NEW YORK STATE CLASS ACTIONS IN 2008

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Last year, the Court of Appeals ruled on the enforceability of " microprint " contractual clauses in a point of sale (POS) terminal lease while the Appellate Division, Second Department, ruled on the enforceability of gift card clauses imposing dormancy fees " in font sizes materially less than that required pursuant to CPLR 4544 "[i]. In addition, other Appellate Divisions and numerous trial Courts ruled on a variety of class actions in 2008.

Tiny Print

In Pludeman v. Northern Leasing Systems, Inc.[ii] a class of small business owners who had entered into lease agreements for POS terminals asserted that defendant used " deceptive practices,

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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 ". In sustaining the fraud cause of action against the individually named corporate officers the Court 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 ".

Trilogy Of Gift Card Cases

In three class actions purchasers of gift cards challenged the imposition of dormancy fees by gift card issuers[iii]. Gift cards, a multi-billion business[iv], may " eliminate the headache of choosing a perfect present (but) the recipient might find some cards are a pain in the neck. Many come with enough fees and restrictions that you might be

better off giving a check. Most annoying are expiration dates and maintenance or dormancy fees "[v]. In addition, gift cards may not be given any special consideration in a bankruptcy proceeding[vi].

In Lonner v. Simon Property Group, Inc.[vii] a class of consumers challenged the imposition of gift card dormancy fees of $2.50 per month setting forth three causes of action seeking damages for breach of contract, violation of General Business Law 349 ("GBL 349") and unjust enrichment. Within the context of defendant's motion to dismiss the amended complaint, the Court found that the Lonner plaintiffs had pleaded sufficient facts to support causes of action for breach of contract based upon a breach of the implied covenant of good faith and fair dealing and a violation of GBL 349.

In Llanos v. Shell Oil Company[viii], a class of consumers challenged the imposition of gift card dormancy fees of $1.75 per month setting forth four causes of action seeking damages for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and violation of GBL 349. Within the context of defendant's motion to dismiss the Complaint as preempted by GBL 396-I and for failure to state a cause of action, the Court found that the claims of the Llanos plaintiffs were not preempted by GBL 396-I and remitted the matter for consideration of the merits of each cause of action.

And in Goldman v. Simon Property Group, Inc.[ix], a class of

consumers also challenged dormancy fees and the Court found that there was no private right of action under GBL 396-I and that CPLR 4544 applies to business gifts which involve a consumer transaction. The Court also restored claims for injunctive relief and declaratory judgment and allowed plaintiffs to plead unjust enrichment and money had and received as alternative claims to the breach of contract cause of action. In an earlier decision the Court found that these claims were not preempted by federal law[x].

Mass Torts, Mold And Medical Monitoring

In four mass tort class actions brought on behalf of " former tenants of a luxury apartment complex (in) Westbury " who were " instructed (by the landlord) that their leases would be terminated and they had to vacate the premises " because of water intrusion and the development of mold. The actions had been removed pursuant to the Class Action Fairness Act [CAFA][xi]. The U.S. District Court in Sorrentino v. ASN Roosevelt Center, LLC[xii] and Ventimiglia v. Tishman Speyer Archstone-Snith Westbury, L.P.[xiii] remanded all of the class actions back to Nassau County Supreme Court. Earlier the Court had found that the New York Court of Appeals would recognize an independent cause of action for medical monitoring[xiv] and that the plaintiffs " have stated a

rational basis for exposure to a disease-causing agent and there is a rational basis for their fear of contracting the disease ". The Court also found a viable GBL 349 claim when " applied...in the landlord-tenant context, where tenants allege harm caused by the deceptive acts of their landlords, without regard to a broad consumer impact on consumers at large ".

Working Off-The-Clock

In Lamarca v. Great Atlantic & Pacific Tea Co. Inc.[xv] the Court affirmed certification of a class of employees that " claim that they were not paid for overtime work...(Which) arises out of the same course of conduct, i.e., that as a result of the pressure defendant placed on individual store managers to keep payroll costs down, in conjunction with its express policy forbidding off-the-clock work and mandating payment of overtime, stores were chronically understaffed and employees were permitted, or pressured to work overtime without compensation "

However, in Alix v. Wal-Mart Stores, Inc.[xvi] the Court denied certification to a class of employees who alleged " defendant used its store level managers to implement a corporate-wide policy that systematically deprived many of its employees of proper compensation through the manipulation of time records and the implementation of employment practices designed to compel employees to work off the clock without compensation ". The Court found inadequate representation [" the conflict that exists between the interests of these managerial personnel and the other members of the

proposed class is self-evident "], the existence of individual issues which would " overwhelm consideration of the issues common to the entire class and compromise any goal that might otherwise be achieved by class action certification ", questioned the use of statistical analysis " to establish the existence of these workplace practices and their impact " and found a lack of superiority [" an administrative remedy is available by which plaintiffs...could file wage related complaints with the Department of Labor "].

No-Fault Reimbursement Rates

In Globe Surgical Supply v. GEICO[xvii] a class of durable medical equipment { DME] providers alleged that GEICO " violated the regulations promulgated by the New York State Insurance Department...pursuant to the no-fault provisions of the Insurance Law, by systematically reducing its reimbursement for medical equipment and supplies...based on what it deemed to be ' the prevailing rate in the geographic location of the provider ' or
' the reasonable and customary rate for the item billed '. In denying certification the Court found that Globe had met all of the class certification prerequisites except adequacy of representation since, *inter alia*, GEICO had asserted a counterclaim and as a result Globe may be " preoccupied with defenses unique to it ".

Topping Up Cell Phone Plan

In Ballas v. Virgin Media, Inc.[xviii] a class of cell phone users alleged that

defendant failed to properly reveal " the top up provisions of the pay-by-the-minute plan " known as " Topping up (which) is a means by which a purchaser of Virgin's cell phone (" Oystr "), who pays by the minute, adds cash to their cell phone account so that they can continue to receive cell phone service. A customer may top up by (1) purchasing Top Up cell phone cards that are sold separately; (2) using a credit or debit card to pay by phone or on the Virgin Mobile USA website or (3) using the Top Up option contained on the phone ". If customers do not " top up " when advised to do so they " would be unable to send or receive calls ". The Court dismissed the breach of contract and GBL 349, 350 claims because there was no deception since " the topping-up requirements of the 18 cents per minute plan were fully revealed in the Terms of Service
booklet ".

Secret, Illegal Kickbacks

In Matter of Schulman[xix] a class action attorney's name was stricken from the roll of attorneys pursuant to Judiciary Law 90(4)(a),(b) based upon " his plea allocution and plea agreement ...that from approximately 2003 through at least 2005, while respondent was a partner at Milberg Weiss[xx], there was an agreement among two or more other Milberg Weiss attorneys to conduct...a ' pattern of racketeering activity '. This involved giving secret, illegal kickbacks to individual class action

plaintiffs who were essentially on call to act as lead plaintiffs (allowing) Milberg Weiss to file lawsuits faster and to gain the position as lead counsel to receive higher fees...Respondent admitted that he knew the secret arrangement was improper ".

Overtime Wage Claims

In Edwards v. Jet Blue Airways Corp.[xxi], a class of nonunion airline employees challenged defendant's " policy where employees are paid at only their regular rate for hours worked over forty that are exchanged with co-workers ". Jet Blue moved to dismiss the complaint " due to the exemption...applicable statutes and regulations. See 12 NYCRR 142-2.2 ". In finding that plaintiff stated a cause of action the Court stated that " at a minimum (plaintiff has) alleged that defendant has inadequately compensated him for overtime under New York law, which affords him the benefit of at least his regular rate plus one-half times minimum hourly rate for overtime ".

Prevailing Wage Claims

In Pajaczek v. Cema Construction Corp.[xxii], the Court certified a class (divided into two subclasses) of plaintiffs seeking monetary damages in the amount of the difference between the prevailing wages that the New York Labor Law had entitled

them to receive for working on various public projects, and the wages that they had actually been paid. Pursuant to CPLR 901, the Court found numerosity [40 class members], predominance of common questions of law or fact [i.e., whether the defendant failed to pay the plaintiffs the requisite prevailing wages and whether their work was "public" pursuant to the Labor Law], typicality [i.e., the class members were allegedly "injured in the same manner" by failing to receive compensation at prevailing wage rates from the defendants], adequacy of representation [i.e., as evidenced by the financial interest of the named plaintiffs in the outcome of the litigation, and the absence of conflict between the class members and counsel for the named plaintiffs] and a superior means of resolving the plaintiffs' claims for wages valued at an aggregate of more than $500,000.

In Galdamez v. Biordi Construction Corp.[xxiii], the Appellate Division, First Department affirmed the trial court's order certifying a proposed class of plaintiffs also seeking to recover prevailing wages that the Labor Law allegedly entitled them to receive. In doing so, the Appellate Division found that the trial court: (I) had rightly considered class members' reply affidavits that responded to issues presented by the defendants' opposition to certification; and (ii) had properly exercised its discretion to excuse the plaintiffs' delay in moving for class certification, because it resulted from the defendants' delays during discovery.

In Jara v. Strong Steel Door, Inc.[xxiv], the Court agreed with the plaintiffs that common questions of law and fact predominated over individual issues, in that the "ultimate question" was whether they had received their mandatory wages, supplemental benefits, and overtime compensation under the Labor Law; and that the

named plaintiffs' claims were typical of those of the rest of the class. The Court denied the plaintiffs' motion for class certification, however, because (1) the subclasses, demonstrated by plaintiffs to include only 20 people at most, did not satisfy the numerosity requirement, (2) the named plaintiffs did not adequately represent the class, because evidence indicated that a trade union had urged them to commence the action, and had introduced the named plaintiffs to their attorneys, so that the union could retaliate against the defendant in connection with a collective bargaining dispute and (3) and a class action would not provide a superior means for adjudication of the plaintiffs' claims, for which they possessed administrative remedies pursuant to the Labor Law

In Dabrowski v. ABAX Inc.[xxv] the defendant contended on a CPLR 3211 pre-answer motion to dismiss that the Court should consider the eligibility of the proposed class for certification. Whereas Rule 23©)(1) of the Federal Rules of Civil Procedure does encourage a federal court to consider whether to certify a class action "at any early practicable time," CPLR 901 contains no such provision. Citing David B. Lee & Co. v. Ryan[xxvi], which held that a motion to certify a class action is premature before issue has been joined, the Court denied defendants' motion to dismiss the putative class action "without prejudice to . . . making a full analysis of the issues attendant to class certification, including plurality [of the claims presented], when the issue is appropriately before the court."

Lien Law

In Dick's Concrete Co. v. K. Hovnanian at Monroe II, Inc.[xxvii], class plaintiffs moved for summary judgment on various causes of action alleging that the defendants had breached their fiduciary duty by diverting trust funds in violation of the New York Lien Law. In response, the defendants cross-moved for summary judgment or, in the alternative, a ruling that class counsel were not entitled to attorneys' fees pursuant to CPLR 909. In awarding the class plaintiffs partial summary judgment, the Court determined that any decision concerning class counsel's eligibility to receive attorneys' fees, or concerning class plaintiffs' potential to recover punitive damages, was premature, until such time as the Court would conduct an appropriate inquest.

Workmen's Compensation

In Matter of Kirk v. Central Hudson Gas & Electric Co.[xxviii], the Appellate Division upheld the determination of the New York State Workers' Compensation Board that an employer's workers' compensation carrier cannot necessarily offset future compensation payments to an injured worker against a payment that the worker received in settlement of class-action claims that arose from his injury.

The worker had been a plaintiff in a class action commenced in 1993 against manufacturers of asbestos, to which he had been exposed on the job. The defendants subsequently settled the worker's class-action claim for over $44,000, with

the consent of his workers' compensation carrier. Thereafter, the worker filed workers' compensation claims for pleural disease and for colorectal cancer, both of which allegedly resulted from his exposure to asbestos. The Board allowed the worker's carrier, pursuant to Workers' Compensation Law Section 29(4), to offset the class-action settlement against its payments under the pleural disease claim only, not under the colorectal cancer claim. Finding that substantial evidence supported this decision, the Appellate Division agreed. Noting that the offset provision in Section 29(4) was intended to prevent double recovery for the same injury, the Court refused to apply it to the colorectal cancer claim, because the injured worker had been diagnosed with that disease several years after receiving the class-action settlement.

Mortgage Payoff Fees

In Dowd v. Alliance Mortgage Company[xxix], a consumer class action challenging " certain fees for providing mortgage related documents " as violative of RPL 274-a and GBL 349, the Court certified a class finding numerosity [1,800 loans], predominance of common questions [" the central question...is whether defendant violated...RPL 274-a and GBL 349 by charging...fax fees and/or priority handling fees for the delivery of mortgage related documents in connection with the satisfaction of a mortgage "], typicality, adequacy of representation [" no possible conflict...no special benefit...

attorneys experienced in complex commercial litigation "] and superiority [" small amount of money involved "]. As for the merits the Court noted that the sufficiency of the amended complaint[xxx] and the complaints in similar class actions[xxxi] had been previously addressed.

Settlements Approved

In Cox v. Microsoft[xxxii], a certified[xxxiii] consumer class action on behalf of computer software buyers alleging monopolistic conduct, the Court approved a settlement addressing the criticisms of an objector that the release was too broad. " It was appropriate to extend the release until December 31, 2004, ...Claims based on a factual predicate different from the factual predicate of this action are not barred by the release ".

In Flemming v. Barnwell Nursing Home And Health Facilities, Inc.[xxxiv], a certified class action[xxxv] on behalf of residents of defendant's skilled nursing facility alleging violation of Public Health Law 2801-d [" which provides a private of action for nursing home residents to recover for the deprivation of certain rights- and for class action certification of the claims based on that section and in negligence "], the Court approved a proposed settlement on behalf of 242 class members of $950,000. In addition, the Court [recognizing the viability of both the

lodestar and percentage methods] approved attorneys fees of $425,000 [" Counsel requested a fee amount greater than a one-third percentage but approximately $23,000 less than the amount determined under the lodestar method "], refused to authorize an incentive award to the named plaintiff [" The Legislature did not statutorily provide for incentive awards...and we decline to create new law "][xxxvi] and refused to award fees to the objector's counsel [" As counsel fees are not statutorily permitted for anyone but class counsel, the court could not award fees to
(objector's) counsel "][xxxvii].

And in Conolly v. Universal American Financial Corp.[xxxviii], a shareholders class action, the Court certified a settlement class and approved a proposed settlement providing for changes in corporate governance " consistent with the goal of promoting effective corporate oversight ". The Court also noted the absence of " any meaningful role in achieving a resolution that resulted in a substantial recovery of monies and stock to the Company ", and that " there is little, or no, likelihood that Plaintiffs would succeed on any of the theories...espoused ". Nonetheless " a resolution which ends with corporate reforms may be more beneficial to the shareholders than a monetary settlement ". As for attorneys fees and costs the Court approved the agreed upon cap of $800,000, seemed to approve of the use of the lodestar

method but found " that the record is presently insufficient to support an award of the magnitude being requested here ".

Cablevision: Attorneys Fees

In Matter of Cablevision Systems Corp. Shareholders Litigation[xxxix], the trial court ruled class counsel eligible for an award of attorneys' fees for their role in brokering a corporate merger plan to settle the litigation, even though the corporation's independent shareholders voted to reject the plan.

In 2005, members of the family of Charles F. Dolan, who had originally founded the Cablevision Systems Corporation in the 1970's, proposed to Cablevision's board of directors that they privatize the business by buying out shareholders not affiliated with the family $21 per share. After intensive negotiations caused the Dolan family to increase its offering price to only $27 per share, various plaintiffs filed five separate class actions on behalf of Cablevision's minority shareholders, alleging that Cablevision's controlling shareholders planned illegally to acquire minority shares for insufficient consideration. These actions were consolidated into a single action in November 2006. After further discussions in the year that followed, the Dolans reached an agreement with class counsel to offer Cablevision's stockholders $36.26 per share, which represented an aggregate increase of $30 million in consideration from the Dolans' offer of $27 per share in 2006. Pursuant to this agreement, Cablevision's board of directors and a "special committee" reviewing the merger issued a "definitive proxy

statement" in September 2007 to recommend its approval by the shareholders. This definitive proxy statement particularly noted the role that class counsel had played in negotiating the agreement. One week later, class counsel and counsel for the Dolans entered into a stipulation defining the class, acknowledging class counsel's part in increasing the compensation to Cablevision's shareholders, declaring that the $36.26 per share agreement was fair, reasonable, and "in the best interests of the class," and affirming that class counsel intended to seek an award of attorneys' fees and expenses in the amount of $29.25 million, which Cablevision would agree to pay upon "consummation of the merger." A majority of Cablevision's unaffiliated shareholders, however, rejected the merger. Class counsel sought reimbursement for attorneys' fees and expenses nonetheless, while the defendants argued that they had no obligation to pay in the absence of approval of the negotiated merger plan.

As a threshold matter, the Court acknowledged that the plaintiffs had not satisfied the requirement of CPLR 902 to move to certify the class within sixty days after expiration of the time to serve a responsive pleading. Yet the rationale for this requirement – to prevent the sudden enlargement of liability to the defendant long after commencement of a class action – would not apply to an application for attorneys' fees. Noting the "flexibility" of CPLR Article 9, the Court found that the plaintiffs' failure to seek prompt certification would not prevent them from recovering attorneys' fees, because the defendants had notice of plaintiffs' intention to pursue the litigation as a class action. Finding that the named plaintiffs' claims were typical of those of the class plaintiffs, and that the named plaintiffs adequately represented the class' interests as institutional investors in Cablevision, the Court then certified the proposed class of "all

unaffiliated shareholders of Cablevision Class A stock who were eligible to vote on the proposed merger."

Without awarding the $29.25 million requested by class counsel, the Court decided to permit the plaintiffs to apply for attorneys' fees. Noting that a fee award is appropriate in a class action for attorneys whose work yielded a "substantial benefit" to the class, the Court founded that the increased share price brokered by class counsel conferred such a benefit, even though Cablevision's unaffiliated shareholders rejected the merger plan. Class counsel's negotiations, as recognized by the Dolan family in its previous stipulation, constituted the proximate cause of the substantial benefit. As such, class counsel would receive reimbursement for attorneys' fees in an amount to be determined by the Court, equal to the product of "the number of hours reasonably expended and a reasonably hourly rate ".

Legal Notices

In NCJ Cleaners, LLC v. ALM Media, Inc.[xl], a class of advertisers alleged that the mandatory use of the New York Law Journal to publish legal notices created a *de facto* monopoly, which allowed the publisher to inflate its publication rates for " legal notices relating to the formation of partnerships, limited liability companies and other business entities...located in the City of New York "[xli]. In dismissing the complaint alleging " breach of a service contract made for the publication of legal notices " the Court held that " Differential pricing unilaterally imposed by a seller of certain goods or

services across geographic regions has ‘ long been a familiar characteristic of our free enterprise system, never thought to be either immoral or unlawful ‘”.

Vendor Chargebacks

In CLC/CFI Liquidating Trust v. Bloomingdale’s Inc.[xlii] a class of vendors alleged that defendants “ improperly imposed chargebacks on vendors for merchandize that did not comply with ‘ floor-ready ‘ requirements without giving the reasonable notice required by UCC 2-607, and took certain cash discounts “. The Court denied class certification because of predominance of individual questions [“ notwithstanding defendants’ use of uniform contract forms and procedures, the claims asserted in the complaint involve a preponderance of individualized factual questions “] and a lack of superiority [“ in light of the number of individual inquiries required as to each vendor and transaction, plaintiffs failed to demonstrate that a class action would be superior “].

SSI Eligibility

In Khrapunskiy v. Doar[xliii], the named plaintiffs were elderly, blind, and/or disabled legal aliens, residing in New York, who had formerly been eligible to receive

supplemental security income (SSI) and federally administered additional state payments ("ASP"), but had lost their eligibility solely because they had failed to become American citizens within seven years after their original arrival in the United States. The plaintiffs asked that the Court find this loss of eligibility, mandated by Section 209 of the New York Social Services Law, to constitute a violation of Article XVII, Section 1, of the New York Constitution, which provides that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state . . . ." The trial court had granted the plaintiffs' motion for summary judgment, which had enjoined the State from denying the plaintiffs the SSI and ASP benefits which they would have received had they become United States citizens within the statutory seven-year period, and which had directed the State to provide such benefits to the plaintiffs prospectively and retroactively to the time of their denial. The Appellate Division affirmed summary judgment, and further found that the trial court had properly certified the plaintiffs' class to include "[a]ll persons identified to, or identified by, [the State] as elderly, blind, and disabled persons lawfully residing in New York State who have received, are receiving, or will receive assistance at less than the standard of need set out in Social Services Law § 209(2), solely because of their immigration status . . . ."

File Closing Charges

In Rife v. The Barnes Firm, P.C.[xliv], the plaintiffs sued the defendant law firm for reimbursement of expenses that they alleged to have been charged when the firm closed their files. In denying class certification, the Court found that the plaintiffs'

claims, as well as the law firm's available defenses, were "varied and individualized": whereas one named plaintiff had paid the file-closing expenses charged by the firm, the other named plaintiff had not. As such, the Court reasoned, the claims of the named plaintiffs' claims were not typical of those of the proposed class. The Court further noted that another action was already pending against the law firm concerning the propriety of the file-closing charges. Despite this ongoing litigation, the plaintiffs' motion papers in favor of class certification failed to discuss the class-certification considerations set forth in CPLR 902, including the potential interest of class members in pursuing separate actions against the law firm.

Water Contracts

In Pino Alto Partners v. Erie County Water Authority[xlv], the plaintiffs alleged that the defendant had failed to disclose a markup of up to 30% on the cost of a water main connection, for which the members of the proposed class had agreed only to pay its "actual cost," or alternatively its actual cost plus the defendant's "most recent audited overhead rates." Over the defendant's objection, the trial court certified the class, described as "[a]ny individual or entity who contracted with the Erie County Water Authority since December 1, 2000, for large service contracts involving water connection services and who were as a result of that agreement assessed with one or

more charges that were not disclosed in their contracts with the Erie County Water Authority and for which there has not been a refund in full." In doing so, the Court found numerosity [i.e., at least 82 plaintiffs who had entered into the same contract for water connection services with the defendant as the named plaintiff had], predominance of common questions of law or fact [i.e., the propriety of the defendant's undisclosed markup charges, predominated and were typical among the class members], adequacy of representation [i.e, in that it had invested significant resources into the case, had retained competent class counsel, and had developed no conflict with other class members], superior to more cumbersome and inefficient litigation by individual class members, each of whom could expect only a "relatively small potential recovery" from the defendant] and the Supreme Court constituted a suitable forum for consideration of the class plaintiffs' claims.

The defendant Erie County Water Authority contended that the "governmental operations rule" prohibited class certification, because 'governmental operations [were] involved and . . . subsequent petitioners [would] be adequately protected under the principles of *res judicata*'" (quoting Martin v. Lavine[xlvi]. The Court declined to apply this rule, because a "recognized exception" existed for claims that sought to redress conduct that took place solely in the past, rather than to enjoin future government action. The Court did, however, decline the named plaintiff's request that the class include Erie County Water Authority customers who had not entered into a formal contract with the Authority, and customers who had received only a credit memo or an invoice to pay the markup charge, because the plaintiff had not produced sufficient evidence that such putative class members existed.

Louisiana Judgment Unenforceable

In Boudreaux v. State of Louisiana, Dep't of Transportation[xlvii], the Appellate Division affirmed the trial court's decision not to enforce a judgment rendered in a class action against the State of Louisiana in a Louisiana state court. The judgment awarded the class plaintiffs over $91 million in damages for the State's negligent design of a bridge whose construction caused their homes to flood. The class action could proceed to judgment because the State of Louisiana had waived sovereign immunity. The Louisiana Constitution and a corresponding statute, however, provided that the plaintiffs could collect on their judgment against the State only if the Legislature had specifically appropriated funds for that purpose. Because no such appropriation ever took place, the class plaintiffs had been unsuccessful in collecting on their judgment in Louisiana, and sought to enforce it in New York. The "full faith and credit" clause in Article IV of the United States Constitution, the Court noted, only requires New York to give the Louisiana class-action judgment "the same preclusive effect that Louisiana would give under its own law." Because the judgment would not be payable in Louisiana absent action by the Louisiana Legislature, therefore, a New York court similarly could not mandate payment, and would defer to Louisiana law as a matter of comity.

Yield Spread Premiums

Shovak v. Long Island Commercial Bank[xlviii] concerned an agreement between the plaintiff and a mortgage broker, who had agreed to procure a mortgage loan for the plaintiff in return for a fee equal to one point on the loan. Pursuant to this agreement, the broker also could receive a premium based on the loan's interest rate, provided that his total compensation would not exceed two points. With the broker's help, the plaintiff obtained a mortgage loan from a non-party lender. At the closing, the plaintiff signed a HUD-1 Settlement Statement, which revealed that the lender would also pay the broker a "yield spread premium" equal to two points. The plaintiff then commenced this action, alleging that the yield spread premium constituted a "bribe" or "kickback," and seeking damages for breach of fiduciary duty, a violation of General Business Law Section 349, and unjust enrichment.

Reversing the trial court, the Appellate Division unanimously granted the defendant broker's motion to dismiss the complaint. The Court determined that the yield spread premium was not illegal *per se*, and that the full disclosure of the yield spread premium did not give rise to a materially misleading statement necessary to substantiate a General Business Law Section 349 violation. The Court further ruled that no fiduciary duty existed between the plaintiff and his broker, and that the existence of the HUD-1 Settlement Statement establishing the yield spread premium barred the plaintiff's unjust enrichment claim. The Court also denied the plaintiff's motion to amend the complaint to assert a claim for fraud and to demand punitive damages.

Violent Felony Offenders

In State v. Myers[xlix], the State of New York and its Department of Correctional Services and its Division of Parole sought a declaratory judgment allowing them to maintain custody of violent felony offenders who may have been illegally assigned post-release supervision ("PRS") pursuant to "Jenna's Law" by the Department of Correctional Services, rather than by a court of law. The plaintiffs also requested certification of several classes of defendants, for whom there existed no documentation of the terms of their PRS, to afford the State time to identify those felons subject to mandatory PRS, and to refer them for re-sentencing.

The Court denied the plaintiffs' motion to certify the defendant class. The Court reasoned that due process "insures procedural fairness and protects the interests of absent class members," especially unnamed defendants who may be subject to liability without having received an opportunity to contest it. As such, adjudication of the rights of absent criminal defendants would violate the Due Process Clause of the United States Constitution, even though the defendants had previously commenced their own federal class actions seeking damages for their allegedly illegal sentences to PRS. The State, moreover, had failed to demonstrate any of the "pre-requisite elements" to class certification – numerosity, predominance of common questions of law and fact, typicality, adequacy of representation, and superiority of the class action – set forth in CPLR 901. Because the plaintiffs had failed to move for class certification within sixty days after the time to serve a pleading responsive to the complaint had expired, the

Court further exercised its discretion to dismiss the complaint, pursuant to CPLR 902.

ENDNOTES

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i. Lonner v. Simon Property Group, Inc., 57 A.D. 3d 100, 866 N.Y.S. 2d 239, 242-243 (2d Dept. 2008).

ii. Pludeman v. Northern Leasing Systems, Inc., 10 N.Y. 3d 486, 890 N.E. 2d 184 (2008).

iii. See Lonner v. Simon Property Group, Inc., 57 A.D. 3d 100, 866 N.Y.S. 2d 239, 241, fn. 1 (2d Dept. 2008)(" Virtually all gift cards have expiration dates and are subject to a variety of fees, including maintenance fees or dormancy fees (see Gift Cards 2007: Best and Worst Retail Cards: A Deeper View of Bank Cards Doesn't Improve Their Look, Office of Consumer Protection, Montgomery County, Maryland at www.montgomerycountymd.gov. ").

iv. See Alterio, Store closings deal blow to holiday gift-card sales, The Journal News, November 27, 2008, p. 1 (" The National Retail Federation estimates that gift-card sales will dip 5% this holiday season to $24.9 billion, down from $26.3 billion last year ").

v. Gift-Card Gotchas, Consumer Reports, December 2006, at p. 8.

vi. See Alterio, Store closings deal blow to holiday gift-card sales, The Journal News, November 27, 2008, p. 1, 23A (" ' We've never been very enthusiastic about gift cards around here ' Consumer Reports Executive Editor Greg Daugherty said. ' All the retailer and restaurant and bank and airline troubles are one more reason to think twice or three times before you get a gift card. It's conceivable a company will go into bankruptcy, and you will be just one more creditor waiting to get your money back ").

vii. Lonner v. Simon Property Group, Inc., 55 A.D. 3d 100, 866 N.Y.S. 2d 239 (2d Dept. 2008). See also: Sims v First Consumers Nat'l Bank, 303 AD2d 288, 289, 750 N.Y.S. 2d 284 (1st Dept. 2003).

viii. Llanos v. Shell Oil Company, 55 A.D. 3d 796, 866 N.Y.S. 2d 309 (2d Dept. 2008).

ix. Goldman v. Simon Property Group, Inc., __A.D. 3d__, 2008 WL_ 5006453 (2d Dept. 2008).

x. Goldman v. Simon Property Group, Inc., 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).

xi. See 3 Weinstein Korn & Miller, New York Civil Practice Lexis-Nexis (MB) at 901.10[3].

xii. Sorrentino v. ASN Roosevelt Center, LLC, 588 F. Supp. 2d 350 (E.D.N.Y. 2008).

xiii. Ventimiglia v. Tishman Speyer Archstone-Snith Westbury, L.P., 588 F. Supp. 2d 329 (E.D.N.Y. 2008).

xiv. Sorrentino v. ASN Roosevelt Center, LLC, 588 F. Supp. 2d 350, 2008 WL 4410369 (E.D.N.Y. 2008). See also Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524, 538 (S.D.N.Y. 2007); Allen v. General Electric, Company 32 A,.D. 3d 1163, 821 N.Y.S. 2d 692 (4th Dept. 2006); Cunningham v. American Home Products, Corp., N.Y.L.J., September 21, 1999, p. 26, col. 5 (N.Y. Sup.); 3 Weinstein Korn & Miller New York Civil Practice, Lexis-Nexis (MB) 901.23[9].

xv. LaMarca v. The Great Atlantic and Pacific Tea Company, 55 A.D. 3d 487 (1st Dept. 2008).

xvi. Alex v. Wal-Mart Stores, Inc., 57 A.D. 3d 1044 (3d Dept. 2008).

xvii. Globe Surgical Supply v. GEICO, __A.D. 3d__, 2008 WL 5413643 (2d Dept. 2009).

xviii. Ballas v. Virgin Media, Inc., 18 Misc. 3d 1106 (N.Y. Sup. 2007).

xix. Matter of Schulman, 51 A.D. 3d 220, 854 N.Y.S. 2d 57 (1st Dept. 2008).

xx. See Lin, Free: Milberg Agrees To Pay $75 Million in Settlement, New York Law Journal Online, July 17, 2008.

xxi. Edwards v. Jet Blue Airways Corp., __Misc. 3d__, 852 N.Y.S. 2d 724 (Kings Sup. 2008).

xxii. Pajaczek v. Cema Construction Corp., 859 N.Y.S.2d 897, 2008 WL 541298 (Sup. Ct. N.Y. County Feb. 21, 2008).

xxiii. Galdamez v. Biordi Construction Corp., 50 A.D.3d 357, 855 N.Y.S.2d 104 (1st Dep't 2008).

xxiv. Jara v. Strong Steel Door, Inc., 2008 WL 3823769 (Sup. Ct. Kings County Aug. 15, 2008).

xxv. Dabrowski v. ABAX Inc., 862 N.Y.S.2d 807, 2008 WL 2120689 (Sup. Ct. N.Y. County May 5, 2008).

xxvi. David B. Lee & Co. v. Ryan, 266 A.D.2d 811, 698 N.Y.S.2d 377 (4th Dep't 1999).

xxvii. Dick's Concrete Co. v. K. Hovnanian at Monroe II, Inc., 2008 WL 4274481 (Sup. Ct. Orange County Sept. 17, 2008).

xxviii. Matter of Kirk v. Central Hudson Gas & Electric Co., 50 A.D.3d 1298, 855 N.Y.S.2d 721 (3d Dep't 2008).

xxix. Dowd v. Alliance Mortgage Company, 21 Misc. 3d 1112, 2008 WL 4587270 (Suffolk Sup. 2008)

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

xxxi. See MacDonnell v. PHH Mortgage Corp., 45 A.D. 3d 537, 846 N.Y.S. 2d 223 (2d Dept. 2007); Dougherty v. North Fork Bank, 302 A.D. 2d 491, 753 N.Y.S. 2s 130 (2d Dept. 2003).

xxxii. Cox v. Microsoft, 48 A.D. 3d 215, 850 N.Y.S. 2d 103 (1st Dept. 2008), leave to appeal denied, 10 N.Y. 3d 711 (June 3, 2008).

xxxiii. See Cox v. Microsoft, 10 Misc. 3d 1055 (N.Y. Sup. 2005)

xxxiv. Flemming v. Barnwell Nursing Home And Health Facilities, Inc., 56 A.D. 3d 162, 865 N.Y.S. 2d 706 (3d Dept. 2008).

xxxv. Flemming v. Barnwell Nursing Home And Health Facilities, Inc., 309 A.D. 2d 1132, 766 N.Y.S. 2d 241 (3d Dept. 2003).

xxxvi. Incentive awards have been awarded in Mark Fabrics Inc. V. GMAC Commercial Credit LLC, N.Y.L.J., Dec. 22, 2005, p. 18, col. 3 (N.Y. Sup.)($25,000); Naevus International Inc. V. AT&T Corp., No. 99/602191 N.Y. Sup. (Feb. 4, 2003)($5,000 for each named plaintiff). See also 3 Weinstein Korn & Miller New York Civil Practice, Lexis-Nexis (MB) at 908.08

xxxvii. Fees and costs have been awarded to objector's counsel. See 3 Weinstein Korn & Miller New York Civil Practice, Lexis-Nexis (MB) at 908.14[5].

xxxviii. Connolly v. Universal American Financial Corp., 21 Misc. 3d 1109, 2008 WL 4514098 (West. Sup. 2008).

xxxix. Matter of Cablevision Systems Corp. Shareholders Litigation, 21 Misc. 3d 419, 2008 WL 4140538 (Sup. Ct. Nassau County Aug. 6, 2008).

xl. NCJ Cleaners, LLC v. ALM Media, Inc., 17 Misc 3d 209, 844 N.Y.S. 2d 619 (2007).

xli. NCJ Cleaners, LLC v. ALM Media, Inc., 48 A.D. 3d 766, 852 N.Y.S. 2d 384 (2d Dept. 2008).

xlii. CLC/CFI Liquidating Trust v. Bloomingdale's Inc., 50 A.D. 3d 446, 855 N.Y.S. 2d 499 (1st Dept. 2008).

xliii. Khrapunskiy v. Doar, 49 A.D.3d 201, 852 N.Y.S.2d 40 (1st Dep't 2008).

xliv. Rife v. The Barnes Firm, P.C., 48 A.D.3d 1228, 852 N.Y.S.2d 551 (4th Dep't 2008).

xlv. Pino Alto Partners v. Erie County Water Authority, 2008 WL 4603469 (Sup. Ct. Erie County Oct. 15, 2008).

xlvi. Martin v. Lavine, 39 N.Y.2d 72 (1976)).

xlvii. Boudreaux v. State of Louisiana, Dep't of Transportation, 49 A.D.3d 238, 849 N.Y.S.2d 262 (1st Dep't 2008).

xlviii. Shovak v. Long Island Commercial Bank, 50 A.D.3d 1118, 858 N.Y.S.2d 660 (2d Dep't 2008).

xlix. State v. Myers, 865 N.Y.S.2d 880 (Sup. Ct. Albany County Oct. 21, 2008).