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Consumer Protection Rulings in 2011

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Each year "Consumer Law: The Judge's Guide to Federal and New York State Consumer Protection Statutes," published by the New York courts, is updated, and the [2011 version](#) is now available on the Internet.¹ There have been several exciting developments involving mandatory arbitration clauses and class action and class arbitration waivers, the standing of MERS (Mortgage Electronic Registration Systems Inc.) in foreclosure actions, the notice requirements of RPAPL §1304, appraisals and vulnerability, expanding the scope of Lien Law Article 3-A, steering and low balling, bogus taxes, forum selection clauses, gift cards and federal preemption.

Class Arbitration

The U.S. Supreme Court rendered two important consumer law decisions that address the enforceability of contractual clauses prohibiting class actions and class arbitration. i.e., *AT&T Mobility LL v. Concepcion*² abrogating *Discover Bank v. Superior Court*,³ and *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*⁴ In *Concepcion*, the Court, by a 5-4 vote, held that the Federal Arbitration Act of 1925 (FAA) preempted a rule enunciated by the California Supreme Court in *Discover Bank*, which provided that class-action waivers in consumer contracts of adhesion were unconscionable in cases where "disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money" (id. at 1746).

Significantly, section two of the FAA contains a savings clause, which permits agreements to arbitrate to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract" (9 USC §2). Relying on its recent decision in *Stolt-Nielsen*, in which it held that "an arbitration panel exceeded its powers under Section 10(a)(4) of the FAA imposing class procedures based on policy judgments rather than the arbitration agreement itself," the Supreme Court found that "class arbitration to the extent that it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA" (131 S. Ct. at 1750-1751).⁵

Appellate Decisions. The full impact of these decisions remains to be seen. However, two recent Appellate Division cases may suggest how New York courts will react to *AT&T* and *Stolt*. In *Cheng v. Oxford Health Plans Inc.*⁶ the First Department distinguished *Stolt-Nielsen* and held that an arbitration panel's award finding that an arbitration should proceed as a class arbitration "neither exceeded its powers nor manifestly disregarded the law in certifying the class" and further that the plaintiff's claims were typical of those of the class and that the issues raised, "at least for the liability phase" predominated over individual issues. And in *Frankel v. Citicorp Insurance Services Inc.*,⁷ a class action challenging the repeated and erroneous imposition of \$13 payments for the defendant's "Voluntary Flight Insurance Program," the defendant sought to compel arbitration and stay the class action relying upon a unilateral change of terms notice imposing a class action waiver set forth in a mailed notice sent to plaintiff.

In remitting, the Second Department noted that "Since there is a substantial question as to whether the arbitration agreement is enforceable

under South Dakota law, the trial court should have temporarily stay[ed] arbitration pending a framed-issue hearing." At such a hearing, the trial court should consider, inter alia, the issues of unconscionability, adequate notice of the change in terms, viability of class action waivers and the "costs of prosecuting the claim on an individual basis, including anticipated fees for experts and attorneys, the availability of attorneys willing to undertake such a claim and the corresponding costs likely incurred if the matter proceeded on a class-wide basis."⁸

Standing MERS on Its Head

In two first impression mortgage foreclosure cases, the Second Department clarified the notice requirements of RPAPL §1304 and the standing of Mortgage Electronic Registration Systems Inc. (MERS). MERS was created in 1993 to "streamline the mortgage process by using electronic commerce to eliminate paper,' [and facilitate] 'the transfer of loans into pools of other loans which were then sold to investors as securities [and which avoids] the payment of fees which local governments require to record mortgages."⁹

In *Bank of New York v. Silverberg*,¹⁰ the court, noting the Court of Appeals' decision in *Matter of MERSCORP Inc. v. Romaine*¹¹ ("whether MERS has standing to prosecute a foreclosure action remained for another day") and that MERS "purportedly holds approximately 60 million mortgage loans [or] 60% of all mortgage loans in the United States" and being mindful of the possible impact its decision "may have on the mortgage industry in New York and perhaps the nation," held that MERS, as "nominee and mortgagee for purposes of recording [is unable] to assign the right to foreclose upon a mortgage... absent MERS's right to, or possession of the actual underlying promissory note." The court also distinguished its earlier decision in *Mortgage Elec. Recording Sys. Inc. v. Coakley*.¹²

And in *Aurora Loan Services Inc. v. Weisblum*¹³ the court not only held that the plaintiff lacked standing to foreclose on the mortgage ("there is nothing in the [mortgage] document to establish the authority of MERS to assign the first note [or] that MERS initially physically possessed the note") but equally important, found that plaintiff had failed to comply with the notice requirements of RPAPL §1304 and provide defaulting mortgagees with "a list of at least five housing counseling agencies' with their 'last known addresses and telephone numbers.'" Rejecting the concept of constructive notice in the absence of shown prejudice, the court held that "proper service of the RPAPL 1304 notice containing the statutorily mandated content is a condition precedent to the commencement of a foreclosure action."

Class Action Legal Fees

Governor Andrew Cuomo signed into law last week a modification CPLR §909 which allows trial courts in CPLR Article 9 class actions to not only award attorney's fees to class representative's counsel but also "to any other person that the court finds has acted in benefit the class." This excellent modification, which addresses *Flemming v. Barnwell Nursing Home and Health Facilities Inc.*, 15 N.Y. 3d 375, 938 NE. 2d 937 (2010), wherein the majority found no authority in CPLR 909 for an award of attorney's fees to objector's counsel, will encourage responsible objectors to, inter alia, analyze and challenge proposed settlements which may or may not benefit the class. (For further discussion of the need to compensate objectors' counsel, see Dickerson & Manning, "Rulings in 2010 in Class Actions Under CPLR Article 9," NYLJ, Feb. 24, 2011, p. 4. See generally, Dickerson, "New York State Class Actions: Make It Work—Fulfill the Promise," 74 Albany L.R. 711 (2010/2011).)

Appraisals and Vulnerability

In *People v. First American Corp.*,¹⁴ the First Department ruled, "The [Attorney General] claims that defendants engaged in fraudulent, deceptive and illegal business practices by allegedly permitting eAppraisalIT residential real estate appraisers to be influenced by nonparty Washington Mutual Inc. (WaMu) to increase real estate property values on appraisal reports in order to inflate home prices: We conclude that neither federal statutes nor the regulations and guidelines implemented by the Office of Thrift Supervision (OTS) preclude the [Attorney General] from pursuing [this action]... the [Attorney General also] has standing to pursue his claims pursuant to [GBL] 349... [D]efendants had implemented a system [allegedly] allowing WaMu's loan origination staff to select appraisers who would improperly inflate a property's market value to WaMu's desired target loan amount."

In *Flandera v. AFA America Inc.*,¹⁵ the Fourth Department found that plaintiffs' allegation that defendants' appraisal of the property purchased... contained 'several misrepresentations concerning the condition and qualities of the home, including... who owned the property, whether the property had municipal water, the type of basement and the status of repairs on the home'" stated claims for fraud and violation of GBL §349.

And in *Emigrant Mortgage Co. Inc. v. Fitzpatrick*,¹⁶ a foreclosure action, the Supreme Court, Suffolk County, found the loan unconscionable and a violation of GBL §349 "because the monthly mortgage payments... were in excess of the [homeowner's] fixed monthly income... the conduct of the plaintiff in extending the subject loan... without determining her ability to repay when a reasonable person would expect such an established bank... to offer a loan that he or she could afford was materially misleading... said conduct had the potential to affect similarly situated financially vulnerable consumers."

Lien Law Expanded

In *Ippolito v. TJC Development LLC*,¹⁷ homeowners who terminated a home improvement contract were awarded \$121,155 by an arbitrator and commenced a Lien Law article 3-A class action against the contractor TJC and its two principals. Plaintiff's claim against TJC was dismissed on the grounds of res judicata based upon the arbitrator's award. However, as a matter of first impression, the Second Department held that the homeowners, "beneficiaries of the trust created by operation of Lien Law §70" had standing to assert a Lien Law Article 3-A claim

against TJC's officers or agents alleging an improper diversion of trust pursuant to Lien Law §72.

Forum Selection Clauses

In *Bernstein v. Wysocki*,¹⁸ a camper was injured in a camp in Pennsylvania and taken to a local hospital in Broom County for care. The plaintiff's lawsuit was later brought in Nassau County against the camp and treating medical personnel employed by the camp and the local hospital.

At issue was a forum selection clause requiring litigation of all claims in Pennsylvania which was enforced as to camp personnel but not as to non-signatory hospital staff because they "do not have sufficient close relationship with the Camp such that enforcement of the forum selection clause by them was foreseeable to the plaintiffs by virtue of that relationship."

Steering and Low Balling

In *M.V.B. Collision Inc. v. Allstate Insurance Company*¹⁹ the Eastern District of New York sustained a GBL §349 claim based upon steering insureds to approved repair shops. "Mid Island is an auto-body shop. Mid Island and Allstate have had a long-running dispute over the appropriate rate for auto-body repairs. Mid Island alleges that, as a result of that dispute, Allstate agents engaged in deceptive practices designed to dissuade Allstate customers from having their cars repaired at Mid Island and to prevent Mid Island from repairing Allstate customers' cars."

And in *Frey v. Bekins Van Lines Inc.*²⁰ the Eastern District sustained GBL §§349, 350 claims involving movers. "Broadly stated, Plaintiffs claim that Defendants are engaged in a pattern and practice of quoting lower shipping prices than those ultimately charged—a practice referred to as 'low-balling' estimates—with the intent of charging higher amounts. Defendants are also accused of overcharging their customers [for] a variety of add-on services, including fuel supplements and insurance premiums on policies that Defendants are alleged never to have obtained."

Bogus Taxes

In *Chiste v. Hotels.Com LP*²¹ the Southern District of New York sustained a GBL §349 claim asserted against an online travel company. "The crux of Plaintiffs' allegations stem from what is not disclosed on this invoice [for the online purchase of hotel accommodations]... Second, Plaintiffs allege that Defendants are charging consumers a higher tax based on the Retail Rate consumers pay Defendants rather than the Wholesale Rate Defendants pay the hotels. Instead of remitting the full amount of taxes collected to the hotels, Defendants keep the difference between the tax collected and the amount remitted to the tax authorities...as a profit or fee without disclosing it."

Gift Cards and Preemption

The struggle between gift card issuers (a multi-billion dollar business) and cooperating banks and consumers over the legality of excessive fees including expiration or dormancy fees goes on with gift card issuers trying to morph themselves into entities protected from state consumer protection statutes by federal preemption. In three New York State class actions, purchasers of gift cards challenged, inter alia, the imposition of dormancy fees by gift card issuers.²² See *Lonner v. Simon Property Group Inc.*,²³ *Llanos v. Shell Oil Company*²⁴ and *Goldman v. Simon Property Group Inc.*²⁵ The most recent battle is over whether or not actions that rely upon the common law and violations of salutary consumer protection statutes, such as GBL §§349, 396-I and CPLR §4544, brought by New York residents against gift card issuers and cooperating banks are preempted by federal law.²⁶

Although this issue seemingly was resolved earlier in *Goldman*,²⁷ two recent Nassau Supreme Court decisions have taken opposite positions on the issue of federal preemption. In *L.S. v. Simon Property Group Inc.*,²⁸ a class action challenging, inter alia, a renewal fee of \$15 imposed after a six-month expiration period, raised the issue anew by holding that the claims stated therein were preempted by federal law. However, most recently the court in *Sheinken v. Simon Property Group Inc.*,²⁹ a class action challenging dormancy fees and account closing fees, held that "the National Bank Act and federal law do not regulate national banks exclusively such that all state laws that might affect a national bank's operations are preempted." Distinguishing *SPGCC, LLC v. Ayotte*³⁰ and relying on *Lonner* and *Goldman*, the court denied the motion to dismiss on the grounds of federal preemption.

Thomas A. Dickerson and Cheryl E. Chambers are Associate Justices of the Appellate Division, Second Department. Justice Dickerson is author of "Class Actions: The Law of 50 States," *Law Journal Press* (2011).

Endnotes:

1. See www.nycourts.gov/courts/9jd/TacCert_pdfs/Dickerson_Docs/CONSUMERLAW_040611.pdf.

2. *AT&T Mobility LL v. Concepcion*, 131 S. Ct. 1740 (April 27, 2011).

3. *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal Rptr 3d 76 (2005).

4. *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). See also: *Fensterstock v. Education Fin. Partners*, 611 F.3d 124, 141 (2d Cir. 2010).
5. Notably, in his concurring opinion in *AT&T*, Justice Clarence Thomas interpreted the FAA as "requir[ing] that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement," and the *Discover Bank* rule "does not relate to defects in the making of an agreement" (131 S. Ct. at 1753).
6. *Cheng v. Oxford Health Plans Inc.*, 84 A.D.3d 673, 923 N.Y.S.2d 533 (2011) ("In that demand [plaintiff] alleged that Oxford engaged in a scheme to deny and reduce reimbursement amounts to [plaintiff] and others similarly situated participating providers... On March 7, 2006, the arbitration panel rendered an award determining that the parties' arbitration clause permitted class arbitration (award reinstated in 45 A.D.3d 356 (2007)... On September 25, 2008 the arbitration panel rendered an award certifying the class... Oxford moved to vacate that award (which the trial court denied in 2009 WL 3704354 which is hereby affirmed)").
7. *Frankel v. Citicorp Insurance Services Inc.*, 2010 WL 4909624 (2d Dept. 2010).
8. See generally *Scott v. Cingular Wireless*, 160 Wash. 2d 843 (Wash. Sup. En Banc 2007).
9. *Bank of New York v. Silverberg*, —A.D.3d—, 2011 WL 2279723 (2d Dept. 2011).
10. *Bank of New York v. Silverberg*, —A.D.3d—, 2011 WL 2279723 (2d Dept. 2011).
11. *Matter of MERSCORP Inc. v. Romaine*, 8 N.Y. 3d 90, —N.Y.S.2d—.
12. *Mortgage Elec. Recording Sys. Inc. v. Coakley*, 41 A.D.3d 674, —N.Y.S.2d— (2d Dept. 2010).
13. *Aurora Loan Services Inc. v. Weisblum*, —A.D.3d—, 2011 WL 1902620 (2d Dept. 2011). See also Wise, "Lenders Must 'Strictly Comply' With Foreclosure Notice Rules," NYLJ, May, 24, 2011, p. 1.
14. *People v. First American Corp.*, 76 A.D. 3d 68, 902 N.Y.S.2d 521 (1st Dept. 2010).
15. *Flandera v. AFA America Inc.*, 78 A.D. 3d 1639, 913 N.Y.S.2d 441 (4th Dept. 2010).
16. *Emigrant Mortgage Co. Inc. v. Fitzpatrick*, 29 Misc.3d 746, 906 N.Y.S.2d 874 (N.Y. Sup. Suffolk Co. 2010).
17. *Ippolito v. TJC Development LLC*, 2011 WL 1088097 (2d Dept.). See also: *Stern v. DiMarzo Inc.*, 19 Misc.3d 1144(A) (West. Sup. 2008), aff'd 77 A.D.3d 730, 909 N.Y.S.2d 480 (2d Dept. 2010).
18. *Bernstein v. Wysocki*, 77 A.D.3d 241, 907 N.Y.S.2d 49 (2d Dept. 2010).
19. *M.V.B. Collision Inc. v. Allstate Insurance Company*, 728 F.Supp.2d 205 (EDNY 2010).
20. *Frey v. Bekins Van Lines Inc.*, 748 F.Supp.2d 175 (EDNY 2010).
21. *Chiste v. Hotels.Com LP*, 756 F.Supp.2d 382 (SDNY 2010).
22. See *Lonner v. Simon Property Group Inc.*, —A.D.3d—, 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)."
23. *Lonner v. Simon Property Group Inc.*, —A.D.3d—, 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).
24. *Llanos v. Shell Oil Company*, —A.D.3d—, 866 N.Y.S.2d 309 (2d Dept. 2008).
25. *Goldman v. Simon Property Group Inc.*, —A.D.3d—, 2008 WL 5006453 (2d Dept. 2008).
26. See e.g., *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007); *McAnaney v. Astoria Financial Corp.*, 665 F.Supp.2d 132 (EDNY 2009).
27. *Goldman v. Simon Property Group Inc.*, 31 A.D.3d 382, 383, 818 N.Y.S.2d 245 (2d Dept. 2006) (Actually, the type of commercial relationship between Simon and the cooperating financial institution may have changed from that analyzed by the courts in *Goldman* and in

SPGGC, LLC v. Blumenthal, 505 F.3d 183 (2d Cir. 2007) and the relationship analyzed by the courts in *McAnaney v. Astoria Financial Corp.*, 665 F.Supp.2d 132 (EDNY 2009) and in *L.S. and Sheinken*).

28. *L.S. v. Simon Property Group Inc.*, NYLJ, July 21, 2010, p. 26, col. 5 (Sup. Ct. Nassau Co.).

29. *Sheinken v. Simon Property Group Inc.*, Index No: 022038/2010, J. Warshawsky, Dec. June 28, 2011. (Sup. Ct. Nassau Co.)

30. *SPGCC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007).



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