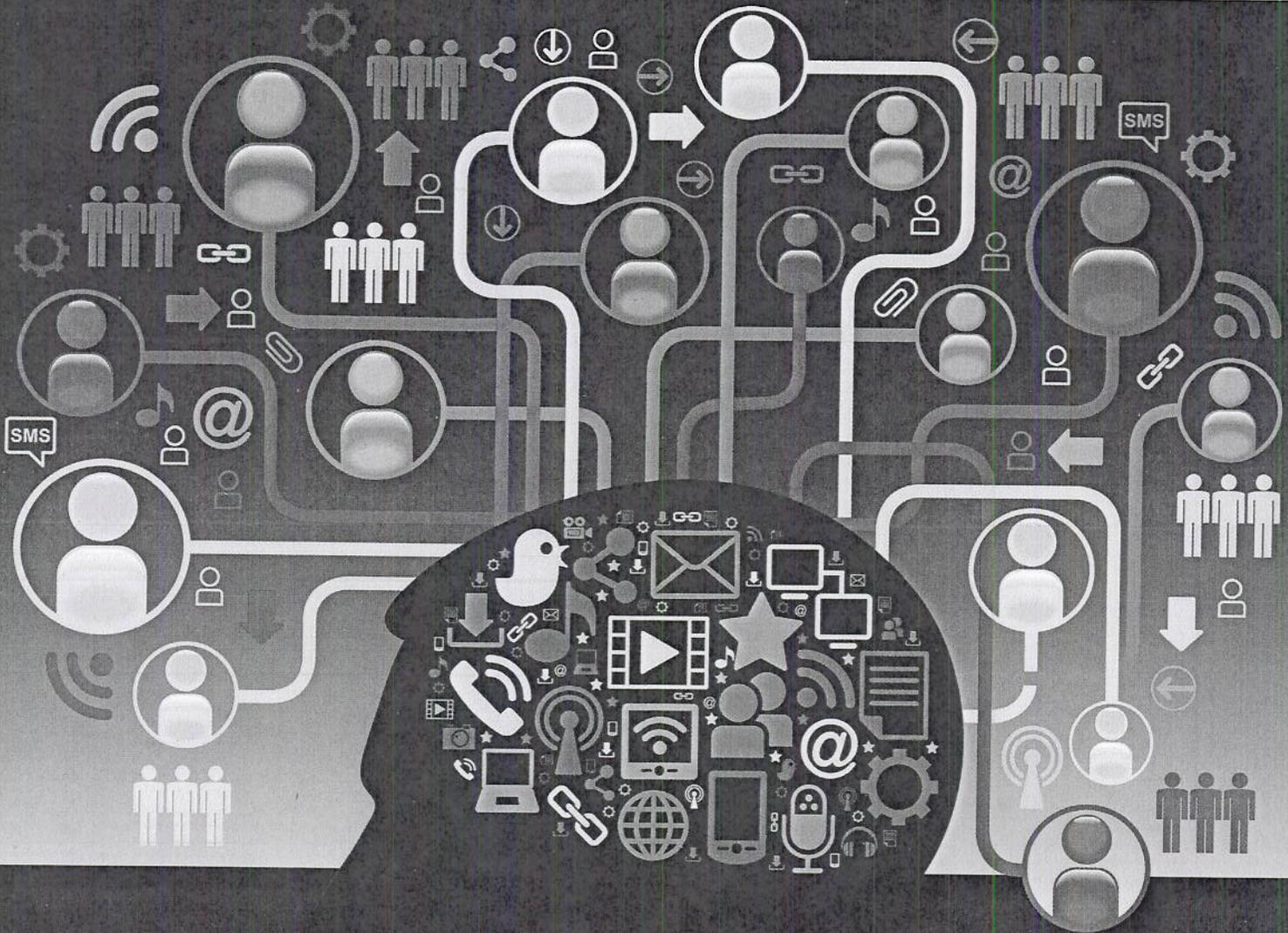


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Journal



Researching Jurors on the Internet— Ethical Implications

By Robert B. Gibson and Jesse D. Capell

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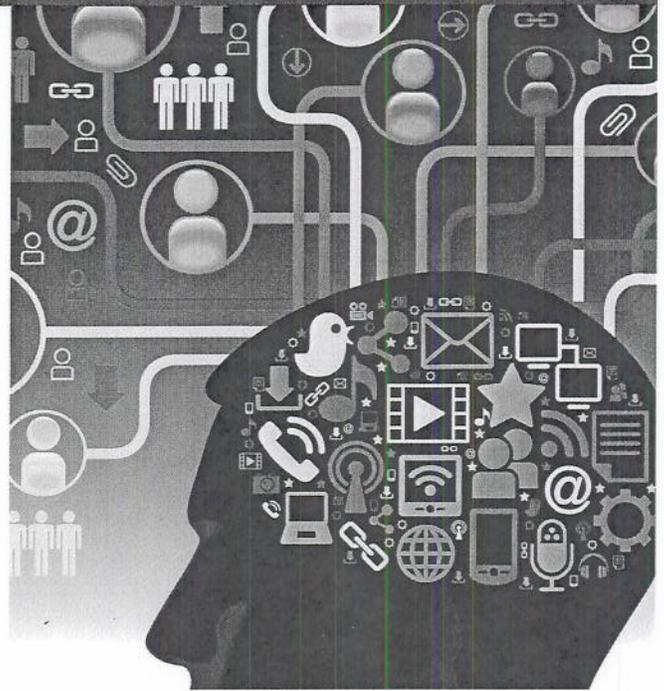
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THOMAS A. DICKERSON, DANIEL D. ANGIOLILLO, JOHN M. LEVENTHAL, CHERYL E. CHAMBERS, and JEFFREY A. COHEN are Associate Justices of the Appellate Division, Second Department, of the New York State Supreme Court and have co-authored several articles on New York State consumer law. In addition, Justice Dickerson is the author of *Class Actions: The Law of 50 States*, Law Journal Press, 2012; *Travel Law*, Law Journal Press, 2012; Article 9 [New York State Class Actions] of Weinstein, Korn & Miller, *New York Civil Practice CPLR*, Lexis-Nexis (MB), 2012; *Consumer Protection* Chapter 98 in *Commercial Litigation in New York State Courts: Third Edition* (Robert L. Haig, ed.) (West & NYCLA 2012); Dickerson, Gould & Chalos, *Litigating Foreign Torts in U.S. Courts*, Thomson-Reuters (West) scheduled for publication in 2012, and over 300 articles and papers on consumer law, class actions, travel law and tax certiorari issues, many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml.

New York State Consumer Law and Class Actions: 2011–2012

By Justices Thomas A. Dickerson, Daniel D. Angiolillo, John M. Leventhal, Cheryl E. Chambers and Jeffrey A. Cohen

Recently, New York courts have ruled on a variety of important consumer law issues involving health clubs and defibrillators, gift cards and federal preemption, tenants and an implied covenant for attorney fees, Lien Law article 3-A and the liability of the principals of home improvement contractors, and notice and standing requirements in residential foreclosure actions. In addition, the Court of Appeals clarified the scope of General Business Law (GBL) § 350 (false advertising), broadening its availability in consumer class actions while the U.S. Supreme Court sought to narrow the availability of class-wide remedies by enforcing class arbitration waivers in consumer contracts.

Health Clubs and AEDs

If you exercise in a health club within the jurisdiction of the Second Department,¹ the health clubs which are governed by GBL § 627-a are now not only required to have an operable automated external defibrillator device (AED) and a person trained in its use *but also have an*

affirmative duty to actually use this life-saving device upon a club member in apparent cardiac distress. In *Miglino v. Bally Total Fitness of Greater New York*,² the Second Department noted that

[t]he risk of heart attacks following strenuous exercise is well recognized, and it has also been documented that the use of AED devices in such instances can be particularly effective if defibrillation is administered in the first few minutes after the cardiac episode commences . . . “Sudden cardiac arrest is a major unresolved health problem. Each year, it strikes more than 350,000 Americans. . . . More than 95% of these people die because life-saving defibrillators arrive on the scene too late, if at all.”

The *Miglino* court held that GBL § 627-a “imposes an inherent duty to make use of the statutorily required AED” and, further, that such a duty was assumed at common law because the defendant’s employee “was trained in the use of the AED [and] his failure to use the device was tantamount to not acting carefully.”³ Prior

to *Miglino*, there had been several cases addressing the duties of health clubs, in New York and elsewhere, to have AEDs available, along with employees trained in their use, and to use the AED in a responsible manner when needed. These issues were recently explored in *Digiulio v. Gran, Inc.*,⁴ where the First Department rejected the “argument that [GBL § 627-a] implicitly obligated the club to use its AED,” finding that “[w]hile the statute explicitly requires health clubs to have AEDs and people trained to operate them on their premises, it is silent as to the clubs’ duty, if any, to use the devices.”⁵ Although the Court of Appeals affirmed, it did so leaving “open the question of whether GBL § 627-a creates a duty upon a health club to use the AED which it is required to provide.”⁶

recover attorney fees as the prevailing party. As noted by the court,

we are called upon to determine whether (a paragraph) of the parties’ lease gives rise to the implied covenant in the tenant’s favor pursuant to (Real Property Law § 234). . . . The implication of a covenant in favor of the tenant here is consistent with the Legislature’s remedial purpose of effecting mutuality in landlord-tenant litigation and helping to deter frivolous and harassing litigation by landlords who wish to evict tenants.

Lien Law Article 3-A

In *Ippolito v. TJC Development, LLC*,¹² homeowners who terminated a home improvement contract were awarded \$121,155.32 by an arbitrator and commenced a

Health clubs are now not only required to have an operable AED and a person trained in its use *but also have an affirmative duty to actually use it* upon a club member in apparent cardiac distress.

Gift Cards and Preemption

New York consumers have been vigorously challenging the fees imposed by the issuers of gift cards. For example, in *Lonner v. Simon Property Group, Inc.*⁷ 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 (1) breach of contract, (2) violation of GBL § 349 and (3) unjust enrichment. Within the context of the defendant’s motion to dismiss the amended complaint, the Court found that the *Lonner* plaintiff 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. The struggle between gift card issuers (a multi-billion dollar business) and cooperating banks and consumers has shifted to whether or not actions (which rely upon the common law and violations of salutary consumer protection statutes such as GBL §§ 349, 396-I and CPLR 4544) are preempted by federal law.⁸ This issue seemingly was resolved earlier in *Goldman v. Simon Property Group, Inc.*⁹ Very recently, however, the Appellate Division, Second Department, in *Sharabani v. Simon Property Group, Inc.*,¹⁰ a gift card class action challenging the imposition of a \$15 renewal fee on expired gift cards as a deceptive business practice, found that GBL § 349 is not preempted by the Home Owners’ Loan Act (HOLA) or the Office of Thrift Supervision (OTS) regulations.

Tenant May Recover Attorney Fees and Costs

In *Casamento v. Juaregui*,¹¹ the Appellate Division, Second Department, held that a lease providing for payment of the landlord’s attorney fees in an action against a tenant triggered an implied covenant in the tenant’s favor to

Lien Law article 3-A class action against the contractor TJC Development, LLC (TJC) and its two principals. The plaintiffs’ 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 court 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.

Foreclosures and Standing

In two first impression mortgage foreclosure cases, the Appellate Division, Second Department, clarified the notice requirements of Real Property Actions & Proceedings Law § 1304 (RPAPL) 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 mortgage[s].”¹³ In *Bank of New York v. Silverberg*,¹⁴ the court noted the Court of Appeals’s decision in *MERSCORP, Inc. v. Romaine*¹⁵ (“whether MERS has standing to prosecute a foreclosure action remained for another day”) and that MERS “purportedly holds approximately 60 million mortgage loans and is involved in the origination of approximately 60% of all mortgage loans in the United States.”¹⁶ The court distinguished *Mortgage Electronic Registration Systems, Inc. v. Coakley*¹⁷ 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."¹⁸ The court further declared that "the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property."¹⁹

And in *Aurora Loan Services, LLC v. Weisblum*,²⁰ 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 the plaintiff had failed to comply with the notice requirements of RPAPL § 1304 and provide defaulting borrowers 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."²¹

New York Class Actions Reinvigorated

The receptivity of New York courts in making the class action device readily available to consumers, amongst other groups, as set forth in the legislative history,²² has been problematic. As noted in *New York State Class Actions: Make It Work – Fulfill the Promise*,²³ "[n]otwithstanding the broad language in the legislative history of CPLR Article 9, New York courts have not implemented this salutary statute as broadly as they might have. As a remedial vehicle, CPLR Article 9 is operating at approximately forty percent of its intended potential."²⁴

Game Changer

In *Koch v. Acker, Merrall & Condit Co.*,²⁵ the Court of Appeals has, *inter alia*, clarified that justifiable reliance is not an element of a GBL § 350 claim (false advertising). In *Koch*, the plaintiff alleged that the defendant auction house offered certain wines for sale after having conducted a careful inspection of the wines to verify that they were genuine.²⁶ The defendant allegedly described its wines as "extraordinary," "absolutely stunning," "superlative," "incredible," and among the "greatest wines . . . ever experienced." Tucked away in the defendant's extensive April 2005 and January 2006 catalogs was an "as is" disclaimer.²⁷ The plaintiff alleged that certain wines purchased were counterfeit. In the action, the plaintiff asserted that the defendant misrepresented the authenticity of the wines, and that the defendant's inspection protocols were false or materially misleading.

The defendant sought dismissal on the grounds that the "as is" disclaimer barred the GBL §§ 349 and 350 claims.

The Court of Appeals held that to assert GBL §§ 349 and 350 claims, a consumer "must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice."²⁸ The Court found that the plaintiff sufficiently pled such causes of action, and that the disclaimers in the defendant's brochures "do not . . . bar [the plaintiff's] claims for deceptive trade practices at this stage of the proceedings, as they do not establish a defense as a matter of law."²⁹

GBL § 350 and Reliance

Equally important was the Court's finding that "[t]o the extent that the Appellate Division order imposed a reliance requirement on [GBL §§ 349 and 350] claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim."³⁰ The Court of Appeals's determination in this regard is in conformity with the language of both statutes, but appears to overrule a line of Appellate Division cases dating to 1982.³¹ It should be noted that the Court of Appeals previously had not expressly ruled on whether claims pursuant to GBL § 350 include a reliance requirement. The Court had stated, however, that "[t]he standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349." Nonetheless, with *Koch*, the Court of Appeals has now made expressly clear that justifiable reliance is no more an element of a GBL § 350 cause of action than it is an element of a GBL § 349 claim.³²

GBL § 350 Class Actions Now Available

In addition to making GBL § 350 more accessible to injured consumers, the *Koch* decision is equally important for classes of consumers seeking to utilize not only GBL § 349 but GBL § 350.³³ While consumer class actions alleging violations of GBL § 349 are generally certifiable,³⁴ the courts have previously declined to certify GBL § 350 class actions, finding that reliance is not subject to class-wide proof.

Class Action and Class Arbitration Waivers

A particularly disconcerting development for consumers, however, has been the enforcement of class action waivers and class arbitration waivers in consumer contracts. In that regard, the U.S. Supreme Court rendered two important consumer law decisions which address the enforceability of contractual clauses prohibiting class actions and class arbitration: *AT&T Mobility LLC v. Concepcion*,³⁵ abrogating *Discover Bank v. Superior Court*;³⁶ and *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*³⁷ In *Concepcion*, the Supreme Court, by a 5 to 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.”³⁸ Significantly, § 2 of the FAA contains a

The receptivity of New York courts in making the class action device readily available has been problematic.

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.”³⁹ Relying on its recent decision in *Stolt-Nielsen*, in which it held that “an arbitration panel exceeded its powers under § 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.”⁴⁰

Reaction to *Concepcion*

The reaction of several state⁴¹ and federal⁴² courts – including those in New York – has been interesting. For example, in denying en banc review in *American Express Merchant’s Litigation*⁴³ the Second Circuit held that “*Amex III* strives to give full effect to the Supreme Court’s teachings that where a contractual agreement functions ‘as a prospective waiver of a party’s right to pursue statutory remedies’ then the contractual agreement may not be enforced.”

New York state courts have also reacted to *Concepcion*. For example, *Gomez v. Brill Securities, Inc.*⁴⁴ concerned a class of employees who sought to recover for overtime wages (violation of 12 N.Y.C.R.R. § 142-2.2), impermissible wage deductions (violation of Labor Law §§ 193, 198-b) and wages and commissions as agreed (violation of Labor Law § 191). The court denied a motion to compel arbitration because

the agreement to arbitrate, by its very terms, clearly precludes arbitration when arbitrable claims are brought as a class action . . . the agreement between the parties makes it exceedingly clear that arbitration shall be governed by the rules promulgated by FINRA . . . rule 13204(d) prohibits arbitration of class actions. . . . Contrary to defendants’ contention . . . *Concepcion* (does not) warrant reversal of the motion court’s

decision and compulsion to arbitrate . . . (which is) inapposite since in that case the Court, reiterating that an agreement to arbitrate must be enforced as written, simply held that such an agreement, freely entered into, cannot be vitiated by a state law deeming unconscionable the preclusion of a right antithetical to the goals of arbitration as envisioned by the FAA.⁴⁵

In *JetBlue Airways Corp. v. Stephenson*,⁴⁶ 728 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 the 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.*,⁴⁷ the Appellate Division, First Department, held that an arbitration panel’s determination that an arbitration in that case 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.*,⁴⁸ 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 the plaintiff. In remitting, the Appellate Division, Second Department, noted that “[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 plaintiff’s 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.” ■

1. The Court rejected the reasoning of the First Department case of *Digiulio v. Gran, Inc.*, 74 A.D.3d 450 (1st Dep’t), *lv. granted*, 16 N.Y.3d 701, *order aff’d*, 17 N.Y.3d 765, *reargument denied*, 17 N.Y.3d 881 (2011) which found no such duty under either GBL § 627-a or the common law.

2. 92 A.D.3d 148, 155–56 (2d Dep’t 2011).

3. *Id.* at 158–60.

4. *Digiulio*, 74 A.D.3d 450.

5. *Id.* at 453.

6. *Miglino*, 92 A.D.3d 148.

7. 57 A.D.3d 100 (2d Dep’t 2008); see also *Sims v. First Consumers Nat’l Bank*, 303 A.D.2d 288, 289 (1st Dep’t 2003).

8. See, e.g., *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007); *McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132 (E.D.N.Y. 2009).
9. 31 A.D.3d 382, 383 (2d Dep't 2006).
10. 942 N.Y.S.2d 551 (2d Dep't 2012).
11. 88 A.D.3d 345 (2d Dep't 2011).
12. 83 A.D.3d 57 (2d Dep't 2011); see also *Stern v. DiMarzo, Inc.*, 77 A.D.3d 730 (2d Dep't 2010).
13. *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 278 (2d Dep't 2011).
14. *Id.*
15. 8 N.Y.3d 90 (2006).
16. *Silverberg*, 86 A.D.3d at 283.
17. 41 A.D.3d 674 (2d Dep't 2010).
18. *Silverberg*, 86 A.D.3d at 279-83.
19. *Id.* at 283.
20. 85 A.D.3d 95, 109 (2d Dep't 2011); see also Daniel Wise, *Lenders Must 'Strictly Comply' With Foreclosure Notice Rules*, N.Y.L.J., May, 24, 2011, p. 1.
21. *Aurora Loan Servs.*, 85 A.D.3d 95.
22. In recommending passage then Assembly Majority Leader Stanley Fink stated that "[i]n its present form the Statute fails to accommodate pressing needs for an effective, flexible and balanced group remedy in vital areas of social concern, such as claims arising from exposure of numerous persons to environmental offenses, violation of consumer interests, invasion of civil rights, execution of adhesion contracts and many other collective activities reaching virtually every phase of human life. While the substantive law applicable in these areas may be generally adequate, there exists no workable remedy when neither relief on an individual basis nor actual joinder of the class is economically feasible" (A. 1252-B, L. 1975 ch. 207, reprinted in 1975 N.Y. State Legislative Annual 9 (N.Y. Legislative Serv., Inc. 1975)).
23. Thomas A. Dickerson, *New York State Class Actions: Make It Work – Fulfill the Promise*, 74 Alb. L. Rev. 711 (2010-2011).
24. *Id.* p. 715.
25. *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940 (2012).
26. ROA 63, 195-197, 208.
27. See *Koch v. Acker, Merrall & Condit Co.*, 73 A.D.3d 661, 661 (1st Dep't 2010), *rev'd*, 18 N.Y.3d 940 (2012). ("The 'Conditions of Sale/Purchaser's Agreement' included in each of defendant's auction catalogues contains an 'as is' provision alerting prospective purchasers that defendant 'makes no express or implied representation, warranty, or guarantee regarding the origin, physical condition, quality, rarity, authenticity, value or estimated value of [the wine],' that any statements made by defendant were 'opinion only, and shall not be relied upon by any bidder,' and that '[p]rospective bidders must satisfy themselves by inspection or other means as to all considerations pertinent to any decision to place any bid.'").
28. *Koch*, 18 N.Y.3d 940, 941 (quoting *City of N.Y. v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621 (2009)).
29. *Id.* (quoting *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 (2002)).
30. *Id.*
31. See *Dank v. Sears Holding Mgmt. Corp.*, 93 A.D.3d 627 (2d Dep't 2012); *Morrissey v. Nextel Partners, Inc.*, 72 A.D.3d 209, 217 (3d Dep't 2010); *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 72 (2d Dep't 2006); *Gale v. Int'l Bus. Mach. Corp.*, 9 A.D.3d 446, 447 (2d Dep't 2004); *Butler v. Caldwell & Cook*, 122 A.D.2d 559 (4th Dep't 1986) (GBL §§ 349, 350 claims dismissed "because of the failure to state facts showing that plaintiffs relied to their detriment upon deceptive practices"); *Bello v. Cablevision Sys. Corp.*, 185 A.D.2d 262 (2d Dep't 1992) (GBL §§ 349 and 350 claims dismissed "for failure to sufficiently demonstrate reliance"); *Gerson v. Hertz Corp.*, 215 AD2d 202, 203 (1st Dep't 1995) ("cause of action under General Business Law § 350 for false advertising is legally insufficient absent an allegation that he relied upon or even knew of defendant's advertising"). The error of requiring reliance in GBL §§ 349 and 350 claims can be traced to *Burns v. Volkswagen of Am., Inc.*, 118 Misc. 2d 289, 292 (Sup. Ct., Monroe Co. 1982), *aff'd*, 97 A.D.2d 977 (4th Dep't 1983) ("A necessary element of any action based upon deception is reliance" citing as authority a 1978 common law fraud (not asserting GBL §§ 349, 350 claims) class action in *Strauss v. Long Island Sports*, 60 A.D.2d 501, 506 (2d Dep't 1978)).
32. *Koch*, 18 N.Y.3d 940.
33. See Thomas A. Dickerson, *New York State Class Actions Under CPLR Article 9 in New York Civil Practice: CPLR 2006* (2006).
34. See *id.*

35. 131 S. Ct. 1740 (2011).
36. 36 Cal. 4th 148 (2005).
37. 130 S. Ct. 1758 (2010); see also *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 141 (2d Cir. 2010).
38. *Concepcion*, 131 S. Ct. at 1746).
39. 9 U.S.C. § 2.
40. *Concepcion*, 131 S. Ct. at 1750-51. Notably, in his concurring opinion in *AT&T*, Justice 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." *Concepcion*, 131 S. Ct. at 1753.
41. See, e.g., *Medina v. Sonic-Denver T, Inc.*, 252 P.3d 1216 (Colo. App. 2011); *McKenzie v. Betts*, 55 So. 3d 615 (Fla. App. 2011); *Feeney v. Dell, Inc.*, 2011 WL 5127806 (Mass. Super. Oct. 4, 2011); *Picardi v. Eighth Judicial Dist. Court*, 251 P.3d 723 (2011); *Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2010); *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 717 S.E.2d 909 (W. Va. 2011).
42. See, e.g., *Sutherland v. Ernst & Young, LLP*, 847 F. Supp. 2d 528, 535 (S.D.N.Y. 2012) ("Although the applicability of *Concepcion* . . . is a close question, the facts before this court differ significantly . . . because *Sutherland*, unlike the *Conceptions* is not able to vindicate her rights absent a collective action"); 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."
43. 681 F.3d 139, 140 (2d Cir. 2012); cf. *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) (FAA preempted Washington state law invalidating class action waiver as unconscionable).
44. 95 A.D.3d 32 (1st Dep't 2012).
45. *Id.* at 36-38.
46. 88 A.D.3d 567, 568, 574 (1st Dep't 2011).
47. 84 A.D.3d 673, 675 (1st Dep't 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 Dep't 2007).
48. 80 A.D.3d 280, 290, 291 (2d Dep't 2010); see generally *Scott v. Cingular Wireless*, 160 Wash. 2d 843 (Wash. Sup. 2007).

