CONSUMER LAW 2008 UPDATE

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

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[This Paper May Not Be Reproduced Without The Permission Of Thomas A. Dickerson]

By Justice Thomas A. Dickerson[1]

Ever since my days as a City Court Judge sitting in the Small Claims Part[1] 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[2]. This

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[1] Thomas A. Dickerson is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Dickerson is the author of Class Actions: The Law of 50 States, Law Journal Press, 2008; Travel Law, Law Journal Press, 2008;, Article 9 of 3 Weinstein, Korn & Miller, New York Civil Practice CPLR, Lexis-Nexis (MB), 2007; and over 250 articles and papers on consumer law issues, many of which are available at
www.courts.state.ny.us/courts/ad2/justice_dickerson.shtml
www.classactionlitigation.com/library/ca_articles.html
www.consumerlaw.org/links/#travel_articles

Paper, prepared annually for New York State Civil Court Judges and the Town & Village Courts Resource Center discusses those consumer protection statutes most frequently used in New York State courts.

The Methodology Of This Paper

This Paper reports on recent consumer law cases in New York State Small Claims Courts, City Courts, District Courts, Civil Courts and Supreme Courts and categorizes them by the New York State or Federal consumer protection statutes invoked. For example, the most popular consumer protection statute is New York State General Business Law § 349 [G.B.L § 349] which prohibits deceptive and misleading business practices. Under this category there is a description of cases, by type of product or service involved, which have successfully invoked G.B.L. § 349. Other consumer protection statutes are described within the context of product and service categories such as Cars and Loans and Credit. There also tables of both New York State and Federal consumer protection statutes.

Consumer Crisis: Credit Card Debt & Mortgage Foreclosures

Last year we noted the avalanche of credit card default

cases being brought in New York State and the extraordinary response of our Civil Courts[3]. A recent study[4] by the Urban Justice Center discussed " the explosion of consumer debt cases in the New York City Civil Court in recent years. Approximately, 320,000 consumer debt cases were filed in 2006, leading to almost $800 million in judgments. The report notes that this is more filings than all the civil and criminal cases in U.S. District Courts...findings of the report include (1) The defendant failed to appear in 93.3% of the cases, (2) 80% of cases result in default judgments, (3) Even when defendants appear, they were virtually never represented by counsel, (4) Almost 90% of cases are brought by debt buyers "[5].

Home foreclosures have increased dramatically leading New York State Court of Appeals Chief Justice Kaye to note that " Since January 2005, foreclosure filings have increased 150 percent statewide and filing are expected to rise at least an additional 40 percent in 2008 " and to announce a residential foreclosure program to " help ensure that homeowners are aware of available legal service providers and mortgage counselors who can help them avoid unnecessary foreclosures and reach-of-court resolutions "[6].

In addition, the Courts have responded, particularly, in the area of standing [see Recent Standing Decisions from New York, NCLC Reports, Bankruptcy and Foreclosures Edition, Vol. 26,

March/April 2008, p. 19 (“ In a series of recent decisions several New York courts[7] either denied summary judgment or refused to grant motions for default to plaintiffs who provided the courts with clearly inadequate proof of their standing to foreclose “) and in applying New York State’s predatory lending and “ high-cost home loan “ statute as an affirmative defense in foreclosure proceedings[8].

Consumer Class Actions Too

Article 9 of the C.P.L.R.[9] allows consumers to aggregate similar claims into class actions. The fact patterns in such class actions often provide useful information on new areas of consumer law. The scope of New York State class actions[10] and a review of all New York State class actions reported between January 2005 to January 2008 appears herein.

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[B] **G.B.L. § 350** [False Advertising];

[B-1] **G.B.L. Article 29-H** [Improper Debt Collection];

[C] **G.B.L. § 198-a** [New Car Lemon Law];

[D] **G.B.L. § 198-b** [Used Car Lemon Law];

[E] **G.B.L. § 201** [Overcoats Lost At Restaurants];

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

[G] **G.B.L. § 359-fff** [Pyramid Schemes];

[G.1] **G.B.L. §§ 380-s, 380-l** [Identity Theft];

[G.2] **G.B.L. § 394-c** [Dating Services];

[G.3] **G.B.L. § 396-aa** [Unsolicited Telefacsimile Advertising];

[H] **G.B.L. § 396-p(5)** [New Car Purchase Contract Disclosure Requirements];

[H.1] **G.B.L. § 396-q** [New Cars; Sales & Leases];

[H.2] **G.B.L. § 396-t** [Merchandise Layaway Plans];

[I] **G.B.L. § 396-u** [Merchandise Delivery Dates];

[I.1] **G.B.L. § 397** [Unlawful Use Of Name Of Nonprofit Organization];

[I.2] **G.B.L. § 399-c** [Mandatory Arbitration Clauses In Certain Consumer Contracts Prohibited];

[J] **G.B.L. § 399-p** [Restrictions On Automated Telemarketing Devices];

[K] **G.B.L. § 399-pp** [Telemarketing And Consumer Fraud And

Abuse Prevention Act];

[L] **G.B.L. § 399-z** [No Telemarketing Sales Call Registry];

[L.1] **G.B.L. § 601** [Debt Collection Practices];

[M] **G.B.L. § 617(2)(a)** [New Parts Warranties];

[M.1] **G.B.L. §§ 620 et seq** [Health Club Services];

[N] **G.B.L. §§ 752 et seq** [Sale Of Dogs And Cats];

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

[O.1] **G.B.L. § 777** [New Home Implied Warranty Of Merchantability];

[O.2] **G.B.L. § 820** [Sale Of Outdated Over The Counter Drugs];

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

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[R] **M.D.L. § 78** [Duty To Keep Premises In Good Repair];

[R.1] **P.P.L. § 302 [** retail Installment Sales];

[R.2] **P.P.L. § 401 et seq.** [Retail Installment Sales Act];

[S] **P.P.L. §§ 425 et seq** [Door-To-Door Sales];

[T] **P.P.L. §§ 500 et seq** [Rental Purchase Agreements];

[U] **R.P.L. § 235-b** [Warranty Of Habitability];

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[Y] **U.C.C. § 2-601** [Nonconforming Goods; Right of Rescission];

[Y.1] **U.C.C. § 2-608** [Delivery of Non-Conforming Goods];

[Y.2] **U.C.C. §§ 610, 611** [Repossession & Sale Of Vehicle];

[Z] **V.T.L. § 417** [Warranty Of Serviceability];

[AA] **17 N.Y.C.R.R. § 814.7** [Duties & Rights of Movers of Household Goods];

[BB] **Education Law § 6512(1)** [Massage Therapy];

[CC] **G.O.L. § 5-901** [Limitations On Enforceability Of Automatic Lease Renewal Provisions].

2] **<u>Table Of Federal Consumer Protection Statutes</u>**

[A] **12 U.S.C. § 2601** [Real Estate Settlement Procedures Act (RESPA)];

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

[C] **15 U.S.C. § 1639** [Home Ownerships and Equity Protection

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[C-1] **15 U.S.C. §§ 1692e, 1969k** [Fair Debt Collection Practices Act];

[C-2] **15 U.S.C. § 1693f** [Electronic Fund Transfer Act];

[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 Consumer Law Articles**

Dickerson & Manning, Summary of Article 9 Class Actions in 2006, New York Law Journal, January 24, 2007, p. 4.

Dickerson, The Modern Cruise Passenger's Rights and Remedies Part I, New York State Bar Association Journal, Vol. 79, No. 3 (March/April 2007), p. 10.

Dickerson, False, Misleading and Deceptive Advertising In The Travel Industry [2007] International Travel Law Journal 90.

Dickerson, The Modern Cruise Passenger's Rights & Remedies-Part II, New York State Bar Association Journal, Vol. 79, No. 5

(June 2007), p. 18.

Dickerson, Consumer Protection Law 2007: Guide to Statutes, New York Law Journal, July 25, 2007, p. 4.

Dickerson & Manning, Class Actions Under CPLR Art. 9 in 2007, New York Law Journal, January 18, 2008, p. 4.

Dickerson, New York State Consumer Protection Law and Class Actions in 2007- Part I, Vol. 80, No. 2, New York State Bar Association Journal, February 2008, 42.

Dickerson, New York State Consumer Protection Law and Class Actions-Part II, Vol. 80, No. 4, New York State Bar Association Journal, May 2008, p. 39.

Dickerson, Travel Abroad, Sue At Home, New York Law Journal, June 11, 2008, p. 4.

Morgenson, Illinois to Sue Countrywide, New York Times, nytimes.com, June 25, 2008 (" The Illinois attorney general is suing Countrywide Financial, the troubled mortgage lender... contending that the company and its executives defrauded borrowers in the state by selling them costly and defective loans

that quickly went into foreclosure...accused Countrywide...of relaxing underwriting standards, structuring loans with risky features and misleading consumers with hidden fees and fake marketing claims, like its heavily advertised ‘ no closing costs loan ‘”).

Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor available at www.urbanjustice.org/cdp

News & Trends, Rebate ripoffs spark consumer lawsuits, new legislation, Trial November 2007. P. 14 (discussing limited value of some rebate programs). See e.g., Faigman v. AT&T Mobility LLC, 2007 WL 2088561 (N.D. Cal. 2007)(“ Plaintiffs are California residents who claim that they were mislead into purchasing mobile phones and service contracts from Cingular as a result of a misleading rebate program...Plaintiffs claim that Cingular’s practice of marketing its rebates as directly reducing the cost of Cingular cell phones by the dollar amount of the rebate is misleading because the VISA Rewards Cards do not reduce the cost of Cingular phones by the value of the rebate. The cards are less valuable than cash or check, according to plaintiffs, due to the limitations and restrictions placed upon the cards... Plaintiffs identify the following restrictions which are not

disclosed in Cingular’s advertisements: the cards must be activated, the cards are only accepted at certain locations, the cards can incur service charges, the cards will be declined in transactions that exceed the balance of the card, the cards expire, the cards are not redeemable for cash, the cards do not earn interest, the cards are not divisible, the cards are not transferable and the cards are issued in maximum increments of $50 “.

Points Mania, Consumer Reports, July 2008, p. 12 (“ With just about every retailer and credit-card issuer offering a rewards program, you might wonder which, if any, are worth the bother. The answer: Not many “).

Extended warranties: A high priced gamble, Consumer Reports, April 2008, p. 26 (“ Our survey of 8,000 new-car buyers shows they are usually a poor deal “).

Best & Worst Credit Cards, Consumer Reports, October 2007, p. 12 (“ Credit cards might look pretty much alike, but our new survey shows vast differences in how pleased people are with their plastic. And we’re not just talking about interest rates, which vary widely from one card to another “).

Banks, Contract Law, Scope of Forum Selection: ‘Phillips v. Audio Active‘, New York Law Journal, September 17, 2007, p. 3.

Confessore & Kershaw, As Home Health Care Industry Booms, Little Oversight to Counter Fraud, The New York Times, Metro Section, September 2, 2007, p. 1 (“ It is one of New York’s fastest growing industries, driven by government policy and nourished by tax dollars. But as the home health care industry has expanded, the state appears to have been a step behind, with a confusing hodgepodge of regulations and agencies to police it, experts and state officials say “).

Schepp, Rules are few on product dating, Journal News, January 20, 2008, p. 1 (“ Federal, state laws do little to stop the sale of outdated food items “).

Cuomo to sue Rite Aid, CVS, Journal News, June 13, 2008, p. 1 (“ State Attorney General Andrew Cuomo plans to sue Rite Aid and CVS, claiming they sell expired products-including milk, eggs, medicines and baby formula-at stores across New York “).

Drury, Kmart fined $1.5M over price tags, Journal News, April 2, 2008, p. 1 (“ An Administrative law judge has ordered giant retailer Kmart to pay a $1.56 million fine after Westchester

County inspectors found more than 1,500 items at stores in Yorktown and Greenburgh that did not have price tags “).

Seven Ways to Challenge a Foreclosure on Standing Grounds, NCLC Reports, Bankruptcy and Foreclosures Edition, Vo. 26, March/April 2008, p. 1.

Twelve Reasons to Love the Magnuson-Moss Warranty Act, NCLC Reports, Deceptive Practices and Warranties Edition, Vol. 26, January/February 2008, p. 1.

Thirteen Ways to Use Other Parties’ Misconduct to Defend a Foreclosure, NCLC Reports, Deceptive Practices and Warranties Edition, Vo. 26, November/December 2007.

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[11]. G.B.L. § 349 allows consumers and, possibly, businesses[12] 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) “.[13] 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 “[14]. Attorneys fees and costs may be recovered as well.

A] **History & Philosophy**

As stated by Justice Graffeo in the dissenting opinion in Matter of Food Parade, Inc. v. Office of Consumer Affairs[15], “ This Court has broadly construed general consumer protection laws to effectuate their remedial purposes, applying the state deceptive practices law to a full spectrum of consumer-oriented conduct, from the sale of ‘ vanishing premium ‘ life insurance policies...to the provision of infertility services...We have repeatedly emphasized that (G.B.L. § 349) and section 350, its companion...’ apply to virtually all economic activity, and their application has been correspondingly broad...The reach of these statutes provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State ‘...In determining what types of conduct may be deceptive practices under state law, this Court has applied an objective standard which asks whether the ‘ representation or omission [was] likely to mislead a reasonable consumer acting reasonably under the circumstances ‘...taking into

account not only the impact on the ‘ average consumer ‘ but also on ‘ the vast multitude which the statutes were enacted to safeguard-including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions ‘”.

B] **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 “[16], constitutes “ consumer-oriented conduct “[17] and does not involve private disputes[18].

C] **Stating A Cognizable Claim**

As stated in Small v. Lorillard Tobacco Co.[19] “ 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.[20] 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 ".

In Ladino v. Bank of America[21] the Court dismissed the GBL 349 claim because he " alleges only that the defendant's predecessor, Fleet, engaged in a ' deceptive practice ' by issuing a loan to the third party without knowledge of the Plaintiff '. Although Fleet's alleged conduct may have been negligent it did not mislead the plaintiff in any material way and did not constitute a ' deceptive act '".

In Relativity Travel, Ltd. V. JP Morgan Chase Bank [22] the Court stated " the Complaint alleges that Relativity was injured because it paid more for its foreign currency that what was required by the conversion rate applicable at the time of each transaction. Relativity's allegation that it was injured by having

been charged an undisclosed additional amount on foreign currency transactions is sufficient to state a (G.B.L. § 349) claim “.

In Berkman v. Robert’s American Gourmet Food, Inc.[23], a class of consumers of Pirate’s Booty, Veggie Booty and Fruity Booty brands snack food alleged defendant’s advertising “ made false and misleading claims concerning the amount of fat and calories contained in their products “. Noting that certification of a settlement class requires heightened scrutiny the Court denied class certification to the GBL 350 claim because individual issues of reliance predominated [“ common reliance on the false representations of the fat and caloric content...cannot be presumed (in GBL 350 claims) “][24], but noted that certification of the GBL 349 claim may be appropriate if limited to New York residents [“ causes of action predicated on GBL 349 which do not require reliance (may be certifiable but) a nationwide class certification is inappropriate “][25].

In Baron v. Pfizer, Inc.[26] The Court stated that “ for plaintiff to state a cause of action under (G.B.L. § 349) plaintiff needs to allege more than being prescribed a medication for off-label use and paying for such medication since prescribing FDA-approved medications for off-label uses appears to be a common practice in the medical community...plaintiff has failed to connect the allegations regarding defendant’s deceptive conduct to any actions taken with regard to the plaintiff “.

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[27]]. 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.[28]].

D] **Preemption**

G.B.L. §§ 349, 350 may be pre-empted by other consumer protection statutes[29] [Stone v. Continental Airlines[30](airline bumping G.B.L. § 349, 350 claims preempted by federal airline regulations); People v. Applied Card Systems, Inc.[31] (" We next reject...contention that (TILA) preempted petitioner's claims (which) pertain to unfair and deceptive acts and practices "); Batas v. Prudential Insurance Company of America[32] (" " plaintiff's causes of action for...violations of (GBL 349, 350) were properly sustained over defendants' objections that, under Public Health Law 4406, the responsibility for regulating

the contracts of Health Maintenance Organizations (HMOs) lies with the Commissioner of the Department of Health. Nothing in that section or elsewhere in the statutory scheme suggests a clear legislative intent to preempt common-law or other rights and remedies “)].

E] **Actual Injury Necessary**

The complaint must allege actual injury arising from the alleged violations of G.B.L. § 349[33] [Small v. Lorillard Tobacco Co.[34](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)].

In Vigiletti v. Sears, Roebuck & Co.[35] a class of consumers alleged that Sears marketed its Craftsman tools “ as ‘ Made in USA ‘ although components of the products were made outside the United States as many of the tools have the names of other countries, e.g., ‘ China ‘ or ‘ Mexico ‘ diesunk or engraved into various parts of the tools “. In dismissing the GBL 349 claim the Court found that plaintiffs had failed to prove actual injury [“ no allegations...that plaintiffs paid an inflated price for the tools...that tools purchased...were not made in the U.S.A. or were deceptively labeled or advertised as made in the U.S.A. or that the quality of the tools purchased were of lesser quality than

tools made in the U.S.A. “], causation [“ plaintiffs have failed to allege that they saw any of these allegedly misleading statements before they purchased Craftsman tools “] and territoriality [“ no allegations that any transactions occurred in New York State “].

In Baron v. Pfizer, Inc.[36] a class of purchasers of the drug Neurontin asserted claims of fraud, violation of GBL 349 and unjust enrichment “ based on claims arising from ‘ off-label ‘ uses “ for which FDA approval had not been received. Although the FDA had approved Neurontin only for the treatment of epilepsy, “ From June 1995 to April 2000...Warner Lambert...engaged in a broad campaign to promote Neurontin for a variety of pain uses, psychiatric conditions such as biploar disorder and anxiety and for certain other unapproved uses...Warner Lambert...ultimately agreed to plead guilty to (1) introducing into interstate commerce a misbranded drug that did not have adequate directions on the label for the intended uses of the drug and (2) introducing an unapproved new drug into interstate commerce ...consented to a criminal fine of $240 million...civil fines of $190 million “. The Court dismissed the GBL 349 claim because of an absence of actual injury [“ Without allegations that...the price of the product was inflated as a result of defendant’s deception or that use of the product adversely affected plaintiff’s health...failed even to allege...that Neurontin was ineffective to treat her neck pain and

her claim that any off-label prescription was potential dangerous both asserts a harm that is merely speculative and is belied...by the fact that off-label use is a widespread and accepted medical practice "] and the unjust enrichment claim.

In Ballas v. Virgin Media, Inc.[37] a class of consumers charged the defendant cell phone service provider with breach of contract and a violation of GBL 349 in allegedly failing to properly reveal " the top up provisions of the pay by the minute plan " known as " Topping up (which) is a means by which a purchaser of Virgin's cell phone (" Oystr "), who pays by the minute, adds cash to their cell phone account so that they can continue to receive cell phone service. A customer may top up by (1) purchasing Top Up cell phone cards that are sold separately; (2) using a credit or debit card to pay by phone or on the Virgin Mobile USA website or (3) using the Top Up option contained on the phone ". If customers do not " top up " when advised to do so they " would be unable to send or receive calls ". The Court dismissed the GBL 349 claim " because the topping-up requirements of the 18 cent per minute plan were fully revealed in the Terms of Service booklet ".

In People v. Direct Revenue, LLC[38] " [i]n response to consumers who complained that Direct Revenue's ad-generating software was being installed on their computers without notice or consent the (AG) commenced an investigation...petitioner alleges that Direct Revenue's software has been installed 150 million

times in computers all over the world...Given the disclosures made in the (end-user license agreement (EULA)) regarding the pop-up ads and respondents' relevant policies no GBL 349 (claim) for a deceptive practice may be asserted. Petitioner does not identify anything in the EULA that is false, deceptive or misleading. Furthermore, the clear disclaimers and waivers of liabilities bar any remedy ".

See also: Shebar v. Metropolitan Life Insurance Co.[39](" 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) "); Edelman v. O'Toole-Ewald Art Associates, Inc.[40](appraiser malpractice; " failed to demonstrate, for purposes of (G.B.L. § 349) that he suffered ' actual ' or pecuniary harm "); Solomon v. Bell Atlantic Corp.[41] (" 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.[42] (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[43] (" 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.[44](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.[45](" 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[46], (" a privacy invasion claim-and an accompanying request for attorney's fees-may be stated under (G.B.L. § 349) based on nonpecuniary injury "); Weinstock v. J.C. Penney Co.[47](no actual injury); Sokoloff v. Town Sports International, Inc.[48](" Such claim impermissibly ' sets forth deception as both act and injury ' "); Donahue v. Ferolito, Vultaggio & Sons[49] (" (plaintiff) failed to establish any actual damages resulting from defendants' alleged deceptive practices and false advertising on the labels "); Levine v. Philip Morris Inc.[50](" plaintiff must offer evidence that

defendant made a misrepresentation...which actually deceived...and which caused her injury "); Han v. Hertz Corp.[51] (" proof that a material deceptive act or practice caused actual–albeit not necessarily pecuniary–harm is required to impose compensatory damages ")].

F] **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][52]. 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.[53]].

In Shovak v. Long Island Commercial Bank[54] a class of borrowers sued a mortgage broker alleging that a " yield spread premium paid to the defendant by the nonparty lender was a kickback in exchange for the defendant procuring an interest rate on the plaintiff's loan higher than the lender's market or par rate ". Subsequently in Shovak v. Long Island Commercial Bank[55],

the Court dismissed the GBL 349 claim finding that " there was no materially misleading statement, as the record indicated that the yield spread premium, which is not per se illegal, was fully disclosed to the plaintiff.

Matter of City Line Auto Mall, Inc. v. Mintz[56](" However, with respect to the Jeep Cherokee that petitioner offered for sale with a registration sticker affixed stating that it was a Honda, there is no substantial evidence that a reasonable consumer would have been deceived by the sticker ").

G] **Scope Of G.B.L. § 349**

G.B.L. § 349 applies to a broad spectrum of goods and services [Karlin v. IVF America[57] (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[58] (" encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law "); State of New York v. Feldman[59] (G.B.L. § 349 " was intended to be broadly applicable, extending far beyond the reach of common

law fraud “)].

H] **Statute Of Limitations**

G.B.L. § 349 claims are governed by a three-year period of limitations [C.P.L.R. 241(2)][60]. G.B.L. § 349 claims accrue when the consumer “ has been injured by a deceptive act “[61].

I] **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[62]] or received services in New York State [Scott v. Bell Atlantic Corp.[63]].

J] **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.[64]].

K] **Territorial Limitations**

In Goshen v. The Mutual Life Ins. Co.[65] [consumers of

vanishing premium insurance policies] and Scott v. Bell Atlantic Corp.[66], [consumers of Digital Subscriber Line (DSL)[67] 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[68] of the " territorial reach " of G.B.L. § 349 the Court in Truschel v. Juno Online Services, Inc.[69], 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[70]., 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) "].

L] **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[71] and Anilesh v. Williams[72] (renting illegal apartments); Yochim v. McGrath[73] (renting illegal sublets)];

[2] **Attorney Advertising** [People v. Law Offices of Andrew F. Capoccia[74](" The alleged conduct the instant lawsuit seeks to enjoin and punish is false, deceptive and fraudulent advertising practices "); Aponte v. Raychuk[75](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[76] (misrepresenting the qualifications of an abusive aupair to care for handicapped children)];

[4-5] **Auctions; Bid Rigging** [State of New York v. Feldman[77] (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[78]. (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.[79](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); People v. Condor Pontiac[80] (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) ")];

[6.1] **Automotive: Repair Shop Labor Charges** [Tate v. Fuccillo Ford, Inc.[81](While plaintiff agreed to pay $225 to have vehicle towed and transmission " disassembled...to determine the cause of why it was malfunctioning " he did not agreed to have repair shop install a re-manufactured transmission nor did he

agree to pay for “ flat labor time “ national time standard minimum of 10 hours for a job that took 3 hours to complete [“ defendant’s policy of fixing its times to do a given job on a customer’s vehicle based on a national time standard rather than being based upon the actual time it took to do the task without so advising each customer of their method of assessing labor costs is ‘ a deceptive act or practice directed towards consumers and that such...practice resulted in actual injury to a plaintiff ‘”. Damages included, inter alia, the $254.04 cost of obtaining a loan to pay for the authorized labor charges, $776.88 for the labor overcharge and “ $1,000 under GBL 349(h) for ‘ willfully and knowingly violating ‘ that statute resulting in the $776.88 overcharge for doing 3 hours of work and charging the plaintiff for 13.3 hours for a total of $2,030.92 “];

[6.2] **Automotive: Improper Billing For Services** [Joyce v. SI All Tire & Auto Center[82](“ 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 “)];

[6.3] **Automotive: Defective Ignition Switches** [Ritchie

v. Empire Ford Sales, Inc.[83] (dealer liable for damages to used car that burned up 4 ½ years after sale)];

[6.4] **Automotive: Defective Brake Shoes** [Giarrantano v. Midas Muffler[84] (Midas Muffler fails to honor brake shoe warranty)];

[6.5] **Automotive: Motor Oil Changes** [Farino v. Jiffy Lube International, Inc.[85] (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)];

[6.6] **Automotive: Extended Warranties** [Kim v. BMW of Manhattan, Inc.[86](Misrepresented extended warranty; " The deceptive act that plaintiffs allege here is that, without disclosing to Chun that the Extension could not be cancelled, BMW Manhattan placed the charge for the Extension on his service invoice, and acted as though such placement have BMW Manhattan a mechanic's lien on the Car. Such action constituted a deceptive practice within the meaning of GBL § 349...As a result of that practice, plaintiffs were deprived of the use of the Car for a significant time and Chun was prevented from driving away, while he sat in the Car for several hours, until he had paid for the

Extension “)].

[6.7] **Automotive: Refusal To Pay Arbitrator’s Award** [Lipscomb v. Manfredi Motors[87] (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)];

[6.8] **Baldness Products** [Karlin v. IVF[88] (reference to unpublished decision applying G.B.L. § 349 to products for treatment of balding and baldness); Mountz v. Global Vision Products, Inc.[89] (“ 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 “)];

[7] **Budget Planning** [People v. Trescha Corp.[90] (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 “)];

[8] **Cable TV: Charging For Unneeded Converter Boxes**

[In Samuel v. Time Warner, Inc.[91], 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 "[92], 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 "].

[8.1] **Cable TV: Imposition Of Unauthorized Taxes**

[In Lawlor v. Cablevision Systems Corp.[93]the plaintiff claimed that his monthly bill for Internet service " contained a charge for ' Taxes and Fees ', Lawlor alleges Cablevision had no legal rights to charge these taxes or fees and seeks to recover (those charges)...The Agreement for Optimum Online for Commercial Services could be considered misleading ")];

[9] **Cell Phones** [Naevus International, Inc. v. AT&T

Corp.[94], (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[95](" 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[96] (refusing to refund purchase price in cash for defective and shedding fake fur)];

[11] **Computer Software** [Cox v. Microsoft Corp.[97](" 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 ")

[12] **Credit Cards** [People v. Applied Card Systems, Inc.[98](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[99] (" 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[100], (" 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[101] (credit card company misrepresented the application of its low introductory annual percentage rate to cash advances)];

[13] **Currency Conversion** [Relativity Travel, Ltd. V. JP

Morgan Chase Bank [102] (" Relativity has adequately alleged that the Deposit Account Agreement was deceptive despite the fact that the surcharge is described in that agreement. The issue is not simply whether the Deposit Account Agreement was deceptive, but whether Chase's overall business practices in connection with the charge were deceptive...Viewing Chase's practices as a whole including the failure to list the surcharge on the Account Statement or on Chase's website and the failure to properly inform its representatives about the surcharge are sufficient, if proved, to establish a prima facie case... Relativity's allegation that it was injured by having been charged an undisclosed additional amount on foreign currency transactions is sufficient to state a (G.B.L. § 349) claim ")];

[14] **Customer Information** [Anonymous v. CVS Corp.[103] (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 ")];

[14.1] **Debt Collection Practices** [Centurion Capital Corp. v. Druce[104] (plaintiff, a purchaser of credit card debt, was held to be a debt collector as defined in Administrative Code of

City of New York § 20-489 and because it was not licensed its claims against defendant must be dismissed; defendant's counterclaim asserting that plaintiff violated G.B.L. § 349 by " bringing two actions for the same claim...is sufficient to state a (G.B.L. § 349) cause of action ");

[15] **Defective Dishwashers** [People v. General Electric Co., Inc[105](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[106],(misrepresented and grossly overpriced water purification system); Rossi v. 21st Century Concepts, Inc.[107] (selling misrepresented and overpriced pots and pans)];

[17] **Educational Services** [In Drew v. Sylvan Learning Center Corp.[108] parents enrolled their school age children in an educational services[109] program which promised " The Sylvan Guarantee. Your child will improve at least one full grade level equivalent in reading or math within 36 hours of instruction or we'll provide 12 additional hours of instruction at no further cost to you ". After securing an $11,000 loan to pay for the defendant's services and eight months, thrice weekly, on one hour

tutoring sessions the parents were shocked when " based on the Board of Education's standards, it was concluded that neither child met the grade level requirements. As a result plaintiff's daughter was retained in second grade ". The Court found fraudulent misrepresentation, unconscionability and a violation of GBL 349 in that " defendant deceived consumers...by guaranteeing that its services would improve her children's grade levels and there by implying that its standards were aligned with the Board of Education's standards " and (3) unconscionability [" There is absolutely no reason why a consumer interested in improving her children's academic status should not be made aware, prior to engaging Sylvan's services, that these services cannot, with any reasonable probability, guarantee academic success. Hiding its written disclaimer within the progress report and diagnostic assessment is unacceptable "); People v. McNair [110] (" 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[111] (failing to deliver computer programming course for beginners); Brown v. Hambric[112] (failure to deliver travel agent education program)]; Cambridge v. Telemarketing Concepts[113];

[17.1] **Electricity Rates** [Emilio v. Robinson Oil Corp.[114] " the act of unilaterally changing the price (of electricity) in the middle of the term of a fixed-price contract has been found to constitute a deceptive practice... Therefore, the plaintiff should also be allowed to assert his claim under (G.B.L. § 349) based on the allegation that the defendant unilaterally increased the price in the middle of the renewal term of the contract ");

[18] **Employee Scholarship Programs** [Cambridge v. Telemarketing Concepts, Inc.[115] (refusal to honor agreement to provide scholarship to employee)];

[19] **Excessive & Unlawful Bail Bond Fees** [McKinnon v. International Fidelity Insurance Co.[116](misrepresentation of expenses in securing bail bonds)];

[19.1] **Excessive Modeling Fees** [Shelton v. Elite Model Management, Inc.[117](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.[118] (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 "[119]; Dvoskin v. Levitz Furniture Co., Inc.[120] (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.[121](misrepresented extended warranty; $50 statutory damages awarded

under G.B.L. 349(h)); Giarratano v. Midas Muffler[122]
(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[123]
(misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty)];

[20.2] **Food : Nutritional Value** [Pelman v. McDonald's Corp[124]. (misrepresentation of nutritional value of food products);

[20.3] **Food : Expiration Dates**

In Matter of Food Parade, Inc. v. Office of Consumer Affairs [125], the Court of Appeals stated that " Many consumer goods bear expiration dates, as required by law. In the case before us, a supermarket displayed a number of products bearing expired dates. We must decide whether this is a deceptive trade practice within the meaning of the Nassau County Administrative Code [Nassau

County Administrative Code § 21-10.2 which is not preempted by G.B.L. § 820 governing sale of outdated over-the-counter drugs]. We hold that offering such products for sale is not deceptive unless the retailer alters or disguises the expiration dates. Without doubt, the Legislature may prohibit and punish the sale of certain outdates or state products. We cannot, however, fit such sales or displays into the code's ' deceptive trade practice ' prescription ". See also Matter of Stop & Shop Supermarket Companies, Inc. V. Office of Consumer Affairs of County of Nassau[126](" 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[127] (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty); Walker v. Winks Furniture[128] (falsely promising to deliver furniture within one week); Filpo v. Credit Express Furniture Inc.[129] (failing to inform Spanish speaking consumers of a three day cancellation period); Colon v. Rent-A-Center, Inc.[130] (rent-to-own furniture; " an overly inflated cash price " for purchase may violate G.B.L. § 349)];

[21.1] **Guitars** [In Wall v. Southside Guitars, LLC[131] the claimant " a vintage Rickenbacker guitar enthusiast...purchased

the guitar knowing that there were four changed tuners, as represented by the advertisement and the sales representative. What he did not bargain for were the twenty or so additional changed parts as found by his expert. Defendants claim that the changed parts do not affect this specific guitar as it was a ‘ player’s grade ‘ guitar...While determining how much can be replaced in a vintage Rickenbacker guitar before it is just a plain old guitar may be intriguing, this court need not entertain it because an extensively altered guitar was not one that claimant saw advertised and not one that he intended to buy “; violation of GBL 349 found and damages of $830.00 awarded with interest).

[22] **Hair Loss Treatment** [Mountz v. Global Vision Products, Inc.[132] (“ 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 Price Increas**es [Matter of Wilco Energy Corp.[133] (“ Wilco solicited contracts from the public and, after entering into approximately 143 contracts, unilaterally

changed their terms. This was not a private transaction occurring on a single occasion but rather, conduct which affected numerous consumers...Wilco’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** [In Carney v. Coull Building Inspections, Inc.[134] the home buyer alleged that the defendant licensed home inspector “ failed to disclose a defective heating system “ which subsequently was replaced with a new “ heating unit at a cost of $3,400.00 “ although the “ defendant pointed out in the report that the hot water heater was ‘ very old ‘ and “ has run past its life expectancy “. In finding for the plaintiff the Court noted that although the defendant’s damages would be limited to the $395.00 fee paid and no private right of action existed under the Home Improvement Licensing Statute, Real Property Law 12-B, the plaintiff did have a claim under GBL 349 because of defendant’s “ failure...to comply with RPL Article 12-B “ by not including important information on the contract such as the “ inspector’s licensing information “); Ricciardi v. Frank d/b/a/ InspectAmerica Enginerring,P.C.[135] (civil engineer liable for failing to discover wet basement; violation of GBL 349 but damages limited to fee paid)];

[25] **In Vitro Fertilization** [Karlin v. IVF America, Inc. [136] (misrepresentations of in vitro fertilization rates of success)];

[26] **Insurance Coverage & Rates** [Gaidon v. Guardian Life Insurance Co. & Goshen v. Mutual Life Insurance Co.[137] (misrepresentations that " out-of-pocket premium payments (for life insurance policies) would vanish within a stated period of time "); Batas v. Prudential Insurance Company of America[138](GBL 349 and 350 claims properly sustained regarding, inter alia, allegations of failure " to conduct the utilization review procedures...promised in their contracts ", "misrepresentation of facts in materials to induce potential subscribers to obtain defendants' health policies "); Monter v. Massachusetts Mutual Life Ins. Co.[139] (misrepresentations with respect to the terms " Flexible Premium Variable Life Insurance Policy "); Beller v. William Penn Life Ins. Co.[140](" Here, the subject insurance contract imposed a continuing duty upon the defendant to consider the factors comprising the cost of insurance before changing rates and to review the cost of insurance rates at least once every five years to determine if a change should be made...we find that the complaint sufficiently states a (G.B.L. § 349) cause of action "); Skibinsky v. State Farm Fire and Casualty Co.[141]

(misrepresentation of the coverage of a “ builder’s risk “ insurance policy); Brenkus v. Metropolitan Life Ins. Co.[142] (misrepresentations by insurance agent as to amount of life insurance coverage); Makastchian v. Oxford Health Plans, Inc.[143] (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.[144](“ 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.[145] (“ 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.[146] (“ 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.[147] (automobile insurance company fails to provide timely defense to insured)].

[27] **Internet Marketing & Services** [Zurakov v. Register.Com, Inc.[148](" 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.[149] (" 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[150] (failing to deliver purchased magazine subscriptions); Scott v. Bell Atlantic Corp.[151], (misrepresented Digital Subscriber Line (DSL)[152] Internet services).

On the issue of long arm jurisdiction over sellers of items on EBay see Sayeedi v. Walser[153](" EBay is a popular internet service that provides consumers with a way to buy and sell new or used goods in an auction style format over the internet. In 1995 EBay was one of the first to pioneer what has now become a ubiquitous form of e-commerce. As facilitators and providers of Ebay-type services continue to increase in popularity courts are, not surprisingly, faced with the task of applying settled law to modern technological dilemmas...No evidence (to) indicate Defendant may be purposely availing himself specifically to the business of New Yorkers or any desire to take advantage of New York law. The Defendant was prepared to sell his Chevrolet engine to whoever the highest bidder happened to be regardless of the state in which they happened to reside "; no basis for the assertion of long arm jurisdiction found ")];

[28] **" Knock-Off " Telephone Numbers** [Drizin v. Sprint Corp.[154] (" 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[155] (medical malpractice and deceptive advertising arising from lasik eye surgery)];

[29.1] **Layaway Plans** [Amiekumo v. Vanbro Motors, Inc.[156](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** [Pludeman v. Northern Leasing Systems, Inc.[157] (equipment lessees asserted, inter alia, violations of GBL 349 arising from allegations that defendant " purposely concealed three pages of the four-page equipment lease...the concealment finds support in the first page...which contains all of the elements that would appear to form a binding contract including the signature line, a personal guaranty and forum selection, jury waiver and merger clauses, with the only references to the additional pages of the lease being in very small print...defendants did not provide plaintiffs with fully executed copies of the leases and overcharged them by deducting amounts from their bank accounts greater than those called for by the leases ")]; Sterling National Bank v. Kings Manor Estates[158](" 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[159]. (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.[160] (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[161](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[162] (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: Improper Fees & Charges** [MacDonell v. PHM Mortgage Corp.[163] (mortgagors challenged defendant's $40 fee " charged for faxing the payoff statements " [which plaintiffs paid] as violations of GBL 349 and RPL 274-a(2) [" mortgagee shall not charge for providing the mortgage-related documents, provided...the mortgagee may charge not more than twenty dollars, or such amount as may be fixed by the banking board, for each subsequent payoff statement "] which statutory claims were sustained by the Court finding that the voluntary payment rule does not apply[164] and noting that " To the extent that our decision in Dowd v. Alliance Mortgage Company [165] holds to the contrary it should not be followed "); Kidd v. Delta Funding Corp.[166](" 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[167]. (consumers induced to pay for private mortgage insurance beyond requirements under New York Insurance Law § 6503); Negrin v. Norwest Mortgage, Inc.[168] (mortgagors desirous of paying off mortgages charged illegal and unwarranted fax and recording fees); Trang v. HSBC Mortgage

Corp., USA[169] ($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] **Mortgages & Home Equity Loans: Improper Closings** [Bonior v. Citibank, N.A.[170] (" The Court will set forth below several ' problems ' with this closing that might have been remedied by the active participation of legal counsel for the borrowers as well for the other participants ". The Court found that the lenders had violated G.B.L. § 349 by (1) failing to advise the borrowers of a right to counsel, (2) use of contradictory and ambiguous documents containing no prepayment penalty clauses and charging an early closing fee, (3) failing to disclose relationships settlement agents and (4) document discrepancies " The most serious is that the equity source agreement and the mortgage are to be interpreted under the laws of different states, New York and California respectively "; damages of $50.00 against each lender awarded pursuant to G.B.L. § 349(h))].

[35] **Movers; Household Goods** [Goretsky v. ½ Price Movers, Inc[171]. (" 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.[172](deceptive packaging of retail food products)];

[36] **Professional Networking** [BNI New York Ltd. v. DeSanto[173] (enforcing an unconscionable membership fee promissory note)];

[37] **Privacy** [Anonymous v. CVS Corp[174]. (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[175] (same); Meyerson v. Prime Realty Services, LLC[176], (" 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[177] (selling bogus " Beat The System Program " certificates); Brown v. Hambric[178] (selling misrepresented instant travel agent credentials and educational services)];

[39] **Real Estate Sales** [Gutterman v. Romano Real Estate[179] (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[180] (deceptive advertisement and sale of condominium units); B.S.L. One Owners Corp. v. Key Intl. Mfg. Inc.[181](deceptive sale of shares in a cooperative corporation); Breakwaters Townhouses Ass'n. v. Breakwaters of Buffalo, Inc.[182](condominium units); Latiuk v. Faber Const. Co.[183](deceptive design and construction of home); Polonetsky v. Better Homes Depot, Inc.[184](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.[185] (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,[186](" 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.[187](" 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.[188] (" 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.[189](G.B.L. § 349 covers securities transactions)];

[41] **Sports Nutrition Products** [Morelli v. Weider Nutrition Group, Inc.[190],(manufacturer of Steel Bars, a high-protein nutrition bar, misrepresented the amount of fat, vitamins, minerals and sodium therein)];

[41.1] **Suing Twice On Same Claim** [In Centurion Capital Corp. v. Druce[191] (plaintiff, a purchaser of credit card debt, was held to be a debt collector as defined in Administrative Code of City of New York § 20-489 and because it was not licensed its claims against defendant must be dismissed. In addition, defendant's counterclaim asserting that plaintiff violated G.B.L. § 349 by " bringing two actions for the same claim...is sufficient to state a (G.B.L. § 349) cause of action ")].

[41.2] **Tax Advice** [Mintz v. American Tax Relief[192] (" the second and fourth mailing unambiguously state that recipients of the (post) cards ' can be helped Today ' with their ' Unbearable Monthly Payment Plan(s) ' and that defendant can stop wage garnishments, bank seizures and assessment of

interest and penalties. These two mailing...make explicit promises which...Cannot be described as ‘ puffery ‘ and could...be found to be purposely misleading and deceptive “];

[41.3] **Taxes Wrongfully Collected** [Lawlor v. Cablevision Systems Corp.[193] (Cablevision subscribers challenged the imposition of taxes and fees on internet services [“ Lawlor alleges Cablevision had no legal right to charge these taxes or fees and seeks to recover...for the taxes and fees wrongfully collected “] as a violation of GBL 349 [“ If the services had not been provided by a telecommunications provider, these services would not have been subject to the...taxes “].

[42] **Termite Inspections** [Anunziatta v. Orkin Exterminating Co., Inc.[194](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.,[195](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[196] (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[197] (toll is a use tax and not consumer oriented transaction)];

[45] **Travel Services** [Meachum v. Outdoor World Corp.[198] (misrepresenting availability and quality of vacation campgrounds; Malek v. Societe Air France[199](provision of substitute flight and its destination did not mislead " plaintiff in any material way "); Vallery v. Bermuda Star Line, Inc.[200] (misrepresented cruise); Pellegrini v. Landmark Travel Group[201] (refundability of tour operator tickets misrepresented); People v. P.U. Travel, Inc.[202](Attorney General charges travel agency with fraudulent and deceptive business practices in failing to deliver flights to Spain or refunds)];

[45.1] **Tummy Tighteners**

In Johnson v. Body Solutions of Commack, LLC[203] the plaintiff entered into a contract with defendant and paid $4,995 for a single " treatment to tighten her stomach area which lasted 30 minutes " wherein the defendant allegedly applied capacitive radio

frequency generated heat to plaintiffs’ stomach in order to tighten post childbirth wrinkled skin (and according to plaintiff) the service had no beneficial effect whatsoever upon her stomach “. At issue were various representations the essence of which was (1) the 30 minute treatment “ would improve the appearance of her stomach area “, (2) “ One using the websites, provided to him or her by the defendant, will thus be led to believe they are dealing with medical doctors when they go to Body Solutions...another page of this site, described ‘ The... Procedure ‘ as ‘ available only in the office of qualified physicians who specialize in cosmetic procedures ‘...the website provided to the plaintiff for reference promises that treatment will be provided exclusively in a physician’s office...There is no...evidence that the plaintiff was treated in a physician’s or doctor’s office or by a doctor...The Court finds that the defendant has engaged in deceptive conduct under (GBL 349) by not treating her in a medical doctor’s office under the proper supervision of a medical doctor and/or by representing...that she would receive noticeable beneficial results from a single 30 minute treatment and that the lack of proper medical involvement and supervision caused the lack of positive results “; plaintiff awards $4,995 together with interest)].

[46] **TV Repair Shops** [Tarantola v. Becktronix, Ltd[204].

(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[205], 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[206] (the bait and switch[207] 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 “; violation of GBL 349)]. For more on wedding

litigation see **Weddings** Section below.

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.[208] (defective ‘ high speed ‘ Internet services falsely advertised); Card v. Chase Manhattan Bank[209] (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 “[210]. G.B.L. § 350 covers a broad spectrum of misconduct [Karlin v. IVF America[211] (“ (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[212] (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 [213] (" 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)); People v. Applied Card Systems, Inc., 41 A.D. 3d 4, 834 N.Y.S. 2d 558 (2007)(" Supreme Court imposed penalties lower than those proposed by petitioner. It keenly considered CCB's profitability and found that it had the ability to pay penalties which would not be destructive of its business. While it did impose a $500 penalty with respect to respondents' misrepresentation of payoff amounts in connection with the re-aging of consumers' accounts, Supreme Court justified that penalty by finding the practice ' particularly abhorrent '")].

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 [In Berkman v. Robert's American Gourmet Food, Inc.[214], (a class of consumers of Pirate's Booty, Veggie Booty and Fruity Booty brands snack food alleged defendant's advertising " made false and misleading claims concerning the amount of fat and calories contained in their products ". Noting that certification of a settlement class requires heightened scrutiny [" where a

class action is certified for settlement purposes only, the class prerequisites ...must still be met and indeed scrutinized "][215], the Court denied class certification to the GBL 350 claim because individual issues of reliance predominated [" common reliance on the false representations of the fat and caloric content...cannot be presumed (in GBL 350 claims) "][216], but noted that certification of the GBL claim may be appropriate if limited to New York residents [" causes of action predicated on GBL 349 which do not require reliance (may be certifiable but) a nationwide class certification is inappropriate "][217]; See also: Pelman v. McDonald's Corp.[218](G.B.L. § 350 requires proof of reliance); Leider v. Ralfe[219] (G.B.L. § 350 requires proof of reliance); Gale v. International Business Machines Corp.[220](" 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.[221] 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[222] (Used Car Lemon Law), express warranty[223], implied warranty of merchantability[224] (U.C.C. §§ 2-314, 2-318), Vehicle and Traffic Law [V&T] § 417, strict products liability[225]] appears in Ritchie v. Empire Ford Sales, Inc.[226], 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.[227], 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 “[228]. In Giarratano v. Midas Muffler[229], 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 “[230]]. 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[231]. See also: Chun v. BMW of Manhattan, Inc.[232](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[233] (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[234](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; 2-A-212, 2-A-213; 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[235]]. 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[236]., (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.[237] (disclaimer not conspicuous); Mollins v. Nissan Motor Co., Inc.[238](" documentary evidence conclusively establishes all express warranties, implied warranties of merchantability and implied warranties of fitness for a particular purpose were fully and properly disclaimed ")]. 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.[239]]

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

In Tarantino v. DaimlerChrysler Corp.[240], DiCinto v. Daimler Chrysler Corp.[241] and Carter-Wright v. DaimlerChrysler Corp.[242], 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.[243], 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[244], 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[245] 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.[246](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.[247] 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**

As stated by the Court of Appeals in Matter of DaimlerChrysler Corp., v. Spitzer[248] " In 1983, the Legislature enacted the New Car Lemon Law (G.B.L. § 198-a) ' to provide New York consumers greater protection that afforded by automobile manufacturers' express limited warranties or the Federal Magnuson-Moss Warranty Act '". 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.[249]].

In Kandel v. Hyundai Motor America[250] (" The purpose of the Lemon Law is to protect purchasers of new vehicles. This law is remedial in nature and therefore should be liberally construed in favor of consumers...The plaintiff sufficiently established that the vehicle was out of service by reason of repair of one or more nonconformities, defects or conditions for a cumulative total of 30 or more calendar days within the first 18,000 miles or two years...that the defendant was unable to correct a problem that '

substantially impaired ‘ the value of the vehicle after a reasonable number of attempts...and the defendant failed to meet its burden of proving its affirmative defense that the stalling problem did not substantially impair the value of the vehicle to the plaintiff...plaintiff was entitled to a refund of the full purchase price of the vehicle “).

In General Motors Corp. V. Sheikh, 41 A.D. 3d 993, 838 N.Y.S. 2d 235 (2007)the Court held that a vehicle subject to “ conversion “ is not covered by GBL 198-a (“ it is unrefuted that only evidence at the hearing regarding the cause of the leaky windshield was the expert testimony offered by petitioner’s area service manager, who examined the vehicle and its lengthy repair history and opined that the leak was caused by the extensive conversion of the vehicle by American Vans “.

The consumer has no claim under G.B.L. § 198-a if the dealer has “ complied with this provision by accepting the vehicle, canceling the lease and refunding...all the payments made on account of the lease “ [Mollins v. Nissan Motor Co., Inc.[251]] or if the “ cause of the leaky windshield “ was extensive alterations done after final assembly by the manufacturer [Matter of General Motors Corp. [Sheikh][252]].

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[253] (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[254]. However, the defect need not be present at the time of arbitration hearing[255] [" 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 "[256]]. Civil Courts have jurisdiction to adjudicate Lemon Law refund remedy claims up to $25,000.[257]. In Alpha Leisure, Inc. v. Leaty[258]the Court approved an arbitrators award of $149,317 as the refund price of a motor home that " was out of service many times for repair ".

Attorneys fees and costs may be awarded to the prevailing consumer [Kandel v. Hyundai Motor America[259] (" plaintiff was entitled to an award of a statutory attorney's fee "); Kucher v. DaimlerChrysler Corp.[260](" 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[261]($5,554.35 in attorneys fees and costs of $300.00 awarded)].

[F.1] **Used Cars**

In Matter of City Line Auto Mall, Inc. v. Mintz[262] a used car dealer was charged with failing to provide consumers with essential information regarding the used vehicles they purchased. The Court found that " Substantial evidence supports the findings that for more than two years petitioner engaged in deceptive trade practices and committed other violations of its used-car license by failing to provide consumers with essential information (Administrative Code 20-700, 20-701[a][2], namely the FTC Buyers Guide (16 CFR 455.2) containing such information as the vehicle's make, model, VIN, warranties and service contract; offering vehicles for sale without the price being posted (Administrative Code 20-7-8), failing to have a ' Notice to Our Customers ' sign conspicuously posted within the business premises (6 RCNY 2-103[g][1][v]) and carrying on its business off of the licensed premises (Administrative Code 20-268[a])...We reject petitioner's argument that respondent's authority to license and regulate used-car dealers is preempted by State law. While Vehicle and Traffic Law 415 requires that used-car dealers be registered, the State has not assumed full regulatory responsibility for their licensing ".

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

In B & L Auto Group, Inc. v. Zilog[263] 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 Goldsberry v. Mark Buick Pontiac GMC[264] the Court noted that plaintiff " bought a used automobile and a ' SmartChoice 2000 ' extended warranty, only later to claim that neither choice was very smart ". Distinguishing Barthley v. Autostar Funding LLC[265] [which offered " a tempting peg upon which the Court can hang its robe "] the Court found for plaintiff in the amount $1,119.00 [cost of the worthless extended warranty] plus 9% interest.

[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.[266] (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.[267] (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[268]], does not apply to used cars with more than 100,000 miles when purchased[269] and has been applied to used vehicles with coolant leaks [Fortune v. Scott Ford, Inc.[270]], malfunctions in the steering and front end mechanism [Jandreau v. LaVigne[271], Diaz v. Audi of America, Inc.[272]], stalling and engine knocking [Ireland v. JL's Auto Sales, Inc.[273]], vibrations [Williams v. Planet Motor Car, Inc.[274]], " vehicle would not start and the ' check engine ' light was on " [DiNapoli v. Peak Automotive, Inc.[275]] and malfunctioning " flashing data communications link light " [Felton v. World Class Cars[276]].

An arbitrator's award may be challenged in a special proceeding [C.P.L.R. 7502][Lipscomb v. Manfredi Motors[277]] and " does not necessarily preclude a consumer from commencing a subsequent action provided that the same relief is not sought in

the litigation [Felton v. World Class Cars[278]].

Recoverable damages include the return of the purchase price and repair and diagnostic costs [Williams v. Planet Motor Car, Inc.[279] , 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.[280]; Ritchie v. Empire Ford Sales, Inc.[281] (dealer liable for Ford Escort that burns up 4 ½ years after purchase); People v. Condor Pontiac[282] (

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.[283]].

[K] **Repossession & Sale Of Vehicle: U.C.C. § 9-611(b)**

In Coxall v. Clover Commercials Corp.[284], 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.

[L] **Wrecked Cars**

In Jung v. The Major Automotive Companies, Inc.[285] a class of 40,000 car purchasers charged the defendant with fraud “ in purchas(ing) automobiles that were ‘ wrecked ‘ or ‘ totaled ‘ in prior accidents, had them repaired and sold them to unsuspecting consumers...purposely hid the prior accidents from consumers in an attempt to sell the repaired automobiles at a higher price for a profit “. The parties jointly moved for preliminary approval of a proposed settlement featuring (1) a $250 credit towards the purchase of any new or used car, (2) a 10% discount for the purchase of repairs, parts or services, (3) for the next three years each customer who purchases a used car shall receive a free CarFax report and a description of a repair, if any and (4) training of sales representatives “ to explain a car’s maintenance history “, (5) projected settlement value of $4 million, (6) class representative incentive award of $10,000, and (7) $480,000 for attorneys fees, costs and expenses. The Court preliminarily certified the settlement class, approved the proposed settlement

and set a date for a fairness hearing.

[M] **Inspection Stations**

In Stiver v. Good & Fair Carting & Moving, Inc.[286] the plaintiff was involved in an automobile accident and sued an automobile inspection station for negligent inspection of one of the vehicles in the accident. In finding no liability the Court held " as a matter of public policy we are unwilling to force inspection stations to insure against ricks ' the amount of which they may not know and cannot control, and as to which contractual limitations of liability [might] be ineffective '...If New York State motor vehicle inspection stations become subject to liability for failure to detect safety-related problems in inspected cars, they would be turned into insurers. This transformation would increase their liability insurance premiums and the modest cost of a State-mandated safety and emission inspection ($12 at the time of the inspection in this case) would inevitably increase ").

5.1] **Educational Services**

In Drew v. Sylvan Learning Center Corp.[287] parents enrolled

their school age children in an educational services[288] program which promised " The Sylvan Guarantee. Your child will improve at least one full grade level equivalent in reading or math within 36 hours of instruction or we'll provide 12 additional hours of instruction at no further cost to you ". After securing an $11,000 loan to pay for the defendant's services and eight months, thrice weekly, on one hour tutoring sessions the parents were shocked when " based on the Board of Education's standards, it was concluded that neither child met the grade level requirements. As a result plaintiff's daughter was retained in second grade ".

The Court found (1) fraudulent misrepresentation noting that no evidence was introduced " regarding Sylvan's standards, whether those standards were aligned with the New York City Board of Education's standards, or whether Sylvan had any success with students who attended New York City public schools ", (2) violation of GBL 349 citing Brown v. Hambric[289], Cambridge v. Telemarketing Concepts[290] and People v. McNair[291] in that " defendant deceived consumers...by guaranteeing that its services would improve her children's grade levels and there by implying that its standards were aligned with the Board of Education's standards " and (3) unconscionability [" There is absolutely no reason why a consumer interested in improving her children's academic status should not be made aware, prior to engaging Sylvan's services, that these services cannot, with any reasonable

probability, guarantee academic success. Hiding its written disclaimer within the progress report and diagnostic assessment is unacceptable "]. See also: Andre v. Pace University[292] (failing to deliver computer programming course for beginners).

6] **Homes, Apartments & Coops**

[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[293]].

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.[294] (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.[295](construction of a new, custom home falls within the coverage of G.B.L. § 777(2) and not G.B.L. § 777-a(4))].

[A.1] **Home Inspections**

In Carney v. Coull Building Inspections, Inc.[296] the home buyer alleged that the defendant licensed home inspector " failed to disclose a defective heating system " which subsequently was replaced with a new " heating unit at a cost of $3,400.00 " although the " defendant pointed out in the report that the hot water heater was ' very old ' and " has run past its life expectancy ". In finding for the plaintiff the Court noted that although the defendant's damages would be limited to the $395.00 fee paid [See e.g., Ricciardi v. Frank d/b/a/ InspectAmerica Enginerring,P.C.[297] (civil engineer liable for failing to discover wet basement)] and no private right of action existed under the Home Improvement Licensing Statute, Real Property Law 12-B, the plaintiff did have a claim under GBL 349 because of defendant's " failure...to comply with RPL Article 12-B " by not including important information on the contract such as the " inspector's licensing information ".

In Mancuso v. Rubin[298] the plaintiffs retained the services of a home inspector prior to purchasing a house and relied on the inspector's report stating " no ' active termites or termite action was apparent '" but disclaimed by also stating that the " termite inspection certification " was "' not a warranty or a guaranty that there are no termites " and its liability, if any, would be " limited to the $200 fee paid for those services ". After the closing the plaintiffs claim they discovered " extensive

termite infestation and water damage which caused the home to uninhabitable and necessitated extensive repair ". The Court found no gross negligence or fraud and limited contractual damages to the $200 fee paid. As for the homeowners the complaint was dismissed as well since no misrepresentations were made and the house was sold " as is " [see Simone v. Homecheck Real Estate Services Inc.[299]]

[B] **Home Improvement Contractor Licensing: C.P.L.R. § 3015(e); G.B.L. Art. 36-A; RCNY § 2-221; N.Y.C. Administrative Code § 20-387, Nassau County Administrative Code § 21-11.2**

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)][see People v. Biegler[300](noting the differences between NYC Administrative Code 20-386 and Nassau County Administrative Code 21-11.1.7 (" there is no requirement under the Nassau County home improvement ordinance that the People plead or prove that the ' owner ' of the premises did actually reside at or intend to reside at the place where the home improvement was performed in order to maintain

liability under the ordinance “)].

Should the home improvement contractor be unlicensed he will be unable to sue the homeowner for non-payment for services rendered [Flax v. Hommel[301] (“ Since Hommel was not individually licensed pursuant to Nassau County Administrative Code § 21-11.2 at the time the contract was entered and the work performed, the alleged contract...was unenforceable “); CLE Associates, Inc. v. Greene,[302] (N.Y.C. Administrative Code § 20-387; “ it is undisputed that CLE...did not possess a home improvement license at the time the contract allegedly was entered into or the subject work was performed...the contract at issue concerned ‘ home improvement ‘...the Court notes that the subject licensing statute, §20-387, must be strictly construed “); Goldman v. Fay[303] (“ 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 unlicensed contractor “); Tri-State General Remodeling Contractors, Inc v. Inderdai Baijnauth[304] [305](salesmen do not have to have a separate license); Franklin Home Improvements Corp. V. 687 6th Avenue Corp.[306](home improvement contractor licensing does not apply to commercial businesses (“ [t]he legislative purpose in enacting [CPLR 3015(e)] 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 was licensed "); Altered Structure, Inc. v. Solkin[307](contractor unable to seek recovery for home improvement work " there being no showing that it was licensed "); Routier v. Waldeck[308] (" 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.[309],(" 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[310] (unlicenced home improvement contractor unable to sue homeowner in Small Claims Courts for unpaid bills); Moonstar Contractors, Inc. v. Katsir[311](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[312]] while obtaining a license after performance of the contract is not sufficient[B&F Bldg. Corp. V. Liebig[313] (" 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 "); CLE Associates, Inc. v. Greene,[314]].

Licenses to operate a home improvement business may be denied based upon misconduct [Naclerio v. Pradham[315] ("... testimony was not credible...lack of regard for a number of its suppliers and customers...Enterprises was charged with and pleaded guilty to violations of Rockland County law insofar as it demanded excessive down payments from its customers, ignored the three-day right-to-cancel notice contained in its contract and unlawfully conducted business under a name other than that pursuant to which it was licensed ")].

[C] **New Home Housing Merchant Implied Warranty: G.B.L. § 777**

G.B.L. § 777 provides, among other things, for a statutory housing merchant warranty[316] 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.[317](breach of housing merchant implied warranty claim regarding defective tub sustained; remand on damages)].

In Farrell v. Lane Residential, Inc.[318], after a seven day

trial, the Court found that the developer had violated G.B.L. § 777-a regarding " defects with regard to the heating plant; plumbing; improper construction placement and installation of fireplace; master bedroom; carpentry defects specifically in the kitchen area; problems with air conditioning unit; exterior defects and problems with the basement such that the home was not reasonably tight from water and seepage ". With respect to damages the Court found that the cost to cure the defects was $35,952.00. Although the plaintiffs sought damages for the " stigma (that) has attached to the property " [see Putnam v. State of New York[319]] the Court denied the request for a failure to present " any comparable market data ".

The statutory " Housing Merchant Implied Warranty may be excluded or modified by the builder of a new home if the buyer is offered a limited warranty that meets or exceeds statutory standards " [Farrell v. Lane Residential, Inc.[320] (Limited Warranty not enforced because " several key sections including the name and address of builder, warranty date and builder's limit of total liability " were not completed)].

The statute may not apply to a " custom home " [Security Supply Corporation v. Ciocca[321](" Supreme Court correctly declined to charge the jury with the statutory new home warranty provisions of (GBL) 777-a. Since the single-family home was to be constructed on property owned by the Devereauxs, it falls within

the statutory definition of a ‘ custom home ‘ contained in (GBL) 777(7). Consequently, the provisions of (GBL) 777-a do not automatically apply to the parties’ contract “)]. “ While the housing merchant implied warranty under (G.B.L. § 777-a) is automatically applicable to the sale of a new home, it does not apply to a contract for the construction of a ‘ custom home ‘, this is, a single family residence to be constructed on the purchaser’s own property “ [Sharpe v. Mann[322]] and, hence, an arbitration agreement in a construction contract for a custom home may be enforced notwithstanding reference in contract to G.B.L. § 777-a [Sharpe v. Mann[323]].

This Housing Merchant Implied Warranty can not be repudiated by “ an ‘ as is ‘ clause with no warranties “ [Zyburo v. Bristled Five Corporation Development Pinewood Manor[324] (
“ Defendant attempted to...Modify the Housing Merchant Implied Warranty by including an ‘ as is ‘ provision in the agreement. Under (G.B.L. § 777-b) the statutory Housing Merchant Implied Warranty may be excluded or modified by the builder of a new home only if the buyer is offered a limited warranty that meets or exceeds statutory standards [Latiuk v. Faber Construction Co., Inc.[325]; Fumarelli v. Marsam Development, Inc.[326]] .

The statute requires timely notice from aggrieved consumers [Finnegan v. Hill[327](“ Although the notice provisions of the limited warranty were in derogation of the statutory warranty (

see (G.B.L. § 777-b(4)(g)) the notices of claim served by the plaintiff were nonetheless untimely "); Biancone v. Bossi[328](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.[329] (notice adequately alleged in complaint); Taggart v. Martano[330](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[331] (" 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[332](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[333] 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[334]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.

[F] **Arbitration Agreements: G.B.L. § 399-c**

In Baronoff v. Kean Development Co., Inc.[335] the petitioners entered into construction contracts with respondent to manage and direct renovation of two properties. The agreement contained an arbitration clause which respondent sought to enforce after petitioners terminated the agreement refusing to pay balance due. Relying upon Ragucci v. Professional Construction Services[336], the Court, in " a case of first impression ", found that G.B.L. § 399-c barred the mandatory arbitration clause and, further, that petitioners' claims were not preempted by the Federal Arbitration Act [While the (FAA) may in some cases preempt a state statute such as section 399-c, it may only do so in transactions ' affecting commerce ' "].

[G] **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)].

Notwithstanding New York's adherence to the doctrine of caveat emptor in the sale of real estate " and imposed no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment "[337] there have been two significant developments in protecting purchasers of real estate. First, as stated by the Courts in Ayres v. Pressman[338] and Calvente v. Levy[339] any misrepresentations in the Property Condition Disclosure Statement mandated by Real Property Law 462 provides a separate cause of action for defrauded home buyers entitling plaintiff " to

recover his actual damages arising out of the material misrepresentations set forth on the disclosure form notwithstanding the ‘ as is ‘ clause contained in the contract of sale “[340].

Second, the Court in Simone v. Homecheck Real Estate Services, Inc.[341], “ when a seller makes a false representation in a Disclosure Statement, such a representation may be proof of active concealment...the alleged false representations by the sellers in the Disclosure Statement support a cause of action alleging fraudulent misrepresentation in that such false representations may be proof of active concealment “.

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

Tenants in Spatz v. Axelrod Management Co.[342] and coop owners in Seecharin v. Radford Court Apartment Corp.[343] 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 “[344] and may be used

affirmatively in a claim for property damage[345] or as a defense in a landlord's action for unpaid rent[346]. Recoverable damages may include apartment repairs, loss of personal property and discomfort and disruption[347].

[I] **Duty To Keep Rental Premises In Good Repair: M.D.L. § 78.**

In Goode v. Bay Towers Apartments Corp.[348] 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.

7] **Insurance**

A] **Insurance Coverage & Rates** [Gaidon v. Guardian Life Insurance Co. & Goshen v. Mutual Life Insurance Co.[349] (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.[350](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); Beller v. William Penn Life Ins. Co.[351](" Here, the subject insurance contract imposed a continuing duty upon the defendant to consider the factors comprising the cost of insurance before changing rates and to review the cost of insurance rates at least once every five years to determine if a change should be made "); Monter v. Massachusetts Mutual Life Ins. Co.[352](misrepresentations with respect to the terms " Flexible Premium Variable Life Insurance Policy "); Skibinsky v. State Farm Fire and Casualty Co.[353] (misrepresentation of the coverage of a " builder's risk " insurance policy); Brenkus v. Metropolitan Life Ins. Co.[354](misrepresentations by insurance agent as to amount of life insurance coverage); Makastchian v. Oxford Health Plans, Inc.[355] (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.[356](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.[357](" 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 "); Edelman v. O'Toole-Ewald Art Associates, Inc.[358](" action by an art collector against appraisers hire by his property insurer to evaluate damage to one of his paintings while on loan "; failure to demonstrate duty, reliance and actual or pecuniary harm); Makuch v. New York Central Mutual Fire Ins. Co.[359] (" 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.[360] (" 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.[361] (automobile insurance company fails to provide timely defense to insured)].

8] **Mortgages, Credit Cards & Loans**

[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[362]] [JP Morgan Chase Bank v. Tecl[363] (" 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 "); Community Mutual Savings Bank v. Gillen[364] (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[365] (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 ") ,

(2) the **Fair Credit Reporting Act**, 15 U.S.C. § 1681 [Citibank (South Dakota) NA v. Beckerman[366] (" The billing error notices allegedly sent by defendant were untimely since more than 60 days elapsed from the date the first periodic statement reflecting the alleged errors was transmitted "); Tyk v. Equifax Credit Information Services, Inc.[367] (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 “)].],

(3) the **Real Estate Settlement Procedures Act**, 12 U.S.C. § 2601 [RESPA][Iyare v. Litton Loan Servicing, LP[368] (borrower’s “ entitlement to damages pursuant to (RESPA) for alleged improper late charges (dismissed because) none of plaintiff’s payments during the relevant period...was made in a timely fashion “)],

4) the **Home Ownership and Equity Protection Act**, 15 U.S.C. § 1639 [HOEPA][Bank of New York v. Walden[369] (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) and

(5) **Regulation Z**, 13 C.F.R. §§ 226.1 et seq. [Bank of New York v. Walden[370]].

[E.1] **Preemption of State Law Claims**

TILA has been held to preempt Personal Property Law provisions governing retail instalment contracts and retail credit agreements [Albank, FSB v. Foland[371]], but not consumer fraud claims brought under G.B.L. §§ 349, 350 [People v. Applied Card Systems, Inc.[372] (" We next reject...contention that (TILA) preempted petitioner's claims (which) pertain to unfair and deceptive acts and practices "); People]; both TILA and RESPA have been held to " preempt any inconsistent state law " [Rochester Home Equity, Inc. v. Upton[373]) and " *de minimis* violations with ' no potential for actual harm ' will not be found to violate TILA "[374]. See also: Witherwax v. Transcare[375] (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[376] 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[377]].

But in Fuchs v. Wachovia Mortgage Corp.[378], a class of mortgagees challenged the imposition of a $100 document preparation fee for services as constituting the unauthorized practice of law and violative of Judiciary Law 478, 484 and 495(3). Specifically, it was asserted that bank employees " completed certain blank lines contained in a standard ' Fannie Mae/Freddie Mac Uniform Instrument '...limited to the name and address of the borrower, the date of the loan and the terms of the loan, including the principal amount loaned, the interest rate and the monthly payment ". The plaintiffs, represented by counsel did not allege the receipt of any legal advice from the defendant at the closing. In dismissing the complaint that Court held that charging " a fee and the preparation of the documents ...did not transform defendant's actions into the unauthorized practice of law ". Other States have addressed this issue as well[379].

[F.1] **Electronic Fund Transfer Act: 15 U.S.C. § 1693f**

In Household Finance Realty Corp. v. Dunlap[380], a mortgage

foreclosure proceeding arising from defendant's failure to make timely payments, the Court denied plaintiff's summary motion since it was undisputed " the funds were available in defendant's account to cover the preauthorized debit amount " noting that the Electronic Funds Transfer Act [EFTA] was enacted to ' provide a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund transfer systems '...Its purpose is to ' assure that mortgages, insurance policies and other important obligations are not declared in default due to late payment caused by a system breakdown '...As a consumer protect measure, section 1693j of the EFTA suspends the consumer's obligation to make payment ' [i]f a system malfunction prevents the effectuation of an electronic fund transfer initiated by [the] consumer to another person and such other person has agreed to accept payment by such means '".

In Hodes v. Vermeer Owners, Inc.[381] (landlord and tenant " contemplated the use of the credit authorization for the preauthorized payment of rent or maintenance on substantially regular monthly intervals "; landlord's unauthorized withdrawal of $1,066 to pay legal fees without advanced notice " constituted an unauthorized transfer pursuant to 15 USC § 1693e ".

[F.2] **Predatory Lending Practices; High-Cost Home Loans**

In LaSalle Bank, N.A. v. Shearon[382] the plaintiff bank sought summary judgment in a foreclosure action [" financing was for the full $355,000 "] to which defendant homeowners [" joint tax return of $29,567 "] responded by proving that the original lender had engaged in predatory lending and violated New York State Banking Law 6-l(2). The court found three violations including (1) Banking Law 6-l(2)(k) [" which deals with the plaintiff's due diligence into the ability of the defendants to repay the loan. The plaintiff has not offered one scintilla of evidence of any inquiry into the defendant's ability to repay the loan "], (2) Banking Law 6-l(2)(l)(i) [" which requires lending institutions to provide a list of credit counselors licensed in New York State to any recipient of a high cost loan "] and (3) Banking Law 6-l(2)(m) [" which states that no more that 3% of the amount financed is eligible to pay the points and fees associated with closing the loans on the real property...The $19,145.69 in expenses equates to almost 5.4% of the high cost loan and is a clear violation of the statute "]. With respect to available remedies the Court stated that defendants " may be entitled to receive: actual, consequential and incidental damages, as well as all of the interest, earned or unearned, points, fees, the closing costs charged for the loan and a refund of any amounts paid " [see discussion of this case in Scheiner, Federal Preemption of State Subprime Lending Laws, New York Law Journal, April 22, 2008,

p. 4 and the case of Rose v. Chase Bank USA, N.A., 513 F. 3d 1032 (9th Cir. 2008)].

However, in Alliance Mortgage Banking Corp. v. Dobkin[383], also a foreclosure action wherein the defense of predatory lending was raised, the Court held that " She has claimed she was the victim of predatory lending, but has not demonstrated that there was any fraud on the part of the lender or even any failure to disclose fully the terms of the loan. She relies on only one statute, Banking Law 6-l. However, she has not been able to provide any proof that she falls under its provisions, nor under a related Federal statute. See Home Ownership and Equity Protection Act of 1994 [' HOEPA '](15 USC 1639). Neither of these statutes allow mortgagors to escape their legal obligations simply because they borrowed too much ".

[G] **Credit Cards: Misrepresentations** [People v. Applied Card Systems, Inc.[384] (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[385] (" 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[386], (" 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[387] (credit card company misrepresented the application of its low introductory annual percentage rate to cash advances)].

H] **Identity Theft: G.B.L. §§ 380-s, 380-l**

In Kudelko v. Dalessio[388] the Court declined to apply retroactively to an identity theft scheme, G.B.L. §§ 380-s and 380-l which provide a statutory cause of action for damages [actual and punitive] for identity theft [" Identity theft has become a prevalent and growing problem in our society with individuals having their credit ratings damaged or destroyed and causing untold financial burdens on these innocent victims. As stated above the New York State Legislature, recognizing this special category if fraudulent conduct, gave individuals certain

civil remedies when they suffered this harm "] but did find that a claim for fraud was stated and the jury could decide liability, actual and punitive damages, if appropriate.

In Lesser v. Karenkooper.com[389] the plaintiff " an E-Bay on-line store selling pre-owned luxury handbags and accessories, claims that defendant Karenkooper.com, a website selling luxury goods...sought to destroy her business (i) by making false allegations about her and her business on the internet (and alleges, inter alia) statutory identity theft pursuant to (GBL) 380-s ". In dismissing the 380-s claim the Court noted that " The claim asserted by plaintiff...does not involve credit reporting in any way and thus does not appear to fall within the intended scope of GBL 380-s ".

I] **Debt Collection Practices: G.B.L. Article 29-H**

In American Express Centurion Bank v. Greenfield[390] 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[391].

In People v. Boyajian Law Offices[392] the Court noted that NYFDCPA (GBL 600(1)) " is a remedial statute and, as such, should be liberally construed... This is particularly true since the statute involves consumer protection...It is clear that the

NYFDCPA was intended to protect consumers from improper collection practices...the Court will not read the statute as to preclude applying these protections to debtors whose checks were dishonored "); People v. Applied Card Systems, Inc.[393](" considering the allegation that ACS engaged in improper debt collection practices (G.B.L. Article 29-H) the record reflects that despite an initial training emphasizing the parameters of the Debt Collection Procedures Act, the practice changed once actual collection practices commenced. ACS employees were encouraged to use aggressive and illegal practices and evidence demonstrated that the salary of both the collector and the supervisor were determined by their success...ACS collectors used rude and obscene language with consumers, repeatedly called them even when requested not to do so, misrepresented their identities to gain access and made unauthorized debits to consumer accounts ")].

In Centurion Capital Corp. v. Druce[394] (plaintiff, a purchaser of credit card debt, was held to be a debt collector as defined in Administrative Code of City of New York § 20-489 and because it was not licensed its claims against defendant must be dismissed. In addition, defendant's counterclaim asserting that plaintiff violated G.B.L. § 349 by " bringing two actions for the same claim...is sufficient to state a (G.B.L. § 349) cause of action "].

In Asokwah v. Burt[395]The Court addressed " the issue of

whether the defendant improperly collected funds in excess of the outstanding judgment. The plaintiff asks this Court to determine whether the defendant improperly served additional restraining... even though the defendant had already restrained sufficient funds in plaintiff's Citibank account "

[J] **Fair Debt Collective Practices Act: 15 U.S.C. § 1692e, 1692k** [Larsen v. LBC Legal Group, P.C.[396](lawfirm qualified as debt collector under FDCPA and violated various provisions thereof including threatening legal action that could not be taken, attempts to collect unlawful amounts, failing to convey true amount owed); People v. Boyajian Law Offices[397] (lawfirm violated FDCPA by threatening litigation without an intent to file suit, sought to collect time-barred debts and threatened legal action thereon and use of accusatory language); Barry v. Board of Managers of Elmwood Park Condominium[398] (FDCPA does not apply to the collection of condominium common charges because " common charges run with the unit and are not a debt incurred by the unit owner "); American Credit Card Processing Corp. V. Fairchild[399] (FDCPA does not apply to business or commercial debts; " The FDCPA provides a remedy for consumers who are subjected to abusive, deceptive and unfair debt collection practices by debt collectors. The term ' debt ' as used in that act is construed broadly to include any obligation to pay monies

arising out of a consumer transaction...and the type of consumer transaction giving rise to a debt has been described as one involving the offer or extension of credit to a consumer or personal, family and household expenses “)].

9] **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...”[400]. In DiMarzo v. Terrace View[401], 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...’”[402]] allows the consumer to recover actual damages upon proof of a bailment and/or negligence[403]. The enforceability of liability limiting clauses for

lost clothing will often depend upon adequacy of notice [Tannenbaum v. New York Dry Cleaning, Inc.[404] (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[405]($100 liability limitation in storage receipt enforced for $1,000 ripped and damaged beaver coat)].

10] **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 '"[406]. 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[407] 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[408], 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[409], other Courts have found that GBL 359-fff gives consumers a private right of action[410], a violation of which also constitutes a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs[411].

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[412], car rental agreements[413], home improvement contracts[414], insurance policies[415], dry cleaning contracts[416] and financial brokerage agreements[417]. However, this consumer protection statute is not available if the consumer also relies upon the same size type[418] 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.[419] (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[420](" 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[421] (" 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[422] (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[423](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[424](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[425] (“ 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[426] (“ 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.[427] (pet store negligently clipped the wings of Bogey, an African Grey Parrot, who flew away); Nardi v. Gonzalez[428] (“ 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[429] (two dogs burned with hair dryer by dog groomer, one dies and one survives, damages discussed); Lewis v. Al DiDonna[430](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[431] (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[432](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[433] (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.[434] (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.[435] (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[436] (five cases involving sick German Shepherds); Sacco v. Tate[437] (buyers of sick dog could not recover under GBL § 753 because they failed to have dog examined by licensed veterinarian); Roberts v. Melendez[438] (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[439] (“ 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[440](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 "[441]. 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'"[442]. 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[443] (misrepresented and grossly overpriced water purification system), Rossi v. 21st Century Concepts, Inc.[444] [misrepresented pots and pans costing $200.00 each], Kozlowski v. Sears[445] [vinyl windows hard to open, did not lock properly and leaked] and in Filpo v. Credit Express Furniture Inc[446]. [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[447]. 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[448]. In addition PPL 429(3) provides for an award of attorneys fees.

In Certified Inspections, Inc. v. Garfinkel[449] the Court found that the subject contract was covered by PPL 426(1) (" The contract provided by plaintiff failed to contain the terms required by article 10-A, particularly with regard to the right of cancellation as provided in (PPL 428). Under the circumstances, defendants effectively cancelled the contract ").

[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[450] (" 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.2] **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 “[451]. In Dvoskin v. Levitz Furniture Co., Inc.[452], 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[453] (extended warranty for automobile brake pads); Kim v. BMW of Manhattan, Inc.[454](misrepresented automobile extended warranty); Petrello v. Winks Furniture[455] (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty).

[C.3] **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.[456](misrepresentations of location, extent, size of facilities; full contract price minus use recoverable); Steuben Place Recreation Corp. v. McGuiness[457](health club contract void as violating provision that “‘ no contract for services shall provide for a term longer than thirty-six months ‘”); Nadoff v. Club Central[458](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.[459] 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[460] (salesmen do not have to have a separate license); Routier v. Waldeck[461] (" 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[462], (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.[463],(" 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[464](home improvement statute, County Law § 863.313 applies to barn renovations); Cudahy v. Cohen[465] (unlicenced home improvement contractor unable to sue homeowner in Small Claims Courts for unpaid bills); Moonstar Contractors, Inc. v. Katsir[466](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[467]) while obtaining a license after performance of the contract is not sufficient (B&F Bldg. Corp. V. Liebig[468] (" 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[469] (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] **Debt Collectors** [In Centurion Capital Corp. v. Druce[470] (plaintiff, a purchaser of credit card debt, was held to be a debt collector as defined in Administrative Code of City of New York § 20-489 and because it was not licensed its claims against defendant must be dismissed “];

[4] **Other Licensed Businesses** [B & L Auto Group, Inc. v. Zilog[471] (“ 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 “[472].

[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 “[473]. In Walker v. Winks Furniture[474], 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[475]. A violation of GBL 396-u is a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs[476]. In addition, GBL 396-u(7) provides for a trebling of damages upon a showing of a wilful violation of the statute[477].

In Dweyer v. Montalbano's Pool & Patio Center, Inc[478] 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.

In Julio v. Villency[479] the Court held " that an item of

furniture ordered in one of several designs, materials, sizes, colors or fabrics offered by a manufacturer to all of its customers, if made pursuant to an order specifying a substantial portion of its components and elements, is ‘ in substantial part custom-made “.

[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.[480](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].

[F.2] **Price Gouging**

G.B.L. § 396-r prohibits price gouging during emergency

situations. In People v. My Service Center, Inc.[481] the Court addressed the charge that a " gas station (had inflated) the retail price of its gasoline " after the "' abnormal market disruption '" caused by Hurricane Katrina in the summer of 2005. " this Court finds that respondent's pricing patently violated GBL § 396-r...given such excessive increases and the fact that such increases did not bear any relation to the supplier's costs...Regardless of respondent's desire to anticipate market fluctuations to remain competitive, notwithstanding the price at which it purchased that supply, is precisely the manipulation and unfair advantage GBL § 396-r is designed to forestall ". See also: People v. Two Wheel Corp.[482]; People v. Beach Boys Equipment Co., Inc.[483]; People v. Wever Petroleum Inc.[484] (disparity in gasoline prices following Hurricane Katrina warranting injunction); People v. Chazy Hardware, Inc.[485](generators sold following ice storm at unconscionable prices).

[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 "[486]]. In Baker v. Burlington Coat Factory Warehouse[487], 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 '"[488].

In Evergreen Bank, NA v. Zerteck[489](" defendant had violated (G.B.L. § 218-a when it sold a boat to Jacobs...(by failing) to post its refund policy...Jacobs was awarded a refund (and attorneys fees of $2,500)"); In Perel v. Eagletronics[490] 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][491]. In essence, U.C.C. § 2-314 preempts[492] GBL § 218-a [Baker v. Burlington Coat Factory Warehouse[493] (defective shedding fake fur); Dudzik v. Klein's All Sports[494] (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[495].

[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[496] 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[497] 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[498] 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[499] (defective air conditioner; breach of the implied warranty of merchantability); alarm and monitoring systems [Cirillo v. Slomin's Inc.[500] (contract clause disclaiming express or implied warranties enforced), kitchen cabinet doors [Malul v. Capital Cabinets, Inc.[501] (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[502] (U.C.C. § 2-314 preempts[503] GBL § 218-a], baseball bats [Dudzik v. Klein's All Sports[504]] and dentures [Shaw-Crummel v. American Dental Plan[505] (" 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.[506] (misrepresenting availability and quality of vacation campgrounds; Vallery v. Bermuda Star Line, Inc.[507] (misrepresented cruise); Pellegrini v. Landmark Travel Group[508] (refundability of tour operator tickets misrepresented); People v. P.U. Travel, Inc.[509](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., 2008;

Dickerson, False, Misleading & Deceptive Advertising In The Travel Industry[510]; Dickerson, The Cruise Passenger's Rights & Remedies[511]; Dickerson, Hotels, Resorts And Casinos Selected Liability Issues[512]].

1] **Airline Bumping**

In Stone v. Continental Airlines[513] 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] **Failure To Adhere To Check-In Times**

In Rottman v. El Al Israel Airlines[514] the passenger failed to check in within the airline’s 3 hour pre-boarding check-in time.

“ Claimant has failed to establish that El Al breached its contract by overbooking the flight and not offering him alternative transportation. Rottman arrived at te El Al terminal less than an hour before departure. By this time, the flight was closed and El Al properly refused him passage. However...The ticket issued by the travel agent to Rottman made it impossible for him to comply with El Al’s rule requiring a minimum of three hours for check-in...the travel agent who was bound by El Al’s rules pertaining to the sale of tickets was acting as the agent of the airline...El Al is responsible for the agent’s error in writing a ticket for the first leg of the journey that did not comply with the airline’s rules “. The plaintiff was awarded $2,945.40 together with interest.

3] **Breach Of Hotel Reservations Contract**

In Fallsview Glatt Kosher Caterers Inc v. Rosenfeld[515], 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[516] (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[517] 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[518] [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)© "[519]. 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.[520]] 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 ' "[521] The TCPA may be used by consumers in New York State Courts including Small Claims Court [Kaplan v. Democrat & Chronicle[522]; Shulman v. Chase Manhattan Bank,[523] (TCPA provides a private right of action which may be asserted in New York State Courts)]. The use of cellphone text messaging features to send advertisements may constitute a violation of TCPA [Joffe v. Acacia Mortgage Corp.[524]].

In Stern v. Bluestone[525] an attorney received 14 faxes entitled "' Attorney Malpractice Report " and subtitled ' Free Monthly report on Attorney Malpractice From the Law Office of Andrew Lavoott Bluestone '". Evidently, defendant was the subject of a similar TCPA action in 2003 wherein his faxes were found to be " prohibited advertisements ". Here, the Court found the faxes to be " unsolicited advertisements " notwithstanding their " informational " content. " The faxes at issue certainly have the purpose and effect of influencing recipients to procure

Bluestone's services...the motion court properly awarded treble damages for a willful or knowing violation of the statute ".

1] **Exclusive Jurisdiction**

Some Federal Courts have held that the states have exclusive jurisdiction over private causes of action brought under the TCPA[526] while others have not[527]. Some State Courts have held that the Federal TCPA does not preempt State law analogues which may be stricter[528]. 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 "[529]. 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[530] (" 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 "[531] the Act); Antollino v. Hispanic Media Group, USA, Inc[532]. (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[533]. Recently, the Court in Rudgayzer & Gratt v. Enine, Inc.[534] held that the TPCA, to the extent it restricts unsolicited fax advertisements, is unconstitutional as violative of freedom of speech. This decision was reversed[535], 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[536]the Court declined to pass on the constitutionality of TPCA for a lack of jurisdiction.

[2] Statute of Limitations

In Stern v. Bluestone[537]the Court noted that although " TCPA does not have an express statute of limitations " it would be appropriate to apply a " four-year statute of limitations ".

[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 "[538] 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[539] (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[540] (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.[541] 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.[542], the Appellate Term refused to consider " whether the TCPA has preempted (G.B.L.) § 396-aa in whole or in part ". However, in Weber v. U.S. Sterling Securities, Inc.[543] The Connecticut Supreme Court held that the TCPA " prohibits all unsolicited fax advertisements, and the plaintiff therefore has alleged facts in his complaint sufficient to state a cause of action under the act. Furthermore...(GBL § 396-aa) cannot preempt the plaintiff's federal cause of action ". And in Gottlieb v. Carnival Corp.[544] 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.

Proper pleading was addressed by the Connecticut Supreme Court in Weber v. U.S. Sterling Securities, Inc.[545] which noted the GBL 396-aa " provides an exception from liability for certain

transmissions: ‘ This section shall not apply...to transmissions not exceeding five pages received between the hours of 9:00P.M. and 6:00 A.M. local time ‘”. The Connecticut Supreme Court affirmed that trial court’s conclusion “ that § 393-aa precludes the plaintiff’s individual claim because the fax underlying the plaintiff’s complaint fell within the exception contained in that statute. That is, because the plaintiff failed to allege that he had received an unsolicited fax advertisement between the hours of 6 a.m. and 9 p.m., or that he had received and unsolicited fax advertisement in excess of five pages between the hours of 6 a.m. and 9. P.m., the fax at issue is not actionable under § 396-aa “. Nonetheless, the plaintiff did state a claim under the federal TCPA as noted above.

12.1] **Weddings**

Weddings are unique experiences and may be cancelled or profoundly effected by a broken engagement [see DeFina v. Scott[546] (“ The parties, once engaged, sue and countersue on issues which arise from the termination of their engagement. The disputes concern the wedding preparation expenses, the engagement ring, third-party gifts and the premarital transfer of a one-half interest in the real property which as to be the marital abode “)], failure to deliver a contracted for wedding hall [see Barry v.

Dandy, LLC[547] (" Defendant's breach of contract left Plaintiff without a suitable wedding hall for her wedding a mere two months before the scheduled date for her wedding. Monetary damages would adequately compensate Plaintiff for he loss. A bride's wedding day should be one of the happiest occasions in her life. It is a time filled with love and happiness, hopes and dreams...(She) secured the perfect wedding hall for her wedding, namely Sky Studios (which) is a unique, high-end event location with spectacular views of New York City...As Plaintiff is from Iowa, this will negatively interfere with the traveling plans of numerous out-of-town guests... Defendant is obligated to make its space available for Plaintiff's September 15th wedding pursuant to the terms of its agreement ") or " ideal wedding site "[Murphy v. Lord Thompson Manor, Inc.[548]

(unhappy bride recovers $17,000 in economic and non-economic damages plus costs arising from defendant, Lord Thompson Manor's " failure to perform a contract for wedding related services and accommodations ")], failure to deliver a promised wedding singer [see Bridget Griffin-Amiel v. Frank Terris Orchestras[549] (", the bait and switch[550] 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 ")], failure to deliver proper photographs of the wedding [see Andreani v. Romeo Photographers & Video Productions[551] (" The Plaintiff asserts that

the quality of the pictures were unacceptable as to color, lighting, positioning and events...The majority of the photos depict dark and grey backgrounds and very poor lighting. The colors were clearly distorted, for example, there were picture taken outdoors where the sky appeared to be purple instead of blue or gray; pictures where the grass and trees appeared to be brown instead of green and pictures where the lake appeared to be blue in some shots and brown in other shots. The majority of the indoor pictures were dark, blurry and unfocused ")].

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[552]. 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[553] and the Federal District Courts within the Second Circuit[554] 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[555] [especially between commercial entities[556]] within the context of individual and class actions.

However, in Ragucci v. Professional Construction Services[557] 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 "]; Baronoff v. Kean Development Co., Inc.[558] the petitioners entered into construction contracts with respondent to manage and direct renovation of two properties. The agreement contained an arbitration clause which respondent sought to enforce after petitioners terminated the agreement refusing to pay balance due. The Court, in " a case of first impression ", found that G.B.L. § 399-c barred the mandatory arbitration clause and, further, that petitioners' claims were not preempted by the Federal Arbitration Act [" While the (FAA) may in some cases

preempt a state statute such as section 399-c, it may only do so in transactions ‘ affecting commerce ‘ “].

And in D’Agostino v. Forty-Three East Equities Corp.[559] (an arbitration clause between tenant and owner regarding any dispute arising over a settlement agreement or lease was void on public policy grounds as contrary to the intent of the Legislature “ to protect and preserve existing housing, regardless of whether the proceeding is commenced by (Department of Housing Preservation and Development [HPD]) or a tenant...The Legislature set specific time frames for the completing of repairs, specific penalties if repairs are not made and gave the court broad powers to obtain compliance...This responsibility cannot be placed in the hands of an arbitrator who only has a duty to the contracting Panties, is not bound by the principals of substantive law and has no authority to compel HPD into arbitration “).

In Tal Tours v. Goldstein[560]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 Kaminetzky v. Starwood Hotels & Resorts Worldwide[561] (dispute on the cancellation of hotel reservations contract for Passover event subject to mandatory arbitration agreement which is

neither substantively nor procedurally unconscionable; motion to compel arbitration granted).

In Mahl v. Rand[562] 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] **Credit Card Defaults & Mortgage Foreclosures**

Last year we noted the avalanche of credit card default cases being brought in New York State and the extraordinary response of our Civil Courts[563]. A recent study[564] by the Urban Justice Center discussed " the explosion of consumer debt cases in the New York City Civil Court in recent years. Approximately, 320,000 consumer debt cases were filed in 2006, leading to almost $800 million in judgments. The report notes that this is more filings than all the civil and criminal cases in U.S. District Courts...findings of the report include (1) The defendant failed to appear in 93.3% of the cases, (2) 80% of cases result in default judgments, (3) Even when defendants appear, they were

virtually never represented by counsel, (4) Almost 90% of cases are brought by debt buyers "[565].

Home foreclosures have increased dramatically leading New York State Court of Appeals Chief Justice Kaye to note that " Since January 2005, foreclosure filings have increased 150 percent statewide and filing are expected to ruse at least an additional 40 percent in 2008 " and to announce a residential foreclosure program to " help ensure that homeowners are aware of available legal service providers and mortgage counselors who can help them avoid unnecessary foreclosures and reach-of-court resolutions "[566].

In addition, the Courts have responded vigorously as well [see Recent Standing Decisions from New York, NCLC Reports, Bankruptcy and Foreclosures Edition, Vol. 26, March/April 2008, p. 19 (" In a series of recent decisions several New York courts[567] either denied summary judgment or refused to grant motions for default to plaintiffs who provided the courts with clearly inadequate proof of their standing to foreclose ") including the application of New York State's predatory lending and " high-cost home loan " statute as an affirmative defense in foreclosure proceedings[568].

Several Courts have sought to establish appropriate standards for adjudicating credit card default claims brought by lenders. In Citibank (South Dakota), NA v. Martin[569] 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.

In MBNA America Bank, NA v. Straub,[570] the Court set forth appropriate procedures for the confirmation of credit card arbitration awards. " After credit card issuers and credit card debt holders turn to arbitration to address delinquent credit card accounts, as they do increasingly, courts are presented with post-arbitration petitions to confirm arbitration awards and enter money judgments (CPLR 7510). This decision sets out the statutory and constitutional framework for review of a petition to confirm a credit card debt arbitration award, utilizing legal precepts relating to confirming arbitration awards and credit cards, a novel approach most suited to this type of award.

Briefly put, to grant a petition to confirm an arbitration award on a credit card debt, a court must require the following: (1) submission of the written contract containing the provision authorizing arbitration; (2) proof that the cardholder agreed to arbitration in writing or by conduct, and (3) a demonstration of proper service of the notice of arbitration hearing and of the

award. In addition, the court must consider any supplementary information advanced by either party regarding the history of the parties' actions. Judicial review of the petition should commence under the New York provisions governing confirmation of an arbitration award but- if the written contract and cardholder agreement are established by the petition-the manner of service of the notice and award and treatment of supplementary information should be considered under the Federal Arbitration Act provisions (9 U.S.C. § 1, et seq., ' FAA') ".

In MBNA America Bank, NA v. Nelson[571]the Court stated that " Over the past several years this Court has received a plethora of confirmation of arbitration award petitions. These special proceedings commenced by a variety of creditors...seek judgment validating previously issued arbitration awards against parties who allegedly defaulted on credit card debt payments. In most of these cases the respondents have failed to answer...the judiciary continues to provide an important role in safeguarding consumer rights and in overseeing the fairness of the debt collection process. As such this Court does not consider its function to merely rubber stamp confirmation of arbitration petitions...Specifically, ' an arbitration award may be confirmed upon nonappearance of the respondent only when the petitioner makes a prima facie showing with admissible evidence that the award is entitled to confirmation '... Petition dismissed without

prejudice (for failure of proof)". The Court also created " two checklist short form order decisions to help provide guidance and a sense of unity among the judges of the Civil Court of New York. One provides grounds for dismissal without prejudice...The other lists grounds for dismissal with prejudice ".

And in MBNA America Bank NA v. Pacheco[572]the denied a motion to confirm an arbitration award for lack of proper service.

C] **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 " [Arbor Commercial Mortgage, LLC v. Martinson,[573] (the contract provision " does not establish New York as the exclusive or only possible forum "); Strujan v. AOL, 12 Misc. 3d 1160 (N.Y. Civ. 2006)(" If the court were to enforce the forum selection clause, Ms. Stujan...would have to travel to Virginia, probably more than once, for court appearances. The trip is not one easily completed in a single day which could necessitate food and lodging

expenses...Ms. Stujan would quickly see her litigation expenses eat away ay her potential recovery. Ms. Stujan brought her action against AOL in a forum designed to provide an economical and prompt resolution of action involving pro se litigants. To enforcement of the Agreement's forum selection clauses would deprive her of this forum and provide no practical alternative...the enforcement of the forum selection clause in this action would be unreasonable "); Oxman v. Amoroso[574] (Utah forum selection clause not enforced); Posh Pooch Inc. v. Nieri Argenti[575] (" 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.[576](" 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.[577](Minnesota forum

selection clause enforced citing Brooke Group v. JCH Syndicate 488[578](" Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes "); Glen & Co. V. Popular Leasing USA, Inc.,[579] (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[580] (" 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.[581] (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.[582] (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)].

D] **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[583], 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 “.

E] **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[584]. A review of the fact patterns in consumer class actions can be helpful in analyzing how consumer protection statutes may be applied. For a more detailed analysis of New York State class actions see our annual updates to Article 9 of 3 Weinstein Korn & Miller, New York Civil Practice CPLR, Lexis-Nexis (MB)(2007), Dickerson, Class Actions : The Law of 50 States[585], Law Journal Press (2008), Dickerson, New York State Consumer Protection Law and Class Actions-Parts I & II, New York State Bar Association Journal, February and May 2008 and Dickerson, Class Warfare, Aggregating and Prosecuting Consumer Claims as Class Actions-Part I, New York State Bar Association Journal, July/August 2005, p. 18.

F] **Reported Class Actions Cases : 1/1/2005-12/31/2005**

In 2005 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[586] 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[587] 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[588].

2] **Monopolistic Business Practices**

In Cox v. Microsoft[589] 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[590] dismissing a Donnelly Act claim as being prohibited by C.P.L.R. § 901(b). The Court certified a previously sustained[591] 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.[592], 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[593] [" Thus, (defendants) have been subjected to judicial remediation for their wrongs and any recovery here would be duplicative "].

In Cunningham v. Bayer, AG[594], 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[595] [" 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[596]. 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[597], 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[598].

4] **Fruity Booty Settlement Rejected**

In Klein v. Robert's American Gourmet Food, Inc.[599], the Appellate Division rejected a proposed discount coupon settlement[600] 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[601] under the Lanham Act from advertising that “ Listerine’s as effective as floss “ a class of New York consumers alleged in Whalen v. Pfizer[602], 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[603], “ 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.[604] 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.[605], 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 "[606], 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.,[607] 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.[608] a class of consumers charged defendant with " ' illegal ' slamming[609] 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 '"][610], 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[611] 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[612], 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.[613], 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[614], 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 “[615]. The Court also noted that the filing of a class action complaint “ is not a sufficient indication of protest by each proposed “ class member[616].

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[617]. In Heiko Law Offices, P.C. v. AT&T Wireless Services, Inc.[618] 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[619]

[“ 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 “][620].

In Investment Corp. v. Kaplan[621], 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.[622], the latest case involving “ vanishing premium “ life insurance policies[623], 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 “[624].

13] **Labor Disputes**

In Jacobs v. Macy’s East, Inc.[625], the Court, which had

earlier sustained a cause of action under Labor Law § 193[626], 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 "[627] 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[628], a class of commissioned sales persons sought recovery of amounts deducted for ' unidentified returns '[629] from their commissions. The Court granted certification finding adequacy of representation in that plaintiff had sufficient financial resources[630] 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.[631], 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.[632], 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[633] and the action dismissed " because none of the remaining named plaintiffs allege a relationship with any of the remaining non-settling defendants "[634].

In North Shore Environmental Solutions, Inc. v. Glass,[635] 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.[636], 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,[637] 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,[638] 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,[639] 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,[640] 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.,[641] 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.,[642] 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.,[643] 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,[644] 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.,[645] 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,[646] 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[647], the Court, which had earlier sustained claims for fraud and a violation of G.B.L. § 349[648] and certified[649] 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[650], 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©[651]] should exercise its discretion and require the Defendant to bear the necessary costs "].

In Naposki v. First National Bank of Atlanta[652], 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[653], the Court rejected the use of opt-in notice[654], 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[655], 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 '"[656]].

21.1] **Insurance Dividends**

In Rabouin v. Metropolitan Life Insurance Company,[657] 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 "[658]. 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.[659], Leyse v. Flagship Capital Services Corp.[660], Ganci v. Cape Canaveral Tour & Travel, Inc.[661], Weber v. Rainbow Software, Inc.[662] and Bonime v. Discount Funding Associates, Inc.[663], 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[664] 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 "[665].

23] **Residential Electricity Contracts**

In Emilio v. Robison Oil Corp.[666], 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 "[667].

24] **Oil & Gas Royalty Payments**

In Cherry v. Resource America, Inc.[668], the Court, relying upon its earlier decision in Freeman v. Great Lakes Energy Partners[669], 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[670] 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[671], 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,[672] 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[673], 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,[674] 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.

G] **Reported Class Action Cases : 1/1/2006-12/31/2006**

In 2006 the Court of Appeals ruled on the enforceability of a forum selection clause in an employment class action. In addition the Appellate Divisions and numerous trial Courts ruled on a variety of class actions in 2006.

1] **Forum Selection Clause Enforced**

In Boss v. American Express Financial Advisors, Inc.[675], a

class action brought by " first-year financial advisors " challenging the' expense allowance ' paid by each advisor for the maintenance of office space and overhead expenses " as violating Labor Law § 193 and 12 NYCRR 195.1, the Court of Appeals held that a contractual forum selection clause " provid(ing) unambiguously that any disputes are to be decided in the courts of Minnesota and that Minnesota law shall govern " would be enforced [" ' Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes' "]. Boss is the most recent in a flood of cases involving the enforceability of contractual provisions, particularly, in consumer contracts[676], regarding forum selection, choice of law, mandatory arbitration[677] and class action waivers[678]. As for plaintiff's challenge to the enforcement of the Minnesota choice of law clause as " contrary to the public policy concerns of New York ", the Court of Appeals held that such an argument " should have been made to a court in Minnesota-the forum the parties chose by contract ".

2] **Insurance Dividends**

In Rabouin v. Metropolitan Life Ins. Co.[679], the Court decertified a global class of insureds challenging the issuance of dividends on manageability grounds [" questions concerning

the initial policies as to reliance, parol evidence regarding the parties' intentions and the potential need for the examination of other documents for contract interpretation...would warrant the application of the law of other jurisdictions (and) approximately 30% of the (class) live in jurisdictions with shorter statutes of limitations than exist in New York "] as well as a GBL § 349 New York subclass [" the policies...were purchased...10 years before the alleged deceptive practices...the issue of whether the alleged deceptive acts were misleading... requires inquiry into both the nature of the initial solicitations as well as the annual statements and that such inquiry necessitates the resolution of individual issues "].

3] **Water & Sewer Customers**

In Stevens v. American Water Services, Inc.[680] a class of water and sewer customers in Buffalo challenged the imposition of a 21% surcharge on past due accounts alleging unjust enrichment and a violation of GBL § 349. In dismissing the complaint the Court held that the relief sought was in the nature of a CPLR Article 78 proceeding and as such was time barred because it had not been filed within the four month statute of limitations. The Court also held that the Water Board and Sewer Authority had " indeed (acted) within their authority ".

4] **Donnelly Act**

In three consumer class actions alleging violations of GBL § 340 [Donnelly Act][Paltre v. General Motors Corp.[681] and Sperry v. Crompton Corp.[682]] and one by homeowners [Hamlet On Olde Oyster Bay Home Owners Association, Inc. v. Holiday Organization[683]] the Courts reaffirmed that CPLR 901(b) prohibits class actions seeking a penalty [the Donnelly Act " mandates that ' any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby '...The treble damages provision is a penalty within the meaning of CPLR 901(b)...(And) may not be maintained because the Donnelly Act does not specifically authorize the recovery of this penalty in a class action "[684]].

In Paltre, a class action alleging " that Japanese, American and Canadian automobile manufacturers (conspired) to sell or lease vehicles in New York at prices 10% to 30% higher than nearly identical vehicles in Canada and for effectively prohibiting New York residents from purchasing those vehicles in Canada ", the Court also dismissed a GBL § 349 claim " because the alleged misrepresentations were either not directed at consumers or were not materially deceptive ".

And in Sperry, a class action by tire purchasers alleging

that producers of rubber processing chemicals conspired to fix prices, the Court also dismissed an unjust enrichment claim " Because the plaintiff was not in privity with the defendants ".

5] **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 "[685]. 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 2006 the Court in Giovanniello v. Carolina Wholesale Office Machine Co.[686] as other Courts did in 2005 [Rudgayser & Gratt v. Cape Canaveral Tour & Travel, Inc.[687], Leyse v. Flagship Capital Services Corp.[688], Ganci v. Cape Canaveral Tour & Travel, Inc.[689], Weber v. Rainbow Software, Inc.[690] and Bonime v. Discount Funding Associates, Inc.[691]], held that class action treatment of TCPA claims is inappropriate under CPLR § 901(b)'s prohibition of class actions seeking a penalty.

6] **Photocopying Costs**

In Morales v. Copy Right, Inc.[692] a class of consumers alleged that defendants " violated CPLR 8001 by charging more than 10 cents per page for photocopying subpoenaed medical records ". Relying upon the voluntary payment rule the Court dismissed for a failure to state a cause of action because the complaint failed to allege that payment was induced by fraud or was the result of mistake of material fact or law.

7] **Tobacco Master Settlement Agreement**

In State v. Philip Morris, Inc.[693] the Court revisited the Master Settlement Agreement [MSA] between " the four largest tobacco companies (which) were the original participating manufacturers [OPMs] " and which provided for the subsequent participation of some " 40 additional tobacco companies. Including the three nonparty appellants herein [SPMs] ". This time a dispute arose regarding how the OPMs would be compensated " for any loss of market share that may be attributable to the competitive disadvantage these companies face as a result of the MSA as against nonparticipating manufacturers ". The Court held that the dispute must be resolved by a " panel of three neutral arbitrators ". The Court noted that " Arbitration is strongly favored under New York law...Any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration...there is a

compelling logic to having these disputes handled by a single arbitration panel of three federal judges rather than numerous state and territorial courts "[694].

8] **Outdoor World Settlement**

In Colbert v. Outdoor World Corp.[695], " [a]fter nine years of fighting (plaintiffs) achieved a wide-ranging settlement in a class action (involving) the sale of campground time-share vacation packages located in the Eastern U.S. "[696]. A plaintiff class had been certified in 2000 alleging " false and misleading statements made in promotional materials and at sales presentations (and sought damages) and other relief under various...theories " including GBL § 349, false advertising, violation of New York Membership Campground Act, breach of contract, unconscionability and unjust enrichment[697]. In 2004 the Court certified a " class action counterclaim which alleged breach of contract against (the Class) to the extent they were deficient in payments due under the Membership Campground Agreements "[698]. The settlement provided for the payment by defendants of $8,250,000 to be " utilized for payments to (the Class), costs of notice and settlement administration, incentive fees to plaintiffs ($ 20,000), attorney's fees and expenses of Class Counsel (not to exceed $2,970,000) and payments into an

infrastructure Improvement Fund ($1,000,000)”[699]. In addition the defendant agreed to dismiss its “ class action counterclaim... against ‘ Inactive ‘ Class Members (and) credit reporting agencies (will be) directed to expunge all records involving credit reports of Inactive Members. Lastly, class members would receive “ a distribution of cash benefits...without the necessity of filing a claim form “[700].

9] **Counterfeit Drugs**

In Dimich v. Med-Pro, Inc.[701] a class of consumers alleged “ a scheme to sell counterfeit Lipitor (after receipt of a) recall letter “. The Court denied class certification because the plaintiff’s claims were not typical [“ the prescription was issued to his wife and paid for, other than a $15 co-payment, by her insurance plan and the recall letter was addressed to her, all of which create unique defenses “ and common issues did not predominate [“ Defining the ‘ tainted ‘ or ‘ counterfeit ‘ Lipitor to include all of the recalled Lipitor impermissibly shifted the burden of proof to defendants to show which of the class members received genuine Lipitor “[702]][703]. The Court also imposed sanctions against the plaintiff “ for repleading the claim in subsequent complaints after it was dismissed “.

10] **DHL Processing Fees**

In Kings Choice Neckwear, Inc. v. DHL Airways, Inc.[704] a class of recipients of DHL packages sent from foreign countries challenged the imposition of a " processing fee " [$5.00 or more]. The processing fee was defined in DHL's " Conditions of Carriage: ' In the event that DHL advances customs or import duties/assessments on behalf of the consignee...a surcharge may...be assessed based on a flat rate or a percentage of the total amount advanced '". The class alleged breach of contract and sought class certification on behalf of a class of New York recipients and those residing in all other states. After the action was removed to federal Court and remanded[705] the Court denied certification on several grounds. First, the recipients of the DHL packages had no standing since they were not parties to the contract [" A class action should not be used to ' bootstrap ' standing which does not otherwise exist '"]. Second, the proposed class action was unmanageable because of the need to apply the law of many foreign jurisdictions. DHL's Conditions of Carriage " provides that all disputes are subject to the non-exclusive jurisdiction of the courts, and governed by the law, of the country of origin ". Third, the plaintiffs' claims are atypical. One plaintiff " is subject to unique defenses because she waived her claim by not bringing it within 20 days " and the

other plaintiff " paid the charges under duress, because DHL and its collection (agency) threatened to commence litigation or to take action that would adversely impact upon its credit worthiness. There is no indication...that these circumstances are representative (of that of other class members) ".

11] **Spraypark Mass Tort**

In Arroyo v. State of New York[706], two classes of " Spraypark "[707] patrons alleged that the State was negligent in failing " to adequately maintain or monitor the sanitary conditions of the Spraypark water " which " was contaminated with cryptosporidium, a highly contagious waterborne parasite (causing) abdominal cramping, diarrhea, nausea, vomiting, dehydration, fatigue, fever and loss of appetite ". Class actions brought against the State of New York pursuant to C.P.L.R. Article 9 in the Court of Claims, though rare, have been recognized[708]. However, the Court held the class size must be limited to " at least 663 individuals (who) have been named as claimants " because " a person must be a named claimant in a filed claim in order to be included as a member of a certified class in the Court of Claims ". The Court also noted that because most of the claimants are infants that their claims are tolled " until the disability is removed and it may then be presented within two

years “. Notwithstanding the general trend in New York not to certify physical injury and property damage mass tort class actions, the Court granted class certification to this physical injury mass tort noting “ many of the individual claims may be reasonably modest and the ability to proceed as a class action will be the most cost effective procedure for many of the individual claimants. Furthermore, it would be an incredible waste of manpower for the Attorney General to defend over 600 potential claims “.

12] **Spanish Yellow Pages**

In Nissenbaum & Associates v. Hispanic Media Group, USA[709], a class of subscribers who placed advertisements in the Spanish Yellow Pages claimed they did so because of misrepresentations in “ promotional material indicating that hundreds of thousands of copies of the Spanish Yellow Pages were printed and distributed annually “ and “ that the directory was used by millions of people. In fact, a maximum of 50,000 copies were printed in any given year and less than the entire printing was systematically distributed “. The class alleged common law fraud, sought rescission and demanded restitution of monies paid for the advertising. Although the defendant admitted that its “ advertising material contains false and misleading information

“[710] the Court denied class certification for several reasons, First, the plaintiffs allegedly relied on advertising brochures [which they were unable to even produce] while the defendant also solicited business using fax transmissions, phone solicitations and personal solicitations [“ Plaintiffs must establish that the members of the class were exposed to or provided with the same or substantially similar misleading, false or inaccurate materials “]. Second, there may be a conflict of interest between the plaintiffs and the “ between 65% and 80% of all advertisers (that) have renewed their ads “ [“ With a substantial renewal rate, it is clear that advertisers who are renewing their ads do not have the same interest as Plaintiffs “]. Third, the proposed class action was not a superior method of adjudicating the issues raised [“ the claims of the individual plaintiffs could be dealt with as efficiently, if not more so, in the Commercial Small Claims parts of the local courts “]. Fourth, the plaintiffs failed to identify the class [“ Plaintiffs made no attempt to ascertain or demonstrate...how many members there are in the potential class “].

13] **Demutualization Plan Challenged**

In Fiala v. Metropolitan Life Ins. Co.[711], a class of policyholders challenged the plan by which “ Metropolitan Life

Insurance Company (Metlife) converted itself from a mutual life insurance company to a domestic stock company, a process known as demutualization ". The class sought to certify the two claims, violation of the provisions of the Conversion Law and common law fraud, which had survived a prior motion to dismiss[712]. In granting class certification the Court found that the predominance requirement was met with respect to the Conversion Law claim but not with the common law fraud claim [" plaintiffs argue that reliance need not be pleaded or proved...as the circumstances establish a causal connection between the omission and plaintiff's injury...although a showing of causation is sufficient and proof of reliance is not required in actions brought under (GBL § 349)...such actions are distinct from claims of common law fraud...no authority to establish that a showing of causation, by itself, is sufficient to plead and prove common law fraud "]. As for adequacy of representation the defendants claimed a conflict of interest in that one of the plaintiffs was an associate of class counsel [" (Associate) is only one of a number of Proposed Class Representatives and the court notes that (his) lawfirm ...is only one of the four co-lead law firms...serve(s) to minimize the potential for impropriety, conflict or undue influence arising out of (Associate's) duel relationship "].

14] **Stock Exchange Merger**

In New York Stock Exchange/Archipelago Merger[713] the Court approved the settlement of a class action brought by members of the New York Stock Exchange [" NYSE "] against the NYSE and others regarding a proposed merger with Archipelago Holdings, Inc., a fully-automated electronic stock market. The settlement provided for an independent fairness report of the merger before the scheduled seat holder vote. The Court considered both the small number of class members and their sophistication in financial markets. In providing for an independent analysis of the proposed settlement, the Court limited its role to ensuring that the seat holder vote on the merger would be made upon adequate disclosure so that the seat holders could evaluate the impact of any conflicts in the terms of the transaction. Dissatisfied with a prior " standard fairness opinion ", the Court approved the settlement by including critical comments submitted by plaintiffs' expert, together with the additional fairness opinion, to the seat holders, finding that the competing presentations gave a fair and balanced view of the proposed merger.

15] **Digital Mobile Communications**

In Fortune Limousine Service, Inc. v. Nextel Communications[714] the plaintiff commenced a class action relating to its contracts

for digital mobile communications services and equipment. After pre-class certification discovery defendants moved for summary judgment which was denied. On appeal the Court found no triable issue of fact was raised concerning plaintiffs' untimely exercise of an option to purchase the equipment, and dismissed the claim for breach of contract. The Court also dismissed an unjust enrichment claim "since the relationship between the parties was defined by a valid written contract, which detailed the applicable terms and conditions for renewing or continuing the contract after the expiration of the eleven month term..."[715]. Finally, the Court dismissed an unconscionability claim observing that " [t]he doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery ". The Court also observed that plaintiff failed to invoke any statute or case law authorizing it to serve as a " private attorney general " to vindicate the rights of the public.

16] **Group Life Insurance Benefits**

In Cohen v. Nassau Educators Federal Credit Union[716] the plaintiff brought a putative class action against defendant credit union relating to the termination of a life insurance benefit. The Court dismissed the breach of contract claim because of a failure of consideration, and the terms of the policy permitted

termination of the life insurance benefit. The Court also dismissed a GBL § 349 claim finding class members could have discovered that the life insurance benefits could be canceled at any time by reviewing the certificate of insurance. The Court also dismissed a claim for breach of the implied covenant of good faith and fair dealing as not actionable and a claim for unjust enrichment.

17] **Wage Claims**

In Brandy v. Canea Mare Contracting, Inc.[717] certification was granted to a class of laborers seeking wages and benefits for providing labor on public works projects. The defendant sureties supplied payment bonds for one of the public works contracts. However, the Court granted summary judgment to the sureties under § 220 and § 220-g of the Labor Law for a failure to exhaust administrative remedies. Nevertheless, the Court affirmed the denial of summary judgment to the sureties with respect to plaintiffs' common law claims for underpayment of wages.

18] **Mortgage Pay-Offs**

In Daniel Fontana v. Champion Mortgage Co., Inc[718] a plaintiff class of mortgagees alleging violations of RPL § 274-

a, sought leave to amend the complaint to add breach of contract and GBL § 340 claims. In denying the motion to amend the Court interpreted the language of a mortgage note which, provided in pertinent part that "[i]nterest will be charged on the unpaid principal until the full amount of principal has been paid". The Court found the "fair and reasonable meaning" of the provision permitted defendant's calculation of interest properly to include the date it received the pay-off check. Accordingly, the Court found no breach of the terms of the mortgage note and determined that the proposed breach of contract cause of action was "palpably insufficient as a matter of law ". The Court also found that, because the bank's interest calculation conformed to the terms of the mortgage note, the GBL § 349 claim was devoid of merit.

In Dowd v. Alliance Mortgage Company[719] a plaintiff class of mortgagees charged " priority handling fees " and unspecified " additional fees " after requesting mortgage pay-off statements, alleged unjust enrichment, money had and received and violations of GBL § 349 and RPL § 274-1. The Court held that defendant was prohibited from charging fees for providing mortgage-related documents under real property law § 274-a(2)[720] Neither the assertion that plaintiff voluntarily agreed to pay those fees, nor the absence of allegations of a written demand for the pay-off statement constituted a defense.

19] **Retiree Benefits**

In Jones v. Board of Education of Watertown City School District[721] a class of public service retirees sought to annul a determination diminishing contributions for health care premiums. The Court determined that the 4-month statute of limitations applied to this Article 78 proceeding affirming a dismissal of one petition and the granting of another. Although the Court rejected the contention that notices of claim were required in an Article 78 proceeding, it denied certification since class action treatment is not considered a superior method of adjudication in actions against a government body.

20] **Attorneys Fees**

In Mark Fabrics, Inc. v. GMAC Commercial Credit LLC[722], the Court approved a settlement which featured " non-monetary relief including defendant's agreement to complete a system-wide review of its files " regarding the factoring of accounts receivable and the alleged improper calculation of interest. " In addition the settlement provides for a total cash payment...of $850,000 " which plaintiffs claim equals $1,275,000 in " benefits to the class ". Based upon this analysis class counsel sought fees of $425,000 or one third of the anticipated benefit. The Court, however, awarded

attorneys fees of only $240,109.98 as " approximately 30% of the monetary recovery " finding any additional fees " inequitable to the members of the class ". The Court also approved of an incentive award to the plaintiff in the amount of $25,000.

In Kantrowitz, Goldhammer & Graifman, P.C. v. New York State Electric & Gas[723] the attorneys for two rate payers sought to recover additional fees, costs and disbursements relating to litigation commenced by their clients involving claimed overcharges by New York State Electric & Gas Corporation ("NYSED"). The attorneys previously had commenced an action which was dismissed on primary jurisdiction grounds. Following administrative litigation, the Public Service Commission ("PSC") ordered NYSEG to re-bill accounts of the two taxpayers and issue refunds, if appropriate. As a result, the attorneys moved, on behalf of their clients, to vacate or modify a prior order to permit class certification and allow additional customers to obtain relief, a request which was denied. With the attorneys' attempts to pursue a class action against NYSEG stymied, they then commenced a proceeding essentially to impose a charging lien or constructive trust upon the refunds to be paid to other NYSEG customers, claiming that the refunds were largely due to their efforts in the prior litigation. The PSC unilaterally had requested that NYSEG identify its other customers who had been adversely affected by its tariff misapplication and re-bill those

customers accordingly. While acknowledging authority providing for payment of attorneys' fees from a non-client pursuant to a "common fund" doctrine, the Court determined that "it is unclear whether the courts of this state have uniformly adopted such a rule". Nevertheless, assuming that such a recovery might be permissible in New York, the Court found no basis to treat the application as an "exceptional" case in which "dominating reasons of justice" require the allowance of counsel fees. The attorneys did not dispute that they had received remuneration for their efforts pursuant to a one-third contingency fee arrangement with their clients. The Court found that this fact alone militated against a finding that this case constituted one in which "overriding considerations" require the equitable allowance of more attorneys fees. The Court found "unpersuasive" the attorneys' claim that an implied contract existed between themselves and non-client NYSEG rate payers.

21] **Electric Rate Overcharges**

In Township of Thompson v. New York State Electric & Gas Corporation[724] a class of non-resident, seasonal customers of New York State Electric & Gas Corporation ("NYSEG") alleged that they were overcharged for electrical service. The action was based on

the 2003 determination by the PSC that resolved similar complaints of overcharging filed by rate payers[725]. Applying the doctrine of primary jurisdiction the Court dismissed the complaint finding that the PSC was in a better position to determine whether the NYSEG had complied with its directive to properly recalculate the bills.

22] **Medical Necessity**

In Long Island Radiology v. Allstate Insurance Company[726] a class of radiologists which had performed MRI testing challenged the denial of no-fault benefits for MRIs based on a lack of medical necessity. Although the Court found that "lack of medical necessity" is a defense available to insurers in no-fault cases, it determined that such a defense is unavailable where the MRI testing was prescribed by a treating physician or licensed medical provider in a no-fault case. Accordingly, the Court denied defendants' motion for summary judgment and granted plaintiffs' cross-motion for summary judgment. Class certification was denied, without prejudice to renewal, since plaintiff had established neither numerosity nor adequacy of representation.

H] **Reported Class Action Cases : 1/1/2007-12/31/2007**

Last year, the Court of Appeals in a matter of first impression ruled that CPLR 901(b)'s prohibition against class actions seeking a penalty or minimum recovery applied to GBL 340 (Donnelly Act). In addition, the Appellate Divisions and numerous trial Courts ruled on a variety of class actions in 2007.

1] **Donnelly Act**

In Sperry v. Crompton[727], a class of tire purchasers claimed consumers of tires " that defendants entered into a price-fixing agreement, overcharging tire manufacturers for (rubber processing chemicals), and that the overcharges trickled down the distribution chain to consumers " and further alleged violations of GBL 340 (Donnelly Act) seeking " three fold the actual damages ", GBL 349 and unjust enrichment. After a careful analysis of the 1975 legislative histories of both CPLR Article 9 and the amendments to GBL 340 [adding " treble damages provision and... costs and attorneys fees "], the Court concluded that when " Read together, we conclude that Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned...Where a statute is already designed to foster litigation through an enhanced award, CPLR 901(b) acts to restrict recoveries in class actions absent statutory authorizations ". Although CPLR 901(b) has also been applied to deny class

certification in actions alleging violations of the Telephone Consumer Protection Act[728] it has not been applied to GBL 349 class actions as long as class members seek only actual damages[729].

2] **Fruity Booty Settlement Revisited**

In Berkman v. Robert's American Gourmet Food, Inc.[730], a class of consumers of Pirate's Booty, Veggie Booty and Fruity Booty brands snack food alleged defendant's advertising " made false and misleading claims concerning the amount of fat and calories contained in their products ". A proposed nationwide settlement and the objections of Meredith Berkman were extensively reviewed in Klein v. Robert's American Gourmet Food[731] which was remanded [and consolidated with the Berkman class action] for further consideration of the settlement's reasonableness including " whether a nationwide (settlement) class or indeed any class should be certified ". The settlement provided for the issuance and guaranteed redemption of $3.5 million worth of discount coupons[732] for the purchase of defendant's snack products and label monitoring and product testing[733]. Noting that certification of a settlement class requires heightened scrutiny [" where a class action is certified for settlement purposes only, the class prerequisites ...must still be met and indeed scrutinized "][734], the Court denied class certification to the GBL 350 claim because

individual issues of reliance predominated [" common reliance on the false representations of the fat and caloric content...cannot be presumed (in GBL 350 claims) "][735], but noted that certification of the GBL claim may be appropriate if limited to New York residents [" causes of action predicated on GBL 349 which do not require reliance (may be certifiable but) a nationwide class certification is inappropriate "][736].

3] **Craftsman Tools**

In Vigiletti v. Sears, Roebuck & Co.[737] a class of consumers alleged that Sears marketed its Craftsman tools " as ' Made in USA ' although components of the products were made outside the United States as many of the tools have the names of other countries, e.g., ' China ' or ' Mexico ' diesunk or engraved into various parts of the tools ". In dismissing the GBL 349 claim the Court found that plaintiffs had failed to prove actual injury [" no allegations...that plaintiffs paid an inflated price for the tools...that tools purchased...were not made in the U.S.A. or were deceptively labeled or advertised as made in the U.S.A. or that the quality of the tools purchased were of lesser quality than tools made in the U.S.A. "], causation [" plaintiffs have failed to allege that they saw any of these allegedly misleading statements before they purchased Craftsman tools "] and

territoriality [“ no allegations that any transactions occurred in New York State “].

4] **Drug Misbranding**

In Baron v. Pfizer, Inc.[738] a class of purchasers of the drug Neurontin asserted claims of fraud, violation of GBL 349 and unjust enrichment “ based on claims arising from ‘ off-label ‘ uses “ for which FDA approval had not been received. Although the FDA had approved Neurontin only for the treatment of epilepsy, “ From June 1995 to April 2000...Warner Lambert...engaged in a broad campaign to promote Neurontin for a variety of pain uses, psychiatric conditions such as biploar disorder and anxiety and for certain other unapproved uses...Warner Lambert...ultimately agreed to plead guilty to (1) introducing into interstate commerce a misbranded drug that did not have adequate directions on the label for the intended uses of the drug and (2) introducing an unapproved new drug into interstate commerce...consented to a criminal fine of $240 million...civil fines of $190 million “. The Court dismissed the GBL 349 claim because of an absence of actual injury [“ Without allegations that...the price of the product was inflated as a result of defendant’s deception or that use of the product adversely affected plaintiff’s health...failed even to allege...that Neurontin was ineffective to treat her neck pain and

her claim that any off-label prescription was potential dangerous both asserts a harm that is merely speculative and is belied...by the fact that off-label use is a widespread and accepted medical practice "] and the unjust enrichment claim.

5] **Snapple Distributors**

In McGuckin v. Snapple Distributors, Inc.[739] the plaintiff marketed, sold and distributed Snapple products to retail outlets in a certain area in New York City and commenced this class action after Snapple entered into agreements " with the New York City Department of Education to directly sell their products to public schools and with the New York City Marketing Development Corporation to directly sell their products to municipal entities ". The Court dismissed the complaint finding that the distribution contract allowed Snapple to sell directly to public schools and municipal entities.

6] **Cellular Telephones**

In Naftulin v. Sprint Corp.[740] a class of cell phone users claimed that defendant misrepresented the availability of its " Add-A-Phone " cell phone plan " distributed by Staples as a newspaper insert in approximately 200 newspapers nationwide[741].

The plaintiff decided to sign up but claimed that defendants " never fully honored the contract she entered into on September 18, 2001 ". According to defendant the plan was erroneously offered in New York because of Staples' error and retracted within 24 hours of discovery. Of the 16,000 individuals nationwide who activated the plan, over 900 were in New York but only 26 complained about the billing overcharges and of those only 4 resided in New York. In denying class certification the Court found (1) a lack of numerosity [" Based upon the history of restitution provided to those who complained...there is only a minuscule number of actual potential class members who suffered injury as a result of defendants' allegedly fraudulent advertising "], (2) lack of uniformity in advertising and plan contracts [" no uniformity in the terms of the contracts...nor the plans "] and (3) lack of typicality [" Plaintiff herself did not sign up at Staples, the acknowledged source of the ' false ' advertising, but contracted at a local...store using a contract not demonstrated to be identical to that used by Staples ". In addition the proposed nationwide class was unmanageable because of the Court would need " to apply the law of 50 different jurisdictions to the claims presented "[742].

In Mollins v. Nissan Motor Co., Ltd.[743], a class of leasees claimed " deficiencies in a ' Blue Tooth ' phone system in the 2006 Infiniti M35X ". Initially, the Court addressed the issue of

mootness and found that " Despite the surrender of the vehicle, termination of the lease and a full refund of all money paid on account of the lease " there was insufficient evidence of the " payment or settlement of the Mollins claim ". However, the Court then proceeded to dismiss each cause of action including breach of contract [no privity], breach of warranty [all warranties fully and properly disclaimed], fraud [no cognizable damages], violation of GBL 198(a) [New Car Lemon Law][dealer fully complied] and GBL 349 [private dispute] and strict products liability [no economic loss damages recoverable]. Since the plaintiff had no claim and hence no standing the class allegations were dismissed as well.

7] **Cablevision Taxes & Fees**

In Lawlor v. Cablevision Systems Corp.[744] a class of Cablevision subscribers challenged the imposition of taxes and fees on internet services [" Lawlor alleges Cablevision had no legal right to charge these taxes or fees and seeks to recover...for the taxes and fees wrongfully collected "]. The Court sustained the GBL 349 claim [" If the services had not been provided by a telecommunications provider, these services would not have been subject to the...taxes "] and held that class certification of the GBL 349 claim would be appropriate,

notwithstanding CPLR 901(b), as long as only actual damages are sought.

8] **Mortgages: Document Preparation Fees**

In Fuchs v. Wachovia Mortgage Corp.[745], a class of mortgagees challenged the imposition of a $100 document preparation fee for services as constituting the unauthorized practice of law and violative of Judiciary Law 478, 484 and 495(3). Specifically, it was asserted that bank employees " completed certain blank lines contained in a standard ' Fannie Mae/Freddie Mac Uniform Instrument '...limited to the name and address of the borrower, the date of the loan and the terms of the loan, including the principal amount loaned, the interest rate and the monthly payment ". The plaintiffs, represented by counsel did not allege the receipt of any legal advice from the defendant at the closing. In dismissing the complaint that Court held that charging " a fee and the preparation of the documents...did not transform defendant's actions into the unauthorized practice of law ". Other States have addressed this issue as well[746].

9] **Mortgages: Yield Spread Premiums**

In Shovak v. Long Island Commercial Bank[747] a class of

borrowers sued a mortgage broker alleging that a “ yield spread premium paid to the defendant by the nonparty lender was a kickback in exchange for the defendant procuring an interest rate on the plaintiff’s loan higher than the lender’s market or par rate “. In denying class certification the Court found the predominance of individual issues [“ the two-pronged test promulgated by the Department of Housing and Urban Development ...to determine if a yield spread premium was a kickback or bribe under the Real Estate Settlement Procedures Act (is) applicable to State actions [such as plaintiff’s] asserting claims for breach of fiduciary duty, money had and received, unjust enrichment and violations of GBL 349 and Penal Law 180.08...is an individualized, fact-intensive analysis “].

Subsequently in Shovak v. Long Island Commercial Bank[748], the Court dismissed the (1) GBL 349 claim finding that “ there was no materially misleading statement, as the record indicated that the yield spread premium, which is not per se illegal, was fully disclosed to the plaintiff, (2) breach of fiduciary duty claim [“ The plaintiff failed to show that a fiduciary relationship existed between him and the defendant “] and for unjust enrichment and money had and received [“‘ quasi-contractual claims...are not viable where, as here, it is undisputed that the parties entered into an express agreement ‘”].

10] **Mortgages: Payoff Statement Fee**

In MacDonell v. PHM Mortgage Corp.[749], a class of mortgagors challenged defendant's $40 fee " charged for faxing the payoff statements " [which plaintiffs paid] asserting violations of GBL 349 and RPL 274-a(2) [" mortgagee shall not charge for providing the mortgage-related documents, provided...the mortgagee may charge not more than twenty dollars, or such amount as may be fixed by the banking board, for each subsequent payoff statement "] and common law causes of action alleging unjust enrichment, money had and received and conversion. The Court sustained the statutory claims finding that the voluntary payment rule does not apply[750] but does serve to bar the common law claims and noting that " To the extent that our decision in Dowd v. Alliance Mortgage Company [751] holds to the contrary it should not be followed ".

11] **DHL Processing Fees**

In Kings Choice Neckwear, Inc. v. DHL Airways, Inc.[752] a class of recipients of DHL packages sent from foreign countries challenged the imposition of a " processing fee " [$5.00 or more]. The processing fee was defined in DHL's " Conditions of Carriage: ' In the event that DHL advances customs or import

duties/assessments on behalf of the consignee...a surcharge may...be assessed based on a flat rate or a percentage of the total amount advanced ‘“. The class alleged breach of contract and sought class certification on behalf of a class of New York recipients and those residing in all other states. The Court denied class certification on the grounds of a lack of standing [“ they were not parties to the contracts with the shippers of the merchandise received by defendants...Nor have they demonstrated that they...were intended third-party beneficiaries of the contracts “].

12] **Equipment Leases**

In Pludeman v. Northern Leasing Systems, Inc.[753] a class of equipment lessees asserted claims of breach of contract and violations of federal RICO and GBL 349 arising from allegations that defendant “ purposely concealed three pages of the four-page equipment lease...the concealment finds support in the first page...which contains all of the elements that would appear to form a binding contract including the signature line, a personal guaranty and forum selection, jury waiver and merger clauses, with the only references to the additional pages of the lease being in very small print...defendants did not provide plaintiffs with fully executed copies of the leases and overcharged them by

deducting amounts from their bank accounts greater than those called for by the leases “. The Court sustained the breach of contract and GBL 349 claims but denied class certification as premature[754].

13] **Health Insurance**

In Batas v. The Prudential Insurance Company[755], a class of health participants alleged that defendant’s contracts provide “‘ all care-including hospitalization-that is deemed to be medically necessary in accordance with the prevailing medical opinion within the appropriate speciality of the United States medical profession ‘”. Plaintiffs allege that it is defendant’s “ practice to have unqualified lay personnel (rather than physicians) determine what care is medically necessary ...based on actuarial utilization review guidelines that allegedly conflict with generally accepted medical standards “.

After previously sustaining the breach of contract and GBL 349 claims[756], the Court denied class certification because (1) the class definition was overbroad [includes all participants to Prudential’s healthcare plans “ regardless of whether these individuals were ever denied promised care or treatment based on allegedly improper procedures and guidelines “] and (2) predominance of individuals issues in the breach of contract and

GBL 349 claims [“ the medical necessity issue-unique and complex in each class member’s particular case-would predominate...The difficulty of [directing Prudential to reevaluate the each class member’s claim using appropriate procedures] is that reprocessing...would be only the first step; every new claim review...that resulted in a denial of care would then require individualized scrutiny of the medical necessity issue “. The Court also denied certification to a subclass alleging tortuous interference with contract.

In Cohen v. Nassau Educators Federal Credit Union[757] a class of credit union members alleged breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment and violation of GBL 349 by their credit union. In dismissing the complaint the Court found that the documentary evidence “ flatly contradicted the plaintiff’s claim that the defendant... was obligated to maintain a group insurance policy for its members... that the credit union was authorized to terminate the insurance policy at any time “

14] **Life Insurance**

In Beller v. William Penn Life Ins. Co.[758], a class of policyholders of flexible premium adjustable life insurance policies alleged that defendant “ was not following the cost of

insurance provisions in the policies when calculating the annual premiums...(which) were in excess of what they should have been according to the terms of the policies " and asserted, inter alia, claims of breach of contract, constructive trust and fraud in the sale of insurance contracts . The Court certified the class finding that CPLR Article 9 " is to be liberally construed (and) that plaintiff satisfied the statutory criteria set forth in CPLR 901 ". The trial Court also addressed discovery issues in " a class action swiftly approached trial " allowing plaintiff's counsel to submit written questions to defendant's expert witnesses.[759]

In Fiala v. Metropolitan Life Ins. Co.[760], a class of 10,000,000 former policyholders " in Metropolitan Life Insurance Company (MetLife), a mutual company, until MetLife converted to a stock insurance company " alleging, inter alia, dilution of equity[761] [injuries included " policyholders receiving a lower initial public offering price for the shares allotted to them "], sought approval of an opt-out notice, primarily, by publication together with a limited direct mailing of printed notices. Based upon a finding that the direct mail cost of individual notice " will certainly run into the millions of dollars " and " It seems doubtful that significant numbers of class-members would desire to exclude themselves " the Court provided for (1) notice by publication in the national and local

editions of the Wall Street Journal and New York Post once a week for three consecutive weeks, (2) sending a mail notice to a random sample of 500,000 class members selected from MetLife's lists and (3) piggyback mailings of printed notices along with any periodic mailings to class members. The plaintiffs were to pay the cost of the publication notice and one half of the cost of the 500,000 random mailing except that the culling of names will be done by MetLife.

15] **Wrecked Cars**

In Jung v. The Major Automotive Companies, Inc.[762] a class of 40,000 car purchasers charged the defendant with fraud " in purchas(ing) automobiles that were ' wrecked ' or ' totaled ' in prior accidents, had them repaired and sold them to unsuspecting consumers...purposely hid the prior accidents from consumers in an attempt to sell the repaired automobiles at a higher price for a profit ". The parties jointly moved for preliminary approval of a proposed settlement featuring (1) a $250 credit towards the purchase of any new or used car, (2) a 10% discount for the purchase of repairs, parts or services, (3) for the next three years each customer who purchases a used car shall receive a free CarFax report and a description of a repair, if any and (4) training of sales representatives " to explain a car's maintenance

history “, (5) projected settlement value of $4 million, (6) class representative incentive award of $10,000, and (7) $480,000 for attorneys fees, costs and expenses. The Court preliminarily certified the settlement class, approved the proposed settlement and set a date for a fairness hearing.

16] **Employees: Wages & Overtime**

In Lamarca v. Great Atlantic & Pacific Tea Co. Inc.,[44], a class of full time hourly employees sought overtime wages. Notwithstanding a prior federal action[45] which denied certification to plaintiffs’ New York Labor Law claims, the court held that plaintiffs were not precluded from seeking other relief under the statute as a class.[46] After considering the adequacy of the class representatives [alleged violations of defendant’s time and attendance policies and two plaintiffs previously disciplined] the Court certified the proposed class.

In Alix v. Wal-Mart Stores, Inc.,[60], a class of employees sought overtime wages alleging that defendant required employees to work through their earned rest breaks and lunch periods without pay and that plaintiffs were required to work without compensation, either before their shifts began or after their shifts had ended. The Court denied class certification because(1) the class definition included numerous individuals who had no

colorable claim, (2) predominance of individual issues [rejection of expert testimony and statistical evidence as a substitute for individualized proof], (3) lack of typicality [" "as plaintiffs' individual claims do not encompass many of those which plaintiffs seek to advance on behalf of the class "], (4) inadequacy of representation [conflict of interest between assistant managers and employees] and (5) lack of superiority [administrative remedies available under the Labor Law].

17] **Employees: Davis-Bacon Act**

In Cox v. NAP Construction Co., Inc.,[55] a class of workers sought prevailing wages, supplemental benefits and overtime compensation by defendant for work performed on federally funded public works projects in New York City.[56] Defendant asserted that plaintiffs claims were preempted by federal law because no private right of action exists under the Davis-Bacon Act to recover prevailing wages. The Court held that " the Davis-Bacon Act neither preempts nor otherwise precludes state law causes of action, whether common law or statutory, which seek payment of the very wages that Davis-Bacon Act requires ".

In Gawez v. Inter-Connection Electric Inc.,[68] a class of workers sought to recover wages at the prevailing rate mandated by Labor Law 220. The Court found that (1) " no private right of

action exists to enforce contracts requiring payment of prevailing wages pursuant to the Federal Davis-Bacon Act “, (2) private entities are not subject to prevailing wage guidelines and (3) with respect to the sureties “ none of the named plaintiffs did any work on these projects “.

18] **Undocumented Aliens: Wage Claims**

In Jara v. Strong Steel Doors, Inc.,[70] a class of workers sought prevailing wages and supplemental benefits, including overtime compensation. Defendants moved for partial summary judgment based upon plaintiffs’ submission of fraudulent documents in connection with his employment. The court held that an employee may sue an employer for unpaid wages, notwithstanding an alleged violation of the Immigration and Reform Control Act.[73]

19] **Lien Law Class Actions**

In ADCO Electric Corp. v. McMahon,[75] plaintiffs brought a class action suit to enforce a Lien Law trust for funds paid to a contractor. Defendant moved to dismiss the complaint for failure to state a cause of action, claiming that plaintiffs failed to seek class certification, as required by the New York Lien Law. The Court held that such a motion should be denied thus affording

the plaintiffs an opportunity to comply with the class certification requirement of New York Lien Law.

In ARA Plumbing & Heating Corp. v. Abcon Assoc's Inc.,[78] the Court reversed the award of punitive damages holding that not every violation of Article 3-A of New York Lien Law constitutes the criminal offense of larceny, and that the Lien Law does not create a strict liability crime. Therefore, a conviction of larceny, by misappropriation of trust funds, requires proof of larcenous intent which plaintiffs had failed to do.

In Matros Automated Electrical Const. Corp. v. Libman,[79] the Court granted summary judgment finding that defendants made a *prima facie* showing that no funds were due and owing at the time of the filing of the liens. In addition, the Court denied class certification since the plaintiff had no claim and, hence, no representative standing.

20] Investments/Securities

In Vladimir v. Cowperthwait,[81] the plaintiff closed his account and commenced a class action on behalf of himself and all others who invested in defendant's portfolio after plaintiff's initial investment declined in value by 39% . The investment policy statement provided that the portfolio would be managed in a "prudent manner" and further provided that "the equity portions of

the portfolio should be well diversified to avoid any undue exposure." The Court granted defendant summary judgment finding that plaintiff had not been mislead since he had been provided with a list of stocks held in the portfolio and knew that defendant possessed discretionary authority with respect to the portfolio's stocks.

In Brody v. Catell,[99] a class of investors alleged that the proffered consideration for National Grid's acquisition of Keyspan Corporation was undervalued, inadequate and unfair. The parties moved for final approval of a proposed settlement. The Court certified a settlement class and found the plaintiffs to appropriate representatives. The Court found the settlement [which provided for any disclosure to shareholders deemed necessary by plaintiff and the opportunity afforded to plaintiff's counsel to scrutinize the merits of the proposed merger and confirm its fairness to the class] to have been negotiated at arms length and awarded attorneys fees of $350,000.

In Pressnar v. MortgageIT Holdings Inc.,[101] a class of investors challenged various aspects of the proposed merger of defendant MortgageIT Holdings, Inc. with Titan Acquisition Corp. In response, the defendant agreed to provide plaintiff with the materials that were provided to the Board of Directors in connection with its approval of the proposed merger, to include additional information in its proxy statement, and to release any

and all claims relating to the merger. The Court held that "in view of the fact that the proposed settlement was arrived at by the parties who [we]re represented by able counsel, and since there ha[d] been no objection to the proposed settlement and the broad release that the class [wa]s giving, the settlement is approved."

21] **Publishing Legal Notices**

In NCJ Cleaners, LLC v. ALM Media Inc.,[83] a class of advertisers alleged that the mandatory use of the New York Law Journal to publish legal notices created a *de facto* monopoly, which allowed the publisher to inflate its publication rates for business entities doing business within the City of New York. The court dismissed the Complaint noting that "differential prices have long been a familiar characteristic of our free enterprise system, never thought to be either immoral or unlawful " and that plaintiffs' allegations that defendants restrained competition was more properly directed against the County Clerk or the New York State Legislature in mandating that publications be made only in defendants' newspaper.

22] **Constitutional Rights**

In Brown v. State,[88] the trial of a certified class action on behalf of 67 claimants was concluded with the dismissal of all claims based on an alleged violation of constitutional rights. On appeal, the Court held that the testimony and documentary evidence adduced at trial failed to demonstrate that the State Police ever adopted a policy which expressly classified persons on the basis of race so as to constitute the type of express racial classification triggering strict scrutiny.

23] **Disclosure of Class Counsel's File**

In Wyly v. Milberg Weiss Bershad & Schulman LLP,[105] an investor, as a former class member, brought a special proceeding against class counsel alleging that he had the right to disclosure of files created and maintained in connection with class counsel's prior representation. The action stemmed from plaintiff's request that respondents move to relieve a settlement class from the settlement that respondents had brokered in a Federal Court action against Computer Associates, because of the existence of numerous documents not known to Respondents at the time of the fairness hearing in the Federal Court action. Petitioner brought a special

proceeding in New York State court alleging that as a former client of class counsel, he had a right to the files created in connection with Federal Court action. The Court determined that Petitioner was not precluded from seeking the disclosure because the Petitioner's relationship with Respondents was sufficiently similar to a traditional attorney-client relationship, to create a presumption in favor of affording Petitioner access to Respondents' files.[107]

24] **Vendors: Charge Backs & Late Payments**

In CLC/CFI Liquidating Trust v. Bloomingdales, Inc.,[108] a class of 4,000 vendors who sold goods to defendant sought monetary damages based upon defendants alleged uniform policy and practice of improper conduct towards vendors. Plaintiffs alleged that defendants took deductions for non-conforming goods without giving the vendors notice that the goods were non-conforming. The plaintiffs also alleged that defendants systemically made late payments to vendors and failed to pay interest on late payments. The Court denied certification because of (1) a lack of commonality given the differences between vendors in regard to notice and charge backs and (2) inadequacy of representation since there may be conflict of interest between the bankruptcy trustees' duties to the bankrupt party plaintiffs and to the proposed class.

ENDNOTES

1. 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.

2. See Bonior v. Citibank, N.A., 14 Misc. 3d 771, 828 N.Y.S. 2d 765 (N.Y. Civ. 2006)(" Since this is a Small Claims action, the claimants' complaint is merely a general statement of why relief is being sought and not a formalistic assertion of legal principals. This requires the Court to analyze the facts of each case as presented rather than pleaded so as to grant the ' substantial justice ' mandated by the statute "); Dvoskin v. Levitz Furniture Co., Inc., 9 Misc. 3d 1125 (N.Y. Dist. Ct. 2005)(" 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 ").

3. There was a much needed effort by some Courts to analyze the process by which consumer agreements are entered into and the appropriate standards of proof regarding the disposition of disputes that arise therefrom such as summary judgment motions made by credit card issuers [see Citibank [South Dakota], NA v. Martin, 11 Misc. 3d 219 (N.Y. Civ. 2005)], confirmation of arbitration awards [MBNA America Bank, N.A. v. Nelson, 15 Misc. 3d 1148 (N.Y. Civ. 2007); MBNA America Bank, NA v. Straub, ____Misc. 3d_____, 2006 NYSlipOp 26209 (N.Y. Civ.)], deceptive practices used by lenders in home equity loan mortgage closings [see Bonior v. Citibank, N.A., 14 Misc. 3d 771, 828 N.Y.S. 2d 765 (N.Y. Civ. Ct. 2006), changing the price in the middle of the term of a fixed-price contract [see Emilio v. Robinson Oil Corp., 28 A.D. 3d 418, 813 N.Y.S. 2d 465 (2d Dept. 2006); People v. Wilco Energy Corp., 284 A.D. 2d 469 (2d Dept. 2001)] and improper debt collection methods [see People v. Applied Card Systems, Inc., 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (3d Dept. 2005)].

4. Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor available at www.urbanjustice.org./cdp

5. New Report on New York City's Consumer Credit Crisis, NCLC Reports, Debt Collection and Repossessions Edition, Vo. 26, November/December 2007, p. 11.

6. New York State Unified Court System Press Release June 18, 2008, Chief Judge Kaye Announces Residential Foreclosure Program available at www.nycourts.gov/press/pr2008_4.shtml

7. See e.g., 5-Star Management, Inc. v. Rogers, 940 F. Supp. 512 (E.D.N.Y. 1996); FNMA v. Youkelstone, 755 N.Y.S. 2d 730 (App. Div. 2003); Guyerzeller Bank A.G. v. Chascona, NV, 841 N.Y.S. 22 (App. Div. 2007); Wells Fargo Bank Minnesota, National Association v. Mastropaolo, 837 N.Y.S. 2d 247 (App. Div. 2007); U.S. National Bank Association v. Kosak, 2007 WL 2480127 (N.Y. Civ. Ct. 2007); Wells, Fargo Bank, NA v. Farmer, 2008 WL 307454 (N.Y. Sup. 2008); Deutsche Bank National Trust Co. V. Castellanos, 2008 WL 123798 (N.Y. Sup. 2008); Countrywide Home Loans, Inc. V. Taylor, 843 N.Y.S. 2d 495 (N.Y. Sup. 2007); Deutsche Bank National Trust Co. v. Clouden, 2007 WL 2709996 (N.Y. Sup. 2007); U.S. National Association v. Merino, 836 N.Y.S. 2d 853 (N.Y. Sup. 2007); U.S. Bank National Association v. Bernard, 2008 WL 383814 (N.Y. Sup. 2008); Wells Fargo Bank, N.A. v. Davilmar, 2007 WL 2481898 (N.Y. Sup. 2007).

8. LaSalle Bank, N.A. v. Shearon, 19 Misc. 3d 433, 850 N.Y.S. 2d 871 (2008); Alliance Mortgage Banking Corp. v. Dobkin, 19 Misc. 3d 1121, 2008 WL 1758864 (2008).

9. See 3 W.K.M. New York Civil Practice CPLR §§ 901.01-901.27, Lexis-Nexis (MB)(2007).

10. See Dickerson, Article 9 of 3 W.K.M. New York Civil Practice CPLR, Lexis-Nexis (MB)(2007).

11. 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).

12. 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 "). But see **Freefall Express, Inc. v. Hudson River Park Trust**, 16 Misc. 3d 1135 (N.Y. Sup. 2007)(" Where the alleged deceptive practices occur between relatively sophisticated entities with equal bargaining power such does not give rise to liability under GBL 349...large business are not the small-time individual consumers GBL 349 was intended to protect "); **Feinberg v. Federated Department Stores, Inc.,** 15 Misc. 3d 299, 832 N.Y.S. 2d 760 (N.Y. Sup. 2007)(private contract dispute over charge-backs between apparel manufacturer and distributor and retail store).

13. 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 "); **Tate v. Fuccillo Ford, Inc.**, 15 Misc. 3d 453 (Watertown Cty. Ct. 2007)(" defendant's policy of fixing its times to do a given job on a customer's vehicle based on a national time standard rather than being based upon the actual time it took to do the task without so advising each customer of their method of assessing labor costs is ' a deceptive act or practice directed towards consumers and that such...practice resulted in actual injury to a plaintiff '". Damages included, inter alia, the $254.04 cost of obtaining a loan to pay for the authorized labor charges, $776.88 for the labor overcharge and " $1,000 under GBL 349(h) for ' willfully and knowingly violating ' that statute

resulting in the $776.88 overcharge for doing 3 hours of work and charging the plaintiff for 13.3 hours for a total of $2,030.92 "];

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

15. **Matter of Food Parade, Inc. V. Office of Consumer Affairs,**7 N.Y. 3d 568, 859 N.E. 2d 473, 825 N.Y.S. 2d 667 (2006).

16. **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 "); **People v. Wilco Energy Corp.**, 284 A.D. 2d 469, 728 N.Y.S. 2d 471 (2d Dept. 2001)(" Wilco solicited contracts from the public and, after entering into approximately 143 contracts, unilaterally changed their terms. This was not a private transaction occurring on a single occasion but rather, conduct which affected numerous consumers...Wilco'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 "); **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); **Tate v. Fuccillo Ford, Inc.**, 15 Misc. 3d 453 (Watertown Cty. Ct. 2007)(" defendant's policy of fixing its times to do a given job on a customer's vehicle based on a national time standard rather than being based upon the actual time it took to do the task without so advising each customer of their method of assessing labor costs is ' a deceptive act or practice directed towards consumers and that

such...practice resulted in actual injury to a plaintiff ‘”); **Chun 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 “).

17. 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 "); **Freefall Express, Inc. v. Hudson River Park Trust**, 16 Misc. 3d 1135 (N.Y. Sup. 2007)(" Where the alleged deceptive practices occur between relatively sophisticated entities with equal bargaining power such does not give rise to liability under GBL 349...large business are not the small-time individual consumers GBL 349 was intended to protect "); **Feinberg v. Federated Department Stores, Inc.,** 15 Misc. 3d 299, 832 N.Y.S. 2d 760 (N.Y. Sup. 2007)(private contract dispute over charge-backs between apparel manufacturer and distributor and retail store); **Huang v. Utica National Ins. Co.**, 15 Misc. 3d 127 (N.Y.A.T. 2007)(" private contract dispute "); **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).

18. See **Mandelkow v. Child and Family Services of Erie County**, 49 A.D. 3d 1316 (N.Y.A.D. 4th Dept. 2008)(" With respect to the first counterclaim alleging the violation of (GBL 349) (it) arises from a ' [p]rivate contract dispute...[and thus does] not fall within the ambit of the statute ' "); **Northeast Wine Development, LLC v. Service-Universal Distributors, Inc.**, 23 A.D. 3d 890, 804 N.Y.S. 2d 836 (3d Dept. 2005)(retail wine store sues wine wholesaler alleging " that defendant has unlawfully refused to sell it certain brands of wine and liquor at the prices listed in defendant's mandatory filings with defendant New York State Liquor Authority...it (is) clear that this conduct was directed at retailers and makes no factual allegations as to how

it has had the requisite ‘ broad impact ‘ on consumers “), aff’d 7 N.Y. 3d 871, 859 N.E. 2d 912, 826 N.Y.S. 2d 173 (2006); **LoGerfo v. Trustees of Columbia University**, 35 A.D. 3d 395, 827 N.Y.S. 2d 166 (2d Dept. 2006)(“ private contractual relationship concerning compensation and not a consumer-oriented transaction “); **Mollins v. Nissan Motor Co., Inc.**, 14 Misc. 3d 1226 (Nassau Sup. 2007)(“ This is a private dispute...The gravamen of the complaint and the damages Mollins seeks to recover involve his inability to effectively use his cell phone from his car to conduct his law practice...This claim is thus specific to Mollins and his business needs “).

19. **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 “).

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

21. Ladino v. Bank of America, __A.D. 3d__, 2008 WL 2390282 (2008).

22. **Relativity Travel, Ltd. V. JP Morgan Chase Bank**, 13 Misc. 3d 1221 (N.Y. Sup. 2006).

23 Berkman v. Robert’s American Gourmet Food, Inc., 16 Misc. 3d 1104 (N.Y. Sup. 2007).

24 See also WKM, supra, at 901.23[6][c].

25 Id.

26. **Baron v. Pfizer, Inc.**, 12 Misc. 3d 1169 (Albany Sup. 2006)

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

28. **Pelman v. McDonald's Corp.**, 396 F. Supp. 2d 439 (S.D.N.Y. 2005). See also: **Corcino v. Filstein**, 32 A.D. 3d 201, 820 N.Y.S. 2d 220 (1st Dept. 2006)(plaintiff's claim of defective penile implant failed to show that advertising was materially deceptive and misleading).

29. **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 ").

30. **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).

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

32. Batas v. Prudential Insurance Company of America, 281 A.D. 2d 260, 724 N.Y.S. 2d 3d (2001). See also Batas v. The Prudential Insurance Company, 37 A.D. 3d 320, 831 N.Y.S. 2d 371 (2007)(certification denied).

33. 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 ").

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

35 Vigiletti v. Sears, Roebuck & Co., Index No: 2573/05, Sup. Ct. Westchester County, J. Rudolph, Decision September 23, 2005, aff'd 42 A.D. 3d 497, 838 N.Y.S. 2d 785 (2d Dept. 2007).

36 Baron v. Pfizer, Inc., 42 A.D. 3d 627, 840 N.Y.S. 2d 445 (3d Dept. 2007).

37. Ballas v. Virgin Media, Inc., 18 Misc. 3d 1106 (N.Y. Sup. 2007).

38. People v. Direct Revenue, LLC, 19 Misc. 3d 1124 (N.Y. Sup. 2008).

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

40. **Edelman v. O'Toole-Ewald Art Associates, Inc.**, 28 A.D. 3d 250, 814 N.Y.S. 2d 98 (1st Dept. 2006).

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

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

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

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

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

46. **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).

47. **Weinstock v. J.C. Penney Co., Inc.**, New York Law Journal, February 23, 2007, p. 28, col. 1 (Nassau Sup.).

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

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

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

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

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

53. **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).

54. Shovak v. Long Island Commercial Bank, 35 A.D. 3d 837, 829 N.Y.S. 2d 546 (2d Dept. 2006).

55. Shovak v. Long Island Commercial Bank, 50 A.D. 3d 1118, 2008 N.Y. Slip Op. 04070 (2008)

56. Matter of City Line Auto Mall, Inc. v. Mintz, 42 A.D. 3d 407, 840 N.Y.S. 2d 783 (2007).

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

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

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

60. **State v. Daicel Chemical Industries, Ltd.**, 42 A.D. 3d 301, 840 N.Y.S. 2d 8 (2007)(GBL 349 claims " time-barred by the three-year statute of limitations "); **Beller v. William Penn Life Ins. Co.**, 8 A.D. 3d 310, 778 N.Y.S. 2d 82 (2d Dept. 2004) (" Here, the subject insurance contract imposed a continuing duty upon the defendant to consider the factors comprising the cost of insurance before changing rates and to review the cost of insurance rates at least once every five years to determine if a change should be made...we find that the complaint sufficiently states a (G.B.L. § 349) cause of action (but) is time-barred (as) governed by a three-year limitations period ").

61. 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).

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

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

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

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

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

67. 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.

68. 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 ").

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

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

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

72. **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).

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

74. **People v. Law Offices of Andrew F. Capoccia**, Albany County Sup., Index No: 6424-99, August 22, 2000.

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

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

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

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

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

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

81. **Tate v. Fuccillo Ford, Inc.**, 15 Misc. 3d 453 (Watertown Cty. Ct. 2007).

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

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

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

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

86. **Kim v. BMW of Manhattan, Inc.**, 11 Misc. 3d 1078 (N.Y. Sup. 2005), *affirmed as modified* 35 A.D. 3d 315, 827 N.Y.S. 2d 129 (1st Dept. 2006).

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

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

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

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

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

92 **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 ").

93. **Lawlor v. Cablevision Systems Corp.**, 15 Misc. 3d 1111 (Nassau Sup. 2007).

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

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

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

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

98. **People v. Applied Card Systems, Inc.**, 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (2005), lv dismissed 7 N.Y. 3d 741 (2006). See also: **People v. Applied Card Systems, Inc.**, __A.D. 3d __, __N.Y.S. 2d __, 2007 WL 1016885 (3d Dept. 2007)(" petitioner successfully established his claims pursuant to (G.B.L. § 349 and 350)...Having met the initial burden of establishing liability, Supreme Court was left to determine what measure of the injury ' is attributable to respondents' deception...We find no error in its exercise of such discretion, despite the lack of a hearing...(as to damages decision modified " by reversing so much thereof as awarded restitution to consumers who enrolled in the Credit Account Protection program and whose accounts were re-aged ").

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

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

101. **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).

102. **Relativity Travel, Ltd. V. JP Morgan Chase Bank**, 13 Misc. 3d 1221 (N.Y. Sup. 2006).

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

104. Centurion Capital Corp. v. Druce, 11 Misc. 3d 564, 828 N.Y.S. 2d 851 (N.Y. Civ. 2006).

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

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

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

108. Drew v. Sylvan Learning Center, 16 Misc. 3d 838 (N.Y. Civ. 2007).

109. See e.g., 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)(failing to give basic computer course for beginners). See also: Cullen v. Whitman Medical Corp., 197 F.R.D. 136 (E.D. Pa. 2000)(settlement of class action involving education misrepresentations).

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

111. **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).

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

113. Cambridge v. Telemarketing Concepts, 171 Misc. 2d 796 (Yonkers City Ct. 1997).

114. **Emilio v. Robinson Oil Corp.**, 28 A.D. 3d 418, 813 N.Y.S. 2d 465 (2d Dept. 2006).

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

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

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

118. **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.

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

120. **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).

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

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

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

124. **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).

125. **Matter of Food Parade, Inc. V. Office of Consumer Affairs**,7 N.Y. 3d 568, 859 N.E. 2d 473, 825 N.Y.S. 2d 667 (2006), *aff'g* 19 A.D. 3d 593, 799 N.Y.S. 2d 55 (2005).

126. **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).

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

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

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

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

131. Wall v. Southside Guitars, LLC, 17 Misc. 3d 1135 (N.Y. Civ. 2007).

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

133. **Matter of Wilco Energy Corp.**, 283 A.D. 2d 469 (2d Dept. 2001).

134. Carney v. Coull Building Inspections, Inc., 16 Misc. 3d 1114 (N.Y. Civ. 2007).

135. 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).

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

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

138. Batas v. Prudential Insurance Company of America, 281 A.D. 2d 260, 724 N.Y.S. 2d 3d (2001). See also Batas v. The Prudential Insurance Company, 37 A.D. 3d 320, 831 N.Y.S. 2d 371 (2007)(certification denied).

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

140. **Beller v. William Penn Life Ins. Co.**, 8 A.D. 3d 310, 778 N.Y.S. 2d 82 (2d Dept. 2004).

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

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

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

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

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

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

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

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

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

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

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

152. 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.

153. **Sayeedi v. Walser**, 15 Misc. 3d 621, 835 N.Y.S. 2d 840 (N.Y. Civ. 2007).

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

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

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

157 Pludeman v. Northern Leasing Systems, Inc., 40 A.D. 3d 366, 837 N.Y.S. 2d(1st Dept. 2007), aff'd __N.Y. 3d__, 2008 WL 1944567 (2008).

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

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

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

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

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

163 MacDonell v. PHM Mortgage Corp., 846 N.Y.S. 2d 223, 2007 WL 3317808 (2d Dept. 2007).

164 See Dowd v. Alliance Mortgage Co., 32 A.D. 3d 894, 822 N.Y.S. 2d 558 (2d Dept. 2006); Dougherty v. North Fork Bank, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2d Dept. 2003); see generally Negrin v. Norwest Mortgage, 263 A.D. 2d 39, 700 N.Y.S. 2d 184 (2d Dept. 1999).

165 Dowd v. Alliance Mortgage Co., 32 A.D. 3d 894, 822 N.Y.S. 2d 558 (2d Dept. 2006). See generally Dillon v. U-A Columbia Cablevision of Westchester, 100 N.Y. 2d 525, 760 N.Y.S. 2d 726, 790 N.E. 2d 1155 (2003).

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

167. **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).

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

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

170. **Bonior v. Citibank, N.A.**, 14 Misc. 3d 771, 828 N.Y.S. 2d 765 (N.Y. Civ. Ct. 2006).

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

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

173. **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).

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

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

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

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

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

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

161. **Board of Mgrs. Of Bayberry Greens Condominium v. Bayberry Greens Associates**, 174 A.D. 2d 595, 571 N.Y.S. 2d 496(1991).

181. ; **B.S.L. One Owners Corp. v. Key Intl. Mfg. Inc.,** 225 A.D. 2d 643, 640 N.Y.S. 2d 135 (1996).

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

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

184. **Polonetsky v. Better Homes Depot, Inc.,** 185 Misc. 2d 282, 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).

185. **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).

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

187. **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).

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

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

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

191. **Centurion Capital Corp. v. Druce**, 11 Misc. 3d 564, 828 N.Y.S. 2d 851 (N.Y. Civ. 2006).

192. **Mintz v. American Tax Relief**, __Misc. 3d__, 2007 WL 1545234 (N.Y. Sup. 2007).

193 Lawlor v. Cablevision Systems Corp., 15 Misc 3d 1111 (Nassau Sup. 2007).

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

195. **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).

196. **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 ").

197. **Kinkopf v. Triborough Bridge and Tunnel Authority**, 6 Misc. 3d 731 (N.Y. App. Term. 2005).

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

199. **Malek v. Societe Air France**, 13 Misc. 3d 723, 827 N.Y.S. 2d 485 (N.Y. Civ. 2006).

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

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

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

203. Johnson v. Body Solutions of Commack, LLC, 19 Misc. 3d 1131 (N.Y. Dist. Ct. 2008).

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

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

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

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

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

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

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

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

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

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

214 Berkman v. Robert's American Gourmet Food, Inc., 16 Misc. 3d 1104 (N.Y. Sup. 2007).

215 See also Class Actions, supra, at 9.03[2]; WKM, supra, at 903.10.

216 See also WKM, supra, at 901.23[6][c].

217 Id.

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

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

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

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

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

223. 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.).

224. **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).

225. 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).

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

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

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

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

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

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

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

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

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

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

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

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

238. **Mollins v. Nissan Motor Co., Inc.**, 14 Misc. 3d 1226 (Nassau Sup. 2007).

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

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

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

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

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

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

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

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

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

248. **Matter of DaimlerChrysler Corp., v. Spitzer**, 7 N.Y. 3d 653, 860 N.E. 2d 705, 827 N.Y.S. 2d 88 (2006).

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

250. Kandel v. Hyundai Motor America, __A.D. 3d__, 858 N.Y.S. 2d 298 (2008).

251. **Mollins v. Nissan Motor Co., Inc.**, 14 Misc. 3d 1226 (Nassau Sup. 2007).

252. **Matter of General Motors Corp. [Sheikh**], __A.D. 3d__,__N.Y.S. 2d__ 2007 WL 4577944 (3d Dept. 2007).

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

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

255. **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), *aff'd* 7 N.Y. 3d 653, 860 N.E. 2d 705, 827 N.Y.S. 2d 88 (2006). See also: **Matter of Arbitration between General Motors Corp. v. Brenda Gurau**, 33 A.D. 3d 1149, 824 N.Y.S. 2d 180 (3d Dept. 2006)(" Lemon Law does not require a consumer to prove that a defect exists at the time of an arbitration hearing in order to recover under the statute ").

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

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

258. **Alpha Leisure, Inc. v. Leaty**, 14 Misc. 3d 1235 (Monroe Sup. 2007).

259. Kandel v. Hyundai Motor America, __A.D. 3d__, 858 N.Y.S. 2d 298 (2008).

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

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

262. Matter of City Line Auto Mall, Inc. v. Mintz, 42 A.D. 3d 407, 840 N.Y.S. 2d 783 (2007).

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

264. **Goldsberry v. Mark Buick Pontiac GMC**, New York Law Journal, December 14, 2006, p. 25, col. 1 (Yks Cty Ct.).

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

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

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

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

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

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

271. **Jandreau v. LaVigne**, 170 A.D. 2d 861, 566 N.Y.S. 2d 683 (1991).

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

273. **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).

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

275. **DiNapoli v. Peak Automotive, Inc.**, 34 A.D. 3d 674, 824 N.Y.S. 2d 424 (2d Dept. 2006).

276. **Felton v. World Class Cars**, 12 Misc. 3d 64, __N.Y.S. 2d__ (N.Y.A.T. 2006).

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

278. **Felton v. World Class Cars**, 12 Misc. 3d 64, __N.Y.S. 2d__ (N.Y.A.T. 2006). See also: **Williams v. Planet Motor Car**, 190 Misc. 2d 33 (2001).

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

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

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

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

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

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

285 Jung v. The Major Automotive Companies, Inc., 17 Misc. 3d 1124 (Bronx Sup. 2007).

[44] Lamarca v. Great Atlantic & Pacific Tea Co. Inc., 16 Misc. 3d 1115(A), 2007 WL 2127354 (N.Y. Supp. 2007).

[45] Foster v. The Food Emporium, 2000 WL 1737858 (S.D.N.Y. 2000).

[46] The court said a "class action for actual damages may be maintained under the Labor Law so long as claims for liquidated damages are waived." Lamarca, 2007 WL 2127354 at *2.

[55] Cox v. NAP Co., Inc., 40 A.D.3d 459, 837 N.Y.S.2d 612 (1st Dep't 2007).

[56] The contracts required defendant to "pay to all laborers and mechanics employed [under the contract] not less than the wages prevailing in the locality of the project . . . pursuant to the Davis-Bacon Act."

[60] Alix v. Wal-Mart Stores, Inc., 16 Misc. 3d 844, 838 N.Y.S.2d 885 (Albany Sup. Ct. 2007).

[68] Gawez v. Inter-Connection Electric Inc., 44 A.D.3d 898,2007 N.Y. Slip. Op. 08034 (2d Dep't 2007).

[70] Jara v. Strong Steel Doors, Inc., 16 Misc. 3d 1139 (A), 2007 WL 2696110 (Kings Sup. Ct. 2007).

[73] Immigration and Reform Control Act of 1986, 8 U.S.C. § 1324 c. The Court noted that disregarding a statutory mandate to pay prevailing wages where the claimant is an undocumented alien would encourage employers to pay illegal aliens lower wages than legal workers, or simply not pay them at all, knowing that the employee would have no legal recourse.

[75] ADCO Electric Corp. v. McMahon, 38 A.D.3d 805, 835 N.Y.S.2d 588 (2d Dep't 2007).

[78] ARA Plumbing & Heating Corp. v. Abcon Assoc's Inc., 44 A.D.3d 598, 843 N.Y.S.2d 154 (2d Dep't 2007).

[79] Matros Automated Electrical Const. Corp. v. Libman, 37 A.D.3d 313, 830 N.Y.S.2d 127 (1st Dep't 2007).

[81] Vladimir v. Cowperthwait, 42 A.D.3d 413, 839 N.Y.S.2d 761 (1st Dep't 2007).

[83] NCJ Cleaners, LLC v. ALM Media Inc., 17 Misc. 3d 209, 844 N.Y.S.2d 619 (Richmond Sup. Ct. 2007).

[88] Brown v. State, 45 A.D.3d 15, 841 N.Y.S.2d 698 (3d Dep't 2007).

[99] Brody v. Catell, 16 Misc. 3d 1105(A), 841 N.Y.S.2d 825 (Kings Sup. Ct. 2007).

[101] Pressnar v. MortgageIT Holdings Inc., 16 Misc. 3d 1103 (A), 841 N.Y.S.2d 828, 2007 WL 1794935 (NY Sup. Ct. 2007).

[105] Wyly v. Milberg Weiss Bershad & Schulman LLP, 15 Misc. 3d 583, 834 N.Y.S.2d 631, 2007 N.Y. Slip. Op. 27077 (N.Y. Sup. Ct. 2007).

[107] See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997)

[108] The CLC/CFI Liquidating Trust v. Bloomingdales, Inc., 2007 WL 3101249, 2007 N.Y. Slip. Op. 52062 (N.Y. Sup. Ct. 2007).

286. Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y. 3d 253,___N.Y.S. 2d___ (2007).

287. Drew v. Sylvan Learning Center, 16 Misc. 3d 838 (N.Y. Civ. 2007).

288. See e.g., 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)(failing to give basic computer course for beginners). See also: Cullen v. Whitman Medical Corp., 197 F.R.D. 136 (E.D. Pa. 2000)(settlement of class action involving education misrepresentations).

289. Brown v. Hambric, 168 Misc. 2d 502 (Yonkers City Ct. 1995).

290. Cambridge v. Telemarketing Concepts, 171 Misc. 2d 796 (Yonkers City Ct. 1997).

291. People v. McNair, 9 Misc. 3d 1121 (N.Y. Sup. 2005) (" 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)").

292. **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).

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

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

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

296. Carney v. Coull Building Inspections, Inc., 16 Misc. 3d 1114 (N.Y. Civ. 2007).

297. 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).

298. Mancuso v. Rubin, __A.D. 3d__, 2008 WL 2390139 (2008).

299. Simone v. Homecheck Real Estate Services Inc., 42 A.D. 3d 518 (N.Y.A.D. 2007).

300. People v. Biegler, 17 Misc. 3d 1139 (N.Y. Dist. Ct. 2007).

301. **Flax v. Hommel**, 40 A.D. 3d 809, 835 N.Y.S. 2d 735 (2d Dept. 2007).

302. **CLE Associates, Inc. v. Greene**, New York Law Journal, Nov. 22, p. 27, col. 3 (N.Y. Sup.).

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

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

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

306. Franklin Home Improvements Corp. V. 687 6th Avenue Corp., 19 Misc. 3d 1107 (N.Y. Sup. 2008).

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

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

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

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

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

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

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

314. **CLE Associates, Inc. v. Greene**, New York Law Journal, Nov. 22, p. 27, col. 3 (N.Y. Sup.).

315. Naclerio v. Pradham, 45 A.D. 3d 585, 845 N.Y.S. 2d 409 (2007).

316. 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.

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

318. **Farrell v. Lane Residential, Inc.**, 13 Misc. 3d 1239 (Broome Sup. 2006).

319. **Putnam v. State of New York**, 233 A.D. 2d 872 (2d Dept. 1996).

320. **Farrell v. Lane Residential, Inc.**, 13 Misc. 3d 1239 (Broome Sup. 2006).

321. Security Supply Corporation v. Ciocca, 49 A.D. 3d 1136, 854 N.Y.S. 2d 570 (2008).

322. **Sharpe v. Mann**, 34 A.D. 3d 959, 823 N.Y.S. 2d 623 (3d Dept. 2006).

323. **Sharpe v. Mann**, 34 A.D. 3d 959, 823 N.Y.S. 2d 623 (3d Dept. 2006).

324. **Zyburo v. Bristled Five Corporation Development Pinewood Manor**, 12 Misc. 3d 1177 (Nassau Dist. Ct. 2006).

325. **Latiuk v. Faber Construction Co., Inc.**, 269 A.D. 2d 820, 703 N.Y.S. 2d 645 (2000)(builder could not reply upon contractual shortened warranty period because of a failure to comply with statutory requirements).

326. **Fumarelli v. Marsam Development, Inc**., 238 A.D. 2d 470, 657 N.Y.S. 2d 61 (1997), aff'd 92 N.Y. 2d 298, 680 N.Y.S. 2d 440, 703 N.E. 2d 251 (1998)(purchase agreement's limited warranty must be in accordance with the provisions of (G.B.L. § 777-b)).

327. **Finnegan v. Hill**, 38 A.D. 3d 491, 833 N.Y.S. 2d 107 (2d Dept. 2007).

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

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

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

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

332. **Randazzo v. Abram Zylberberg**, 4 Misc. 3d 109 (N.Y. App. Term. 2004).

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

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

335. Baronoff v. Kean Development Co., Inc., 12 Misc. 3d 627 (Nassau Sup. 2006).

336. **Ragucci v. Professional Construction Services**, 25 A.D. 3d 43, 803 N.Y.S. 2d 139 (2005).

337. Simone v. Homecheck Real Estate Services, Inc., 42 A.D. 2d 518, 840 N.Y.S. 2d 398, 400 (2d Dept. 2007).

338. Ayres v. Pressman, 14 Misc. 3d 145 (N.Y.A.T. 2007).

339. Calvente v. Levy, 12 Misc. 3d 38 (N.Y.A.T. 2006).

340. Ayers, supra, at 14 Misc. 3d 145.

341. Simone v. Homecheck Real Estate Services, Inc., 42 A.D. 2d 518, 840 N.Y.S. 2d 398, 400 (2d Dept. 2007). See also: McMullen v. Propester, 13 Misc. 3d 1232 (N.Y. Sup. 2006).

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

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

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

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

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

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

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

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

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

351. **Beller v. William Penn Life Ins. Co.**, 8 A.D. 3d 310, 778 N.Y.S. 2d 82 (2d Dept. 2004).

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

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

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

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

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

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

358. **Edelman v. O'Toole-Ewald Art Associates, Inc**., 28 A.D. 3d 250, 814 N.Y.S. 2d 98 (1st Dept. 2006).

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

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

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

362. 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 ").

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

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

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

366. Citibank (South Dakota) NA v. Beckerman, 18 Misc. 3d 133 (N.Y.A.T. 2008).

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

368. **Iyare v. Litton Loan Servicing, LP**, 12 Misc. 3d 123, __N.Y.S. 2d__ (N.Y.A.T. 2006).

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

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

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

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

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

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

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

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

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

378 Fuchs v. Wachovia Mortgage Corp., 41 A.D. 3d 424, 838 N.Y.S. 2d 148 (2d Dept. 2007).

379 See Charter One Mortgage Corp. v. Condra, 847 N.E. 2d 207 (Ind. App. 2006), transfer granted 860 N.E. 2d 599 (Ind. Sup. 2006), rev'd 865 N.E. 2d 602 (Ind. Sup. 2007)(" if the completion of legal documents is incident to a lender's financing activities, it is generally not the practice of law, whether or not a fee is charged "); King v. First Capital Fin. Servs. Corp., 215 Ill. 2d 1, 293 Ill. Dec. 657, 828 N.E. 2d 1155 (2005)(" [T]he charging of a fee, without more, for the preparation of the loan documents by the lenders' employees did not transform their [permissible] conduct into the unauthorized practice of law "); Dressel v. Ameribank, 468 Mich. 557, 664 N.W. 2d 151 (2003)(completion of standard mortgage documents by non-attorney employees did not constitute the practice of law; " [i]t is immaterial that [the bank] charged a fee for its services. Charging a fee for nonlegal services does not transmogrify those services into the practice of law '); cf, Eisel v. Midwest Bankcentre, 2006 WL 3408185 (Mo. App. E.D.)(" The trial court did not err in finding that Midwest engaged in the unauthorized business of law when it charged customers a separate document preparation fee for the completion of loan forms "), aff'd 230 S.W. 3d 335 (Mo. Sup. 2007)].

380. **Household Finance Realty Corp. V. Dunlap**, 15 Misc. 3d 659, 834 N.Y.S. 2d 438 (2007).

381. **Hodes v. Vermeer Owners, Inc.**, 14 Misc. 3d 366, 824 N.Y.S. 2d 872 (N.Y. Civ. 2006).

382. LaSalle Bank, N.A. v. Shearon, 19 Misc. 3d 433, 850 N.Y.S. 2d 871 (2008).

383. Alliance Mortgage Banking Corp. v. Dobkin, 19 Misc. 3d 1121, 2008 WL 1758864 (2008).

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

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

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

387. **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).

388. **Kudelko v. Dalessio**, 14 Misc. 3d 650, 829 N.Y.S. 2d 839 (N.Y. Civ. 2006).

389. Lesser v. Karenkooper.com, 18 Misc. 2d 1119 (N.Y. Sup. 2008).

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

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

392. People v. Boyajian Law Offices, 17 Misc. 3d 1119 (N.Y. Sup. 2007).

393. **People v. Applied Card Systems, Inc.**, 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (2005), *lv dismissed* 7 N.Y. 3d 741 (2006). See also: **People v. Applied Card Systems, Inc.**, __A.D. 3d __, __N.Y.S. 2d __, 2007 WL 1016885 (3d Dept. 2007)(" petitioner successfully established his claims pursuant to (G.B.L. § 349 and 350)...Having met the initial burden of establishing liability, Supreme Court was left to determine what measure of the injury ' is attributable to respondents' deception...We find no error in its exercise of such discretion, despite the lack of a hearing...(as to damages decision modified " by reversing so much thereof as awarded restitution to consumers who enrolled in the Credit Account Protection program and whose accounts were re-aged ").

394. **Centurion Capital Corp. v. Druce**, 11 Misc. 3d 564, 828 N.Y.S. 2d 851 (N.Y. Civ. 2006).

395. **Asokwah v. Burt**, New York Law Journal, June 19, 2006, p. 25, col. 3 (Yks. City Ct.).

396. Larsen v. LBC Legal Group, P.C., 533 F. Supp. 2d 290 (E.D.N.Y. 2008).

397. People v. Boyajian Law Offices, 17 Misc. 3d 1119 (N.Y. Sup. 2007).

398. Barry v. Board of Managers of Elmwood Park Condominium, 18 Misc. 3d 559 (N.Y. Civ. 2007).

399. **American Credit Card Processing Corp. V. Fairchild**, 11 Misc. 3d 972, 810 N.Y.S. 2d 874 (Suffolk Sup. 2006).

400. **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.

401. **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.

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

403. **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.

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

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

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

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

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

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

410. 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.).

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

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

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

414. **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).

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

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

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

418. **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 ")

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

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

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

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

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

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

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

426. **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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

442. **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)).

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

444. **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.).

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

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

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

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

449. Certified Inspections, Inc. v. Garfinkel, 19 Misc. 3d 134 (N.Y.A.T. 2008).

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

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

452. **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).

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

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

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

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

457. **Steuben Place Recreation Corp. v. McGuiness**, 15 Misc. 3d 1114 (Albany Cty Ct 2007).

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

459. **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 ").

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

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

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

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

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

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

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

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

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

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

470. **Centurion Capital Corp. v. Druce**, 11 Misc. 3d 564, 828 N.Y.S. 2d 851 (N.Y. Civ. 2006).

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

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

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

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

475. **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 ").

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

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

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

479. Julio v. Villency, 15 Misc. 3d 913, 832 N.Y.S. 2d 788 (2007).

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

481. **People v. My Service Center, Inc.**, 14 Misc. 3d 1217, 836 N.Y.S. 2d 487 (West. Sup. 2007).

482. **People v. Two Wheel Corp.**, 71 N.Y. 2d 693, ___N.Y.S. 2d__, __N.E. 2d__ (1988).

483. **People v. Beach Boys Equipment Co., Inc.**, 273 A.D. 2d 850 (__Dept. 2000).

484. **People v. Wever Petroleum Inc.**, __Misc. 2d__, 2006 N.Y. Slip Op 26414 (Albany Sup. 2006).

485. **People v. Chazy Hardware, Inc.**, 176 Misc. 2d 960 (Clinton Sup. 1998).

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

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

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

489. **Evergreen Bank, NA v. Zerteck**, 28 A.D. 3d 925, 813 N.Y.S. 2d 796 (3d Dept. 2006).

490. **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).

492. 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)).

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

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

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

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

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

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

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

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

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

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

503. 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)).

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

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

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

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

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

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

510. Dickerson, False, Misleading & Deceptive Advertising In The Travel Industry, at www.classactionlitigation.com/library/ca_articles.html

511. 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.

512. Dickerson, Hotels, Resorts And Casinos Selected Liability Issues at www.classactionlitigation.com/library/ca_articles.html

513. **Stone v. Continental Airlines**, 10 Misc. 3d 811, 804 N.Y.S. 2d 652 (2005).

514. Rottman v. El Al Israel Airlines, 18 Misc. 3d 885, 849 N.Y.S. 2d 431 (2008).

515. **Fallsview Glatt Kosher Caterers Inc. v. Rosenfeld**, New York Law Journal, January 19, 2005, p. 20, col. 1 (Kings Civ. 2005).

516. **Tal Tours v. Goldstein**, 9 Misc. 3d 1117(A) (Nassau Sup. 2005).

517. **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).

518. Telephone Consumer Protection Act of 1991, 47 USC § 227.

519. **Gottlieb v. Carnival Corp**., 436 F. 3d 335 (2d Cir. 2006).

520. **Weiss v. 4 Hour Wireless, Inc.**, New York Law Journal, September 7, 2004, p. 18, col. 1 (N.Y. App. Term 2004).

521. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 28, 701 N.Y.S. 2d 859 (1999).

522. **Kaplan v. Democrat & Chronicle**, 266 A.D. 2d 848, 698 N.Y.S. 2d 799 (3rd Dept. 1998).

523. **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).

524. **Joffe v. Acacia Mortgage Corp.**, 211 Ariz. 325, 121 P. 3d 831 (2005).

525. Stern v. Bluestone, 47 A.D. 3D 576, 850 N.Y.S. 2d 90 (2008).

526. 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).

527. **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 ").

528. **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 ").

529. 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...").

530. **Kaplan v. Life Fitness Center**, Rochester City Court, December 13, 1999.

531. 47 USC § 227[b][3].

532. **Antollino v. Hispanic Media Group, USA, Inc**., New York Law Journal, May 9, 2003, p. 21, col. 3 (N.Y. Sup.).

533. 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 ").

534. **Rudgayzer & Gratt v. Enine, Inc.,** 2002 WL 31369753 (N.Y. Civ. 2002).

535. **Rutgayser & Gratt v. Enine, Inc.**, 4 Misc. 3d 4 (N.Y. App. Term 2004).

536. **Bonime v. Management Training International**, New York Law Journal, February 6, 2004, p. 19, col. 1 (N.Y. Sup. 2004).

537. Stern v. Bluestone, 47 A.D. 3D 576, 850 N.Y.S. 2d 90 (2008).

538. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 701 N.Y.S. 2d 859 (1999).

539. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 701 N.Y.S. 2d 859 (1999).

540. **Kaplan v. Life Fitness Center**, Rochester City Court, December 13, 1999.

541. 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 ".)

542. **Rudgayser & Gratt v. Enine, Inc.**, 4 Misc. 3d 4 (N.Y. App. Term 2004).

543. **Weber v. U.S. Sterling Securities, Inc.**, 2007 WL 1703469 (Conn. Sup. 2007).

544. **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 ").

545. **Weber v. U.S. Sterling Securities, Inc.**, 2007 WL 1703469 (Conn. Sup. 2007).

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

547. Barry v. Dandy, LLC, 17 Misc. 3d 1109, 851 N.Y.S. 2d 62 (2007).

548. Murphy v. Lord Thompson Manor, Inc., 105 Conn. App. 546, 938 A. 2d 1269 (2008)

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

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

551. Andreani v. Romeo Photographers & Video Productions, 17 Misc. 3d 1124, 851 N.Y.S. 2d 67 (2007).

552. 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) ").

553. 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).

554. 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).

555. 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 "); Siegel v. Landy, 34 A.D. 3d 556, 824 N.Y.S. 2d 404 (2d Dept. 2006)(dispute over contract for interior design assistance; arbitration agreement enforced); Sharpe v. Mann, 34 A.D. 3d 959, 823 N.Y.S. 2d 623 (3d Dept. 2006)(arbitration agreement in contract for the construction of a custom home enforced notwithstanding reference in contract to G.B.L. § 777-a); 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).

556. **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 ").

557. **Ragucci v. Professional Construction Services**, 25 A.D. 3d 43, 803 N.Y.S. 2d 139 (2005).

558. **Baronoff v. Kean Development Co., Inc.**, 12 Misc. 3d 627 (Nassau Sup. 2006).

559. **D'Agostino v. Forty-Three East Equities Corp.**, 12 Misc. 3d 486, __N.Y.S. 2d__ (2006).

560. **Tal Tours v. Goldstein**, 9 Misc. 3d 1117(A) (Nassau Sup. 2005).

561. **Kaminetzky v. Starwood Hotels & Resorts Worldwide**, New York Law Journal, June 14, 2006, p. 32, col. 3 (West. Sup.)

562. **Mahl v. Rand**, 11 Misc. 3d 1071(A)(N.Y. Civ. 2006).

563. There was a much needed effort by some Courts to analyze the process by which consumer agreements are entered into and the appropriate standards of proof regarding the disposition of disputes that arise therefrom such as summary judgment motions made by credit card issuers [see Citibank [South Dakota], NA v. Martin, 11 Misc. 3d 219 (N.Y. Civ. 2005)], confirmation of arbitration awards [MBNA America Bank, N.A. v. Nelson, 15 Misc. 3d 1148 (N.Y. Civ. 2007); MBNA America Bank, NA v. Straub, ____Misc. 3d_____, 2006 NYSlipOp 26209 (N.Y. Civ.)], deceptive practices used by lenders in home equity loan mortgage closings [see Bonior v. Citibank, N.A., 14 Misc. 3d 771, 828 N.Y.S. 2d 765 (N.Y. Civ. Ct. 2006), changing the price in the middle of the term of a fixed-price contract [see Emilio v. Robinson Oil Corp., 28 A.D. 3d 418, 813 N.Y.S. 2d 465 (2d Dept. 2006); People v. Wilco Energy Corp., 284 A.D. 2d 469 (2d Dept. 2001)] and improper debt collection methods [see People v. Applied Card Systems, Inc., 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (3d Dept. 2005)].

564. Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor available at www.urbanjustice.org./cdp

565. New Report on New York City's Consumer Credit Crisis, NCLC Reports, Debt Collection and Repossessions Edition, Vo. 26, November/December 2007, p. 11.

566. New York State Unified Court System Press Release June 18, 2008, Chief Judge Kaye Announces Residential Foreclosure Program available at www.nycourts.gov/press/pr2008_4.shtml

567. See e.g., 5-Star Management, Inc. v. Rogers, 940 F. Supp. 512 (E.D.N.Y. 1996); FNMA v. Youkelstone, 755 N.Y.S. 2d 730 (App. Div. 2003); Guyerzeller Bank A.G. v. Chascona, NV, 841 N.Y.S. 22 (App. Div. 2007); Wells Fargo Bank Minnesota, National Association v. Mastropaolo, 837 N.Y.S. 2d 247 (App. Div. 2007); U.S. National Bank Association v. Kosak, 2007 WL 2480127 (N.Y. Civ. Ct. 2007); Wells, Fargo Bank, NA v. Farmer, 2008 WL 307454 (N.Y. Sup. 2008); Deutsche Bank National Trust Co. V. Castellanos, 2008 WL 123798 (N.Y. Sup. 2008); Countrywide Home Loans, Inc. V. Taylor, 843 N.Y.S. 2d 495 (N.Y. Sup. 2007);
Deutsche Bank National Trust Co. v. Clouden, 2007 WL 2709996 (N.Y. Sup. 2007); U.S. National Association v. Merino, 836 N.Y.S. 2d 853 (N.Y. Sup. 2007); U.S. Bank National Association v. Bernard, 2008 WL 383814 (N.Y. Sup. 2008); Wells Fargo Bank, N.A. v. Davilmar, 2007 WL 2481898 (N.Y. Sup. 2007).

568. LaSalle Bank, N.A. v. Shearon, 19 Misc. 3d 433, 850 N.Y.S. 2d 871 (2008); Alliance Mortgage Banking Corp. v. Dobkin, 19 Misc. 3d 1121, 2008 WL 1758864 (2008).

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

570. **MBNA America Bank, NA v. Straub**, ____Misc. 3d_____, 2006 NYSlipOp 26209(N.Y. Civ.).

571. MBNA America Bank, NA v. Nelson, 15 Misc. 3d 1148 (N.Y. Civ. 2007).

572. **MBNA America Bank NA v. Pacheco**, 12 Misc. 3d 1194 (Mt. Vernon Cty Ct 2006).

573. Arbor Commercial Mortgage, LLC v. Martinson, 18 Misc. 3d 178, 844 N.Y.S. 2d 689 (2007).

574. **Oxman v. Amoroso**, 172 Misc. 2d 773, 659 N.Y.S. 2d 963 (Yonkers Cty Ct 1997).

575. **Posh Pooch Inc. v. Nieri Argenti**, 11 Misc. 3d 1055(A), 2006 WL 435808 (N.Y. Sup.).

576. **Studebaker-Worthington Leasing Corp. v. A-1 Quality Plumbing Corp.,** New York Law Journal, October 28, 2005, p. 28, col. 1 (N.Y. Sup.).

577. **Boss v. American Express Financial Advisors, Inc.**, 6 N.Y. 3d 242, 811 N.Y.S. 2d 620 (2006).

578. **Brooke Group v. JCH Syndicate 488**, 87 N.Y. 2d 530 (1996).

579. **Glen & Co. v. Popular Leasing USA, Inc.**, New York Law Journal, May 18, 2006, p. 25, col. 3 (West Sup. 2006).

580. **Scarella v. America Online** 11 Misc. 3d 19 (N.Y. App. Term. 2005), *aff'g* 4 Misc. 3d 1024(A) (N.Y. Civ. 2004).

581. **Gates v. AOL Time Warner, Inc**., 2003 WL 21375367 (N.Y. Sup. 2003).

582. **Murphy v. Schneider National, Inc**., 362 F. 3d 1133 (9th Cir. 2004).

583. **Great American Insurance Agency v. United Parcel Service**, 3 Misc. 3d 301, 772 N.Y.S. 2d 486 (2004).

584. 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
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Dickerson & Manning, A Summary of Article 9 Class Actions in 2004 at www.nycourts.gov/courts/9jd/taxcert.shtml

585. See Table of Contents of Class Actions: The Law of 50 States, Law Journal Press (2007) at http://www.lawcatalog.com/table_of_contents.cfm?productID=1112&return=listview&CFID=596802&CFTOKEN=2

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

587 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).

588 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 ").

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

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

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

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

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

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

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

596 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].

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

598 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 ").

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

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

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

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

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

604 Saunders v. AOL Time Warner, Inc., 18 A.D. 3d 216, 794 N.Y.S. 2d 342 (1st Dept. 2005).

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

606 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 ").

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

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

609 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)").

610 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 ".

611 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 ").

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

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

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

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

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

617 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).

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

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

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

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

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

623 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).

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

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

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

627 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].

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

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

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

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

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

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

634 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 ").

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

636 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).

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

638 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).

639 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).

640 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).

641 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).

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

643 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).

644 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).

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

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

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

648 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].

649 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 ").

650 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 ").

651 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.

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

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

654 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 ").

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

656 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 ").

657. Rabouin v. Metropolitan Life Insurance Company, 25 A.D. 3d 349, 806 N.Y.S. 2d 584 (2006).

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

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

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

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

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

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

664 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].

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

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

667 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.

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

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

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

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

672 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).

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

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

675 Boss v. American Express Financial Advisors, Inc., 6 N.Y. 3d 242, 844 N.E. 2d 1142, 811 N.Y.S. 2d 620 (2006).

676 See Dickerson, New York State Consumer Law 2006 at www.classactionlitigation.com/library/consumerlaw2006update.html

See also 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) ").

677 See e.g., Ragucci v. Professional Construction Services 25 A.D. 3d 43, 803 N.Y.S. 2d 139 (2d Dept. 2005)(G.B.L. § 399-c's prohibition against the use of mandatory arbitration clauses in certain consumer contracts enforced and applied to a contract for architectural services); 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).

678 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 "); 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).

679 Rabouin v. Metropolitan Life Ins. Co., 25 A.D. 3d 349, 806 N.Y.S. 2d 584 (1st Dept. 2006).

680 Stevens v. American Water Services, Inc., 32 A.D. 3d 1188, 823 N.Y.S. 2d 639 (4th Dept. 2006).

681 Paltre v. General Motors Corp., 26 A.D. 3d 481, 810 N.Y.S. 2d 496 (2d Dept. 2006).

682 Sperry v. Crompton Corp., 26 A.D. 2d 488, 810 N.Y.S. 2d 498 (2d Dept. 2006).

683 Hamlet On Olde Oyster Bay Home Owners Association, Inc. v. Holiday Organization, New York Law Journal, August 17, 2006, p. 23, col. 3 (Nassau Sup. 2006)(Donnelly Act causes of action " must be dismissed since private individuals may not prosecute a class action under the Donnelly Act ").

684 Paltre v. General Motors Corp., 26 A.D. 3d 481, 810 N.Y.S. 2d 496 (2d Dept. 2006).

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

686 Giovanniello v. Carolina Wholesale Office Machine Co., 29 A.D. 3d 737, 815 N.Y.S. 2d 248 (2d Dept. 2006).

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

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

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

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

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

692 Morales v. Copy Right, Inc., 28 A.D. 3d 440, 813 N.Y.S. 2d 731 (2d Dept. 2006).

693 State v. Philip Morris, Inc., 30 A.D. 3d 26, 813 N.Y.S. 2d 71 (1st Dept. 2006).

694 See N. 3, supra.

695 Colbert v. Outdoor World Corporation, Index No: 11140/98, Queens Sup., J. Polizzi (Notice of Settlement dated July 2006).

696 NACA, The Consumer Advocate, Vol. 12, October November December 2006, p. 14.

697 Notice of Settlement at p. 2.

698 Notice of Settlement at p. 3.

699 Notice of Settlement at p. 4.

700 Id.

701 Dimich v. Med-Pro, Inc., 34 A.D. 3d 329, 2006 WL 3316086 (1st Dept. 2006).

702 Compare: Collins v. Safeway Stores, 187 Cal. App. 3d 62m 72, 231 Cal. Rptr. 638, 644 (1986)(contaminated eggs).

703 In addition the Court dismissed the plaintiff's individual claims for (1) breach of warranty and negligent misrepresentation because he was not the purchaser of the Lipitor, (2) violations of GBL § 349 because of the " remoteness " of the claim and (3) common law fraud because he " may have acted improperly in obtaining the prescription in his wife's name "

704 Kings Choice Neckwear, Inc. V. DHL Airways, Inc., New York Law Journal, May 5, 2006, p. 22, col. 1 (N.Y. Sup. 2006).

705 Kings Choice Neckwear, Inc. V. DHL Airways, Inc., 2003 WL 22283814 (S.D.N.Y. 2003).

706 Arroyo v. State of New York, 12 Misc. 3d 1197 (N.Y. Ct. Cl. 2006).

707 The Spraypark " consists of over 100 water jets that spontaneously spray water over a hardtop surface ".

708 See e.g., Bertoldi v. State of New York, 164 Misc. 2d 581, 625 N.Y.S. 2d 814 (N.Y. Ct. Cl. 1995); Brown v. State of New York, 250 A.D. 2d 314, 681 N.Y.S. 2d 170 (N.Y. Ct. Cl. 1998); St. Paul Fire and Marine Ins. Co. v. State of New York, 99 Misc. 2d 140, 415 N.Y.S. 2d 949 (N.Y. Ct. Cl. 1979).

709 Nissenbaum & Associates v. Hispanic Media Group, USA, 13 Misc. 3d 1216 (Nassau Sup. 2006).

710 Id. At fn. 2 (" The material contains misstatements regarding the number of pages in the directory, the number of households to which the directory was distributed and the number of directories printed ").

711 Fiala v. Metropolitan Life Ins. Co., New York Law Journal, June 2, 2006, p. 22, col. 1 (N.Y. Sup. 2006).

712 See Shah v. Metropolitan Life Ins. Co., 2003 WL 728869 (N.Y. Sup. 2003), *aff'd as mod'd* Fiala v. Metropolitan Life Ins. Co., 6 A.D. 3d 320 (1st Dept. 2004).

713 **New York Stock Exchange/Archipelago Merger 12 Misc.3d 1184 (N.Y. Sup. 2005).**

714 Fortune Limousine Service, Inc. v. Nextel Communications, 2006 WL 3526947 (2d Dept. 2006).

715 In so doing, the Court distinguished the decision in City Postal, Inc. v. Unistar Leasing, 283 A.D.2d 916, which examined a very similar contract and determined that the unjust enrichment claim should survive a motion to dismiss under CPLR 3211.

716 Cohen v. Nassau Educators Federal Credit Union 12 Misc.3d 1164, 819 N.Y.S. 2d 209 (N.Y. Sup. 2006).

717 Brandy v. Canea Mare Contracting, Inc. , 34 A.D. 3d 512, 2006 WL 3307404 (2d Dept. 2006).

718 Daniel Fontana et al. v. Champion Mortgage Co., Inc. 32 A.D.3d 453, 819 N.Y.S. 2d 472 (2d Dept. 2006).

719 Dowd v. Alliance Mortgage Company 32 A.D.3d 894, 822 N.Y.S. 2d 558 (2d Dept. 2006).

720 See Negrin v. Norwest Mortgage, 263 A.D.2d. 39 (2d Dept. 1999).

721 Jones v. Board of Education of Watertown City School District, 30 A.D. 3d 967, 816 N.Y.S. 2d 796 (4th Dept. 2006).

722 Mark Fabrics, Inc. V. GMAC Commercial Credit LLC, New York Law Journal, December 22, 2005, p. 18, col. 3 (N.Y. Sup. 2006).

723 Kantrowitz, Goldhammer & Graifman, P.C. v. New York State Electric & Gas 27 A.D.3d 872, 810 N.Y.S. 2d 550 (3d Dept. 2006)

724 Township of Thompson v. New York State Electric & Gas Corporation 25 A.D.3d 850, 807 N.Y.S. 2d 203 (3d Dept. 2006)

725 See Kantrowicz, Goldhammer & Graifman, P.C. v. New York State Electric & Gas Corporation, 27 A.D.3d 872 (3d Dept. 2006).

726 Long Island Radiology v. Allstate Insurance Company 12 Misc.3d 1167, 820 N.Y.S. 2d 843 (N.Y. Sup. 2006)

727 Sperry v. Crompton, 8 N.Y. 3d 204, 863 N.E. 2d 1012, 831 N.Y.S. 2d 760 (2007), aff'g 26 A.D. 3d 488, 810 N.Y.S. 2d 498 (2d Dept. 2006).

728 See 3 Weinstein Korn & Miller, New York Civil Practice (MB) (2008) 901.28 (WKM). In Giovanniello v. Carolina Wholesale Office Machine Co., 29 A.D. 3d 737, 815 N.Y.S. 2d 248 (2d Dept.

2006); Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005); Leyse v. Flagship Capital Services Corp., 22 A.D. 3d 426, 803 N.Y.S. 2d 52 (1st Dept. 2005); Ganci v. Cape Canaveral Tour & Travel, Inc., 21 A.D. 3d 399, 799 N.Y.S. 2d 737 (2d Dept. 2005); Bonime v. Discount Funding Associates, Inc., 21 A.D. 3d 393, 799 N.Y.S. 2d 418 (2d Dept. 2005) the Courts have held that class action treatment of TCPA claims is inappropriate under CPLR § 901(b)'s prohibition of class actions seeking a penalty.

729 See WKM, supra, at 901.23[6][c]. Lawlor v. Cablevision Systems Corp., 15 Misc 3d 1111(Nassau Sup. 2007).

730 Berkman v. Robert's American Gourmet Food, Inc., 16 Misc. 3d 1104 (N.Y. Sup. 2007).

731 Klein v. Robert's American Gourmet Food, 28 A.D. 3d 63, 808 N.Y.S. 2d 766 (2d Dept. 2006).

732 Berkman v. Robert's American Gourmet Food, Inc., 16 Misc. 3d 1104 (N.Y. Sup. 2007)(" These discount coupons could be redeemed by consumers at the point of purchase...in the following amounts 1. At least $0.40 for the purchase of a 4 once bag of any Robert's snack food product; or 2. At least $0.20 for the purchase of a 1 once or 1 -3/8 ounce bag of any Robert's snack food product, 3. To the extent that Robert's replaces the size of the above product packages with other sizes Robert's will offer discount coupons redeemable against such new packaging in an amount calculated in good faith to equal 20% of the average retail selling price...no claim forms were needed to be completed or submitted to Defendants. Moreover, the nature of the Coupon Distribution-a completely ' fluid recovery '- meant that consumers did not have to prove that they purchased the Products or were otherwise damaged ").

733 Id. (" The parties agreed that the fat and caloric testing would be carried out monthly for eighteen months...quarterly for the next thirty months ").

734 See also Class Actions, supra, at 9.03[2]; WKM, supra, at 903.10.

735 See also WKM, supra, at 901.23[6][c].

736 Id.

737 Vigiletti v. Sears, Roebuck & Co., Index No: 2573/05, Sup. Ct. Westchester County, J. Rudolph, Decision September 23, 2005, aff'd 42 A.D. 3d 497, 838 N.Y.S. 2d 785 (2d Dept. 2007).

738 Baron v. Pfizer, Inc., 42 A.D. 3d 627, 840 N.Y.S. 2d 445 (3d Dept. 2007).

739 McGuckin v. Snapple Distributors, Inc., 41 A.D.3d 795, 837 N.Y.S. 2d 576 (2d Dept. 2007).

740 Naftulin v. Sprint Corp., 16 Misc. 3d 1131 (Kings Sup. 2007).

741
Id. (The advertisement " offered a ' 2 Phones 1 Rate Plan ' with 3000 minutes at a rate of $49.99 per month (and) also stated that more phones could be added for an additional $10.00 per month...(Plaintiff purchased) the advertised plan and three phones...and paid $364.00 for the phones and paid an activation fee of $34.99 ").

742 See also Class Actions, supra, at 6.07[5] and WKM, supra, at 902.07.

743 Mollins v. Nissan Motor Co., Ltd., 14 Misc. 3d 1226 (Nassau Sup. 2007).

744 Lawlor v. Cablevision Systems Corp., 15 Misc 3d 1111 (Nassau Sup. 2007).

745 Fuchs v. Wachovia Mortgage Corp., 41 A.D. 3d 424, 838 N.Y.S. 2d 148 (2d Dept. 2007).

746 See Charter One Mortgage Corp. v. Condra, 847 N.E. 2d 207 (Ind. App. 2006), transfer granted 860 N.E. 2d 599 (Ind. Sup. 2006), rev'd 865 N.E. 2d 602 (Ind. Sup. 2007)(" if the completion of legal documents is incident to a lender's financing activities, it is generally not the practice of law, whether or not a fee is charged "); King v. First Capital Fin. Servs. Corp., 215 Ill. 2d 1, 293 Ill. Dec. 657, 828 N.E. 2d 1155 (2005)(" [T]he charging of a fee, without more, for the preparation of the loan documents by the lenders' employees did not transform their [permissible] conduct into the unauthorized practice of law "); Dressel v. Ameribank, 468 Mich. 557, 664 N.W. 2d 151 (2003)(completion of standard mortgage documents by non-attorney employees did not constitute the practice of law; " [i]t is immaterial that [the bank] charged a fee for its services. Charging a fee for nonlegal services does not transmogrify those

services into the practice of law ‘); cf, Eisel v. Midwest Bankcentre, 2006 WL 3408185 (Mo. App. E.D.)(“ The trial court did not err in finding that Midwest engaged in the unauthorized business of law when it charged customers a separate document preparation fee for the completion of loan forms “), aff’d 230 S.W. 3d 335 (Mo. Sup. 2007)].

747 Shovak v. Long Island Commercial Bank, 35 A.D. 3d 837, 829 N.Y.S. 2d 546 (2d Dept. 2006).

748. Shovak v. Long Island Commercial Bank, 50 A.D. 3d 1118, 2008 N.Y. Slip Op. 04070 (2008).

749 MacDonell v. PHM Mortgage Corp., 846 N.Y.S. 2d 223, 2007 WL 3317808 (2d Dept. 2007).

750 See Dowd v. Alliance Mortgage Co., 32 A.D. 3d 894, 822 N.Y.S. 2d 558 (2d Dept. 2006); Dougherty v. North Fork Bank, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2d Dept. 2003); see generally Negrin v. Norwest Mortgage, 263 A.D. 2d 39, 700 N.Y.S. 2d 184 (2d Dept. 1999).

751 Dowd v. Alliance Mortgage Co., 32 A.D. 3d 894, 822 N.Y.S. 2d 558 (2d Dept. 2006). See generally Dillon v. U-A Columbia Cablevision of Westchester, 100 N.Y. 2d 525, 760 N.Y.S. 2d 726, 790 N.E. 2d 1155 (2003).

752 Kings Choice Neckwear, Inc. V. DHL Airways, Inc., 41 A.D. 3d 117, 836 N.Y.S. 2d 605 (1st Dept. 2007), aff’g New York Law Journal, May 5, 2006, p. 22, col. 1 (N.Y. Sup. 2006).

753 Pludeman v. Northern Leasing Systems, Inc., 40 A.D. 3d 366, 837 N.Y.S. 2d(1st Dept. 2007), aff’d __N.Y. 3d__, 2008 WL 1944567 (2008).

754 See Bernstein v. Kelso & Co., 231 A.D. 2d 314, 323, 659 N.Y.S. 2d 276 (1st Dept. 1997).

755 Batas v. The Prudential Insurance Company, 37 A.D. 3d 320, 831 N.Y.S. 2d 371 (1st Dept. 2007).

756 Batas v. The Prudential Insurance Company, 281 A.D. 2d 260, 724 N.Y.S. 2d 3 (1st Dept. 2007).

757 Cohen v. Nassau Educators Federal Credit Union, 37 A.D. 3d 751, 832 N.Y.S. 2s 50 (2d Dept. 2007).

758 Beller v. William Penn Life Ins. Co., 37 A.D. 3d 747, 830 N.Y.S. 2d 759 (2d Dept. 2007).

759 Beller v. William Penn Life Ins. Co., 15 Misc. 3d 350, 828 N.Y.S. 2d 869 (N.Y. Sup. 2007).

760 Fiala v. Metropolitan Life Ins. Co., 17 Misc. 3d 1102 (N.Y. Sup. 2007).

761 Fiala v. Metropolitan Life Ins. Co., 6 A.D. 3d 320, 776 N.Y.S. 2d 29 (1st Dept. 2004)(claim stated against insurer for dilution of equity).

762 Jung v. The Major Automotive Companies, Inc., 17 Misc. 3d 1124 (Bronx Sup. 2007).

[44] Lamarca v. Great Atlantic & Pacific Tea Co. Inc., 16 Misc. 3d 1115(A), 2007 WL 2127354 (N.Y. Supp. 2007).

[45] Foster v. The Food Emporium, 2000 WL 1737858 (S.D.N.Y. 2000).

[46] The court said a "class action for actual damages may be maintained under the Labor Law so long as claims for liquidated damages are waived." Lamarca, 2007 WL 2127354 at *2.

[55] Cox v. NAP Co., Inc., 40 A.D.3d 459, 837 N.Y.S.2d 612 (1st Dep't 2007).

[56] The contracts required defendant to "pay to all laborers and mechanics employed [under the contract] not less than the wages prevailing in the locality of the project . . . pursuant to the Davis-Bacon Act."

[60] Alix v. Wal-Mart Stores, Inc., 16 Misc. 3d 844, 838 N.Y.S.2d 885 (Albany Sup. Ct. 2007).

[68] Gawez v. Inter-Connection Electric Inc., 44 A.D.3d 898,2007 N.Y. Slip. Op. 08034 (2d Dep't 2007).

[70] Jara v. Strong Steel Doors, Inc., 16 Misc. 3d 1139 (A), 2007 WL 2696110 (Kings Sup. Ct. 2007).

[73] Immigration and Reform Control Act of 1986, 8 U.S.C. § 1324 c. The Court noted that disregarding a statutory mandate to pay prevailing wages where the claimant is an undocumented alien would encourage employers to pay illegal aliens lower wages than legal workers, or simply not pay them at all, knowing that the employee would have no legal recourse.

[75] ADCO Electric Corp. v. McMahon, 38 A.D.3d 805, 835 N.Y.S.2d 588 (2d Dep't 2007).

[78] ARA Plumbing & Heating Corp. v. Abcon Assoc's Inc., 44 A.D.3d 598, 843 N.Y.S.2d 154 (2d Dep't 2007).

[79] Matros Automated Electrical Const. Corp. v. Libman, 37 A.D.3d 313, 830 N.Y.S.2d 127 (1st Dep't 2007).

[81] Vladimir v. Cowperthwait, 42 A.D.3d 413, 839 N.Y.S.2d 761 (1st Dep't 2007).

[83] NCJ Cleaners, LLC v. ALM Media Inc., 17 Misc. 3d 209, 844 N.Y.S.2d 619 (Richmond Sup. Ct. 2007).

[88] Brown v. State, 45 A.D.3d 15, 841 N.Y.S.2d 698 (3d Dep't 2007).

[99] Brody v. Catell, 16 Misc. 3d 1105(A), 841 N.Y.S.2d 825 (Kings Sup. Ct. 2007).

[101] Pressnar v. MortgageIT Holdings Inc., 16 Misc. 3d 1103 (A), 841 N.Y.S.2d 828, 2007 WL 1794935 (NY Sup. Ct. 2007).

[105] Wyly v. Milberg Weiss Bershad & Schulman LLP, 15 Misc. 3d 583, 834 N.Y.S.2d 631, 2007 N.Y. Slip. Op. 27077 (N.Y. Sup. Ct. 2007).

[107] See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997)

[108] The CLC/CFI Liquidating Trust v. Bloomingdales, Inc., 2007 WL 3101249, 2007 N.Y. Slip. Op. 52062 (N.Y. Sup. Ct. 2007).