

SUMMARY OF ARTICLE 9 CLASS ACTIONS IN 2004

January 12, 2005

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[Submitted For Publication To The New York Law Journal]

Last year the Court of Appeals ruled on the scope of G.B.L. § 349 claims that impacts upon class actions brought under CPLR Article 9. In addition, the Appellate Divisions and numerous trial Courts ruled on a variety of class actions in 2004.

Consumers Only?

Do corporations and other non-consumers have standing to assert claims under G.B.L. § 349? The Second Circuit Court of Appeals in Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA Incⁱ. certified two questions to the New York Court of

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Appeals, the firstⁱⁱ of which was answered. Relying upon the common law rule that “ an insurer or other third-party payer of medical expenditures may not recover derivatively for injuries suffered by its insured ” the Court of Appeals held, without deciding the ultimate issue of whether non-consumers are covered by G.B.L. § 349ⁱⁱⁱ, that Blue Cross’s claims were too remote to provide it with standing under G.B.L. § 349 [“ Indeed, we have warned against ‘ the potential for a tidal wave of litigation against businesses that was not intended by the Legislature ’ ”].

Policy On Arbitration

Last year the Appellate Division in New York State v. Philip Morris, Inc^{iv}. and Ranieri v. Bell Atlantic Mobile^v re-affirmed its policy, first enunciated in 1981 in Harris v. Shearson Hayden Stone^{vi} that “ the interests favoring arbitration should prevail over those favoring the class action ” and that class actions may be contractually prohibited [“ [G]iven the strong public policy favoring arbitration...and the absence of a commensurate policy favoring class action, we are in accord with authorities holding that a contractual proscription against class actions is neither unconscionable nor violative of public policy ”^{vii}].

Arbitration & The Tobacco Wars

In 2004 the Appellate Division revisited the Tobacco Wars^{viii} in Matter of Brown & Williamson v. Chesley^{ix} by enforcing a fee award of \$1.25 billion rendered by the majority of an arbitration panel but vacated by the trial Court^x. In finding that the

“ Supreme Court improperly interjected itself into the merits of the fee dispute “, the Appellate Division held that “ the award is neither irrational nor violative of public policy “ and well justified based upon the risk, complexity, achievements and “ unique professional experience and expertise acquired by ‘ being one of the first in the tobacco wars ‘ “.

Mandatory Arbitration Agreements

The enforceability of mandatory arbitration agreements was considered by the Appellate Division and two trial Courts. In Tsadilas v. Providian Bank^{xi}, the Appellate Division enforced an arbitration provision in a credit card agreement “ even though it waives plaintiff’s right to bring a class action “, found the claim of exposure to “ potentially high arbitration fees (as) premature “ and held that the credit card agreement as a whole was not unconscionable “ because plaintiff had the opportunity to

opt out without any adverse consequences “. In Johnson v. Chase Manhattan Bank USA^{xii}, Visa credit card holders who “ accepted a promotional offer...to borrow money by cash advances “ at a low introductory APR claimed that the application of monthly payments deprived them of the “ full benefit of the promotional rate “. The trial Court enforced an Arbitration Agreement finding it not to be unconscionable^{xiii} and dismissed the complaint. And in Spector v. Toys ‘R’ Us^{xiv} a class of Toys ‘R’ Us credit card holders challenged a rebate program as deceptive. The defendant moved to add the credit card administrator, Chase Manhattan, as a necessary defendant. In denying the motion the trial Court found that “ The devaluation of the... reward coupons appears not to be by Chase Manhattan in its issuance of its coupons but rather by Toys “R” Us in its application of them “ and concluded that Toys “R” Us was trying “ to hide behind the arbitration clause of a seemingly non-defaulting party “.

Mass Torts

Generally, the Courts have been unwilling to certify mass tort class actions alleging personal injury or property damage under CPLR Article 9^{xv}. 2004 was no different. In Rallis v. City of New York^{xvi}, the Appellate Division denied certification to a class action alleging property damage that resulted from flooding

in a residential neighborhood in Flushing, Queens [“ According to the plaintiffs, the damage was caused by the City’s negligence in failing to properly design, install, maintain and operate its sewer and water drainage systems ”].

Monopolistic Business Activities

In Cox v. Microsoft Corp^{xvii} consumers charged Microsoft with deceptive monopolistic business practices by “ entering into secret agreements with computer manufacturers... to inhibit competition and technological development...by creating an’ applications barrier ’ “. The Appellate Division sustained the unjust enrichment and G.B.L. § 349 claims and notwithstanding an earlier decision^{xviii} dismissing the Donnelly Act claim as prohibited by C.P.L.R. § 901(b), found the G.B.L. § 349 claim certifiable if limited to “ only actual damages ”.

After settlement of a federal credit card/debit card illegal tie-in class action^{xix}, a class of consumers in Ho v. Visa U.S.A., Inc^{xx}. charged Visa with violating the Donnelly Act and G.B.L. § 349 in that “ retail stores (passed) on the increased charge to consumers, such as themselves, by raising the price of the products that they sell “. Noting the CPLR § 901(b) prohibition against treble damage antitrust class actions^{xxi}, the trial Court dismissed the individual Donnelly Act claims “ as too

remote to provide antitrust standing “. The G.B.L. § 349 claims were dismissed as well for remoteness and because of “ the complexity and speculative nature of calculating damages “.

DSL Services

In Solomon v. Bell Atlantic Corporation^{xxii}, a class of New York DSL subscribers alleged that defendant misrepresented the speed [“ FAST, high speed Internet access “], connectivity [“ You’re always connected “] and ease of installation [“ self installation...in minutes “] of its services. The Appellate Division decertified the class because of a lack of uniform misrepresentations [“ the individual plaintiffs did not all see the same advertisements; some saw no advertisements at all before deciding to become subscribers “] and the predominance numerous individual issues, e.g., whether each individual was reasonably misled, how they were injured and damaged [“ we reject the argument for ‘ a statistically based assessment of damages absent any certain quantification of actual losses of putative class members arising from defects in defendant’s system ‘ “], the application of the affirmative defenses of voluntary payment, a 30 day trial period [“ To determine actual injury, individual trials would be required to demonstrate which statements and/or disclaimers each plaintiff read and why he or she continued to

receive the service even after the 30 day trial period "] and the individual acceptance of billing credit.

Title Insurance

In Matter of Coordinated Title Insurance Cases^{xxiii}, classes of home buyers charged title insurance companies with fraud, unjust enrichment and violation of G.B.L. § 349 by failing to " comply with their own filed and state-approved title insurance premium rates ". After noting that every " Class member has allegedly been damaged by a few hundred dollars, while each title insurance defendant has allegedly collected millions of dollars " the Court certified the class finding that reliance may be presumed and that G.B.L. § 349 claims are more certifiable when they arise from an omission as opposed to an affirmative representation.

Life Insurance

In DeFilippo v. Mutual Life Ins. Co.^{xxiv}, a " vanishing premium " class action, the Appellate Division found a predominance of individual issues of proof and decertified the class because a recent Court of Appeals' decision^{xxv} which held that " the deceptive acts or practices under GBL § 349 ' [are]

not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer ' eliminated any doubt (such claims) would require individualized inquires into the conduct of defendants' sales agents with respect to each individual purchaser ". And in Goldman v. Metropolitan Life Ins. Co.^{xxvi} and Katz v. American Mayflower Life Ins. Co.^{xxvii}, the Appellate Division dismissed two class actions challenging " so-called ' cash on delivery '...method of payment...wherein no coverage would take effect until the policy was physically delivered to the insured and until the insured paid the first premium in full " on the grounds of " documentary evidence, i.e., the clear and unambiguous terms of the subject policy ".

Telephone Consumer Protection Statute

In Ganci v. Cape Canaveral Tour and Travel, Inc.^{xxviii}, and Giovanniello v. Hispanic Media Group USA, Inc^{xxix}., classes of consumers who received unsolicited telephone calls or commercial faxes claimed violations of the federal Telephone Consumer Protection Act [TCPA]. In denying class certification the Courts relied upon CPLR § 901(b). " The TCPA statute does not specifically provide for a class action to collect the \$500 damages and said \$500 damages is a ' penalty '...or a ' minimum measure of recovery '...the allowance of treble damages under the

TCPA is punitive in nature and constitutes a penalty “xxx.

In Rudgayser & Gratt v. Enine, Inc.^{xxxii}, the Appellate Term reversed a trial court ruling that the TCPA was unconstitutional and that New York’s unsolicited fax statute, G.B.L. § 396-aa, was “ less restrictive than the TCPA and sufficient for New Yorkers “^{xxxiii}. And in Bonime v. Management Training International^{xxxiii}, a class of consumers who had received unsolicited faxes alleged violations of the TCPA. The Court denied a motion to dismiss on the same constitutional grounds as in the Rudgayser case.

Michael Jackson: The Solo Years

In Gross v. Ticketmaster L.L.C.^{xxxiv}, a class of purchasers of \$98.50 tickets for a concert “ billed as ‘ Michael Jackson: 30th Anniversary Celebration, the Solo Years ‘ claimed obstructed views and charged defendant with fraud, breach of contract, unjust enrichment and violation of G.B.L. § 349. After dismissing the fraud claim the Court granted class certification finding the “ the class action form...superior to a large number of individual claimants having to pursue their respective rights to small refunds “.

Hair Treatment Loss Products

In Mountz v. Global Vision Products, Inc.^{xxxv}, purchasers of Avacor, a hair loss treatment product, alleged fraudulent and negligent misrepresentations of “ ‘ no known side effects ‘ (as being) refuted by documented minoxidil side effects... cardiac changes, visual disturbances, vomiting, facile swelling and exacerbation of hair loss “. The Court variously dismissed the monetary claims under Maine’s consumer protection statute but noted that defendant’s “ limited money back guarantee “ does not insulate it from liability for deceit, sustained the G.B.L. §§ 349, 350 claims but limited coverage to New York residents deceived in New York, denied a motion to strike class allegations and stayed plaintiffs’ counsel from commencing similar class actions elsewhere [“ the interests of justice provide adequate reason to place an appropriate bar on the ability of the named plaintiffs to commence and pursue identical claims before other forums pending a determination of the scope and nature of this litigation “^{xxxvi}].

Rebates, Fat Fingers, Rental Cars & Soft Drinks

In Amalfitano v. Sprint Corp.^{xxxvii}, a class of purchasers of the Qualcomm 2700 wireless telephone charged defendant with

fraud, breach of contract, negligent misrepresentation and violations of G.B.L. § 349 in failing to honor a \$50 rebate promotion. The Court dismissed the G.B.L. § 349 claim but certified the class. In Drizin v. Sprint Corp^{xxxviii} a class of telephone users charged defendants with fraud and violation of G.B.L. § 349 by maintaining “ numerous toll-free call service numbers that were nearly identical (except for one digit) to the toll-free numbers of competing long distance telephone service providers...’ fat fingers ’ business... customers allegedly unaware that they were being routed through a different long distance provider, ended up being charged rates far in excess of what they would have paid to their intended providers “. The Appellate Division affirmed certification of a class limited to New York State residents. In Han v. Hertz Corp.^{xxxix}, the Appellate Division dismissed a class action seeking to void rental car contracts “ for failure to abide by the disclosure requirements for former (GBL) § 396-z relating to the customers’s liability for damage to a rental car “. The Court found no private right of enforcement of GBL § 396-z and no actual damages under GBL § 349. In Donahue v. Ferolito^{xl}, a class of consumers sought an injunction “ against continued sale of certain bottled soft drinks “ because of misrepresentations that the products “ would improve memory, reduce stress and improve overall health “. The Court dismissed the complaint finding no

actual harm was alleged, no warranty was promised and enforced a disclaimer of any health benefit.

Government Operations Rule

In Tosner v. Town of Hempstead^{xli} the Appellate Division affirmed certification of a class of employees seeking status as “ full time employees entitled to...benefits “, finding an exception to the government operations rule^{xlii} [“ that rule does not apply where, as here, the purported class consists of a large number of identifiable individuals seeking monetary damages “].

Oil & Gas Royalty Payments

In Freeman v. Great Lakes Energy Partners^{xliii}, a class of landowners with interests in oil and gas leases sought compensatory and punitive damages arising from an alleged reduction in royalty payments. The Appellate Division certified the class action finding predominance based upon a common course of conduct “ including whether certain deductions taken by defendants in calculating the royalties were improper and whether defendants artificially manipulated the royalty calculations as a result of self-dealing transactions “.

Internet Domain Names

In Wornow v. Register.Co., Inc.^{xliv}, a class challenged defendant's " automatic renewal of...domain names registration " as violative of GOL § 5-903 " which makes automatic renewal provisions unenforceable unless notice thereof is given to recipient of services ". The Appellate Division dismissed the GOL § 5-903 claim [" domain name that is not trademarked or patented is not personal property "], the GBL § 349 claim [" nothing deceptive in...use of e-mail to notice of modification "], conversion claim [charge to credit card not identifiable], and breach of covenant of good faith claim [" plaintiff received full benefit of that agreement "] but sustained the money had and received claim.

ENDNOTES

i. Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA, Inc., 344 F. 3d 211, 217-218 (2d Cir. 2003)

ii. Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA, Inc., 3 N.Y. 3d 200, 205, 2004 WL 2339565 (2004) (" Are claims by a third party payer of health care costs seeking to recover costs of services provided to subscribers as a result of those subscribers being harmed by a defendant's...violation of N.Y. Gen. Bus. Law § 349 too remote to permit suit under that statute? ").

iii. Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA, Inc., 3 N.Y. 3d 200, 207, 2004 WL 2339565 (2004) (" In concluding that derivative actions are barred, we do not agree with plaintiff that precluding recovery here will necessarily limit the scope of section 349 to only consumers, in contravention of the statute's plain language permitting recovery by any person injured ' by reason of ' any violation (see e.g., Securitron Magnalock Corp., v. Schnabolk, 65 F. 3d 256, 264 (2d Cir. 1995, cert. denied 516 US 1114 (1996) (allowing a corporation to use section 349 to halt a competitor's deceptive consumer practices ").

iv. New York State v. Philip Morris, Inc., 308 A.D. 2d 57, 63, 763 N.Y.S. 2d 32, 35 (1st Dept. 2003) (" Justice Ramos's...order rests on the assumption that, if CPLR Article 9 and 75 conflict, the former trumps the latter. However, that assumption is incorrect...(There is a) strong public policy in favor of arbitration ").

v. Ranieri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (1st Dept. 2003).

vi. Harris v. Shearson Hayden Stone, 82 A.D. 2d 87, 441 N.Y.S. 2d 70 (1st Dept. 1981), *aff'd* 56 N.Y. 2d 627, 450 N.Y.S. 2d 482, 435 N.E. 2d 1097 (1982).

vii. Ranieri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (1st Dept. 2003). See also: Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 2402, 2408, 156 L. Ed. 2d 414

(2003)(class action arbitration permissible under Federal Arbitration Act unless prescribed by arbitration agreement).

viii. See e.g., New York State v. Philip Morris, Inc., 308 A.D. 2d 57, 63, 763 N.Y.S. 2d 32, 35 (1st Dept. 2003)(arbitration panel award of \$625 million in legal fees to attorneys representing New York State in Tobacco Wars enforced). See also: Freedom Holdings, Inc. v. Spitzer, 2004 WL 2035334 (S.D.N.Y. 2004)(discussion of various issues regarding the Tobacco Master Settlement Agreement).

ix. Matter of Brown & Williamson v. Chesley, 7 A.D. 3d 368, 777 N.Y.S. 2d 82 (1st Dept. 2004).

x. Matter of Brown & Williamson v. Chesley, 194 Misc. 2d 540, 749 N.Y.S. 2d 842 (N.Y. Sup. 2002).

xi. Tsadilas v. Providian National Bank, 2004 WL 2903518 (1st Dept. 2004).

xii. Johnson v. Chase Manhattan Bank USA, N.A., 2 Misc. 3d 1003(A), 784 N.Y.S. 2d 921 (N.Y. Sup. 2004).

xiii. Johnson v. Chase Manhattan Bank USA, N.A., 2 Misc. 3d 1003(A), 784 N.Y.S. 2d 921 (N.Y. Sup. 2004)(" The Arbitration Agreement was not presented on a ' take it or leave it ' basis. It permits plaintiff the opportunity to opt out of arbitration, and to still continue using his Chase USA credit card without the requirement that ' any claim or dispute ' be arbitrated. The claim of unconscionability is unavailing ").

xiv. Spector v. Toys 'R' US, New York Law Journal, April 1, 2004, p. 20, col. 1 (Nassau Sup. 2004).

xv. See e.g., Catalano v. Heraeus Kulzer, Inc., 305 A.D. 2d 356, 759 N.Y.S. 2d 159 (2d Dept. 2003)(class of dentists claimed strict products liability and breach of warranty by the distributor of Artglass, a fabricated polymer-based system of dental restorations; certification denied); Lieberman v. 293 Mediterranean Market Corp., 303 A.D. 2d 560, 756 N.Y.S. 2d 469 (2d Dept. 2003)(food poisoning at restaurant; certification denied); Fleming v. Barnswell Nursing Home and Health Facilities, Inc., 309 A.D. 2d 1132, 766 N.Y.S. 2d 241 (3d Dept. 2003)(nursing home patients allege medical malpractice, negligence and a violation of Public Health Law § 2801-d; certification denied to all but Public Health claim since statute provides for class actions if prerequisites for certification in

CPLR Article 9 are met).

xvi. Rallis v. City of New York, 3 A.D. 3d 525, 770 N.Y.S. 2d 736 (2d Dept. 2004).

xvii. Cox v. Microsoft Corp., 8 A.D. 3d 39, 778 N.Y.S. 2d 147 (1st Dept. 2004).

xviii. Cox v. Microsoft Corp., 290 A.D. 2d 206, 737 N.Y.S. 2d 1 (1st Dept. 2002).

xix. In re Visa Check/Mastermoney Antitrust Litigation, 297 F. Supp. 2d 503 (E.D.N.Y. 2003). See also: Morris v. Visa USA, Inc., 2004 WL 2414027 (N.C. Sup.)(indirect purchasers' credit card-debit card tie-in class actions dismissed for lack of standing).

xx. Ho. v. Visa USA, Inc., 3 Misc. 3d 1105(A), 2004 WL 1118534 (N.Y. Sup. 2004).

xxi. See e.g., Asher v. Abbott Laboratories, 290 A.D. 2d 208, 737 N.Y.S. 2d 4 (1st Dept. 2002)(“ private persons are precluded from bringing a class action under the Donnelly Act...because the treble damage remedy...constitutes a ‘ penalty ‘ within the meaning CPLR 901(b) “); Rubin v. Nine West Group, Inc., 1999 WL 1425364 (N.Y. Sup. 1999)(“ Although plaintiff makes the general statement that ‘ CPLR 901(b) does not create a barrier to class actions under the Donnelly Act ‘...a reading of that statute and the Act establish the contrary “); Russo & Dubin v. Allied Maintenance Corp., 95 Misc. 2d 344, 407 N.Y.S. 2d 617 (N.Y. Sup. 1978).

xxii. Solomon v. Bell Atlantic Corp., 9 A.D. 3d 49, 777 N.Y.S. 2d 50 (1st Dept. 2004).

xxiii. Matter of Coordinated Title Insurance Cases, 2 Misc. 3d 1007(A), 784 N.Y.S. 2d 919 (Nassau Sup. 2004).

xxiv. DeFilippo v. Mutual Life Ins. Co., 2004 WL 2902570 (1st Dept. 2004).

xxv. Goshen v. Mutual Life Ins. Co., 98 N.Y. 2d 314, 325(2002).

xxvi. Goldman v. Metropolitan Life Ins. Co., 2004 WL 2984366 (1st Dept. 2004).

xxvii. Katz v. American Mayflower Life Ins. Co., 2004 WL 2984899 (1st Dept. 2004).

xxviii. Ganci v. Cape Canaveral Tour And Travel, Inc., 4 Misc. 3d

1003(A), 2004 WL 1469372 (Kings Sup. 2004).

xxix. Giovanniello v. Hispanic Media Group USA, 4 Misc. 3d 440, 780 N.Y.S. 2d 720 (Nassau Sup. 2004).

xxx. Giovanniello v. Hispanic Media Group USA, 4 Misc. 3d 440, 442, 780 N.Y.S. 2d 720 (Nassau Sup. 2004).

xxxi. Rudgayser & Gratt v. Enine, Inc., 4 Misc. 3d 4, __N.Y.S. 2d__ (App. Term 2004), revg 193 Misc. 2d 449, 749 N.Y.S. 2d 855 (Kings Civ. 2002).

xxxii. Rudgayser & Gratt v. Enine, Inc., 193 Misc. 2d 449, 455, 749 N.Y.S. 2d 855 (Kings Civ. 2002).

xxxiii. Bonime v. Management Training International, New York Law Journal, February 6, 2004, p. 17, col. 1 (Kings Sup. 2004).

xxxiv. Gross v. Ticketmaster L.L.C., 5 Misc. 3d 1005(A), 2004 WL 2339808 (N.Y. Sup. 2004).

xxxv. Mountz v. Global Vision Products, Inc., 3 Misc. 3d 171, 770 N.Y.S. 2d 603 (N.Y. Sup. 2003).

xxxvi. Mountz v. Global Vision Products, Inc., 3 Misc. 3d 171, 180, 770 N.Y.S. 2d 603 (N.Y. Sup. 2003). Compare: In Matter of Bridgestone/Firestone Inc. Tires Products Liability Litigation, 288 F. 3d 1012 (7th Cir. 2000), the Seventh Circuit of Appeals denied class certification to a nationwide class of buyers and lessees of sport utility vehicles equipped with defective tires. In a subsequent motion the defendants sought an injunction barring all similar state court class action. In Matter of Bridgestone/Firestone Inc. Tires Products Liability Litigation, 333 F. 3d 763 (7th Cir. 2003) the Court of Appeals granted in the injunction barring all “Class suits (which) have been filed in many jurisdictions: in at least five suits, plaintiffs seek certification of the same nationwide classes that our opinion nixes...But when federal litigation is followed by many duplicative state suits, it is sensible to handle the preclusive issue once and for all in the original case, rather than put the parties and state judges through an unproductive exercise. That these suits are multiplying suggests that some lawyers have adopted the strategy of filing in as many courts as necessary until a nationwide class comes into being and persists...”).

xxxvii. Amalfitano v. Sprint Corp. 4 Misc. 3d 1027(A), 2004 WL 2169399 (N.Y. Sup.).

xxxviii. Drizin v. Sprint Corp., 2004 WL 2591249 (1st Dept. 2004).
See also: Drizin v. Sprint Corp., 3 A.D. 3d 388, 771 N.Y.S. 2d 82
(1st Dept. 2004)(common law fraud and G.B.L. § 349 claims
stated).

xxxix. Han v. Hertz Corp., 12 A.D. 3d 195, 784 N.Y.S. 2d 106 (1st Dept. 2004).

xl. Donahue v. Ferolito, Vultaggio & Sons, 786 N.Y.S. 2d 153, 2004 WL 2749313 (1st
Dept. 2004).

xli. Tosner v. Town of Hempstead, 12 A.D. 3d 589, 785 N.Y.S. 2d 101 (2d Dept. 2004
).

xlii. Tosner v. Town of Hempstead, 12 A.D. 3d 589, 785 N.Y.S. 2d 101 (2d Dept. 2004
) (“... class certification is generally disfavored where governmental operations are
involved and subsequent plaintiffs will be adequately protected under the principle of
stare decisis “).

xliii. Freeman v. Great Lakes Energy Partners, 2004 N.Y. Slip. Op. 08526, 785 N.Y.S.
2d 640 (4th Dept. 2004).

xliv. Wornow v. Register.Com, Inc., 8 A.D. 3d 59, 778 N.Y.S. 2d 25 (1st Dept. 2004).