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CPLR 901: Fraud Actions Not Generically Unsuitable for Class Certification

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Survey will be of assistance to the practicing bar.

ARTICLE 9—CLASS ACTIONS

CPLR 901: Fraud actions not generically unsuitable for class certification

Among the prerequisites to a class action[1] set forth in CPLR 901 is the requirement that "questions of law or fact common to the class . . . predominate over any questions affecting only individual members."[2] Since individual reliance upon a material mis-

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[1] The procedural rules governing class actions in New York are contained in article 9 of the CPLR, which repealed and superseded CPLR 1005. *See* ch. 207, § 2, [1975] N.Y. Laws 316 (McKinney). Under CPLR 1005, one or more persons could maintain a class action where there was a "question of law or fact common to persons of a numerous class whose joinder was impracticable." Ch. 308, § 1005, [1962] N.Y. Laws 1332. Under this section, "[n]either the procedural needs of the members of the class nor the inconvenience to the courts where many separate suits are combined were, alone, sufficient bases for a class action." 2 WK&M ¶ 901.02, at 9-6. In addition, the courts appeared to require some connection "between the substantive rights of members of the class." *Id.; see, e.g.,* Bouton v. Van Buren, 229 N.Y. 17, 22, 127 N.E. 477, 478 (1920). Specifically, under CPLR 1005, the plaintiffs were required to demonstrate some "privity" among the members of the class apart from their separate transactions with the defendant. *See* Onofrio v. Playboy Club, Inc., 15 N.Y.2d 740, 741, 205 N.E.2d 308, 309, 257 N.Y.S.2d 171, 172 (1965) (adopting the opinion of the dissent below, 20 App. Div. 2d 3, 7, 244 N.Y.S.2d 485, 489 (1st Dep't 1963) (Stevens, J., dissenting)); Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 236, 11 N.E.2d 890, 893 (1937); *cf.* Hall v. Coburn Corp., 26 N.Y.2d 396, 400, 259 N.E.2d 720, 721, 311 N.Y.S.2d 281, 282 (1970) (similarity in form of contract insufficient basis for class certification); Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939) (common injury pursuant to a single plan by defendant insufficient basis for class certification). *But see* Ray v. Marine Midland Grace Trust Co., 35 N.Y.2d 147, 154, 316 N.E.2d 320, 324, 359 N.Y.S.2d 28, 33 (1974); Richards v. Kaskel, 32 N.Y.2d 524, 536, 300 N.E.2d 388, 393, 347 N.Y.S.2d 1, 8 (1973); Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 535, 223 N.E.2d 869, 872-73, 277 N.Y.S.2d 377, 382-83 (1966). *See generally* Dole, *Consumer Class Action Under Recent Consumer Credit Legislation,* 44 N.Y.U.L. REV. 80, 104-07 (1969).

[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:
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> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
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> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
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> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
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> 4. the representative parties will fairly and adequately protect the interests of the class; and
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> 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,[3] it has been unclear whether fraud cases are suitable for class action treatment under article 9.[4] 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).

[3] 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, (3) reliance on the representation by the party to whom it is made, and (4) damages arising from that reliance. *Id.; see* Lee v. Wiegand, 28 App. Div. 2d 560, 561, 280 N.Y.S.2d 278, 279 (2d Dep't 1967); Allied Financial Corp. v. Duo Factors, Inc., 26 App. Div. 2d 538, 539, 271 N.Y.S.2d 402, 403 (1st Dep't 1966), *aff'd*, 19 N.Y.2d 865, 227 N.E.2d 591, 280 N.Y.S.2d 668 (1967); Leventhal v. Martin, 25 App. Div. 2d 508, 508, 266 N.Y.S.2d 774, 775 (1st Dep't 1966).

[4] *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 Milion 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 890, 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.,[5] 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.[6]

In *King*, the plaintiffs contracted with the defendants for participation in a vacation travel package to the Caribbean island of Guadaloupe.[7] 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.[8] 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.[9] The plaintiffs subsequently brought an action, alleging breach of contract and fraudulent misrepresentations in the marketing of the vacation travel package,[10] and moved for class certification.[11] The Supreme Court, New York County, granted the plaintiffs' motion, and the defendants appealed.[12]

The Appellate Division, First Department, rejected the defen-

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tion 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. 89 Misc. 2d at 699, 392 N.Y.S.2d at 785. *See also* Dupack v. Nationwide Leisure Corp., 70 App. Div. 2d 568, 417 N.Y.S.2d 63 (1st Dep't 1979).

[5] 76 App. Div. 2d 123, 430 N.Y.S.2d 65 (1st Dep't 1980).

[6] *Id.* at 125, 430 N.Y.S.2d at 66.

[7] *Id.* at 124, 430 N.Y.S.2d at 65.

[8] *Id.* at 124, 430 N.Y.S.2d at 66.

[9] *Id.* at 125, 430 N.Y.S.2d at 66. 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.

[10] *Id.* at 124, 430 N.Y.S.2d at 65. 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.*

[11] *Id.* The proposed class was limited to persons choosing the accommodations at the hotel for the last week of July 1977. *Id.*

[12] *Id.* at 123, 430 N.Y.S.2d at 65.

dants' contention that class certification was inappropriate in fraud actions, and affirmed the order granting the plaintiffs' motion for certification.[13] Writing for a divided court,[14] Justice Sandler noted that fraud actions were not "generically unsuitable" for class certification under CPLR article 9.[15] Rather, the court stated, class certification of an action sounding in fraud should depend upon satisfaction of the prerequisites enumerated in the statute.[16] 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.[17] 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.[18]

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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 236. 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.[19]

Dissenting, Justice Murphy argued that the issues common to the class did not predominate over the individual question of reliance.[20] Instead, the dissent characterized reliance as a "critical element" in every fraud action.[21] Because the issue of reliance is "highly subjective,"[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.[23] Thus, Justice Murphy concluded that the issue of reliance predominated, and that class certification was, therefore, inappropriate.[24]

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

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leged that the plaintiffs have made a separate investigation of the facts or had access to relevant information. *Id.; see* W. PROSSER, *supra* note 3, § 108.

[19] 76 App. Div. 2d at 127-28, 430 N.Y.S.2d at 67.

[20] *Id.* at 129, 430 N.Y.S.2d at 69 (Murphy, P.J., dissenting).

[21] *Id.* (Murphy, P.J., dissenting).

[22] *Id.* (Murphy, P.J., dissenting).

[23] *Id.* at 130, 430 N.Y.S.2d at 69 (Murphy, P.J., dissenting).

[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.*

[25] *See* note 15 and accompanying text *supra.*

[26] *See* Dickerson, *Class Actions Under Article 9 of CPLR,* N.Y.L.J., Aug. 18, 1980, at 1, col. 1.

[27] *See* THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 232 (1976). In recommending the enactment of CPLR article 9, the judicial conference stated that the "privity" requirement of former CPLR 1005, *see* note 4 *supra,* effectively prevented class action certification in cases involving "typically modern claims [such] as those associated with mass exposure to environmental offenses, violations of consumer rights . . . and a multitude of other collective activities reaching virtually every phase of human life." THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 232, 248 (1976). Perceiving a need for a less rigid approach to class certification in these areas, the conference recommended the repeal of CPLR 1005 and the substitution of the present article 9. *Id.* at 250; *see* Governor's Memorandum on Approval of ch. 207, N.Y. Laws (June

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.[28] 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.[29] 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.[30]

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.[31] In such event, CPLR 907 provides guidelines for the court to follow in its conduct of the proceedings.[32] Under section 907, the court may decertify the class if necessary to ensure the fair conduct of the action.[33] Alternatively, the proceedings can be bifurcated, pursuant

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17, 1975), *reprinted in* [1975] N.Y. Laws 1748 (McKinney).

[28] *See* Guadagno v. Diamond Tours & Travel, Inc., 89 Misc. 2d 697, 698, 392 N.Y.S.2d 783, 784 (Sup. Ct. N.Y. County 1976); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 639 (1971).

[29] *See* 76 App. Div. 2d at 127-28, 430 N.Y.S.2d at 67. Although all of the elements of a cause of action sounding in fraud generally must be proven, Dhooge Bros., Inc. v. Mecho, 15 App. Div. 2d 774, 774, 224 N.Y.S.2d 745, 746 (1st Dep't 1962) (per curiam); Vom Lehn v. Astor Art Galleries, Ltd., 86 Misc. 2d 1, 9, 380 N.Y.S.2d 532, 540 (Sup. Ct. Suffolk County 1976); Taylor v. Heisinger, 39 Misc. 2d 955, 959, 242 N.Y.S.2d 281, 284 (Sup. Ct. Suffolk County 1963); Tani v. Luddy, 32 Misc. 2d 53, 56, 221 N.Y.S.2d 314, 319 (Sup. Ct. Westchester County 1961), reliance may be inferred under the proper circumstances. *See, e.g.*, Ochs v. Woods, 221 N.Y. 335, 338, 117 N.E. 305, 306 (1917); Taylor v. Guest, 58 N.Y. 262, 266 (1874); Strauss v. Long Island Sports, Inc., 60 App. Div. 2d 501, 508, 401 N.Y.S.2d 233, 236 (2d Dep't 1978) (dictum); Gaudagno v. Diamond Tours & Travel, Inc., 89 Misc. 2d 697, 699, 392 N.Y.S.2d 783, 785 (Sup. Ct. New York County 1976).

[30] *See* notes 18-19 and accompanying text *supra*.

[31] While the plaintiff's case may be established by circumstantial evidence, *see* Ochs v. Woods, 221 N.Y. 335, 338, 117 N.E.2d 305, 306 (1917); Taylor v. Guest, 58 N.Y. 262, 266 (1874); Strauss v. Long Island Sports, Inc., 60 App. Div. 2d 501, 508, 401 N.Y.S.2d 233, 236 (2d Dep't 1978) (dictum), the inference drawn is not conclusive and may be rebutted. *See generally* W. RICHARDSON, EVIDENCE §§ 56-58 (10th ed. J. Prince 1973).

[32] CPLR 907 (1976). *See generally The Survey*, 50 ST. JOHN'S L. REV. 189 (1975).

[33] 2 WK&M ¶ 901.08, at 9-34. CPLR 907 gives the court power to "make appropriate orders" for the conduct of the action which may have the effect of amending the original order granting class certification. CPLR 907 (1976); *see* 2 WK&M ¶ 902.03, at 9-51. The order permitting class action, pursuant to CPLR 902, is not immutable, and may be altered at any time prior to decision on the merits, CPLR 902 (1976). If the court finds that class

to CPLR 906, and the issue of reliance tried separately from the questions which are common to the class.[34] 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 certification. Accordingly, the holding in *King*, coupled with these safeguards, should facilitate the vindication of the rights of defrauded consumers without compromising the rights of the individual parties, whether defendants or unnamed plaintiffs.[35]

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action is not appropriate, the action may be allowed to proceed as the individual claim of the named plaintiff. 2 WK&M ¶ 902.03, at 9-51; *cf.* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 530 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978) (rule 23(c)(1) of Federal Rules of Civil Procedure permits court to decertify class if later events indicate class action inappropriate); Fox v. Prudent Resources Trust, 69 F.R.D. 74, 77 (E.D. Pa. 1975) (rule 23(c)(1) of Federal Rules of Civil Procedure allows court to reverse decision allowing class action).

[34] CPLR 906 (1976) provides in pertinent part:

1. an action may be brought or maintained as a class action with respect to particular issues, or
2. a class may be divided into subclasses and each subclass treated as a class.

Id.; see Simon v. Cunard Line Ltd., 75 App. Div. 2d 283, 288-89, 428 N.Y.S.2d 952, 955 (1st Dep't 1980). *But see* CPLR 901, commentary at 28 (Supp. 1980-1981); Strauss v. Long Island Sports, Inc., 60 App. Div. 2d 501, 401 N.Y.S.2d 233 (2d Dep't 1978). In *Strauss*, the court questioned the practicality of separating the common questions from the question of reliance in a fraud action. The court urged that where reliance would not be substantially established by the proofs on the issue of liability, bifurcation of the reliance question would cause the class action to degenerate into separate trials on the issue of reliance. *Id.* at 507, 401 N.Y.S.2d at 235. Therefore, contrary to the aims of CPLR 906, judicial economy would not be served. *Id.; cf.* Tucker v. Arthur Anderson & Co., 67 F.R.D. 468, 477-78 (S.D.N.Y. 1975) (bifurcation approach criticized as not resolving the conflict between the necessity of establishing reliance in a fraud action and the requirement under rule 23 of Federal Rules of Civil Procedure that common issues predominate over individual questions).

[35] If, at some time after the proceedings commence, it develops that the defendant can rebut the inference of reliance with respect to individual members of the class, the class may be subdivided to remove those members, CPLR 906, commentary at 345 (1976), or the court may separate the issues and allow the class action to proceed with respect to the common issues, *see* note 34 and accompanying text *supra*, or if rebuttal evidence is presented with respect to so many members of the class that the action becomes unmanageable, the court may decertify the class. 2 WK&M ¶ 901.08, at 9-34.

While most commentators have focused on the class action as a device for vindicating the rights of the plaintiffs, *see, e.g.*, Dickerson, note 26 *supra*, it is important to remember that the rights of the unnamed plaintiffs are jeopardized when class certification is granted. A judgment for the defendant will be binding on them as well as on the plaintiffs who are actually bringing the action. RESTATEMENT OF JUDGMENTS § 86 (1942); Farrell, *Civil Practice*, 27 SYRACUSE L. REV. 425, 429 (1976); *see* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 533 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978); Levitt v. Fireman's Fund Ins. Cos., 44 App. Div. 2d 558, 558-59, 352 N.Y.S.2d 677, 678 (2d Dep't 1974); 2 WK&M ¶ 901.10,

ARTICLE 31—DISCLOSURE

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."[36] Pursuant to this provision, a deposition may be admitted into evidence for impeachment purposes or as evidence in chief[37] notwithstanding that the deponent is available to testify as a witness.[38] Nevertheless, it had never been expressly determined whether a trial court, in the exercise of

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at 9-36. Therefore, if it appears that the defendant will be able to establish nonreliance by the named plaintiff on the alleged misrepresentations, the court may find it necessary to decertify the class to preserve the rights of members of the class who are not before it.

[36] CPLR 3117(a)(2) (Supp. 1980-1981) provides:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:
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> . . . .
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> (2) the deposition of a party or of any one who at the time of taking the deposition was an officer, director, member, or managing or authorized agent of a party, or the deposition of an employee of a party produced by that party, may be used for any purpose by any adversely interested party . . . .

CPLR 3117(a) was adapted in part from the Federal Rules of Civil Procedure, FIRST REP. 146, and is virtually identical to rule 32(a)(2) of the federal rules. *See generally* 4A J. MOORE, FEDERAL PRACTICE ¶ 32.01 (2d ed. 1980).

[37] *See* United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 263, 360 N.E.2d 943, 951, 392 N.Y.S.2d 265, 273 (1976); Spampinato v. A.B.C. Consol. Corp., 35 N.Y.2d 283, 286-87, 319 N.E.2d 196, 198, 360 N.Y.S.2d 878, 880 (1974); Gonzalez v. Medina, 69 App. Div. 2d 14, 21-22, 417 N.Y.S.2d 953, 958 (1st Dep't 1979); *In re* Estate of Schaich, 55 App. Div. 2d 914, 914, 391 N.Y.S.2d 135, 136 (2d Dep't 1977); Rodford v. Sample, 30 App. Div. 2d 588, 588, 290 N.Y.S.2d 30, 32 (3d Dep't 1968); CPLR 3117, commentary at 491 (1970); 3A WK&M ¶ 3117.04. It has been noted that CPLR 3117(a)(2) was intended "to authorize the use of a party's deposition unlimitedly against the deponent." SIXTH REP. 318.

[38] *See* Spampinato v. A.B.C. Consol. Corp., 35 N.Y.2d 283, 285, 319 N.E.2d 196, 198, 360 N.Y.S.2d 878, 880 (1974); Perkins v. New York Racing Ass'n, 51 App. Div. 2d 585, 586, 378 N.Y.S.2d 757, 759 (2d Dep't 1976); General Ceramics Co. v. Schenley Products Co., 262 App. Div. 528, 529, 30 N.Y.S.2d 540, 541 (1st Dep't 1941); *cf.* Fey v. Walston & Co., 493 F.2d 1036, 1046 (7th Cir. 1974); Fenstermacher v. Philadelphia Nat'l Bank, 493 F.2d 333, 338 (3d Cir. 1974); Pingatore v. Montgomery Ward & Co., 419 F.2d 1138, 1142 (6th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970); Community Counselling Serv., Inc. v. Reilly, 317 F.2d 239, 243 (4th Cir. 1963); Pursche v. Atlas Scraper & Eng'r Co., 300 F.2d 467, 488-89 (9th Cir. 1961), *cert. denied*, 371 U.S. 911 (1962) (federal rule 32(a)(2) allows introduction of party's deposition notwithstanding his prior testimony or unavailability). Notably, however, if the deponent is a nonparty witness his deposition may not be used as evidence in chief, unless one of the unavailability requirements enumerated in CPLR 3117(a)(3) is satisfied. 3A WK&M ¶ 3117.04. *See* Wojtas v. Fifth Ave. Coach Corp., 23 App. Div. 2d 685, 685, 257 N.Y.S.2d 404, 405 (2d Dep't 1965).