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New York State Consumer Protection Law and Class Actions in 2009: Part II

By Thomas A. Dickerson

In 2009, consumer protection law underwent a number of developments, including in the area of consumer class actions. The first part of this article, which appeared in the March/April issue of the *Journal*, reviewed recent consumer protection law cases; this second part looks at several consumer class action cases.

Sears, Television Sets, and Deceptive Price Matching

In *Dank v. Sears Holding Management Corp.*,¹ the Appellate Division, Second Department denied class certification in an action challenging Sears’s “price matching”² policy. In particular, the appellate court found that the class plaintiff failed to establish the element of numerosity, his adequacy as class representative, and his class counsel did not create a conflict of interest. In an earlier decision,³ the appellate court had affirmed the plaintiff’s claims under N.Y. General Business Law §§ 349 and 350 (GBL). In the complaint, the plaintiff had alleged that Sears had a policy promising “to match the price on an identical branded item with the same features currently available for sale at another local retail store.” Apparently, at three separate locations, the plaintiff requested that “Sears sell

him a flat-screen television at the same price at which it was being offered by another retailer.” However, at two of the stores, Sears denied the plaintiff’s request on the basis that “each store manager had the discretion to decide what retailers are considered local and what prices to match.” The plaintiff was able to purchase the television unit “at the third Sears at the price offered by a retailer located 12 miles from the store, but was denied the \$400 lower price offered by a retailer located 8 miles from the store.”

Deceptive Cell Phone Plans

In *Ballas v. Virgin Media, Inc.*,⁴ the Second Department dismissed a class action commenced by cell phone users alleging that “pay as you go” cellular phone service violated contract law principles and GBL §§ 349 and 350. According to the plaintiffs, the defendant failed to disclose “either the requirement that subscribers to its phone services periodically ‘top up’ their accounts by paying additional sums of money to the defendant to increase the available balances on those accounts, or the consequences of failing to ‘top up.’”

In *Morrissey v. Nextel Partners, Inc.*,⁵ another case arising out of Supreme Court, Albany County, the court declined to certify a class of cell phone users. The plaintiffs alleged that the defendant cellular telephone service provider “systematically overcharged many of its subscribers in violation of consumer protection statutes as well as principles of contract law.” The plaintiffs pointed to two specific areas where overcharging had occurred: (1) the method of crediting so-called bonus minutes to customers’ accounts; and (2) the assessment of additional fees from subscribers with poor credit ratings. With respect to “bonus minutes,” the plaintiffs alleged that such minutes, provided in the plaintiffs’ service agreements, were in fact illusory. The plaintiffs’ service agreements provided for a base level of 1,000 minutes on monthly usage, as well as 200 “bonus minutes.” However, the plaintiffs never saw or were never provided the additional 200 minutes. In addition, the plaintiffs complained that subscribers with low credit scores on a “spending limit program” contract were charged fees in excess of those for which they had bargained.

The Artful Business of Telecommunications and Cable Providers

In *Corsello v. Verizon New York Inc.*,⁶ a New York County trial court denied class certification in a trespass action brought by property owners seeking compensation from Verizon. The action arose out of the tricky business of establishing telecommunications infrastructure in New York City’s congested and dense neighborhoods, where buildings are attached and access to streets is limited. One of the only ways Verizon is able provide service is by extending its telephone lines from the public way or street to individual homes and businesses, “which requires Verizon to place terminal boxes on the rear-walls of privately owned buildings.” The plaintiff property owners complained that the rear wall terminals encumbered their property. Accordingly, they commenced an action under Transportation Corporations Law § 27 and pursuant to GBL § 349, seeking declaratory and injunctive relief, as well as monetary damages for trespass upon their property and deceptive practices that purportedly allowed the defendant to avoid paying the plaintiffs compensation for its invasion.

In another action, *Brissenden v. Time Warner Cable of New York City*,⁷ a New York County trial court declined to certify a class of cable TV customers challenging the necessity of converter boxes and remote controls. According to the plaintiffs, Time Warner Cable engaged in unfair and deceptive business practices in violation of GBL § 349. The plaintiffs alleged that the cable company charged its basic cable customers for converter boxes that they did not need because they subscribed only to channels that were not subject to conversion. In addition, the plaintiffs pointed out that the cable company engaged

in the practice of charging customers for unnecessary remote controls, regardless of their level of service.

The Enforceability of Microprint Contractual Provisions

In *Pludeman v. Northern Leasing Systems, Inc.*,⁸ the trial court certified a class of small business owners, who had entered into lease agreements for point-of-sale equipment and then brought an action challenging the enforceability of concealed microprint disclaimers and waivers in the agreement. In 2008,⁹ the New York Court of Appeals had upheld the plaintiffs’ claims that the defendant had used “deceptive practices” and “hid material and onerous lease terms.” Specifically, the plaintiffs said that the defendant’s sales representatives would provide a one-page contract on a clipboard, which had the effect of concealing the three pages underneath. Apparently, one of the concealed pages included a number of microprint clauses, such as a no-cancellation clause, a no-warranties clause, an absolute liability for insurance obligations clause, and a late charge clause. In sustaining the plaintiffs’ fraud claim against the individually named corporate defendants, the Court held that

it is the language, structure and format of the deceptive lease form and the systematic failure by the salespeople to provide each lessee a copy of the lease at the time of its execution that permits, at this early stage, an inference of fraud against the corporate officers in their individual capacity and not the sales agents.¹⁰

Using a Class Action to Challenge Brokerage Account Maintenance Fees

In *Yeager v. E*Trade Securities LLC*,¹¹ the First Department declined to certify a class of brokerage customers who sought to challenge account maintenance fees. The plaintiffs had complained that E*Trade unlawfully assessed account management fees a day early. The appellate court, however, maintained that determining whether the early fee caused an individual class member actual damages depended “upon facts so individualized that it is impossible to prove them on a class-wide basis.” Moreover, to recover under a breach of contract claim, the court held, “each class member would have to show that he or she would have avoided the fee had E*Trade collected it at the proper time.” Since proving damages would be subject to a host of factors exclusive to the individual, the court concluded that “individualized issues, rather than common ones, predominate.”

The Propriety of Backdating Renewal Memberships

In *Argento v. Wal-Mart Stores, Inc.*,¹² the Appellate Division, Second Department certified a class of customers who alleged that the defendant engaged in deceptive business practices in violation of GBL § 349. According to the plaintiffs, the company routinely backdated renewal

memberships at Sam's Club stores. This suspect policy allowed the company to charge members who renewed their memberships after the date their one-year membership terms expired, the full annual fee for less than a full year of membership.

Macy's Credit Card Holders and the Fine Print of Rewards Certificates

In *Held v. Macy's, Inc.*,¹³ the trial court dismissed several causes of action in a class action brought by customers alleging that Macy's misled its charge card holders into believing they would obtain cost savings opportunities if they purchased Macy's merchandise. Specifically, the plaintiffs complained that the company had systematically failed to disclose that the Rewards Certificates they received as a benefit of card membership were "worth significantly less than customers [were led] to believe." The court dismissed the plaintiffs' claims under GBL §§ 349 and 350 because the literature Macy's disseminated to the plaintiffs expressly stated that the plaintiffs were not entitled to Rewards Certificates. In fact, the certificate clearly stated that it was a typical store coupon, which would be similar to a "free discount coupons dis-

seminated to the general public in store flyers and not the functional equivalent of cash." ■

1. 59 A.D.3d 584, 872 N.Y.S.2d 722 (2d Dep't 2009).
2. See, e.g., *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418 (S.D.N.Y. 2009) (certification granted to class action alleging deceptive price matching in violation of GBL § 349); *Jay Norris, Inc.*, 91 F.T.C. 751 (1978), modified, 598 F.2d 1244 (2d Cir. 1979); *Commodore Corp.*, 85 F.T.C. 472 (1975) (consent order).
3. *Dank*, 59 A.D.3d 584.
4. 60 A.D.3d 712, 875 N.Y.S.2d 523 (2d Dep't 2009).
5. 22 Misc. 3d 1124(A), 880 N.Y.S.2d 874 (Sup. Ct., Albany Co. 2009).
6. 25 Misc. 3d 1221, 2009 WL 368259 (Sup. Ct., Kings Co. 2009).
7. 25 Misc. 3d 108, 885 N.Y.S.2d 879 (Sup. Ct., N.Y. Co. 2009), *aff'd as modified*, No. 507875, 2010 WL 653090 (3d Dep't Feb. 25, 2010); see also *Saunders v. AOL Time Warner, Inc.*, 18 A.D.3d 216, 794 N.Y.S.2d 342 (1st Dep't 2005) (customers challenge cable converter box rentals; complaint dismissed; plaintiff "not aggrieved by the complained of conduct").
8. 24 Misc. 3d 1206(A), 890 N.Y.S.2d 70 (Sup. Ct., N.Y. Co. 2009).
9. *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 489-90, 860 N.Y.S.2d 422 (2008).
10. *Id.* at 493.
11. 65 A.D.3d 410, 884 N.Y.S.2d 21 (1st Dep't 2009).
12. 66 A.D.3d 930, 888 N.Y.S.2d 117 (2d Dep't 2009); see *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29 (E.D.N.Y. 2008) (customers asserts that membership renewal policy is deceptive trade practice and violates GBL § 349; class certification granted).
13. 25 Misc. 3d 1219, 2009 WL 3465945 (Sup. Ct., Westchester Co. 2009).

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