NEW YORK STATE CLASS ACTIONS IN 2006

January 15, 2007

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Last year the Court of Appeals ruled on the enforceability of a forum selection clause in an employment class action. In addition the Appellate Divisions and numerous trial Courts ruled on a variety of class actions in 2006.

Forum Selection Clause Enforced

In Boss v. American Express Financial Advisors, Inc.[i], a class action brought by " first-year financial advisors " challenging the' expense allowance ' paid by each advisor for the maintenance of office space and overhead expenses " as violating Labor Law § 193 and 12 NYCRR 195.1, the Court of Appeals held that a contractual forum selection clause " provid(ing) unambiguously that any disputes are to be decided in the courts of

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Minnesota and that Minnesota law shall govern " would be enforced [" ' Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes' "]. Boss is the most recent in a flood of cases involving the enforceability of contractual provisions, particularly, in consumer contracts[ii], regarding forum selection, choice of law, mandatory arbitration[iii] and class action waivers[iv].

As for plaintiff's challenge to the enforcement of the Minnesota choice of law clause as " contrary to the public policy concerns of New York ", the Court of Appeals held that such an argument

" should have been made to a court in Minnesota-the forum the parties chose by contract ".

Insurance Dividends

In Rabouin v. Metropolitan Life Ins. Co.[v], the Court decertified a global class of insureds challenging the issuance of dividends on manageability grounds [" questions concerning the initial policies as to reliance, parol evidence regarding the parties' intentions and the potential need for the examination of other documents for contract interpretation...would warrant the application of the law of other jurisdictions (and) approximately 30% of the (class) live in jurisdictions with shorter statutes of limitations than exist in New York "] as well as a GBL § 349 New York subclass [" the policies...were purchased...10 years before the alleged deceptive practices...the issue of whether the alleged deceptive acts were misleading... requires inquiry into both the nature of the initial solicitations as well as the annual statements and that such inquiry

necessitates the resolution of individual issues "].

Water & Sewer Customers

In Stevens v. American Water Services, Inc.[vi] a class of water and sewer customers in Buffalo challenged the imposition of a 21% surcharge on past due accounts alleging unjust enrichment and a violation of GBL § 349. In dismissing the complaint the Court held that the relief sought was in the nature of a CPLR Article 78 proceeding and as such was time barred because it had not been filed within the four month statute of limitations. The Court also held that the Water Board and Sewer Authority had

" indeed (acted) within their authority ".

Donnelly Act

In three consumer class actions alleging violations of GBL § 340 [Donnelly Act][Paltre v. General Motors Corp.[vii] and Sperry v. Crompton Corp.[viii]] and one by homeowners [Hamlet On Olde Oyster Bay Home Owners Association, Inc. v. Holiday Organization[ix]] the Courts reaffirmed that CPLR 901(b) prohibits class actions seeking a penalty [the Donnelly Act " mandates that ' any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby '...The treble damages provision is a penalty within the meaning of

CPLR 901(b)...(And) may not be maintained because the Donnelly Act does not specifically authorize the recovery of this penalty in a class action "[x]].

In Paltre, a class action alleging " that Japanese, American and Canadian automobile manufacturers (conspired) to sell or lease vehicles in New York at prices 10% to 30% higher than nearly identical vehicles in Canada and for effectively prohibiting New York residents from purchasing those vehicles in Canada ", the Court also dismissed a GBL § 349 claim " because the alleged misrepresentations were either not directed at consumers or were not materially deceptive ".

And in Sperry, a class action by tire purchasers alleging that producers of rubber processing chemicals conspired to fix prices, the Court also dismissed an unjust enrichment claim " Because the plaintiff was not in privity with the defendants ".

Telephone Consumer Protection Act

The federal Telephone Consumer Protection Act [TCPA] was enacted in 1991 " to address telemarketing abuses by use of telephones and facsimile machines...mak(ing) it unlawful for any person to send an unsolicited advertisement to a telephone facsimile machine belonging to a recipient within the United States "[xi]. TCPA grants consumers a private right of action over which " state courts (have) exclusive jurisdiction " and

“ creates a minimum measure of recovery and imposes a penalty for wilful or knowing violations “. In 2006 the Court in Giovanniello v. Carolina Wholesale Office Machine Co.[xii] as other Courts did in 2005 [Rudgayser & Gratt v. Cape Canaveral Tour & Travel, Inc.[xiii], Leyse v. Flagship Capital Services Corp.[xiv], Ganci v. Cape Canaveral Tour & Travel, Inc.[xv], Weber v. Rainbow Software, Inc.[xvi] and Bonime v. Discount Funding Associates, Inc.[xvii]], held that class action treatment of TCPA claims is inappropriate under CPLR § 901(b)’s prohibition of class actions seeking a penalty.

Photocopying Costs

In Morales v. Copy Right, Inc.[xviii] a class of consumers alleged that defendants “ violated CPLR 8001 by charging more than 10 cents per page for photocopying subpoenaed medical records “. Relying upon the voluntary payment rule the Court dismissed for a failure to state a cause of action because the complaint failed to allege that payment was induced by fraud or was the result of mistake of material fact or law.

Tobacco Master Settlement Agreement

In State v. Philip Morris, Inc.[xix] the Court revisited the Master Settlement Agreement [MSA] between “ the four largest

tobacco companies (which) were the original participating manufacturers [OPMs] " and which provided for the subsequent participation of some " 40 additional tobacco companies. Including the three nonparty appellants herein [SPMs] ". This time a dispute arose regarding how the OPMs would be compensated " for any loss of market share that may be attributable to the competitive disadvantage these companies face as a result of the MSA as against nonparticipating manufacturers ". The Court held that the dispute must be resolved by a " panel of three neutral arbitrators ". The Court noted that " Arbitration is strongly favored under New York law...Any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration...there is a compelling logic to having these disputes handled by a single arbitration panel of three federal judges rather than numerous state and territorial courts "[xx].

Outdoor World Settlement

In Colbert v. Outdoor World Corp.[xxi], " [a]fter nine years of fighting (plaintiffs) achieved a wide-ranging settlement in a class action (involving) the sale of campground time-share vacation packages located in the Eastern U.S. "[xxii]. A plaintiff class had been certified in 2000 alleging " false and misleading statements made in promotional materials and at sales presentations (and sought damages) and other relief under

various...theories " including GBL § 349, false advertising, violation of New York Membership Campground Act, breach of contract, unconscionability and unjust enrichment[xxiii]. In 2004 the Court certified a " class action counterclaim which alleged breach of contract against (the Class) to the extent they were deficient in payments due under the Membership Campground Agreements "[xxiv]. The settlement provided for the payment by defendants of $8,250,000 to be " utilized for payments to (the Class), costs of notice and settlement administration, incentive fees to plaintiffs ($ 20,000), attorney's fees and expenses of Class Counsel (not to exceed $2,970,000) and payments into an infrastructure Improvement Fund ($1,000,000)"[xxv]. In addition the defendant agreed to dismiss its " class action counterclaim... against ' Inactive ' Class Members (and) credit reporting agencies (will be) directed to expunge all records involving credit reports of Inactive Members. Lastly, class members would receive " a distribution of cash benefits...without the necessity of filing a claim form "[xxvi].

Counterfeit Drugs

In Dimich v. Med-Pro, Inc.[xxvii] a class of consumers alleged " a scheme to sell counterfeit Lipitor (after receipt of a) recall letter ". The Court denied class certification because the

plaintiff's claims were not typical [" the prescription was issued to his wife and paid for, other than a $15 co-payment, by her insurance plan and the recall letter was addressed to her, all of which create unique defenses " and common issues did not predominate [" Defining the ' tainted ' or ' counterfeit ' Lipitor to include all of the recalled Lipitor impermissibly shifted the burden of proof to defendants to show which of the class members received genuine Lipitor "[xxviii]][xxix]. The Court also imposed sanctions against the plaintiff " for repleading the claim in subsequent complaints after it was dismissed ".

DHL Processing Fees

In Kings Choice Neckwear, Inc. v. DHL Airways, Inc.[xxx] a class of recipients of DHL packages sent from foreign countries challenged the imposition of a " processing fee " [$5.00 or more]. The processing fee was defined in DHL's " Conditions of Carriage: ' In the event that DHL advances customs or import duties/assessments on behalf of the consignee...a surcharge may...be assessed based on a flat rate or a percentage of the total amount advanced '". The class alleged breach of contract and sought class certification on behalf of a class of New York recipients and those residing in all other states. After the action was removed to federal Court and remanded[xxxi] the Court

denied certification on several grounds. First, the recipients of the DHL packages had no standing since they were not parties to the contract [" A class action should not be used to ' bootstrap ' standing which does not otherwise exist '"]. Second, the proposed class action was unmanageable because of the need to apply the law of many foreign jurisdictions. DHL's Conditions of Carriage " provides that all disputes are subject to the non-exclusive jurisdiction of the courts, and governed by the law, of the country of origin ". Third, the plaintiffs' claims are atypical. One plaintiff " is subject to unique defenses because she waived her claim by not bringing it within 20 days " and the other plaintiff " paid the charges under duress, because DHL and its collection (agency) threatened to commence litigation or to take action that would adversely impact upon its credit worthiness. There is no indication...that these circumstances are representative (of that of other class members) ".

Spraypark Mass Tort

In Arroyo v. State of New York[xxxii], two classes of " Spraypark "[xxxiii] patrons alleged that the State was negligent in failing " to adequately maintain or monitor the sanitary conditions of the Spraypark water " which " was contaminated with cryptosporidium, a highly contagious waterborne parasite

(causing) abdominal cramping, diarrhea, nausea, vomiting, dehydration, fatigue, fever and loss of appetite ". Class actions brought against the State of New York pursuant to C.P.L.R. Article 9 in the Court of Claims, though rare, have been recognized[xxxiv]. However, the Court held the class size must be limited to " at least 663 individuals (who) have been named as claimants " because " a person must be a named claimant in a filed claim in order to be included as a member of a certified class in the Court of Claims ". The Court also noted that because most of the claimants are infants that their claims are tolled " until the disability is removed and it may then be presented within two years ". Notwithstanding the general trend in New York not to certify physical injury and property damage mass tort class actions, the Court granted class certification to this physical injury mass tort noting " many of the individual claims may be reasonably modest and the ability to proceed as a class action will be the most cost effective procedure for many of the individual claimants. Furthermore, it would be an incredible waste of manpower for the Attorney General to defend over 600 potential claims ".

Spanish Yellow Pages

In Nissenbaum & Associates v. Hispanic Media Group, USA[xxxv], a

class of subscribers who placed advertisements in the Spanish Yellow Pages claimed they did so because of misrepresentations in “ promotional material indicating that hundreds of thousands of copies of the Spanish Yellow Pages were printed and distributed annually “ and “ that the directory was used by millions of people. In fact, a maximum of 50,000 copies were printed in any given year and less than the entire printing was systematically distributed “. The class alleged common law fraud, sought rescission and demanded restitution of monies paid for the advertising. Although the defendant admitted that its “ advertising material contains false and misleading information “[xxxvi] the Court denied class certification for several reasons, First, the plaintiffs allegedly relied on advertising brochures [which they were unable to even produce] while the defendant also solicited business using fax transmissions, phone solicitations and personal solicitations [“ Plaintiffs must establish that the members of the class were exposed to or provided with the same or substantially similar misleading, false or inaccurate materials “]. Second, there may be a conflict of interest between the plaintiffs and the “ between 65% and 80% of all advertisers (that) have renewed their ads “ [“ With a substantial renewal rate, it is clear that advertisers who are renewing their ads do not have the same interest as Plaintiffs “]. Third, the proposed class action was not a superior method of adjudicating the issues

raised [“ the claims of the individual plaintiffs could be dealt with as efficiently, if not more so, in the Commercial Small Claims parts of the local courts “]. Fourth, the plaintiffs failed to identify the class [“ Plaintiffs made no attempt to ascertain or demonstrate...how many members there are in the potential class “].

Demutualization Plan Challenged

In Fiala v. Metropolitan Life Ins. Co.[xxxvii], a class of policyholders challenged the plan by which “ Metropolitan Life Insurance Company (Metlife) converted itself from a mutual life insurance company to a domestic stock company, a process known as demutualization “. The class sought to certify the two claims, violation of the provisions of the Conversion Law and common law fraud, which had survived a prior motion to dismiss[xxxviii]. In granting class certification the Court found that the predominance requirement was met with respect to the Conversion Law claim but not with the common law fraud claim [“ plaintiffs argue that reliance need not be pleaded or proved...as the circumstances establish a causal connection between the omission and plaintiff’s injury...although a showing of causation is sufficient and proof of reliance is not required in actions brought under (GBL § 349)...such actions are distinct from claims of common law

fraud...no authority to establish that a showing of causation, by itself, is sufficient to plead and prove common law fraud "]. As for adequacy of representation the defendants claimed a conflict of interest in that one of the plaintiffs was an associate of class counsel [" (Associate) is only one of a number of Proposed Class Representatives and the court notes that (his) lawfirm ...is only one of the four co-lead law firms...serve(s) to minimize the potential for impropriety, conflict or undue influence arising out of (Associate's) duel relationship "].

Stock Exchange Merger

In New York Stock Exchange/Archipelago Merger[xxxix] the Court approved the settlement of a class action brought by members of the New York Stock Exchange [" NYSE "] against the NYSE and others regarding a proposed merger with Archipelago Holdings, Inc., a fully-automated electronic stock market. The settlement provided for an independent fairness report of the merger before the scheduled seat holder vote. The Court considered both the small number of class members and their sophistication in financial markets. In providing for an independent analysis of the proposed settlement, the Court limited its role to ensuring that the seat holder vote on the merger would be made upon adequate disclosure so that the seat holders could evaluate the impact of any conflicts in the terms of the transaction. Dissatisfied with a prior " standard fairness opinion ", the Court approved the settlement by including critical comments submitted by

plaintiffs' expert, together with the additional fairness opinion, to the seat holders, finding that the competing presentations gave a fair and balanced view of the proposed merger.

Digital Mobile Communications

In Fortune Limousine Service, Inc. v. Nextel Communications[xl] the plaintiff commenced a class action relating to its contracts for digital mobile communications services and equipment. After pre-class certification discovery defendants moved for summary judgment which was denied. On appeal the Court found no triable issue of fact was raised concerning plaintiffs' untimely exercise of an option to purchase the equipment, and dismissed the claim for breach of contract. The Court also dismissed an unjust enrichment claim "since the relationship between the parties was defined by a valid written contract, which detailed the applicable terms and conditions for renewing or continuing the contract after the expiration of the eleven month term..."[xli]. Finally, the Court dismissed an unconscionability claim observing that " [t]he doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery ". The Court also observed that plaintiff failed to invoke any statute or case law authorizing it to serve as a " private attorney general " to vindicate the rights of the public.

Group Life Insurance Benefits

In Cohen v. Nassau Educators Federal Credit Union[xlii] the plaintiff brought a putative class action against defendant credit union relating to the termination of a life insurance benefit. The Court dismissed the breach of contract claim because of a failure of consideration, and the terms of the policy permitted termination of the life insurance benefit. The Court also dismissed a GBL § 349 claim finding class members could have discovered that the life insurance benefits could be canceled at any time by reviewing the certificate of insurance. The Court also dismissed a claim for breach of the implied covenant of good faith and fair dealing as not actionable and a claim for unjust enrichment.

Wage Claims

In Brandy v. Canea Mare Contracting, Inc.[xliii] certification was granted to a class of laborers seeking wages and benefits for providing labor on public works projects. The defendant sureties supplied payment bonds for one of the public works contracts. However, the Court granted summary judgment to the sureties under § 220 and § 220-g of the Labor Law for a failure to exhaust administrative remedies. Nevertheless, the Court affirmed the denial of summary judgment to the sureties with respect to plaintiffs' common law claims for underpayment of wages.

Mortgage Pay-Offs

In Daniel Fontana v. Champion Mortgage Co., Inc[xliv] a plaintiff class of mortgagees alleging violations of RPL § 274-a, sought leave to amend the complaint to add breach of contract and GBL § 340 claims. In denying the motion to amend the Court interpreted the language of a mortgage note which, provided in pertinent part that "[i]nterest will be charged on the unpaid principal until the full amount of principal has been paid". The Court found the "fair and reasonable meaning" of the provision permitted defendant's calculation of interest properly to include the date it received the pay-off check. Accordingly, the Court found no breach of the terms of the mortgage note and determined that the proposed breach of contract cause of action was "palpably insufficient as a matter of law ". The Court also found that, because the bank's interest calculation conformed to the terms of the mortgage note, the GBL § 349 claim was devoid of merit.

In Dowd v. Alliance Mortgage Company[xlv] a plaintiff class of mortgagees charged " priority handling fees " and unspecified " additional fees " after requesting mortgage pay-off statements, alleged unjust enrichment, money had and received and violations of GBL § 349 and RPL § 274-1. The Court held that defendant was prohibited from charging fees for providing mortgage-related documents under real property law § 274-a(2)[xlvi] Neither the assertion that plaintiff voluntarily agreed to pay those fees, nor the absence of allegations of a written demand for the pay-off statement constituted a defense.

Retiree Benefits

In Jones v. Board of Education of Watertown City School District[xlvii] a class of public service retirees sought to annul a determination diminishing contributions for health care premiums. The Court determined that the 4-month statute of limitations applied to this Article 78 proceeding affirming a dismissal of one petition and the granting of another. Although the Court rejected the contention that notices of claim were required in an Article 78 proceeding, it denied certification since class action treatment is not considered a superior method of adjudication in actions against a government body.

Attorneys Fees

In Mark Fabrics, Inc. v. GMAC Commercial Credit LLC[xlviii], the Court approved a settlement which featured " non-monetary relief including defendant's agreement to complete a system-wide review of its files " regarding the factoring of accounts receivable and the alleged improper calculation of interest. " In addition the settlement provides for a total cash payment...of $850,000 " which plaintiffs claim equals $1,275,000 in " benefits to the class ". Based upon this analysis class counsel sought fees of $425,000 or one third of the anticipated benefit. The Court, however, awarded attorneys fees of only $240,109.98 as " approximately 30% of the monetary recovery " finding any additional fees " inequitable to the members of the class ". The Court also approved of an incentive award to the plaintiff in the amount of $25,000.

In Kantrowitz, Goldhammer & Graifman, P.C. v. New York State Electric & Gas[xlix] the attorneys for two rate payers sought to recover additional fees, costs and disbursements relating to litigation commenced by their clients involving claimed overcharges by New York State Electric & Gas Corporation ("NYSED"). The attorneys previously had commenced an action which was dismissed on primary jurisdiction grounds. Following administrative litigation, the Public Service Commission ("PSC") ordered NYSEG to re-bill accounts of the two taxpayers and issue refunds, if appropriate. As a result, the attorneys moved, on behalf of their clients, to vacate or modify a prior order to permit class certification and allow additional customers to obtain relief, a request which was denied. With the attorneys' attempts to pursue a class action against NYSEG stymied, they then commenced a proceeding essentially to impose a charging lien or constructive trust upon the refunds to be paid to other NYSEG customers, claiming that the refunds were largely due to their efforts in the prior litigation. The PSC unilaterally had requested that NYSEG identify its other customers who had been adversely affected by its tariff misapplication and re-bill those customers accordingly. While acknowledging authority providing for payment of attorneys' fees from a non-client pursuant to a "common fund" doctrine, the Court determined that "it is unclear whether the courts of this state have uniformly adopted such a rule". Nevertheless, assuming that such a recovery might be permissible in New York, the Court found no basis to treat the application as an "exceptional" case in which "dominating reasons of justice" require the allowance of counsel fees. The attorneys did not dispute that they had received remuneration for their efforts pursuant to a one-third contingency fee arrangement with their clients. The Court found that this fact alone militated against a finding that this case constituted one in which

"overriding considerations" require the equitable allowance of more attorneys fees. The Court found "unpersuasive" the attorneys' claim that an implied contract existed between themselves and non-client NYSEG rate payers.

Electric Rate Overcharges

In Township of Thompson v. New York State Electric & Gas Corporation[l] a class of non-resident, seasonal customers of New York State Electric & Gas Corporation ("NYSEG") alleged that they were overcharged for electrical service. The action was based on the 2003 determination by the PSC that resolved similar complaints of overcharging filed by rate payers[li]. Applying the doctrine of primary jurisdiction the Court dismissed the complaint finding that the PSC was in a better position to determine whether the NYSEG had complied with its directive to properly recalculate the bills.

Medical Necessity

In Long Island Radiology v. Allstate Insurance Company[lii]
a class of radiologists which had performed MRI testing challenged the denial of no-fault benefits for MRIs based on a lack of medical necessity. Although the Court found that "lack of medical necessity" is a defense available to insurers in no-fault cases, it determined that such a defense is unavailable where the MRI testing was prescribed by a treating physician or licensed medical provider in a no-fault case. Accordingly, the Court

denied defendants' motion for summary judgment and granted plaintiffs' cross-motion for summary judgment. Class certification was denied, without prejudice to renewal, since plaintiff had established neither numerosity nor adequacy of representation.

ENDNOTES

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i. Boss v. American Express Financial Advisors, Inc., 6 N.Y. 3d 242, 844 N.E. 2d 1142, 811 N.Y.S. 2d 620 (2006).

ii. See Dickerson, New York State Consumer Law 2006 at www.classactionlitigation.com/library/consumerlaw2006update.html

See also Sternlight & Jensen, " Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse? ", 67 Law and Contemporary Problems, Duke University Law School, Winter/Spring 2004 Nos. 1 & 2, pp. 77-78 (" Companies are increasingly drafting arbitration clauses worded to prevent consumers from bringing class actions against them in either litigation or arbitration. If one looks at the form contracts she received regarding her credit card, cellular phone, land phone, insurance policies, mortgage and so forth, most likely, the majority of those contracts include arbitration clauses, and many of those include prohibitions on class actions. Companies are seeking to use these clauses to shield themselves from class action liability, either in court or in arbitration..
.numerous courts have held that the inclusion of a class action prohibition in an arbitration clause may render that clause unconscionable (reviewing cases) ").

iii. See e.g., Ragucci v. Professional Construction Services 25 A.D. 3d 43, 803 N.Y.S. 2d 139 (2d Dept. 2005)(G.B.L. § 399-c's prohibition against the use of mandatory arbitration clauses in certain consumer contracts enforced and applied to a contract for architectural services); Brown & Williamson v. Chesley, 7 A.D. 3d 368, 777 N.Y.S. 82, 87-88 (1st Dept. 2004)(" Consistent with the public policy favoring arbitration, the grounds for vacating an arbitration award are narrowly circumscribed by statute "), *rev'g* 194 Misc. 2d 540, 749 N.Y.S. 2d 842 (2002)(trial court vacated an arbitrator's award of $1.3 billion of which $625 million was to be paid to New York attorneys in the tobacco cases); Ranieri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (1st Dept. 2003)(class action stayed pending arbitration; " Given the strong public policy favoring arbitration...and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions...is neither unconscionable nor violative of public policy "); In re Application of Correction Officer's Benevolent Ass'n, 276 A.D. 2d 394, 715 N.Y.S. 2d 387 (1st Dept. 2000)(parties agreed to class wide arbitration in interpreting a clause in collective bargaining agreement providing military leaves with pay); Brower v. Gateway 2000, Inc., 246 A.D. 2d 246, 676 N.Y.S. 2d 569 (1st Dept. 1998)(arbitration and choice of law clause enforced; arbitration before International Chamber of Commerce was, however, substantively unconscionable); Hackel v. Abramowitz, 245 A.D. 2d 124, 665 N.Y.S. 2D 655 (1ST Dept. 1997)(although the issue as to the arbitrability of the controversy is for the court, and not the arbitrator, to decide, a party who actively participated in the arbitration is deemed to have waived the right to so contend); Heiko Law Offices, PC v. AT&T Wireless Services, Inc., 6 Misc. 3d 1040(A) (N.Y. Sup. 2005)(motion to compel arbitration clause granted); Spector v. Toys "R" Us, New York Law Journal, April 1, 2004, p. 20, col. 1 (Nassau Sup.)(motion to add credit card issuing bank as necessary party denied; arbitration clause does not apply); Johnson v. Chase Manhattan Bank, USA, N.A., 2 Misc. 3d 1003 ((A)(N.Y. Sup. 2004)(class bound by unilaterally added mandatory arbitration agreement and must submit to class arbitration pursuant to agreement and Federal Arbitration Act); Rosenbaum v. Gateway, Inc., 4 Misc. 3d 128(A), 2004 WL 1462568 (N.Y.A.T. 2004) arbitration clause in computer " Standard Terms of Sale and Limited Warranty Agreement " enforced and small claims court case stayed); Flynn v. Labor Ready, Inc., 2002 WL 31663290 (N.Y. Sup.)(class of employees challenge propriety of " receiving their wages by...cash voucher " which could only be cashed by using the employer's cash dispensing machine and paying as much as $1.99 per transaction; action stayed and enforced arbitration clause after employer agreed to pay some of the costs of arbitration); Licitra v. Gateway, Inc., 189 Misc. 2d 721, 734 N.Y.S. 2d 389 (Richmond Sup. 2001)(arbitration clause in consumer contract not
enforced) Berger v. E Trade Group, Inc., 2000 WL 360092 (N.Y. Sup. 2000)(misrepresentations by online broker " in its advertising and marketing materials, knowingly exaggerated the sophistication of its technology and its capacity to handle its customers transactions "; arbitration agreement enforced); Hayes v. County Bank, 185 Misc. 2d 414, 713 N.Y.S. 2d 267 (N.Y. Sup. 2000)(unconscionable " payday " loans;

motion to dismiss and
enforce arbitration clause denied pending discovery on unconscionability); Carnegie v. H & R Block, Inc., 180 Misc. 2d 67, 687 N.Y.S. 2d 528, 531 (N.Y. Sup. 1999)(after trial court certified class, defendant tried to reduce class size by having some class members sign forms containing retroactive arbitration clauses waiving participation in class actions), *mod'd* 269 A.D. 2d 145, 703 N.Y.S. 2d 27 (1st Dept. 2000)(class certification denied).

iv. See e.g., Tsadilas v. Providian National Bank, 2004 WL 2903518 (1st Dept. 2004)(" The arbitration provision is enforceable even though it waives plaintiff's right to bring a class action...The arbitration provision alone is not unconscionable because plaintiff had the opportunity to opt out without any adverse consequences...Arbitration agreements are enforceable despite an inequality in bargaining position "); Ranieri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (1st Dept. 2003)(class action stayed pending arbitration; " Given the strong public policy favoring arbitration...and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions...is neither unconscionable nor violative of public policy "); In re Application of Correction Officer's Benevolent Ass'n, 276 A.D. 2d 394, 715 N.Y.S. 2d 387 (1st Dept. 2000)(parties agreed to class wide arbitration in interpreting a clause in collective bargaining agreement providing military leaves with pay).

v. Rabouin v. Metropolitan Life Ins. Co., 25 A.D. 3d 349, 806 N.Y.S. 2d 584 (1st Dept. 2006).

vi. Stevens v. American Water Services, Inc., 32 A.D. 3d 1188, 823 N.Y.S. 2d 639 (4th Dept. 2006).

vii. Paltre v. General Motors Corp., 26 A.D. 3d 481, 810 N.Y.S. 2d 496 (2d Dept. 2006).

viii. Sperry v. Crompton Corp., 26 A.D. 2d 488, 810 N.Y.S. 2d 498 (2d Dept. 2006).

ix. Hamlet On Olde Oyster Bay Home Owners Association, Inc. v. Holiday Organization, New York Law Journal, August 17, 2006, p. 23, col. 3 (Nassau Sup. 2006)(Donnelly Act causes of action
" must be dismissed since private individuals may not prosecute a class action under the Donnelly Act ").

x. Paltre v. General Motors Corp., 26 A.D. 3d 481, 810 N.Y.S. 2d 496 (2d Dept. 2006).

xi. Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005).

xii. Giovanniello v. Carolina Wholesale Office Machine Co., 29 A.D. 3d 737, 815 N.Y.S. 2d 248 (2d Dept. 2006).

xiii. Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 (2d Dept. 2005).

xiv. Leyse v. Flagship Capital Services Corp., 22 A.D. 3d 426, 803 N.Y.S. 2d 52 (1st Dept. 2005).

xv. Ganci v. Cape Canaveral Tour & Travel, Inc., 21 A.D. 3d 399, 799 N.Y.S. 2d 737 (2d Dept. 2005).

xvi. Weber v. Rainbow Software, Inc., 21 A.D. 3d 411, 799 N.Y.S. 2d 428 (2d Dept. 2005).

xvii. Bonime v. Discount Funding Associates, Inc., 21 A.D. 3d 393, 799 N.Y.S. 2d 418 (2d Dept. 2005).

xviii. Morales v. Copy Right, Inc., 28 A.D. 3d 440, 813 N.Y.S. 2d 731 (2d Dept. 2006).

xix. State v. Philip Morris, Inc., 30 A.D. 3d 26, 813 N.Y.S. 2d 71 (1st Dept. 2006).

xx. See N. 3, supra.

xxi. Colbert v. Outdoor World Corporation, Index No: 11140/98, Queens Sup., J. Polizzi (Notice of Settlement dated July 2006).

xxii. NACA, The Consumer Advocate, Vol. 12, October November December 2006, p. 14.

xxiii. Notice of Settlement at p. 2.

xxiv. Notice of Settlement at p. 3.

xxv. Notice of Settlement at p. 4.

xxvi. Id.

xxvii. Dimich v. Med-Pro, Inc., 34 A.D. 3d 329, 2006 WL 3316086 (1st Dept. 2006).

xxviii. Compare: Collins v. Safeway Stores, 187 Cal. App. 3d 62m 72, 231 Cal. Rptr.

638, 644 (1986)(contaminated eggs).

xxix. In addition the Court dismissed the plaintiff's individual claims for (1) breach of warranty and negligent misrepresentation because he was not the purchaser of the Lipitor, (2) violations of GBL § 349 because of the " remoteness " of the claim and (3) common law fraud because he " may have acted improperly in obtaining the prescription in his wife's name "

xxx. Kings Choice Neckwear, Inc. V. DHL Airways, Inc., New York Law Journal, May 5, 2006, p. 22, col. 1 (N.Y. Sup. 2006).

xxxi. Kings Choice Neckwear, Inc. V. DHL Airways, Inc., 2003 WL 22283814 (S.D.N.Y. 2003).

xxxii. Arroyo v. State of New York, 12 Misc. 3d 1197 (N.Y. Ct. Cl. 2006).

xxxiii. The Spraypark " consists of over 100 water jets that spontaneously spray water over a hardtop surface ".

xxxiv. See e.g., Bertoldi v. State of New York, 164 Misc. 2d 581, 625 N.Y.S. 2d 814 (N.Y. Ct. Cl. 1995); Brown v. State of New York, 250 A.D. 2d 314, 681 N.Y.S. 2d 170 (N.Y. Ct. Cl. 1998); St. Paul Fire and Marine Ins. Co. v. State of New York, 99 Misc. 2d 140, 415 N.Y.S. 2d 949 (N.Y. Ct. Cl. 1979).

xxxv. Nissenbaum & Associates v. Hispanic Media Group, USA, 13 Misc. 3d 1216 (Nassau Sup. 2006).

xxxvi. Id. At fn. 2 (" The material contains misstatements regarding the number of pages in the directory, the number of households to which the directory was distributed and the number of directories printed ").

xxxvii. Fiala v. Metropolitan Life Ins. Co., New York Law Journal, June 2, 2006, p. 22, col. 1 (N.Y. Sup. 2006).

xxxviii. See Shah v. Metropolitan Life Ins. Co., 2003 WL 728869 (N.Y. Sup. 2003), *aff'd as mod'd* Fiala v. Metropolitan Life Ins. Co., 6 A.D. 3d 320 (1st Dept. 2004).

xxxix. New York Stock Exchange/Archipelago Merger 12 Misc.3d 1184 (N.Y. Sup. 2005).

xl. Fortune Limousine Service, Inc. v. Nextel Communications, 2006 WL 3526947 (2d Dept. 2006).

xli. In so doing, the Court distinguished the decision in City Postal, Inc. v. Unistar Leasing, 283 A.D.2d 916, which examined a very similar contract and determined that the unjust enrichment claim should survive a motion to dismiss under CPLR 3211.

xlii. Cohen v. Nassau Educators Federal Credit Union 12 Misc.3d 1164, 819 N.Y.S. 2d 209 (N.Y. Sup. 2006).

xliii. Brandy v. Canea Mare Contracting, Inc. , 34 A.D. 3d 512, 2006 WL 3307404 (2d Dept. 2006).

xliv. Daniel Fontana et al. v. Champion Mortgage Co., Inc. 32 A.D.3d 453, 819 N.Y.S. 2d 472 (2d Dept. 2006).

xlv. Dowd v. Alliance Mortgage Company 32 A.D.3d 894, 822 Ny.S.D. 2d 558 (2d Dept. 2006).

xlvi. See Negrin v. Norwest Mortgage, 263 A.D.2d. 39 (2d Dept. 1999).

xlvii. Jones v. Board of Education of Watertown City School District, 30 A.D. 3d 967, 816 N.Y.S. 2d 796 (4th Dept. 2006).

xlviii. Mark Fabrics, Inc. V. GMAC Commercial Credit LLC, New York Law Journal, December 22, 2005, p. 18, col. 3 (N.Y. Sup. 2006).

xlix. Kantrowitz, Goldhammer & Graifman, P.C. v. New York State Electric & Gas 27 A.D.3d 872, 810 N.Y.S. 2d 550 (3d Dept. 2006)

l. Township of Thompson v. New York State Electric & Gas Corporation 25 A.D.3d 850, 807 N.Y.S. 2d 203 (3d Dept. 2006)

li. See Kantrowicz, Goldhammer & Graifman, P.C. v. New york State Electric & Gas Corporation, 27 A.D.3d 872 (3d Dept. 2006).

lii. Long Island Radiology v. Allstate Insurance Company 12 Misc.3d 1167, 820 N.Y.S. 2d 843 (N.Y. Sup. 2006)