CONSUMER CLASS ACTIONS IN NEW YORK

by the COMMITTEE ON CONSUMER AFFAIRS

I. Consumer Class Actions in New York

At the dawn of the new century, the Consumer Affairs Committee of the Association of the Bar of the City of New York reviewed class certification under CPLR Article 9 as it relates primarily to actions by consumers. The law has remained virtually unchanged since its passage in 1975 and the Court of Appeals has set forth extremely clear guidelines regarding the elements of class certification. The Committee has found, however, that the lower courts with some regularity have rejected class certification despite the fact that the criteria necessary for class certification apparently have been satisfied.

In the Committee=s view, two recent Court of Appeals decisions reaffirm the contours of the question. *See Gaidon v. Guardian Life Insurance Company of America,* and the companion case *Goshen v. Mutual Life Insurance Co. of New York,* 94 N.Y.2d 330 (1999) and *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1 (1st Dep=t 1998), *aff=d*, 94 N.Y.2d 43 (1999). These cases concerned allegations pursuant to New York=s unfair and deceptive trade practices statute, GBL '349, and/or New York=s false advertising statute, GBL '350.

They make plain that where liability can be established uniformly and at once for all class members, a class action will serve as the superior method of adjudication; where liability turns on whether a particular product, statement, or event injured a class member, individual issues may predominate and class treatment of the underlying claim may be unmanageable and inefficient. These principles apply equally to consumer claims for breach of warranty, breach of contract, fraud, negligent misrepresentation, and breach of fiduciary duty.

The Committee notes that in one area of importance to consumers, the enforcement of New York=s antitrust laws, several trial level courts have denied class treatment to claims asserted under the Donnelly Act, GBL '340. These courts have denied class treatment of Donnelly Act claims on the grounds that the treble damage remedy provided for in the Donnelly Act is a penalty and the CPLR precludes certification of any action seeking a penalty. It is the Committee=s view that the treble damage remedy is <u>not</u> a penalty and therefore these decisions were incorrectly decided.

Application of Article 9 in a manner consistent with its intent and controlling case law will improve the quality of justice in New York. This report will examine the history of the statute and will give examples of cases that apply, and that appear to deviate from, controlling principles.

II. History of CPLR Article 9

The class action has long been recognized as an important procedural device for the consumer to seek redress of grievances in a matter in which the damages suffered may not justify the cost of individual litigation.[1]

New York=s original class action rule, CPLR '1005, set forth the standards for a proper class action in broad terms:

> Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Yet, New York courts consistently interpreted the statute narrowly to require a Aunity of interest@ among the class members. *Hall v. Coburn Corp.,* 26 N.Y.2d 396, 398 (1970). Courts confined the relief available under CPLR §1005 to controversies involving either a limited fund or specific property as to which the members of the class were united by Aprivity@ or where the relief sought either automatically satisfied the claims of all or was injunctive in nature. Where the controversy involved the predominance of common questions of law or fact rather than questions affecting particular members of the class --

[1] The Committee previously wrote that A[t]he single most important obstacle for the aggrieved consumer is the disproportion between the amount of his claim and the cost of enforcing that claim.@ *See* The Record, 1973 Committee Report

and this is the norm in consumer suits -- the class action remedy was unavailable. In light of the foregoing, in 1975 the Committee wrote,

> [c]lass action relief has not been extended in New York to such problems as mass consumer exposure to deceptive sales practices, unlawful collection practices or unlawful adhesion contracts. As to these and other areas of abuses against consumers, **it is the view of this Committee that the single most effective remedy will be the creation of a Apredominant common question@ right of class action under the laws of this state. Until such a right arises so as to deter unlawful conduct and require compensation for its harm consumers will remain victims without remedy in the face of actual violations of existing substantive law.**

The Record, 1973 Committee Report AProposed Class Action Legislation In New York,@ at 485 (emphasis added).

In 1973, the Court of Appeals, in *Moore v. Metropolitan Life Insurance Co.,* 33 N.Y.2d 304 (1973), called upon the New York State Legislature to enact class action legislation then pending. The court implied that if the Legislature did not do so, then the courts themselves would bring class action practice and procedure in New York up to modern standards. The court wrote:

> [i]n our view there is urgency for early legislation to accomplish these purposes, in light of the general and judicial

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AProposed Class Action Legislation In New York.@

> dissatisfaction with the existing restrictions on class action which in many instances may mean a total lack of remedy, as a practical matter, for wrongs demanding correction.

Id. at 313. Thus, the Judicial Conference was charged with correcting New York=s class action law. The result was Article 9, patterned largely, though not entirely, on Rule 23 of the Federal Rules of Civil Procedure.

CPLR ' 901(a) sets forth the prerequisites to a class action, all five of which must be satisfied before the court will allow a class action to proceed. They are:

1. The class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. There are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. The representative parties will fairly and adequately protect the interest of the class; and
5. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

See CPLR §901.

In addition, pursuant to CPLR '902, the court must consider:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticability or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; and

5. The difficulties likely to be encountered in the management of a class action.

Courts uniformly have ruled that these requirements are to be liberally construed. In one decision, the Second Department wrote:

> [Article 9] should be broadly construed not only because of the general command for liberal construction of all CPLR sections but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it.

Friar v. Vanguard Holding Corp., 78 A.D.2d 83 (2nd Dep=t 1980) (citations omitted); *accord Brandon v. Chefetz,* 106 A.D.2d 162, 168 (1st Dep=t 1985) (A[t]he policy of [Article 9] is to favor the maintenance of class actions and for a liberal interpretation.@). In another decision, the First Department reasoned:

> [t]herapeutic benefits are premised on the concept of collateral public benefits flowing from use of the remedy. The class action is seen as a means of inducing socially and ethically responsible behavior on the part of large and wealthy institutions which will be deterred from carrying out policies or engaging in activities harmful to large numbers of individuals. Absent the class action lawsuit. . .these institutions will be permitted to operate virtually unchecked and continue to engage in <legalized theft= which is perpetuated because the injured potential plaintiffs are frequently damaged in a small sum… .

Brandon, 106 A.D.2d at 169.

Despite the clear legislative preference for the class action, Article 9 includes a number of hurdles to certification. CPLR §901(a)(2), the predominance requirement, has

been described as Aunquestionably . . . the most troublesome@ prerequisite. *Friar,* 78 A.D.2d at 95. It has foiled many an attempt to certify. In *Friar*, the Second Department wrote

> In the Federal system, the Apredominance@ inquiry has led to widely differing and irreconcilable results because of the practice of focusing upon the delineation of all questions as either Acommon@ or Aindividual@ and then deciding which group outweighs the other. Discrete weighing has evoked criticism from those who suggest that the focus of the predomination inquiry should be that of promoting efficient economy of judicial resources. . . . We, too, abjure the weighing process in the belief that the decision as to whether there are common predominating questions of fact or law so as to support a class action should not be determined by any mechanical test, but rather, Awhether the use of a class action would >achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated=".

Id. at 96-97 (citations omitted).

Indeed, more often than not, when class treatment of a claim is denied in New York for a reason other than standing or pleading, the reason has been the absence of a predominance of common questions. The mere existence of individual questions, however, should not defeat class certification. *See Pruitt v. Rockefeller Center Properties, Inc.*, 167 A.D.2d 14, 21-22 (1st Dep=t 1991); *Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc.2d 941, 944 (Sup. Ct. N.Y. Co. 1978).

So long as there is a Acommon legal grievance,@ New York courts should grant class certification, notwithstanding possible differences regarding some factual issues or in the amount or measure or damages. *See Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 6-7 (1st

Dep=t 1986), *aff'd*, 69 N.Y.2d 979 (1987); *Thompson v. Whitestone Savings & Loan Ass'n*, 101 A.D.2d 833, 834 (2d Dep=t 1984); *see also* 2 Weinstein, Korn & Miller, *New York Civil Practice*, & 901.11 at 9-49 to 9-50 (1996). The test is Awhether the use of a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.'@ *Friar*, 78 A.D.2d at 97. The *Friar* court further explained that:

> [a]ny device which would allow one action to do a job, or a good part of it, that would otherwise have to be done by many, must be considered <superior= in a state which is as pro-consolidation as New York is: were all the potential class members to bring separate actions, the common issue would itself permit consolidation . . . . It is only to stress that as far as CPLR 901(a)(5) is concerned, New York does deem one action a <superior= way to adjudicate multiple claims.

Id. at 100 (*quoting* Siegel, *New York Practice,* ' 141, p. 180 (1978)). One of the rationales for a class action, of course, is the difficulty individual class members would face litigating their claims absent the class action device. As the Second Department noted,

> [t]here can be little doubt that a class action is the only feasible mechanism of addressing the claims of the individual members of the proposed class. The small amount of damages sustained by the individual class members would discourage many of them from pursuing their claims individually, and the number of claimants would render consolidation unfeasible.

Super Glue Corp. v. Avis Rent A Car System, Inc., 132 A.D.2d 604, 607-8 (2d Dep=t 1987) (citations omitted).

To that end, Aany error, if there is to be one, should be in favor of allowing the class action.@ *Pruitt*, 167 A.D.2d at 21, *quoting Esplin v. Hirschi,* 402 F.2d 94, 101 (10th Cir. 1968) *cert. denied,* 398 U.S. 928 (1969). ATo litigate the issue [of defendant=s liability] 300 times would be an obvious waste of judicial resources. . . .@ *Friar,* 78 A.D.2d at 100.

III Class Actions in Practice

A. Consumer Claims and GBL Section 349

Consumer claims arising out of uniform misconduct, uniform misrepresentations and/or uniform omissions from uniform documents received by class members are ideally suited for class treatment. Thus, New York courts have repeatedly certified for class-wide treatment claims under GBL '349 where it is established that defendants behaved in such uniform fashion toward all class members, causing uniform injury. *See, e.g., Super Glue Corp,* 132 A.D.2d at 604. Section 349 claims are particularly well-suited for class treatment, because the statute concerns practices that affect consumers generally, rather than Asingle-shot@ transactions. *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank,* 85 N.Y.2d 20, 21 (1995). In *Oswego*, the Court of Appeals held that in order to fall within the proscriptions of GBL ' 349, a practice must potentially affect other similarly-situated consumers. It should follow that such claims present common questions of fact.

These principles recently were reaffirmed in *Gaidon v. The Guardian Life Insurance Company of America,* and the companion case *Goshen v. Mutual Life Insurance Co. of New York*, 94 N.Y.2d 330 (1999). Each followed the dismissal of a GBL '349 claim asserted on behalf of a class of consumers arising out of oral and written

misrepresentations respecting “vanishing premium” life insurance policies. In both cases, the misrepresentations were allegedly made by insurance agents while preparing Apersonalized timetables@ and Aindividualized projections@ to Alure@ would-be customers into purchasing policies. 94 N.Y.2d at 330. In *Gaidon*, the claim was dismissed on the pleadings and before class certification. In *Goshen*, the claim was dismissed on a motion for summary judgment, and after a state class had been certified. 94 N.Y.2d at 341.

In *Goshen*, the Court of Appeals reinstated the GBL'349 class claim, stating:

> Consumers vary in their level of sophistication and their ability to perceive the connection between a fluctuation in dividend/interest rates and a vanishing date, or to make the necessary arithmetic adjustments. **The issue before us is not whether, as matter of law, reasonable consumers would be misled in a material way, but whether that prospect is enough to create a question of fact in the *Goshen* appeal, or to state a claim in *Gaidon*. It is, in both cases, for a number of reasons.**

94 N.Y.2d at 345. (emphasis added). While the *Goshen* class certification order was not considered expressly by the Court of Appeals, by leaving undisturbed a class certification founded upon a skein of individual oral communications, the principles governing class certification there should apply *a fortiori* in cases that contain uniform written material misrepresentations or omissions.[2]

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[2] Class certification was denied in an earlier vanishing premium case, *Russo v. Massachusetts Mutual Life Ins. Co.*, 178 Misc. 2d 772 (Sup. Ct. Tompkins Co. 1998), *aff=d*, 274 A.D.2d 878 (3d Dep=t 2000), *rev’d on other grounds, Gaidon v. Guardian Life Ins. Co. of America,* 2001 WL 493351 (2001). As in *Gaidon*, the *Russo* plaintiff argued that all class members had been induced to buy insurance on the basis

of written illustrations used during sales pitches that falsely represented that premiums would Avanish@ after a fixed number of annual payments were made. 178 Misc.2d at 773. While the *Gaidon* court found that the common question of whether the sales pitches were false and misleading predominated, the *Russo* court found that individual issues predominated on that same point. "[C]ountless combinations and permutations of financial and personal factors may have induced each of the individual sales, whether or not an illustration was mentioned or displayed by the agent, or >browsed= by the insured.@ *Id.* at 774. Possibly fatal to obtaining certification was that plaintiff Russo testified that Athe illustrations played a minor role, and perhaps no role, in her decision to buy.@ *Id. at 775* The court thus found:

> Based on the evidence before us, including the Russo testimony, we are not free to assume that sales to the class were triggered by written representations received by each class member under circumstances which would permit the conclusion that the documents were actually considered by

In *Taylor v. American Bankers Insurance Group, Inc.,* 267 A.D.2d 178 (1st Dep=t 1999), the First Department affirmed the certification of a *nationwide* class based on claims asserted under GBL "349 and 350. The court wrote:

> The predominant focus of this litigation is defendants= general practice of offering, in prominent print, ostensibly easily available credit insurance coverage, while, at the same time relegating to small, inconspicuous print the precise terms of the coverage being extended, and then, rejecting insurance claims on the ground that the consumer had not been paying for the appropriate type of insurance.

> the recipients in making a decision to buy the policies… . The common element, which arguably unites the class, is anything but common.

Id. at 775-6. The *Russo* appeal to the Court of Appeals concerned only whether the lower courts properly dismissed the case on statute of limitations grounds. The denial of class certification was not before the court. Thus, it cannot be said what effect if any *Gaidon* and *Goshen* may have had on the *Russo* class certification.

267 A.D.2d at 178. The court concluded that certification of a nationwide class was a proper exercise of the trial court=s discretion. AThis general practice, and the question of whether it constitutes a consumer fraud, affects hundreds if not thousands of consumers." *Id.* The defendants had opposed class certification on the grounds that class members were exposed to a variety of different forms and promotions, and individual questions of reliance and causation predominated. *Id.* The court held, however, that immaterial variations in otherwise-uniform documents are not a bar to certification. *Id.* A[M]atters relating to individual reliance and causation are relatively insignificant, if not irrelevant@ in cases concerning uniform deceptive practices. *Id., citing Pruitt*, 167 A.D.2d at 22.

These fundamental principles are well established in New York case law. In *King v. Club Med., Inc.,* 76 A.D.2d 123, 127 (1st Dep=t 1980), class members alleged breach of contract and fraudulent misrepresentation claims against defendant arising out of false and misleading information in travel brochures for one of its Ahotel villages.@ The brochures uniformly promised modern air conditioned rooms, hot and cold water, private bathrooms and other amenities. Nevertheless, the complaint alleged that the hotel rooms "had sporadic electricity, either no hot or cold running water or intermittent hot or cold running water and . . . the toilet and other sanitary facilities . . . were either not operational or sporadic.@ *Id.* at 124. In granting class certification, the court expressly rejected defendant=s argument that even in cases Ain which identical representations are made in writing to a large group of people, the common issues of law and fact inherent in the claim

of fraudulent material misrepresentations do not >predominate= over the allegedly individual issues of reliance.@ *Id.* at 127. The court wrote:

> it is not plausible that persons confronted with the very distinct choice in the character of facilities presented in defendants= brochures would have opted to spend a July vacation on a tropical island in a >luxury= hotel with air conditioning, private bathrooms and electricity without having >relied= on those representations . . . . We think it is improbable that a case-by-case evidentiary showing of reliance will be necessary with regard to any member of the class disclosed to have participated in the tour after reading defendants= promotional literature if the evidence establishes that the described representations were fraudulent.

Id. The court also noted that reliance and causation will be presumed where defendants effectively control all of the information about a transaction. *Id.* At 127. While technically a fraudulent misrepresentation and breach of contract case, *King* is oft-cited in common law fraud, false advertising, GBL '349, and other consumer class actions where claims arise out of uniform documents.

Stellema v. Vantage Press, Inc., 109 A.D.2d 423, 424 (1st Dep=t 1985), is another frequently cited, uniform document, consumer class action decision. The complaint alleged that Vantage=s standard form contract contained fraudulent representations that it was a publisher and would provide a variety of editorial, publishing and promotional services for its authors. The complaint also alleged that each class member author paid to Vantage the full amount of his or her publication costs pursuant to its Asubsidy@ plan. *Id.* at 392. Plaintiff asserted that Awere it not for the representation by Vantage that it was a publisher with the facilities and programs alleged, the authors would not have paid substantial

publication fees.@ *Id.* Certification was granted because Vantage=s alleged misrepresentations Awere uniform and were generally transmitted in two documents in which Vantage represented that it was a publisher with the facilities described.@ *Id.*

The principles of *King* and *Stellema* were applied in the GBL ' 349 context in *Weinberg v. Hertz Corp.,* 116 A.D.2d 1 (1st Dep=t 1986), *aff=d*, 69 N.Y.2d 979 (1987). There, plaintiffs alleged that Hertz=s refueling and insurance charges were excessive, unfair and deceptive in violation of GBL '349. It was undisputed that these charges were imposed on consumers pursuant to uniform documents actually received by every class member. A class was certified.

Super Glue Corp. v. Avis Rent A Car System, Inc., 132 A.D.2d 604 (2d Dep=t 1987), is comparable to *Weinberg v. Hertz*. It concerned Avis= uniform practice of charging for gasoline utilized during rentals and not disclosing information pertaining to insurance coverage supplied by other companies. A class was certified given the predominance of common questions, Anamely, whether the refueling, [insurance] and late charges were deceptive and a breach of the rental agreement.@ *Id*. at 607. *Super Glue,* like *Weinberg,* is a paradigmatic example of the cert-worthiness of a GBL ' 349 claim arising out of uniform misrepresentations and non-disclosures in uniform documents.

Similarly, in *Pruitt v. Rockefeller Center Properties, Inc.*, 161 A.D.2d 14 (1st Dep=t 1991), the allegations concerned the truth of statements made in a prospectus issued in connection with a public offering. While the causes of action concerned defendant=s violation of state securities laws, the court looked to more traditional consumer law

precedent in evaluating the propriety of class treatment. AWhere >identical representations are made in writing to a large group=, individual questions of reliance do not justify denial of class status.@ *Id.* at 675, *quoting King,* 76 A.D.2d at 127.

The Committee is aware of only one case where certification of a GBL ' 349 claim arising out of uniform non-disclosures in uniform documents has been denied. In *Carnegie v. H&R Block,* 269 A.D.2d 145 (1st Dep=t 2000), the First Department *reversed* the trial court=s certification of a state class on a GBL '349 claim arising out of Block=s uniform failure to disclose in uniform documents its numerous financial interests in steering its customers into short term, high interest loans. Rejecting entirely the basis for plaintiff=s claim, the First Department cast the case as one involving varied oral communications between class members and Block employees. It wrote,

> [t]he oral communications that allegedly induced members of the putative class to obtain [refund anticipation loans] cannot be proven on a class basis, but would require individualized proof in the case of each class member, and issues arising in this connection would overwhelm any questions common to the class.

Id. at 147.

In the Committee=s view, the First Department=s description of the case is not supported by the record. The claims did not derive from “oral communications” but, rather, from uniform omissions in uniform written documents. Who said what to whom was not relevant to the *Block* claims. Yet, by re-casting the claims as contingent on individual oral

communications, the First Department took *Block* out of the *Gaidon* and *Taylor* model and reversed the certification based on individual reliance and causation.

GBL '349 claims frequently run into certification trouble on issues of causation and injury. This is because, in addition to proving that the challenged act or practice was consumer-oriented, a plaintiff under ' 349 must prove that the act or practice was misleading in a material way and that plaintiff was injured as a result. Thus, while *Oswego, Gaidon* and *Goshen* definitively established that reliance is not an element of a GBL '349 claim,[3] a plaintiff, nevertheless, must show that the defendant=s Amaterial deceptive act@ caused the injury. *Oswego, supra,* at 26.

The problem arises from an inability to establish that injury (not damages) could be shown on a class wide basis. Thus, while A[r]eliance provides the requisite causal connection between the defendants= misrepresentation and the plaintiff=s injury,@ *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 197 (1st Dep=t 1998), *citing Basic*

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[3] *See Oswego,* 85 N.Y.2d at 25 (Athe statute does not require proof of justifiable reliance@); *Gaidon,* 94 N.Y.2d at 344; *see also Small v. Lorillard Tobacco Co.,* 94 N.Y.2d at 55 (Aintent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim@); 8 Givens, Supp. Practice Commentaries, McKinney=s Cons. Laws of N.Y. Book 19, General Business Law " 349-350, 2000 Cum. Pocket Part, at 223 (“Section 349 contains no requirement that an injured party show

Incorporated v. Levinson, 485 U.S. 224, 243 (1988) and *In re Laser Arms Corp. Sec. Litig.*, 794 F. Supp. 475 (S.D.N.Y. 1989), *aff'd*, 969 F.2d 15 (2d Cir. 1992), the Aplaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that *caused* actual, although not necessarily pecuniary harm.@ *Oswego,* 85 N.Y.2d at 25. In short, reliance can be presumed but actual injury cannot.

In the wake of *Oswego*, courts have grappled with the reliance-causation nexus. The Court of Appeals recently addressed the issue in *Stutman v. Chemical Bank,* 95 N.Y.2d 24 (2000). In affirming the dismissal of a GBL ' 349 claim asserted on behalf of a nationwide class, the Court of Appeals reaffirmed that Areliance is not an element of a section 349 claim,@ *id*. at 28, but that plaintiff Amust show that the defendant=s >material deceptive act= caused the injury.@ *Id. citing Oswego,* 85 N.Y.2d at 26. It then endeavored to clarify the point by examining closely the grounds for the Appellate Division=s dismissal of *Stutman's* ' 349 claim.

The Appellate Division had dismissed Stutman's '349 claim on the ground that plaintiffs failed to show justifiable reliance, that is Athat [defendant=s] failure to disclose [a] $275 attorney=s fee >had any effect on plaintiffs= decision to borrow from defendant in the first place.=@ *Id*. at 29. But, the Court of Appeals said that this was Athe wrong standard,

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reasonable reliance on erroneous statements in order to obtain relief@).

because reliance is not an element of a §349 claim.@ *Id*. at 30; Anotably, even after *Oswego,* the Appellate Division has occasionally applied an incorrect standard in section 349 cases, imposing a reliance requirement when in fact there is none. *Id. See, e.g., Gershon v. Hertz Corp.,* 215 A.D.2d 202, 202-203 (no §349 claim where plaintiff=s >allegations do not show materially deceptive conduct on which plaintiff relied to his detriment=). The Court of Appeals continued,

> [n]or did the Appellate Division merely apply the causation standard in the guise of reliance. The Appellate Division=s ruling clearly imposed a reliance requirement that plaintiffs made the decision to take the loan in reliance on their belief that the $275 fee would not apply. In contrast to section 349 claims, that is precisely the type of reliance that must be shown in order to state a common law fraud claim.

95 N.Y.2d at 30.

The Court of Appeals used the *Stutman* facts to illustrate the difference between reliance and causation, stating

> plaintiffs alleged that because of defendant=s deceptive act, they were forced to pay a $275 fee that they had been led to believe was not required. In other words, plaintiffs alleged that defendant=s material deception caused them to suffer a $275 loss. This allegation satisfies the causation requirement. Plaintiffs need not additionally allege that they would not otherwise have entered into the transaction. Nothing more is required.

Id. at 30.

The court likened the issue to cases in the securities context where Aproof of reliance is not required where a duty to disclose material information has been breached or

where there are material omissions or misstatements in a proxy statement.@ *Id.* at 30, n. 2. ARather, the materiality of the omission or misstatement satisfies the causation requirement.@ *Id., citing Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972) and *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 385 (1970). Nevertheless, the *Stutman* court affirmed the dismissal of plaintiffs= claim because plaintiffs had failed to show that defendant committed a deceptive act.@ *Id.* at 31.

B. Claims For False Advertising under GBL Section 350

A claim for false advertising under GBL '350 requires individualized proof of reliance. *See Small v. Lorillard,* 252 A.D.2d 1, 8 (1st Dep=t 1998), *aff'd*, 94 N.Y.2d 43 (1999). However, reliance can be presumed where the GBL ' 350 claim concerns uniform material omissions or where defendants effectively control all the information about a transaction. *Id.* at 8. Thus, where a case involves:

> primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.

Affiliated Ute Citizens v. United States, 406 U.S. 128,153-54 (1972); s*ee also Brandon v. Chefetz*, 106 A.D.2d 162 (1st Dep=t 1985) (proof of individual reliance unnecessary in

cases involving fraudulent material omissions). When a defendant=s advertisements contain materially misleading omissions, justifying a presumption of reliance, a class should be certified; individual issues of reliance do not exist. *Ackerman*, 683 N.Y.S.2d at 192, *citing Weinberg*, 116 A.D.2d at 7, *Brandon*, 106 A.D.2d at 167.

Under GBL '350, if a case is not based on material omissions, the reliance requirement is a frequent barrier to certification of a class. In *Small v. Lorillard*, plaintiff argued that defendants lied in their advertisements about nicotine=s addictive properties and the fact that they were manipulating the nicotine content of their products in order to cause consumers to become addicted to cigarettes. 252 A.D.2d at 4. The court refused to presume reliance, stating:

> Reliance on defendants= misrepresentations will not be presumed where plaintiffs had a reasonable opportunity to discover the facts about the transaction beforehand by using ordinary intelligence . . . or where a variety of factors could have influenced a class members decision to purchase. Only when defendants effectively controlled all the information about the transaction will the existence of misrepresentations give rise to an inference of reliance without need for further proof.

Small at 8, *citing King v. Club Med*, 76 A.D.2d at 27; *Stellema v. Vantage Press*, 109 A.D.2d at 424 (citation omitted). In *Small*, A[p]laintiff=s claim of ignorance [was] implausible in light of years of pre-1994 press coverage of research on nicotine addiction, as well as the well-known difficulty of quitting smoking. . . . This widely available information about nicotine forecloses any presumption of reliance and requires individualized inquiry into whether particular class members were unaware of such information.@ *Id.* at 9-10.

Strauss v. Long Island Sports, Inc., 60 A.D.2d 501 (2d Dep=t 1978), is an oft-cited example of how individual issues of reliance can defeat a false advertising claim. Class action certification was sought by one who had purchased a season ticket on the basis that the New York Nets basketball team had widely advertised and represented that the Nets star Julius Erving (ADr. J.@) would play for the season. As it turned out, the Nets traded Dr. J. to another team before the season began. The Second Department reversed Special Term=s certification of the class on the ground that there are a wide variety of reasons why people purchase season tickets for basketball games, including business reasons, the fact that the Nets had just won the league championship, geographical location, etc. AIn short, by no stretch of the imagination may one comfortably presume that a majority of season ticket holders purchased in reliance on the Nets newspaper advertising. Indeed, many season ticket holders may not have even seen defendants= advertisements." *Id.* at 507. The court wrote:

> [i]n a case where common exposure to or reliance upon alleged misleading advertising cannot be readily inferred, there is no advantage to be gained from permitting the action to proceed as a class action since the proceeding is likely to 'splinter into individual trials'.

Id.

Similarly, in *Morgan v. AO Smith Corp.,* 233 A.D.2d 375 (2d Dep=t 1996), the Appellate Division affirmed the IAS court=s denial of certification of a class of Havrestore grain silo purchasers where plaintiffs claimed that the common question of fact was Awhether they and the prospective class members purchased or leased . . . silos based

upon advertising claims that structures were oxygen free or oxygen-reducing.@ *Id*. at 376 The court determined that the question could not properly be resolved on a class wide basis. A[I]ndividual issues exist as to what each proposed class member knew or was told about the structures and what influenced their decision to purchase or lease [the] silos.@ *Id.* A different result may have obtained had plaintiff presented the common issue as a uniform failure to make proper disclosures regarding the silos in a uniform document received by every class member. *See, e.g., King*; *Stellema, supra.*

C. Claims Under New York's Antitrust Law

CPLR §901(b) provides that a class action may not be brought to recover a penalty or a minimum measure of damages unless the statute which creates such penalty or measure of recovery Aspecifically authorizes the recovery thereof in a class action.@ *Rubin v. Nine West Group*, *Inc.*, 1999 WL 1425364 (Sup. Ct. N.Y.Co. Nov. 3, 1999), *citing Blumenthal v. American Society of Travel Agents, Inc.,* 1977 WL 18392, 1977-1 Trade Cases P 61,530 (Sup. Ct. N.Y. Co. July 5, 1997). Trial courts in New York have denied class treatment of claims asserted under New York=s antitrust statute, the Donnelly Act, GBL ' 340, on the grounds that the treble damages provided for in the statute are penalties. *See, e.g., Russo & Dubin v. Allied Maintenance Corp.,* 95 Misc. 2d 344 (Sup. Ct. N.Y. Co. 1978); *Blumenthal*, *supra*; *Rubin*, *supra*; *Cox v. Microsoft,* No. 105193100 (N.Y. Sup. Ct. Nov. 29, 2000). It is the view of the Committee that these trial court decisions have been made in error.

New York=s Court of Appeals has made very clear that the Donnelly Act Ashould generally be construed in light of federal precedent and given a different interpretation only where State policy differences in the statutory language or the legislative history justify such a result.@ *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988); *accord People v. Ratteni*, 81 N.Y.2d 166, 171 (1993). Although several New York state trial courts have held that the treble damages provided for in the Donnelly Act are penalties, the only federal decision addressing this issue, however, makes plain that antitrust treble damages are compensatory in nature. In *Ethicon, Inc. v. Aetna Casualty & Surety Co.,* 737 F. Supp. 1320 (S.D.N.Y. 1990), Judge Leisure explained:

> [n]either the Supreme Court nor, apparently, any of the circuit courts has directly stated whether antitrust treble damages are to be considered punitive or non-punitive in nature. This Court has undertaken a thorough review of the case law on the treble damages provisions within the antitrust laws and finds that the clear focus in the application of antitrust treble damages is compensatory and not punitive. This is not to say that the intent of the treble damages provision is entirely clear. . . .
>
> It is apparent, however, from the substance in which the Supreme Court and other courts have addressed the nature of the treble damages provision, that the courts believe that the provision is primarily remedial, not punitive. . . .

737 F. Supp. at 1335-36; *see generally Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906); *Brunswick Corp. v. Pueblo Bowl-o-Mat*, 429 U.S. 477, 485-86 (1977). Thus, to the extent that trial courts are prohibiting class treatment of Donnelly Act claims on the basis that the Act's treble damages are a Apenalty@ unsuitable for class

treatment without specific authorization, the courts= reasoning appear to be in conflict with the Court of Appeals= directive to follow federal precedent.

There is a further reason why class claims under the Donnelly Act should be permitted. Even if the Act's treble damages are considered to be a penalty, plaintiffs should be permitted to waive any statutory penalties and proceed on a class basis for actual damages. This has been permitted in analogous cases with class claims asserted under GBL ' 349. The First, Second and Fourth Departments have certified classes on GBL ' 349 claims even though GBL ' 349(h) gives individuals the right to recover a minimum of $50, injunctive relief, and discretionary treble damages to a maximum of $1,000. In those cases, courts have permitted plaintiffs to waive the statutory minimum and proceed as the class representative. The Second Department explained:

> [a]lthough CPLR 901(b) bars a class action to recover a penalty or minimum damages imposed by statute, where, as here, the statute does not explicitly authorize a class recovery thereof, the named plaintiff in a class action may waive that relief and bring an action for actual damages only.

Super Glue Corp. v. Avis Rent a Car System, Inc., 132 A.D.2d 604, 606 (2d Dep=t 1987).

The First Department has reached the same conclusion (albeit without opinion). *See Weinberg v. Hertz Corp.*, 69 N.Y.2d 979, 981 (1987) (describing prior order of First Department affirming, without opinion, trial court's ruling that plaintiff could maintain class action under GBL ' 349 despite existence of statutory penalty). So has the Fourth Department. *See Ridge Meadows Homeowners' Association, Inc. v. Tara Development*

Co., Inc., 242 A.D.2d 947 (4th Dept. 1997) (action under GBL ' 349 maintainable as a class action for actual damages).

Thus, the Committee recommends that courts certify Donnelly Act claims for treble damages. If courts do not do so, the Committee recommends that the Legislature expressly provide for class actions under the Donnelly Act. At a minimum, the courts should permit plaintiffs to waive the treble damage provisions contained in the Act and to proceed as a class action.

D. Breach of Contract and Breach of Warranty Claims

Appellate courts typically approve certification of class claims for breach of a uniform contract executed by every class member. *See, e.g., King v. Club Med., Inc.,* 7 6 A.D.2d 123, 127 (1st Dep=t 1980); *Stellema v. Vantage Press, Inc.,* 109 A.D.2d 423, 424 (1st Dep=t 1985); *Jim & Phil=s Family Pharmacy, Ltd. v. Aetna U.S. Healthcare, Inc.,* 271 A.D.2d 281 (1st Dept= 2000) (IAS court properly certified class of 1600 pharmacies on claim that defendant violated provision of APharmacy Service Agreement@ to which every class member was a signator); *Meachum v. Outdoor World Corp.,* 273 A.D.2d 209 (2d Dep=t 2000) (reversing denial of certification where common question was whether membership campground contract violated statute governing when membership campground contracts are void and unenforceable). However, where individualized proof concerning the various bases for liability arising out of each contract is required, certification will be denied. *See, e.g., Banks v. Carroll & Graf Publishers, Inc.,* 267 A.D.2d 68 (1st Dep=t 1999) (certification denied where class consisted of authors with breach of contract claims that required individualized proof concerning various bases of liability and were subject to individual defenses); *Gordon v. Ford Motor Co.,* 260 A.D.2d 164 (1st Dep=t 1999), (denial of class certification in an action for breach of express warranty and implied warranty of merchantability on the ground that each plaintiff would have to prove that his or her vehicle was not fit).

E. Bundled Personal Injury Claims

When *Small v. Lorillard,* 252 A.D.2d 1 (1st Dep=t 1998), *aff=d,* 94 N.Y.2d 43 (1999), was presented to the Appellate Division, class certification was denied because GBL ' 349 liability turned on the question of whether an individual was addicted to tobacco. 252 A.D.2d at 8. This created an unmanageable situation, not properly suited for class treatment. *Id.* To try to circumvent the manageability problem on appeal to the Court of Appeals, the *Small* plaintiffs Aabandoned the addiction component of their legal theory@ and asserted instead that they were injured because Adefendants= deception prevented them from making free and informed choices as consumers@ 94 N.Y.2d at 56. The *Small* plaintiffs however did not allege that they were injured by becoming addicted to nicotine, nor had they alleged that they were injured by paying higher prices as a result of defendants= misconduct. *Id.* Thus, their theory of injury contained Ano manifestation of either pecuniary or actual harm@ as required by statute. *Id.* The Appellate Division=s decertification of plaintiff=s claims was affirmed.

F. Claims Brought By Consumers of Particular Products

As in *Small v. Lorillard, supra,* certification was denied in *Karlin v. IVF America,* 239 A.D.2d 560 (2d Dep=t 1997), *aff=d as modified*, 93 N.Y.2d 282 (1999), on the ground that liability was dependent on individual issues as to what each patient was told about fertility treatment, the effect of the treatment on the patient and the extent of damages. In the Committee=s view, a class should be certified where the members of the class have received essentially the same information regarding a service or product, whether orally or in writing, as was alleged in the IVF Karlin case.

Class certification has been granted in a tort case where the relief sought was injunctive, not monetary. Thus, individual issues did not defeat certification in *Cunningham v. American Home Products,* 9/21/99, N.Y.L.J 26 (col.5)(S.Ct.N.Y.Co.), which was a diet drug products liability action. In this case, plaintiffs sought the establishment of a court-supervised medical monitoring program for FDA-recommended medical testing that was being conducted evaluate the long term effects of the use of certain diet drugs. The class consisted of consumers of fenfluramine, dexfenfluramine and phentermine who had not yet manifested any of the health problems associated with the drugs. Defendants opposed certification on the grounds that individual issues concerning exposure predominated. The court described the defendants' position as follows:

> [A]ny approach that treats all class members as a group ignores the many variable such as length of exposure, preexisting conditions, and medical history, existing monitoring protocols and the fact that a number of consumers have already undergone testing. They claim that plaintiffs= approach assumes that a uniform medical surveillance regimen would be used for every class member. In addition, defendants claim that the reliance factor varies significantly.

Id. The court rejected defendants= argument, stating that Aalthough a uniform monitoring regimen may not be appropriate, that does not mean that common questions do not predominate, particularly where, as here, plaintiffs *seek injunctive relief, not damages*." *Id.* The court continued:

> All parties have an interest in establishing the fund for monitoring and surveillance. All class members are threatened by defendants= alleged failure to test for and disclose adverse effects of fenfluramine drugs. All prospective class members

> are united by common issues concerning labeling, the promotion of the drugs, individually and in conjunction with other drugs, and appropriateness of warnings. The medical associations and governmental regulatory authorities have recommended surveillance for all users of the drugs. Various experts have proffered scientific evidence concerning the need for monitoring. The Court can address the difference among the appropriate regimens for class members by establishing standards, removing members from the class, or creating subclasses. . . . The overriding predominant common issue, is however, the interest of all parties in establishing the fund for monitoring and surveillance.

Id.

Cunningham marks a striking departure from a long line of medical product and pollution related cases that rejected certification on the grounds that individual issues concerning liability and causation predominated. *See, e.g., Aprea v. Hazeltine Corp.,* 247 A.D.2d 564 (2d Dep=t 1998) (certification denied because individual issues predominated as to what extent the emission of toxic chemicals caused damage to property); *Askey v. Occidental Chemical Corp.,* 102 A.D.2d 130 (4th Dep=t 1984) (rejecting certification of class of persons claiming injury from exposure to toxic landfill on ground that individual issues respecting injury predominated); *see also Jones v. Utilities Painting Corp.*, 198 A.D.2d 268 (2d Dep=t 1993); *Schmidt v. Merchants Desp. Trans. Co.*, 270 N.Y.287 (1936); *Gibbs v. E.I. DuPont De Nemours & Co., Inc.,* 876 F. Supp. 75 (W.D.N.Y. 1995); *Patton v. General Signal Corp.*, 984 F. Supp. 666 (W.D.N.Y. 1997).

G. The Impact Of Arbitration Clauses On Class Actions

Mandatory binding arbitration clauses are frequently being inserted into standard consumer contracts -- often with language expressly prohibiting class actions. *See generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?* 42 Wm. & Mary L. Rev. 1 (2000). How this frontal attack on Article 9 will ultimately play out in the New York courts remains to be seen.

In *Brower v. Gateway 2000, Inc.,* 246 A.D.2d 246 (1st Dep=t 1998), the First Department dismissed a putative class action asserted on behalf of Gateway computer purchasers because of a pre-dispute arbitration clause in the agreements delivered with the customers= computers. The court rejected plaintiff=s arguments that the clause was unenforceable as a contract of adhesion. A[I]f any term of the agreement is unacceptable to the consumer, he or she can easily buy a competitor=s product instead.@ *Id*. at 252. The court also rejected plaintiff=s arguments that the arbitration clause was procedurally and substantively unconscionable. *Id*. The court wrote:

> As to the procedural element, a court will look to the contract formation process to determine if, in fact, one party lacked any meaningful choice in entering into the contract, taking into consideration such factors as the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained >fine print=, whether the seller used >high-pressured tactics= and any disparity in the parties= bargaining power. None of the factors supports appellants= claim here. [T]he substantive element . . . entails an examination of the substance of the [a]greement in order to determine whether the terms unreasonably favor one party.

Id. at 253-254 (Citations omitted). The court concluded that, while the costs of arbitrating in the designated forum was high, they were not so Aegregiously oppressive@ as to deem the clause unconscionable or to cause the contract to unreasonably favor one party. *Id. at 255.*

Carnegie v. H&R Block, Inc., 180 Misc.2d 67 (Sup. Ct. N.Y.Co. 1999), also considered the effect of an arbitration clause on a putative class action, but in a wholly different context. In *Carnegie,* defendants inserted the clause into a standard form contract *after* the *Carnegie* action was commenced, but before the class certification. *Id*. at 68. The clause provided that the parties to the contract would submit their disputes to arbitration upon the election of either party and were barred from proceeding by class action except by mutual consent. *Id.* The clause did not inform customers of the pending class action and that they were waiving their rights to participate in it once they signed on the dotted line. Holding the arbitration clause unenforceable, the court wrote:

> [f]or Block to require its customers to sign a form stating, *inter alia,* that ANo class actions are permitted without the consent of the parties . . .@ and that their >ERO= meaning Block is a party to this arbitration provision without disclosing either the pendency of this action . . . or that Block has already refused its consent to class certification, is patently deceptive.

Id. at 72.

In *Hayes v. County Bank,* 185 Misc. 2d 414 (Sup. Ct. Queens Co. 2000), defendant moved for an order compelling arbitration of plaintiffs= claims in a putative class action arising out of fees charged by defendant in connection with Apay day loans.@ Plaintiffs

cross-moved for discovery. While the court denied defendants= motion without prejudice to renewal upon a showing that it answered the discovery demand, it nevertheless acknowledged that arbitration clauses in credit agreements may be unenforceable on grounds, *inter alia,* of unconscionability or public policy.

IV. Conclusion

The legislative intent, public policy, and express language of Article 9 make plain that its critical objective is to provide a means for aggrieved citizens of New York to seek redress for grievances in which the damages suffered may not justify the cost of individual litigation. There are a number of areas however, in which the statute and the clear guidelines set forth by the Court of Appeals apparently have not been followed. Where liability can be established uniformly and at once for all class members, a class action will serve as the superior method of adjudication; where liability turns on whether a particular product or statement or event injured a class member, individual issues may predominate and class treatment of the underlying claim may be unmanageable and inefficient.

In addition, there appears to be no reasonable justification for denying class treatment of claims brought under the Donnelly Act. Therefore, class actions seeking treble damages pursuant to the Donnelly Act should be permitted. At a minimum, plaintiffs asserting claims under the Donnelly Act should be permitted to waive treble damages and proceed on a class basis for actual damages.

This Committee applauds the Court of Appeals' decisions reaffirming the importance of class actions in this state. As we begin the new century, however, we have grave

concerns that the proliferation of mandatory arbitration clauses and the deference they are accorded by the courts may eviscerate consumers' ability to utilize class actions to obtain relief of wrongs. *

* The Committee would like to thank Alice McInerney and Joanne M. Cicala, the principal drafters of the report.

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