

SUMMARY OF NEW YORK STATE CLASS ACTIONS

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Last year¹, New York state courts ruled on a variety of class actions pursuant to CPLR Article 9 involving mass property torts, class wide arbitration, attorneys fees, retail refund policies, lien law, standing and timeliness of moving for class certification.

Mass Torts

In reversing the trial Court's certification of two subclasses of property owners residing within "a ten-mile radius of Brookhaven National Laboratories (BNL)...(who seek to) recover

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damages for personal injury and property damage alleged to be the result of various nuclear and non-nuclear materials of a hazardous and toxic nature emitted into the air, soil and groundwater (by BNL)“², the Appellate Division, Second Department in *Osarczuk v. Associated Universities, Inc.*³ found “Undoubtedly, there are questions common to all proposed class members that have been raised in this case, such as whether the defendant improperly handled and used hazardous and toxic material, and whether the defendant engaged in an ultrahazardous activity. Nonetheless, individualized investigation, proof and determination would need to be made, not only on complicated questions such as the extent of damage, if any, to the numerous individual properties and their diminished market value, but as to causation. Under the circumstances presented, questions of whether the emissions of various toxic materials, over several decades, from various sources and in various ways, caused injury to the individual properties and economic loss to the property owners, cannot be resolved on a class-wide basis”.

And in *DeLuca v. Tonawanda Coke Corp.*⁴ a mass tort class action brought on behalf of 38,875 people who reside near defendant’s facilities in Tonawanda, New York for the manufacture of foundry coke and other products alleging toxic emissions and asserting ten causes of action including negligence, gross negligence, negligence per se, strict liability, absolute

liability, trespass, nuisance, unjust enrichment, battery and 'punitive damages' was removed to federal court and then remanded because "allegations do not create a federal law question necessary to the determination of whether Defendants committed common-law torts against Plaintiffs".

Mass Torts & The Court Of Claims

While the certification of mass tort class actions still remains problematic⁵ there have been exceptions, particularly, in the Court of Claims which has been receptive to the use of the class action device. For example, in *Springer v. State of New York*⁶ the court allowed the filing of late notices of claim in a previously certified toxic tort and water contamination class action⁷ of additional 1,020 putative infant plaintiffs and 817 adult individuals. In *Partridge v. State of New York*⁸ the Court noted that the Erie Canal, known today as part of The New York State Barge Canal System, flooded between 1993 and 1995 causing damage to the property of, at least, 281 landowner-claimants who commenced an action on "behalf of a putative class of individuals who own property along the 'canalized' waterways of the 'Oswego River Basins...allege that the Canal System management practices of the Defendants were negligent or grossly negligent and effect a defacto taking of portions of their riparian properties".

Defendants motion to strike class allegations was denied and class certification was granted to claimants who filed proper claims.

Class Notice Of Claims

As for what constitutes "proper" claims and whether class notices of claim are viable in the Court of Claim, this issue seems to have been resolved in Weaver v. State⁹, with the Appellate Division, Second Department holding that "The weight of Court of Claims authority supports the conclusion... that class actions brought in the Court of Claims must satisfy all of the jurisdictional requirements set forth in section 11(b) and that each member must be a named claimant in a filed claim...This conclusion is consonant with the principle that 'nothing less than strict compliance with the jurisdictional requirements of the Court of Claims Act is necessary'".

Attorneys Fees

Governor Cuomo signed into law a modification to CPLR § 909 which allows trial courts in CPLR Article 9 class actions to not only award attorneys 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.*¹⁰ wherein the majority found no authority in CPLR 909 for an award of attorneys 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. And in *Graves v. Doar*¹¹ the Appellate Division, Second Department awarded class counsel attorneys fees and costs pursuant to New York State Equal Access to Justice Act (CPLR § 8600) and CPLR § 909 in a class action leading to the restoration of monthly food stamp benefits.

Class Wide Arbitration

In *AT&T Mobility LL v. Concepcion*¹² the U.S. Supreme Court abrogated *Discover Bank v. Superior Court*¹³ which had determined that consumer contracts containing clauses prohibiting class actions or class arbitration were void as unconscionable. In so ruling the Court found its earlier decision in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp*¹⁴ to be instructive. "The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA".

Reactions To Concepcion

The reaction of several State courts¹⁵ including those in New York has been interesting. For example, in *JetBlue Airways Corp. V. Stephenson*¹⁶, 728 unnamed current JetBlue pilots and 18 named former JetBlue pilots entered into separate employment contracts containing the same salary adjustment clause. The pilots "filed a single demand for arbitration with the AAA on behalf of all of the pilots" seeking, in effect, collective or class arbitration. JetBlue sought an order compelling individual arbitration. The Appellate Division, First Department distinguished *Stolt* noting that instant action was not brought as a class action but by "affected pilots (as) actual parties and concluded that the arbitrator would decide whether "AAA Rules permit collective, or joint, arbitration, in the first place". In *Cheng v. Oxford Health Plans, Inc.*¹⁷ The Appellate Division, First Department held that an arbitration panel's award that an arbitration should proceed as a class arbitration "neither exceeded its powers nor manifestly disregarded the law in certifying the class". The Court also found that the plaintiff's claim was 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.*¹⁸, 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 relying upon a unilateral change of terms notice imposing a class action waiver set forth in a notice mailed to plaintiff. In remitting, the Appellate Division, Second Department noted that "Since [T]here is a substantial question as to whether the arbitration agreement is enforceable under South Dakota law ". On remittal 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".

Refund Policies

In *Smilewicz v. Sears Roebuck Company*¹⁹, the Appellate Division, Second Department affirmed the trial Court's denial of class certification in an action alleging deceptive and misleading refund policies. The trial Court noted "the photographs submitted by the parties...suggest that there are significant variations in location and prominence of the return policy signs from store to store (raising) a possibility that the

visibility of the return policy may change over time...thus consumers who went to different retail locations in New York likely encountered different levels of exposure to the written return policy”.

Public Defense System

In *Hurrell-Harring v. State*²⁰ the Appellate Division, Third Department granted class certification to a plaintiff class against whom criminal charges were pending and which alleged systemic deficiencies in the public defense system. The Court found “That the inquiry distills to whether, ‘in one or more of the five counties at issue, the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions...It is this concrete legal issue and the constitutional right to counsel sought to be vindicated, that is common to all members of the class and transcends any individual questions”.

Standing

In *Lucker v. Bayside Cemetery*²¹ the grandchildren of decedents who purchased perpetual care plots from a cemetery did

not have standing to sue for, inter alia, false advertising and deceptive business practices under GBL §§ 349, 350. The plaintiffs alleged that the cemetery failed to honor the perpetual care contracts sold to their grandparents obligating defendants to keep plots in presentable condition. Claims which are "clearly derivative" may not be brought under GBL §§ 349, 350²². And in *Ellington v. EMI Music, Inc.*²³ "Duke" Ellington's heir and grandson alleged that a music publisher breached its royalty agreements. In dismissing the complaint the Court enforced a "net receipts" agreement: "Finally, the branches of the motion to dismiss the class action claims are granted on the ground that the same claims asserted by Ellington individually are not legally viable and have been dismissed".

Timeliness

In *Globe Surgical Supply v. Allstate Insurance Co.*²⁴ motions to (1) allow two new class representatives to intervene, (2) to dismiss counterclaims (fraud, RICO, unjust enrichment, GBL 349) and affirmative defenses and (3) to strike class allegations as untimely were all granted ("Accordingly, pursuant to CPLR § 902, the plaintiffs were required to move for class certification within the sixty days following the service of Allstate's Amended Answer. As they failed to do so, Allstate's instant application,

which seeks an order dismissing the plaintiff's class allegations is hereby granted").

ENDNOTES

1. See Appendix A for an overview of CPLR Article 9 from its enactment in 1975 to 2011.
2. *Osarczuk v. Associated Universities, Inc.*, 26 Misc. 3d 1209(A) (Suffolk Sup. 2009). *Compare*: *Suffolk County Water Authority v. Dow Chemical Company*, 30 Misc. 3d 1202(A) (Suffolk Sup. 2010) (not a class action; alleged PCE contamination in over 150 County wells);
3. *Osarczuk v. Associated Universities, Inc.*, 82 A.D. 3d 853, 918 N.Y.S. 2d 538 (2d Dept. 2011). See also: *Nicholson v. KeySpan Corp.* 65 A.D. 3d 1025, 885 N.Y.S. 2d 106 (2d Dept. 2009) (mass tort; soil contamination; certification denied; plaintiffs summary judgment motion on strict liability cause of action denied because "failed to proffer evidence that any of the defendants had engaged in an abnormally dangerous activity").
4. *DeLuca v. Tonawanda Coke Corp.*, 2011 WL 3799985 (W.D.N.Y. 2011).
5. *Dickerson, New York State Class Actions: Make It Work-Fulfill The Promise*, 74.2 Albany LR 711 (2010/2011) ("This article identifies what types of class actions are presently certifiable and what types of class actions are not, but should be, given the broad legislative history of CPLR Article 9, and the needs of New York State residents").
6. *Springer v. State of New York*, #2008-009-023, Claim No. 111361 J. Midey, Jr., Decision dated September 29, 2008 (Ct. Cl. 2008).
7. *Arroyo v. State of New York*, 12 Misc. 3d 1197(A), 824 N.Y.S. 2d 767 (N.Y. Ct. Cl. 2006) (certification of class of Spraypark patrons alleging that State was negligent in failing "to adequately maintain or monitor the sanitary conditions of the Spraypark water" which "was contaminated with cryptosporidium, a highly contagious waterborne parasite (causing) abdominal cramping, diarrhea, nausea, vomiting, dehydration, fatigue, fever and loss of appetite").

8. Partridge v. State of New York, #2000-013-002, Claim No. 90710, J. Patti, Decision May 31, 2000 (N.Y. Ct. Cl. 2000).
9. Weaver v. State, 82 A.D. 3d 878, 918 N.Y.S. 2d 192 (2d Dept. 2011) (no class action claims allowed in Court of Claims), aff'g #2009-010-054, Claim No. 115531, J. Ruderman, Decision of January 14, 2010 (Ct. Cl. 2010).
10. Flemming v. Barnwell Nursing Home and Health Facilities, Inc., 15 N.Y. 3d 375, 938 NE. 2d 937 (2010). For further discussion of the need to compensate objectors counsel see Dickerson & Manning, Rulings in 2010 in Class Actions Under CPLR Article 9, N.Y.L.J., 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).
11. Graves v. Doar, 87 A.D. 3d 744, 928 N.Y.S. 2d 771 (2d Dept. 2011).
12. AT&T Mobility LL v. Concepcion, 131 S. Ct. 1740 (April 27, 2011).
13. Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal Rptr 3d 76 (2005).
14. Stolt-Nielsen, S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010).
15. See e.g., Medina v. Sonic-Denver T, Inc., 2011 WL 915780 (Colo. App. 2011); McKenzie v. Betts, 55 So. 3d 615 (Fla. App. 2011); Feeney v. Dell, Inc., 2011 WL 5127806 (Mass. Super. 2011); Picardi v. Eighth Judicial District Court, 251 P. 3d 723 (2011); Herron v. Century BMW, 2011 WL 6347845 (S.C. Sup. 2011); State ex rel. Richmond American Homes of West Virginia v. Sanders, 2011 WL 5903509 (W. Va. 2011). See also: NLRB Decision January 3, 2012 in D.R. Horton, Inc. And Michael Cuda, Case 12-CA-25764 prohibits employers from "(b) Maintaining a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial".
16. JetBlue Airways Corp. V. Stephenson, 88 A.D. 3d 567, 931 N.Y.S. 2d 284 (1st Dept. 2011).
17. Cheng v. Oxford Health Plans, Inc., 84 A.D. 3d 673, 923 N.Y.S. 2d 533 (1st Dept. 2011). See also: Cheng v. Oxford Health Plans, Inc., 2009 WL 3704354 (N.Y. Sup. 2009); Cheng v. Oxford Health Plans, Inc. 45 A.D. 3d 356 (1st Dept. 2007).

18. Frankel v. Citicorp Insurance Services, Inc., 80 A.D. 3d 280, 913 N.Y.S. 2d 254 (2d Dept. 2010). See generally Scott v. Cingular Wireless, 160 Wash. 2d 843 (Wash. Sup. En Banc 2007)).
19. Smilewicz v. Sears Roebuck Company, 82 A.D. 3d 744, 917 N.Y.S. 2d 904 (2d Dept. 2011), aff'g Index No. 17525/07, J. Pfau, Decision dated November 24, 2009 (Kings Sup. 2009). See also: Baker v. Burlington Coat Factory Warehouse, 175 Misc. 2d 951, 673 N.Y.S. 2d 281 (Yks. Cty. Ct. 1998) (defective fake fur; no cash, no refund return policy violates GBL § 349).
20. Hurrell-Harring v. State, 81 A.D. 3d 69, 914 N.Y.S. 2d 367 (3d Dept. 2011).
21. Lucker v. Bayside Cemetary, 33 Misc. 3d 1203(A) (N.Y. Sup. 2011).
22. See e.g., City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y. 3d 616, 883 N.Y.S. 2d 772 (2009) (derivative claims may not be asserted under GBL 349). See also: Dickerson, Chapter 98 Consumer Protection, Commercial Litigation In New York State Courts, 3d, Robert L. Haig, Ed., West (2010), Supp. (2012).
23. Ellington v. EMI Music, Inc., 33 Misc. 3d 1209(A) (N.Y. Sup. 2011).
24. Globe Surgical Supply v. Allstate Insurance Co., 31 Misc. 3d 1227(A) (N.Y. Sup. 2011).