from external or internal sources. Such a claim may invoke Real Property Law § 235-b [" RPL § 235-b "] , a statutory warranty of habitability in every residential lease " that the premises...are fit for human habitation ". RPL § 235-b " has provided consumers with a powerful remedy to encourage landlords to maintain apartments in a decent, livable condition "[ccxciii] and may be used affirmatively in a claim for property damage[ccxciv] or as a defense in a landlord's action for unpaid rent[ccxcv]. Recoverable damages may include apartment repairs, loss of personal property and discomfort and disruption[ccxcvi].

[C] **Duty To Keep Rental Premises In Good Repair: M.D.L. §**

78.

In Goode v. Bay Towers Apartments Corp.[ccxcvii] the tenant sought damages from his landlord arising from burst water pipes under Multiple Dwelling Law § 78 which provides that " Every multiple dwelling...shall be kept in good repair ". The Court applied the doctrine of *res ipsa loquitur* and awarded damages of $264.87 for damaged sneakers and clothing, $319.22 for bedding and $214.98 for a Playstation and joystick.

11] **Retail Sales & Leases**

[A] **Consumer Contract Type Size: C.P.L.R. § 4544**

C.P.L.R. § 4544 provides that " any printed contract... involving a consumer transaction...where the print is not clear and legible or is less that eight points in depth...May not be received in evidence in any trial ". C.P.L.R. § 4544 has been applied in consumer cases involving property stolen from a health club locker[ccxcviii], car rental agreements[ccxcix], home improvement contracts[ccc], insurance policies[ccci], dry cleaning contracts[cccii] and financial brokerage agreements[ccciii]. However, this consumer protection statute is not available if the consumer also relies upon the same size type[ccciv] and does not apply to cruise passenger contracts which are, typically, in smaller type size

and are governed by maritime law [see e.g., Lerner v. Karageorgis Lines, Inc.[cccv] (maritime law preempts state consumer protection statute regarding type size; cruise passenger contracts may be in 4 point type) and may not apply if it conflicts with federal Regulation Z [Sims v. First Consumers National Bank[cccvi](" Regulation Z does not preempt state consumer protection laws completely but requires that consumer disclosures be ' clearly and conspicuously in writing ' (12 CFR 226.5(a)(1)) and, considering type size and placement, this is often a question of fact ")].

[A.1] **Dating Services: G.B.L. § 394-c**

G.B.L. § 394-c applies to a social referral service which charges a " fee for providing matching of members of the opposite sex, by use of computer or any other means, for the purpose of dating and general social contact " and provides for disclosures, a three day cancellation requirement, a Dating Service Consumer Bill of Rights, a private right of action for individuals seeking actual damages or $50.00 which ever is greater and licensing in cities of 1 million residents [See e.g., Doe v. Great Expectations[cccvii] (" Two claimants sue to recover (monies) paid under a contract for defendant's services, which offer to expand a client's social horizons primarily through posting a client's

video and profile on an Internet site on which other clients can review them and, therefore, as desired, approach a selected client for actual social interaction "; defendant violated G.B.L. § 394-c(3) by implementing a " massive overcharge " [" Where, as here, the dating service does not assure that it will furnish a client with a specified number of social referrals per month, the service may charge no more than $25 "] and § 394-c(7)(e) by failing to provide claimants with the required " Dating Service Consumer Bill of Rights "; full refund awarded as restitutionary damages); Grossman v. MatchNet[cccviii] (plaintiff failed to allege that " she sustained any ' actual harm ' from defendant's failure to include provisions mandated by the Dating Services Law. Plaintiff has not alleged that she ever sought to cancel or suspend her subscription (or that any rights were denied her) ").

[B] **Dogs And Cat Sales: G.B.L. § 752**

Disputes involving pet animals are quite common [see e.g., Woods v. Kittykind[cccix](owner of lost cat claims that " Kittykind (a not-for-profit animal shelter inside a PetCo store) improperly allowed defendant Jane Doe to adopt the cat after failing to take the legally-required steps to locate the cat's rightful owner "); O'Rourke v. American Kennels[cccx](Maltese

misrepresented as " teacup dog "; " (Little Miss) Muffet now weighs eight pounds. Though not exactly the Kristie Alley of the dog world, she is well above the five pounds that is considered the weight limit for a ' teacup ' Maltese "; damages $1,000 awarded); Mongelli v. Cabral[cccxi] (" The plaintiffs ...and the defendants...are exotic bird lovers. It is their passion for exotic birds, particularly, for Peaches, a five year old white Cockatoo, which is at the heart of this controversy"); Dempsey v. American Kennels, 121 Misc. 2d 612 (N.Y. Civ. 1983)("' Mr. Dunphy ' a pedigreed white poodle held to be defective and nonmerchantable (U.C.C. § 2-608) because he had an undescended testicle "); Mathew v. Klinger[cccxii] (" Cookie was a much loved Pekinese who swallowed a chicken bone and died seven days later. Could Cookie's life have been saved had the defendant Veterinarians discovered the presence of the chicken bone sooner? "); O'Brien v. Exotic Pet Warehouse, Inc.[cccxiii] (pet store negligently clipped the wings of Bogey, an African Grey Parrot, who flew away); Nardi v. Gonzalez[cccxiv] (" Bianca and Pepe are diminutive, curly coated Bichon Frises (who were viciously attacked by) Ace...a large 5 year old German Shepherd weighing 110 pounds "); Mercurio v. Weber[cccxv] (two dogs burned with hair dryer by dog groomer, one dies and one survives, damages discussed); Lewis v. Al DiDonna[cccxvi](pet dog dies from overdose of prescription drug, Feldene, mislabeled " 1 pill twice daily '

when should have been “ one pill every other day “); Roberts v. Melendez[cccxvii] (eleven week old dachshund puppy purchased for $1,200 from Le Petit Puppy in New York City becomes ill and is euthanized in California; costs of sick puppy split between buyer and seller); Anzalone v. Kragness[cccxviii](pet cat killed by another animal at animal hospital; damages may include “ actual value of the owner “ where no fair market value exists)].

General Business Law §§ 752 et seq applies to the sale of dogs and cats by pet dealers and gives consumers rescission rights fourteen days after purchase if a licensed veterinarian “ certifies such animal to be unfit for purchase due to illness, a congenital malformation which adversely affects the health of the animal, or the presence of symptoms of a contagious or infectious disease “ [GBL § 753]. The consumer may (1) return the animal and obtain a refund of the purchase price plus the costs of the veterinarian’s certification, (2) return the animal and receive an exchange animal plus the certification costs, or (3) retain the animal and receive reimbursement for veterinarian services in curing or attempting to cure the animal. In addition, pet dealers are required to have animals inspected by a veterinarian prior to sale [GBL § 753-a] and provide consumers with necessary information [GBL §§ 753-b, 753-c]. Several Courts have applied GBL §§ 752 et seq in Small Claims Courts [see e.g., O’Rourke v. American Kennels[cccxix] (statutory one year

guarantee which " provides that if the dog is found to have a ' serious congenital condition ' within one year period, then the purchaser can exchange the dog for ' another of up to equal value '" does not apply to toy Maltese with a luxating patella); Fuentes v. United Pet Supply, Inc.[cccxx] (miniature pinscher puppy diagnosed with a luxating patella in left rear leg; claims under GBL § 753 must be filed within fourteen days; claim valid under UCC § 2-324); Saxton v. Pets Warehouse, Inc.[cccxxi] (consumer's claims for unhealthy dog are not limited to GBL § 753(1) but include breach of implied warranty of merchantability under UCC § 2-714); Smith v. Tate[cccxxii] (five cases involving sick German Shepherds); Sacco v. Tate[cccxxiii] (buyers of sick dog could not recover under GBL § 753 because they failed to have dog examined by licensed veterinarian); Roberts v. Melendez[cccxxiv] (claim against Le Petit Puppy arising from death of dachshund puppy; contract " clearly outlines the remedies available ", does not violate GBL § 753 and buyer failed to comply with available remedies; purchase price of $1,303.50 split between buyer and seller]. Pets have also been the subject of aggravated cruelty pursuant to Agriculture and Markets Law § 353-a [People v. Garcia[cccxxv] (" Earlier on that day, defendant had picked up a 10-gallon fish tank containing three pet goldfish belonging to Ms. Martinez's three children and hurled it into a 47-inch television screen, smashing the television screen and the fish

tank...Defendant then called nine-year old Juan into the room and said ‘ Hey, Juan, want to something cool? ‘ Defendant then proceeded to crush under the heel of his shoe one of the three goldfish writhing on the floor “) and protected by Environmental Conservation Laws

[People v. Douglas Deelecave[cccxxvi](D & J Reptiles not guilty of violations of Environmental Conservation Law for exhibiting alligator at night and selling a Dwarfed Calman)].

[C] **Door-To-Door Sales: G.B.L. §§ 425-431**

“ Some manufacturers...favor door-to-door sales (because) ...the selling price may be several times greater than...in a more competitive environment (and)...consumers are less defensive...in their own homes and...are, especially, susceptible to high pressure sales tactics “[cccxxvii]. Personal Property Law [“ PPL “] §§ 425-431 “‘ afford(s) consumers a ‘ cooling-off’ period to cancel contracts which are entered into as a result of high pressure door-to-door sales tactics’“[cccxxviii]. PPL § 428 provides consumers with rescission rights should a salesman fail to complete a Notice Of Cancellation form on the back of the contract. PPL § 428 has been used by consumers in New York Environmental Resources v. Franklin[cccxxix] (misrepresented and grossly overpriced water purification system), Rossi v. 21st

Century Concepts, Inc.[cccxxx] [misrepresented pots and pans costing $200.00 each], Kozlowski v. Sears[cccxxxi] [vinyl windows hard to open, did not lock properly and leaked] and in Filpo v. Credit Express Furniture Inc[cccxxxii]. [unauthorized design and fabric color changes and defects in overpriced furniture]. Rescission is also appropriate if the Notice of Cancellation form is not in Spanish for Spanish speaking consumers[cccxxxiii]. A failure to " comply with the disclosure requirements of PPL 428 regarding cancellation and refund rights " is a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs[cccxxxiv]. In addition PPL 429(3) provides for an award of attorneys fees.

[C.1] **Equipment Leases**

For an excellent " exploration of the (U.C.C.) and consumer law provisions governing the private parties to (equipment lease agreements) " see Sterling National Bank v. Kings Manor Estates[cccxxxv] (" The defendants...claim that the equipment lease was tainted by fraud and deception in the inception, was unconscionable and gave rise to unjust enrichment...the bank plaintiff, knowing of the fraudulent conduct, purchased the instant equipment lease at a deep discount, and by demanding payment thereunder acted in a manner

violating...(G.B.L. § 349) “)].

[C.1] **Furniture Extended Warranties**

“ The extended warranty and new parts warranty business generates extraordinary profits for the retailers... and for repair shops. It has been estimated that no more than 20% of the people who buy warranties ever use them... Of the 20% that actually try to use their warranties...(some) soon discover that the real costs can easily exceed the initial cost of the warranty certificate “[cccxxxvi]. In Dvoskin v. Levitz Furniture Co., Inc.[cccxxxvii], the consumer purchased furniture from Levitz Furniture Company with “ defects (that) occurred within six to nine months of delivery “. Levitz’s attempt to disavow liability under both a one year warranty and a five year extended warranty was rejected by the Court for lack of notice (“ The purported limited warranty language which the defendant attempts to rely on appears on the reverse side of this one page ‘ sale order ‘. The defendant has not demonstrated and the Court does not conclude that the plaintiff was aware of or intended to be bound by the terms which appear on the reverse side of the sale order...the solicitation and sale of an extended warranty to be honored by an entity that is different from the selling party is inherently deceptive if an express representation is not made disclosing who

the purported contracting party is “); See also: Giarratano v. Midas Muffler[cccxxxviii] (extended warranty for automobile brake pads);

Kim v. BMW of Manhattan, Inc.[cccxxxix](misrepresented automobile extended warranty); Petrello v. Winks Furniture[cccxl] (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty).

[C.2] **Health Club Services: G.B.L. §§ 620-631**

The purpose of G.B.L. § 620-631 is to “ safeguard the public and the ethical health club industry against deception and financial hardship “ by requiring financial security such as bonds, contract restrictions, disclosures, cancellation rights, prohibition of deceptive acts and a private right of action for individuals seeking actual damages which may be trebled plus an award of attorneys fees [Faer v. Verticle Fitness & Racquet Club, Ltd.[cccxli](misrepresentations of location, extent, size of facilities; full contract price minus use recoverable); Nadoff v. Club Central[cccxlii](restitution of membership fees charged after expiration of one year membership where contract provided for renewal without 36 month statutory limitation)].

[D] **Lease Renewal Provisions: G.O.L. § 5-901**

In Andin International Inc. v. Matrix Funding Corp.[cccxliii] the Court held that the automatic renewal provision in a computer lease was ineffective under G.O.L. § 5-901 because the lessor failed to notify lessee of lessee's obligation to provide notice of intention not to renew. In addition, the provision may be unconscionable (under terms of lease unless lessee " is willing to meet the price unilaterally set for the purchase of the equipment, (lessee) will be bound for a successive 12-month period to renting the equipment. This clause, which, in essence, creates a perpetual obligation, is sufficiently one-sided and imbalanced so that it might be found to be unconscionable (under Utah law) ")].

[E] **Licensing To Do Business: C.P.L.R. § 3015(e)**

C.P.L.R. § 3015(e) provides, in part, that " Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed...the complaint shall allege...that plaintiff is duly licensed...The failure of the plaintiff to comply...will permit the defendant (consumer) to move for dismissal ". This rule has been applied to

[1] **Home Improvement Contractors** [Tri-State General Remodeling Contractors, Inc v. Inderdai Baijnauth[cccxliv] (salesmen do not have to have a separate license); Routier v. Waldeck[cccxlv] (" The Home Improvement Business provisions...were enacted to safeguard and protect consumers against fraudulent practices and inferior work by those who would hold themselves out as home improvement contractors "); Power Cooling, Inc. v. Wassong[cccxlvi], (N.Y.C. Administrative Code § 20-386[2] requiring the licensing of home improvement contractors does not apply to the installation of room air-conditioners); Colorito v. Crown Heating & Cooling, Inc.[cccxlvii],(" Without a showing of proper licensing, defendant (home improvement contractor) was not entitled to recover upon its counterclaim (to recover for work done) "); Falconieri v. Wolf[cccxlviii](home improvement statute, County Law § 863.313 applies to barn renovations); Cudahy v. Cohen[cccxlix] (unlicenced home improvement contractor unable to sue homeowner in Small Claims Courts for unpaid bills); Moonstar Contractors, Inc. v. Katsir[cccl](license of sub-contractor can not be used by general contractor to meet licensing requirements). Obtaining a license during the performance of the contract may be sufficient (Mandioc Developers, Inc. v. Millstone[ccccli]) while obtaining a license after performance of the contract is not sufficient (B&F Bldg. Corp. V. Liebig[ccclii] (" The legislative

purpose...was not to strengthen contractor's rights, but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor is licensed ")];

[2] **Used Car Dealers** [B & L Auto Group, Inc. v. Zilog[cccliii] (used car dealer's claim against consumer for balance of payment for used car of $2,500.00 dismissed for a failure to have a Second Hand Automobile Dealer's license pursuant to New York City Department of Consumer Affairs Regulation when the car was sold)];

[3] **Other Licensed Businesses** [B & L Auto Group, Inc. v. Zilog[ccclv] (" The legal consequences of failing to maintain a required license are well known. It is well settled that not being licensed to practice in a given field which requires a license precludes recovery for the services performed " either pursuant to contract or in quantum merit...This bar against recovery applies to...architects and engineers, car services, plumbers, sidewalk vendors and all other businesses...that are required by law to be licensed ")].

[E.1] **Massage Therapy: Education Law § 6512(1)**

" To the extent that the small claims action is founded upon

allegations that defendant unlawfully practiced ‘ manipulation ‘ or massage therapy in violation of Education Law § 6512(1), no private right of action is available under the statue “[ccclv].

[F] **Merchandise Delivery Dates: G.B.L. § 396-u**

“ In order to induce a sale furniture and appliance store salesman often misrepresent the quality, origin, price, terms of payment and delivery date of ordered merchandise “[ccclvi]. In Walker v. Winks Furniture[ccclvii], a salesman promised delivery of new furniture within one week and then refused to return the consumer’s purchase price when she canceled two weeks later unless she paid a 20% cancellation penalty. GBL § 396-u protects consumers from unscrupulous salesmen who promise that merchandise will be delivered by specific date when, in fact, it is not. A violation of GBL § 396-u [failing to disclose an estimated delivery date in writing when the order is taken [GBL § 396-u(2)], failing to advise of a new delivery date and giving the consumer the opportunity to cancel [GBL § 396-u(2)(b)], failing to honor the consumer’s election to cancel without imposing a cancellation penalty [GBL § 396-u(s)©)], failing to make a full refund within two weeks of a demand without imposing a cancellation penalty [GBL § 396-u(2)(d)]] allows the consumer to rescind the purchase contract without incurring a cancellation

penalty[ccclviii]. A violation of GBL 396-u is a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs[ccclix]. In addition, GBL 396-u(7) provides for a trebling of damages upon a showing of a wilful violation of the statute[ccclx].

In Dweyer v. Montalbano's Pool & Patio Center, Inc[ccclxi] a furniture store failed to timely deliver two of six purchased chairs. The Court found that the delayed furniture was not " custom-made " and that the store violated G.B.L. § 396-u(2) in failing to fill in an " ' estimated delivery date ' on the form as required by statute ", failing to give notice of the delay and advising the customer of her right to cancel under G.B.L. § 396-u(2)(b). The Court awarded G.B.L. § 396-u damages of $287.12 for the two replacement chairs, trebled to $861.36 under G.B.L. 396-u(7). In addition the Court granted rescission under U.C.C. § 2-601 [" if the goods or tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole..."] awarding the customer the contract price of $2,868.63 upon return of the furniture.

[F-1] **Merchandise Layaway Plans: G.B.L. § 396-t**

G.B.L. § 396-t " governs merchandise sold according to a layaway plan. A layaway plan is defined as a purchase over the amount of $50.00 where the consumer agrees to pay for the

purchase of merchandise in four or more installments and the merchandise is delivered in the future " [Amiekumo v. Vanbro Motors, Inc.[cccclxii](failure to deliver vehicle purchased and comply with statutory disclosure requirements)]. While G.B.L. § 396-t does not provide a private right of action for consumers it is has been held that a violation of G.B.L. § 396-t is a *per se* violation of G.B.L. § 349 thus entitling the recovery of actual damages or $50 whichever is greater, attorneys and costs [Amiekumo v. Vanbro Motors, Inc., supra].

[G] **Retail Refund Policies: G.B.L. § 218-a**

Some stores refuse to refund the consumer's purchase price in cash upon the return of a product [" Merchandise, in New Condition, May be Exchanged Within 7 Days of Purchase for Store Credit...No Cash Refunds or Charge Credits "[ccclxiii]]. In Baker v. Burlington Coat Factory Warehouse[ccclxiv], a clothing retailer refused to refund the consumer's cash payment when she returned a shedding and defective fake fur two days after purchase. General Business Law § 218-a [" GBL § 218-a "] permits retailers to enforce a no cash refund policy if there are a sufficient number of signs notifying consumers of " its refund policy including whether it is ' in cash, or as credit or store credit only

’”[ccclxv].

In Perel v. Eagletronics[ccclxvi] the consumer purchased a defective air conditioner and sought a refund. The Court held that defendant’s refund policy [“ No returns or exchanges ”] placed “ at the very bottom “ of invoices and sales receipts was inconspicuous and violated G.B.L. § 218-a(1). In addition, the air conditioner was defective and breached the implied warranty of merchantability under U.C.C. § 2-314.

If, however, the product is defective and there has been a breach of the implied warranty of merchantability [U.C.C. § 2-314] then consumers may recover all appropriate damages including the purchase price in cash [U.C.C. § 2-714][ccclxvii]. In essence, U.C.C. § 2-314 preempts[ccclxviii] GBL § 218-a [Baker v. Burlington Coat Factory Warehouse[ccclxix] (defective shedding fake fur); Dudzik v. Klein’s All Sports[ccclxx] (defective baseball bat)]. It has been held that a “ failure to inform consumers of their statutory right to a cash or credit card charge refund when clothing is defective and unwearable “ is a violation of GBL 349 which provides for treble damages, attorneys fees and costs[ccclxxi].

[G.1] **Retail Sales Installment Agreements: P.P.L. § 401**

New York’s Retail Installment Sales Act is codified in P.P.L. § 401 et seq. In Johnson v. Chase Manhattan Bank USA[ccclxxii]

a credit card holder challenged the enforceability of a mandatory arbitration agreement on, amongst other grounds, that it violated P.P.L. § 413(10(f) which " voids a provision in a retail installment credit agreement by which the retail buyer waives any right to a trial by jury in any proceeding arising out of the agreement ". Nonetheless the Johnson Court found the arbitration agreement enforceable because the Federal Arbitration Act " preempts state law to the extent that it conflicts with the FAA ".

[H] **Rental Purchase Agreement: P.P.L. § 500**

Personal Property Law §§ 500 et seq [" PPL §§ 500 et seq] provides consumers who enter into rental purchase agreements with certain reinstatement rights should they fall behind in making timely payments or otherwise terminate the contract [PPL § 501]. In Davis v. Rent-A-Center of America, Inc[ccclxxiii] the Court awarded the consumer damages of $675.73 because the renter had failed to provide substitute furniture of a comparable nature after consumer reinstated rental purchase agreement after skipping payment. In Sagiede v. Rent-A-Center[ccclxxiv] the Court awarded the consumers damages of $2,124.04 after their TV was repossessed
(" this Court finds that, in keeping with the intent of Personal

Property Law which attempts to protect the consumer while simultaneously allowing for a competitive business atmosphere in the rental-purchase arena, that the contract at bar fails to reasonably assess the consumer of his rights concerning repossession ").

[I] **Implied Warranty Of Merchantability: U.C.C. § 2-314**

U.C.C. § 2-314 provides consumers with an implied warranty of merchantability for products and has arisen in consumer lawsuits involving air conditioners [Perel v. Eagletronics[ccclxxv] (defective air conditioner; breach of the implied warranty of merchantability); alarm and monitoring systems [Cirillo v. Slomin's Inc.[ccclxxvi] (contract clause disclaiming express or implied warranties enforced), kitchen cabinet doors [Malul v. Capital Cabinets, Inc.[ccclxxvii] (kitchen cabinets that melted in close proximity to stove constitutes a breach of implied warranty of merchantability; purchase price proper measure of damages), fake furs [Baker v. Burlington Coat Factory Warehouse[ccclxxviii] (U.C.C. § 2-314 preempts[ccclxxix] GBL § 218-a], baseball bats [Dudzik v. Klein's All Sports[ccclxxx]] and dentures [Shaw-Crummel v. American Dental Plan[ccclxxxi] (" Therefore implicated in the contract ...was the warranty that the dentures would be fit for chewing and speaking. The two sets of dentures...were clearly not

fit for these purposes “)].

[J] **Travel Services**

Consumers purchase a variety of travel services from airlines, cruise lines, railroads, bus and rental car companies, hotels and resorts, time share operators, casinos, theme parks, tour operators, travel agents and insurance companies some of which are misrepresented, partially delivered or not delivered at all [Meachum v. Outdoor World Corp.[ccclxxxii] (misrepresenting availability and quality of vacation campgrounds; Vallery v. Bermuda Star Line, Inc.[ccclxxxiii] (misrepresented cruise); Pellegrini v. Landmark Travel Group[ccclxxxiv] (refundability of tour operator tickets misrepresented); People v. P.U. Travel, Inc.[ccclxxxv](Attorney General charges travel agency with fraudulent and deceptive business practices in failing to deliver flights to Spain or refunds)]; See also: Dickerson, Travel Law, Law Journal Press, N.Y., 2006; Dickerson, False, Misleading & Deceptive Advertising In The Travel Industry[ccclxxxvi]; Dickerson, The Cruise Passenger’s Rights & Remedies[ccclxxxvii]; Dickerson, Hotels, Resorts And Casinos Selected Liability Issues[ccclxxxviii]].

1] **Airline Bumping**

In Stone v. Continental Airlines[cccclxxxix] the Court held the airline liable for reasonable damages arising from airline bumping (passenger who purchased, Colorado ski trip for himself and 13 year old daughter for the 2004 Christmas season was bumped and canceled trip " Because the airline would not unload their luggage and could give no firm advice regarding how long the airline would take to return the baggage, which included cold-weather sportswear for both and the father's ski equipment, the father and daughter returned home and were unable to make any firm alternate ski or ' getaway ' plans. Continental refunded the price of the airline rickets while claimant was in the airline terminal...He testified that his loss included $1,360 for unrecoverable pre-paid ski lodge accommodations, lift tickets and his daughter's equipment rental, and that the entire experience involved inconveniences and stresses upon himself and his daughter because the ' bumping ' and the scheduled holiday ' that never was '. (Damages included the following) First, as to out-of-pocket expenses flowing from the loss of passage, claimant testified that he was unable to recoup $1,360 of pre-paid expenses. This item falls within the class of traditionally recognized damages for ' bumped ' passengers...Second, it is well settled that an award for inconvenience, delay and uncertainty is cognizable under New York law. Here, a father and teenage daughter were bumped on the outward leg of a week-long round trip

during the holiday season to a resort location, leaving the claimant father subject to the immediate upset of being denied boarding in a public setting, and with resulting inconvenience continuing for some period of time thereafter. Inconvenience damages represent compensation for normal reactions...On the record presented...inconvenience damages of $1,000 are awarded...Third, regarding the deprivation of use of the contents of checked baggage, this factor was also present and claimant testified that, had their baggage been made available, he would have arranged for a local substitute ski trip...the court awards $740 as rough compensation...Based on the foregoing, judgment shall enter for the total mount of $3,110...With interest from December 25, 2004, the date of the ‘ bumping ‘ “).

2] **Breach Of Hotel Reservations Contract**

In Fallsview Glatt Kosher Caterers Inc v. Rosenfeld[cccxc], the Court held that U.C.C. § 2-201(1)(Statute of Frauds) did not apply to a hotel reservations contract which the guest failed to honor (“ Fallsview...alleges that it ‘ operates a catering business...and specializes in organizing and operating programs at select hotels whereby [its] customers are provided with Glatt Kosher food service during Jewish holiday seasons...at Kutcher’s Country Club...Mr. Rosenfeld ‘ requested accommodations

for 15 members of his family...and full participation in the Program '...he agreed to pay Fallsview $24,050.00 ' for the Program '...Mr. Rosenfeld and his family ' failed to appear at the hotel without notification ' to Fallsview "). See also: Tal Tours v. Goldstein[cccxci] (dispute between joint venturers of a company catering to " a clientele which observes Jewish dietary laws known as Kashrut or Kosher ").

12] **Telemarketing**

It is quite common for consumers and businesses to receive unsolicited phone calls, faxes and text messages[cccxcii] at their homes, places of business or on their cellular telephones from mortgage lenders, credit card companies and the like. Many of these phone calls, faxes or text messages originate from automated telephone equipment or automatic dialing-announcing devices, the use of which is regulated by Federal and New York State consumer protection statutes.

[A] **Federal Telemarketing Rule: 47 U.S.C. § 227**

On the Federal level the Telephone Consumer Protection Act[cccxciii] [TCPA] prohibits " *inter alia*, the ' use [of] any telephone, facsimile machine, computer or other device to send,

to a telephone facsimile machine, an unsolicited advertisement...47 U.S.C. § 227(b)(1)© "[cccxciv]. A violation of the TCPA may occur when the " offending calls (are) made before 8 a.m. or after 9 p.m. " or " the calling entity (has) failed to implement do-not-call procedures " [Weiss v. 4 Hour Wireless, Inc.[cccxcv]] The purpose of the TCPA is to provide " a remedy to consumers who are subjected to telemarketing abuses and ' to encourage consumers to sue and obtain monetary awards based on a violation of the statute ' "[cccxcvi] The TCPA may be used by consumers in New York State Courts including Small Claims Court [Kaplan v. Democrat & Chronicle[cccxcvii]; Shulman v. Chase Manhattan Bank,[cccxcviii] (TCPA provides a private right of action which may be asserted in New York State Courts)].

1] **Exclusive Jurisdiction**

Some Federal Courts have held that the states have exclusive jurisdiction over private causes of action brought under the TCPA[cccxcix] while others have not[cd]. Some State Courts have held that the Federal TCPA does not preempt State law analogues which may be stricter[cdi]. Some scholars have complained that " Congress intended for private enforcement actions to be brought by *pro se* plaintiffs in small claims court and

practically limited enforcement to such tribunals "[cdii]. Under the TCPA consumers may recover their actual monetary loss for each violation or up to $500.00 in damages, whichever is greater [Kaplan v. Life Fitness Center[cdiii] (" that plaintiff is entitled to damages of $500 for the TCPA violation (and) an additional award of damages of $500 for violation of the federal regulation "; treble damages may be awarded upon a showing that " defendant willfully and knowingly violated "[cdiv] the Act); Antollino v. Hispanic Media Group, USA, Inc[cdv]. (plaintiff who received 33 unsolicited fax transmissions awarded " statutory damages of $16,500 or $500 for each violation ")]. In 2001 a Virginia state court class action against Hooters resulted in a jury award of $12 million on behalf of 1,321 persons who had received 6 unsolicited faxes[cdvi]. Recently, the Court in Rudgayzer & Gratt v. Enine, Inc.[cdvii] held that the TPCA, to the extent it restricts unsolicited fax advertisements, is unconstitutional as violative of freedom of speech. This decision was reversed[cdviii], however, by the Appellate Term (" A civil liberties organization and a personal injury attorney might conceivably send identical communications that the recipient has legal rights that the communicating entity wishes to uphold; the former is entitled to the full ambit of First Amendment protection...while the latter may be regulated as commercial speech "). In Bonime v. Management Training International[cdix]the Court declined to pass on

the constitutionality of TPCA for a lack of jurisdiction.

[B] **New York's Telemarketing Rule: G.B.L. § 399-p**

On the State level, General Business Law § 399-p [" GBL § 399-p "] " also places restrictions on the use of automatic dialing-announcing devices and placement of consumer calls in telemarketing "[cdx] such as requiring the disclosure of the nature of the call and the name of the person on whose behalf the call is being made. A violation of GBL § 399-p allows recovery of actual damages or $50.00, whichever is greater, including trebling upon a showing of a wilful violation.

Consumers aggrieved by telemarketing abuses may sue in Small Claims Court and recover damages under both the TCPA and GBL § 399-p [Kaplan v. First City Mortgage[cdxi] (consumer sues telemarketer in Small Claims Court and recovers $500.00 for a violation of TCPA and $50.00 for a violation of GBL § 399-p); Kaplan v. Life Fitness Center[cdxii] (consumer recovers $1,000.00 for violations of TCPA and $50.00 for a violation of GBL § 399-p)].

[C] **Telemarketing Abuse Act: G.B.L. § 399-pp**

Under General Business Law § 399-z [" GBL § 399-z "],

known as the “ Do Not Call “ rule, consumers may prevent telemarketers from making unsolicited telephone calls by filing their names and phone numbers with a statewide registry. “ No telemarketer...may make...any unsolicited sales calls to any customer more than thirty days after the customer’s name and telephone number(s)...appear on the then current quarterly no telemarketing sales calls registry “. Violations of this rule may subject the telemarketer to a maximum fine of $2,000.00. In March of 2002 thirteen telemarketers accepted fines totaling $217,000 for making calls to persons who joined the Do Not Call Registry.[cdxiii] In addition “ [n]othing (in this rule) shall be construed to restrict any right which any person may have under any other statute or at common law “.

[D] **Telemarketing Abuse Prevention Act: G.B.L. § 399-pp**

Under General Business Law § 399-pp [“ GBL § 399-pp “] known as the Telemarketing And Consumer Fraud And Abuse Prevention Act, telemarketers must register and pay a $500 fee [GBL § 399-pp(3)] and post a $25,000 bond “ payable in favor of (New York State) for the benefit of any customer injured as a result of a violation of this section “ [GBL § 399-pp(4)]. The certificate of registration may be revoked and a $1,000 fine imposed for a violation of this section and other statutes

including the Federal TCPA. The registered telemarketer may not engage in a host of specific deceptive [GBL § 399-pp(6)(a)] or abusive [GBL § 399-pp(7)] telemarketing acts or practices, must provide consumers with a variety of information [GBL § 399-pp(6)(b)] and may telephone only between 8:00AM to 9:00PM. A violation of GBL § 399-pp is also a violation of GBL § 349 and also authorizes the imposition of a civil penalty of not less than $1,000 nor more than $2,000.

[E] **Unsolicited Telefacsimile Advertising: G.B.L. § 396-aa**

This statute makes it unlawful to " initiate the unsolicited transmission of fax messages promoting goods or services for purchase by the recipient of such messages " and provides an private right of action for individuals to seek " actual damages or one hundred dollars, whichever is greater ". In Rudgayser & Gratt v. Enine, Inc.[cdxiv], the Appellate Term refused to consider " whether the TCPA has preempted (G.B.L.) § 396-aa in whole or in part ". And in Gottlieb v. Carnival Corp.[cdxv] the Court of Appeals vacated a District court decision which held that a G.B.L. § 396-aa claim was not stated where there was no allegation that faxes had been sent in intrastate commerce).

13] **Litigation Issues**

A] **Mandatory Arbitration Clauses: G.B.L. § 399-c**

Manufacturers and sellers of goods and services have with increasing frequency used contracts with clauses requiring aggrieved consumers to arbitrate their complaints instead of bringing lawsuits, particularly, class actions[cdxvi]. The language in such an agreement seeks to extinguish any rights customers may have to litigate a claim before a court of law. The U.S. Supreme Court[cdxvii] and the Federal District Courts within the Second Circuit[cdxviii] have addressed the enforceability of contractual provisions requiring mandatory arbitration, including who decides arbitrability and the application of class procedures, the court or the arbitrator. New York Courts have, generally, enforced arbitration agreements[cdxix] [especially between commercial entities[cdxx]] within the context of individual and class actions.

However, in Ragucci v. Professional Construction Services[cdxxi] the Court enforced G.B.L. § 399-c's prohibition against the use of mandatory arbitration clauses in certain consumer contracts and applied it to a contract for architectural services [" A residential property owner seeking the services of an architect for the construction or renovation of a house is not on equal footing in bargaining over contractual terms such as the manner in which a potential future dispute should be resolved. Indeed,

the plaintiffs in this case played no role in drafting the subject form agreement. Moreover, a residential property owner may be at a disadvantage where the chosen forum for arbitration specializes in the resolution of disputes between members of the construction industry "][See also: Kesselman & Kirsch, Consumer Services Sector: Mandatory Arbitration End Threatened, New York Law Journal, November 18, 2005, p. 4, col. 3; Elsberg, Incorporation of Arbitration Clauses, New York Law Journal, January 6, 2006, p. 4, col. 3 (" Where the parties' contract has no arbitration clause, but refers or is related to a separate document that includes an arbitration clause, may one party compel the other to arbitrate? ")].

In Tal Tours v. Goldstein[cdxxii]the Court resolved the manner in which an arbitration before the Beth Din of America (" BDA ") involving a dispute between joint venturers of a tour " catering to a clientele which observes Jewish dietary laws known as Kashrut or Kosher " was to proceed. In Mahl v. Rand[cdxxiii]the Court addressed " The need to identify a cognizable pleading " for persons dissatisfied with an arbitration award and held that " for the purposes of the New York City Civil Court, a petition to vacate the arbitration award as a matter of right which thereby asserts entitlement to a trial *de novo* is a pleading which may be utilized by a party aggrieved by an attorney fee dispute arbitration award in a dollar amount within

the court’s monetary jurisdiction “).

B] **Forum Selection Clauses**

“ Forum selection clauses are among the most onerous and overreaching of all clauses that may appear in consumer contracts. The impact of these clauses is substantial and can effectively extinguish legitimate consumer claims, e.g., plaintiff’ claim herein of $1,855 is, practically speaking, unenforceable except in the Small Claims Court, since the costs of retaining an attorney in and traveling to Utah would far exceed recoverable damages “ [Oxman v. Amoroso[cdxxiv] (Utah forum selection clause not enforced); Posh Pooch Inc. v. Nieri Argenti[cdxxv] (“ Defendant also contends that I should dismiss this action based on the forum selection clause written in Italian in tiny type at the bottom of several invoices sent to Plaintiffs. I do not need to reach the question of whether a forum selection clause written in Italian is enforceable against a plaintiff that does read or understand Italian, because I find that the forum selection clause is unenforceable under (UCC) § 2-207(2)(b)... which governs disputes arising out of a contract for sale of goods between merchants “); Studebaker-Worthington Leasing Corp. V. A-1 Quality Plumbing Corp.[cdxxvi](“ the forum selection clause lacks specificity as it does not designate a specific forum or choice of law for the determination of the controversies that may arise out of the contract. Therefore, enforcement of the clause would be unreasonable and unjust as it is

overreaching "); Boss v. American Express Financial Advisors, Inc.[cdxxvii](Minnesota forum selection clause enforced citing Brooke Group v. JCH Syndicate 488[cdxxviii](" Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes "); Glen & Co. V. Popular Leasing USA, Inc.,[cdxxix]
(Norvergence forum selection clause; " Whether the forum selection clause is enforceable, which would place venue of this action in Missouri, or unenforceable, requiring the Court to then consider whether New York or Missouri is a proper forum for this action pursuant to CPLR 327...venue would in either event be in Missouri "); Sterling National Bank v. Borger, Jones & Keeley-Cain, N.Y.L.J., April 28, 2005, p. 21 (N.Y. Civ. 2005)
(contractual dispute between defunct telecommunications company and lawfirm; " floating " forum selection clause not enforced as lacking in "' certainty and predictability '" and not negotiated as part of " sophisticated business transaction "); Scarella v. America Online[cdxxx]
(" the forum selection clause set forth in the electronic
(AOL) membership agreement, which required that any dispute against AOL be litigated in Virginia, was unenforceable in the limited context of this small claims case...enforcement of the forum selection clause in the parties' ' clipwrap ' agreement would be unreasonable in that he would be deprived not only of his preferred choice to litigate this $5,000 controversy in the Small Claims Part, but for all practical purposes of his day in court "). But see Gates v. AOL Time Warner, Inc.[cdxxxi] (Gay & Lesbian AOL customers challenged AOL's failure to police chat rooms to prevent threats by hate

speech by others; Virginia forum selection clause enforced notwithstanding plaintiffs' claims that it " should not be enforced...because Virginia law does not allow for consumer class action litigation and would therefore conflict with...public policy "); See also: Murphy v. Schneider National, Inc.[cdxxxii] (court must conduct evidentiary hearing to determine if person against whom enforcement of forum selection clause is sought would be deprived of day in court)].

B.1] **Tariffs; Filed Rate Doctrine**

An excellent discussion of filed and unfiled tariffs and the filed rate doctrine [" Under that doctrine, ' the rules, regulations and rates filed by carriers with the I.C.C. form part of all contracts of shipments and are binding on all parties concerned, whether the shipper has notice of them or not '
(and) ' bars judicial challenges under the common law to a rate fixed by a regulatory agency '"] in cases involving loss of shipped packages appears in Great American Insurance Agency v. United Parcel Service[cdxxxiii], a case involving the loss of the contents of a package containing jewelry. The Court found that the filed rate doctrine did not apply because of a failure to establish that " the 1998 UPS Tariff was properly made a part of the shipping contract at issue ". In addition, the two year contractual limitation period for the commencement of lawsuits was not enforced. " The 1998 UPS Tariff's reference to two years after discovery of the loss by the customer is impermissibly shorter than the Carmack Amendment's minimum threshold of two years after notice of

disallowance “.

B.2] **Credit Card Cases: Standards Of Proof**

In Citibank (South Dakota), NA v. Martin[cdxxxiv] the Court, after noting that “ With greater frequency, courts are presented with summary judgment motions by credit card issuers seeking a balance due from credit card holders which motions fail to meet essential standards of proof and form in one or more particulars “, set forth much needed standards of proof regarding, *inter alia*, assigned claims, account stated claims, tendering of original agreements, requests for legal fees and applicable interest rates.

C] **Consumer Class Actions Under CPLR Article 9**

In New York State Supreme Courts consumer claims may be brought as class actions under C.P.L.R. Article 9[cdxxxv]. Generally, New York Courts has been somewhat restrictive in applying Article 9[cdxxxvi] but certain types of consumer class actions are certifiable.

1] **Types Of Consumer Class Action Claims**

Over the last 10 years[cdxxxvii] New York Courts have addressed consumer class actions[cdxxxviii] involving a variety of misrepresented or defective goods and services:

[a] **Baby Makers** [e.g., misrepresented in vitro fertilization rates[cdxxxix]],

[b] **Bail Bonds** [e.g., excessive and unlawful fees[cdxl]],

[c] **Books** [e.g., author of novel " Chains of Command " misrepresented[cdxli], underpayment of royalties[cdxlii], misrepresented annual rates of return in " The Beardstown Ladies' Common-Sense Investment Guide "[cdxliii]],

[d] **Cars, Cars, Cars** [e.g., defective single recliner mechanisms[cdxliv], deceptive engine oil disposal surcharge[cdxlv], defective Lincoln Continentals[cdxlvi], failure to reduce lease payments[cdxlvii], misrepresented Automatic Ride Control[cdxlviii], deceptive pricing of identical Octane gasolines[cdxlix], misrepresented low prices, low finance charges and guaranteed minimum trade-in allowances[cdl], failure to disclose alternative rental car arrangements at lower rates[cdli], misrepresented rental car replacement gasoline, personal accident insurance and collision damage waivers[cdlii]],

[e] **CDs & DVDs** [e.g., inflated shipping and handling charges from music club[cdliii]],

[f] **Computers, Software & Internet Services** [e.g., creating an software applications barrier[cdliv], misrepresented DSL services[cdlv], misrepresented services by Internet provider[cdlvi], unauthorized renewal of domain names registration[cdlvii], failure to police chat rooms[cdlviii], misrepresented ink jet printers[cdlix], defective Microsoft IntelliMouse Explorers[cdlx], improper billing for unlimited AOL service[cdlxi], failure to provide 24 hour technical support[cdlxii], failure to provide promised service[cdlxiii], misrepresenting computer upgradability[cdlxiv], vibration problems[cdlxv]],

[g] **Dental Products** [e.g., defective polymer-based dental restorations[cdlxvi]],

[h] **Drugs** [e.g., price fixing[cdlxvii]],

[I] **Electricity** [e.g., residential electric supply customer automatic renewal of contract without notice failure to comply with G.O.L. § 5-903[cdlxviii], seasonal electric service customers overcharged in violation of PSC tariff[cdlxix]],

[ii] **Entertainment** [e.g., obstructed view of Michael Jackson concert[cdlxx], heavy weight fight stopped because Mike Tyson bites off opponent's ear[cdlxxi]

],

[j] **Food & Drink** [e.g., misrepresentations that soft drink would " improve memory "[cdlxxii], food poisoning[cdlxxiii], misrepresented fat and coloric content in Pirate's Booty & Fruity Booty[cdlxxiv], fat content of Power Bars misrepresented[cdlxxv], misrepresented baby food and cooking wine[cdlxxvi], spoiled, stale and tasteless soft drinks[cdlxxvii]],

[k] **Gambling** [e.g., racetrack bettors challenge rounding down of winnings[cdlxxviii]],

[l] **Grain Silos** [e.g., misrepresentations of prevention of oxygen exposure[cdlxxix]],

[m] **Hospitals** [e.g., overbilling[cdlxxx]],

[n] **Household Goods** [e.g., disclosure of " effective economic interest rate "[cdlxxxi], misrepresentations of amount of water purified by water filters[cdlxxxii]],

[o] **Insurance** [e.g., failure to charge statutorily approved title insurance premium rates[cdlxxxiii], vanishing premium life insurance policies[cdlxxxiv], improper claims handling[cdlxxxv], coverage and COD payments[cdlxxxvi], termination of coverage

without notice[cdlxxxvii], medical fees in excess of Medicare rules[cdlxxxviii], failure to increase benefits[cdlxxxix], improper deduction of contractor's profit and overhead[cdxc], misrepresented Optional Premiums[cdxci], excess and unwarranted rate increases[cdxcii]],

[p] **Loans/Credit Cards/Debit Cards** [e.g., illegal credit card/debit card tie-in[cdxciii], high pressure sales[cdxciv], payment allocation for cash advances[cdxcv], misrepresented credit insurance[cdxcvi], excessive interest on payday loans[cdxcvii], misrepresented yield spread premiums[cdxcviii]],

[q] **Mortgages** [e.g., improper fax fees, quote fees & satisfaction fees[cdxcix], improper recording and fax fees[d], improper mortgage refinancing fees[di], illegal loan application processing fees[dii], unnecessary private mortgage insurance[diii], improperly inflating escrow payments for realty taxes[div]],

[r] **Newspaper Subscriptions** [e.g., changing the terms of a promotional offer after subscriptions purchased[dv]],

[s] **Nursing Homes** [e.g., mistreatment and malpractice[dvi]],

[t] **Personal Products** [e.g., misrepresented sun tan lotion[dvii], different prices for chemically identical contact lens[dviii], failure to reveal known side effects of hair loss product[dix], misrepresented Doan's Pills[dx]],

[u] **Privacy** [e.g., bank used unauthorized photo of employees[dxi], pharmacy sells customer records and medical histories[dxii], bank sells customer names and phone numbers to telemarketing firm[dxiii]],

[v] **Shippers** [e.g., refunds of " an improperly collected Federal tax " sought from Federal Express[dxiv]],

[w] **Tax Advice** [e.g., unneeded and unwanted refund anticipation loans from tax preparer[dxv]; negligent tax advice[dxvi]],

[x] **Telephones, Cell Phones & Faxes** [e.g., unsolicited telephone calls and faxes[dxvii], deficient cell phone service and excessive charges[dxviii], failure to honor Qualcomm $50 rebate[dxix], " fat fingers " toll-free call services[dxx], improperly credited cell phone calls[dxxi], misrepresented cell phone rates[dxxii], inadequate cell phone service[dxxiii], malfunctioning 800 numbers[dxxiv], illegal automatic cell phone renewal clause[dxxv], failure to implement All Call Restrict service[dxxvi], rounding up to whole minute increments[dxxvii], defective cell phone service[dxxviii]],

[y] **Tobacco Products** [e.g., price fixing[dxxix], addictive nature of nicotine misrepresented[dxxx]],

[z] **Toys** [e.g., shipping dates

misrepresented[dxxxi]],

[aa] **Travel** [e.g., misrepresented campground sites[dxxxii], flight misrepresented as " non-stop "[dxxxiii]. school trips canceled[dxxxiv], deceptive cruise port charges[dxxxv], airline overbooking[dxxxvi]],

[bb] **TV & Cable** [e.g., cable TV late fees[dxxxvii]].

[cc] **Windows** [e.g., defective chemical preservative failed to keep windows from rotting and
decaying[dxxxviii]].

2] **Consumer Law Theories Of Liability**

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

3] **Common Law Claims**

[a] **Breach Of Contract**: Breach of contract claims are, generally, certifiable under Article 9 of the C.P.L.R.
[e.g., insurance[dxxxix], oil and gas royalties[dxl], book publishing[dxli], air transportation

services[dxlii], credit card agreements[dxliii], campground sites[dxliv], Michael Jackson concert tickets[dxlv], $50 cell phone rebates[dxlvi], employment agreements[dxlvii], failure to credit mortgage commitment fees[dxlviii] and tour packages[dxlix]] when they are based upon uniform[dl], printed offers, solicitations or contracts which have been breached in a similar manner without regard to the quantitative differences in class member damages[dli]. While oral representations[dlii] may be sufficient for class certification, printed contracts are, generally, necessary.

[b] **Quasi Contractual Claims**: Breach of quasi-contractual obligations[dliii] are certifiable claims if the misconduct is uniform in its impact upon class members. Such claims include:

[c] **Unjust Enrichment** [e.g., artificially inflated prices for Microsoft software[dliv], sale of confidential medical and prescription information[dlv], sale of campground sites[dlvi], caller identification services[dlvii], obstructed concert view[dlviii], overpayments for title insurance[dlix]],

[d] **Money Had And Received** [e.g., automatic renewal of domain name registrations[dlx], mortgage recording taxes[dlxi]],

[e] **Bad Faith Dealings** [e.g., overcharges for rental car replacement gasoline, collision damage waivers and personal accident insurance[dlxii],

book publisher's accounting of sales to foreign affiliates[dlxiii], failure to give notice of 30-day insurance policy grace period[dlxiv], underpayment of movie and video royalties[dlxv]],

[f] **Breach Of An Implied Covenant Of Good Faith** [e.g., underpayment of oil and gas royalties[dlxvi], renewal of domain name registrations[dlxvii], allocating credit card payments to cash advances[dlxviii], marketing credit cards with hidden fees[dlxix]],

[g] **Unconscionability** [e.g., sale of campground sites[dlxx], sale of rental car replacement gasoline [dlxxi]],

[h] **Economic Duress** [e.g., mortgage recording taxes[dlxxii]],

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

[j] **Breach Of Warranty** claims are difficult to certify as class actions [e.g., defective dental restorations[dlxxvii], defective recliner mechanism[dlxxviii], defectively designed Lincoln Continentals[dlxxix], defective grain silos[dlxxx], defective

Microsoft IntelliMouse Explorers[dlxxxi], defective computer software[dlxxxii], misrepresented bottled soft drinks[dlxxxiii]]. For example, the breach of an express warranty class action is rarely certified under Article 9 because proof of individual reliance may be required, some courts finding that individual reliance issues predominate over common questions[dlxxxiv].

[k] **Fraud** claims are, generally, certifiable [e.g., fat fingers business[dlxxxv], campground sites[dlxxxvi], improper termination of insurance coverage[dlxxxvii], method of amortizing mortgage principal balances[dlxxxviii], telephone caller identification services[dlxxxix], marketing of Hyundai cars[dxc], travel services[dxci], failure of title insurers to charge mandated discounted rates for refinancing[dxcii], obstructed view for Michael Jackson concert[dxciii], failure to honor $50 cellphone rebate[dxciv], overpriced Burger King fast food[dxcv]] if the representations are uniform and printed[dxcvi]. Usually[dxcvii], but not always[dxcviii], New York courts are willing to presume reliance in common law fraud class actions.

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

[m] **Negligence** claims which seek economic damages are, generally, certifiable [e.g., negligent misrepresentations about the amount of water which can be purified[dcii], the nature of a student tour[dciii], the availability of a $50 cell phone rebate[dciv], failure to give notice of 30 day insurance policy grace period[dcv], negligent rendering of tax advice[dcvi]] unless they involve mass torts arising from physical injury or property damage claims. Generally, mass torts are not certifiable under Article 9 of the C.P.L.R.[dcvii]

4] **Statutory Theories Of Liability**

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

a] **G.B.L. §§ 349**, **350**: The most popular consumer protection statute is General Business Law [" G.B.L. "] § 349. As we discussed earlier[dcviii] G.B.L. § 349 is a statutory compliment to or substitute for a common law fraud claim. G.B.L. § 349 covers a broad and growing spectrum of goods and services " appl(ying) to virtually all economic activity "[dcix] and is broader than common law fraud [no proof of reliance or scienter[dcx] required but must prove causation[dcxi]] and " encompasses a significantly wider range of deceptive business practices that were ever previously condemned by decisional law "[dcxii]. The Courts have been willing to certify G.B.L. § 349 and § 350 [false advertising[dcxiii]] claims [e.g., in 2004 and 2005 G.B.L. § 349 class actions were

certified involving artificially inflated prices for Microsoft software[dcxiv], " fat fingers " telephone service[dcxv], overpayments for title insurance[dcxvi], obstructed views of a Michael Jackson concert[dcxvii], hair loss product misrepresented as having no known side effects[dcxviii] and failure to honor a Qualcomm 2700 $50 rebate program[dcxix]], usually, but not always[dcxx], limited to a class of New York residents [upon whom the deceptive act was performed in New York State[dcxxi]]. The deceptive acts must be consumer oriented[dcxxii], demonstrate a " nexus between this violation and the damages claimed "[dcxxiii] and be based upon uniform printed misrepresentations[dcxxiv] or uniform omissions of material fact[dcxxv] or a common course of conduct[dcxxvi]. Although C.P.L.R. § 901(b) prohibits a class action seeking a minimum recovery or treble damages such damages may be waived in a G.B.L. § 349 class action[dcxxvii] as long as class members are notified and given a chance to opt-out[dcxxviii].

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

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

d] **Public Health Law** claims under § 2801-d involving the mistreatment of residents of residential care facilities are certifiable[dcxxxi] and claims involving overcharges for hospital medical records may be certifiable under § 18(2)(e)[dcxxxii].

e] **Tenant Security Deposit** claims may be certifiable[dcxxxiii] as long as they involve uniform misconduct by landlords in failing to properly handle security deposits.

f] **Privacy** claims are certifiable based upon a violation of **Civil Rights Law § 51**[dcxxxiv] or common law theories such as breach of fiduciary duty[dcxxxv].

g] **No Fault Insurance** coverage claims are certifiable, especially, when the class action seeks to enforce a decision on the merits in a non-class action[dcxxxvi].

h] **Real Property Law § 274** claims may be certifiable[e.g., fax fee, quote fee and satisfaction fee[dcxxxvii], recording and fax fees[dcxxxviii]].

5] **<u>Mandatory Arbitration Agreements & Class Actions</u>**

Manufacturers and sellers of goods and services have with increasing frequency used contracts with clauses requiring aggrieved consumers to arbitrate their complaints[dcxxxix] instead of bringing lawsuits, particularly, class actions[dcxl]. The language

in such an agreement seeks to extinguish any rights customers may have to litigate a claim before a court of law. The U.S. Supreme Court[dcxli] has addressed the enforceability of contractual provisions requiring mandatory arbitration, including who decides arbitrability and the application of class procedures, the court or the arbitrator[dcxlii]. New York Courts have, generally, enforced arbitration agreements including those prohibiting class actions[dcxliii]. In, perhaps, a portent of future developments the State of Utah " passed the first law in the nation validating class action waivers in consumer contracts such as credit card agreements. The new law...allows credit card issuers to put a provision in contracts by which consumers agree to settle disputes through individual arbitration and waiver their rights to file a class action...In addition, the new statute has the potential for broader application beyond Utah's borders...Utah based financial institutions now can try to enforce their class action waivers in other states based on conflict-of-law or choice of law principals "[dcxliv]).

6] **Class Wide Arbitration**

Mandatory arbitration agreements are considered to be a viable means by which to counteract class actions since some courts may view these two procedural devices, arbitration and class actions, as competing and contradictory devices. In fact arbitration and the class action device are complimentary and seek greater efficiencies than otherwise available to individual litigants. Class wide arbitration should be encouraged and can enhance the overall effectiveness of arbitration proceedings[dcxlv]. Class wide

arbitration and the enforceability of contractual clauses prohibiting class actions and class-wide arbitration have been considered by federal and New York courts[dcxlvi]. Permitting class actions to be litigated within the context of arbitration proceedings is appropriate[dcxlvii].

7] **Removal To Federal Court**

Defendants may remove a consumer class action brought in New York State Courts to a federal District Court[dcxlviii]. Class plaintiffs may seek to remand on the grounds that class member damages do not meet the jurisdictional amount in controversy or a federal claim is not set forth in the complaint[dcxlix] or based upon the citizenship of the real parties in interest[dcl]. As a general rule federal courts do not permit the aggregation of the claims of individual class members[dcli] and, hence, remand may be appropriate. However, some federal District Courts have permitted for jurisdictional purposes the aggregation of statutory damages[dclii] or punitive damages[dcliii] or attorneys fees[dcliv] or the value of injunctive relief[dclv] or the value of disgorgement damages[dclvi]. Defendants may also seek to remove to federal court relying upon supplemental jurisdiction under 28 U.S.C. § 1367. With respect to meeting the jurisdictional amount in controversy some courts have held that 28 U.S.C. § 1367 requires only that the class representative's claim meet the amount in controversy[dclvii].

8] **Class Action Fairness Act of 2005**

Defendants may also seek removal based upon the recently enacted federal Class Action Fairness Act of 2005[dclviii] [CAFA]. The CAFA is meant, in part, to curb perceived abuses[dclix] in consumer class actions often brought in State courts such as " disproportionately large fees received by plaintiffs' lawyers, with class members left with coupons and other awards of little or no value "[dclx]. The CAFA grants (federal) district courts original jurisdiction of any civil action in which the matter in controversy exceeds $5 million, exclusive of interests and costs, and that is between citizens of different states, or citizens of a State and foreign State or its citizens or subjects "[dclxi].

Upon removal the federal court may[dclxii] " decline to exercise jurisdiction over a class in which more than one-third but less that two-thirds of the members of the proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed, based on consideration of " several factors[dclxiii]. The extent to which the CAFA may impact impacts upon C.P.L.R. Article 9 consumer class actions remains to be seen.

9] **Coupon Settlements**

Consumer class actions often result in settlements wherein class members receive coupons or certificates for the purchase of defendants' products or services[dclxiv]. Such settlements have been criticized as, primarily, benefitting class attorneys at the expense of class members. " The stark reality of coupon settlements is that they may

only benefit the attorneys representing the class, who are paid in cash, and the defendants who are relying on a coupon design and redemption process which guarantees that very few coupons will ever be redeemed. The telltale sign of this lawyer's ' bargain ' is that very few coupon settlement agreements provide for coupon tracking or promise to continue issuing coupons until a specific dollar amount is redeemed...Low coupon redemption rates make a mockery of the concept that class members should receive value for settling their claims [dclxv]". The CAFA seeks to address such abuses[dclxvi].

Coupon settlements are useful, however, and may be appropriate if designed properly to maximize class benefit[dclxvii]. The features of acceptable coupon settlements include (1) coupons must be redeemable in cash[dclxviii] often with the creation of a clearing house[dclxix] to help sellers find buyers, (2) anti-stacking provisions preventing use of two or more coupons together should be rejected[dclxx], (3) the court should require the parties to track coupon redemptions and make timely reports to the court until the cash value of the settlement has been reached[dclxxi], (4) coupons should be redeemable over a reasonable time period[dclxxii], (5) if class member identify is unknown cy pres techniques should be used[dclxxiii] and (6) attorneys fees should be based claims made[dclxxiv] and/or class counsel should be paid, in whole or in part, in the very same coupons given to class members[dclxxv].

D] **Reported Class Actions Cases : 1/1/2005-7/1/2006**

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.

1] **" Risk Free " Insurance**

In Goldman v. Metropolitan Life Insurance Company[dclxxvi] the Court 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[dclxxvii] 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[dclxxviii].

2] **Monopolistic Business Practices**

In Cox v. Microsoft[dclxxix] 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[dclxxx] dismissing a Donnelly Act claim as being prohibited by C.P.L.R. § 901(b). The Court certified a previously sustained[dclxxxi] 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.[dclxxxii], 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[dclxxxiii] [“ Thus, (defendants) have been subjected to judicial remediation for their wrongs and any recovery here would be duplicative “].

In Cunningham v. Bayer, AG[dclxxxiv], 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[dclxxxv] [“ we decline to revisit those precedents “].

3] **Forum Shopping: G.B.L. § 340 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[dclxxxvi]. 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[dclxxxvii], 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[dclxxxviii].

4] **Fruity Booty Settlement Rejected**

In Klein v. Robert's American Gourmet Food, Inc.[dclxxxix], the Appellate Division rejected a proposed discount coupon settlement[dcxc] 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 “].

5] **Listerine As Effective As Floss?**

After Pfizer was enjoined[dcxci] under the Lanham Act from advertising that “ Listerine’s as effective as floss “ a class of New York consumers alleged in Whalen v. Pfizer[dcxcii], 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[dcxciii], “ 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 “].

6] **Cable TV**

In Saunders v. AOL Time Warner, Inc.[dcxciv] 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.[dcxcv], 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 "[dcxcvi], 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.,[dcxcvii] 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.

7] **Illegal Telephone " Slamming "**

In Baytree Capital Associates, LLC v. AT&T Corp.[dcxcviii] a class of consumers charged defendant with " ' illegal ' slamming[dcxcix] 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 '"][dcc], 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[dcci] 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 "].

8] **Rental Cars**

In Goldberg v. Enterprise Rent-A-Car Company[dccii], 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 “].

9] **Document Preparation Fees**

In Fuchs v. Wachovia Mortgage Corp.[dcciii], 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 ".

10] **Tax Assessments**

In Neama v. Town of Babylon[dcciv], 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 "[dccv]. The Court also noted that the filing of a class action complaint " is not a sufficient indication of protest by each proposed " class member[dccvi].

11] **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[dccvii]. In Heiko Law Offices, P.C. v. AT&T Wireless Services, Inc.[dccviii] 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[dccix] [“ 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 “][dccx].

In Investment Corp. v. Kaplan[dccxi], 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 “.

12] **Vanishing Premiums**

In DeFilippo v. The Mutual Life Ins. Co.[dccxii], the latest case involving “ vanishing premium “ life insurance policies[dccxiii], 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 “[dccxiv].

13] **Labor Disputes**

In Jacobs v. Macy's East, Inc.[dccxv], the Court, which had earlier sustained a cause of action under Labor Law § 193[dccxvi], 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 "[dccxvii] 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[dccxviii], a class of commissioned sales persons sought recovery of amounts deducted for ' unidentified returns '[dccxix] from their commissions. The Court granted certification finding adequacy of representation in that plaintiff had sufficient financial resources[dccxx] 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.[dccxxi], 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.[dccxxii], 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[dccxxiii] and the action dismissed
" because none of the remaining named plaintiffs allege a relationship with any of the remaining non-settling defendants "[dccxxiv].

In North Shore Environmental Solutions, Inc. v. Glass,[dccxxv] 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.[dccxxvi], 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,[dccxxvii] 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,[dccxxviii] a class of employees alleged age discrimination. The Court granted summary judgment dismissing plaintiffs' causes of action for disparate treatment and disparate impact.

14] **Retiree Benefits**

In Jones v. Board of Education of the Watertown City School District,[dccxxix] 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,[dccxxx] 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.

15] **Mortgages**

In Wint v. ABN Amro Mortgage Group, Inc.,[dccxxxi] 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.

16] **Tenants**

In Chavis v. Allison & Co.,[dccxxxii] 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.

17] **Document Preservation**

In Weiller v. New York Life Ins. Co.,[dccxxxiii] 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.

18] **Shareholder's Suit**

In Adams v. Banc of America Securities LLC,[dccxxxiv] 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 "].

19] **Corporate Merger**

In Higgins v. New York Stock Exchange, Inc.,[dccxxxv] 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].

20] **Partnership Dispute**

In Morgado Family Partners, LP v. Lipper et al,[dccxxxvi] 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.

21] **Notice Issues**

In Drizin v. Sprint Corp[dccxxxvii], the Court, which had earlier sustained claims for fraud and a violation of G.B.L. § 349[dccxxxviii] and certified[dccxxxix] 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[dccxl], 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©[dccxli]] should exercise its discretion and require the Defendant to bear the necessary costs "].

In Naposki v. First National Bank of Atlanta[dccxlii], 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[dccxliii], the Court rejected the use of opt-in notice[dccxliv], 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[dccxlv], 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 ‘”[dccxlvi]].

21.1] **Insurance Dividends**

In Rabouin v. Metropolitan Life Insurance Company,[dccxlvii] a plaintiff class claimed defendant’s issuance of dividends violated G.B.L. § 349. The Court denied class certification noting that “ approximately 30% of the members of the prospective class live in jurisdictions with shorter statutes of limitations than exist in New York, militate against granting global class

certification " and " the issue of whether the alleged deceptive acts were misleading in a material way requires inquiry into both the nature of the initial solicitation as well as the annual statements and that such inquiry necessitates the resolution of individual issues ").

22] **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 "[dccxlviii]. 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.[dccxlix], Leyse v. Flagship Capital Services Corp.[dccl], Ganci v. Cape Canaveral Tour & Travel, Inc.[dccli], Weber v. Rainbow Software, Inc.[dcclii] and Bonime v. Discount Funding Associates, Inc.[dccliii], 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[dccliv] 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 “[dcclv].

23] **Residential Electricity Contracts**

In Emilio v. Robison Oil Corp.[dcclvi], 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 “[dcclvii].

24] **Oil & Gas Royalty Payments**

In Cherry v. Resource America, Inc.[dcclviii], the Court, relying upon its earlier decision in Freeman v. Great Lakes

Energy Partners[dcclix], 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 ".

25] **Street Vendors Unite**

In Ousmane v. City of New York[dcclx] 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[dcclxi], 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 “.

26] **Inmates**

In Brad H. v. City of New York,[dcclxii] 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.

27] **Legal Aliens**

In Khrapunskiy v. Doar[dcclxiii], 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 ".

29] **Shelter Allowances**

In Jiggetts v. Dowling,[dcclxiv] 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

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i. Thomas A. Dickerson is a Justice of the New York State Supreme Court, 9th Judicial District, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York, 10606. See Justice Dickerson's Court Web Page is at www.nycourts.gov/courts/9jd/taxcert.shtml and personal Web Page is at http://members.aol.com/judgetad/index.html.
Justice Dickerson is the author of Article 9 (rev. 2005, 2006) of 3 Weinstein, Korn & Miller, New York Civil Practice CPLR,

Lexis-Nexis; Travel Law, Law Journal Press, New York, 1981-2006; Class Actions: The Law of 50 States, Law Journal Press, 1988-2006 and over 220 articles and papers on consumer law issues, many of which are available at www.consumerlaw.org/links/#travel_articles and www.classactionlitigation.com/library/ca_articles.html

ii. For a listing of my published Small Claims Court decisions see www.nycourts.gov/courts/9jd/TacCert_pdfs/TADCASES.pdf; For an excellent discussion of Small Claims Court procedures see Kaye & Lippman, A Guide To Small Claims In The NYS City, Town And Village Court, New York State Unified Court System, August 2005.

iii. **Dvoskin v. Levitz Furniture Co.**, Inc., 9 Misc. 3d 1125(A) (Suffolk Dist. Ct. 2005). See e.g., **Giarratano v. Midas Muffler**, 166 Misc. 2d 390, 393, 630 N.Y.S. 2d 656 (1995).

iv. See Dickerson, The Marketing of Travel Services Over the Internet and the Impact Upon the Assertion of Personal Jurisdiction: 2004, N.Y.S.B.A. Torts, Insurance & Compensation Law Section Journal, Vol. 33, No. 2, Summer 2004, p. 28.

v. See 3 W.K.M. New York Civil Practice CPLR §§ 901.01-901.27.

vi. For an excellent discussion of General Business Law § 349 see **Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris Inc.,**, 178 F. Supp. 2d 198 (E.D.N.Y. 2001).

vii. Do corporations and other non-consumers have standing to assert claims under G.B.L. § 349? The Second Circuit Court of Appeals in **Blue Cross and Blue Shield v. Philip Morris USA**, 344 F. 3d 211 (2d Cir 2003) certified two questions to the New York Court of Appeals, the first of which was answered. Relying upon the common law rule that " an insurer or other third-party payer of medical expenditures may not recover derivatively for injuries suffered by its insured " the Court of Appeals in **Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA, Inc.**,, 3 N.Y. 3d 200, 207, 2004 WL 2339565 (2004) held, without deciding the ultimate issue of whether non-consumers are covered by G.B.L. § 349, that Blue Cross's claims were too remote to provide it with standing under G.B.L. § 349). See also: **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 "). Compare: **Northeast Wine Development, LLC v. Service-Universal Distributors, Inc.**, 23 A.D. 3d 890, 804 N.Y.S. 2d 836 (2005)(" plaintiff (retailer) alleges that defendant

(wholesaler) violated (G.B.L. §§ 349, 350) by failing to disclose that it was selling wine and liquor to other retailers at prices lower than those offered to plaintiff. However, plaintiff's allegation makes clear that this conduct was directed at retailers and makes no factual allegations as to how it has the requisite ' broad impact ' on consumers ").

viii. See e.g., **Hart v. Moore**, 155 Misc. 2d 203, 587 N.Y.S. 2d 477, 480 (1992). However, at least, one court has awarded damages exceeding the $1,000.00 limit. See **Lipscomb v. Manfredi Motors**, New York Law Journal, April 2, 2002, p. 21 (N.Y. Civ.) (damages consisted of the " balance owed to the claimant pursuant to the arbitrator's award...reduced to the jurisdictional amount of $3,000 ") and **Levitsky v. SG Hylan Motors, Inc.**, New York Law Journal, July 3, 2003, p. 27, col. 5 (N.Y. Civ. 2003)(" In addition GBL 349(h) allows the court to award punitive damages. The actions of the defendant entitled the claimant to an award of actual damages and punitive damages up to the $3,000.00, the jurisdictional limit of small claims part ").

ix. **State of New York v. Justin,** 2003 WL 23269283 (N.Y. Sup. 2003)(investment scheme for the purchase of payphones marketed to elderly).

x. **Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.**, 85 N.Y. 2d 20, 623 N.Y.S. 2d 529, 532, 647 N.E. 2d 741 (1995). See also **Shebar v. Metropolitan Life Insurance Co.**, 23 A.D. 3d 858, 807 N.Y.S. 2d 448 (2006)(" Plaintiff alleged a specific deceptive practice on the part of defendant, directed at members of the public generally who purchased its standard-form policy, that amounts to a misrepresentation of the nature of the coverage being provided...Inasmuch as plaintiff asserts that this consumer-oriented conduct was deceptive, material and caused him injury...these allegations sufficiently allege (a violation of G.B.L. § 349) "); **Brooks v. Key Trust Company National Ass'n**, 26 A.D. 3d 628, 809 N.Y.S. 2d 270 (2006)(" plaintiff's complaint... that defendants induced him to transfer his investment account to them for active management, that defendants thereafter failed to abide by promises and representations regarding the management and goals...(does) not amount to conduct affecting the consuming public at large "); **Northeast Wine Development, LLC v. Service-Universal Distributors, Inc.**, 23 A.D. 3d 890, 804 N.Y.S. 2d 836 (2005)(" plaintiff (retailer) alleges that defendant (wholesaler) violated (G.B.L. §§ 349, 350) by failing to disclose that it was selling wine and liquor to other retailers at prices lower

than those offered to plaintiff. However, plaintiff's allegation makes clear that this conduct was directed at retailers and makes no factual allegations as to how it has the requisite ' broad impact ' on consumers "); **Walts v. Melon Mortgage Corporation**, 259 A.D. 2d 322, 686 N.Y.S. 2d 428 (1999)(" Plaintiffs have adequately alleged a materially deceptive practice aimed at consumers "), appeal dismissed 94 N.Y. 2d 795, 700 N.Y.S. 2d 424, 722 N.E. 2d 504 (1999); **Kim v. BMW of Manhattan, Inc.**, 11 Misc. 3d 1078 (N.Y. Sup. 2005)(misrepresented extended warranty; " Plaintiffs' inability to cancel the Extension was not a merely private one-shot transaction "); **Meyerson v. Prime Realty Services, LLC**, 7 Misc. 2d 911(N.Y. Sup. 2005)(" defendants own and manage a substantial number of rent-regulated apartments, and use its challenged forms for all lease renewals, so that the dispute is not simply a private contract dispute and generally claims involving residential rental units are a type of claim recognized under (G.B.L. § 349)); **Dunn v. Northgate Ford, Inc.**, 1 Misc. 3d 911(A)(N.Y. Sup. 2004)(" there is evidence from other affiants that similar omissions and/or misstatements of fact, known to the dealer to be false or misleading...occurred in other sales at the same dealership...such practices are not isolated instances and would have a ' broader impact on consumers at large ' "); **McKinnon v. International Fidelity Insurance Co.**, 182 Misc. 2d 517, 522 (N.Y. Sup. 1999)(" the conduct must be consumer-oriented and have a broad impact on consumers at large ").

xi. See e.g., **Paltre v. General Motors Corp.**, 26 A.D. 3d 481, 810 N.Y.S. 2d 496 (2006)(failure to state G.B.L. § 349 claim " because the alleged misrepresentations were either not directed at consumers or were not materially deceptive "); **Weiss v. Polymer Plastics Corp**., 21 A.D. 3d 1095, 802 N.Y.S. 2d 174 (2005)(defective synthetic stucco; " To establish prima facie violation of (G.B.L. § 349) a plaintiff must demonstrate that a defendant is engaging in consumer-oriented conduct which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it...The transaction in this case was between two companies in the building construction and supply industry...It did not involve any direct solicitation...(of) the ultimate consumer...In short, this was not the type of ' modest ' transaction that the statute was intended to reach "); **Biancone v. Bossi**, 24 A.D. 3d 582, 806 N.Y.S. 2d 694 (2005)(plaintiff's claim that defendant contractor failed " to paint the shingles used in the construction...(And) add sufficient topsoil to the property " arose from " a private contract that is unique to the parties, rather than conduct that

affects consumers at large "); **Continental Casualty Co. v. Nationwide Indemnity Co.**, 16 A.D. 2d 353, 792 N.Y.S. 2d 434 (2005)(allegations that insurer misrepresented meaning of their standard comprehensive general liability policies is " at best a private contract dispute over policy coverage "); **Fulton v. Allstate Ins. Co.**, 14 A.D. 3d 380, 788 N.Y.S. 2d 349 (2005)(denial of insurance claim not materially deceptive nor consumer oriented practice); **Medical Society of New York v. Oxford Health Plans, Inc**., 15 A.D. 3d 206, 790 N.Y.S. 2d 79 (2005)(denial or untimely settlement of claims not consumer oriented and too remote); **Berardino v. Ochlan**, 2 A.D. 3d 556, 770 N.Y.S. 2d 75 (2003)(claim against insurance agent for misrepresentations not consumer oriented); **Martin v. Group Health, Inc.**, 2 A.D. 3d 414, 767 N.Y.S. 2d 803 (2003)(dispute over insurance coverage for dental implants not consumer oriented); **Goldblatt v. MetLife, Inc**., 306 A.D. 2d 217, 760 N.Y.S. 2d 850 (2003)(claim against insurance company not " consumer oriented "); **Rosenberg v. Chicago Ins. Co.**, 2003 WL 21665680 (N.Y. Sup. 2003)(conduct not consumer oriented; " Although the complaint includes allegations that the insurer's alleged bad acts had an impact on the public (plaintiff) is a large law firm, which commenced this action to protect its interests under a specific insurance policy "); **Canario v. Prudential Long Island Realty**, 300 A.D. 2d 332, 751 N.Y.S. 2d 310 (2002)(.78 acre property advertised as 1.5 acres is size; " the misrepresentation had the potential to affect only a single real estate transaction involving a single unique piece of property...There was no impact on consumers or the public at large "); **Cruz v. NYNEX Information Resources**, 263 A.D. 2d 285, 290, 703 N.Y.S. 2d 103 (1st Dept. 2000).

xii. **Small v. Lorillard Tobacco Co.**, 94 N.Y. 2d 43, 720 N.E. 2d 892, 698 N.Y.S. 2d 615 (1999). See also: **Goldman v. Metropolitan Life Insurance Company** (insured claimed a 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... There is nothing in the ' Risk Free ' period suggesting that coverage will start from the policy date without the payment of a premium...Plaintiffs have not properly alleged any deceptive practices "); **Lum v. New Century Mortgage Corp**., 19 A.D. 3d 558 (N.Y. App. Div. 2005)(charge that mortgagor failed to reveal yield spread premium did not state G.B.L. § 349 claim because " there was no materially misleading statement ").

xiii. **Pelman v. McDonald's Corp**., 396 F. Supp. 2d 439 (S.D.N.Y. 2005).

xiv. **Gabbay v. Mandel**, New York Law Journal, March 10, 2004, p. 19, col. 3 (N.Y. Sup. 2004).

xv. **Pelman v. McDonald's Corp**., 396 F. Supp. 2d 439 (S.D.N.Y. 2005).

xvi. **People v. Gift & Luggage Outlet**, 194 Misc. 2d 582 (N.Y. Sup. 2003)(G.B.L. §§ 870 et seq. prohibiting the sale of imitation weapons preempts G.B.L § 349 (G.B.L. § 873 was enacted " to prescribe the enforcement mechanisms and penalties to be imposed for violations of (G.B.L. § 872). To accept the...argument that a violation of section 872 should also lead to the imposition of additional penalties pursuant to (G.B.L. §§ 349 and 350-d) would upset the statutory scheme and impose double penalties for the same violation in a manner not intended by the
Legislature ").

xvii. **Stone v. Continental Airlines**, 10 Misc. 3d 811, 804 N.Y.S. 2d 652 (2005). See also: **Mendelson v. Trans World Airlines**, 120 Misc. 2d 423 (Queens Sup. 1983); **People v. Trans World Airlines**, 171 A.D. 2d 76 (N.Y. A.D. 1991).

xviii. **People v. Applied Card Systems, Inc.**, 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (2005).

xix. See e.g., **Anonymous v. CVS Corp.**, New York Law Journal, January 8, 2004, p. 19, col. 1 (N.Y. Sup.)(" Deception itself with no other injury is not actionable under § 349 ").

xx. **Small v. Lorillard Tobacco Co.**, 94 N.Y. 2d 43, 55-56 (1999).

xxi. **Solomon v. Bell Atlantic Corp.**, 9 A.D. 3d 49, 777 N.Y.S. 2d 50 (1st Dept. 2004).

xxii. **Ho v. Visa USA, Inc.**, 2005 WL 6463343 (N.Y. App. Div. 2005).

xxiii. **Goldberg v. Enterprise Rent-A-Car Car Company**, 14 A.D. 3d 418, 789 N.Y.S. 2d 114 (2005).

xxiv. **Thompson v. Foreign Car Center, Inc**., New York Law Journal, March 10, 2006, p. 19, col. 3 (N.Y. Sup.).

xxv. **Wendol v. The Guardian Life Ins. Co.**, New York Law Journal, March 7, 2006, p. 21, col. 3 (N.Y. Sup.).

xxvi. **Meyerson v. Prime Realty Services, LLC**, 7 Misc. 2d 911 (N.Y. Sup. 2005)(excellent review of history of social security numbers and privacy considerations).

xxvii. **Sokoloff v. Town Sports International, Inc.**, 6 A.D. 3d 185, 778 N.Y.S. 2d 9 (1st Dept. 2004).

xxviii. **Donahue v. Ferolito, Vultaggio & Sons**, 13 A.D. 3d 77, 786 N.Y.S. 2d 153 (1st Dept. 2004).

xxix. **Levine v. Philip Morris Inc.**, 5 Misc. 3d 1004(A) (N.Y. Sup. 2004).

xxx. **Han v. Hertz Corp**., 12 A.D. 3d 195, 784 N.Y.S. 2d 106 (1st Dept. 2004).

xxxi. **Guggenheimer v. Ginzburg**, 43 N.Y. 2d 268, 401 N.Y.S. 2d 182, 184, 372 N.E. 2d 17 (1977).

xxxii. **Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.**, 85 N.Y. 2d 20, 623 N.Y.S. 2d 529, 532, 647 N.E. 2d 741 (1995).

xxxiii. **Peabody v. Northgate Ford, Inc**., 16 A.D. 3d 879 (N.Y. App. Div. 2005).

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

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

xxxvi. **State of New York v. Feldman**, 2002 W.L. 237840 (S.D.N.Y. 2002).

xxxvii. Id. See also: **Soskel v. Handler**, 189 Misc. 2d 795, 736 N.Y.S. 2d 853(2001)(unsatisfactory performance of hair transplant procedures; GBL § 349 claim accrued when last surgical procedure was performed).

xxxviii. **Goshen v. Mutual Life Insurance Company**, 286 A.D. 2d 229, 730 N.Y.S. 2d 46 (2001)

xxxix. **Scott v. Bell Atlantic Corp.**, 282 A.D. 2d 180, 726 N.Y.S. 2d 60 (2001).

xl. **Farino v. Jiffy Lube International, Inc.**, 298 A.D. 2d 553, 748 N.Y.S. 2d 673 (2002)..

xli. **Goshen v. The Mutual Life Ins. Co.**, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002).

xlii. **Scott v. Bell Atlantic Corp.,** 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002).

xliii. In **Croak v. Bell Atlantic Corp.**, N.Y.L.J., January 10, 2002, p. 20, col. 4 (N.Y. Sup.), the Court dismissed a consumer class action claiming that DSL services were misrepresented as to speed and quality citing as authority Scott v. Bell Atlantic Corp., 282 A.D. 2d 180 (1st Dep. 2001). The Scott decision was later modified by the Court of Appeals restoring the GBL 349 claim.

xliv. See e.g., **Murrin v. Ford Motor Co.**, 303 A.D. 2d 475, 756 N.Y.S. 2d 596 (2003)(G.B.L. § 349 claim dismissed for failing to " allege that the deceptive acts complained of took place within the State of New York "); **Mountz v. Global Vision Products, Inc.**, 770 N.Y.S. 2d 603 (N.Y. Sup. 2003)(" this complaint pleads no consumer action or contact occurring within New York State as the out-of-state plaintiffs ").

xlv. **Truschel v. Juno Online Services, Inc.**, N.Y.L.J., December 12, 2002, p. 21, col. 4 (N.Y. Sup.).

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

xlvii. **Bartolomeo v. Runco**, 162 Misc. 2d 485, 616 N.Y.S. 2d 695 (1994).

xlviii. **Anilesh v. Williams**, New York Law Journal, Nov. 15, 1995, p. 38, col. 2 (Yks. Cty. Ct.)(landlord can not recover unpaid rent for illegal apartment).

xlix. **Yochim v. McGrath**, 165 Misc. 2d 10, 626 N.Y.S. 2d 685 (1995).

l. **People v. Law Offices of Andrew F. Capoccia**, Albany County

Sup., Index No: 6424-99, August 22, 2000.

li. **Aponte v. Raychuk**, 160 A.D. 2d 636, 559 N.Y.S. 2d 255 (1990).

lii. **Oxman v. Amoroso**, 172 Misc. 2d 773, 659 N.Y.S. 2d 963 (1997).

liii. **Lipscomb v. Manfredi Motors**, New York Law Journal, April 2, 2002, p. 21 (Richmond Civ. Ct.)

liv. **State of New York v. Feldman**, 2002 W.L. 237840 (S.D.N.Y. 2002).

lv. **Levitsky v. SG Hylan Motors, Inc**., New York Law Journal, July 3, 2003, p. 27., col. 5 (N.Y. Civ. 2003).

lvi. **Spielzinger v. S.G. Hylan Motors Corp**., New York Law Journal, September 10, 2004, p. 19, col. 3 (Richmond Civ. 2004).

lvii. **Karlin v. IVF**, 93 N.Y. 2d 283, 291 (1999).

lviii. **Mountz v. Global Vision Products, Inc.**, 3 Misc. 3d 171, 770 N.Y.S. 2d 603 (N.Y. Sup. 2003).

lix. **Joyce v. SI All Tire & Auto Center**, Richmond Civil Ct, Index No: SCR 1221/05, Decision Oct. 27, 2005.

lx. **People v. Trescha Corp**., New York Law Journal, December 6, 2000, p. 26, col. 3 (N.Y. Sup.).

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

lxii **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 “).

lxiii. **People v. Condor Pontiac**, 2003 WL 21649689 (N.Y. Sup. 2003).

lxiv. **Spielzinger v. S.G. Hylan Motors Corp.**, New York Law Journal, September 10, 2004, p. 19, col. 3 (Richmond Civ. 2004).

lxv. **Naevus International, Inc. v. AT&T Corp.**, 2000 WL 1410160 (N.Y. Sup. 2000).

lxvi. **Sherry v. Citibank, N.A.**, 5 A.D. 3d 335, 773 N.Y.S. 2d 553 (1st Dept. 2004).

lxvii. **Baker v. Burlington Coat Factory**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281 (1998).

lxviii. **Cox v. Microsoft Corp.**, 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (2004).

lxix. **People v. Applied Card Systems, Inc.**, 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (2005).

lxx. **People v. Telehublink**, 301 A.D. 2d 1006, 756 N.Y.S. 2d 285 (2003).

lxxi. **Sims v. First Consumers National Bank,** 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (2003).

lxxii. **Broder v. MBNA Corporation**, New York Law Journal, March 2, 2000, p. 29, col. 4 (N.Y. Sup.), aff'd 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (2001).

lxxiii. **Anonymous v. CVS Corp.**, 188 Misc. 2d 616, 728 N.Y.S. 2d 333
(2001).

lxxiv. **Ritchie v. Empire Ford Sales, Inc.**, New York Law Journal, November 7, 1996, p. 30, col. 3 (Yks. Cty. Ct.).

lxxv. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656 (1995).

lxxvi. **People v. General Electric Co., Inc.**, 302 A.D. 2d 314, 756 N.Y.S. 2d 520 (2003).

lxxvii. **New York Environmental Resources v. Franklin**, New York Law Journal, March 4, 2003, p. 27 (N.Y. Sup.).

lxxviii. **Rossi v. 21st Century Concepts, Inc.**, 162 Misc. 2d 932,

618 N.Y.S. 2d 182 (1994).

lxxix. **People v. McNair**, 9 Misc. 2d 1121(a) (N.Y. Sup. 2005).

lxxx. **Andre v. Pace University**, 161 Misc. 2d 613, 618 N.Y.S. 2d 975 (1994), rev'd on other grounds 170 Misc. 2d 893, 655 N.Y.S. 2d 777 (1996). See also: **Cullen v. Whitman Medical Corp**., 197 F.R.D. 136 (E.D. Pa. 2000)(settlement of class action involving education misrepresentations).

lxxxi. **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995). Web Page, supra.

lxxxii. **Cambridge v. Telemarketing Concepts, Inc.**, 171 Misc. 2d 796, 655 N.Y.S. 2d 795 (1997).

lxxxiii. **McKinnon v. International Fidelity Insurance Co.**, 182 Misc. 2d 517, 704 N.Y.S. 2d 774 (1999).

lxxxiv. **Shelton v. Elite Model Management, Inc.**, 11 Misc. 3d 345, 812 N.Y.S. 2d 745 (2005).

lxxxv. **Sharknet Inc. v. Techmarketing, NY Inc.**, New York Law Journal, April 22, 1997, p. 32, col. 3 (Yks. Cty. Ct.), aff'd N.Y.A.T., Decision dated Dec. 7, 1998.

lxxxvi. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 659 (1995).

lxxxvii. **Dvoskin v. Levitz Furniture Co.**, Inc., 9 Misc. 3d 1125(A)
(Suffolk Dist. Ct. 2005). See e.g., **Giarratano v. Midas Muffler**, 166 Misc. 2d 390, 393, 630 N.Y.S. 2d 656 (1995).

lxxxviii. **Kim v. BMW of Manhattan, Inc.**, 11 Misc. 3d 1078 (N.Y. Sup. 2005).

lxxxix. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 660 (1995).

xc. **Petrello v. Winks Furniture**, New York Law Journal, May 21, 1998, p. 32, col. 3 (Yks. Cty. Ct.).

xci. **Pelman v. McDonald's Corp.**, 2005 WL 147142 (2d Cir. 2005) (" Count I alleges that the combined effect of McDonald's

various promotional representations...was to create the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumer daily. Count II alleges that McDonald's failed adequately to disclose that its use of certain additives and the manner of its food processing rendered certain of its foods substantially less healthy than represented. Count III alleges that McDonald's deceptively represented that it would provide nutritional information to its New York customers when in reality such information was not readily available "); **Pelman v. McDonald's Corp.**, 396 F. Supp. 2d 439 (S.D.N.Y. 2005)(motion for more definite statement of claims granted; complaint must identify deceptive advertisements and explain how and why they are materially deceptive).

xcii. **Matter of Food Parade, Inc. V. Office of Consumer Affairs**, 19 A.D. 3d 593, 799 N.Y.S. 2d 55 (2005).

xciii. **Matter of Stop & Shop Supermarket Companies, Inc. V. Office of Consumer Affairs of County of Nassau**, 23 A.D. 3d 565, 805 N.Y.S. 2d 95 (2005).

xciv. **Petrello v. Winks Furniture**, New York Law Journal, May 21, 1998, p. 32, col. 3 (Yks. Cty. Ct.).

xcv. **Walker v. Winks Furniture**, 168 Misc. 2d 265, 640 N.Y.S. 2d 428 (1996).

xcvi. **Filpo v. Credit Express Furniture Inc.**, New York Law Journal, Aug. 26, 1997, p. 26, col. 4 (Yks. Cty. Ct.).

xcvii. **Colon v. Rent-A-Center, Inc.**, 2000 N.Y. App. Div. LEXIS 11289 (1st Dept. 2000).

xcviii. **Mountz v. Global Vision Products, Inc.**, 770 N.Y.S. 2d 603 (N.Y. Sup. 2003).

xcix. **State v. Wilco Energy Corp.**, 283 A.D. 2d 469, 728 N.Y.S. 2d 471 (2001).

c. **Ricciardi v. Frank d/b/a InspectAmerica Engineering, P.C.**, 163 Misc. 2d 337, 620 N.Y.S. 2d 918 (1994), mod'd 170 Misc. 2d 777, 655 N.Y.S. 2d 242 (N.Y.A.T. 1996). See also: Seebacher, **Watching the inspectors**, Real Estate Section, The Journal News, January 1-2, 2005 (licensing of home inspectors and how to choose a home inspector).

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

cii. **Gaidon v. Guardian Life Insurance Co.**, 94 N.Y. 2d 330, 338, 704 N.Y.S. 2d 177, 725 N.E. 2d 598 (1999).

ciii. **Monter v. Massachusetts Mutual Life Ins. Co.**, 12 A.D. 3d 651, 784 N.Y.S. 2d 898 (2d Dept. 2004).

civ. **Skibinsky v. State Farm Fire and Casualty Co.**, 6 A.D. 3d 976, 775 N.Y.S. 2d 200 (3d Dept. 2004).

cv. **Brenkus v. Metropolitan Life Ins. Co.**, 309 A.D. 2d 1260, 765 N.Y.S. 2d 80 (2003).

cvi. **Makastchian v. Oxford Health Plans, Inc.**, 270 A.D. 2d 25, 704 N.Y.S. 2d 44 (2000).

cvii **Shebar v. Metropolitan Life Insurance Co.**, 23 A.D. 3d 858, 807 N.Y.S. 2d 448 (2006).

cviii. **Makuch v. New York Central Mutual Fire Ins. Co.**, 12 A.D. 3d 1110, 785 N.Y.S. 2d 236 (4th Dept. 2004).

cix. **Acquista v. New York Life Ins. Co.**, 285 A.D. 2d 73, 730 N.Y.S. 2d 272 (2001).

cx. **Rubinoff v. U.S. Capitol Insurance Co.**, New York Law Journal, May 10, 1996, p. 31, col. 3 (Yks. Cty. Ct.).

cxi. **Zurakov v. Register.Com, Inc**., 304 A.D. 2d 176, 760 N.Y.S. 2d 13(2003).

cxii. **People v. Network Associates**, 195 Misc. 2d 384, 758 N.Y.S. 2d 466 (2003).

cxiii. **People v. Lipsitz**, 174 Misc. 2d 571, 663 N.Y.S. 2d 468 (1997).

cxiv. **Scott v. Bell Atlantic Corp.,** 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002).

cxv. In **Croak v. Bell Atlantic Corp.**, N.Y.L.J., January 10, 2002, p. 20, col. 4 (N.Y. Sup.), the Court dismissed a consumer class action claiming that DSL services were misrepresented as to speed and quality citing as authority Scott v. Bell Atlantic Corp., 282

A.D. 2d 180 (1st Dep. 2001). The Scott decision was later modified by the Court of Appeals restoring the GBL 349 claim.

cxvi. **Drizin v. Sprint Corporation**, 3 A.D. 3d 388, 771 N.Y.S. 2d 82 (2004).

cxvii. **Gabbay v. Mandel**, New York Law Journal, March 10, 2004, p. 19, col. 3 (N.Y. Sup.).

cxviii. **Amiekumo v. Vanbro Motors, Inc.**, 3 Misc. 3d 1101(A) (Richmond Civ. 2004).

cxix. **Sterling National Bank v. Kings Manor Estates**, 9 Misc. 3d 1116(A)(N.Y. Civ. 2005).

cxx. **Morgan Services, Inc. V. Episcopal Church Home & Affiliates Life Care Community, Inc.**, 305 A.D. 2d 1106, 757 N.Y.S. 2d 917 (2003).

cxxi. **Dunn v. Northgate Ford, Inc.**, 1 Misc. 3d 911(A)(N.Y. Sup. 2004).

cxxii. **Lewis v. Al DiDonna**, 294 A.D. 2d 799, 743 N.Y.S. 2d 186 (3d Dept. 2002).

cxxiii. **Cox v. Microsoft Corp.**, 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (2004).

cxxiv. **Kidd v. Delta Funding Corp.**, 299 A.D. 2d 457, 751 N.Y.S. 2d 267 (2002).

cxxv. **Walts v. First Union Mortgage Corp**., New York Law Journal, April 25, 2000, p. 26,col. 1 (N.Y. Sup. 2000). See also **Walts v. First Union Mortgage Corp.**, 259 A.D. 2d 322, 686 N.Y.S. 2d 428 (1999), appeal dismissed 94 N.Y. 2d 795, 700 N.Y.S. 2d 424, 722 N.E. 2d 504 (1999)(no private right of action under New York Insurance Law § 6503; money had and received, breach of fiduciary duty and tortious interference with contractual relation claims dismissed).

cxxvi. **Negrin v. Norwest Mortgage, Inc.**, 263 A.D. 2d 39, 700 N.Y.S. 2d 184 (1999).

cxxvii. **Trang v. HSBC Mortgage Corp., USA**, New York Law Journal, April 17, 2002, p. 28, col. 3 (Queens Sup.).

cxxviii. **Farino v. Jiffy Lube International, Inc.**, New York Law Journal, August 14, 2001, p. 22, col. 4 (N.Y. Sup).

cxxix. **Goretsky v. ½ Price Movers**, New York Law Journal, March 12, 2004, p. 19, col. 3 (N.Y. Civ. 2004).

cxxx. **Sclafani v. Barilla America, Inc.**, 19 A.D. 3d 577, 796 N.Y.S. 2d 548 (2005).

cxxxi. **BNI New York Ltd. v. DeSanto**, 177 Misc. 2d 9, 14-15, 675 N.Y.S. 2d 753 (1998); See also **Ricucci v. Business Network Int'l,** Index No. SC 8876/97, Decision dated May 5, 1998, Yks. Cty. Ct. (TAD)(professional networking organization fails to deliver " good referrals " to real estate broker).

cxxxii. **Anonymous v. CVS Corp.**, New York Law Journal, January 8, 2004, p. 19, col. 1 (N .Y. Sup.).

cxxxiii. **Smith v. Chase Manhattan Bank**, 293 A.D. 2d 598 (N.Y. App. Div. 2000).

cxxxiv. **Meyerson v. Prime Realty Services, LLC**, 7 Misc. 2d 911 (N.Y. Sup. 2005).

cxxxv. **C.T.V., Inc. v. Curlen**, New York Law Journal, Dec. 3, 1997, p. 35, col. 1 (Yks. Cty. Ct.).

cxxxvi. **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995).

cxxxvii. **Gutterman v. Romano Real Estate**, New York Law Journal, Oct. 28, 1998, p. 36, col. 3 (Yks. Cty. Ct.).

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cxl. **Breakwaters Townhouses Ass'n. V. Breakwaters of Buffalo, Inc.**, 207 A.D. 2d 963, 616 N.Y.S. 2d 829 (1994).

cxli. **Latiuk v. Faber Const. Co.**, 269 A.D. 2d 820, 703 N.Y.S. 2d 645 (2000).

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712 N.Y.S. 2d 801 (2000), rev'd 279 A.D. 2d 418, 720 N.Y.S. 2d 59 (2001), rev'd 97 N.Y. 2d 46, 735 N.Y.S. 2d 479, 760 N.E. 2d 1274 (2001).

cxliii. **Gray v. Seaboard Securities, Inc.**, 14 A.D. 3d 852, 788 N.Y.S. 2d 471 (3d Dept. 2005), *leave to appeal dismissed* 4 N.Y. 3d 846 (2005).

cxliv. **Yeger v. E* Trade Securities LLC,** New York Law Journal, February 10, 2006, p. 21, col. 1 (N.Y. Sup.).

cxlv. **Fesseha v. TD Waterhouse Investor Services, Inc.**, 193 Misc. 2d 253, 747 N.Y.S. 2d 676 (2002), *aff'd* 305 A.D. 2d 268, 761 N.Y.S. 2d 22 (1st Dept. 2003).

cxlvi. **Berger v. E*Trade Group, Inc.**, 2000 WL 360092 (N.Y. Sup. 2000).

cxlvii. **Scalp & Blade, Inc. v. Advest, Inc**., 291 A.D. 2d 882, 722 N.Y.S. 2d 639 (4th Dept. (2001).

cxlviii. **Morelli v. Weider Nutrition Group, Inc.**, 275 A.D. 2d 607, 712 N.Y.S. 2d 551 (2000).

cxlix. **Anunziatta v. Orkin Exterminating Co., Inc.**, 180 F. Supp. 2d 353 (N.D.N.Y. 2001).

cl. **Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris Inc.**, 2003 WL 22133705 (2d Cir 2003). See also: Karmel & Paden, Consumer Protection Law Claims in Toxic Torts Litigation, New York Law Journal, August 23, 2005, p. 3 (discussion of whether " the claim that the plaintiff's exposure to a toxic substance is actionable... the state consumer protection statutes).

cli. **Kinkopf v. Triborough Bridge and Tunnel Authority**, 1 Misc. 3d 417, 764 N.Y.S. 2d 549 (2003)(deceptive practices involve a failure to inform customers who or what is E-Z Pass, which of four different State authorities actually is the contracting party and what the rules are for filing claims and commencing lawsuits; " having four agencies with four separate procedures when a customer believes he or she has contracted with one totally different entity is a deceptive practice that entitles the claimant to damages of $50.00 ").

clii. **Kinkopf v. Triborough Bridge and Tunnel Authority**, 6 Misc.

3d 731 (N.Y. App. Term. 2005).

cliii. **Meachum v. Outdoor World Corp**., 235 A.D. 2d 462, 652 N.Y.S. 2d 749 (1997).

cliv. **Vallery v. Bermuda Star Line, Inc**., 141 Misc. 2d 395, 532 N.Y.S. 2d 965 (1988) .

clv. **Pellegrini v. Landmark Travel Group**, 165 Misc. 2d 589, 628 N.Y.S. 2d 1003 (1995).

clvi. **People v. P.U. Travel, Inc**., New York Law Journal, June 19, 2003, p. 20 (N.Y. Sup.).

clvii. **Tarantola v. Becktronix, Ltd.**, Index No: SCR 1615/03, N.Y. Civ., Richmond Cty., March 31, 2004, J. Straniere.

clviii. **Leider v. Ralfe**, 2005 WL 152025 (S.D.N.Y. 2005).

clix. **Bridget Griffin-Amiel v. Frank Terris Orchestras,** 178 Misc. 2d 71, 677 N.Y.S. 2d 908 (1998).

clx. Jacobs, **Bride Wins Lawsuit Over a Switch in Wedding Singers**, New York Times Metro Section, Sept. 10, 1998, p. 1.

clxi. **DeFina v. Scott,** New York Law Journal, February 24, 2003, p. 21, (N.Y. Sup.).

clxii. **Scott v. Bell Atlantic Corp.,** 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002).

clxiii. **Card v. Chase Manhattan Bank**, 175 Misc. 2d 389, 669 N.Y.S. 2d 117 (1996).

clxiv. **Card v. Chase Manhattan Bank**, 175 Misc. 2d 389, 669 N.Y.S. 2d 117, 121 (1996)

clxv. **Karlin v. IVF America, Inc.**, 93 N.Y. 2d 282, 690 N.Y.S. 2d 495, 712 N.E. 2d 662, 665 (1999).

clxvi. **People v. Lipsitz**, 174 Misc. 2d 571, 663 N.Y.S. 2d 468, 475
(1997).

clxvii. **People v. McNair**, 9 Misc. 2d 1121(a) (N.Y. Sup. 2005).

clxviii. **Pelman v. McDonald's Corp**., 2005 U.S. App. LEXIS 1229 (2d Cir. 2005).

clxix. **Leider v. Ralfe**, 2005 WL 152025 (S.D.N.Y. 2005).

clxx. **Gale v. International Business Machines Corp.**, 9 A.D. 3d 446, 781 N.Y.S. 2d 45 (2d Dept. 2004).

clxxi. **Metropolitan Opera Association, Inc. v. Figaro Systems, Inc.**, 7 Misc. 3d 503 (N.Y. App. Div. 2005).

clxxii. **Millan v. Yonkers Avenue Dodge, Inc.,** New York Law Journal, Sept. 17, 1996, p. 26, col. 5 (Yks. Cty. Ct.).

clxxiii. Automobile manufacturers or dealers may sell consumers new and used car warranties which, typically, are contingent upon an opportunity to cure. **Borys v. Scarsdale Ford Inc.,** New York Law Journal, June 15, 1998, p. 34, col. 4 (Yks. Cty. Ct.).

clxxiv. **Denny v. Ford Motor Company**, 87 N.Y. 2d 248, 639 N.Y.S. 2d 250, 253-259, 662 N.E. 2d 730 (1995)(comparison of causes of action based upon strict products liability and breach of warranty of merchantability).

clxxv. Strict products liability theory applies to new and used car dealers. **Nutting v. Ford Motor Company**, 180 A.D. 2d 122, 584 N.Y.S. 2d 653 (1992).

clxxvi. **Ritchie v. Empire Ford Sales Inc.**, New York Law Journal, Nov. 7, 1996, p. 30, col. 3 (Yks. Cty. Ct.).

clxxvii. **Borys v. Scarsdale Ford, Inc.,** New York Law Journal, June 15, 1998, p. 34, col. 4 (Yks. Cty. Ct.).

clxxviii. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 659 (1995).

clxxix. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 660 (1995).

clxxx. New York General Business Law § 617(2)(a).

clxxxi. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 661 (1995).

clxxxii. **Kim v. BMW of Manhattan, Inc.**, 11 Misc. 3d 1078 (N.Y.

Sup. 2005).

clxxxiii. **Welch v. Exxon Superior Service Center**, New York Law Journal, May 8, 2003, p. 25, col. 2 (City Ct. 2003).

clxxxiv. **Shalit v. State of New York**, 153 Misc. 2d 241, 580 N.Y.S. 2d 836 (1992)

clxxxv. **Denny v. Ford Motor Company**, 87 N.Y. 2d 248, 638 N.Y.S. 2d 250, 253-259 (1995).

clxxxvi. **Hull v. Moore Mobile Home Stebra, Inc.**, 214 A.D. 2d 923, 625 N.Y.S. 2d 710, 711 (1995).

clxxxvii. **Natale v. Martin Volkswagen, Inc.**, 92 Misc. 2d 1046, 402 N.Y.S. 2d 156, 158-159 (1978).

clxxxviii. **Urquhart v. Philbor Motors, Inc.**, 9 A.D. 3d 458, 780 N.Y.S. 2d 176 (2d Dept. 2004).

clxxxix. **Tarantino v. DaimlerChrysler Corp.**, New York Law Journal, October 30, 2000, p. 34, col. 5 (West. Sup.).

cxc. **DiCinto v. DaimlerChrysler Corp**., New York Law Journal, August 30, 2000, p. 24, col. 5 (N.Y. Sup.).

cxci. **Carter-Wright v. DaimlerChrysler Corp.**, New York Law Journal, August 30, 2000, p. 26.

cxcii. **DiCintio v. DaimlerChrysler Corp.**, 2002 WL 257017 (N.Y. Ct. App. Feb. 13, 2002).

cxciii. **Borys v. Scarsdale Ford, Inc.,** New York Law Journal, June 15, 1998, p. 34, col. 4 (Yks. Cty. Ct.).

cxciv. **Levitsky v. SG Hylan Motors, Inc.**, New York Law Journal, July 3, 2003, p. 27, col. 5 (N.Y. Civ. 2003).

cxcv. **Spielzinger v. S.G. Hylan Motors Corp**., New York Law Journal, September 10, 2004, p. 19, col. 3 (Richmond Civ. 2004).

cxcvi. **Thompson v. Foreign Car Center, Inc**., New York Law Journal, March 10, 2006, p. 19, col. 3 (N.Y. Sup.).

cxcvii. **Borys v. Scarsdale Ford, Inc.,** New York Law Journal, June

15, 1998, p. 34, col. 4 (Yks. Cty. Ct.).

cxcviii. **Chrysler Motors Corp. v. Schachner,** 166 A.D. 2d 683, 561 N.Y.S. 2d 595, 596-597 (1990).

cxcix. **Matter of General Motors Corp. v. Warner**, 5 Misc. 3d 968, 784 N.Y.S. 2d 360 (Albany Sup. 2004).

cc. **Matter of DaimlerChrysler Corp. v. Spitzer**, 6 Misc. 3d 228, 782 N.Y.S. 2d 610 (Albany Sup. 2004), *aff'd* 26 A.D. 3d 88, 804 N.Y.S. 2d 506 (2005).

cci. **Kucher v. DaimlerChrysler Corp**., 9 Misc. 3d 45, 802 N.Y.S. 2d 298 (N.Y. App. Term 2005).

ccii. **Kucher v. DaimlerChrysler Corp**., 9 Misc. 3d 45, 802 N.Y.S. 2d 298 (N.Y. App. Term 2005).

cciii. **Kucher v. DaimlerChrysler Corp.**, New York Law Journal, May 15, 2006, p. 20, col. 3 (N.Y. Civ.)(

cciv. **DaimlerChrysler Corp. v. Karman**, 5 Misc. 3d 567, 782 N.Y.S. 2d 343 (Albany Sup. 2004).

ccv. **B & L Auto Group, Inc. v. Zilog**, New York Law Journal, July 6, 2001, p. 21, col. 2 (N.Y. Civ. 2001).

ccvi. **Barthley v. Autostar Funding LLC**, Index No: SC 3618-03, Yonkers Small Claims Court, December 31, 2003, J. Borrelli.

ccvii. **Cintron v. Tony Royal Quality Used Cars, Inc.**, 132 Misc. 2d 75, 503 N.Y.S. 2d 230 (1986).

ccviii. **Millan v. Yonkers Avenue Dodge, Inc.**, New York Law Journal, Sept. 17, 1996, p. 26, col. 5 (Yks. Cty. Ct.).

ccix. **Armstrong v. Boyce**, 135 Misc. 2d 148, 513 N.Y.S. 2d 613, 617 (1987).

ccx. **Shortt v. High-Q Auto, Inc.**, New York Law Journal, December 14, 2004, p. 20, col. 3 (N.Y. Civ. 2004).

ccxi. **Fortune v. Scott Ford, Inc**., 175 A.D. 2d 303, 572 N.Y.S. 2d 382 (1991).

ccxii. **Jandreau v. LaVigne**, 170 A.D. 2d 861, 566 N.Y.S. 2d 683

(1991).

ccxiii. **Diaz v. Audi of America, Inc.,** 19 A.D. 3d 357, 796 N.Y.S. 2d 419 (2005).

ccxiv. **Ireland v. J.L.'s Auto Sales, Inc.**, 151 Misc. 2d 1019, 574 N.Y.S. 2d 262 (1991), rev'd 153 Misc. 2d 721, 582 N.Y.S. 2d 603 (1992).

ccxv. **Williams v. Planet Motor Car, Inc**., New York Law Journal, January 3, 2002, p. 19 (Kings Civ. Ct.).

ccxvi. **Lipscomb v. Manfredi Motors**, New York Law Journal, April 2, 2002, p. 21 (Richmond Civ. Ct.)

ccxvii. **Williams v. Planet Motor Car, Inc**., New York Law Journal, January 3, 2002, p. 19 (Kings Civ. Ct.).

ccxviii. **Barilla v. Gunn Buick Cadillac-GMC, Inc.**, 139 Misc. 2d 496, 528 N.Y.S. 2d 273 (1988).

ccxix. **Ritchie v. Empire Ford Sales Inc.,** New York Law Journal, Nov. 7, 1996, p. 30, col. 3 (Yks. Cty. Ct.).

ccxx. **People v. Condor Pontiac**, 2002 WL 21649689 (N.Y. Sup. 2003).

ccxxi. **Williams v. Planet Motor Car, Inc**., New York Law Journal, January 3, 2002, p. 19 (Kings Civ. Ct.).

ccxxii. **Coxall v. Clover Commercials Corp.**, New York Law Journal, June 17, 2004, p. 19, col. 1 (N.Y. Civ. 2004).

ccxxiii. **Precision Foundations v. Ives**, 4 A.D. 3d 589, 772 N.Y.S. 2d 116 (3d Dept. 2004).

ccxxiv. **Udezeh v. A+Plus Construction Co.**, New York Law Journal, October 10, 2002, p. 22 (N.Y. Civ. 2002).

ccxxv. **Garan v. Don & Walt Sutton Builders, Inc**., 5 A.D. 3d 349, 773 N.Y.S. 2d 416 (2d Dept. 2004).

ccxxvi. **Goldman v. Fay**, 8 Misc. 3d 959, 797 N.Y.S. 2d 731 (Richmond Civ. 2005).

ccxxvii. **Tri-State General Remodeling Contractors, Inc. v.**

Inderdai Bailnauth, 194 Misc. 2d 135, 753 N.Y.S. 2d 327 (2002).

ccxxviii. **Goldman v. Fay**, 8 Misc. 3d 959, 797 N.Y.S. 2d 731 (2005).

ccxxix. **Altered Structure, Inc. v. Solkin**, 7 Misc. 3d 139(A) (N.Y. App. Div. 2005).

ccxxx. **Routier v. Waldeck**, 184 Misc. 2d 487, 708 N.Y.S. 2d 270 (2000).

ccxxxi. **Colorito v. Crown Heating & Cooling, Inc**., 2005 WL 263751 (N.Y. App. Term 2005).

ccxxxii. **Cudahy v. Cohen**, 171 Misc. 2d 469, 661 N.Y.S. 2d 171 (1997).

ccxxxiii. **Moonstar Contractors, Inc. v. Katsir**, New York Law Journal, October 4, 2001, p. 19, col. 6 (N.Y. Civ.)

ccxxxiv. **Mandioc Developers, Inc. v. Millstone**, 164 Misc. 2d 71, 623 N.Y.S. 2d 704 (1995).

ccxxxv. **B&F Bldg. Corp. v. Liebig**, 76 N.Y. 2d 689, 563 N.Y.S. 2d 40, 564 N.E. 2d 650 (1990).

ccxxxvi. For a discussion of this statute see Bailey & Desiderio, **New Home Warranty, An Open Question Seeking an Answer**, Real Estate Update, New York Law Journal, November 10, 2004, p. 5.

ccxxxvii. **Etter v. Bloomingdale Village Corp**., 6 Misc. 3d 135(A) (N.Y. App. Term. 2005.)

ccxxxviii. **Biancone v. Bossi**, 24 A.D. 3d 582, 806 N.Y.S. 2d 694 (2005).

ccxxxix. **Rosen v. Watermill Development Corp**., 1 A.D. 3d 424, 768 N.Y.S. 2d 474 (2003).

ccxl. **Taggart v. Martano**, 282 A.D. 2d 521 (N.Y. App. Div. 2001).

ccxli. **Testa v. Liberatore**, 6 Misc. 3d 126(A)(N.Y. App. Term. 2004).

ccxlii. **Randazzo v. Abram Zylberberg**, 4 Misc. 3d 109 (N.Y. App.

Term. 2004).

ccxliii. **Goretsky v. ½ Price Movers, Inc.**, New York Law Journal, March 12, 2004, p. 19, col. 3 (N.Y. Civ. 2004).

ccxliv. **Olukotun v. Reiff**, Index No: S.C.R. 232/04, Richmond Cty Civ Ct. July 29, 2004, J. Straniere.

ccxlv. **Gaidon v. Guardian Life Insurance Co.**, 94 N.Y. 2d 330, 338, 704 N.Y.S. 2d 177, 725 N.E. 2d 598 (1999).

ccxlvi. **Tahir v. Progressive Casualty Insurance Co.**, 2006 WL 1023934 (N.Y. Civ. 2006).

ccxlvii. **Monter v. Massachusetts Mutual Life Ins. Co.**, 12 A.D. 3d 651, 784 N.Y.S. 2d 898 (2d Dept. 2004).

ccxlviii. **Skibinsky v. State Farm Fire and Casualty Co.**, 6 A.D. 3d 976, 775 N.Y.S. 2d 200 (3d Dept. 2004).

ccxlix. **Brenkus v. Metropolitan Life Ins. Co.**, 309 A.D. 2d 1260, 765 N.Y.S. 2d 80 (2003).

ccl. **Makastchian v. Oxford Health Plans, Inc.**, 270 A.D. 2d 25, 704 N.Y.S. 2d 44 (2000).

ccli. **Whitfield v. State Farm Mutual Automobile Ins. Co.**, New York Law Journal, March 29, 2006, p. 20, col. 3 (N.Y. Civ.).

cclii **Shebar v. Metropolitan Life Insurance Co.**, 23 A.D. 3d 858, 807 N.Y.S. 2d 448 (2006).

ccliii. **Makuch v. New York Central Mutual Fire Ins. Co.**, 12 A.D. 3d 1110, 785 N.Y.S. 2d 236 (4th Dept. 2004).

ccliv. **Acquista v. New York Life Ins. Co.**, 285 A.D. 2d 73, 730 N.Y.S. 2d 272 (2001).

cclv. **Rubinoff v. U.S. Capitol Insurance Co.**, New York Law Journal, May 10, 1996, p. 31, col. 3 (Yks. Cty. Ct.).

cclvi. See **NCLC Reports**, Consumer Credit and Usury Edition, Vol. 23, Dec. 2004, p. 10 (" TILA provides that a credit card issuer is subject to all claims (except tort claims) and defenses of a consumer against a merchant when the consumer uses a credit card as a method of payment, if certain conditions are met. This right

is essentially the credit card equivalent of the Federal Trade Commission's Holder Rule (16 C.F.R. § 433)...A consumer invokes her right as at assert claims or defenses against a card issuer by withholding payment or as a defense in a collection action. The claims or defenses asserted can include claims that also might be raised as a billing error. More importantly, a consumer can use this right to raise a dispute as to the quality of the merchandise or services paid for by the credit card. Note, there is significant confusion about the existence of this right, especially in the context of disputes over the quality of goods or services ").

cclvii. **JP Morgan Chase Bank v. Tecl**, 24 A.D. 3d 1001 (3d Dept. 2005).

cclviii. **Bank of New York v. Walden**, 194 Misc. 2d 461, 751 N.Y.S. 2d 341 (2002).

cclix. **Community Mutual Savings Bank v. Gillen**, 171 Misc. 2d 535, 655 N.Y.S. 2d 271 (1997).

cclx. **Rochester Home Equity, Inc. v. Upton**, 1 Misc. 3d 412, 767 N.Y.S. 2d 201 (2003).

cclxi. **Nova Information Systems, Inc. V. Labatto**, New York Law Journal, August 20, 2004, p. 18, col. 3 (N.Y. Civ. 2004).

cclxii. **Tyk v. Equifax Credit Information Services, Inc**., 195 Misc. 2d 566, 758 N.Y.S. 2d 761 (2003).

cclxiii. **Albank, FSB v. Foland**, 177 Misc. 2d 569, 676 N.Y.S. 2d 461
(1998).

cclxiv. **People v. Applied Card Systems, Inc.**, 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (2005).

cclxv. **Rochester Home Equity, Inc. v. Upton**, 1 Misc. 3d 412, 767 N.Y.S. 2d 201 (2003).

cclxvi. **JP Morgan Chase Bank v. Tecl**, 24 A.D. 3d 1001 (3d Dept. 2005).

cclxvii. **Witherwax v. Transcare**, New York Law Journal, May 5, 2005, p. 19 (N.Y. Sup. 2005).

cclxviii. **Dougherty v. North Fork Bank**, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2003).

cclxix. **Negrin v. Norwest Mortgage,** 263 A.D. 2d 39, 700 N.Y.S. 2d 184 (1999).

cclxx. **Citibank (South Dakota), NA v. Martin**, 11 Misc. 3d 219, 807 N.Y.S. 2d 284 (2005).

cclxxi. **People v. Applied Card Systems, Inc.**, 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (2005).

cclxxii. **People v. Telehublink**, 301 A.D. 2d 1006, 756 N.Y.S. 2d 285
(2003).

cclxxiii. **Sims v. First Consumers National Bank,** 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (2003).

cclxxiv. **Broder v. MBNA Corporation**, New York Law Journal, March 2, 2000, p. 29, col. 4 (N.Y. Sup.), aff'd 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (2001).

cclxxv. **American Express Centurion Bank v. Greenfield**, 11 Misc. 3d 129(A) (N.Y. App. Term. 2006).

cclxxvi. **Varela v. Investors Insurance Holding Corp**., 81 N.Y. 2d 958, 598 N.Y.S. 2d 761 (1993).

cclxxvii. **DiMarzo v. Terrace View**, New York Law Journal, June 9, 1997, p. 34, col. 3 (Yks. Cty. Ct.), remanded on damages only, N.Y.A.T, Decision dated Oct. 27, 1998.

cclxxviii. **DiMarzo v. Terrace View**, New York Law Journal, June 9, 1997, p. 34, col. 3 (Yks. Cty. Ct.), remanded on damages only, N.Y.A.T, Decision dated Oct. 27, 1998.

cclxxix. New York General Business Law § 201(1).

cclxxx. **DiMarzo v. Terrace View**, New York Law Journal, June 9, 1997, p. 34, col. 3 (Yks. Cty. Ct.), remanded on damages only, N.Y.A.T, Decision dated Oct. 27, 1998.

cclxxxi. **Tannenbaum v. New York Dry Cleaning, Inc.**, New York Law Journal, July 26, 2001, p. 19, col. 1 (N.Y. Civ. Ct.).

cclxxxii. **White v. Burlington Coat Factory**, 3 Misc. 3d 1106(A) (Mt. Vernon Cty Ct 2004).

cclxxxiii. **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995).

cclxxxiv. **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995).

cclxxxv. **C.T.V., Inc. v. Curlen**, New York Law Journal, Dec. 3, 1997, p. 35, col. 1 (Yks. Cty. Ct.).

cclxxxvi. **Pacurib v. Villacruz**, 183 Misc. 2d 850, 705 N.Y.S. 2d 819
(1999).

cclxxxvii. See e.g., **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995); **C.T.V., Inc. v. Curlen**, New York Law Journal, Dec. 3, 1997, p. 35, col. 1 (Yks. Cty. Ct.).

cclxxxviii. **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995). Web Page, supra.

cclxxxix. **Malach v. Chuang**, 754 N.Y.S. 2d 835 (N.Y. Civ. 2002).

ccxc. **Goldman v. Fay**, 8 Misc. 3d 959, 797 N.Y.S. 2d 731 (2005).

ccxci. **Spatz v. Axelrod Management Co.**, 165 Misc. 2d 759, 630 N.Y.S. 2d 461 (1995).

ccxcii. **Seecharin v. Radford Court Apartment Corp.**, Index No. SC 3194-95, Yks. Cty. Ct. (TAD), Decision dated June 15, 1995.

ccxciii. **Spatz v. Axelrod Management Co.**, 165 Misc. 2d 759, 764, 630 N.Y.S. 2d 461 (1995).

ccxciv. **Spatz v. Axelrod Management Co.,** 165 Misc. 2d 759, 630 N.Y.S. 2d 461 (1995); **Seecharin v. Radford Court Apartment Corp**., supra.

49. **Kachian v. Aronson**, 123 Misc. 2d 743 (1984)(15% rent abatement).

ccxcvi. **Spatz v. Axelrod Management Co.**, 165 Misc. 2d 759, 630

N.Y.S. 2d 461 (1995).

ccxcvii. **Goode v. Bay Towers Apartments Corp**., 1 Misc. 3d 381, 764 N.Y.S. 2d 583 (2003).

ccxcviii. **Welch v. New York Sports Club Corp**., New York Law Journal, March 21, 2001, p. 19 (N.Y. Civ.).

ccxcix. **Hamilton v. Khalife,** 289 A.D. 2d 444 (2d Dept. 2001); **Morris v. Snappy Car Rental**, 189 A.D. 2d 115 (4th Dept. 1993).

ccc. **Bauman v. Eagle Chase Association**, 226 A.D. 2d 488 (2d Dept. 1996); **Filippazzo v. Garden State Brickface Co.**, 120 A.D. 2d 663 (2d Dept. 1986).

ccci. **Gulf Ins. Co. v. Kanen**, 13 A.D. 3d 579, 788 N.Y.S. 2d 132 (2d Dept. 2004)(

cccii. **Tannenbaum v. N.Y. Dry Cleaning**, New York Law Journal, July 26, 2001, at p. 19 (N.Y. Civ.).

ccciii. **Hacker v. Smith Barney, Harris Upham & Co.**, 131 Misc. 2d 757 (N.Y. Civ. 1986).

ccciv. **Tsadilas v. Providian National Bank**, 2004 WL 2903518 (1st Dept. 2004)(" Plaintiff may not invoke the type-size requirements of CPLR 4544 because her own claims against defendant depend on paragraph 4 of each credit card agreement, which appears to be in the same size type as the rest of the agreement ")

cccv. **Lerner v. Karageorgis Lines, Inc.**, 66 N.Y. 2d 479, 497 N.Y.S. 2d 894, 488 N.E. 2d 824 (1985).

cccvi. **Sims v. First Consumers National Bank**, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (2003).

cccvii. **Doe v. Great Expectations**, 10 Misc. 3d 618 (N.Y. Civ. 2005).

cccviii. **Grossman v. MatchNet**, 10 A.D. 3d 577, 782 N.Y.S. 2d 246 (1st Dept. 2004).

cccix. **Woods v. Kittykind**, 8 Misc. 3d 1003, 801 N.Y.S. 2d 782 (2005).

cccx. **O'Rourke v. American Kennels**, N.Y.L.J., May 9, 2005, p. 18

(N.Y. Civ. 2005).

cccxi. **Mongelli v. Cabral**, 166 Misc. 2d 240, 632 N.Y.S. 2d 927 (1995).

cccxii. **Mathew v. Klinger**, New York Law Journal, October 7, 1997, p. 29, col. 1 (Yks. City. Ct.), mod'd 179 Misc. 2d 609, 686 N.Y.S. 2d 549 (1998).

cccxiii. **O'Brien v. Exotic Pet Warehouse, Inc.**, New York Law Journal, October 5, 1999, p. 35, col. 2 (Yks. City Ct.).

cccxiv. **Nardi v. Gonzalez**, 165 Misc. 2d 336, 630 N.Y.S. 2d 215 (1995).

cccxv. **Mercurio v. Weber**, New York Law Journal, June 30, 2003, p. 33, col. 5 (N.Y. Civ. 2003).

cccxvi. **Lewis v. Al DiDonna**, 294 A.D. 2d 799, 743 N.Y.S. 2d 186 (3d Dept. 2002).

cccxvii. **Roberts v. Melendez**, N.Y.L.J., February 3, 2005, p. 19, col. 1 (N.Y. Civ. 2005)

cccxviii. **Anzalone v. Kragness**, 826 N.E. 2d 472 (Ill. App. Ct. 2005).

cccxix. **O'Rourke v. American Kennels**, N.Y.L.J., May 9, 2005, p. 18
(N.Y. Civ. 2005).

cccxx. **Fuentes v. United Pet Supply, Inc.**, New York Law Journal, September 12, 2000, p. 24, col. 3 ((N.Y. Civ. Ct.).

cccxxi. **Saxton v. Pets Warehouse, Inc.**, 180 Misc. 2d 377, 691 N.Y.S. 2d 872 (1999).

cccxxii. **Smith v. Tate**, New York Law Journal, January 29, 1999, p. 35, col. 5 (N.Y. Civ.).

cccxxiii. **Sacco v. Tate**, 175 Misc. 2d 901, 672 N.Y.S. 2d 618 (1998).

cccxxiv. **Roberts v. Melendez**, New York Law Journal, February 3, 2005, p. 19, col. 1 (N.Y. Civ. 2005).

cccxxv. **People v. Garcia**, 3 Misc. 3d 699 (N.Y. Sup. 2004).

cccxxvi. **People v. Douglas Deelecave**, New York Law Journal, May 10, 2005, p. 19 (N.Y. Dist Ct. 2005).

cccxxvii. **Rossi v. 21st Century Concepts, Inc.**, 162 Misc. 2d 932, 618 N.Y.S. 2d 182, 185 (1994).

cccxxviii. **Rossi v. 21st Century Concepts, Inc.**, 162 Misc. 2d 932, 618 N.Y.S. 2d 182, 185 (1994). **Compare: Millan v. Yonkers Avenue Dodge, Inc**., New York Law Journal, Sept. 17, 1996, p. 26, col. 5 (Yks. Cty. Ct.)(cooling-off period under Door-To-Door Sales Act does not apply to sale of used cars which is governed, in part, by cure requirements under New York's Used Car Lemon Law (GBL § 198-b)).

cccxxix. **New York Environmental Resources v. Franklin**, New York Law Journal, March 4, 2003, p. 27 (N.Y. Sup.)

cccxxx. **Rossi v. 21st Century Concepts, Inc.,** 162 Misc. 2d 932, 618 N.Y.S. 2d 182 (1994); **New York Environmental Resources v. Franklin**, New York Law Journal, March 4, 2003, p. 27 (N.Y. Sup.).

cccxxxi. **Kozlowski v. Sears**, New York Law Journal, Nov. 6, 1997, p. 27, col. 3 (Yks. Cty. Ct.).

cccxxxii. **Filpo v. Credit Express Furniture Inc.**, New York Law Journal, Aug. 26, 1997, p. 26, col. 4 (Yks. Cty. Ct.). Web Page, supra.

cccxxxiii. **Filpo v. Credit Express Furniture Inc.**, New York Law Journal, Aug. 26, 1997, p. 26, col. 4 (Yks. Cty. Ct.). Web Page, supra.

cccxxxiv. **Rossi v. 21st Century Concepts, Inc.,** 162 Misc. 2d 932, 618 N.Y.S. 2d 182, 187 (1994).

cccxxxv. **Sterling National Bank v. Kings Manor Estates**, 9 Misc. 3d 1116(A)(N.Y. Civ. 2005).

cccxxxvi. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 659 (1995).

cccxxxvii. **Dvoskin v. Levitz Furniture Co.**, Inc., 9 Misc. 3d

1125(A)
(Suffolk Dist. Ct. 2005). See e.g., **Giarratano v. Midas Muffler**, 166 Misc. 2d 390, 393, 630 N.Y.S. 2d 656 (1995).

cccxxxviii. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 660 (1995).

cccxxxix. **Kim v. BMW of Manhattan, Inc.**, 11 Misc. 3d 1078 (N.Y. Sup. 2005).

cccxl. **Petrello v. Winks Furniture**, New York Law Journal, May 21, 1998, p. 32, col. 3 (Yks. Cty. Ct.).

cccxli. **Faer v. Verticle Fitness & Racquet Club, Ltd.**, 126 Misc. 2d 720, 486 N.Y.S. 2d 594 (N.Y. Civ. 1983).

cccxlii. **Nadoff v. Club Central**, 2003 WL 21537405 (N.Y. Civ. 2003).

cccxliii. **Andin International Inc. v. Matrix Funding Corp.**, 194 Misc. 2d 719 (N.Y. Sup. 2003)(legislative history provides that
" This bill seeks to protect all businessmen from fast talking sales organizations armed with booby traps which they plant in business contracts involving equipment rentals ").

cccxliv. **Tri-State General Remodeling Contractors, Inc. v. Inderdai Bailnauth**, 194 Misc. 2d 135, 753 N.Y.S. 2d 327 (2002).

cccxlv. **Routier v. Waldeck**, 184 Misc. 2d 487, 708 N.Y.S. 2d 270 (2000).

cccxlvi. **Power Cooling, Inc. v. Wassong**, 5 Misc. 3d 22, 783 N.Y.S. 2d 741 (N.Y. App. Term. 2004).

cccxlvii. **Colorito v. Crown Heating & Cooling, Inc.**, 2005 WL 263751
(N.Y. App. Term 2005).

cccxlviii. **Falconieri v. Wolf**, New York Law Journal, January 13, 2004, p. 20, col. 1 (West. Justice Court 2004).

cccxlix. **Cudahy v. Cohen**, 171 Misc. 2d 469, 661 N.Y.S. 2d 171 (1997).

cccl. **Moonstar Contractors, Inc. v. Katsir**, New York Law Journal,

October 4, 2001, p. 19, col. 6 (N.Y. Civ.)

cccli. **Mindich Developers, Inc. v. Milstein**, 164 Misc. 2d 71, 623 N.Y.S. 2d 704 (1995).

ccclii. **B&F Bldg. Corp. v. Liebig**, 76 N.Y. 2d 689, 563 N.Y.S. 2d 40, 564 N.E. 2d 650 (1990).

cccliii. **B & L Auto Group, Inc. v. Zelig**, New York Law Journal, July 6, 2001, p. 21, col. 2 (N.Y. Civ. 2001).

cccliv. **B & L Auto Group, Inc. v. Zelig**, New York Law Journal, July 6, 2001, p. 21, col. 2 (N.Y. Civ. 2001).

ccclv. **Vashovsky v. Blooming Nails**, 11 Misc. 3d 127(A)(N.Y. Sup. 2006).

ccclvi. **Walker v. Winks Furniture**, 168 Misc. 2d 265, 640 N.Y.S. 2d 428 (1996).

ccclvii. **Walker v. Winks Furniture**, 168 Misc. 2d 265, 640 N.Y.S. 2d 428 (1996).

ccclviii. **Walker v. Winks Furniture**, 168 Misc. 2d 265, 640 N.Y.S. 2d 428, 430 (1996). But see **Dweyer v. Montalbano's Pool & Patio Center, Inc**., New York Law Journal, March 16, 2004, p. 18, col. 3 (N.Y. Civ. 2004) (" There is nothing in the statute that permits the consumer to rescind the contract; damages are the only remedy under the statute ").

ccclix. **Walker v. Winks Furniture**, 168 Misc. 2d 265, 640 N.Y.S. 2d 428, 431 (1996).

ccclx. **Walker v. Winks Furniture**, 168 Misc. 2d 265, 640 N.Y.S. 2d 428 (1996).

ccclxi. **Dweyer v. Montalbano's Pool & Patio Center, Inc**., New York Law Journal, March 16, 2004, p. 18, col. 3 (N.Y. Civ. 2004).

ccclxii. **Amiekumo v. Vanbro Motors, Inc.**, 3 Misc. 3d 1101(A) (Richmond Civ. 2004).

ccclxiii. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281, 282 (1998).

ccclxiv. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281, 282 (1998).

ccclxv. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281, 283 (1998).

ccclxvi. **Perel v. Eagletronics**, New York Law Journal, April 14, 2006, p. 20, col. 1 (N.Y. Civ.).

231. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281, 283 (1998).

ccclxviii. On the issue of preemption see **Eina Realty v. Calixte**, 178 Misc. 2d 80, 679 N.Y.S. 2d 796 (1998)(RPAPL § 711 which permits commencement of litigation by landlord within three days of service of rent demand notice is preempted by Fair Debt Collection Practice Act (15 U.S.C.A. § 1692)).

ccclxix. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281 (1998).

ccclxx. **Dudzik v. Klein's All Sports**, 158 Misc. 2d 72, 600 N.Y.S. 2d 1013 (1993).

ccclxxi. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 956-957, 673 N.Y.S. 2d 281 (1998).

ccclxxii. **Johnson v. Chase Manhattan Bank USA, N.A.**, 2 Misc. 3d 1003(A), 784 N.Y.S. 2d 921 (N.Y. Sup. 2004).

ccclxxiii. **Davis v. Rent-A-Center of America, Inc.**, 150 Misc. 2d 403, 568 N.Y.S. 2D 529 (1991).

ccclxxiv. **Sagiede v. Rent-A-Center**, New York Law Journal, December 2, 2003, p. 19, col. 3 (N.Y. Civ. 2003).

ccclxxv. **Perel v. Eagletronics**, New York Law Journal, April 14, 2006, p. 20, col. 1 (N.Y. Civ.).

ccclxxvi. **Cirillo v. Slomin's Inc.**, 196 Misc. 2d 922 (N.Y. Sup. 2003).

ccclxxvii. **Malul v. Capital Cabinets, Inc.**, 191 Misc. 2d 399, 740 N.Y.S. 2d 828 (2002)

ccclxxviii. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc.

2d 951, 673 N.Y.S. 2d 281 (1998).

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ccclxxx. **Dudzik v. Klein's All Sports**, 158 Misc. 2d 72, 600 N.Y.S. 2d 1013 (1993).

ccclxxxi. **Shaw-Crummel v. American Dental Plan**, New York Law Journal, March 31, 2003, p. 34, col. 6 (Nassau Dist. Ct.)

ccclxxxii. **Meachum v. Outdoor World Corp**., 235 A.D. 2d 462, 652 N.Y.S. 2d 749 (1997).

ccclxxxiii. **Vallery v. Bermuda Star Line, Inc.**, 141 Misc. 2d 395, 532 N.Y.S. 2d 965 (1988) .

ccclxxxiv. **Pellegrini v. Landmark Travel Group**, 165 Misc. 2d 589, 628 N.Y.S. 2d 1003 (1995).

ccclxxxv. **People v. P.U. Travel, Inc**., New York Law Journal, June 19, 2003, p. 20 (N.Y. Sup.).

ccclxxxvi. Dickerson, False, Misleading & Deceptive Advertising In The Travel Industry, at www.classactionlitigation.com/library/ca_articles.html

ccclxxxvii. Dickerson, The Cruise Passenger's Rights & Remedies at www.classactionlitigation.com/library/ca_articles.html; Dickerson, The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights, 28 Tulane Maritime Law Journal, 447-517, No. 2, Summer 2004.

ccclxxxviii. Dickerson, Hotels, Resorts And Casinos Selected Liability Issues at www.classactionlitigation.com/library/ca_articles.html

ccclxxxix. **Stone v. Continental Airlines**, 10 Misc. 3d 811, 804 N.Y.S. 2d 652 (2005).

cccxc. **Fallsview Glatt Kosher Caterers Inc. v. Rosenfeld**, New

York Law Journal, January 19, 2005, p. 20, col. 1 (Kings Civ. 2005).

cccxci. **Tal Tours v. Goldstein**, 9 Misc. 3d 1117(A) (Nassau Sup. 2005).

cccxcii. **Joffe v. Acacia Mortgage Corp.**, 121 P. 3d 831 (Ariz. Ct. App. 2005)(unsolicited advertizing sent to cellular telephone user in the form of text messaging violates Telephone Consumer Protection Act).

cccxciii. Telephone Consumer Protection Act of 1991, 47 USC § 227.

cccxciv. **Gottlieb v. Carnival Corp**., 436 F. 3d 335 (2d Cir. 2006).

cccxcv. **Weiss v. 4 Hour Wireless, Inc.**, New York Law Journal, September 7, 2004, p. 18, col. 1 (N.Y. App. Term 2004).

cccxcvi. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 28, 701 N.Y.S. 2d 859 (1999).

cccxcvii. **Kaplan v. Democrat & Chronicle**, 266 A.D. 2d 848, 698 N.Y.S. 2d 799 (3rd Dept. 1998).

cccxcviii. **Schulman v. Chase Manhattan Bank**, 268 A.D. 2d 174, 710 N.Y.S. 2d 368 (2000). Compare: **Charvat v. ATW**, Inc., 27 Ohio App. 3d 288, 712 N.E. 2d 805 (1998)(consumer in small claims court has no private right of action under TPCA unless and until telemarketer telephones a person more than once in any 12-month period after the person has informed the telemarketer that he or she does not want to be called).

cccxcix. See e.g., **Foxhall Realty Law Offices, Ltd. v. Telecommunications Premium Services, Ltd.**, 156 F. 3d 432 (2d Cir. 1998)(Congress intended to divest federal courts of federal question jurisdiction over private TCPA claims); **International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.**, 106 F. 3d 1146 (4th Cir. 1997); **Murphey v. Lanier**, 204 F. 3d 911 (9th Cir. 2000); **United Artists Theater Circuit, Inc. v. F.C.C.**, 2000 WL 33350942 (D. Ariz. 2000).

cd. **Gottlieb v. Carnival Corp**., 436 F. 3d 335 (2d Cir. 2006)

(“ we conclude that Congress did not intend to divest the federal courts of diversity jurisdiction over private causes of action under the TCPA....We also vacate the (trial court’s judgment) dismissing (the) claim under New York (G.B.L.) § 396-aa for lack of supplemental jurisdiction in light of our holding that the district court has diversity jurisdiction over his TCPA claim “).

cdi. **Utah Division of Consumer Protection v. Flagship Capital**, 125 P. 3d 894 (Utah Sup. 2005)(“ Close examination of the Utah laws showed that they are not in conflict with the TCPA, not do they stand as an obstacle to the accomplishments and full objective of federal law...The telemarketing standards set by our legislature are stricter than, but do not directly conflict with the federal standards. A telemarketers who complies with the Utah standards will have little difficulty complying with the federal standards “).

cdii. Miller and Biggerstaff, **Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes**, 52 Federal Communications Law Journal, 667, 668-669 (2000)(“ The TCPA presents ‘ an unusual constellation of statutory features ‘. It provides a federal right to be free from certain types of telephone solicitations and facsimiles (faxes), but it does permit a victim to enforce that right in federal court. The TCPA’s principal enforcement mechanism is a private suit, but the TCPA does not permit an award of attorney fees to the prevailing party, as do most other private attorney general statutes. The TCPA is practically incapable of forming the basis of a class action...”).

cdiii. **Kaplan v. Life Fitness Center**, Rochester City Court, December 13, 1999.

cdiv. 47 USC § 227[b][3].

cdv. **Antollino v. Hispanic Media Group, USA, Inc**., New York Law Journal, May 9, 2003, p. 21, col. 3 (N.Y. Sup.).

cdvi. See Glaberson, **Dispute Over Faxed Ads Draws Wide Scrutiny After $12 Million Award**, N.Y. Times Sunday National Section, July 22, 2001, p. 18 (“ The basic damages were set by multiplying the six faxes received by the 1,321 recipients by $500—and then tripling the amount “).

cdvii. **Rudgayzer & Gratt v. Enine, Inc.,** 2002 WL 31369753 (N.Y. Civ. 2002).

cdviii. **Rutgayser & Gratt v. Enine, Inc.**, 4 Misc. 3d 4 (N.Y. App. Term 2004).

cdix. **Bonime v. Management Training International**, New York Law Journal, February 6, 2004, p. 19, col. 1 (N.Y. Sup. 2004).

cdx. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 701 N.Y.S. 2d 859 (1999).

cdxi. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 701 N.Y.S. 2d 859 (1999).

cdxii. **Kaplan v. Life Fitness Center**, Rochester City Court, December 13, 1999.

cdxiii. See **13 telemarketers accept fines for violating No Not Call law**, The Journal News, March 10, 2002, p. 3A (" In most cases the settlement is for $1,000 per call, compared with a maximum fine of $2,000 per call. More than 200 more companies are being investigated...More than 4,000 complaints have been field and nearly 2 million households have signed up to bar calls from telemarketers nationwide ".)

cdxiv. **Rudgayser & Gratt v. Enine, Inc.**, 4 Misc. 3d 4 (N.Y. App. Term 2004).

cdxv. **Gottlieb v. Carnival Corp**., 436 F. 3d 335 (2d Cir. 2006) (" We also vacate the (trial court's judgment) dismissing (the) claim under New York (G.B.L.) § 396-aa for lack of supplemental jurisdiction in light of our holding that the district court has diversity jurisdiction over his TCPA claim ").

cdxvi. See Sternlight & Jensen, " **Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse**? ", 67 Law and Contemporary Problems, Duke University Law School, Winter/Spring 2004 Nos. 1 & 2, pp. 77-78
(" Companies are increasingly drafting arbitration clauses worded to prevent consumers from bringing class actions against them in either litigation or arbitration. If one looks at the form contracts she received regarding her credit card, cellular phone, land phone, insurance policies, mortgage and so forth, most likely, the majority of those contracts include arbitration clauses, and many of those include prohibitions on class actions. Companies are seeking to use these clauses to shield themselves from class

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

cdxvii. See e.g., **Green Tree Financial Corp. v. Bazzle**, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)(class wide arbitration permissible unless expressly prohibited in arbitration agreement; remand for arbitrator's decision on whether class action procedures are available); Green Tree Financial Corp. V. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)(arbitration clause which is silent on fees and costs in insufficient to render agreement unreasonable); Shearson American Express, Inc. V. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987).

cdxviii. See e.g., Ball v. SFX Broadcasting, Inc., 165 F. Supp. 2d 230 (N.D.N.Y. 2001)(costs of arbitration would preclude enforcement of statutory claims); Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585 (S.D.N.Y. 2001)(consumers not bound by arbitration agreement in software agreement); Lewis Tree Service, Inc. V. Lucent Technologies, Inc., 2000 WL 1277303 (S.D.N.Y. 2000)(named plaintiff's claims dismissed; arbitration agreement enforced).

cdxix. See e.g., Tsadilas v. Providian National Bank, 2004 WL 2903518 (1st Dept. 2004)(" The arbitration provision is enforceable even though it waives plaintiff's right to bring a class action...The arbitration provision alone is not unconscionable because plaintiff had the opportunity to opt out without any adverse consequences...Arbitration agreements are enforceable despite an inequality in bargaining position "); Brown & Williamson v. Chesley, 7 A.D. 3d 368, 777 N.Y.S. 82, 87-88 (1st Dept. 2004)(" Consistent with the public policy favoring arbitration, the grounds for vacating an arbitration award are narrowly circumscribed by statute "),
rev'g 194 Misc. 2d 540, 749 N.Y.S. 2d 842 (2002)(trial court vacated an arbitrator's award of $1.3 billion of which $625 million was to be paid to New York attorneys in the tobacco
cases); Ranieri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (1st Dept. 2003)(class action stayed pending arbitration; " Given the strong public policy favoring arbitration...and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions...is neither unconscionable nor violative of public policy "); In re Application of Correction Officer's Benevolent Ass'n, 276 A.D. 2d 394, 715 N.Y.S. 2d 387 (1st Dept. 2000)(parties agreed to class wide arbitration in interpreting a clause in collective bargaining agreement providing military leaves with pay); Brower v. Gateway 2000, Inc., 246 A.D. 2d 246, 676 N.Y.S. 2d 569 (1st Dept. 1998)(arbitration and choice of law clause enforced; arbitration before International Chamber of Commerce was, however, substantively unconscionable); Hackel v. Abramowitz, 245 A.D. 2d 124, 665 N.Y.S. 2D 655 (1ST Dept. 1997)(although the issue as to the arbitrability of the controversy is for the court, and not the arbitrator, to decide, a party who actively participated in the arbitration is deemed to have waived the right to so contend); Heiko Law Offices, PC v.

AT&T Wireless Services, Inc., 6 Misc. 3d 1040(A) (N.Y. Sup. 2005)(motion to compel arbitration clause granted); Spector v. Toys "R" Us, New York Law Journal, April 1, 2004, p. 20, col. 1 (Nassau Sup.)(motion to add credit card issuing bank as necessary party denied; arbitration clause does not apply); Johnson v. Chase Manhattan Bank, USA, N.A., 2 Misc. 3d 1003 ((A)(N.Y. Sup. 2004)(class bound by unilaterally added mandatory arbitration agreement and must submit to class arbitration pursuant to agreement and Federal Arbitration Act); Rosenbaum v. Gateway, Inc., 4 Misc. 3d 128(A), 2004 WL 1462568 (N.Y.A.T. 2004) arbitration clause in computer " Standard Terms of Sale and Limited Warranty Agreement " enforced and small claims court case stayed); Flynn v. Labor Ready, Inc., 2002 WL 31663290 (N.Y. Sup.)(class of employees challenge propriety of " receiving their wages by...cash voucher " which could only be cashed by using the employer's cash dispensing machine and paying as much as $1.99 per transaction; action stayed and enforced arbitration clause after employer agreed to pay some of the costs of arbitration); Licitra v. Gateway, Inc., 189 Misc. 2d 721, 734 N.Y.S. 2d 389 (Richmond Sup. 2001)(arbitration clause in consumer contract not
enforced) Berger v. E Trade Group, Inc., 2000 WL 360092 (N.Y. Sup. 2000)(misrepresentations by online broker " in its advertising and marketing materials, knowingly exaggerated the sophistication of its technology and its capacity to handle its customers transactions "; arbitration agreement enforced); Hayes v. County Bank, 185 Misc. 2d 414, 713 N.Y.S. 2d 267 (N.Y. Sup. 2000)(unconscionable " payday " loans; motion to dismiss and
enforce arbitration clause denied pending discovery on unconscionability); Carnegie v. H & R Block, Inc., 180 Misc. 2d 67, 687 N.Y.S. 2d 528, 531 (N.Y. Sup. 1999)(after trial court certified class, defendant tried to reduce class size by having some class members sign forms containing retroactive arbitration clauses waiving participation in class actions), *mod'd* 269 A.D. 2d 145, 703 N.Y.S. 2d 27 (1st Dept. 2000)(class certification denied).

cdxx. **God's Battalion of Prayer Pentecostal Church v. Miele Associates, LLP**, 6 N.Y. 2d 371, 2006 WL 721504 (Ct. App. 2006) (" we reiterate our long-standing rule that an arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by the contract ").

cdxxi. **Ragucci v. Professional Construction Services**, 25 A.D. 3d 43, 803 N.Y.S. 2d 139 (2005).

cdxxii. **Tal Tours v. Goldstein**, 9 Misc. 3d 1117(A) (Nassau Sup. 2005).

cdxxiii. **Mahl v. Rand**, 11 Misc. 3d 1071(A)(N.Y. Civ. 2006).

cdxxiv. **Oxman v. Amoroso**, 172 Misc. 2d 773, 659 N.Y.S. 2d 963 (Yonkers Cty Ct 1997).

cdxxv. **Posh Pooch Inc. v. Nieri Argenti**, 11 Misc. 3d 1055(A), 2006 WL 435808 (N.Y. Sup.).

cdxxvi. **Studebaker-Worthington Leasing Corp. v. A-1 Quality Plumbing Corp.**, New York Law Journal, October 28, 2005, p. 28, col. 1 (N.Y. Sup.).

cdxxvii. **Boss v. American Express Financial Advisors, Inc.**, 6 N.Y. 3d 242, 811 N.Y.S. 2d 620 (2006).

cdxxviii. **Brooke Group v. JCH Syndicate 488**, 87 N.Y. 2d 530 (1996).

cdxxix. **Glen & Co. v. Popular Leasing USA, Inc.,** New York Law Journal, May 18, 2006, p. 25, col. 3 (West Sup. 2006).

cdxxx. **Scarella v. America Online** 11 Misc. 3d 19 (N.Y. App. Term. 2005), *aff'g* 4 Misc. 3d 1024(A) (N.Y. Civ. 2004).

cdxxxi. **Gates v. AOL Time Warner, Inc.**, 2003 WL 21375367 (N.Y. Sup. 2003).

cdxxxii. **Murphy v. Schneider National, Inc**., 362 F. 3d 1133 (9th Cir. 2004).

cdxxxiii. **Great American Insurance Agency v. United Parcel Service**, 3 Misc. 3d 301, 772 N.Y.S. 2d 486 (2004).

cdxxxiv. **Citibank (South Dakota), NA v. Martin**, 11 Misc. 3d 219, 807 N.Y.S. 2d 284 (2005).

cdxxxv. For a history of the use of Article 9 see Dickerson, Class Actions Under Articles 9 Of The CPLR, New York Law Journal, December 26, 1979, p. 1; Dickerson, Class Actions Under Article 9 Of The CPLR," Jurisdiction Over Non-Residents; Forum Non Conveniens ", New York Law Journal, July 14, 1980, p. 1; Dickerson, Class Actions Under Article 9 Of CPLR, New York Law Journal, August 18, 1980, p. 1; Dickerson, Class Actions Under Article 9 Of CPLR—Decision Reviewed, New York Law Journal, February 3, 1981, p. 1; Dickerson, Class Actions Under Art. 9 Of CPLR—A New Beginning, New York Law Journal, August 7, 1981, p. 1 Dickerson, Pre-Certification Discovery In Class Actions Under CPLR, New York Law Journal, November 13, 1981, p. 1; Dickerson, Class Actions Under Article 9 Of CPLR—The Dynamic Duo, March 15,

1982, p. 1; Dickerson, Class Actions Under Article 9 Of The CPLR, New York Law Journal, March 18, 1983, p. 1; Dickerson, A Review Of Class Actions Under CPLR Article 9, New York Law Journal, March 14, 1984, p. 1; Dickerson, Class Actions Under Article 9 Of The CPLR, New York State Bar Association, I.N.C.L. Journal, June, 1984, p. 8; Dickerson, Class Actions Under Article 9 Of CPLR—Faith Restored, New York Law Journal, February 8, 1985, p. 1 Dickerson, Class Actions Under Article 9 Of CPLR—85' Was Good Year, New York Law Journal, February 7, 1986, p. 1; Dickerson, Review Of 1986 Decisions Of Article 9 Class Actions, New York Law Journal, January 21, 1987, p. 1; Dickerson, Article 9 Class Actions--Year-End Review Of Decisions, New York Law Journal, December 30, 1987, p. 1; Dickerson, Consumer Class Actions-An Introduction; Consumer Class Actions--Travel, Entertainment, Food, Landlord/Tenant; New York State Bar Association, I.N.C.L. Journal, December 1987, pp. 3, 2; Dickerson, Article 9 Class Actions--A Review Of Decisions In 1988, New York Law Journal, January 26, 1989, p. 1; Dickerson, Article 9 Class Actions: A Review Of 1989, New York Law Journal, January 4, 1990, p. 1; Dickerson, A Review Of Article 9 Class Actions In 1990, New York Law Journal, January 28, 1991, p. 1; Dickerson, Article 9 Class Actions In 1991, New York Law Journal, January 4, 1992, p. 1 Dickerson, Article 9 Class Actions In 1992, New York Law Journal, January 6, 1993, p. 1; Dickerson & Manning, Article 9 Class Actions In 1993, New York Law Journal, January 31, 1994, p. 1 Dickerson, Article 9 Class Actions In 1994, New York Law Journal, January 23, 1995, p. 1; Dickerson & Manning, Article 9 Class Actions in 1995, New York Law Journal, January 30, 1996, p. 1 Web Site http://courts.state.ny.us/tandv/Art9-95.html Dickerson & Manning, Article 9 Class Actions in 1996, New York Law Journal, February 6, 1997, p. 1. Web Site http://courts.state.ny.us/tandv/classact96.html Dickerson & Manning, A Summary of Article 9 Class Actions in 1997, New York Law Journal, January 12, 1998, p. 1. Web Site Dickerson & Manning, Summary of Article 9 Class Actions in 1998, New York Law Journal, February 11, 1999, p. 1. Web Site http://courts.state.ny.us/tandv/NYCA98.htm

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Dickerson & Manning, A Summary of Article 9 Class Actions in 2004 at www.nycourts.gov/courts/9jd/taxcert.shtml

cdxxxvi. See Dickerson, Class Actions: The Law of 50 States, Law Journal Press, 1981-2005; Weinstein, Korn & Miller, New York Civil Practice, Article 9.

cdxxxvii For a description of Article 9 consumer class action cases from 1976 to 1995 see Dickerson, Consumer Class Actions, INCL Journal, N.Y.S.B.A., Dec. 1987 Issue (various authors) and Justice Dickerson's annual class action summaries published in the New York Law Journal. See e.g., Dickerson & Manning, A Summary of Article 9 Class Actions in 2003, N.Y.L.J., April 7, 2004, p. 1.

cdxxxviii For more on New York State class actions see Dickerson, Class Actions: The Law of 50 States, Law Journal Press, N.Y., 1988-2005 and Justice Dickerson's soon to be published revision of Article 9 of New York Civil Practice, CPLR (Weinstein, Korn & Miller).

cdxxxix Karlin v. IVF America, Inc., 93 N.Y., 2d 282, 690 N.Y.S. 2d 495, 712 N.E. 2D 662 (1999)(G.B.L. § 349 claim sustained).

cdxl McKinnon v. International Fidelity Ins. Co., 182 Misc. 2d 517, 704 N.Y.S. 2d 774 (N.Y. Sup. 2000) (fraud and G.B.L. § 349 claims sustained)

cdxli Rice v. Penguin Putnam, Inc., 2001 WL 1606752 (2d Dept. 2001) (complaint dismissed).

cdxlii Englade v. HarperCollins Publishers, Inc., 2001 WL 1637491 (1st Dept. 2001) (certification granted).

cdxliii Lacoff v. Buena Vista Publishing, Inc., 183 Misc. 2d 600, 705 N.Y.S. 2d 183 (N.Y. Sup. 2000)(complaint dismissed).

cdxliv Frank v. DaimlerChrylser Corp., 292 A.D. 2d 118, 741 N.Y.S. 2d 9 (1st Dept. 2002)(complaint dismissed); Banks v. Carroll & Graf Publishers, Inc., 1999 WL 1126501 (1st Dept. 1999) (certification denied).

cdxlv Farino v. Jiffy Lube International, Inc., N.Y.L.J., Aug. 14, 2001, p. 22, col. 3 (Suff. Sup.) (claims sustained; G.B.L.

§ 349 does not require an underlying private right of action).

cdxlvi Gordon v. Ford Motor Co., 260 A.D. 2d 164, 687 N.Y.S. 2d 369 (1st Dept. 1999)(certification denied).

cdxlvii Drogin v. General Electric Capital, 238 A.D. 2d 272, 657 N.Y.S. 2d 28 (1st Dept. 1996) (settlement approved).

cdxlviii Faden Bayes Corp. v. Ford Motor Corp., Index Number 601076/97, N.Y. Sup.) (complaint dismissed).

cdxlix Jurman v. Sun Company, Inc., N.Y.L.J., Aug. 8, 1997, p. 21, col. 4 (N.Y. Sup.) (complaint dismissed; federal preemption).

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

cdli Gershon v. Hertz Corp., 215 A.D. 2d 202, 626 N.Y.S. 2d 80 (1st Dept. 1995) (complaint dismissed).

cdlii Weinberg v. Hertz Corp., 116 A.D. 2d 1, 499 N.Y.S. 2d 692 (1st Dept. 1986), aff'd 69 N.Y. 2d 979, 516 N.Y.S. 2d 652, 509 N.E. 2d 347 (1987)(certification granted); Lewis v. Hertz Corp., 212 A.D. 2d 476, 624 N.Y.S. 2d 800 (1st Dept. 1995) (class decertified); Super Glue Corp. v. Avis Rent-A-Car System, Inc., 132 A.D. 2d 604, 517 N.Y.S. 2d 764 (2d Dept. 1987)(no affirmative cause of action available for bad faith dealings or unconscionability).

cdliii Zuckerman v. BMG Direct Marketing, Inc., N.Y.L.J., July 13, 2000, p. 28, col. 1 (N.Y. Sup.)(complaint dismissed)

cdliv Cox v. Microsoft Corp., 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (1st Dept. 2004)(unjust enrichment and G.B.L. § 349 claims sustained); Cox v. Microsoft Corp., N.Y.L.J., Sept. 8, 2005, p. 18, col. 3 (N.Y. Sup. 2005)(certification granted).

cdlv Scott v. Bell Atlantic, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002)(G.B.L. § 349 class actions limited to New York residents exposed to deceptive act in New York State); Solomon v. Bell Atlantic Corp., 9 A.D. 3d 49, 777 N.Y.S. 2d 50 (1st Dept. 2004)(class decertified).

cdlvi Truschel v. Juno Online Services, Inc., N.Y.L.J., Dec. 12, 2002, p. 21, col. 4 (N.Y. Sup.)(G.B.L. § 349 claim dismissed).

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

cdlviii Gates v. AOL Time Warner Inc., 2003 WL 21375367 (N.Y. Sup. 2003)(Virginia forum selection enforced).

cdlix Strishak v. Hewlett Packard Company, 300 A.D. 2d 608, 752 N.Y.S. 2d 200 (2d Dept. 2002)(complaint dismissed).

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

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

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

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

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

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

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

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

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

cdlxix KLCR Land Corporation v. New York State Electric & Gas Corporation, 15 A.D. 3d 719, 789 N.Y.S. 2d 323 (3d Dept. 2004)

(plaintiffs in class action challenging electricity rate stayed on grounds of primary jurisdiction seek class certification after PSC ruled in their favor; motion denied since trial court had not retained jurisdiction and plaintiffs failed to preserve issues on appeal; " We note that the PSC sent a letter to defendant in March 2004 requesting that it ascertain all other similarly situated customers who were adversely affected by defendant's misapplication of the tariff and to take necessary steps to rebill such customers ").

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

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

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

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

cdlxxiv Klein v. Robert's American Gourmet Foods, No. 006956/02 (Nassau Sup. Jan. 14, 2003)(settlement approved).

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

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

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

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

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

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

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

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

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

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

cdlxxxv. Weiller v. New York Life Ins. Co., 6 Misc. 3d 1038(A) (N.Y. Sup. 2005)(evidence preservation order preventing destruction of e-mail messages granted).

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

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

cdlxxxviii Sterling v. Ackerman, 244 A.D. 2d 170, 663 N.Y.S. 2d 842 (1st Dept. 1997) (claims sustained; discovery on class issues).

cdlxxxix Kenavan v. Empire Blue Cross, 248 A.D. 2d 42, 677 N.Y.S. 2d 560 (1st Dept. 1998) (certification granted; summary judgement for class).

cdxc Mazzocki v. State Farm Fire & Casualty Co., 170 Misc. 2d 70, 649 N.Y.S. 2d 656 (N.Y. Sup. 1996) (motion to change venue granted).

cdxci Tuchman v. Equitable Companies, Inc., N.Y.L.J., July 18, 1996, p. 26, col. 5 (N.Y. Sup.) (complaint dismissed).

cdxcii Empire Blue Cross Customer Litigation, N.Y.L.J. Oct. 12, 1995, p. 28, col. 6 (N.Y. Sup.) (certification denied).

cdxciii Ho v. Visa USA, Inc., 3 Misc. 3d 1105(A)(N.Y. Sup. 2004)

(class certification not appropriate; G.B.L. §§ 340, 349 claims dismissed).

cdxciv Sims v. First Consumers National Bank, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (1st Dept. 2003)(G.B.L. § 349 claim sustained).

cdxcv Broder v. MBNA, 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001 (certification granted); Broder v. MBNA, N.Y. Sup. Index No: 605153/98, J. Cahn, Decision April 10, 2003 (settlement approved).

cdxcvi Taylor v. American Banker's Insurance Group, 267 A.D. 2d 178, 700 N.Y.S. 2d 458 (1st Dept. 1999) (certification granted to nationwide class).

cdxcvii Hayes v. County Bank, 2000 WL 1410029 (N.Y. Sup. 2000) (arbitration clause not enforced pending discovery on unconscionability).

cdxcviii. Wint v. ABN Amro Mortgage Group, Inc., 19 A.D. 3d 588 (N.Y. App. Div. 2005)(failure to plead fraud with sufficient particularity; no private right of action under Penal Law § 180.03; certification denied).

cdxcix Dougherty v. North Fork Bank, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2d Dept. 2003)(summary judgment for plaintiffs on fax and quote fees).

d Negrin v. Norwest Mortgage, Inc., 293 A.D. 2d 726, 741 N.Y.S. 2d 287 (1st Dept. 2002)(certification denied); Trang v. HSBC Mortgage Corp., N.Y.L.J., April 17, 2002, p. 28, col. 3 (N.Y. Sup.)(defendant's summary judgment motion denied).

di Stutman v. Chemical Bank, 95 N.Y. 2d 24, 709 N.Y.S. 2d 892, 731 N.E. 2d 608 (2000) (complaint dismissed; reliance not a necessary element of G.B.L. § 349 claim).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dxviii. Heiko Law Offices, P.C. v. AT&T Wireless Services, Inc., 6 Misc. 3d 1040(A)(N.Y. Sup. 2005)(motion to compel arbitration granted; arbitrator to decide if action proceeds as class action).

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

dxx Drizin v. Sprint Corp., 2004 WL 2591249 (1st Dept. 2004) (certification granted); Drizin v. Sprint Corp., 7 Misc. 3d 1018(A)(N.Y. Sup. 2005)(notice approved).

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

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

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

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

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

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

dxxvii Porr v. MYNEX Corp., 230 A.D. 2d 564, 660 N.Y.S. 2d 440 (1st Dept, 1997) (complaint dismissed)

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

dxxix Lennon v. Philip Morris Co., 2001 WL 1535877 (N.Y. Sup. 2001)(price fixing claim under Donnelly Act dismissed;

certification denied pursuant to C.P.L.R. § 901(b)).

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

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

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

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

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

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

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

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

dxxxviii Williams v. Marvin Windows And Doors, 15 A.D. 3d 393, 790 N.Y.S. 2d 66 (2d Dept. 2005)(claims barred by prior settlement in Minnesota state court nationwide class action).

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

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

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

dxlii Liechtung v. Tower Air, Inc., 269 A.D. 2d 363, 702 N.Y.S. 2d 111 (1st Dept. 2000)(certification granted).

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

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

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

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

dxlvii Jacobs v. Bloomingdales, Inc., N.Y.L.J., May 27, 2003, p. 23, col. 1 (Nassau Sup. 2003)
(certification granted to unpaid wage claim).

dxlviii Mimnorm Realty v. Sunrise Federal, 83 A.D. 2D 936, 442 N.Y.S. 2d 780 (2d Dept. 1981)(certification granted).

dxlix Guadagno v. Diamond Tours & Travel, Inc., 89 Misc. 2d 697, 392 N.Y.S. 2d 783 (N.Y. Sup. 1976)(certification granted).

dl See e.g., DeFilippo v. Mutual Life Ins. Co., 2004 WL 2902570
(1st Dept. 204)(vanishing life insurance premium class action decertified because oral sales presentations created a predominance of individual issues); Broder v. MBNA Corp., 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(" Plaintiff's allegations of deceptive acts are based on identical written solicitations "); Carnegie v. H & R Block, Inc., 269 A.D. 2d 145, 703 N.Y.S. 2d 27 (1st Dept. 2000)(" oral communications that allegedly induced [consumers] to obtain RALs cannot be proven on a class basis, but would require individualized proof "); Taylor v. American Bankers Insurance Group, 267 A.D. 2d 178, 700 N.Y.S. 2d 458, 459 (1st Dept. 1999)(" Although defendants contend that they used a variety of forms and promotions...the solicitations in question did not differ materially...given the uniformity of defendant's offers of coverage, any matters relating to individual reliance and causation are relatively insignificant ").

dli See e.g., Mazzocki State Farm Fire & Casualty Corp. 1 A.D. 3d 9, 766 N.Y.S. 2d 719,(3d Dept. 2003)(" the individualized damages of the resulting class members would not preclude class certification "); Broder v. MBNA Corp., 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (1st Dept. 2001)(" Plaintiff alleges that defendant's practice of allocating credit card payment to cash advances, which were subject to a promotional annual percentage rate (APR) before the balance generated by purchases, which was subject to a significantly higher APR, deprived credit cardholders of the full benefit of the promotional rate, thereby rendering the promotion deceptive... allegations of deceptive

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

dlii See e.g., Compact Electra Corp. v. Paul, 98 Misc. 2d 807, 403 N.Y.S. 2d 611 (N.Y.A.T. 1997)(fraud counterclaim class action may be certifiable if the oral misrepresentations were based on ' canned ' techniques).

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

dliv Cox v. Microsoft Corp., 8 A.D. 3d 39, 40, 778 N.Y.S. 2d 147 (1st Dept. 2004)(" plaintiffs' allegations that Microsoft's deceptive practices caused them to pay artificially inflated prices for its products state a cause of action for unjust enrichment "); Cox v. Microsoft Corp., N.Y.L.J., Sept. 8, 2005, p. 18, col. 3 (N.Y. Sup. 2005)(certification granted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dlxxi Super Glue Corp. V. Avis Rent-A-Car System, Inc., 132 A.D. 2d 604, 517 N.Y.S. 2d 764 (2d Dept. 1987)(no affirmative cause of action available for bad faith dealings or unconscionability).

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

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

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

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

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

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

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

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

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

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

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

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

dlxxxiii In Donahue v. Ferolito, 786 N.Y.S. 2d 153 (N.Y. App. Div. 1st Dept. 2004) a class of consumers sought an injunction " against continued sale of certain bottled soft drinks " because of misrepresentations that the products " would improve memory, reduce stress and improve overall health ". The Court dismissed the complaint finding no actual harm was alleged, no warranty was promised and enforced a disclaimer of any health benefit.

dlxxxiv See e.g., Catalano v. Heraeus Kulzer, inc., 305 A.D. 2d 356, 759 N.Y.S. 2d 159 (1st Dept. 2003)(certification denied; predominance of the individual " issues of causation and
reliance "); Hazelhurst v. Brita Products Company, 295 A.D. 2d 240, 744 N.Y.S. 2d 31 (1st Dept. 2002)(certification denied;
" Reliance... may not be presumed where, as here, a host of individual factors could have influenced a class members's decision (to purchase) the product...a variety of reasons for replacing their filters, including the lapse of time, taste and appearance of the water...reliance upon the alleged misrepresentations of Brita is an issue that varies from individual to individual "); Morgan v. A.O. Smith Corp., 233 A.D. 2d 375, 650 N.Y.S. 2d 748 (2d Dept. 1996)(certification denied; " Individual issues exist...[which] influenced their decision to purchase [the silos]"; Brummel v. Leading Edge Products, Inc., N.Y.L.J., February 19, 1998, p. 28, col. 4 (N.Y. Sup.)(defective computer software; certification denied; eight different warranties; reliance and choice of law issues).

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

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

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

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

dlxxxix Lauer v. New York Telephone Co., 231 A.D. 2d 126, 659 N.Y.S. 2d 359 (3d

Dept. 1997)(certification granted).

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

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

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

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

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

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

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

dxcvii See e.g., Ackerman v. Price Waterhouse, 252 A.D. 2d 179, 683 N.Y.S. 2d 179 (1st Dept. 1998)(presumption of reliance; certification granted); King v. Club Med, Inc., 76 A.D. 2d 123, 430 N.Y.S. 2D 65 (1ST Dept. 1980)(reliance presumed; certification granted); Matter of Coordinated Title Insurance Cases, 3 Misc. 3d 1007(A), 2002 WL 690380 (N.Y. Sup. 2004)

(“ In common law fraud claims, proof of plaintiff’s reliance is crucial...reliance has been presumed in certain cases involving material omissions...”); Guadagno v. Diamond Tours & Travel, Inc., 89 Misc. 2d 697, 392 N.Y.S. 2d 783 (N.Y. Sup. 1976).

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

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

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

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

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

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

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

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

dcvi Ackerman v. Price Waterhouse, 252 A.D. 2d 179, 683 N.Y.S. 2d 179 (1st Dept. 1998)(certification granted).

dcvii See e.g., Rallis v. City of New York, 3 A.D. 3d 525, 770 N.Y.S. 2d 736 (2d Dept. 2004) (water damage from flooding; certification denied); Catalano v. Heraeus Kulzer, Inc., 305 A.D. 2d 356, 759 N.Y.S. 2d 159 (1st Dept. 2003)(defective polymer-based system of dental restorations; certification denied); Lieberman v. 293 Mediterranean Market Corp., 303 A.D. 2d 560, 756 N.Y.S. 2d 469 (2d Dept. 2002)(food poisoning at restaurant; certification denied); Geiger v. American Tobacco Co., 277 A.D. 2d 420, 716 N.Y.S. 2d 108 (2d Dept. 2000)(smokers' mass tort class action; certification denied); Weprin v. Fishman, 275 A.D. 2d 614, 713 N.Y.S. 2d 57 (1st Dept. 2000)(collapse of elevator tower closes street; claims of class of businesses for economic losses dismissed); Aprea v. Hazeltine Corp.,247 A.D. 2d 564, 669 N.Y.S. 2d 61 (2d Dept. 1998)(toxic emissions; certification denied); Karlin v. IVF America, Inc., 239 A.D. 2d 562, 657 N.Y.S. 2d 460 (2d Dept. 2997)(misrepresentation of in vitro fertilization successful pregnancy rates; certification denied); mod'd on other grounds, 93 N.Y. 2d 282, 690 N.Y.S. 2d 495, 712 N.E. 2d 662 (1999); Komonczi v. Gary Fields, 232 A.D. 2d 374, 648 N.Y.S. 2d 151 (2d Dept. 1996)(improperly performed colonscopies; certification denied); Hurtado v. Purdue Pharma Laboratories, 2005 N.Y. Misc. LEXIS 79
(N.Y. Sup. 2005)(certification of oxycontin mass tort class denied); Hurtado v. Purdue Pharma Co., N.Y.L.J., Sept. 1, 2005, p. 20, col. 3 (N.Y. Sup. 2005)(coordination ordered in Oxycontin matters by Litigation Coordinating Panel); McBarnette v. Feldman, 153 Misc. 2d 627, 582 N.Y.S. 2d 900 (Suffolk Sup. 1992)(patients of AIDS-infected dentist seeks emotional distress damages; certification denied; mass torts not favored).

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

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

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

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dcxi Emilio v. Robison Oil Corp., 15 A.D. 3d 609, 790 N.Y.S. 2d 535 (2d Dept. 2005)(" Assuming arguendo that a violation of General Business Law § 5-903 can qualify as a deceptive trade practice, there is no nexus between this violation and the damages claimed by the plaintiff for himself and any member of the class "); Solomon v. Bell Atlantic Corp., 9 A.D. 3d 49, 777 N.Y.S. 2d 50 (1st Dept. 2004)(" Individual trials also would be required to determine damages based on the extent of each plaintiff's injuries; certification denied); DeFilippo v. Mutual Life Ins. Co., 2004 WL 2902570 (1st Dept. 2004)(class decertified a because a recent Court of Appeals' decision (Goshen v. Mutual Life Ins. Co., 98 N.Y. 2d 314 (2002)) which held that " the deceptive acts or practices under GBL § 349 ' [are] not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer ' eliminated any doubt (such claims) would require individualized inquires into the conduct of defendants' sales agents with respect to each individual purchaser "); Hazelhurst v. Brita Products Company, 295 A.D. 2d 240, 744 N.Y.S. 2d 31 (1st Dept. 2002)(certification denied); Ho v. Visa USA, Inc., 3 Misc. 3d 1105(A) (N.Y. Sup. 2004)(class certification not appropriate; G.B.L. § 349, 350 claims dismissed as too remote), aff'd 16 A.D. 2d 256, 793 N.Y.S. 2d 8 (1st Dept. 2005).

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

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

dcxiv Cox v. Microsoft Corp., 8 A.D. 3d 39, 40, 778 N.Y.S. 2d 147 (1st Dept. 2004)(" plaintiffs' allegations that Microsoft's deceptive practices caused them to pay artificially inflated prices for its products state a cause of action for unjust enrichment "); Cox v. Microsoft Corp., N.Y.L.J., Sept. 8, 2005, p. 18, col. 3 (N.Y. Sup. 2005)(certification granted).

dcxv Drizin v. Sprint Corp., 2004 WL 2591249 (1st Dept. 2004)(class of telephone users charged defendants with fraud and violation of G.B.L. § 349 by maintaining " numerous toll-free call service numbers that were nearly identical (except for one digit) to the toll-free numbers of competing long distance telephone service providers...' fat fingers ' business...

customers allegedly unaware that they were being routed through a different long distance provider, ended up being charged rates far in excess of what they would have paid to their intended providers "; class certification granted but limited to New York State residents); Drizin v. Sprint Corp., 7 Misc. 3d 1018(A), 2005 WL 1035823 (N.Y. Sup. 2005)(notice by publication and direct mail " by including the notice within the telephone bill...or by separate mailing via U.S. mail " approved).

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

dcxvii Gross v. Ticketmaster L.L.C., 5 Misc. 3d 1005(A) (N.Y. Sup. 2004)(class of purchasers of $98.50 tickets for a concert " billed as ' Michael Jackson: 30th Anniversary Celebration, the Solo Years ' claimed obstructed views and charged defendant with fraud, breach of contract, unjust enrichment and violation of G.B.L. § 349. After dismissing the fraud claim the Court granted class certification finding the " the class action form... superior to a large number of individual claimants having to pursue their respective rights to small refunds ").

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

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

dcxx In Peck v. AT&T Corp., N.Y.L.J., August 1. 2002, p. 18, col. 2 (N.Y. Sup.) a GBL 349 consumer class action involving cell phone service which " improperly credited calls causing (the class) to lose the benefit of weekday minutes included in their

calling plans “, approved a proposed settlement on behalf of residents in New York, New Jersey and Connecticut [“ it would be a waste of judicial resources to require a different [GBL 349] class action in each state...where, as here, the defendants have marketed their plans on a regional (basis) “].

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

dcxxii Do corporations and other non-consumers have standing to assert claims under G.B.L. § 349? The Second Circuit Court of Appeals in Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA Inc., 344 F. 3d 211, 217-218 (2d Cir. 2003), certified two questions to the New York Court of Appeals, the first of which was answered at Blue Cross & Blue Shield of N.J. Inc. V. Philip Morris USA, Inc., 3 N.Y. 2d 200, 205 (2004). Relying upon the common law rule that “ an insurer or other third-party payer of medical expenditures may not recover derivatively for injuries suffered by its insured “ the Court of Appeals held, without deciding the ultimate issue of whether non-consumers are covered by G.B.L. § 349, that Blue Cross’s claims were too remote to provide it with standing under G.B.L. § 349 [“ Indeed, we have warned against ‘ the potential for a tidal wave of litigation against businesses that was not intended by the Legislature ‘“]).

dcxxiii. Emilio v. Robinson Oil Corp., 15 A.D. 3d 609, 790 N.Y.S. 2d 535 (2005)(“ Assuming arguendo that a violation of General Obligations Law § 5-903 can qualify as a deceptive trade practice, there is no nexus between this violation and the damages claimed “).

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

computed "; certification granted to G.B.L. § 349 claim).

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

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

dcxxvii Cox v. Microsoft Corp., 8 A.D. 3d 39, 40, 778 N.Y.S. 2d 147 (1st Dept. 2004)(" A cause of action under General Business Law § 349 is stated by plaintiff's allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices...We also reject Microsoft's argument that plaintiffs are not entitled to class action relief under General Business Law § 349 since the statutorily prescribed $50 minimum damages to be awarded for a violation of that section constitutes a ' penalty ' within the meaning of CPLR 901(b). Inasmuch as plaintiffs in their amended complaint expressly seek only actual damages...CPLR 901(b) which prohibits class actions for recovery of minimum or punitive damages, (is) inapplicable "); Super Glue Corp. V. Avis Rent Car System, Inc., 132 A.D. 2d 604, 517 N.Y.S. 2d 764 (2d Dept. 1987); Weinberg v. Hertz Corporation, 116 A.D. 2d 1, 499 N.Y.S. 2d 693 (1st Dept. 1986), aff'd 60 N.Y. 2d 979, 516 N.Y.S. 2d 652, 509 N.E. 2d 347 (1987); Burns v. Volkswagen of America, Inc., 118 Misc. 2d 289, 460 N.Y.S. 2d 410 (Monroe Sup. 1982)(" as at actual damages, however, § 901(b) would not bar a class action "); Hyde v. General Motors Corp., New York Law Journal, October 30, 1981, p. 5 (N.Y. Sup.).

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

member wishing to pursue statutory minimum and treble damages...may opt out of the class and bring an individual; action ") .

dcxxix See e.g.,

Second Circuit: Leider v. Ralfe, 2005 WL 152025 (S.D.N.Y. 2005)(" federal and state claims based on De Beers alleged price-fixing, anticompetitive conduct and other nefarious business practices "; certification denied for Donnelly Act and G.B.L. § 350 claims... " I further hold that N.Y. C.P.L.R. § 901(b) applies to this matter, notwithstanding plaintiffs' arguments that to should be displaced by (F.R.C.P.) 23 ").

State Law:

New York: Asher v. Abbott Laboratories, 290 A.D. 2d 208, 737 N.Y.S. 2d 4 (1st Dept. 2002)(" private persons are precluded from bringing a class action under the Donnelly Act...because the treble damage remedy...constitutes a ' penalty ' within the meaning CPLR 901(b) "); Cox v. Microsoft Corp., 290 A.D. 2d 206, 737 N.Y.S. 2d 1 (1st Dept. 2002); Ho v. VISA U.S.A. Inc., 3 Misc. 3d 1105(A), 2004 WL 1118534 (N.Y. Sup. 2004)(" plaintiffs' alleged injury is far too remote to provide antitrust standing under the Donnelly Act " and is dismissed); aff'd 16 A.D. 3d 356, 792 N.Y.S. 2d 8 (1st Dept. 2005); Rubin v. Nine West Group, Inc., 1999 WL 1425364 (N.Y. Sup. 1999)(" Although plaintiff makes the general statement that ' CPLR 901(b) does not create a barrier to class actions under the Donnelly Act '...a reading of that statute and the Act establish the contrary "); Russo & Dubin v. Allied Maintenance Corp., 95 Misc. 2d 344, 407 N.Y.S. 2d 617 (N.Y. Sup. 1978)("...even if plaintiff's contention that they are bringing this action for single damages were accepted and such an action was permitted, this action could nevertheless not proceed as a class action. Plaintiffs cannot be considered adequate class representatives since by demanding members of the class to waive their right to treble damages, they cannot be said to fairly and adequately protect the interest of the class "); Blumenthal v. ASTA, New York Law Journal, July 8, 1977, p. 5, col. 1 (N.Y. Sup.)(certification denied).

dcxxx In Ganci v. Cape Canaveral Tour and Travel, Inc., 4 Misc. 3d 1003(A)(Kings Sup. 2004), aff'd 2005 WL 06301 (N.Y. App. Div. 2005) and Giovanniello v. Hispanic Media Group USA, Inc., 4 Misc. 3d 440, 780 N.Y.S. 2d 720 (Nassau Sup. 2004) classes of consumers who received unsolicited telephone calls or commercial faxes claimed violations of the federal Telephone Consumer Protection Act [TCPA]. In denying class certification the Courts relied upon CPLR § 901(b). " The TCPA statute does not specifically provide for a class action to collect the $500 damages and said $500 damages is a ' penalty '...or a ' minimum measure of recovery '...the allowance of treble damages under the TCPA is punitive in nature and constitutes a penalty ". See also: Rudgayzer v. LBS Communications, Inc., 6 Misc. 3d 20 (N.Y. App. Term. 2004) class action under TCPA prohibited by C.P.L.R. § 901(b)), aff'd 2005 WL 1875740 (N.Y. App. Div. 2005).

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

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

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

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

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

dcxxxvi Gurnee v. Aetna Life & Casualty Co., 104 Misc. 2d 840, 428 N.Y.S. 2d 992 (1980)(case dismissed), aff'd 79 A.D. 2d 860, 437 N.Y.S. 2d 944 (4th Dept. 1980), rev'd 55 N.Y. 2d 184, 433 N.E. 2d 128, 448 N.Y.S. 2d 145, cert. Denied 103 S. Ct. 83 (1982); Gurnee v. Aetna Life & Casualty Co., New York Law Journal, November 28, 1983, p. 12, col. 4, aff'f 101 A.D. 2d 722, 477 N.Y.S. 2d 956 (1st Dept. 1984)(class certification granted)
(bilateral class action of insureds against automobile liability insurance companies over the coverage of no fault insurance).

dcxxxvii In Dougherty v. North Fork Bank, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2d Dept. 2003) a class challenged a mortgagor's imposition of " a $5 ' Facsimile Fee ', a $25

‘ Quote Fee ‘ and a $100 ‘ Satisfaction Fee ‘ for the preparation of (a mortgage) satisfaction “; summary judgment for plaintiffs on the facsimile fee and quote fee as a violation of Real Property Law § 274-a(2)(a) and summary judgment to defendant on the satisfaction fee).

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

dcxxxix See Sternlight & Jensen, “ Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse? “, 67 Law and Contemporary Problems, Duke University Law School, Winter/Spring 2004 Nos. 1 & 2, pp. 77-78
(“ Companies are increasingly drafting arbitration clauses worded to prevent consumers from bringing class actions against them in either litigation or arbitration. If one looks at the form contracts she received regarding her credit card, cellular phone, land phone, insurance policies, mortgage and so forth, most likely, the majority of those contracts include arbitration clauses, and many of those include prohibitions on class actions. Companies are seeking to use these clauses to shield themselves from class action liability, either in court or in arbitration..
.numerous courts have held that the inclusion of a class action prohibition in an arbitration clause may render that clause unconscionable (reviewing cases) “).

dcxl See e.g.,
Third Circuit: Johnson v. West Suburban Bank, 225 F. 3d 366 (3rd Cir. 2000), cert. denied 531 S. Ct. 1145 (3d Cir. 2001)
(TILA).
Fourth Circuit: Snowden v. CheckPoint Check Cashing, 290 F. 3d 631 (4th Cir. 2002)(no unconscionability).
Fifth Circuit: Carter v. Countrywide Credit Industries, Inc., 362 F. 3d 294 (5th Cir. 2004)(no unconscionability).
Sixth Circuit: Burden v. Check into Cash of Kentucky, 267 F. 3d 483 (6th Cir. 2001).
Seventh Circuit: Caudle v. American Arbitration Association, 2000 WL 1528950 (7th Cir. 2000).
Eighth Circuit: In re Piper Funds, Inc., 71 F. 3d 298 (8th Cir. 1995).

Ninth Circuit: Ting v. AT&T, 319 F. 3d 1126 (9th Cir. 2003), cert. denied 124 S. Ct. 53 (2003)(unconscionable).

Eleventh Circuit: Bowen v. First Family Financial Services, Inc., 233 F. 3d 1331 (11th Cir. 2000).

See also: Hickok, Arbitration Clauses and Class-Wide Adjudication, 26 C.A.R. 307 (2005)(Estreicher & Bennett, Using Express No-Class Action Provisions to Halt Class-Claims, New York Law Journal, June 10, 2005, p. 3 (" Similarly, most federal courts agree that the inclusion of a class action prohibition in an arbitration clause does not render than clause or the arbitration agreement unenforceable ").

dcxli Green Tree Financial Corp. V. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)(class wide arbitration permissible unless expressly prohibited in arbitration agreement; remand for arbitrator's decision on whether class action procedures are available); Green Tree Financial Corp. V. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)(arbitration clause which is silent on fees and costs in insufficient to render agreement unreasonable); Shearson American Express, Inc. V. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987).

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

dcxliii See e.g., Tsadilas v. Providian Bank, 2004 WL 2903518 (1st Dept. 2004) (arbitration provision in a credit card agreement enforced " even though it waives plaintiff's right to bring a class action ", claim of exposure to " potentially high arbitration fees (as) premature "; credit card agreement as a whole was not unconscionable " because plaintiff had the opportunity to opt out without any adverse consequences "); Brown & Williamson v. Chesley, 7 A.D. 3d 368, 777 N.Y.S. 82, 87-88 (1st Dept. 2004)(" Consistent with the public policy favoring arbitration, the grounds for vacating an arbitration award are narrowly circumscribed by statute "), *rev'g* 194 Misc. 2d 540, 749 N.Y.S. 2d 842 (2002)(trial court vacated an arbitrator's award of $1.3 billion of which $625 million was to be paid to New York attorneys in the tobacco cases); Ranieri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (1st Dept. 2003)(class action stayed pending arbitration; " Given the strong public policy favoring

arbitration...and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions...is neither unconscionable nor violative of public policy "); In re Application of Correction Officer's Benevolent Ass'n, 276 A.D. 2d 394, 715 N.Y.S. 2d 387 (1st Dept. 2000)(parties agreed to class wide arbitration in interpreting a clause in collective bargaining agreement providing military leaves with pay); Brower v. Gateway 2000, Inc., 246 A.D. 2d 246, 676 N.Y.S. 2d 569 (1st Dept. 1998)(arbitration and choice of law clause enforced; arbitration before International Chamber of Commerce was, however, substantively unconscionable); Hackel v. Abramowitz, 245 A.D. 2d 124, 665 N.Y.S. 2D 655 (1ST Dept. 1997)(although the issue as to the arbitrability of the controversy is for the court, and not the arbitrator, to decide, a party who actively participated in the arbitration is deemed to have waived the right to so contend); Spector v. Toys "R" Us, New York Law Journal, April 1, 2004, p. 20, col. 1 (Nassau Sup.)(motion to add credit card issuing bank as necessary party denied; arbitration clause does not apply); Johnson v. Chase Manhattan Bank, USA, N.A., 2 Misc. 3d 1003 ((A)(N.Y. Sup. 2004)(class bound by unilaterally added mandatory arbitration agreement and must submit to class arbitration pursuant to agreement and Federal Arbitration Act); Rosenbaum v. Gateway, Inc., 4 Misc. 3d 128(A), 2004 WL 1462568 (N.Y.A.T. 2004)(arbitration clause in computer " Standard Terms of Sale and Limited Warranty Agreement " enforced and small claims court case stayed); Flynn v. Labor Ready, Inc., 2002 WL 31663290 (N.Y. Sup.)(class of employees challenge propriety of " receiving their wages by...cash voucher " which could only be cashed by using the employer's cash dispensing machine and paying as much as $1.99 per transaction; action stayed and enforced arbitration clause after employer agreed to pay some of the costs of arbitration); Berger v. E Trade Group, Inc., 2000 WL 360092 (N.Y. Sup. 2000)(misrepresentations by online broker " in its advertising and marketing materials, knowingly exaggerated the sophistication of its technology and its capacity to handle its customers transactions "; arbitration agreement enforced); Hayes v. County Bank, 185 Misc. 2d 414, 713 N.Y.S. 2d 267 (N.Y. Sup. 2000)(unconscionable " payday " loans; motion to dismiss and enforce arbitration clause denied pending discovery on unconscionability); Carnegie v. H & R Block, Inc., 180 Misc. 2d 67, 687 N.Y.S. 2d 528, 531 (N.Y. Sup. 1999)(after trial court certified class, defendant tried to reduce class size by having some class members sign forms containing retroactive arbitration clauses waiving participation in class actions), *mod'd* 269 A.D. 2d 145, 703 N.Y.S. 2d 27 (1st Dept. 2000)(class certification denied).

dcxliv. Geier, Utah law allows consumer class action waivers, National Law Journal Online, March 30, 2006.

dcxlv See Hickok, Arbitration Clauses and Class-Wide Adjudication, 26 C.A.R. 307 (2005).

dcxlvi See e.g.,

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

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

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

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

dcxlviii See e.g.,

Second Circuit: Farr v. Gonzo Corp., 212 F. Supp. 2d 199 (S.D.N.Y. 2001).

New York: Kenevan v. Empire Blue Cross and Blue Shield, 248 A.D. 2d 42, 677 N.Y.S. 2d 560 (1st Dept. 1998)(class action removed to federal court, certified and remanded to state court after dismissal of ERISA claims; summary judgment granted and $3 million awarded to class).

dcxlix See e.g., Tremblay v. Phillip Morris, Inc., 231 F. Supp. 2d 41 (D.N.H. 2002)(smoker's class action not removable under federal official removal statute).

dcl See e.g., Garbie v. Chrylser Corp., 8 F. Supp. 2d 814 (N.D. Ill. 1998)(citizenship of real parties in interest must be considered on remand motion).

dcli See e.g., Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973); Snyder v. Harris, 392 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969).

dclii See e.g., Werwinski v. Ford Motor Co., 286 F. 3d 611 (3d Cir. 2002)(trebled statutory compensatory damages aggregated). Contra: Biggerstaff v. Voice Power Telecommunications, Inc., 221 F. Supp. 2d 652 (D.S.C. 2002)(individual damages under Telephone Consumer Protection Act may not be aggregated).

dcliii See e.g., Hutchins v. Progressive Paloverde Ins. Co., 211 F. Supp. 2d 788 (S.D. Va. 2002)(punitive damages may be aggregated). Contra: Gilman v. BHC Securities, Inc., 104 F. 3d 1418 (2d Cir. 1997)(punitive damages may not be aggregated).

dcliv See e.g., Grant v. Chevron Phillips Chemical Co., 309 F. 3d 864 (5th Cir. 2002)(attorneys fees may be aggregated). Contra: Ratliff v. Sears Roebuck & Co., 911 F. Supp. 177
(E.D.N.C. 1995)(attorneys fees may not be aggregated).

dclv See e.g., In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702 (D. Me. 2001). Contra: Leonard v. Enterprise Rent A Car, 279 F. 3d 967 (11th Cir. 2002).

dclvi See e.g., McCarty v. Amoco Pipeline Co., 595 F. 2d 389 (7th Cir. 1979). Contra: Colon v. Rent-A-Center, Inc., 13 F. Supp. 2d 553 (S.D.N.Y. 1998)(compliance costs may not be aggregated).

dclvii See e.g., Olden v. LaFarge Corp., 203 F.R.D. 254 (E.D. Mich. 2001). Contra: In re Life USA Holding, Inc. Insurance Litigation, 242 F. 3d 136 (3d Cir. 2001).

dclviii See Weinstein, Korn & Miller's, New York Civil Practice, § 901.10[3].

dclix See Vairo, Class Action Fairness Act of 2005, LexisNexis 2005 at p. CAFA-4-5 (" Defendants have long complained about the economic pressure that class actions place on them. Consumer class actions, in which individual damages may be minimal but in the aggregate huge, have been of particular concern...Compounding the problem for defendants, these cases often were brought in so-called ' judicial hellholes ' where certain judges were known to certify classes and then award substantial damages and attorney's fees...One solution is to give defendants a free pass out of the state courts, and CAFA is designed to do just that. "

dclx Id.

dclxi Public Law No: 109-022 (February 18, 2005).

dclxii Id. The federal court must decline jurisdiction in class actions in which " (1) more than two thirds of the members of the proposed plaintiff classes in the aggregate are citizens of the State where the action was originally filed, at least one defendant is a defendant from whom significant relief is sought, whose alleged conduct forms a significant basis for the claims asserted, and who is a citizen of the State where the action was originally filed and principal injuries resulting from the alleged or related conduct were incurred in such State and (2) during the three-year period preceding filing, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or (3) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State where the action was originally filed ".

dclxiii Id. at Section 4. The factors to be considered include whether (1) the claims

involve matters of national interest, (2) the claims will be governed by the laws of the State where the action was originally filed or by the laws of other States, (3) the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction, (4) the action was brought in a forum with a distinct nexus with class members, the alleged harm, or the defendants, (5) the number of citizens of the State or original filing in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State and the citizenship of other proposed class members is dispersed and (6) during the three-year period proceeding filing, one or more other class actions asserting the same or similar claims on behalf of the same persons have been filed.

dclxiv See e.g., Peck v. AT&T Corporation, New York Law Journal, August 1, 2002, p. 18, col. 3 (N.Y. Sup. 2002)(" the Settlement will give each current (cell phone) subscriber 60 minutes of free airtime. Past subscribers will receive a calling card worth 180 minutes of free long distance calls...Indeed, about 74 percent of the Class will receive more minutes than they lost "); Kahn v. Bell Atlantic NYNEX Mobile, New York Law Journal, June 4, 1998, p. 29, col. 2 (N.Y. Sup.)(settlement agreement provided for " free air time " to some members of the class and $225,000 in legal fees and costs; " The problem is that very little evidence has been submitted to demonstrate that the free airtime and other purported benefits of the Settlement Agreement adequately compensate all of the Class Members which by its terms only benefits a segment of the Class "); Klein v. Robert's American Gourmet Foods, No. 006956/02 (Nassau Sup. Jan. 14. 2003)(as reported in 24 Class Action Reports 61 (2003))(snack foods Pirate's Booty, Fruity Booty and Veggie Booty misrepresented as to fat and caloric content; settlement included promise to keep issuing food product coupons until $3.5 million worth were redeemed with coupon tracking reports every six months); Branch v. Crabtree, No. 15822/89, West Sup. Oct. 31, 2995 ($1,000 towards purchase of care; transferable and can be bartered); Feldman v. Quick Quality Restaurants, Inc., New York Law Journal, July 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983)(16 million purchasers of fast food products overcharged one cent; coupons worth fifty cents each toward purchase of Burger King products; coupons issued until specific sum redeemed reached).

dclxv Dickerson & Mechmann, " Consumer Class Actions And Coupon Settlements: Are Consumers Being Shortchanged? ", 12 Advancing The Consumer Interest, No. 2 (Fall/Winter 2000).

dclxvi See Weinstein, Korn & Miller, New York Civil Practice, § 908.06, N. 4 (" If the District Court to which the class action is removed approves of a coupon settlement the ' portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed ' or if the coupons are not used to determine the fee award the ' any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action...").

dclxvii Id.

dclxviii See e.g., Branch v. Crabtree, Index No. 15822.89 West. Sup. Oct. 31, 1995 (certificates transferable and can be sold for cash to others).

dclxix See e.g., In re Auction Houses Antitrust Litigation, 2001 WL 170792 (S.D.N.Y. 2001)(settlement plan included " development and operation of a secondary market in the certificates ").

dclxx See e.g., Shaw v. Toshiba American Information Systems, Inc., 91 F. Supp. 2d 942 (E.D. Texas 2000)(settlement provides for issuance of " Toshiba Bucks " coupons for purchase of defendant's products which are assignable, aggregatable and transferable and available on electronic media; one year redemption period ").

dclxxi See e.g., Klein v. Robert's American Gourmet Foods, No. 006956/02 (Nassau Sup. Jan. 14. 2003)(as reported in 24 Class Action Reports 61 (2003))(snack foods Pirate's Booty, Fruity Booty and Veggie Booty misrepresented as to fat and caloric content; settlement included promise to keep issuing food product coupons until $3.5 million worth were redeemed with coupon tracking reports every six months; Feldman v. Quick Quality Restaurants, Inc., New York Law Journal, July 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983)(16 million purchasers of fast food products overcharged one cent; settlement provided for 50 cent coupons which defendants would continue to issue until a specified sum of money was redeemed).

dclxxii See e.g., In re Auction Houses Antitrust Litigation, 2001 WL 170792 (S.D.N.Y. 2001)(certificates redeemable within five years and may be converted into cash within four years); Matter of Mexico Money Transfer Litigation, 267 F. 3d 743 (7th Cir. 2001)(" coupons entitling (class members) to $6 off the price of one future wire transfer for every transfer made since November 1993...can be used throughout a 35-month period ").

dclxxiii See e.g., Feldman v. Quick Quality Restaurants, Inc., New York Law Journal, July 22, 1983, p. 12, col. 4 (N.Y. Sup. 1983)(16 million purchasers of fast food products overcharged one cent; settlement provided for 50 cent coupons which defendants issued to next best class of customers who purchased products).

dclxxiv In re Compact Disc Minimum Advertised Price Antitrust Litigation, 2003 WL 22862013 (D. Me. 2003), modifying 216 F.R.D. 197 (D. Me. 2003)(" vouchers to music club members giving them the opportunity to purchase a regular price CD at 75% off the regular music club price...I have determined to delay award of attorneys fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is ").

dclxxv In re Auction Houses Antitrust Litigation, 2001 WL 170792 (S.D.N.Y. 2001)($512 million settlement in either cash or discount certificates; " Plaintiffs' lead counsel would receive their fee of approximately $26.75 million in the same ratio of cash and certificates as the class members– approximately $21.53 million in cash and $5.22 million worth of discount certificates ").

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

dclxxvii 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).

dclxxviii 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 ").

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

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

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

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

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

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

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

Dept. 2002).

dclxxxvi 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].

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

dclxxxviii 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 ").

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

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

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

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

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

dcxciv Saunders v. AOL Time Warner, Inc., 18 A.D. 3d 216, 794 N.Y.S. 2d 342 (1st Dept. 2005).

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

dcxcvi 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 ").

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

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

dcxcix 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)").

dcc 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 ".

dcci 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 ").

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

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

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

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

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

dccvii 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).

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

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

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

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

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

dccxiii 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).

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

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

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

dccxvii 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].

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

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

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

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

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

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

dccxxiv 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 ").

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

dccxxvi 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).

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

dccxxviii 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).

dccxxix 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).

dccxxx 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).

dccxxxi 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).

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

dccxxxiii 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).

dccxxxiv 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).

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

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

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

dccxxxviii 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].

dccxxxix 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 “).

dccxl 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 “).

dccxli 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.

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

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

dccxliv 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 “).

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

dccxlvi 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 ").

dccxlvii. Rabouin v. Metropolitan Life Insurance Company, 25 A.D. 3d 349, 806 N.Y.S. 2d 584 (2006).

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

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

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

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

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

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

dccliv 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].

dcclv Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc.,

22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005).

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

dcclvii 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.

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

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

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

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

dcclxii 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).

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

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