# A SUMMARY OF ARTICLE 9 CLASS ACTIONS IN 2003

January 13, 2004 -Submitted For Publication In The New York Law Journal

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Last year the Court of Appeals addressed the viability of three class actions brought under CPLR Article 9 which sets forth the prerequisites for the certification of class actions brought under New York's very own class action rule. The Court of Appeals cases involved the rights of school children in Rochester, cable television subscribers in Westchester County and professional banquet waiters in New York City. In addition, the Appellate Divisions and several Supreme Courts ruled on a variety of class actions in 2003.

**Court Of Appeals Decisions**

In Paynter v. State of New York[i] a class of Rochester school children charged the State with a failure to honor its promise contained in the Education Article of the State Constitution " to afford its children the opportunity for a sound basic education ". The Paynter class alleged that State policies " resulted in high concentrations of racial minorities and poverty in the school district leading to abysmal student performance " and demanded that the State change the demographics of Rochester's school population until educational test results improved. In dismissing the complaint the Court of Appeals noted there was no claim that poor educational performance was " caused by any deficiency in teaching, facilities or

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instrumentalities of learning, or any lack of funding “.

In Dillon v. U-A Columbia Cablevision[ii] a class of Westchester County cable TV subscribers challenged a $5.00 late fee as an “ unlawful penalty bearing no relation to...actual costs incurred in servicing such payments “. The Court of Appeals dismissed the class claim because of the voluntary payment doctrine which “ bars recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law “.

And in Bynog v. Cipriani Group, Inc.[iii], a class of professional banquet waiters in New York City employed by M.J. Alexander & Co. [ “ MJA “ ] [ in the business of providing temporary workers pursuant to catering contracts ] claimed they were employees of the Cipriani defendants [ owners and operators of the “ Rainbow Room “ ]. The Bynog class claimed “ they were entitled to receive ( per Labor Law § 196-d ) a mandatory 22% service charge paid by Cipriani’s customers under various banquet contracts, in addition to the $20-28 flat hourly rate paid by
( MJA ) “[iv]. In dismissing these claims the Court of Appeals held that plaintiffs were not employees because they “ worked at their own direction “, “ worked for other caterers, including Cipriani’s competitors “ and were under the “ exclusive direction and control of MJA, the temporary service agency that interviewed, hired and compensated (them)”.

**Arbitration Favored Over Class Actions**

In 2003 the Appellate Division, First Department re-affirmed its policy, first enunciated in 1981 in Harris v. Shearson Hayden Stone[v] that “ the interests favoring

arbitration should prevail over those favoring the class action “.

The tobacco wars seemingly ended in 1998 with the approval of a Master Settlement Agreement ( MSA ) in a California smoker’s class action providing $240 billion to settle smokers’ class actions pending in 46 states and certain territories. After the MSA and its fee payment provisions were approved[vi] and affirmed by the Appellate Division, a dispute over legal fees arose. Pursuant to the MSA this dispute was submitted to arbitration leading to an award of $1.3 billion[vii] of which $625 million was to be paid to attorneys representing New York State. Subsequently, in New York State v. Philip Morris Inc[viii] the Court, *sua sponte* exercised jurisdiction to review the $625 million arbitrators’ decision because a fee awarded in a class action must be submitted to the Court for approval pursuant to CPLR § 909 [ “ The Court cannot shift its responsibility for supervising legal fees in class actions to an arbitrator “[ix] ]. In reversing[x] the Appellate Division held that “ ( the Court ) had no authority or jurisdiction *sua sponte* to make an independent inquiry into the amount of or method used in fixing the attorneys’ fees...Justice Ramos’s...order rests on the assumption that, if CPLR Articles 9 and 75 conflict, the former trumps the latter. However, that assumption is incorrect...( There is a ) strong public policy in favor of arbitration “[xi].

In Ranieri v. Bell Atlantic Mobile[xii], a class action alleging misrepresentations “ made by defendant cellular phone companies concerning their rates “, the Appellate Division stayed the class action pending arbitration. The “ Cellular Service Orders “ contained an arbitration clause prohibiting class actions which was enforced. “...[G]iven 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 “. Whether and to what extent class action procedures may be used within the context of arbitration has been addressed by several courts[xiii].

Similar in effect but different in approach was the AOL Virginia forum selection clause enforced by the Supreme Court in Gates v. AOL Time Warner Inc[xiv]. In Gates Gay and Lesbian AOL members claimed a violation of G.B.L. § 349 in that AOL “ failed to police its chat rooms causing ( them ) to be harassed and threatened by hate speech from other members “. The Court enforced the Virginia forum selection clause notwithstanding plaintiffs’ claims that it “ should not be enforced...because Virginia law does not allow for consumer class action litigation and would therefore conflict with the public policy underlying ( GBL § 349 ) “.

**Mass Torts**

Generally, the Courts have been unwilling to certify mass tort class actions alleging personal injury or property damage under CPLR Article 9[xv]. 2003 provided no exception, notwithstanding the certification of a Third Department Public Health Law class action. In Catalano v. Heraeus Kulzer, Inc.[xvi], a class of dentists claimed strict products liability and breach of warranty by the distributor of Artglass, a fabricated polymer-based system of dental restorations. The dentists claimed the restorations were defective and failed prematurely after placement in the patients’ mouth. The

Appellate Division, Second Department dismissed the strict products liability/negligence claims because the dentists “ suffered no personal injury or property damage “ and denied certification as to the express warranty claim because of the predominance of the individual “ issues of causation and reliance “.

“ In May 2001, the Nassau County Health Department received nearly 900 complaints of alleged food poisoning from patrons who said they became sick after eating at ( several restaurants )“[xvii]. Subsequently, restaurant patrons commenced a mass tort class action, Lieberman v. 293 Mediterranean Market Corp[xviii], alleging food poisoning. The Appellate Division, Second Department denied class certification because of “ the predominance of individualized factual questions “ and denied partial summary judgment because of plaintiff’s failure to show “ that his injury resulted from consumption of food prepared at ( the restaurant ) “.

Lastly, in Fleming v. Barnswell Nursing Home[xix], the survivor of a deceased nursing home resident commenced a mass tort class action against the nursing home and physician alleging medical malpractice, negligence and a violation of Public Health Law § 2801-d. The Appellate Division, Third Department, denied certification for the negligence claims because of a predominance of individual issues [ causation and damages ] but granted certification to the Public Health Law § 2801-d[xx] claims. “ An action by residents of a residential health care facility for violating their rights or benefits created by statute...may be brought as a class action if the prerequisites to class certification set forth in CPLR article 9 are satisfied... violation of DOH rules affecting residents predominate...(claims of ) inadequate heat and inedible food are typical “.

**Offsets, Sheriff's Fees & Pirate's Booty**

In Watts v. Wing[xxi], a class challenged the Statewide Offset Program [ tax refunds may be offset by any debt owed to the New York State Office of Temporary and Disability Assistance ] as violating due process rights to notice and an opportunity to challenge the validity of the debts. Notwithstanding the governmental operations doctrine[xxii] a majority of the Appellate Division, First Department certified the class action due to common issues of notice and opportunity to contest the debts. The dissent, however, found a predominance of individual issues [ " each ( class member must show ) that the withholding of the refund was based on an invalid claim of debt...the validity of the underlying debts cannot be determined on a class-wide basis " ].

In Yusuf v. City of New York[xxiii], a class challenged the administrative fees earned by the Sheriff enforcing the " ScoffTow " program. The Appellate Division, First Department granted class certification with respect to the imposition of towing charges and poundage fees. "...the discrepancy in each case is relatively small, but the potential class is large, militat(ing) in favor of class certification ".

And in Klein v. Robert's American Gourmet Foods[xxiv], the Supreme Court approved the settlement of a class action alleging that defendant's snack food products [ Pirate's Booty, Fruity Booty and Veggie Booty ] were misrepresented in fat and caloric content. Amongst the significant aspects of this coupon settlement[xxv] was the defendant's promise to keep issuing food product coupons until $3.5 million worth of

coupons have been redeemed and the issuance of coupon tracking reports every six months. These features meet some of the criticisms of coupon settlements.[xxvi]

**Ink Jet Printers, Credit Cards & Faxes**

In Strishak v. Hewlett Packard Company[xxvii], a class of consumers purchased ink jet printers allegedly believing them to have large size ink cartridges when in fact they were equipped with economy size cartridges. The Appellate Division, Second Department dismissed the complaint finding no misrepresentation because the company " did not provide any description with respect to the amount of ink contained in the cartridge " and no deception in not " disclosing that ( the ink cartridges ) were economy-size cartridges ".

In Sims v. First Consumers National Bank[xxviii], a class alleged that " high pressure sales tactics lured them into " credit card contracts with hidden fees. The Appellate Division found that the complaint stated causes of action for violations of GBL § 349, breach of contract and breach of implied duty of good faith and fair dealing. " The gist of ( the ) deceptive practices claim is that the typeface and location of the fee disclosures, combined with high-pressure advertising...was deceptive and misleading in a material way ". In Broder v. MBNA[xxix], a class of credit card holders challenged the method of payment allocation for cash advances as being contrary to the representations made in defendants' solicitation material. The Supreme Court approved a proposed settlement providing for the payment of $3.57 to each of

6,402,097 class members ( $22,855,486 ), an incentive award of $10,000 to the named plaintiff and attorneys fees and costs of $2,263,919.

In Rudgayzer v. LBS Communications, Inc.[xxx], a plaintiff which an obtained an individual judgment in Civil Court for $500.00 under the federal Telephone Consumer Protection Act [ TPCA ] moved to vacate the judgment and " amend the caption to continue the case as a class action or to dismiss this case without prejudice ". In denying the relief sought as violative of the penalty prohibition in CPLR § 901(b), the Court found " the language of TPCA...allows a state to preclude a class action, under the ' if otherwise permitted ' clause ". The Court also stated " the granting of this motion would only be in the interest of legal ' chutzpah '...to have this Court aid in the padding of plaintiff's counsel's pockets...plaintiff seeks the discretion of the Court to aid and abet an attempt to raid the treasuries of defendant and possibly other telecommunications providers ".

**DSL Services, Employees & Closing Costs**

In Solomon v. Bell Atlantic Corp.[xxxi], a class claimed its DSL services had been misrepresented in defendant's advertising as being " fast, reliable, easy-to-install and easy-to-use...' up to 126x faster than your 56K modem '...' Nitro Burning Fast '... technical support is ' unbelievable '". In granting class certification to a consolidated group of DSL class actions[xxxii] alleging violations of GBL §§ 349, 350 the Supreme Court found common questions concerning download speed, service and technical

support.

In Hussain v. Hi-Tech Construction[xxxiii], a class of construction workers sought recovery of prevailing rate wages and benefits on public construction projects. The Supreme Court denied class certification because the class, which sought to include all construction employees without specifying a particular project or range of employment dates, was too broadly defined. In Jacobs v. Bloomingdales, Inc.[xxxiv], a class of 15,000 employees challenged the defendant's practice " of making deductions from credited commissions for ' unidentified returns ' ( by ) deduct(ing) a pro rata share from all the commissions which would have been paid to all sales personnel ".In granting class certification for claims of unpaid wages and a violation of Labor Law § 193 the Supreme Court stated that" Without the benefit of the class action, these retailing conglomerates would act with impunity in such matters ". And in Tosner v. Town of Hempstead[xxxv], a class of part-time employees working full time sought the " rights and privileges...which the Collective Bargaining Agreement provides full-time employees ". Finding an exception to the governmental operations rule the Supreme Court granted certification. " A class action is the only practical way to resolve the issue of whether the Town was using part-time employees in a full time manner ".

In Dougherty v. North Fork Bank[xxxvi], a class challenged a mortgagor's imposition of " a $5 ' Facsimile Fee ', a $25 ' Quote Fee ' and a $100 ' Satisfaction Fee ' for the preparation of ( a mortgage ) satisfaction ". The Appellate Division granted summary judgment to the plaintiff on the facsimile fee and quote fee as a violation of Real Property Law § 274-a(2)(a) and summary judgment to defendant on the satisfaction fee.

**FOOTNOTES**

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i. Paynter v. State of New York, 100 N.Y. 2d 434, 765 N.Y.S. 2d 819, 797 N.E. 2d 1225 ( 2003 ).

ii. Dillon v. U-A Columbia Cablevision of Westchester, Inc., 100 N.Y. 2d 525, 760 N.Y.S. 2d 726, 790 N.E. 2d 1155 (2003 ).

iii. Bynog v. Cipriani Group, Inc., 2003 WL 22844504 ( Ct. App. 2003 ).

iv. The Bynog class also claimed violations of Labor Law § 191 ( failure to pay for work within seven days of performance ) and Labor Law § 193 ( improper withholding of part of pay for Workmen's Compensation premiums ).

v. Harris v. Shearson Hayden Stone, 82 A.D. 2d 87, 441 N.Y.S. 2d 70 ( 1st Dept. 1981 ), aff'd 56 N.Y. 2d 627, 450 N.Y.S. 2d 482, 435 N.E. 2d 1097 ( 1982 ). See also Brower v. Gateway 2000, 246 A.D. 2d 246, 676 N.Y.S. 2d 569 ( 1st Dept. 1998 )( arbitration clause otherwise enforceable held to be unconscionable in the selection of International Chamber of Commerce as arbitration body ); Carnegie v. H&R Block, 180 Misc. 2d 67, 687 N.Y.S. 2d 528 ( 1999 )( arbitration clause prohibiting class actions not enforced; certification granted ), rev'd 269 A.D. 2d 145, 703 N.Y.S. 2d 27 ( 1st Dept. 2000 )( certification denied ).

vi. New York State v. Phillip Morris, Inc., Sup. Ct. N.Y. County, September 25, 1998, Crane, J., 400361/97.

vii. In Brown v. Williamson v. Chesley, 194 Misc. 2d 540, 749 N.Y.S. 2d 842 ( 2002 ) the Court vacated the arbitrator's $1.3 million fee award ( pursuant to CPLR 7511 ) and ordered a rehearing by the arbitrators on the issue of reasonable legal fees. In a subsequent decision [ Brown & Williamson v. Chesley, New York Law Journal, January 7, 2003, p. 19, col. 4 ( N.Y. Sup. )] the Court disqualified the lawfirm representing the Castano Group of lawfirms seeking to reargue or renew their opposition to the Court's prior order vacating the fee award.

viii. New York State v. Phillip Morris, Inc., New York Law Journal, October 28, 2002, p. 26, col. 4.

ix. New York State v. Phillip Morris, Inc., 308 A.D. 2d 57, 63, 763 N.Y.S. 2d 32, 36 ( 1st Dept. 2003 ).

x. New York State v. Phillip Morris, Inc., 308 A.D. 2d 57, 63, 763 N.Y.S. 2d 32, 36 ( 1st Dept. 2003 ).

xi. . In addition, the Appellate Division noted that "Because Justice Crane's approval of the MSA was subsequently affirmed by this Court, Justice Ramos lacked the subject matter jurisdiction or the power to, in effect, reverse this Court by modifying the MSA ".

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

xiii. See e.g., Howard v. Klynveld Peat, 977 F. Supp. 654 ( S.D.N.Y. 1997 )( class wide arbitration barred unless provided for in agreement ); Dickler v. Shearson Lehman Hutton, Inc., 596 A. 2d 860, 867 ( Pa. Super. 1991 )( class-wide arbitration encouraged ); Keating v. Superior Court, 31 Cal. 3d 694, 645 P. 2d 1192, 183 Cal. Rptr. 360 ( 1982 )( class wide arbitration appropriate ).

xiv. Gates v. AOL Time Warner Inc., 2003 WL 21375367 ( N.Y. Sup. 2003 ). Compare to Virginia choice of law clause in DSL contract in Solomon v. Bell Atlantic Corp., New York Law Journal, November 4, 2003, p. 18, col. 1 ( N.Y. Sup. )( certification granted in DSL misrepresentation class action ) and Forrest v. Verizon Communications, Inc., 805 A. 2d 1007 ( D.C. App. 2002 )
( Virginia forum selection clause enforced in DSL class action ).

xv. See e.g., Geiger v. American Tobacco Co., 277 A.D. 2d 420, 716 N.Y.S. 2d 108 ( 2d Dept. 2000 ); Komonczi v. Fields, 232 A.D. 2d 374, 648 N.Y.S. 151 ( 2d Dept. 1996 ); Rosenfeld v. AH Robins Co., 63 A.D. 2d 11, 407 N.Y.S. 2d 196 ( 2d Dept. 1978 ).

xvi. Catalano v. Heraeus Kulzer, Inc., 305 A.D. 2d 356, 759 N.Y.S. 2d 159 ( 2d Dept. 2003 ).

xvii. This Week's News, New York Law Journal, March 25, 2003, p. 16, col. 4.

xviii. Lieberman v. 293 Mediterranean Market Corp., 303 A.D. 2d 560, 756 N.Y.S. 2d 469 ( 2d Dept. 2003 ).

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

xx. Public Health Law § 2801-d provides a private of action to patients of residential health care facilities and creates a
right to proceed as a class action. § 2801-d(4) provides that
Any damages recoverable...may be recovered in any action which a court may authorize to brought as a class action ".

xxi. Watts v. Wing, 308 A.D. 2d 391, 765 N.Y.S. 2d 18 ( 1st Dept. 2003 ).

xxii. See e.g., Bryant Avenue Tenant's Ass'n v. Koch, 71 N.Y. 2d 856, 859, 527 N.Y.S. 2d 743, 522 N.E. 2d 1041 ( 1988 ).

xxiii. Yusuf v. City of New York, 309 A.D. 2d 721, 766 N.Y.S. 2d 554 ( 1st Dept. 2003 ).

xxiv. Klein v. Robert's American Gourmet Foods, No. 006956/02
( N.Y. Sup. Nassau Co. ) Jan. 14, 2003 Decision J. Lally as reported in 24 Class Action Reports 61 ( 2003 ).

xxv. See Dickerson, Class Actions: The Law of 50 States, Law Journal Press, New York, 1988-2004, § 9.03(1)©).

xxvi. See Dickerson & Mechmann, Consumer Class Actions And Coupon Settlements: Are Consumers Being Shortchanged?, Advancing the Consumer Interest, Vol. 12, No. 2, Fall/Winter 2000, at www.classactionlitigation.com/articles_of_interest.htm ( " A coupon settlement should require post settlement tracking of how many class members actually redeem the coupons " ).

xxvii. Strishak v. Hewlett Packard Company, 300 A.D. 2d 608, 752 N.Y.S. 2d 400 ( 2d Dept. 2002 ).

xxviii. Sims v. First Consumers National Bank, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 ( 1st Dept. 2003 ).

xxix. Broder v. MBNA, N.Y. County Sup., Index No: 605153/98, J. Cahn, Decision April 10, 2003.

xxx. Rudgayzer v. LBS Communications, Inc., 2003 WL 22344990 ( N.Y. Civ. Ct. 2003 ).

xxxi. Solomon v. Bell Atlantic Corp., New York Law Journal, November 4, 2002, p. 18, col. 1 ( N.Y. Sup. ).

xxxii. See e.g., Scott v. Bell Atlantic Corp., 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 ( 2002 )( DSL class action; GBL § 349 requires the underlying transactions " in which the consumer is deceived must occur in New York " ).

xxxiii. Hussain v. Hi-Tech Construction and Management Services, Inc.,
N.Y. County Sup., Index No. 605953/01, J. Gammerman, Decision April 28, 2003.

xxxiv. Jacobs v. Bloomingdales Inc., New York Law Journal, May 27, 2003, p. 32, col. 6 ( Queens Sup. ).

xxxv. Tosner v. Town of Hempstead, New York Law Journal, May 23, 2003, p. 23, col. 1

( Nassau Sup. ).

xxxvi. Dougherty v. North Fork Bank, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 ( 2d Dept. 2003 ).