

SUMMARY OF NEW YORK STATE CLASS ACTIONS IN 2009

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Last year the Court of Appeals, the Appellate Divisions and numerous Trial Courts addressed a variety of class issues including post settlement discovery, deceptive price matching, cellphone plans, gift cards, fixed price contracts, employee gratuities, trespass and terminal boxes, cable TV converter boxes, demutualization, microprint equipment leases, lien law, brokerage account maintenance fees, backdating wholesale store renewal memberships, Macy's Rewards Certificates and attorneys fees.

Post Settlement Discovery

In *Wyly v. Milberg Weiss Bershad & Schulman, LLP*¹ the Court of Appeals limited discovery of class counsel dismissed by the Court. " In a class action, however, an absent class member does

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not possess a ' broad right ' of access to the files of a class counsel dismissed by the trial court during the litigation's pendency... would create ' the potential for class counsel to be unduly burdened, eve after the end of litigation, by a multitude of requests from absent class members for counsel's entire file '".

Deceptive Price Matching

In Dank v. Sears Holding Management Corporation², a challenge to Sear's "price matching"³ policy as being as deceptive the court observed that "The complaint alleges that Sears published a policy promising...to match the 'price on an identical branded item with the same features currently available for sale at another local retail store' (and) that the plaintiff requested at three different locations that Sears sell him a flat-screen television at the same price at which it was being offered by another retailer. His request was denied at the first two Sears locations on the basis that each store manager had the discretion to decide what retailers are considered local and what prices to match. Eventually he purchased the television at the third Sears at the price offered by a retailer located 12 miles from the store, but was denied the \$400 lower price offered by a retailer located 8 miles from the store...the complaint states a

cause of action under GBL 349 and 350". The court subsequently denied class certification⁴ finding that plaintiff failed to establish numerosity and his adequacy as class representative since serving as class representative and class counsel created a conflict of interest.

Employee Gratuities

In Krebs v. The Canyon Club⁵ the court granted class action to an action brought by employees seeking retained gratuities. The court noted that plaintiff " alleges that she has worked since July 2007 as a waitress or food server at the Club. The Club is a private golf and country club which is available to the general public as a site for catered events such as weddings, bar/bat mitzvahs and other functions...She alleges that the Club imposed on customers a service charge which customers were led to believe was a gratuity intended for employees but which the Club retained for itself "; certification granted

Trespass And Terminal Boxes

In Corsello v. Verizon New York Inc.⁶ the court denied class certification in a trespass action brought by property owners seeking compensation from Verizon. " [I]n order to service high

density neighborhoods in New York City, where buildings are attached and access to the street is limited, Verizon extends its telephone lines from the public way or street to individual homes and businesses by implementing an ' inside block architecture ' which requires Verizon to place terminal boxes on the rear-walls of privately owned buildings...Plaintiffs, as owners of property encumbered by one of the...rear wall terminals (are) seeking declaratory and injunctive relief and monetary damages for trespass upon their property, compensation pursuant to Transportation Corporations Law § 27...and pursuant to (GBL) § 349, for deceptive practices by which defendant avoid the payment of compensation " .

Cellphones

In *Ballas v. Virgin Media, Inc.*⁷ dismissed a class action by cell phone users alleging breach of contract and violation of GBL §§ 349, 350 " with respect to ' pay-as-you-go ' cellular phone services. Specifically...that the defendant failed to disclose on the packaging of its cellular phone, or did not otherwise properly disclose, either the requirement that subscribers to its phone services periodically ' top up ' their accounts by paying additional sums of money to the defendants to increase the available balances on those accounts, or the consequences of

failing to 'top up'. And in *Morrissey v. Nextel Partners, Inc.*⁸ the court denied class certification noting that

"According to plaintiffs' complaint...defendant, a provider of cellular telephone service, systematically overcharged many of its subscribers in violation of consumer protection statutes as well as principals of contract law. These alleged overcharges arose in two distinct areas: in the method of crediting so-called 'bonus minutes' to customers' accounts, and in the assessment of additional fees from subscribers with poor credit ratings. Plaintiffs contend that the 'bonus minutes' included in their contracts were in fact illusory, while those subscribers with low credit scores on 'spending limit program' contracts were charged fees in excess of those for which that had bargained... Their contracts provide for a base level of 1,000 minutes on monthly usage as well as 200 so-called 'bonus minutes'...When the first month's bill arrived, he discovered that his account had been credited with only 1,000 minutes...Nowhere on the billing statement was there any credit, or even mention, of the 200 'bonus minutes'".

Cable TV Converter Boxes

In *Brissenden v. Time Warner Cable of New York City*⁹ the

court denied class certification to a class action by cable TV customers challenging the necessity of converter boxes. " Plaintiff alleges that Time Warner is engaged in unfair and deceptive business practices in violation of (GBL) § 349...because it is charging its basic cable customers for converter boxes, which they do not need, because the customers subscribe only to channels that are not being converted and because Time Warner charges customers for unnecessary remote controls regardless of their level of service "; class certification denied);

Demutualization Settlement

In re Metlife Demutualization Litigation¹⁰ the court approved a proposed settlement of a federal class action and a New York state class action, Fiala v. Metropolitan Life Insurance Company¹¹. "This class action challenges the accuracy of notice to voters in an insurance company demutualization....A related class action titled Fiala v. Metropolitan Life Insurance Company...The settlement was subject to approval by this court in this action and by the state court in Fiala...The terms of the settlement are as follows: Defendants have agreed to pay \$50,000,000 in money damages in a combined joint settlement of this and the Fiala action. Fees and expenses of class counsel

allocated by the courts will be paid from the settlement amount. Damages will be distributed to the class by paying \$2,500,00 to a non-profit health research organization or 'charity' to be agreed upon by the parties under the cy press doctrine. Allocation of the remainder (after deduction of plaintiffs' attorneys' fees and expenses) shall be assigned to the 'closed block' established in the demutualization of defendant Metropolitan Life Insurance Company for the benefit of insured persons. Both this action and the Fiala action will be dismissed with prejudice, with appropriate releases ".

Microprint Equipment Leases

In *Pludeman v. Northern Leasing Systems, Inc.*¹² the court certified a class of small business owner who had entered to lease agreements for Point Of Sale [POS] equipment and who were challenging the enforceability of concealed microprint disclaimers and waivers. In an earlier decision,¹³ the Court of Appeals noted that plaintiffs asserted that defendant used "deceptive practices, hid material and onerous lease terms. According to plaintiffs, defendants' sales representatives presented them with what appeared to a one-page contract on a clip board, thereby concealing three other pages below...among such concealed items...(were a) no cancellation clause and no

warranties clause, absolute liability for insurance obligations, a late charge clause, and provision for attorneys' fees and New York as the chosen forum ", all of which were in " small print " or " microprint ". In sustaining the fraud cause of action against the individually named corporate defendants the Court noted that " it is the language, structure and format of the deceptive Lease Form and the systematic failure by the sales people to provide each lessee a copy of the lease at the time of its execution that permits, at this early stage, an inference of fraud against the corporate officers in their individual capacities and not the sales agents ".

Lien Law

In *Spectrum Painting Contractors, Inc. v. Kreisler Borg Florman General Construction Co., Inc.*¹⁴ the court declined to decertify a Lien Law class action on behalf of subcontractors. " the defendant...Osborne... borrowed the sum of approximately \$57 million from the Dormitory Authority of the State of New York to finance a capital improvement project. Pursuant to article 3-A of the Lien Law, the proceeds of the building loan constituted a trust fund for the purpose of paying certain statutorily-defined costs of improvement...In 2006 Solar Electric...was certified as class representative of the class of beneficiaries of the trust

fund...certain conduct on the part of Solar's counsel did not warrant disqualification of Solar's counsel or decertification of Solar as class representative ".

Fire Sprinkler Heads

In *Hotel 57 L.L.C., d/b/a Four Seasons Hotel, New York v. Tyco Fire Products*¹⁵ the Appellate Court determined that Plaintiff's claims of fraudulent misrepresentation and non disclosure were neither "factually unique," nor "completely distinct" from those raised in the prior California class actions of *Hart v. Central Sprinkler Corp.* (No. BC 176727) and *County of Santa Clara v. Central Sprinkler Corp.* (No. CV 771019). Under "the same cause of action" prong of California's doctrine of res judicata, Plaintiff's claims against Defendants' for defective Omega fire sprinkler heads, are barred by res judicata given the prior California class action settlements. The Appellate Court found that the primary rights sought by the Plaintiffs in all three actions were "to have defective sprinklers replaced without having to incur the expense of replacement and to be free of misrepresentations by defendants as to the suitability of the Omega sprinkler heads." With regard to Plaintiff's claims of fraud and negligent misrepresentation, the Appellate Division agreed with the trial court's finding that the Plaintiff received

proper notice of "the material elements of the settlement, including the opt-out provision."

Fixed Price Contracts

In *Emilio v. Robinson Oil Corp.*¹⁶ a class of consumers of electricity asserted breach of contract, breach of the covenant of good faith and fair dealing and violation of GBL § 349 based on claims that defendant unilaterally increased the price of electricity after they entered into fixed price contracts. On plaintiff's motion to amend the complaint the Court held that "plaintiff should also be allowed to assert his claim under (GBL § 349) based on the allegation that the defendant unilaterally increased the price in the middle of the renewal term of the contract"¹⁷. Subsequently¹⁸, the Court granted class certification noting that "the extent defendant may have issued three similar contract versions at different times...nothing would prevent the Supreme Court... from establishing sub-classes based on the particular contract at issue".

Brokerage Account Maintenance Fees

In *Yeger v. E*Trade Securities LLC*¹⁹ the court denied certification to a class action brought by brokerage customers

challenging account maintenance fees. " Whether E*Trade's conduct in assessing AMFs (account management fees) a day early caused an individual class member to suffer actual damages depends upon facts so individualized that it is impossible to prove them on a class-wide basis. The motion court concluded that class certification was appropriate because there was a common question as to whether E*Trade collected the AMF too early, i.e., before the date permitted in E*Trade's contracts. However, this is only half the question. A breach of contract claim only exists if E*Trade's common conduct actually damaged a customer. Therefore, to recover, each class member would have to show that he or she would have avoided the fee had E*Trade collected it at the proper time. There were several actions that customers could have taken to avoid the assessment (such as depositing additional funds or executing additional securities trades), as well as other conditions not under their control that could have prevented it, such as when E*Trade, as a courtesy, refunded those customers who paid the AMF. It is this aspect of the proof that would be subject to a host of factors peculiar to the individual. This aspect proof is critical. To allow the Yegers, or any class member, to recover the fee merely because E*Trade collected it early-without proof that each member of the class would have taken steps to avoid the fee had collected occurred at its proper time-would result in a windfall to those plaintiffs who would not

have taken corrective actions. In certain cases, it could also result in writing the AMF out of the agreement entirely, a fee the parties had agreed to freely. Accordingly, individualized issues, rather than common ones, predominate ").

Backdating Renewal Memberships

In *Argento v. Wal-Mart Stores, Inc.*²⁰ the court granted certification to a class of customers who alleged " that defendant engaged in deceptive business practices in violation of (GBL) § 349 by routinely backdating renewal memberships at Sam's Club stores...as a result of the backdating policy, members who renew after the date upon which their one-year membership terms expire are nevertheless required to pay the full annual fee for less than a full year of membership " .

Mentally Retarded

In *City of New York v. Maul*²¹ Plaintiff-Intervenors are mentally retarded and developmentally disabled individuals, who at some point were in the foster care system of Administration for Children's Services ("ACS"). Plaintiffs argued that Defendants failed to properly provide for their care. Plaintiffs specifically contended that ACS: (1) had no uniform policy for

identifying individuals who were in need of New York State Office Of Mental Retardation and Developmental Disabilities ("OMRDD") services; (2) did not train its staff to recognize such individuals; and (3) rarely coordinated with OMRDD to deal with such individuals. Plaintiffs also claimed that OMRDD shared in the responsibility for failing to sufficiently provide appropriate care for mentally retarded and developmentally disabled individuals, and thereby independently failed to fulfill its statutory duties. The Appellate Division upheld the motion court's grant for class certification, because the Plaintiffs proved: (1) there were at least 150 class members, showing numerosity; (2) all members of the class were similarly situated in alleging the same deprivation by governmental services, evidencing commonality; (3) Plaintiff's claims flowed from the same alleged conduct, showing typicality; (4) class interests were adequately protected, as the class was represented by experienced counsel; and (5) no conflict existed between the interests of the Plaintiffs and the class as a whole.

Macy's Rewards Certificates

In *Held v. Macy's, Inc.*²² the court dismissed several causes of action in a class action brought by customers asserting " that while Macy's widely ` advertises the cost savings...to be gained by [Macy's] card holders if they purchase Defendant's

merchandise, Defendant has systematically failed to disclose to customers that the Rewards Certificates they receive...are worth significantly less than customers are lead to believe...

Plaintiff's claims under GBL §§ 349 and 350 cannot stand.

Plaintiff does not dispute that the documents establish that she was a Red Star Rewards member and that based on the literature Macy's disseminated to her, she was not entitled to Rewards Certificates. Further, Plaintiff concedes that she used a coupon rather than a Rewards Certificate and that the coupon was never promoted as the functional equivalent of cash. Indeed, the language of the coupon at issue makes clear that it was a typical store coupon-akin to the free discount coupons disseminated to the general public in store flyers-and not the functional equivalent of cash ".

Early Retirement Program

In Matter of DeSimone v. New York City Employees' Retirement System²³ Plaintiffs commenced a CPLR article 78 and a plenary class action against Defendants. Plaintiffs alleged that the New York City Employees' Retirement Systems ("NYCERS") denied their applications for enrollment in the early retirement program, which constituted a breach of their retirement contracts and constituted a breach of NYCERS' fiduciary duty to them. The

Supreme Court denied Plaintiffs' petition, reasoning that NYCERS did not unlawfully, arbitrarily or capriciously preclude the Plaintiffs from enrolling in the early retirement program. The Appellate Division upheld the trial court's decision, by stating that the Defendants did not violate the NY Constitution, article V, § 7, "which deems membership in a pension or retirement system a 'contractual relationship, the benefits of which shall not be diminished or impaired.'" Accordingly, the Court found that the Defendants, nor the Legislature, impaired or diminished the Plaintiffs' rights in enrolling in early retirement.

Gratuities: Labor Law § 196-d

In Connor v. Pier Sixty, LLC²⁴ Plaintiffs alleged that the Defendants violated Labor Law § 196-d, providing that "[n]o employer . . . shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." Defendants moved to dismiss for failure to state a cause of action, arguing that Labor Law § 196-d applied only to employers and employees, and that Plaintiffs fell outside of the statute because they were merely workers assigned by a temporary agency. The Defendants cited Bynog v. Cipriani Group²⁵, where the Plaintiffs, who were also servers

assigned by a temporary agency, were considered to have worked at events as independent contractors, and not as employees of Defendants. In Connor, however, the Court found nothing in the Bynog decision that suggested a worker who was assigned by a temporary agency must be considered an independent contractor. Moreover, the Court indicated that the determination of whether a worker was an employee or an independent contractor was an issue based on the degree of control exercised by the purported employer, which required a factual assessment of each case. That being said, the Court denied Defendants' motion to dismiss, for failure to state a cause of action.

Shelter Termination Sanction Notices

In Callahan v. Carey²⁶ the Court addressed the issue of whether Defendants had to continue providing the Legal Aid Society with copies of shelter termination sanction notices as soon as residents were made aware of such notice, pursuant to a Final Judgment by Consent dated August 1981. Paragraph 11 of the above-referenced Consent Agreement provided that access must be attainable for "any records relevant to the enforcement and monitoring of the decree" to the Legal Aid Society, counsel for Plaintiff class (homeless men living in New York City). Since the time of the execution of the Consent Agreement, the New York City

Department of Homeless Services ("DHS") developed a program that shifted from managing homelessness to ending chronic homelessness. The shelter termination sanction notices were an integral part of the programs initiated by DHS. The Plaintiffs argued before the Supreme Court that the notices were records relevant to the enforcement and monitoring of the Consent Agreement, which the Legal Aid Society was promised access to within Paragraph 11. The Defendants contended that the Agreement governed the capacity and physical conditions of the City's shelters, not individual sanction determinations. The Supreme Court granted Plaintiff's motion, requiring Defendants to provide the sanction notices to the Legal Aid Society. The Appellate Division, then, reversed the Supreme Court's decision and order, declining to read Paragraph 11 of the Consent Agreement as imposing an obligation on the City to provide sanction notices to the Legal Aid Society when residents are noticed. Finally, the Court of Appeals answered the question of whether the Appellate Division's reversal was properly made. The Court of Appeals determined that the Agreement must be interpreted in light of its plain language. For that reason, the Court of Appeals reinstated the order of the Supreme Court.

SSI

In *Matter of Graves v. Doar*²⁷ the Supreme Court denied the Appellants' motion for class certification of similarly situated group-home residents receiving supplemental security income (SSI), whose food stamps were determined under the New York State Group Home Standardized Benefit program. The Court made such determination solely "on the ground that a class action was not superior to an ordinary lawsuit where "governmental operations" are involved.

Unpaid Wages

In *Maldonado v. Everest General Contractors, Inc.*²⁸ Plaintiffs were a certified class of workers consisting of employees of Everest General Contractors ("Everest"), who were seeking "to recover earned but unpaid wages and supplemental benefits for work performed . . ." Defendants' oral testimony and evidence of Certified Payroll Reports were inconsistent, therefore, the Court credited the Plaintiffs' evidence in its entirety. The Court found that "where an employer failed to keep and produce accurate records, calculations of underpayments of wages may be made using plaintiff's testimony, and that the burden then shifts to defendants to disprove plaintiffs'

calculations." As such, a judgment for money damages were warranted in favor of the class as a whole.

In *Kudinov v. Kel-Tech Construction, Inc.*²⁹ Defendants' appealed the Supreme Court's ruling, which partially granted Plaintiffs' motion for class certification. The Appellate Division found that the Plaintiff had shown sufficient evidence to establish numerosity, in that the number of workers alleged to have been underpaid was high enough to justify the Court's exercise of discretion in certifying the class. Also, the Court found commonality in the claims set forth by Plaintiffs. For those reasons, the Court found Plaintiffs' claim had sufficient merit for the purpose of certifying the class.

Public Defense System Inadequate

In *Durrell-Harding v. State of New York*³⁰ the court dismissed a class action. " Plaintiffs commenced this action against defendant State of New York. Seeking a declaration that the State's public defense system is systematically deficient and presents a grave and unacceptable risk that indigent criminal defendants are being or will be denied their constitutional right to meaningful and effective assistance or counsel. Plaintiffs also sought an injunction requiring defendants to provide a system that is consistent with those guarantees...The critical

issue...whether plaintiffs... have stated a cause of action that is justiciable ".

Retirement Claims

In Matter of DeBlasio v. City of New York³¹ class certification was sought for representatives of all tier three Correction Officers' Benevolent Association ("COBA") members hired between July 26, 1976 and December 19, 1990, and who retired with credited service. Respondents argued that class certification was untimely. Respondents also argued that Petitioners did not satisfy the requirements of class certification, namely that a class action must be superior to all other available methods for the fair and efficient adjudication of the controversy at issue. Respondents argued the proceeding involved "government operations," and in Matter of Jones v. Board of Educ. of Watertown City School Dist.³², the Court stated that "it is well settled that a class action is not considered the superior method for the fair and efficient adjudication of a controversy against a governmental body." That being said, the Appellate Division held that a class action was not the superior method for adjudicating the proceeding. Additionally, the Court found that COBA was not an appropriate representative for the proposed class.

Keypan

In *Nicholson v. KeySpan Corporation*³³ Plaintiffs sought appeal for the denial of their motion for class certification. The Appellate Division upheld the Supreme Court's denial of class certification, upon the basis that Plaintiffs failed to establish the class was numerous enough that joinder would be impracticable. Additionally, the Plaintiffs failed to establish that questions of law or fact, common to the class, predominate over any question that affected individual members, and also that a class action is superior to other available methods for the fair and efficient adjudication of the controversy at issue. Plaintiffs also appealed denial of their cross motion for summary judgment considering strict liability. The Appellate Division found that the Supreme Court properly denied the Plaintiffs' cross motion for summary judgment, because Plaintiffs' failed to establish a prima facie entitlement, by showing that Defendants had engaged in an abnormally dangerous activity.

Disqualifying Counsel

In *Spectrum Painting Contractors, Inc. v. Kreisler Borg Florman General Construction Company, Inc.*³⁴, the Court addressed issues regarding the certified class representative ("Solar") of

the Plaintiff class, as beneficiaries to a trust. The Appellate Division upheld the Supreme Court's denial of Defendants' motion to disqualify Solar's counsel and to decertify Solar as a class representative, despite Defendants' contentions that certain conduct on the part of Solar's counsel warranted disqualification and that Solar should have been decertified as class representative.

Collective Bargaining Agreement

In *Civil Service Employees Association, Inc., A.F.S.C.M.E., Local 1000, A.F.L.-C.I.O. v. County of Nassau*³⁵, Plaintiffs commenced an action alleging that Defendants breached their Collective Bargaining Agreement ("CBA"), when it failed to properly compensate employees who were promoted during a specified period of time. The Plaintiffs sought to correct the improper step/grade placement and collect monetary damages as a result of the breach. Defendants moved for summary judgment to dismiss the action and Plaintiffs cross moved for summary judgment for relief sought in the complaint. The first question posed to the Court was whether the Defendant breached the CBA by placing employees, who were promoted from January 1, 1999 through December 31, 2000, in an improper step/grade on the relevant graded salary schedule. The Court found that the Defendant did,

in fact, breach the CBA, and subsequently the Defendant was required to review the grade placements for promotions made during calendar years 1999 to 2000. The second question before the Court was whether dismissal of the action was warranted, based upon previous determinations made by an Arbitrator on the grounds of res judicata and untimeliness. The Court found that the determinations made in prior arbitrations, as to the issue of whether the Defendant breached the CBA, carried no res judicata effect. Further, the Court found the instant lawsuit to be timely.

Street Vendors Unite

In *Ousmane v. City of New York*³⁶, Plaintiffs commenced a class action, brought on behalf of street vendors fined by the New York City Environmental Control Board ("ECB") for code violations during the years 2003 and 2004. Specifically, Plaintiffs alleged that ECB increased fines for vendors' violations, without going through the required New York City Administrative Procedure Act's ("CAPA") rulemaking procedures. Plaintiffs moved for summary judgment for final injunctive and declaratory relief on the above-referenced CAPA violation. The Plaintiffs also sought an order requiring the Defendant to refund checks that were previously mailed to vendors, who paid increased

finances but whose checks were returned as undeliverable, and that Defendant provided for a cy pres distribution to a nonprofit organization for any refund that ultimately remained unclaimed. Finally, Plaintiffs sought an award for attorneys fees. The Defendants cross moved for partial summary judgment, limiting the class of vendors entitled to judgment and also objected to cy pres distribution of unclaimed funds. First, the Court found that because the time period lapsed in which the Defendant had to appeal the class certification, the order certifying the class was upheld. Next, the Court granted Plaintiffs' motion for summary judgment for final injunctive and declaratory relief, declaring that the City violated CAPA. The Court also granted Plaintiffs' motion that required Defendant to further attempt to locate vendors who are entitled to refund checks. The Court did not, however, grant Plaintiff's request to have cy pres distribution of funds not claimed within one year after the City's last attempt of reimbursement. Finally, the Court granted Plaintiffs' attorneys fees using the Lodestar method, determining that Plaintiff's were entitled to \$160,877 for attorneys fees, and \$1,408 for litigation expenses.

Lottery

In *R. Wright v. New York State Division of Lottery*³⁷ Petitioner commenced a putative class action against the New York

State Division of Lottery, seeking injunctive relief, the imposition of a constructive trust, and compensatory and punitive damages. The Petitioner argued that the Respondent had committed fraud in its print, radio, television and on-line advertising, by overstating the likelihood of winning the Take Five game.

Defendant moved, by Order to Show Cause, for an extension of its time to serve a motion to change venue, and also to extend its time to serve its answer or pre-answer motion to dismiss. The Court used its discretion, and granted Respondent's request to extend its time to serve its answer or pre-answer motion to dismiss, considering the absence of any demonstrable prejudice to plaintiff. In addressing Defendant's motion to change venue, the Court found that because neither party to the action resided in New York County, the instant action was not properly venued in New York County. Therefore, the Court transferred the instant action to Schenectady County, Respondent's principal place of business.

Fees

In *Nager v. Teachers' Retirement System*³⁸, a class action on behalf of teachers and administrators seeking a ruling that "per session" pay is pensionable, the court approved a settlement but modified the Supreme Court's approval of the fee

application. Initially, the court held that the " Supreme Court properly used the lodestar method in determining the reasonable value of plaintiffs' attorneys' services in instituting and settling this class action, rather than applying a percentage of the value of the settlement, in view of the enormous disparity in result between the two methods ". However, the court held that the " Preminger firm failed to establish the reasonableness of its \$610 per hour rate, the reasonableness of billing 76% of its hours at the top partner rate and the qualifications of its associates" and that " a multiplier was not warranted to enhance the lodestar amount ".

ENDNOTES

1. Wyly v. Milberg Weiss Bershad & Schulman, LLP, 12 N.Y. 3d 400, 880 N.Y.S. 2d 898, 908 N.E. 2d 888 (2009).
2. Dank v. Sears Holding Management Corporation, 59 A.D. 3d 582, 874 N.Y.S. 2d 188 (2d Dept. 2009).
3. See e.g., Jermyn v. Best Buy Stores, L.P., 256 F.R.D. 418 (S.D.N.Y. 2009)(certification granted to class action alleging deceptive price matching in violation of GBL 349); Jay Norris, Inc., 91 F.T.C. 751 (1978) modified 598 F. 2d 1244 (2d Cir. 1979); Commodore Corp., 85 F.T.C. 472 (1975) (consent order).
4. Dank v. Sears Holding Management Corporation, 59 A.D. 3d 584, 872 N.Y.S. 2d 722 (2d Dept. 2009).
5. Krebs v. The Canyon Club, 22 Misc. 3d 1125 (N.Y. Sup. 2009).
6. Corsello v. Verizon New York Inc., 25 Misc. 3d 1221 (N.Y. Sup. 2009).

7. Ballas v. Virgin Media, Inc., 60 A.D. 3d 712, 875 N.Y.S. 2d 523 (2d Dept. 2009).
8. Morrissey v. Nextel Partners, Inc., 22 Misc. 3d 1124(A)(Albany Sup. 2009).
9. Brissenden v. Time Warner Cable of New York City, 885 N.Y.S. 2d 879 (N.Y. Sup. 2009). See also: Saunders v. AOL Time Warner, Inc., 18 A.D. 3d 216, 794 N.Y.S. 2d 342 (1st Dept. 2005) (customers challenge cable converter box rentals; complaint dismissed; plaintiff " not aggrieved by the complained of conduct ")
10. In re Metlife Demutualization Litigation, 2009 WL 3633898 (E.D.N.Y. 2009).
11. See Fiala v. Metropolitan Life Ins. Co., 17 Misc. 3d 1102 (N.Y. Sup. 2007), mod'd 52 A.D. 3d 251 (1st Dept. 2008).
12. Pludeman v. Northern Leasing Systems, Inc., 2009 WL 1812532 (N.Y. Sup. 2009).
13. Pludeman v. Northern Leasing Systems, Inc., 10 N.Y. 3d 486, 489-490, 860 N.Y.S. 2d 422 (2008).
14. Spectrum Painting Contractors, Inc. v. Kreisler Borg Florman General Construction Co., Inc., 2009 WL 1957270 (2d Dept. 2009).
15. Hotel 57 L.L.C., d/b/a Four Seasons Hotel, New York v. Tyco Fire Products, 59 A.D.3d 305, 847 N.Y.S.2d 49 (1st Dep't 2009).
16. Emilio v. Robinson Oil Corp., 28 A.D. 3d 418, 813 N.Y.S. 2d 465 (2d Dept. 2006).
17. See also: Matter of Wilco Energy Corp., 284 A.D. 2d 469, 728 N.Y.S. 2d 471 (2d Dept. 2001)(unilateral change of fixed price contract violation of GBL 349).
18. Emilio v. Robinson Oil Corp., 63 A.D. 3d 667, 880 N.Y.S. 2d 177 (2d Dept. 2009).
19. Yeger v. E Trade Securities LLC, 65 A.D. 3d 410, 884 N.Y.S. 2d 21 (1st Dept. 2009).
20. Argento v. Wal-Mart Stores, Inc., 2009 WL 3489222 (2d Dept. 2009). See also Dupler v. Costco Wholesale Corp., 249 F.R.D. 29 (E.D.N.Y. 2008)(customers asserts that membership renewal policy is deceptive trade practice and violates G.B.L. 349; class

certification granted).

21. *City of New York v. Maul*, 59 A.D.3d 187, 873 N.Y.S.2d 540 (1st Dep't 2009).

22. *Held v. Macy's, Inc.*, 2009 WL 3465945 (N.Y. Sup. 2009).

23. *DeSimone v. New York City Employees' Retirement System*, 60 A.D.3d 1053, 876 N.Y.S.2d 467 (2d Dep't 2009).

24. *Connor v. Pier Sixty, LLC*, 23 Misc.3d 435, 870 N.Y.S.2d 899 (Sup. Ct. N.Y. County 2009).

25. *Bynog v. Cipriani Group*, 1 N.Y.3d 193 (2003).

26. *Callahan v. Carey*, 12 N.Y.3d 496, 882 N.Y.S.2d 392 (2009).

27. *Matter of Graves v. Doar*, 62 A.D.3d 874, 879 N.Y.S.2d 204 (2d Dep't 2009).

28. *Maldonado v. Everest General Contractors, Inc.*, 2009 WL 3134846 (Sup. Ct. Kings County 2009).

29. *Kudinov v. Kel-Tech Construction, Inc.*, 65 A.D.3d 481, 884 N.Y.S.2d 413 (1st Dep't 2009).

30. *Durrell-Harding v. State of New York*, 2009 WL 2045335 (3d Dept. 2009).

31. *Matter of DeBlasio v. City of New York*, 24 Misc.3d 789, 883 N.Y.S.2d 843 (1st Dept. 2009).

32. *Matter of Jones v. Board of Educ. of Watertown City School Dist.*, 30 A.D.3d 967, 970, 816 N.Y.S.2d 796 (4th Dep't 2006).

33. *Nicholson v. KeySpan Corporation*, 65 A.D.3d 1025, 885 N.Y.S.2d 106 (2d Dep't 2009).

34. *Spectrum Painting Contractors, Inc. v. Kreisler Borg Florman General Construction Company, Inc.*, 64 A.D.3d 580, 883 N.Y.S.2d 548 (2d Dep't 2009).

35. *Civil Service Employees Association, Inc., A.F.S.C.M.E., Local 1000, A.F.L.-C.I.O. v. County of Nassau*, 2009 WL 2601365 (Sup. Ct. Nassau County 2009).

36. *Ousmane v. City of New York*, 22 Misc.3d 1136(A), 880 N.Y.S.2d 874 (Sup. Ct. N.Y. County 2009).

37. R. Wright v. New York State Division of Lottery, 22 Misc.3d 1135(A), 881 N.Y.S.2d 367 (Sup. Ct. N.Y. County 2009).

38. Nager v. Teachers' Retirement System, 2008 WL 5334322 (1st Dept. 2008).