RULINGS IN 2010 IN CLASS ACTIONS UNDER CPLR ARTICLE 9

February 23, 2011

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Last year, New York state courts ruled on a variety of class actions pursuant to CPLR Article 9 involving attorneys fees, point of sale leases, arbitration and class action waivers, cy pres settlements, cell phone bonus minutes, mootness, inverse condemnation, mortgages, wage claims and mass property torts. In addition, U.S.

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Supreme Court decided that CPLR 901(b)'s prohibition of class actions seeking a "penalty or a minimum measure of recovery" will not be recognized in Federal Court in Rule 23 class actions.

Independent Analysis Needed

Trial courts must carefully examine proposed settlements[i], especially when coupled with a motion seeking certification of a settlement class. Appropriately, counsel for the class and the defendants have an interest in presenting the proposed settlement in a favorable light. The trial court, however, may need a more disinterested analysis of the proposed settlement[ii]. It is for this reason that class members should be encouraged to file objections and appear at the settlement fairness hearing[iii], be permitted to intervene, if necessary, to protect the interests of the class[iv], and be permitted to conduct limited discovery[v], if carefully monitored to avoid unnecessary delay. If the trial court finds the objector's analysis to be useful in evaluating the proposed settlement, some Federal and state courts have approved of objector's incentive awards and the payment of objector's counsel's fees and costs[vi].

Objector's Attorneys' Fees

In *Flemming v. Barnwell Nursing Home And Health Facilities, Inc*.[vii], a majority of the Court of Appeals declined to award an

objector her counsel fees noting that "The language of CPLR 909 permits attorney fees

awards only to ‘the representatives of the class’ and does not authorize an award of counsel fees to any party, individual or counsel, other than class counsel. Had the Legislature intended any party to recover attorney fees it could have expressly said so”. The dissent, however, noted that “Whatever the faults and virtues of the class action device, no one disputes the need to control class counsel’s fees-and nothing furnishes so effective a check on those fees as an objecting lawyer”. Hopefully, the majority’s holding will be ameliorated in future cases where the objector’s input is found to be helpful[viii] unlike in this case where the trial court found that “her objections had neither assisted the court nor benefitted the class”.

Fees In Absence Of Common Fund

In another interesting fee case, *Louisiana Municipal Employees’ Retirement System v. Cablevision Systems Corp*.[ix], the defendants agreed to pay counsel’s attorneys fees as part of a proposed settlement “which became void upon the nonconsummation of a transaction contemplated in the settlement agreement”. The plaintiffs, however, asserted that they obtained a benefit for the class [share price increased], were entitled to an award of attorneys fees pursuant to CPLR 909 and since no common fund had been created which could fund such an award, the plaintiffs sought to have defendants pay. In limiting the scope of CPLR 909 the Appellate Division, Second Department, held that “Although CPLR 909 also provides that ‘if justice requires, [the court in its discretion may] allow recovery of the amount awarded from the opponent of the class’, cases[x] interpreting this statutory provision uniformly

require a showing of bad faith or other improper conduct on the part of a defendant before approving an award of fees directly against it". Finding no bad faith the court reversed the trial court's award of $2.1 million in attorneys fees[xi].

No Penalty Class Actions

CPLR § 901(b)'s prohibition of class actions seeking a penalty or a minimum recovery has been applied by New York courts in antitrust actions under General Business Law [GBL] § 340 [Donnelly Act][*Sperry v. Crompton Corp.*[xii]] and to claims brought under the federal Telephone Consumer Protection Act [*Giovanniello v. Carolina Wholesale Office Machine Co., Inc.*[xiii]]. However, CPLR § 901(b) has not been applied in class actions alleging a violation of GBL §§ 349, 350 [*Cox v. Microsoft Corp.*,[xiv], *Ridge Meadows Homeowners's Association, Inc. v. Tara Development Co., Inc.*,[xv]], Labor Law § 220 [*Pasantez v. Boyle Envrionmental Services, Inc*.[xvi], *Galdamez v. Biordi Construction Corp*.,[xvii]] and Labor Law § 196-d [*Krebs v. The Canyon Club*[xviii]] as long as the penalty damages are waived and class members are given the opportunity to opt-out.

Make A Federal Case Out Of It

Perhaps, on the basis of comity and to discourage forum shopping the federal courts in the Second Circuit have routinely referred to CPLR § 901(b) in class actions brought by New York residents [*Leider v. Ralfe*[xix] ("NY C.P.L.R. § 901(b) must apply in a

federal forum because it would contravene both of these mandates to allow plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court")]. However, a plurality of the U.S. Supreme Court in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*[xx] rejected this concept. "The question in dispute is whether Shady Grove's suit may proceed as a class action. Rule 23...creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his class as a class action...Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question-i.e., it states that Shady Grove's suit 'may *not* be maintained as a class action' (emphasis added) because of the relief it seeks-it cannot apply in diversity suits unless Rule 23 is ultra-vires...Rule 23 automatically applies 'in all civil actions and proceedings in the United States district courts'". Recent federal courts have addressed the ramifications of *Shady Grove*[xxi]. Clearly, there will be an increase in federal class actions and defendants may be less anxious to remove such cases to federal court under the Class Action Fairness Act[xxii]. Lastly, the Legislature may wish to revisit CPLR § 901(b)[xxiii].

More Tiny Print

In *Pludeman v. Northern Leasing Systems, Inc.*[xxiv] a class of small business owners who had entered into lease agreements for POS terminals asserted that defendant used "deceptive practices, hid material and onerous lease terms. According

to plaintiffs, defendants' sales representatives presented them with what appeared to be a one-page contract on a clip board, thereby concealing three other pages below...among such concealed items...(were a) no cancellation clause and no warranties clause, absolute liability for insurance obligations, a late charge clause, and provision for attorneys' fees and New York as the chosen forum", all of which were in "small print" or "microprint". The Appellate Division, First Department certified the class[xxv] noting that "liability could turn on a single issue.

Central to the breach of contract claim is whether it is possible to construe the first page of the lease as a complete contract...

Resolution of this issue does not require individualized proof".

Subsequently, the trial court awarded the plaintiff class partial summary judgment on liability on the breach of contract/ overcharge claims[xxvi].

Arbitration

Until recently New York courts have, generally, enforced mandatory arbitration clauses in consumer contracts including class action waivers[xxvii]. In *Frankel v. Citicorp Insurance Services, Inc.*[xxviii], a class action challenging the repeated and erroneous imposition of $13 payments for the defendant's "Voluntary Flight Insurance Program", the defendant sought to compel arbitration and stay the class action relying upon a unilateral change of terms notice imposing a class action waiver set forth in a mailed notice sent to plaintiff. In remitting, the Appellate Division, Second Department noted

that “Since there is a substantial question as to whether the arbitration agreement is enforceable under South Dakota law “ the trial court should have “temporarily stay(ed) arbitration pending a framed-issue hearing”. At such a hearing the trial court should consider, *inter alia*, the issues of unconscionability, adequate notice of the change in terms, viability of class action waivers and the “costs of prosecuting the claim on an individual basis, including anticipated fees for experts and attorneys, the availability of attorneys willing to undertake such a claim and the corresponding costs likely incurred if the matter proceeded on a class-wide basis”[xxix].

Mass Torts

In *Osarczuk v. Associated Universities, Inc.*[xxx] the trial court certified two of six proposed subclasses in a mass tort class action originally seeking damages for “personal injury and property damage alleged to be the result of various nuclear and non-nuclear materials of a hazardous and toxic nature emitted into the air, soil and groundwater from (the Brookhaven National Laboratory (BNL))”. Prior to class certification the Appellate Division, Second Department limited the claims to alleged injuries arising from exposure to non-nuclear materials[xxxi] The two subclasses certified included residential property owners claiming a loss of real property values or who lost the use and enjoyment of their property within a ten mile radius of BNL (class size 1000) and a subclass of persons who suffered economic loss including the expense of “securing alternative water supplies, including the cost to hookup to the public water

supply and the yearly cost of water" (class size 800).

Cy Pres Settlement

In *Fiala v. Metropolitan Life Ins. Co., Inc.*[xxxii] and a related federal class action[xxxiii], the trial court approved a proposed settlement providing for a total payment of $50 million to resolve both federal and state cases. Of particular interest was $2.5 million allocated for cy pres distribution to The Foundation for the National Institutes of Health which "will allocate the funds to national, health-related research projects". Noting that "There is little New York law[xxxiv] applying the cy pres rule to class action settlements...there is no prohibition against employing this well-recognized doctrine, oft applied by the federal courts...Many of the non-closed-block class members would have to be located at great expense (which) would have greatly depleted the $2.5 million and left these class members with little benefit". In addition, the court approved of the payment of $25,000 for objector's counsel fees and incentive awards "ranging from $1,000 to $1,500" to class representatives. "This award, the court believes, will encourage class representatives to bring needed class actions without worry that their expenses will not be covered".

Bonus Minutes

In *Morrissey v. Nextel Partners, Inc.* [xxxv], two subclasses of defendant's cell phone customers alleged violations of GBL 349, 350 "and various principals of contract law". The "bonus minutes"
subclass alleged that defendant's use of that term was misleading in that the true terms and conditions were not disclosed. The "spending limits" subclass alleged that defendant's notification
of an fee increase for the "Spending Limits Program" was buried
within a billing statement. The Appellate Division, Third Department denied certification to the GBL 349 "bonus minutes" subclass because of the predominance of oral misrepresentations ["lengthy discussion with sales representative"; "exposed to different written promotional materials"] but granted certification to the GBL 349 "spending limits" subclass based upon nondisclosure[xxxvi] ["small typeface and inconspicuous location of the spending limit fee increase disclosures"]. Regarding the GBL 350 claims certification would be inappropriate since such claims require proof of reliance requiring individualized proof.

Mootness & Exhaustion

In two class actions, one on behalf of developmentally disabled foster care children [*City of New York v. Maul*[xxxvii]] and one on behalf of medicaid recipients [*Coleman v. Daines, M.D.*[xxxviii]] the courts addressed the threshold issues of mootness and exhaustion of administrative remedies. In *Maul*, a class action alleging the failure of governmental agencies to fulfill their statutory duties, the Court of Appeals certified the

class noting notwithstanding that eight plaintiffs “are now receiving services” the claims of the class were not moot since “These issues are likely to recur and may evade review given the temporary duration of foster care, the aging out of potential plaintiffs”. And in *Coleman*, a class action alleging, *inter alia*, the failure of the Commissioner of a governmental agency to inform medicaid recipients “as to how many hours of Medicaid funded personal care attendant services she (and the class) were entitled to in a timely manner”, the Appellate Division, First Department found a “likely to recur” exception to the mootness doctrine. In addition the *Coleman* court found an exception to the exhaustion of administrative remedies doctrine since “this dispute turns on the construction of the relevant constitutional, statutory and regulatory framework”.

Inverse Condemnation

Not since the 1980's case of *Loretto v. Teleprompter Manhattan CATV Corp.*[xxxix] have the courts been called upon to address the equities of the use of private property in New York City by telecommunication companies for the allegedly uncompensated placement of terminal boxes, cables and other hardware. In *Corsello v. Verizon New York, Inc.*[xl], property owners challenged defendant’s use of “inside-block cable architecture” instead of “pole-mounted aerial terminal architecture “ often turning privately owned buildings into “community telephone pole(s)”. On a motion to dismiss, the Appellate Division, Second Department held that an inverse condemnation claim was stated noting that the allegations “are sufficient to describe a permanent physical

occupation of the plaintiffs' property". The court also found that a GBL 349 claim was stated for "[t]he alleged deceptive practices committed by Verizon...of an omission and a misrepresentation; the former is based on Verizon's purported failure to inform the plaintiffs that they were entitled to compensation for the taking of a portion of their property, while the latter is based on Verizon's purported misrepresentation to the plaintiffs that they were obligated to accede to its request to attach its equipment to their building, without any compensation, as a condition to the provision of service". The court also found that although the inverse condemnation claim was time barred, the GBL 349 claim was not ["A 'defendant may be estopped to plead the Statute of Limitations...where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action'"]. The court also denied class certification[xli] finding the proposed class definition overbroad, an absence of predominating questions of law or fact and atypicality.

Mortgages & Wages

In *Dowd v. Alliance Mortgage Company*[xlii], a class of mortagees alleged that defendant violated Real Property Law [RPL] 274-a and GBL 349 by charging a "'priority handling fee' in the sum of $20, along with unspecified 'additional fees' for providing her with a mortgage note payoff statement". The Appellate Division, Second Department, granted class certification to the RPL 274-a and GBL 349 claims but denied certification

as to the money had and received causes of action “since an affirmative defense based on the voluntary payment doctrine...necessitates individual inquiries of class members”.

In *Ramirez v. Mansions Catering, Inc.*[xliii], a class of wait staffers sought to recover gratuities or similar payments received by their employer from customers[xliv]. Trial court certified the class seeking the benefit of Labor Law §196-d and relying upon *Samiento v. World Yacht*[xlv], holding that the “gratuity” provision of §196-d “can include mandatory charges when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees”. The First Department affirmed the class certification order, determining that the *World Yacht* decision did not constitute a “new rule”, and found no basis for disturbing the presumption that the holding be accorded retroactive effect. In *Nawrocki v. Proto Construction & Dev. Corp.*[xlvi], a class of bricklayers and other construction workers sought “‘to recover wages and benefits which...were statutorily mandated and (they were) contractually entitled to receive’”. The trial court granted class certification noting that plaintiffs sufficiently stated a viable claim arising from defendant’s allegedly improper pay practices. *In Maldonado v. Everest General Contractors, Inc.*[xlvii] a class of past and present employees sought to recover wages and supplemental benefits that were paid at less than the prevailing rate. The Court certified the class, and ruled that plaintiffs could establish liability through a representative sampling of five class members. Following a non-jury trial, the courts determined that defendant was obligated to pay the claims, up to the amount of its bond, plus interest from date of the Surety’s default.

ENDNOTES

i. See Dickerson, *Class Actions: The Law of 50 States*, 9.01, 9.02(Class Actions); Weinstein Korn Miller, *New York Civil Practice CPLR* 908.03(WKM).

ii. See *Klein v. Robert's American Gourmet Food, Inc*., 28 A.D. 3d 63 (2d Dept. 2005); *Berkman v. Roberts American Gourmet Food, Inc.*, 16 Misc. 3d 1104(A)(N.Y. Sup. 2007).

iii. See *Brody v. Catell* 16 Misc. 3d 1105A (N.Y. Sup. 2007)("Their participating has...served the interests of their fellow shareholders and indeed the public...All parties have benefitted from the contributions of these dissenters who took the time and trouble to demand a full hearing"); WKM at 908.14.

iv. See *New York Diet Drug Litigation*, 15 Misc. 3d 1114(A) (N.Y. Sup. 2007)(intervention allowed because of counsel's alleged ethical violations); *Weiser v. Grace*, N.Y.L.J., Sept. 9, 1996, p. 22, col. 4(N.Y. Sup.)(intervenor to keep eye on plaintiffs' attorneys); WKM at 908.14[1].

v. See *New York Diet Drug Litigation*, 47 A.D. 3d 586 (1st Dept. 2008)(intervention and disclosure allowed); WKM at 908.14[3].
Compare *Wyly v. Milberg Weiss Bershad & Schulman, LLP*, 12 N.Y. 3d 400(2009).

vi. See Class Actions at 9.03[4][b][v]; WKM at 908.14[5]. See also: *In re Domestic Airline Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993).

vii. *Flemming v. Barnwell Nursing Home And Health Facilities, Inc.*, 15 N.Y.3d 375 (2010).

viii. See e.g., *Klein v. Robert's American Gourmet Food, Inc.*, 28 A.D. 3d 63 (2d Dept. 2005)(proposed settlement and certification of settlement class remanded; objector successfully challenged proposed settlement as it 'provided insufficient value to class members, that it contained no injunction against, or admission of liability by, the defendants"); see WKM at 908.14[4].

ix. *Louisiana Municipal Employees' Retirement System v. Cablevision Systems Corp.*, 74 A.D. 3d 1291 (2d Dept. 2010).

x. See *Huff v. C.K. Sanitary Systems*, 260 A.D. 2d 892 (3d Dept. 1999); *Loretto v. Group W Cable*, 135 A.D. 2d 444 (1st Dept. 19870; WKM at 909.03.

xi. *In re Cablevision Systems Corp. Shareholders Litigation*, 21 Misc. 3d 419 (Nassau Sup. 2008).

xii. *Sperry v. Crompton Corp.* 8 N.Y. 3d 204, 831 N.Y.S. 2d 760 (2007).

xiii. *Giovanniello v. Carolina Wholesale Office Machine Co., Inc.*, 29 A.D. 2d 737, 815 N.Y.S. 2d 248 (2d Dept. 2006).

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

xv. *Ridge Meadows Homeowners's Association, Inc. v. Tara Development Co., Inc.*, 242 A.D. 2d 947, 665 N.Y.S. 2d 361 (4th Dept. 1997).

xvi. *Pasantez v. Boyle Envrionmental Services, Inc*., 251 A.D. 2d 11, 673 N.Y.S. 2d 659 (1st Dept. 1998).

xvii. *Galdamez v. Biordi Construction Corp*., 13 Misc. 3d 1224 (2006), aff'd 50 A.D. 3d 357, 855 N.Y.S. 2d 104 (2008)

xviii. *Krebs v. The Canyon Club*, 22 Misc. 3d 1125 (2009).

xix. *Leider v. Ralfe*, 387 F. Supp. 2d 283 (S.D.N.Y. 2005).

xx. *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 2010 WL 1222272 (U.S. Sup. 2010).

xxi. See *Holster v. Gatco, Inc*., 618 F. 3d 214 (2d Cir. 2010)(Telephone Consumer Protection Act(TCPA) class action; CPLR 901(b) precludes federal courts in New York from exercising jurisdiction); *Pfanis v. Westway Diner, Inc*., 2010 WL 3564426 (S.D.N.Y. 2010)(plaintiffs may "now seek liquidated damages authorized by (New York Labor Law) as part of a Rule 23 class action in federal court); *McBeth v. Gabrielli Truck Sales, LTD*, 2010 WL 3081534 (E.D.N.Y. 2010)(claim under New York Labor Law 663(1) allowed under FRCP 23 pursuant to Shady Grove).

xxii. See WKM at 901.10[3]]. See also: *Sorrentino v. ASN Roosevelt Center, LLC* 2008 WL 5068821 (E.D.N.Y. 2008) and *Ventimiglia v. Tishman Speyer Archstone-Snith Westbury, L.P.*, 2008 WL 5068857
(E.D.N.Y. 2008).

xxiii. See Dickerson, "State Class Actions: Game Changer", New York Law Journal, April 6, 2010, p. 6; WKM at 901.28.

xxiv. *Pludeman v. Northern Leasing Systems, Inc.,* 10 N.Y. 3d 486 (2008)(In sustaining the fraud cause of action against the

individually named corporate defendants the Court of Appeals noted that "it is the language, structure and format of the deceptive Lease Form and the systematic failure by the sales people 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 capacities and not the sales agents").

xxv. *Pludeman v. Northern Leasing Systems, Inc.*, 74 A.D. 3d 420 (1st Dept. 2010).

xxvi. *Pludeman v. Northern Leasing Systems, Inc.*, 27 Misc. 3d 1203(A) (N.Y. Sup. 2010), *reargument denied* 2010 WL 3462147 (N.Y. Sup. 2010).

xxvii. See *State v. Philip Morris, Inc*., 30 A.D. 3d 26 (1st Dept. 2006); *Tsadilas v. Providian National Bank*, 13 A.D. 3d 190 (1st Dept. 2004); WKM at 901.06[4].

xxviii. *Frankel v. Citicorp Insurance Services, Inc.*, 2010 WL 4909624 (2d Dept. 2010).

xxix. See generally *Scott v. Cingular Wireless*, 160 Wash. 2d 843 (Wash. Sup. En Banc 2007).

xxx. *Osarczuk v. Associated Universities, Inc.*, 26 Misc 3d 1209(A) (Suffolk Sup. 2009).

xxxi. *Osarczuk v. Associated Universities, Inc.*, 36 A.D. 3d 872 (2d Dept. 2007).

xxxii. *Fiala v. Metropolitan Life Ins. Co., Inc.*, 27 Misc 3d 599 (N.Y. Sup. 2010).

xxxiii. *In re MetLife Demutualization Litigation*, E.D.N.Y., 00 CV 2258, Weinstein, J.

xxxiv. See N. 2, supra; WKM at 908.07.

xxxv. *Morrissey v. Nextel Partners, Inc.*, 72 A.D. 3d 209 (3d Dept. 2010).

xxxvi. See *Goldman v. Simon Properties Group., Inc.*, 58 A.D. 3d 208 (2d Dept. 2008); *Lonner v. Simon Properties Group, Inc*., 57 A.D. 3d 100 (2d Dept. 2008); *Sims v. First Consumers National Bank*, 303 A.D. 2d 288 (1st Dept. 2003).

xxxvii. *City of New York v. Maul*, 14 N.Y. 3d 499 (2010).

xxxviii. *Coleman v. Daines, M.D.*, 2010 WL 5111427 (1st Dept. 2010).

xxxix. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), revg. 53 N.Y. 2d 124 (1981), aff'g 73 A.D. 2d 849 (1st Dept. 1979).

xl. *Corsello v. Verizon New York, Inc.*, 77 A.D. 3d 344 (2d Dept. 2010).

xli. *Corsello v. Verizon New York, Inc.*, 76 A.D. 3d 941 (2d Dept. 2010).

xlii. *Dowd v. Alliance Mortgage Company*, 74 A.D. 3d 867 (2d Dept. 2010).

xliii. *Ramirez v. Mansions Catering, Inc.*, 74 A.D. 3d 490 (1st Dept. 2010).

xliv. See also *Connor vs. Pier 60, LLC,* 29 Misc.3d 1220(a)(N.Y. Supp. 2010)(Temporary banquet servers, hired through a staffing agency, brought a class action alleging that defendants violated Labor Law § 196-d. Summary judgment motion by Pier 60 denied.

xlv. *Samiento v. World Yacht,* 10 N.Y. 3d 70, 854 N.Y.S. 2d 83 (2008).

xlvi. *Nawrocki v. Proto Construction & Dev. Corp.*, 27 Misc. 3d 1211(A) (N.Y. Sup. 2010).

xlvii. *Maldonado v. Everest General Contractors, Inc.*, 25 Misc. 3d 1206(a)(N.Y Supp. 2009).