

**FORDHAM LAW SCHOOL: NEW YORK CIVIL PRACTICE CLASS**

**LECTURE TOPIC: NEW YORK STATE CLASS ACTIONS**

**March 9, 2010**

**Guest Lecturer: Justice Thomas A. Dickerson**

**§ Resource Materials**

All of the topics to be discussed this afternoon are covered in much greater detail in both of my class action treatises.

Those Treatises are

(1) Weinstein Korn & Miller, **New York Civil Practice CPLR**, LEXIS-NEXIS (MB), Article 9 Class Actions **2006-2011**. Revisions, updated every year

(2) Dickerson, **Class Actions: The Law of 50 States**, Law Journal Press, **1988-2011**. Updated every 6 months.

(3) Also **numerous articles** on New York State class actions published in 1977 through 2011, two of which have been sent to you. Our annual review of New York State class actions in 2010 and Game Changer about CPLR 901(b), prohibition on penalty class actions.

(4) Plus handouts regarding two cases, **Guadagno v. Diamond Tours & Travel, Inc.**, the first certified consumer fraud class action under CPLR Article 9, involving a grossly misrepresented vacation tour to Jamaica, and **Feldman v. Quick Quality Restaurants, Inc.**, a classic fluid recovery/cy pres consumer class action, involving the failure to disclose the true price of fast food products. These cases still serve as timely examples of how the class action device can dramatically level the litigation playing field, make the impossible possible and allow consumers

to obtain compensation for defective and/or misrepresented goods and services.

§ **Topics To Be Discussed: Outline**

1] **1975 Was A Very Good Year**

A] Enactment Of CPLR Article 9: Purpose, Objectives

2] **What Factors Are Considered In Certifying A Class Action Under CPLR Article 9 [ See *Globe Surgical Supply v. GEICO Insurance Co.*, 59 A.D. 3d 129, 135-147 (2d Dept. 2008)]**

[WKM]	[CPLR]	
§901.06		A] Standing
§901.21		B] Class Identification
§901.22	§901(a)(1)	C] Numerosity
§901.23	§901(a)(2)	D] Common Questions Of Law or Fact: Predominance
§901.24	§901(a)(3)	E] Typicality
§901.25	§901(a)(4)	F] Adequacy of Representation
§901.26	§901(a)(5)	G] Superiority

§902.03	§902(1)	H] Individual Control
§902.03	§902(2)	I] Inefficiency
§902.03	§902(3)	J] Competing Litigation
§902.05		K] Jurisdiction Over Non-Residents
§902.06	§901(4)	L] Convenient Forum
§902.04	§901(5)	M] Manageability
§902.07		N] Choice Of Law; Nationwide Classes

- 3] **What's Certifiable & What's Not But Should Be?**
  
- 4] **Mass Torts: Property Damage/Physical Injuries: What Are We Waiting For?**
  
- 5] **CPLR 901(b): Make A Federal Case Out Of It**
  
- 6] **GBL §§ 349,350 and Article 9: The Dynamic Duo**
  
- 7] **How To Make Non-Cash Settlements Work**
  
- 8] **Fluid Recovery And Cy-Pres Concepts: Settlements And Disposing Of Unclaimed Settlements Funds**
  
- 9] **Class Representative Incentive Awards**

10] **Fees & Costs For Objector's Counsel; Incentive Awards  
For Objectors**

11] **Attorneys Fees And Costs: Percentage or Lodestar; Fees  
When There Is No Common Fund**

§ **1975 Was A Very Good Year**

§ **1975 : Two Very Important Events Took Place In 1975**

**First, Article 9 of the CPLR was enacted.**

**Second, I went on a vacation.**

§ **Enactment of Article 9 of CPLR: The Promise**

[1] Purpose:

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

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

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

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

#### § Objectives

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

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

[3] Efficiency,

[4] Avoidance of inconsistent adjudications,

[5] Protection of absent class members,

[6] Relief for class members with individually  
small claims,

[7] Disgorgement of ill gotten gains.

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

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

§ The Statute: What Factors Are Considered In Certifying A  
Class Action Under CPLR Article 9 [ See Globe Surgical Supply v.  
GEICO Insurance Co., 59 A.D. 3d 129, 135-147 (2d Dept. 2008)]

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§901.26	§901(a)(5)	G] Superiority
§901.27		G-1] Merits Consideration
§902.03	§902(1)	H] Individual Control
§902.03	§902(2)	I] Inefficiency
§902.03	§902(3)	J] Competing Litigation
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§902.04	§901(5)	M] Manageability

§ Case Law: What's Certifiable And What's Not But Should Be

§ Unfulfilled Uniform Promises

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

[1] Breach of contract

[2] Fraudulent misrepresentations

[3] Negligent misrepresentation

[4] Violation of GBL §§ 349, 350

[5] Breach of warranty

[6] Quasi-contractual claims such as unjust enrichment, economic duress, bad faith dealings,

money had and received, implied covenant of good faith.

**Recent examples of the certification of such class actions include**

1] **Emilio v. Robinson Oil Corp.**, 63 AD3d 667 ( 2d Dept. 2009 ) involving unilateral changes of fixed price electricity contracts alleging breach of contract, breach of covenant of good faith and violation of GBL 349; three similar contracts; sub-classing;

2] **Argento v. Wal-Mart Stores, Inc.**, 66 AD 3d 930 ( 2d Dept. 2009 ) involving the backdating of renewal memberships wherein members who renewed after their membership expiration date were required to pay the full annual fee for less than a full year's membership; alleging violation of GBL 349;

3] **Morrissey v. Nextel Partners, Inc.**, 72 AD3d 209 ( 3d Dept. 2010 ) involving a contract for the provision of cellular telephone services and alleging violations of GBL 349 and 350 regarding a Bonus Minute sub-class and a Spending Limit sub-class, the former being denied certification because of oral misrepresentations and the latter being granted class

certification based upon inconspicuous notice of spending limit fee increase disclosures under GBL 349 but not 350 citing the 2d Dept cases of **Goldman** and **Lonner** and 1<sup>st</sup> Dept case of **Sims**;

4] **Pludeman v. Northern Leasing System, Inc.**, 74 A.D. 3d 420, 904 N.Y.S. 2d 372 (1<sup>st</sup> Dept. 2010) involving lease agreements for Point of Sale equipment and challenging the enforceability on concealed microprint disclaimers and waivers; breach of contract claims certified based on same course of conduct and same legal theory, i.e., " only the first page of lease is enforceable "; notice costs to be borne by defendant. See also recent decision of the trial court at 2010 WL 1254550 ( N.Y. Sup. 2010 ) granting plaintiff class partial summary judgment on breach of contract cause of action.

#### § **Uniform Misconduct**

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

[1] Breach of fiduciary duty

[2] Negligence

[3] Violation of a statute

[4] Quasi-contractual claims

Recent examples of such a class action are

1] **Galdamez v. Biordi Construction Corp.**, 50 AD3d 357 (1<sup>st</sup> Dept. 2008) an action by employees seeking to recover the prevailing rate of wages and supplemental benefits pursuant to Labor Law § 220;

2] **Nawrocki v. Proto Construction**, 2010 WL 1540027 ( N.Y. Sup. 2010 ) an action by employees on Public Works projects seeking wages at prevailing rate, supplemental benefits and overtime pay alleging breach of public works contracts, violation of New York's overtime compensation laws, quantum meruit and unjust enrichment and

3] **Krebs v. The Canyon Club**, 22 Misc. 3d 1125 ( West. Sup. 2009 ) an action by employees seeking retained gratuities allegedly misrepresented to customers as a service charge meant for employees, alleging violation of Labor Law 196-d.

§ **Declaratory & Injunctive Relief & Governmental Operations**

Class actions seeking declaratory and/or injunctive relief are certifiable unless they challenge governmental operations, then they are not certifiable but, on the other hand, may be certifiable under appropriate circumstances.

Recent examples include

1] **City of New York v. Maul**, 14 NY 3d 499 ( 4-2 decision ) (Ct. App. May 6, 2010) involving a class of disabled persons alleging that they did not receive adequate services from the Office of Mental Retardation and Developmental Disabilities and New York City Administration for Children's Services (ACS) while they were in ACS's foster care system ( fn 5. " Supreme Court also rejected ACS's contention that class certification was improper under the governmental operations doctrine (see *Bryant Ave. Tenants' Assn. v. Koch*, 71 NY2d 856, 859 (1988). ACS does not pursue this argument on appeal and we therefore do not address it ") and

2] **Hurrell-Harring v. State**, 2010 WL 1791000 ( Ct. App. May 6, 2010 ), dismissal motion but probably would be certified, the Court of Appeals finding that criminal defendants stated a claim for constructive denial of 6<sup>th</sup> Amendment rights with regard to

alleged inadequacies of the locally funded system of providing lawyers for indigent defendants.

§ CPLR 901(b)

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

As noted by the Court of Appeals in **Sperry v. Crompton**, 8 NY 3d 204 ( 2007 ), a price fixing class action alleging violations of GBL 340, GBL 349 and asserting unjust enrichment, noted that " 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 "

However, class actions alleging violations of GBL § 349, which also has a minimum damage award and penalty provisions, albeit discretionary, are certifiable as long as the named plaintiff waives treble damages with notice to class members so they may opt out and pursue an individual action seeking such

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

GBL § 340 class actions may now be certifiable in federal court under FRCP 23. In order to avoid CPLR 901(b) some antitrust class actions alleging a violation of GBL 340 have been brought in federal court under Rule 23 which contains no such prohibition. Until recently, however, the federal courts in the New York have, whether on the grounds of comity or to discourage forum shopping, have routinely referred to CPLR 901(b) and denied class certification.

Recently, Justice Scalia writing for the plurality in **Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company**, 130 S. Ct. 143 (U.S. Sup. March 31, 2010) held that CPLR 901(b) could no longer trump Rule 23 noting that " Rule 23 provides a one-size-fits-all formula for deciding the class-action question ". The net effect of this decision is three fold. First, there may be an increase in the number of class actions brought in federal court seeking to avoid 901(b). Second, some defendants may not be so anxious to remove a case to federal court under the Class

Action Fairness Act. And third the Legislature may consider repealing 901(b). See my article **State Class Actions: Game Changer**, in NYLJ, April 6, 2010, p. 6.

§ **Mass Torts**

Class action " Mass Torts " brought under CPLR Article 9 involving personal injuries or property damage are, generally, not yet certifiable whether based on negligence, strict products liability, misrepresentations or a violation of GBL 349.

See for example, **Flemming v. Barnswell Nursing Home & Health Facilities, Inc.**, 309 AD2d 1132 (3d Dept. 2003) involving the alleged mistreatment of nursing home residents, class certification denied as to medical malpractice claims but granted as to claims under Pub. Health Law 2308-1, a statute specifically authorizing class actions; This case was settled and modified by the Court of Appeals at 15 N.Y. 3d 375 (2010).

**Rallis v. City of New York**, 3 AD3d 526 ( 2004 ) involving water damage from flooding causes by the City's alleged failure to design and install proper drainage systems; certification denied;

And **Lieberman v. 293 Mediterranean Market Corp.**, 303 AD2d 560

( 2002 )( food poisoning; certification denied ).

However, there have been exceptions including **Godwin Realty Associates v. CATV Enterprises**, 275 AD2d 269 ( 2000 )( building owners seek damages for misappropriation of electricity and physical damage to building by installation of cable; certification granted ); **Arroyo v. Spraypark**, 12 Misc. 3d 1197 ( Ct. Cl. 2006 )( water contamination at Spraypark facility )

Mass torts should be certifiable since it would be consistent with the legislative history of Article 9. In addition mass torts are routinely certified in many other states and in the federal courts.

Recent class certification of a property damage mass tort in **Osarczuk v. Associated Universities, Inc.**, 26 Misc. 3d 1209 ( Suffolk Sup. 2009 ). Previously the AD2d in a January 30, 2007 decision held that some 800 homeowners living near the Brookhaven National Laboratory stated a claim for personal injuries and property damage from exposure to non-nuclear hazardous materials emitted into the air, soil and groundwater, the complaint alleging negligence, abnormally dangerous activity, gross negligence, private nuisance and medical monitoring. Subsequently, the trial court certified two of the proposed six sub-classes including (1)

homeowners who suffered a diminution of real property values or may have lost enjoyment or use and (2) persons who suffered economic loss such as being unable to use private wells and being required to hook up to public water systems. Certification was, however, denied to personal injury claims and medical monitoring requests.

### **§ Types Of Class Actions**

Given the continuing reluctance of New York courts to certify mass tort class, class actions challenging governmental operations or asserting statutory causes of action which provide for an award of a penalty or minimum measure of recovery, it is not surprising that in recent years CPLR Article 9 class actions have, primarily been brought on behalf of consumers, employees, subcontractors, vendors, retirees and recipients of welfare and social service services. Listing of these types of class actions appears in WKM ¶ 901.05.

### **§ Specific Topics**

#### **§ GBL 349 and 350 Class Actions**

GBL 349 is a very broad statute and applies " to virtually

all economic activity...The reach of these statutes provides needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State " [ Judge Graffeo in her dissent in **Matter of Food Parade, Inc. v. Office of Consumer Affairs of County of Nassau**, 7 NY3d 568 ( 2007 )].

GBL 349 is broader than common law fraud, " encompasses a significantly wider range of deceptive business that were never previously condemned by decisional law " [ **Gaidon v. Guardian Life Ins. Co.**, 96 NY2d 201 ( 2001 ) ] and " was intended to be broadly applicable, extending far beyond the reach of common law fraud " [ **State of New York v. Feldman**, 210 F. Supp. 2d 294 ( S.D.N.Y. 2002 )], including, in some instances, property damage mass tort claims [ **Sorrentino v. ASN**, 588 F. Supp. 2d 350 ( E.D.N.Y. 2008 )].

See the listing of these areas in my Internet treatise Consumer Law 2010 and my **Consumer Protection** chapter in Commercial Litigation in New York State Courts, 3d Edition, Thomson Reuters, 2011.

## **§ Certifiability Of GBL 349/350 Claims**

To certify a GBL 349 and 350 claim requires uniform misrepresentations by means of printed advertising or contractual materials, but no unscripted oral misrepresentations, or the uniform omissions of material fact or a common course of conduct and qualitatively similar damages. The difference between these two statutes is that 350 requires proof of reliance and 349 does not. As we mentioned earlier, CPLR 901(b) does not prevent the certification of GBL 349/350 claims as long as minimum recovery or treble damages are waived and class members may opt-out. The scope of such a class action is limited to misleading and deceptive transactions taking place in New York State.

## **§ How To Make Non-Cash Settlements Work**

**§ Burger King** case [ see Handouts ] involving a failure to reveal the true price of fast food products at 21 Burger King franchise stores in New York and New Jersey owned and operated by Quick Quality Restaurants. The thrust of the action was that Quick imposed a 3/4 of 1% sur-charge on all fast food products without properly disclosing this information on the well lit menu boards. The statement " Due to increased energy costs a surcharge was three-quarters of one percent has been added to the menu prices "

appeared on a 2" by 4" dull brown plastic sign on the rear wall of each store's main counter. In essence, the sign was invisible. The class action complaint alleging breach of contract, fraud and violation of GBL 349 and was certified by Justice Wallace although the identity of class members would never be known.

The settlement provided for the issuance of \$.50 coupons to the next best class consisting of customers who first purchased the product. The defendant was to keep issuing coupons until the class settlement amount of \$115,000 was reached. Attorneys fees of \$12,500 was paid in cash. The total amount taken from consumers, one or two cents at a time was \$164,914 with a estimated class of 16 million.

#### **§ Coupon Settlement Design To Maximize Usage**

**§ Reasons for using coupons:** Non-cash settlements provide for the distribution of products or coupons and certifications that provide discounts for the purchase of goods or services, typically, those sold by the defendant. Such settlements can be appropriate, particularly, where the defendant may be forced out of business with a cash settlement and/or the members of the class are not identifiable. However, they must be carefully designed to maximize the benefit received by class members.

§ **Transferability:** Transfer to others for cash, even at a discount, and creating a secondary market for bartering.

§ **Aggregation:** Anti-stacking provisions should be rejected.

§ **Redemption Rate:** The court should appoint experts to advise on the actual value of the coupons including projected redemption rate. There must be a 100% redemption to make such settlements meaningful and that means that defendants must continue to issue coupons until the amount redeemed matches the agreed upon value of the settlement or re-issue coupons for distribution through an approved Cy Pres program. The court should require timely reports on how many coupons have been redeemed.

§ **Time Of Redemption:** The Court should insist upon 2 to 3 year redemption periods.

§ **Timing Of Redemption:** In *Branch v. Crabtree*, a New York class action alleging misrepresentations in the sale of Hyundai motor vehicles a proposed settlement called for the issuance of \$1000 certificates towards the purchase of a new or used car. The certificates could be withheld by the consumer until after negotiating the best price. At that point the certificate could be

produced for a further reduction of the price.

### § **Cy Pres Distributions**

Like the **Burger King** case it may be impossible to identify actual class members. Therefore, a fluid recovery or cy pres recovery may be in order seeking to bestow the benefits of the settlement upon the next best class [ **Burger King** ] or an agreed upon charity or public interest organization such as consumer trust funds, public schools, law schools, research foundations, organizations promoting health and so forth [ **Fiala v. Metropolitan Life Ins. Co.**, 27 Misc. 3d 599 (N.Y. Sup. 2010) (\$2.5 million to The Foundation for the National Institutes of Health)]

### § **Incentive Awards To Class Representative**

**Fiala** yes.

**Flemming v. Barnwell Nursing Home And Health Facilities, Inc.**, 56 A.D. 3d 162, 865 N.Y.S. 2d 706 (3d Dept. 2008), aff'd 15 N.Y. 3d 375 (2010)( no incentive awards to class representatives)

### § **Objector's Incentive Awards; Objector's Counsel Fees & Costs**

**Fiala** yes on objector's counsel fees and **Flemming** no.

Trial courts must carefully examine proposed settlements<sup>1</sup>, especially when coupled with a motion seeking certification of a settlement class. Appropriately, counsel for the class and the defendants have an interest in presenting the proposed settlement in a favorable light. The trial court, however, may need a more disinterested analysis of the proposed settlement<sup>2</sup>. It is for this reason that class members should be encouraged to file objections and appear at the settlement fairness hearing<sup>3</sup>, be permitted to intervene, if necessary, to protect the interests of the class<sup>4</sup>, and be permitted to conduct limited discovery<sup>5</sup>, if carefully monitored to avoid unnecessary delay. If the trial court finds the objector's analysis to be useful in evaluating the proposed settlement, some Federal and state courts have approved of objector's incentive awards and the payment of objector's counsel's fees and costs<sup>6</sup>.

In *Flemming v. Barnwell Nursing Home And Health Facilities, Inc.*<sup>7</sup>, a majority of the Court of Appeals declined to award an objector her counsel fees noting that "The language of CPLR 909 permits attorney fees awards only to 'the representatives of the class' and does not authorize an award of counsel fees to any party, individual or counsel, other than class counsel. Had the

Legislature intended any party to recover attorney fees it could have expressly said so". The dissent, however, noted that "Whatever the faults and virtues of the class action device, no one disputes the need to control class counsel's fees-and nothing furnishes so effective a check on those fees as an objecting lawyer". Hopefully, the majority's holding will be ameliorated in future cases where the objector's input is found to be helpful<sup>8</sup> unlike in this case where the trial court found that "her objections had neither assisted the court nor benefitted the class".

**§ Attorneys Fees and Costs:**

**Loadstar and Percentage Fee: Both Available Under Article 9,**

**§ Fees & Costs; Where There Is No Common Fund Created: When Should Defendant Pay**

In *Louisiana Municipal Employees' Retirement System v. Cablevision Systems Corp.*<sup>9</sup>, the defendants agreed to pay counsel's attorneys fees as part of a proposed settlement "which became void upon the nonconsummation of a transaction contemplated in the settlement agreement". The plaintiffs, however, asserted that they obtained a benefit for the class [share price increased], were

entitled to an award of attorneys fees pursuant to CPLR 909 and since no common fund had been created which could fund such an award, the plaintiffs sought to have defendants pay. In limiting the scope of CPLR 909 the Appellate Division, Second Department, held that "Although CPLR 909 also provides that 'if justice requires, [the court in its discretion may] allow recovery of the amount awarded from the opponent of the class', cases<sup>10</sup> interpreting this statutory provision uniformly require a showing of bad faith or other improper conduct on the part of a defendant before approving an award of fees directly against it". Finding no bad faith the court reversed the trial court's award of \$2.1 million in attorneys fees<sup>11</sup>.

#### ENDNOTES

1. See Dickerson, Class Actions: The Law of 50 States, 9.01, 9.02(Class Actions); Weinstein Korn Miller, New York Civil Practice CPLR 908.03(WKM).
2. See *Klein v. Robert's American Gourmet Food, Inc.*, 28 A.D. 3d 63 (2d Dept. 2005); *Berkman v. Roberts American Gourmet Food, Inc.*, 16 Misc. 3d 1104(A)(N.Y. Sup. 2007).
3. See *Brody v. Catell* 16 Misc. 3d 1105A (N.Y. Sup. 2007)("Their participating has...served the interests of their fellow shareholders and indeed the public...All parties have benefitted from the contributions of these dissenters who took the time and trouble to demand a full hearing"); WKM at 908.14.
4. See *New York Diet Drug Litigation*, 15 Misc. 3d 1114(A) (N.Y. Sup. 2007)(intervention allowed because of counsel's alleged ethical violations); *Weiser v. Grace*, N.Y.L.J., Sept. 9, 1996, p. 22, col. 4(N.Y. Sup.)(intervenor to keep eye on plaintiffs'

attorneys); WKM at 908.14[1].

5. See *New York Diet Drug Litigation*, 47 A.D. 3d 586 (1<sup>st</sup> Dept. 2008)(intervention and disclosure allowed); WKM at 908.14[3]. Compare *Wyly v. Milberg Weiss Bershad & Schulman, LLP*, 12 N.Y. 3d 400(2009).

6. See *Class Actions* at 9.03[4][b][v]; WKM at 908.14[5]. See also: *In re Domestic Airline Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993).

7. *Flemming v. Barnwell Nursing Home And Health Facilities, Inc.*, 15 N.Y.3d 375 (2010).

8. See e.g., *Klein v. Robert's American Gourmet Food, Inc.*, 28 A.D. 3d 63 (2d Dept. 2005)(proposed settlement and certification of settlement class remanded; objector successfully challenged proposed settlement as it 'provided insufficient value to class members, that it contained no injunction against, or admission of liability by, the defendants"); see WKM at 908.14[4].

9. *Louisiana Municipal Employees' Retirement System v. Cablevision Systems Corp.*, 74 A.D. 3d 1291 (2d Dept. 2010).

10. See *Huff v. C.K. Sanitary Systems*, 260 A.D. 2d 892 (3d Dept. 1999); *Loretto v. Group W Cable*, 135 A.D. 2d 444 (1<sup>st</sup> Dept. 1987); WKM at 909.03.

11. *In re Cablevision Systems Corp. Shareholders Litigation*, 21 Misc. 3d 419 (Nassau Sup. 2008).