

 [Click to Print](#) or Select 'Print' in your browser menu to print this document.

Page printed from: *New York Law Journal*

---

Outside Counsel

## New York State Class Actions in 2015

Thomas A. Dickerson and Leonard B. Austin, New York Law Journal

November 25, 2015

A number of exciting trial court and appellate court decisions were rendered in 2015 interpreting CPLR Article 9, New York State's class action statute. As noted earlier this year there has been a noticeable and positive change in the receptivity of New York courts, especially the Court of Appeals, in making our class action statute more readily available to groups of litigants, especially consumers, employees and tenants.<sup>1</sup>

This year the courts dealt with a variety of class action issues including mass physical injury and property damage torts, the enforceability of mandatory arbitration clauses and class action waivers, discontinuances and the need for class notice, the viability of disclosure only settlements, challenges to the class representative's standing by offering to settle his or her individual claim (i.e. "picking-off"), communicating with prospective class members without court approval and attempting to settle their individual claims pre-certification, soliciting prospective class members by Internet website and Lien Law class actions and the numerosity requirement. Lastly, the New York City Bar Association has issued a much anticipated "Report on Class Actions in New York State Courts" and proposed amendments to CPLR Article 9.<sup>2</sup>

### Mass Torts

In *Osarczuk v. Associated Universities*,<sup>3</sup> an ongoing toxic tort arising from the operations of the Brookhaven National Laboratory (BNL) wherein plaintiffs sought "damages for personal injuries and injury to property allegedly resulting from BNL's emission of nuclear and non-nuclear hazardous and toxic substances into the air, soil and groundwater over decades." This mass tort, initially certified, in part, in an opinion by Justice Joseph Farnetti, was subsequently found inappropriate for class treatment.<sup>4</sup> As a consequence 167 members of the purported class sought to intervene pursuant to CPLR 1013 which was approved on appeal since "the causes of action of the proposed intervenors are all based upon common theories of liability. In addition, the Second Department held that intervenors' claims were not time barred but tolled by the commencement of the class action."<sup>5</sup>

In Westfall v. Olean General Hospital,<sup>6</sup> a group of 1,900 patients who received insulin injections alleged negligence and malpractice arising from "a letter...from defendant... informing them that...insulin pens may have been shared by more than one patient." The Appellate Division, Fourth Department, declined to certify the proposed class action noting, "Where, as here, no plaintiff has tested positive for the blood-borne disease to which he or she were allegedly exposed... a prerequisite to recovery is proof of actual exposure to the blood-borne disease... The issue of actual exposure (and the extent of damages<sup>7</sup>) will require individualized determinations with respect to each plaintiffs."

## **Mandatory Arbitration Clause**

The proliferation of mandatory arbitration clauses, class action waivers and class arbitration waivers is most worrisome.<sup>8</sup> In two opinions, the First Department dealt with various aspects of these problematic contractual clauses. In Weinstein v. Jenny Craig Operations,<sup>9</sup> an employee class action, the defendant sought to exclude purported class members who, after the action had been commenced, signed arbitration agreements containing class action waivers.

In denying this request, the First Department held that the trial court "properly exercised its discretion by drawing the inference that the agreements had been implemented in response to this litigation and to preclude class members. Thus, the court properly declined to enforce those agreements signed after the commencement of this litigation." However, the waiver would be enforced as to employees who were hired after the class action was commenced.

In Ansah v. A.W.I. Security & Investigation,<sup>10</sup> an employee class action, defendant's pre-certification summary judgment motion was denied as premature with the court noting that defendant's argument that the contracts require arbitration...is unpreserved (and in any event) would "fail...since plaintiffs never agreed to arbitrate."<sup>11</sup>

## **Discontinuances**

On occasion a purported class action may be discontinued prior to class certification. However, the court must be vigilant in approving such discontinuances and should consider, if necessary, ordering class notice. For example, in Vasquez v. National Securities Corporation,<sup>12</sup> an employee class action, the named plaintiff was paid by the defendant "all of his alleged monetary damages. There, thus, is no class representative. For this reason plaintiff does not oppose dismissal of this action" but does request that notice of the class action be sent to purported class members. In ordering notice the court relied on Avena v. Ford Motor Co.<sup>13</sup> but noted that federal courts applying FRCP 23 do not require such notice ("Defendants...urge the court to follow federal case law which differs from the rule set forth in Avena...Avena rests its reasoning on cases which have not withstood the test of time").

## **Disclosure-Only Settlements**

In the securities field, class actions and shareholder derivative lawsuits are often settled with defendants agreeing to a non-cash settlement<sup>14</sup> featuring additional disclosures of

information regarding, for example, a proposed merger, and the payment of plaintiff's attorney fees and costs in return for a general release of any and all claims related thereto including damage claims. As with the approval of settlement class actions,<sup>15</sup> the courts must be particularly vigilant in protecting the class from problematic disclosure-only settlements.

In *City Trading Fund v. Nye*,<sup>16</sup> the court rejected a proposed disclosure-only settlement noting that "In merger litigation...the time crunch incentivizes a payout to plaintiffs to settle all cases, even frivolous ones. Thus, extra scrutiny is warranted when it appears that the incentives of the purported class representatives diverge from those of the shareholders." Regarding adequacy of representation the court noted, "the secretive nature in which plaintiffs and their counsel choose to litigate...along with the frivolity of their claims, is a strong indication that they are ill suited to represent the class."

In *The Matter of Allied Healthcare Shareholder Litigation*,<sup>17</sup> the court rejected a proposed settlement noting that the proposal offers nothing to the shareholders, except that the attorney they did not hire will receive a \$375,000 fee and the corporate officers who were accused of wrongdoing, will receive general releases. Presumably, the releases would release, not only the alleged wrongdoing, but also the act of the payment of the attorney fees to class counsel." Lastly, in *Matter of Medical Action Industries Shareholder Litigation*<sup>18</sup> the court approved a disclosure-only settlement but reduced proposed class counsel's fees of \$925,000 to a combined award of fees and expenses of \$250,000.

## **Communicating With a Class**

Whether and to what extent defendants may communicate with putative class members, pre-class certification and without court approval, is a matter of some concern.<sup>19</sup> Such communications may be misleading and omit important information, i.e., that a class action has been commenced, and should be monitored closely by the court. There are two important disruptive aspects of defendants communicating with class members pre-certification. First, the defendant may seek to "pick-off" the named representative by offering to settle his or her individual claim, without court approval, thus raising the issues of a lack of representative standing, typicality and adequacy of representation. Second, the defendant may seek to settle with class members for all or a part of their claim,<sup>20</sup> again without court approval.

In *Zeitlin v. New York Islanders Hockey Club*<sup>21</sup> hockey fans who purchased "10-ticket New York Islanders hockey playoff packages" claimed that the packages were deceptively marketed in violation of General Business Law 349. After the defendant learned of the lawsuit "it contacted most of the 119 overpaying patrons and offered refunds in settlement of their claims." All but eight fans accepted and executed written releases. In a separate effort to enjoin defendant from using releases and otherwise communicating with class members, the court denied injunctive relief noting that the communications were neither misleading nor coercive.<sup>22</sup> The court denied class action treatment on the basis of a lack of numerosity and rejected defendant's attempt to settle the named plaintiff's individual claim by compelling acceptance of a compromise offer.

## Seeking Class Members

Plaintiffs may seek to communicate with prospective class members by establishing an Internet website. As noted by the Kings County Supreme Court in *Sachs v. Matano*,<sup>23</sup> "Plaintiff has established a website on GoDaddy.com entitled 'Matano Kills?' whereby he sought other patients for a class action malpractice suit against defendant doctor by asserting, inter alia, 'Beware, he is stubborn, act like a mule, and will discriminate against you if you are not Italian with a Mercedes Benz.'"

In ordering GoDaddy.com to take down "the URL www.matano.kill.com," the court noted that "This is not a website whereby plaintiff seeks other individuals similarly situated that may have been injured by an alleged malpractice in order to establish a class action, but rather the website is couched in terms designed to irreparably damage the reputation and business of defendants."

## Lien Law Class Actions

In *ECD NY v. Britt Realty*,<sup>24</sup> a class of subcontractors and suppliers who furnished labor and materials to defendant, sought access to trust funds, an accounting and punitive damages of \$2 million. The court certified this class action noting that an action under Lien Law Article 3-A must be brought as a representative action for the benefit of all beneficiaries of the trust and "the practice... shall conform as nearly as may be to the practice" in a CPLR Article 9 class action.

The defendants, however, asserted that plaintiff (and his one identified potential class member) had "failed to adduce any evidence of a class." The court rejected that argument noting that the numerosity requirement may be waived in a Lien Law class action and, further, the "absence of information regarding other potential members of the class is not fatal to an action under Article 3-A of the Lien Law." Lastly, the court also held that there is no need to file a mechanic's lien as condition precedent to the application of Article 3-A and opt-out notice is to be sent to class members by certified mail.

## New York City Bar Report

In the New York City Bar Association's Report On Class Actions In The New York Courts and Proposed Amendment<sup>25</sup> the city bar recommends that CPLR 901(b) be repealed. The arguments for repeal include that CPLR 901(b) is inapplicable in federal courts and invites forum shopping, and that state court decisions finding a "penalty" are ambiguous and permitting waivers make application of CPLR 901(b) inconsistent. We agree with these arguments as well.<sup>26</sup>

The city bar also recommends that new guidelines be set forth to assist the court in appointing class counsel and allowing the court to decide when and if class notice of a discontinuance is necessary. This report is thorough and most helpful and reflects the extraordinary efforts of many New York City Bar members including members of the Committee on State Courts of Superior Jurisdiction.<sup>27</sup>

## Endnotes:

1. See Dickerson and Duffy, "Borden": A Welcome Sea Change on New York State Class Actions," *New York Law Journal*, June 29, 2015, p. 4.
2. See [www.nycbar.org](http://www.nycbar.org).
3. *Osarczuk v. Associated Universities*, 130 A.D.3d 591 (2d Dept. 2015).
4. *Osarczuk v. Associated Universities*, 82 A.D.3d 853 (2d Dept. 2011), revg 26 Misc.3d 1209 (Suffolk Sup. 2009).
5. See *Snyder v. Town Insulation*, 81 N.Y.2d 429 (1993); *Yollin v. Holland America Cruises*, 97 A.D.2d 710 (1st Dept. 1983).
6. *Westfall v. Olean General Hospital*, \_\_ A.D.3d \_\_, 17 N.Y.S.2d 572 (4th Dept. 2015).
7. See e.g., *Komomczi v. Fields*, 232 A.D.2d 374 (2d Dept. 1996).
8. See Silver-Greenberg & Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," <http://nyti.ms/1KMvBJg> (Oct. 31, 2015)(Part I); (Part II)(11/1/2015). See also Dickerson, "Class Actions: The Law of 50 States," *Law Journal Press* (2015)(Class Actions) at Section 403(5); Dickerson, *Weinstein Korn Miller New York Civil Procedure CPLR* (2015), Section 901.06(4) (WKM);
9. *Weinstein v. Jenny Craig Operations*, 132 A.D.3d 446, 17 N.Y.S.3d 407 (1st Dept. 2015).
10. *Ansah v. A.W.I. Security & Investigation*, 129 A.D.3d 538 (1st Dept. 2015).
11. See *Belzberg v. Verus Innx. Holdings*, 21 N.Y.3d 626 (2013) ["nonsignatories are generally not subject to arbitration agreements"].
12. *Vasquez v. National Securities Corporation*, 48 Misc.3d 597 (Sup. Ct. N.Y. Co. 2015).
13. *Avena v. Ford Motor Co.*, 85 A.D.2d 149 (1st Dept. 1982).
14. For discussion of non-cash coupon settlements see *Class Actions*, supra, at Section 9.01(3)©; WKM Section 908.06(1).
15. See *Class Actions*, supra, at Section 9.02; WKM Section 908.10.
16. *City Trading Fund v. Nye*, 46 Misc.3d 1206(A), 9 N.Y.S.3d 592 (Sup. Ct. N.Y. Co. 2015).
17. *The Matter of Allied Healthcare Shareholder Litigation*, 2015 WL 6499467 (N.Y. Sup. 2015).
18. *Matter of Medical Action Industries Shareholder Litigation*, 48 Misc.3d 544 (Suffolk Sup. 2015).
19. See "Class Actions" at Section 4.06[1].

20. See *Klakis v. Nationwide Leisure Corp.*, 73 A.D.2d 521 (1st Dept. 1979) (24-hour flight delay; defendant air carrier settled without court approval with all but 21 class members by paying them \$25 to \$50 each, thus raising the issue of lack of numerosity).

21. *Zeitlin v. New York Islanders Hockey Club*, 47 Misc.3d 1220 (Nassau Sup. 2015).

22. *Zeitlin v. New York Islanders Hockey Club*, 47 Misc.3d 1220 (Nassau Sup. 2015).

23. *Sachs v. Matano*, 2015 WL 6515272 (Nassau Sup. 2015).

24. *ECD NY v. Britt Realty*, 47 Misc. 923 (Kings Sup. 2015).

25. See [www.nycbar.org](http://www.nycbar.org)

26. See Dickerson, Austin and Zucco, "New York State Class Actions: Making it Work—Fulfilling the Promise: Some Recent Positive Developments and Why CPLR 901(b) Should be Repealed," 77 Albany L.R. 59 (2014); Dickerson and Austin, "Class Actions in 2013 And Call to Repeal CPLR 901(b)," New York Law Journal, Dec. 24, 2013..

27. Committee on State Courts of Superior Jurisdiction [Adrienne B. Koch, Chair] members working on Report included Richard Schager, Justice Lucy Billings, Lindsey Ramistella, Mitchell Berns, Menachem Kastner, Andrew Cali-Vasquez, and Nicholas Menasche.

*Thomas A. Dickerson and Leonard B. Austin are associate justices of the Appellate Division, Second Department. Justice Dickerson is the author of "Class Actions: The Law of 50 States" (Law Journal Press 2015) and Justice Austin is an adjunct professor at the Maurice A. Deane School of Law at Hofstra University.*