

JUDGES' GUIDE TO MANAGING NEW YORK STATE CLASS ACTIONS

Commercial Division Update Program

June 28, 2010

By Justice Thomas A. Dickerson¹

§ Resource Materials

I. New York State Class Actions

- A. Weinstein Korn Miller, New York Civil Practice CPLR, LEXIS-NEXIS (MB), Article 9 Class Actions 2006-2010 Revisions Authored By Thomas A. Dickerson (hereinafter "**WKM**")
- B. Dickerson, 1977-2010, Various Articles In New York Law Journal, New York State Bar Association Journal, Syracuse Law Review And Other Publications [**Appendix A**]

II. State Court Class Actions

- A. Dickerson, Class Actions: The Law of 50 States, Law Journal Press, 1988-2010 (hereinafter "**CA**")

¹ Justice Dickerson is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. See www.courts.state.ny.us/courts/ad2/justice_dickerson.shtml and www.nycourts.gov/courts/9jd/taxcertatd.shtml

§ Introduction

I. 1975 : CPLR Article 9 Enacted : The Promise

A. Enactment of Article 9 of CPLR

[WKM ¶ 901.04]

[1] Purpose:

To facilitate " the use of the class action device in the adjudication of such typically modern claims as those associated with mass exposure to environmental offenses, violations of consumer rights, civil rights cases, the execution of adhesion contracts and a multitude of other collective activities reaching virtually every phase of human life "

[N.Y.S. Judicial Conference Report to the 1975 Legislature in Relation to the CPLR, Leg. Doc. 90, 232, 248 (1976)]

Sperry v. Crompton Corp., 8 N.Y. 3d 204 (2007)

" The Legislature enacted CPLR Article 9 (sections 901 to 909) in 1975 to replace CPLR 1005, the former class action statute (which) had been judicially restricted over the years and subject to inconsistent results...Consequently, in 1975, the Judicial Conference proposed a new class action statute that was designed ' to set up a flexible, functional scheme whereby class action could qualify without the present undesirable and socially detrimental restrictions' "

[2] Objectives

[a] To set up a flexible functional scheme whereby class actions could qualify for class treatment without the present undesirable and socially detrimental restrictions of CPLR § 1005,

[b] To prescribe basic guidelines for judicial management of class actions,

- [c] Efficiency,
 - [d] Avoidance of inconsistent adjudications,
 - [e] Protection of absent class members,
 - [f] Relief for class members with individually small claims,
- [WKM ¶ 901.01[1]; CA § 1.01[2]]

[3] Early Examples

I. *Weinberg v. Hertz Corporation*, 116 A.D. 2d 1 (1st Dept. 1986), aff'd 69 N.Y. 2d 979 (1987)(gasoline refueling charges excessive "resulting in charges...of \$1.85 per gallon"; unconscionable premiums for CDW and PAI coverage; exorbitant late return charges; causes of actions included breach of contract, GBL § 349, unconscionability, bad faith, violations of UCC §§ 2-302, 1-201; certification granted to class of 2.8 million consumers).

" As a practical matter, a class action is not only a superior method of application, but the only method available for determining the issues raised, for ' the damages that may have been sustained by any single [customer] will almost certainly be insufficient to justify the expenses inherent in any individual action, and the number of individuals involved is too large, and the possibility of effective communication between them too remote, to make practicable the traditional joinder of action'" (citing *King v. Club Med, Inc.*, 76 A.D. 2d 123, 128 (1st Dept. 1980)).

II. *Guadagno v. Diamond Tours & Travel, Inc.*, 89 Misc. 2d 697 (N.Y. Sup. 1976)(travel tours²; fraudulent misrepresentation, breach of contract, rescission based on fraud; certification granted).

" Apparently, no other lawsuits arising out of the actions complained of have been commenced, suggesting that class action relief may well be necessary to vindicate the rights of members of the class, whose individual claims are otherwise too small (under \$500) to warrant independent litigation against the impressive legal strength of the defendant...In light of the manifest legislative purpose to expand the utilization of the class action device to encompass modern claims for relief, such as claims associated with the violation of consumer rights...the instant application for class action status should be, and is, granted "

Guadagno v. Diamond Tours & Travel, Inc., NYLJ, May 13, 1977, p. 1, col. 5 (N.Y. Sup.)(partial summary judgment granted to class on breach of contract).

"The moving papers include the brochures and advertising materials disseminated by...Diamond Tours & Travel Inc. as well as affidavits and statements of several persons who paid for and participated in the tours. The documents and proof submitted fairly establish the representations made by defendants as to the accommodations and facilities at the club, defendant's agreements to furnish the same and plaintiff's reliance upon such representations in booking the tours to Club Islandia. The affidavits of plaintiffs as to their experience on the island and at the club reasonably demonstrate the breach of contract, the failure to comply with the brochures and the advertising and the falsity of the representations made by defendants ".

² For a discussion of travel consumer class actions see Dickerson, Travel Law, Law Journal Press, 1981-2010, §§ 6.01-6.08.

III. *Feldman v. Quick Quality Restaurants, Inc.*, NYLJ July 22, 1983, p. 12, col. 4 (N.Y. Sup.)(fast food franchise; failure to reveal the true price of the fast food products; fraud, breach of contract, General Business Law ["GBL"] § 349; certification granted; fluid recovery; coupon settlement).

" The essence of the instant action focuses on Quick's method of charging customers this .075 percent surcharge. Quick, no doubt can charge whatever price it wants for fast food products. However, Feldman complains that Quick advertises one set of prices on its highly visible and illuminated menu, but actually succeeds in imposing a higher price upon its customers. Feldman does not attack the validity of the surcharge itself, but claims that the notice thereof is inadequate. Since the amount is so small and the notice so inconspicuous, Feldman urges that most, if not all, consumers are probably unaware of the surcharge...Feldman has proven that Quick keeps a record of the surcharge and that Quick has within its possession the total amount derived from the practice...Clearly in this case, the potential for individual recovery is too small to warrant the commencement of separate actions. ` The liberalized requirements of CPLR section 901(a) were codified...to facilitate collective recovery for individuals whose claims are too small to justify the efforts and costs of litigation `".

[Appendix B]

II. 2010: 35 Years Later: Article 9 Full Potential Has Yet To Be Reached

[WKM ¶ 901.05]

Notwithstanding the broad language in the legislative history of Article 9 [with the exception of § 901(b) as discussed below], New York courts have not implemented Article 9 as broadly as they might have [see *Globe Surgical Supply v. GEICO Insurance Co.*, 59 AD3d 129 (2d Dept. 2008); *Friar v. Vanguard Holding Co.*, 78 AD2d 83 (2d Dept. 1986)].

III. What's Certifiable And What's Not But Should Be

A. Unfulfilled Uniform Promises

Class actions based upon uniform printed contracts or solicitation materials or a common core of contractual promises or misrepresentations in different documents are certifiable. Typically, these class actions will assert causes of actions alleging

[1] Breach of contract

[WKM ¶ 901.23[2], CA § 6.04[1][a]],

[2] Fraudulent misrepresentations

[WKM ¶ 901.23[5], CA § 6.04[3]],

[3] Negligent misrepresentation

[WKM ¶ 901.23[8], CA § 6.04[6]],

[4] Violation of GBL §§ 349, 350

[WKM ¶ 901.23[6], CA § 6.04[4]],

[5] Breach of warranty

[WKM ¶ 901.23[4], CA § 6.04[2]],

[6] Quasi-contractual claims such as unjust enrichment, economic duress, bad faith dealings, money had and received, implied covenant of good faith

[WKM ¶ 901.23[3], CA § 6.04[6]].

B. Uniform Misconduct

Class actions based upon uniform misconduct are certifiable. Typically these class actions will assert causes of action alleging

[1] Breach of fiduciary duty

[WKM ¶ 901.23[7], CA § 6.04[5]],

[2] Negligence

[WKM ¶ 901.23[8], CA § 6.04[6]],

[3] Violation of a statute

[WKM ¶ 901.23[11], CA § 6.04[8]],

[4] Quasi-contractual claims

[WKM ¶ 901.23[3], CA § 6.04[6]].

C. Declaratory & Injunctive Relief & Governmental Operations

Class actions seeking declaratory and/or injunctive relief are certifiable [WKM ¶ 901.23[12], CA § 6.04[9]] unless they challenge governmental operations, then they are not certifiable but, on the other hand, may be certifiable under appropriate circumstances³.

[WKM ¶ 901.23[12], CA § 6.04[9]]

³ See *City of New York v. Maul*, 2010 WL 1791003 (Ct. App. May 6, 2010)(fn 5. " Supreme Court also rejected ACS's contention that class certification was improper under the governmental operations doctrine (see *Bryant Ave. Tenants' Assn. v. Koch*, 71 NY2d 856, 859 (1988). ACS does not pursue this argument on appeal and we therefore do not address it ").

D. Mass Torts

Class action " Mass Torts " ⁴ involving personal injuries or property damage are not yet certifiable whether based on negligence, strict products liability, misrepresentations or a violation of GBL 349 although medical monitoring class actions may be certifiable

[WKM ¶ 901.23[9], compare to other states in which mass torts are certifiable CA § 6.04[7][Appendix F].

E. Penalties Or Minimum Damages Imposed By Statute

Class actions alleging violations of GBL § 340 [Donnelly Act] and the federal Telephone Consumer Protection Act are not certifiable, the rationale being CPLR 901(b)'s prohibition against class actions seeking a penalty or minimum damages imposed by statute.

[WKM ¶ 901.28] ⁵

However, class actions alleging violations of GBL § 349,

⁴ See e.g., *Osarczuk v. Associated Universities, Inc.*, 36 AD3d 872 (2d Dept. 2007)(homeowners may seek damages from non-nuclear emissions); *Osarczuk v. Associated Universities, Inc.*, 2009 WL 5256171 (N.Y. Sup. 2009)(certification granted); *Arroyo v. State of New York*, 824 NYS2d 767(Ct.Cl.2006)(Spraypark water contamination; certification granted). Compare: *Flemming v. Barnswell Nursing Home & Health Facilities, Inc.*, 309 AD2d 1132 (3d Dept. 2003)(certification denied as to medical malpractice claims but granted as to claims under Pub. Health Law 2308-1).

⁵ GBL § 340 class actions may now be certifiable in federal court under FRCP 23. See *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 2010 WL 1222272 (U.S. Sup. 2010). See also ; Dickerson, State Class Actions: Game Changer, NYLJ, April 6, 2010, p. 6.

which also has a minimum damage award and penalty provisions, albeit discretionary, are certifiable as long as the named plaintiff waives treble damages with notice to class members so they may opt out and pursue an individual action seeking such damages⁶.

[WKM ¶ 901.23[6], CA § 6.04[4]]
[Appendices G & H]

IV. Types Of Class Actions

Given the continuing reluctance of New York courts to certify mass tort class actions, class actions challenging governmental operations or asserting class action claims prohibited by CPLR § 901(b), it is not surprising that in recent years CPLR Article 9 class actions have, primarily, been brought on behalf of consumers, employees, subcontractors, vendors and retirees.

[Appendices C, D & E]

§ Managing Class Action Litigation

§ Standing

I. Plaintiff Must Have A Direct Claim

[WKM ¶ 901.06[1]; CA § 2.01[1][a]]

II. Tolling Of Contractual And Statutory Time Limitations

[WKM ¶ 901.06[2]; CA § 4.03[4][a]]

⁶ Same concept applied to claims based on violations of Labor Law § 220 [*Pesantez v. Boyle Environmental Services, Inc.*, 251 AD2d 11 (1st Dept. 1998); *Galdamez v. Biordi Construction Corp.*, 50 AD3d 357 (1st Dept. 2008) and Labor Law § 196-d [*Krebs v. Canyon Club, Inc.*, 22 Misc. 3d 1125(A)(West. Sup. 2009)].

III. Mandatory Arbitration Agreements, Motions To Stay
Class Action Proceedings & Class Wide Arbitration

[WKM ¶ 901.06[4]; CA § 4.03[5]]

IV. Defendant Class Actions: Juridical Links

[WKM ¶ 901.06[6]; CA § 2.01[2]]

§ Pre-Certification Motions To Dismiss

I. Failure To State A Cause Of Action

[WKM ¶ 901.09[1]; CA § 4.03[1]]

II. Lack Of Jurisdiction Or *Forum Non Conveniens*

[WKM ¶ 901.09[2]; CA § 4.03[3]]

III. Strike Class Allegations

[WKM ¶ 901.09[4]; CA § 4.03[6]]

§ Removal To Federal Court

I. Class Action Fairness Act of 2005

[WKM ¶ 901.10[3]; CA 4.03[7]]

§ Competing Class Actions

I. Staying Newly Filed Class Actions

[WKM ¶ 901.11, 901.12; CA § 4.03[8][a]]

II. Consolidating Similar Class Actions

III. Judgments In Competing Class Actions Subject To

Collateral Attack

[WKM ¶ 901.13, CA 4.03[8][c]]

§ Motions For Summary Judgment

I. Defendant's Motion For Summary Judgment

[WKM ¶ 901.14[1]; CA § 4.04[1]]

II. Plaintiff's Motion For Summary Judgment

[WKM ¶ 901.14[2]; CA § 4.04[2]]

§ Pre-Certification Attempts To Settle Individual Claims

I. " Picking Off " Class Representative

[WKM ¶ 901.15; CA § 4.06[1]]

II. Communicating With Absent Class Members

[WKM ¶ 901.16; CA § 4.06[2]]

§ Counterclaims

I. Class Action Counterclaims

II. Defendant's Counterclaims Against Class Representative⁷

III. Defendant's Counterclaims Against Class Members

[WKM ¶ 901.18; CA § 4.08]

⁷ See e.g., *Globe Surgical Supply v. GEICO Insurance Co.*, 59 AD3d 129 (2d Dept. 2008).

§ Pre-Certification Discovery

I. Of Class Representative

[WKM ¶ 901.17[1]; CA § 4.07]

II. Of Absent Class Members

[WKM ¶ 901.17[2]; CA § 4.07[a]]

III. Of Defendants

[WKM ¶ 901.17[3]; CA § 4.07[b]]

§ Motion Seeking Class Certification: CPLR §§ 901, 902

[WKM ¶ 901.20; CA § 6.01]

§ Class Must Be Capable Of Being Identified

[WKM ¶ 901.21; CA § 6.02]

§ Class Must Be So Numerous That Joinder Would Be Impracticable

[WKM ¶ 901.22, CA § 6.03]

§ Common Questions Of Law Or Fact Must Predominate Over Individual Questions

[WKM ¶ 901.23[1]; CA § 6.04]

I. Common Legal Grievance Wherein Differing Damages Do Not Defeat Commonality Or Typicality

[WKM ¶ 901.23[1]; CA § 2.02[3]]

II. Breach Of Contract

[WKM ¶ 901.23[2]; CA § 6.04[1]]

II. Quasi Contractual Claims: Unjust Enrichment, Money Had
And Received, Economic Duress, Bad Faith Dealings,
Implied Covenant Of Good Faith

[WKM ¶ 901.23[3]; CA § 6.04[1][b]]

III. Breach Of Warranty

[WKM ¶ 901.23[4]; CA § 6.04[2]]

IV. Common Law Fraud

[WKM ¶ 901.23[5]; CA § 6.04[3]]

V. GBL §§ 349, 350 [Deceptive Business Practices]

[WKM ¶ 901.23[6]; CA § 6.04[4]]
[Appendices G & H]

VI. Breach Of Fiduciary Duty

[WKM ¶ 901.23[7]; CA § 6.04[5]]

VII. Negligence

[WKM ¶ 901.27[8]; CA § 6.04[6]]

VIII. Mass Torts

[WKM ¶ 901.23[9]; CA § 6.04[7]]
[Appendix F]

IX. Governmental Operations

[WKM ¶ 901.23[10]]

X. Violation Of Federal And State Statutes

[WKM ¶ 901.23[11]; CA § 6.04[8]]

XI. Declaratory Judgment And Injunctive Relief

[WKM ¶ 901.23[12]; CA § 6.04[9]]

§ Typicality

[WKM ¶ 901.24; CA § 6.05[1]]

§ Adequacy Of Representation

I. Adequacy Of Class Representative⁸

[WKM ¶ 901.25[1]; CA § 2.02[4][a]]

II. Adequacy Of Defendant Class Representative

[WKM ¶ 901.25[2]; CA § 2.02[4][c]]

III. Adequacy Of Class Counsel

[WKM ¶ 901.25[3]; CA § 2.02[4][b]]

§ Superiority

[WKM ¶ 901.26; CA § 6.06]

§ Consideration Of The Merits Of The Proposed Class Action

[WKM ¶ 901.27; CA § 6.08]

⁸ See e.g., *Globe Surgical Supply v. GEICO Insurance Co.*, 59 AD3d 129 (2d Dept. 2008)]

§ CPLR 901(b): Prohibition Of Class Actions Seeking Penalties
Or Minimum Recoveries

[WKM ¶ 901.28; CA § 4.03[3][c][I]]

§ Plaintiff's Burden To Meet All Requirements of CPLR §§ 901, 902

[WKM ¶ 902.01[1], 902.03; CA § 6.01]

§ Motion For Class Certification Must Be Made Within 60 Days
Unless Stayed By The Court To Conduct Discovery Or Adjudicate
Dispositive Motions

[WKM ¶ 902.01[2]; CA § 5.02[1]]

§ Court Must Hold Hearing And Render A Decision Considering
Each And Every Statutory Prerequisite Including Standing
And Class Identification

[WKM ¶ 902.01[3]; CA § 5.01]

§ Manageability

[WKM ¶ 902.04; CA § 6.07]

I. Fluid Recovery Concepts

[WKM ¶ 908.07, 908.07; CA § 6.07[2]]

II. Jurisdiction Over Non-Residents

[WKM ¶ 902.05; CA § 6.07[3]]

III. *Forum Non Conveniens* And Forum Selection Clauses

[WKM ¶ 902.06; CA § 6.07[4]]

IV. Too Many Choice Of Law Issues

[WKM ¶ 902.07; CA § 6.07[5]]

V. Limiting The Class To Residents Of One State

[WKM ¶ 902.08; CA § 6.07[6]]

§ Selection Of Class Representatives And Lead Class Attorneys

I. Fee Auctions

[WKM ¶ 902.09[2]; CA § 6.09[2]]

II. Intervention To Protect Class And Supervise Counsel

[WKM ¶ 902.09[3]; CA § 2.02[4][a][xii]]

§ Notice Of Class Certification

[WKM ¶ 904.01-904.04; CA §§ 7.01, 7.02]

I. Opt-Out Notice, Mandatory Participation Notice

[WKM ¶ 904.5; CA § 7.02[2]]

II. Request For Exclusion Forms

[WKM ¶ 904.06; CA § 7.02[3][a]]

III. Claim Forms

[WKM ¶ 904.07; CA § 7.02[3][b]]

IV. Methods Of Class Action Notice

[WKM ¶ 904.08; CA § 7.02[4]]

V. Paying For The Costs Of Notice

[WKM ¶ 904.09; CA § 7.02[5]]

§ Subclassing

[WKM ¶ 906.02; CA § 8.03[1]]

§ Post Certification Discovery

[WKM ¶ 907.01-907.03; CA § 8.02]

§ Trial Mechanics

I. Bifurcation And Subclassing

[WKM ¶ 907.05; CA § 8.03[1]]

II. Representative Proof

[WKM ¶ 907.06; CA § 8.03[2]]

III. Statistical Sampling In Proving Damages

[WKM ¶ 907.07; CA § 8.03[2][a][I]]

IV. Using Class Members As Witnesses

[WKM ¶ 907.08; CA § 8.03[3]]

V. Inferences And Circumstantial Evidence

[WKM ¶ 907.09; CA § 8.03[4]]

§ Settlements and Voluntary Discontinuances

[WKM ¶ 908.01; CA § 9.01]

§ Approval Of The Court

[WKM ¶ 908.02; CA § 9.02]

§ Court As Guardian Of The Class

[WKM ¶ 908.03; CA § 9.02[2]]

§ Settlement Procedures

[WKM ¶ 908.04; CA § 9.03]

§ Stipulation Of Settlement

[WKM ¶ 908.05; CA § 903[1]]

§ Non-Cash Settlements: Products, Coupons, Label Monitoring

[WKM ¶ 908.06; CA § 9.03[1][c]]

[Appendices I & J]

§ Cy Pres Remedies: Settlements & Disposing Of Unclaimed Funds

[WKM ¶ 908.07; CA § 9.03[1][d]]

[Appendix K]

§ Class Representative Incentive Awards

[WKM ¶ 908.08; CA § 9.03[4][d]]

[Appendix L]

§ Settlement Classes: Enhanced Scrutiny

[WKM ¶ 908.10; CA § 9.03[2]]

§ Notice Of Settlement

[WKM ¶ 9.08.11; CA § 9.03[3]]

§ Fairness Hearing

[WKM ¶ 9.08.13; CA § 9.03[4]]

§ Objections To Settlement

[WKM ¶ 908.14; CA § 9.03[4][b]]

I. Intervention By Objectors

[WKM ¶ 908.14[1]; CA 9.03[4][b][I]]

II. Discovery By Objectors

[WKM ¶ 908.14[2]; CA § 9.03[4][b][ii]]

III. Procedural Objections

[WKM ¶ 908.14[3]; CA § 9.03[4][b][iii]]

IV. Substantive Objections

[WKM ¶ 908.14[4]; CA § 9.03[4][b][iv]]

V. Fees And Costs For Objector's Counsel; Incentive Awards To Objectors

[WKM ¶ 908.14[5]; CA § 9.03[4][b][v]]
[Appendix M]

§ Factors In Evaluating A Proposed Settlement

[WKM ¶ 908.15; CA § 9.03[4][c]]

§ Attorneys Fees And Costs Authorised

[WKM ¶ 909.01; CA § 10.01]

§ Award Of Attorneys' Fees May Be Recovered From Opponents Of Class

[WKM ¶ 909.03; CA § 10.01]

§ Methods For Awarding Attorneys Fees And Costs

I. Lodestar Method

[WKM ¶ 909.06; CA § 10.03]

A. Time And Costs Records

[WKM ¶ 909.06[1]; CA § 10.03[2]]

B. Establishing Beneficial Hours

[WKM ¶ 909.06[2]; CA § 10.03[3]]

C. Establishing Hourly Rates

[WKM ¶ 909.06[3]; CA § 10.03[4]]

D. Lodestar Computation

[WKM ¶ 909.06[4]; CA § 10.03[5]]

E. Enhancing Lodestar

[WKM ¶ 909.06[5]; CA § 10.03[6]]

II. Percentage Method

[WKM ¶ 909.05; CA § 10.02]

§ Fee Disputes

[WKM ¶ 909.07; CA § 10.03[8]]

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- Appendix D : NYSBA Journal Article [Parts I & II] New York
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- Appendix N : Draft of Consumer Protection Chapter by Thomas A.
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