

COMMERCIAL DIVISION UPDATE PROGRAM

OUTLINE

June 28, 2010

By Justice Thomas A. Dickerson¹

§ Resource Materials

I. New York State Class Actions

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

II. State Court Class Actions

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

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

§ Introduction

Enactment Of Article 1975; Purpose, Objectives, Early Examples

Thirty Five Years Later In 2010; What Is Certifiable And What Isn't But Should Be

Types Of Class Actions

Judge's Guide To Managing New York State Class Actions

§ Selected Topics For Discussion

§ Resource Materials In **WKM, CA** And Appendices To Judge's Guide To Managing New York State Class Actions ["Guide"]

§ General Business Law §§ 349, 350 And Article 9 Class Actions: The Dynamic Duo²

[[**WKM ¶ 901.23[6], CA § 6.04[4]**
[Guide Appendices D, E, G, H & N]

² See e.g., *Weinberg v. Hertz Corporation*, 116 A.D. 2d 1 (1st Dept. 1986), aff'd 69 N.Y. 2d 979 (1987) (gasoline refueling charges excessive "resulting in charges...of \$1.85 per gallon"; unconscionable premiums for CDW and PAI coverage; exorbitant late return charges; causes of actions included breach of contract, GBL § 349, unconscionability, bad faith, violations of UCC §§ 2-302, 1-201; certification granted to class of 2.8 million consumers); *Morrissey v. Nextel Partners, Inc.*, 72 AD3d 209 (3d Dept. 2010) (cellular telephone service "bonus minutes"; GBL §§ 349, 350; class certification issues); *Feldman v. Quick Quality Restaurants, Inc.*, NYLJ, July 22, 1983, p. 12, col. 4 (N.Y. Sup.) (fast food franchise; failure to reveal the true price of the fast food products; fraud, breach of contract, General Business Law ["GBL"] § 349; certification granted; fluid recovery; coupon settlement) (**Guide Appendix B**)

§ Mass Tort Class Actions: Why Shouldn't They Be Certifiable?³

[WKM ¶ 901.23[9], CA § 6.04[7]

[Guide Appendix F]

§ Recent Developments In CPLR 901(b) Class Actions

[WKM ¶ 901.28]⁴

§ Recent Developments In Class Wide Arbitration

[WKM ¶ 901.06[4]; CA § 4.03[5]]⁵

§ How To Make Non-Cash Settlements Work: Coupons And Attorneys Fees

[WKM ¶ 908.06; CA § 9.03[1][c]]

[Guide Appendices B, I & J]

³ See e.g., *Osarczuk v. Associated Universities, Inc.*, 36 AD3d 872 (2d Dept. 2007) (homeowners may seek damages from non-nuclear emissions); *Osarczuk v. Associated Universities, Inc.*, 2009 WL 5256171 (N.Y. Sup. 2009) (certification granted); *Arroyo v. State of New York*, 12 Misc. 3d 1197, 824 NYS2d 767 (Ct.Cl.2006) (Spraypark water contamination; certification granted). Compare: *Flemming v. Barnswell Nursing Home & Health Facilities, Inc.*, 309 AD2d 1132 (3d Dept. 2003) (certification denied as to medical malpractice claims but granted as to claims under Pub. Health Law 2308-1).

⁴ GBL § 340 class actions may now be certifiable in federal court under FRCP 23. See *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 2010 WL 1222272 (U.S. Sup. 2010). See also ; Dickerson, State Class Actions: Game Changer, NYLJ, April 6, 2010, p. 6.

⁵ See *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 2009 WL 1655826 (U.S. Sup. Ct. 2009) ("it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so").

§ Cy Pres Remedies: Settlements⁶ & Disposing Of Unclaimed Funds

[WKM ¶ 908.07; CA § 9.03[1][d]]
[Guide Appendix K]

§ Class Representative Incentive Awards⁷

[WKM ¶ 908.08; CA § 9.03[4][d]]
[Guide Appendix L]

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

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

§ Attorneys Fees And Costs; Percentage Method, Lodestar Method, Who Pays? The Class, Defendant Or Both?

[WKM ¶ 909.01-909.06; CA § 10.01-10.03]

⁶ See e.g., *Fiala v. Metropolitan Life Insurance Co., Inc.*, 27 Misc. 3d 599 (N.Y. Sup.2010).

⁷ See e.g., *Flemming v. Barnwell Nursing Home and Health Facilities, Inc.*, 56 AD3d 162 (3d Dept. 2008), lv. granted NY3d 710 (2009); *Fiala v. Metropolitan Life Insurance Co., Inc.*, 27 Misc. 3d 599 (N.Y. Sup.2010).

Appendix A

BFCP, FORM NO. CPLR 901:3 Complaint in Class Actions Brought by Vacationers Against Travel Companies for Fraud

¶ 901Ref.03 Federal Practice Counterpart to CPLR 901

Fed. R. Civ. P. 23.

5 Moore's Federal Practice, Ch. 23, Class Actions (Matthew Bender 3d ed.).

¶ 901Ref.04 Law Review Articles Relating to CPLR 901

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