CPLR 901: Fraud Actions Not Generically Unsuitable for Class Certification

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ARTICLE 9—CLASS ACTIONS

CPLR 901: Fraud actions not generically unsuitable for class certification

Among the prerequisites to a class action set forth in CPLR 901 is the requirement that "questions of law or fact common to the class... predominating over any questions affecting only individual members." Since individual reliance upon a material mis-

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2 CPLR 901(a) (1976) provides: a. One or more members of a class may sue or be sued as representative parties on behalf of all if: 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 interests of the class; and 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Id.
representation is an essential element of a cause of action for fraud, it has been unclear whether fraud cases are suitable for class action treatment under article 9. Recently, however, in King

The procedure for determining whether the plaintiff's claim is suitable for class action treatment is set forth in CPLR 902. See CPLR 902 & commentary at 336-37 (1976). In particular, section 902 mandates that a "mini-hearing" be held; the court's power to grant class certification is discretionary, however, notwithstanding literal compliance with the requirements of CPLR 901. CPLR 902, commentary at 336-37 (1976). The factors the court will consider in determining whether class status will be granted include:

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.

CPLR 902 (1976).

W. PROSSER, LAW OF TORTS § 105 (4th ed. 1971). The elements of the offense of common-law fraud are:
1. a representation of a material fact which is false, and known to be false when made,
2. an intent on the part of the party making the representation to deceive another, for the purpose of inducing the other to act or refrain from acting, and
3. reliance on the representation by the party to whom it is made, and
4. damages arising from that reliance.


See, e.g., Strauss v. Long Island Sports, Inc., 60 App. Div. 2d 501, 506, 401 N.Y.S.2d 233, 235 (2d Dep't 1978). Traditionally under CPLR 1005, the statute governing class actions in New York prior to the enactment of CPLR article 9, class certification required privity among members of the class, see note 1 supra. Therefore, class certification typically was denied in fraud cases, on the ground that each party had a separate cause of action and a separate choice of remedies, see Society Million Athena, Inc. v. National Bank, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939); Brenner v. Title Guar. & Trust Co, 276 N.Y. 230, 233, 11 N.E.2d 899, 891 (1937), or that the defendant would be unable to prepare an adequate defense when each plaintiff's injury was based on a separate transaction involving different misrepresentations. See id. at 238, 11 N.E.2d at 893-94; MFT Inv. Co. v. Diversified Data Servs. and Sciences, Inc., 52 App. Div. 2d 761, 761, 382 N.Y.S.2d 770, 771 (1st Dep't 1976); Ballen v. Anne Storch Int'l Asti Tours, Inc., 46 App. Div. 2d 643, 643, 360 N.Y.S.2d 436, 437 (1st Dep't 1974); Bennett v. Strow, 28 Misc. 2d 914, 915, 220 N.Y.S.2d 806, 808 (Sup. Ct. Nassau County 1961).

CPLR 901 was intended to remove the "privity" requirement in order to provide a "flexible functional scheme" for class action certification. See note 27 infra. Nevertheless, courts have been reluctant to certify fraud actions under article 9. See, e.g., Ross v. Amrep Corp., 57 App. Div. 2d 99, 105, 393 N.Y.S.2d 410, 414 (1st Dep't), appeal dismissed, 42 N.Y.2d 856, 366 N.E.2d 291, 397 N.Y.S.2d 631 (1977); Cornell Univ. v. Dickerson, 100 Misc. 2d 198, 204, 418 N.Y.S.2d 977, 980 (Sup. Ct. Tompkins County 1979). The leading case granting class status under CPLR 901 in a fraud action is Guadagno v. Diamond Tours & Travel, Inc., 89 Misc. 2d 697, 392 N.Y.S.2d 783 (Sup. Ct. New York County 1976). In Guadagno, the plaintiffs sought to represent as a class the members of a charter tour vaca-
v. Club Med, Inc., the Appellate Division, First Department, affirmed a grant of class certification in a fraud action, holding that the common issues of law and fact in the claim of fraudulent material misrepresentation predominated over the individual questions of reliance.

In King, the plaintiffs contracted with the defendants for participation in a vacation travel package to the Caribbean island of Guadaloupe. The defendants' promotional literature had offered the vacationers a choice between relatively primitive accommodations and luxury accommodations equipped with air conditioning, private bathrooms, and electricity. The plaintiffs chose the accommodations with the luxury features. Upon arriving at the resort, however, they found that the facilities failed to conform to the explicit representations in the promotional brochure. The plaintiffs subsequently brought an action, alleging breach of contract and fraudulent misrepresentations in the marketing of the vacation travel package, and moved for class certification. The Supreme Court, New York County, granted the plaintiffs' motion, and the defendants appealed.

The Appellate Division, First Department, rejected the defense who had relied on the defendants' representations concerning a Jamaican resort. Id. at 698, 392 N.Y.S.2d at 784. The court asserted that class certification should depend upon "whether the group is more bound together by a mutual interest in the settlement of common questions than it is divided" by individual questions. Id. at 699, 392 N.Y.S.2d at 785 (quoting 2 WK&M ¶ 901.08, at 9-31). Noting, therefore, that the case involved a "cohesive and finite group of similarly situated vacationers, who relied upon essentially identical representations in advertising matter," the court granted class certification. See also Dupack v. Nationwide Leisure Corp., 70 App. Div. 2d 568, 417 N.Y.S.2d 63 (1st Dep't 1979).

The plaintiffs alleged that an extended drought at the resort site had caused the hotel to suffer from a sporadic supply of electricity, no air conditioning, intermittent running water, and unsatisfactory sanitary facilities. Id. at 129, 430 N.Y.S.2d at 68 (Murphy, P.J., dissenting). Furthermore, the plaintiffs claimed that the defendants knew of these conditions before the departure of the tour, but failed to inform the members of the tour. Id. at 125, 430 N.Y.S.2d at 66. Alleging a conspiracy to defraud, breach of contract, and fraud, the plaintiffs sought to recover actual and punitive damages or, in the alternative, rescission and refund of monies they had paid to the defendants. Id.

The proposed class was limited to persons choosing the accommodations at the hotel for the last week of July 1977. Id.
dants’ contention that class certification was inappropriate in fraud actions, and affirmed the order granting the plaintiffs’ motion for certification. Writing for a divided court, Justice Sandler noted that fraud actions were not “generically unsuitable” for class certification under CPLR article 9. Rather, the court stated, class certification of an action sounding in fraud should depend upon satisfaction of the prerequisites enumerated in the statute. The court asserted that the presence of “subsidiary questions . . . not common to the class” did not prevent compliance with the requirement of section 901 that common issues of law or fact predominate over individual issues. Justice Sandler then determined that reliance generally was a subsidiary question in fraud actions, and that a substantial issue of reliance was not likely to arise once a material misrepresentation had been established.

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13 Id. at 128, 430 N.Y.S.2d at 68.
14 Justices Kupferman and Lynch joined in Justice Sandler’s majority opinion. Presiding Justice Murphy filed a dissenting opinion in which Justice Lupiano concurred.
15 76 App. Div. 2d at 125, 430 N.Y.S.2d at 66. Justice Sandler acknowledged that prior to the enactment of CPLR article 9, the general rule had been that a class action would not lie for fraud. Id. Citing the legislative history of article 9, however, the majority concluded that the primary thrust of the statute was to provide a more “flexible and functional approach” to class actions. Id. at 126, 430 N.Y.S.2d at 66; see note 27 infra. Moreover, Justice Sandler asserted that the commentators were “uniform” in their belief that the class action device was available where “a single fraud has harmed a large number.” Id. at 126-27, 430 N.Y.S.2d at 67 (citing CPLR 901, commentary at 325 (1976); SIEGEL § 141, at 179; 2 WK&M § 901.08).
16 76 App. Div. 2d at 125, 430 N.Y.S.2d at 66.
17 Id. at 126, 430 N.Y.S.2d at 67.
18 Id. at 127, 430 N.Y.S.2d at 67. In concluding that subsidiary questions of reliance did not preclude class certification of the King plaintiffs’ claims, the court distinguished the decision of the Appellate Division, Second Department, in Strauss v. Long Island Sports, Inc., 60 App. Div. 2d 501, 401 N.Y.S.2d 233 (2d Dep’t 1978). In Strauss, the plaintiff purported to represent a class comprised of all purchasers of season tickets to the defendant basketball team’s games. Id. at 505, 401 N.Y.S.2d at 235. Prior to the opening of the season, the defendant sold the team’s star player. Id. at 504, 401 N.Y.S.2d at 234. The plaintiff alleged that all the purchasers had bought their tickets in reliance on materially misleading advertising to the effect that the team’s star would remain on the team. Id. The Second Department denied the motion for class certification on the ground that the possible motives for the purchase of season tickets were too varied to permit an inference that all the purchases were made in reliance on the advertisement. Id. at 507, 401 N.Y.S.2d at 238. The King court, in contrast, observed that “it is not plausible that persons confronted with the very distinct choice in the character of facilities . . . would have opted to spend a July vacation on a tropical island in a ‘luxury’ hotel with air conditioning, private bathroom and electricity, without having ‘relied’ on those representations.” 76 App. Div. 2d at 127, 430 N.Y.S.2d at 67. Moreover, the majority observed that generally no “substantial” issue of reliance remains in a fraud action once a material misrepresentation has been shown. Id. Indeed, Justice Sandler postulated that the individual questions of reliance would predominate over the common issues only in the “exceptional fraud action” where it is al-
Therefore, the court concluded that, on the facts presented, the common issues predominated over the individual question of reliance.\textsuperscript{19}

Dissenting, Justice Murphy argued that the issues common to the class did not predominate over the individual question of reliance.\textsuperscript{20} Instead, the dissent characterized reliance as a “critical element” in every fraud action.\textsuperscript{21} Because the issue of reliance is “highly subjective,”\textsuperscript{22} the dissent urged that the trier of fact would have to consider the question of reliance separately with respect to each member of the class.\textsuperscript{23} Thus, Justice Murphy concluded that the issue of reliance predominated, and that class certification was, therefore, inappropriate.\textsuperscript{24}

The King court's conclusion that fraud actions are not generically unsuitable for class certification\textsuperscript{25} should provide for greater flexibility in the application of CPLR article 9 to consumer actions,\textsuperscript{26} thus furthering the legislative purpose of article 9.\textsuperscript{27}

\textsuperscript{19} 76 App. Div. 2d at 127-28, 430 N.Y.S.2d at 67.
\textsuperscript{20} Id. at 129, 430 N.Y.S.2d at 69 (Murphy, P.J., dissenting).
\textsuperscript{21} Id. (Murphy, P.J., dissenting).
\textsuperscript{22} Id. (Murphy, P.J., dissenting).
\textsuperscript{23} Id. at 130, 430 N.Y.S.2d at 69 (Murphy, P.J., dissenting).
\textsuperscript{24} Id. (Murphy, P.J., dissenting). Justice Murphy also expressed doubts as to whether the other requirements of section 901(a) had been met. He stated that the claims by plaintiffs were not typical of claims that other members of the class might make; rather, a trier of fact would have to consider the particular facts upon which each individual relied. Id. Nor did Justice Murphy believe that the plaintiffs could adequately protect the interests of the class, as they did not know and could not prove the facts upon which they based their reliance. Id. In Justice Murphy's view, the necessity that the trier of fact in a fraud action address itself to the merits of each claim made class action impractical; therefore, a class action was not “superior to other available methods” for the adjudication of actions sounding in fraud. Id.

\textsuperscript{25} See note 15 and accompanying text supra.
\textsuperscript{26} See Dickerson, Class Actions Under Article 9 of CPLR, N.Y.L.J., Aug. 18, 1980, at 1, col. 1.
Clearly, use of the class action vehicle in fraud cases will permit the maintenance of consumer fraud actions which would be economically infeasible if pursued individually. It must be recognized, however, that the holding in *King* was based upon the court's narrower determination that the facts and circumstances of the case supported an inference of reliance. It is suggested, therefore, that rather than relying on the *King* court's broad generalization that a substantial issue of reliance is unlikely to arise, the courts should consider carefully the facts and circumstances of each case to determine if such an inference of reliance is supportable.

It is further submitted that after a determination in favor of class certification has been made, the court must remain sensitive to the possibility that evidence may emerge during the course of the proceedings which tends to rebut the inference of reliance. In such event, CPLR 907 provides guidelines for the court to follow in its conduct of the proceedings. Under section 907, the court may decertify the class if necessary to ensure the fair conduct of the action. Alternatively, the proceedings can be bifurcated, pursuant
to CPLR 906, and the issue of reliance tried separately from the
questions which are common to the class. The remedies provided
by CPLR 906 and 907, therefore, would seem to provide adequate
safeguards for the rights of individual parties to a fraud action
when it appears that the court has improvidently granted class cer-
tification. Accordingly, the holding in King, coupled with these
safeguards, should facilitate the vindication of the rights of de-
frauded consumers without compromising the rights of the individ-
ual parties, whether defendants or unnamed plaintiffs.

Robert C. Wilkie
CPLR 3117(a)(2): Use of party’s deposition by adversely interested party subject to trial court’s discretionary power to control proceedings

CPLR 3117(a)(2) authorizes the use of a party’s deposition by an adverse party “for any purpose.” Pursuant to this provision, a deposition may be admitted into evidence for impeachment purposes or as evidence in chief notwithstanding that the deponent is available to testify as a witness. Nevertheless, it had never been expressly determined whether a trial court, in the exercise of...