

SUMMARY OF NEW YORK STATE CONSUMER LAW 2010-2012

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Consumer Law 2010

In 2010 the area of consumer protection law underwent a number of developments including the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, “ the most important change in consumer protection law since the late 1960s was signed into law on July 21, 2010.”¹

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Backdating

It is disappointing, indeed, to discover that some "consumer oriented" big box facilities may be taking advantage of their customers. In *Argento v Wal-Mart Stores, Inc.*,² the court granted certification to a class of customers who alleged that defendant violated GBL § 349 by routinely backdating renewal memberships at Sam's Club stores. " [A]s a result of the backdating policy, members who renew after the date upon which their one-year membership terms expire are nevertheless required to pay the full annual fee for less than a full year of membership." Defendant admitted that Sam's Club had received \$940 million in membership fees in 2006.³

Slack Fill

In *Waldman v New Chapter, Inc.*,⁴ the Court found that the packaging of a retail product violated GBL § 349. " In 2009, [p]laintiff purchased a box of Berry Green, a ' Spoonable Whole-Food '...Berry Green comes in a box that is 6 5/8 inches tall...The box contains a jar that is 5 5/8 inches tall...And the jar itself is only half-filled with the product...[GBL § 349

claim stated in that] defendant's packaging is 'misleading' for purposes of this motion...Plaintiff alleges that [the] packaging 'gives the false impression that the consumer is buying more than they are actually receiving;' and thus sufficiently pleads that the packaging was 'misleading in a material way'" under a slack fill theory. In addition, the court found that plaintiffs also stated a claim for violation of GBL § 350. " As an initial matter [GBL § 350] expressly defines 'advertisement' to include 'labeling'. Thus the statute includes claims made on a product's package. In addition...excessive slack fill states a claim for false advertising"⁵.

Insurance Claims

In *Wilner v. Allstate Insurance Company*,⁶ insured homeowners suffered property damage as a result of a storm which caused a hillside to collapse. The court sustained the plaintiffs' GBL § 349 claim including a request for punitive damages and attorneys fees. Plaintiffs alleged that the "defendant purposely failed to reach a decision on the merits of their insurance claim in order to force the plaintiffs to bring suit against the Village before the statute of limitations expired, because, if they did not do

so, the defendant could refuse reimbursement of the claim on the ground that the plaintiffs had failed to protect the defendant's subrogation rights... Presumably, the purpose of this alleged conduct would be to save the defendant money; if the plaintiffs initiate the suit, the plaintiffs have to pay for it, whereas if the defendant initiates its own suit, the cost will fall upon the defendant". The Court found that "the plaintiffs have successfully pleaded conduct on the part of the defendant which was misleading in a material way" and that "the plaintiffs' belief as to their responsibilities under the contract of insurance is a question of fact".

More Tiny Print

In *Pludeman v Northern Leasing Systems, Inc.*,⁷ a class of small business owners who had entered into lease agreements for POS [Point Of Sale] terminals asserted that defendant used "deceptive practices, hid material and onerous lease terms. According to plaintiffs, defendants' sales representatives presented them with what appeared to be a one-page contract on a clip board, thereby concealing three other pages below...among

such concealed items...[were a] no cancellation clause and no warranties clause, absolute liability for insurance obligations, a late charge clause, and provision for attorneys' fees and New York as the chosen forum"; all of which were in "small print" or "microprint". The Appellate Division, First Department certified the class⁸ noting that, "liability could turn on a single issue. Central to the breach of contract claim is whether it is possible to construe the first page of the lease as a complete contract... Resolution of this issue does not require individualized proof." Subsequently, the trial court awarded the plaintiff class partial summary judgment on liability on the breach of contract/overcharge claims⁹.

Cy Pres Settlement

In *Fiala v Metropolitan Life Ins. Co., Inc.*¹⁰ and a related federal class action¹¹, the trial court approved a proposed settlement providing for a total payment of \$50 million to resolve both federal and state cases. Of particular interest was \$2.5 million allocated for cy pres distribution to The Foundation for the National Institutes of Health which "will allocate the

funds to national, health-related research projects". Noting that "[t]here is little New York law¹² applying the cy pres rule to class action settlements...there is no prohibition against employing this well-recognized doctrine, oft applied by the federal courts...Many of the non-closed-block class members would have to be located at great expense [which] would have greatly depleted the \$2.5 million and left these class members with little benefit." In addition, the court approved of the payment of \$25,000 for objector's counsel fees and incentive awards "ranging from \$1,000 to \$1,500" to class representatives. "This award, the court believes, will encourage class representatives to bring needed class actions without worry that their expenses will not be covered."

Bonus Minutes

In *Morrissey v Nextel Partners, Inc.*,¹³ consumers entered into contracts with defendant "for the purchase of a 'bonus minutes' promotional rate plan...Plaintiffs were also required to enroll in defendant's 'Spending Limit Program' which imposed a monthly fee for each phone based on their credit rating ...

Plaintiffs...alleged that defendant's notification of the increased Spending Limit Program maintenance fee, which was buried within a section of the customer billing statement... constitutes a deceptive practice." In granting certification to the Spending Limit sub-class on the GBL § 349 claim only, the court noted the plaintiffs' allegation "that the small typeface and inconspicuous location of the spending limit fee increase disclosures were deceptive and misleading in a material way" citing two gift card cases¹⁴ and one credit card case¹⁵ involving inadequate disclosures.

Mortgages

In *Dowd v Alliance Mortgage Company*,¹⁶ a class of mortgagors alleged that defendant violated Real Property Law (RPL) § 274-a and GBL § 349 by charging a "'priority handling fee' in the sum of \$20, along with unspecified 'additional fees' for providing her with a mortgage note payoff statement." The Appellate Division, Second Department, granted class certification as to the RPL § 274-a and GBL § 349 claims but denied certification as to the money had and received causes of action, "since an

affirmative defense based on the voluntary payment doctrine... necessitates individual inquiries of class members.”

Excessive Mortgage Fees

In *Cohen v J.P. Morgan Chase & Co.*,¹⁷ the court held that the collection of allegedly illegal post-closing fees in violation of RESPA would be misleading under GBL § 349. “There is authority under New York law for finding that collecting an illegal fee constitutes a deceptive business conduct...If it is found that collection of the post-closing fee was in fact illegal under RESPA, then [the] first element of § 349 is established”.

Inverse Condemnation

Not since the 1980's case of *Loretto v Teleprompter Manhattan CATV Corp.*,¹⁸ have the courts been called upon to address the equities of the use of private property in New York City by telecommunication companies for the allegedly uncompensated placement of terminal boxes, cables and other hardware. In *Corsello v Verizon New York, Inc.*,¹⁹ property owners

challenged defendant's use of "inside-block cable architecture" instead of "pole-mounted aerial terminal architecture" often turning privately owned buildings into "community telephone pole(s)". On a motion to dismiss, the Appellate Division, Second Department held that an inverse condemnation claim was stated noting that the allegations "are sufficient to describe a permanent physical occupation of the plaintiffs' property". The court also found that a GBL § 349 claim was stated for "[t]he alleged deceptive practices committed by Verizon...of an omission and a misrepresentation; the former is based on Verizon's purported failure to inform the plaintiffs that they were entitled to compensation for the taking of a portion of their property, while the latter is based on Verizon's purported misrepresentation to the plaintiffs that they were obligated to accede to its request to attach its equipment to their building, without any compensation, as a condition to the provision of service". The court also found that although the inverse condemnation claim was time barred, the GBL § 349 claim was not ["A 'defendant may be estopped to plead the Statute of Limitations...where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely

action'"]. The court also denied class certification²⁰ finding the proposed class definition overbroad, indicating that there was an absence of predominating questions of law or fact and atypicality.

Dating Services

In *Robinson v Together Member Serv.*,²¹ the court awarded the consumer the full contract price of \$2,000 paid a dating service. "The agreement entered into between the parties does not comply [GBL § 394-c]. Specifically...plaintiff paid a membership fee in excess of the allowable amount...[for] services to be provided to her [which] were open-ended as opposed to having a two-year period. While plaintiff was told she would get five referrals, the number of referrals was not to be provided to her on a monthly basis, as required...since Together did not provide a specified number of referrals monthly, the maximum allowable charge was \$25. Clearly, plaintiff was grossly overcharged."

Consumer Law 2011

There have been several exciting developments involving mandatory arbitration clauses and class action and class arbitration waivers, the standing of MERS 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.

Standing MERS On Its Head

In two first impression mortgage foreclosure cases the Appellate Division, 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’.²² In *Bank of New York v Silverberg*,²³ the court, noting the Court of Appeals’ decision in *Matters of MERSCORP, Inc. v Romaine*,²⁴ (“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", distinguishing *Mortgage Elec. Recording Sys. Inc. v Coakley*²⁵ 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." And in *Aurora Loan Services, LLC v Weisblum*,²⁶ 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.”

U.S. Supreme Court: Class Arbitration

The U.S. Supreme Court rendered two important consumer law decisions which address the enforceability of contractual clauses prohibiting class actions and class arbitration. i.e., *AT&T Mobility LLC v Concepcion*²⁷ abrogating *Discover Bank v. Superior Court*²⁸., and *Stolt-Nielsen, S.A. v AnimalFeeds International Corp.*²⁹ In *Concepcion*, the United States 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". 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"³⁰ 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 by 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".³¹

Reaction To Concepcion

The reaction of several State³² and federal³³ courts including those in New York has been interesting. For example, in *Gomez v. Brill Securities, Inc.*³⁴ a class of employees sought overtime wages (violation of 12 NYCRR 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 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...*AT&T Mobility LLC v. 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". In *JetBlue Airways Corp. v Stephenson*³⁵, 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.*,³⁶ 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 *Matter of Frankel v Citicorp Insurance Services, Inc.*,³⁷ 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 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.”

Gift Cards & Preemption

The controversy 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 persists 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 issuers³⁸ (See *Lonner v Simon Property Group, Inc.*³⁹, *Llanos v Shell Oil Company*⁴⁰ and *Goldman v Simon Property Group, Inc.*⁴¹). The most recent battle is over 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) brought by New York residents against gift card issuers and cooperating banks are preempted by federal law⁴². Although this issue seemingly was resolved earlier in *Goldman*⁴³ two

recent Nassau Supreme Court decisions have taken opposite positions on the issue of federal preemption. In *L.S. v Simon Property Group, Inc.*⁴⁴, a class action challenging, *inter alia*, a renewal fee of \$15.00 imposed after a six months 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.*⁴⁵, 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*⁴⁶ and replying on *Lonner* and *Goldman* the Court denied the motion to dismiss on the grounds of federal preemption.

Appraisals & Vulnerability

In *People v First American Corp.*⁴⁷ “[t]he (AG) 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.” The court concluded that “neither federal statutes nor the regulations and guidelines implemented by the Office of Thrift Supervision preclude the Attorney General of the State of New York from pursuing [this action]...the [Attorney General also] has standing to pursue his claims pursuant to (GBL) § 349...[that] defendants 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.*⁴⁸ the court 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*,⁴⁹ a foreclosure action the Court found the loan unconscionable and a violation of GBL § 349 “because the monthly mortgage payments... were in excess of the [home owner’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*⁵⁰, homeowners terminated a home improvement contract, were awarded \$121,155.32 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 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.

Forum Selection Clauses

In *Bernstein v Wysocki*⁵¹ a camper was injured in a camp in Pennsylvania and taken to local hospital in Broom County for care. The plaintiff's lawsuit was later brought in Nassau County against camp, camp doctor and nurse as well as the doctors and nurse in hospital in Broom County. 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 [a] sufficient[ly] 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 & Low Balling

In *M.V.B. Collision, Inc. v Allstate Insurance Company*,⁵² the court 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.*,⁵³ the court sustained GBL §§ 349, 350 claims involving movers of household goods. In this action, Plaintiffs claimed 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 [were] 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*,⁵⁴ the court 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.”

Consumer Law 2012

Health Clubs & Defibrillators

If you exercise in a health club in the Second Department⁵⁵ the health clubs which are governed by General Business Law (GBL) § 627-a are now not only required to have an operable automated Defibrillators 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*,⁵⁶ the Second Department noted that “The 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 defendant's employee "was trained in the use of the AED [and] his failure to use the device was tantamount to not acting carefully".

Health Clubs And Heart Attacks

Prior to *Miglino* there have been several cases addressing the duties of health clubs, in New York and elsewhere, to have AEDs available along with trained employees and to use the AED in a responsible manner when needed. These issues were recently explored in *Digiullo v Gran, Inc.*⁵⁷ with the First Department rejecting the "argument that GBL § 627-a implicitly obligated the club to use its AED" and 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." 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."⁵⁸

Pre-GBL § 627-a Cases

Cases involving cardiac events prior to the 2005 enactment of GBL § 627-a rejected the necessity of having or using AEDs to assist distressed sports participants. In *Colon v Chelsea Piers Mgmt, Inc.*,⁵⁹ a 21 year old suffered cardiac arrest and died while playing basketball at Basketball City New York with the Court finding that the plaintiffs failed to submit admissible evidence that defendants violated industry custom by failing to provide an AED at the premises and the defendants had "no statutory duty to provide an [AED] or personnel trained in [CPR]". In *Rutnick v Colonie Center Court Club*,⁶⁰ a 47 year old died after suffering cardiac arrest while playing racquetball in a tournament. In dismissing the complaint which, inter alia, claimed that defendants "failed to have proper procedures, personnel and equipment (i.e., Defibrillators) ready to respond to medical

emergencies”, the court found that decedent, an experienced amateur racquetball player, assumed “the risk of cardiac failure”. And in *Chappill v Bally Total Fitness Corp.*⁶¹, the plaintiff “collapsed by the lat pull down machines... (suffering) tremendous brain damage.” The court in this pre-GBL 627-a case found no gross negligence or assumption of the risk, applied the Good Samaritan statute (Public Health Law § 3000-a), and found no duty to keep an AED on the premises. AEDs have been the subject of litigation in other states⁶² and involving hotels⁶³ and air carriers, both domestic⁶⁴ and foreign⁶⁵.

ENDNOTES

¹ NCLC Reports, Consumer Credit and Usury/Deceptive Practices and Warranties Editions, Vol. 29, July/August 2010. See also Morgenson, It's Not Over Until It's in the Rules, N.Y. Times Online, August 28, 2010.

² *Argento v Wal-Mart Stores, Inc.*, 66 A.D. 3d 930 (2d Dept. 2009).

³ See also *Dupler v Costco Wholesale Corporation*, 249 F.R.D. 29 (E.D.N.Y. 2008). In *Dupler* the court granted certification to a class of customers that alleged that defendant failed to properly disclose its backdating policy, wherein “ [c]ertain customers who decide to purchase a new annual membership after expiration of the old membership are provided with a term of membership less than 12 months “. The Court held that GBL § 349 covers claims based on omissions as well as actual misrepresentations.

⁴ *Waldman v New Chapter, Inc.*, 2010 WL 2076024 (E.D.N.Y. 2010).

⁵ See *Mennen Co. v Gillette Co.*, 565 F. Supp. 648, 655 (S.D.N.Y. 1983).

⁶ *Wilner v Allstate Insurance Company*, 71 A.D. 3d 155, 893 N.Y.S. 2d 208 (2d Dept. 2010).

⁷ *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y. 3d 486 (2008) (In sustaining the fraud cause of action against the individually named corporate defendants the Court of Appeals noted that "it is the language, structure and format of the deceptive Lease Form and the systematic failure by the sales people to provide each lessee a copy of the lease at the time of its execution that permits, at this early stage, an inference of fraud against the corporate officers in their individual capacities and not the sales agents").

⁸ *Pludeman v. Northern Leasing Systems, Inc.*, 74 A.D. 3d 420 (1st Dept. 2010).

⁹ *Pludeman v. Northern Leasing Systems, Inc.*, 27 Misc. 3d 1203(A) (N.Y. Sup. 2010), *reargument denied* 2010 WL 3462147 (N.Y. Sup. 2010).

¹⁰ *Fiala v. Metropolitan Life Ins. Co., Inc.*, 27 Misc 3d 599 (N.Y. Sup. 2010).

¹¹ *In re MetLife Demutualization Litigation*, 262 F.R.D. 205 (E.D.N.Y. 2009).

¹² See N. 2, *supra*; WKM at 908.07.

¹³ *Morrissey v. Nextel Partners, Inc.*, 72 A.D. 3d 209, 895 N.Y.S. 2d 580 (3d Dept. 2010).

¹⁴ *Goldman v. Simon Properties Group, Inc.*, 58 A.D. 3d 208, 869 N.Y.S. 2d 125 (2d Dept. 2008) and *Lonner v. Simon Properties Group, Inc.*, 57 A.D. 3d 100, 866 N.Y.S. 2d 239 (2d Dept. 2008).

¹⁵ *Sims v. First Consumers National Bank*, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (1st Dept. 2003).

¹⁶ *Dowd v. Alliance Mortgage Company*, 74 A.D. 3d 867 (2d Dept. 2010).

¹⁷ *Cohen v. J.P. Morgan Chase & Co.*, 608 F. Supp. 2d 330 (E.D.N.Y. 2009).

¹⁸ *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *rev'd*, 53 N.Y. 2d 124 (1981), *aff'g* 73 A.D. 2d 849 (1st Dept. 1979).

¹⁹ *Corsello v Verizon New York, Inc.*, 77 A.D. 3d 344 (2d Dept. 2010).

²⁰ *Corsello v Verizon New York, Inc.*, 76 A.D. 3d 941 (2d Dept. 2010).

- ²¹. *Robinson v Together Member Serv.*, 25 Misc. 3d 230 (N.Y. Civ. 2009).
- ²². *Bank of New York v Silverberg*, 86 A.D. 3d 274 (2d Dept. 2011).
- ²³ *Bank of New York v Silverberg*, 86 A.D. 3d 274 (2d Dept. 2011).
- ²⁴ *Matter of MERSCORP, Inc. v Romaine*, 8 N.Y. 3d 90 (Ct. App. 2006).
- ²⁵. *Mortgage Elec. Recording Sys. Inc. v Coakley*, 41 A.D. 3d 674, (2d Dept. 2010).
- ²⁶. *Aurora Loan Services, Inc. v. Weisblum*, 85 A.D. 3d 95 (2d Dept. 2011). See also Wise, Lenders Must 'Strictly Comply' With Foreclosure Notice Rules, N.Y.L.J., May, 24, 2011, p. 1..
- ²⁷. *AT&T Mobility LLC v Concepcion*, 131 S. Ct. 1740 (2010).
- ²⁸. *Discover Bank v Superior Court*, 36 Cal. 4th 148, 30 Cal Rptr 3d 76 (2005).
- ²⁹. *Stolt-Nielsen, S.A. v AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). See also: *Fensterstock v. Education Fin. Partners*, 426 FedAppx 14 (2d Cir. 2011).
- ³⁰ See 9 USC § 2.
- ³¹. 131 S. Ct. At 1750-1751. 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" (131 S. Ct. at 1753).
- ³² 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*, 387 S.C. 525, 693 S.E. 2d 394 (S.C. Sup. 2010); *State ex rel. Richmond American Homes of West Virginia v Sanders*, 2011 WL 5903509 (W. Va. 2011).
- ³³ See e.g., *Sutherland v Ernest & Young*, 2012 WL 130420 (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 *Concepcions* 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”.

³⁴ *Gomez v. Brill Securities, Inc.*, __ A.D. 3d __, 2012 NY Slip Op 01877 (1st Dept. March 15, 2012).

³⁵ *JetBlue Airways Corp. v Stephenson*, 88 A.D. 3d 567, 931 N.Y.S. 2d 284 (1st Dept. 2011).

³⁶ *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).

³⁷ *Matter of 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)).

³⁸ See *Lonner v Simon Property Group, Inc.*, 57 A.D. 3d 100, 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).

³⁹ *Lonner v Simon Property Group, Inc.*, 57 A.D. 3d 100 (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).

⁴⁰ *Llanos v Shell Oil Company*, 55 A.D. 3d 796 (2d Dept. 2008).

⁴¹ *Goldman v Simon Property Group, Inc.*, 58 A.D. 3d 208 (2d Dept. 2008).

⁴² See e.g., *SPGGC, LLC v Ayotte*, 488 F. 3d 525 (1st Cir. 2007); *McAnaney v. Astoria Financial Corp.*, 665 F. Supp. 2d 132 (E.D.N.Y. 2009).

⁴³ *Goldman v Simon Property Group, Inc.*, 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).

⁴⁴ *L.S. v Simon Property Group, Inc.*, New York Law Journal, July 21, 2010, at 26, col. 5 (N.Y. Sup.).

⁴⁵ *Sheinken v Simon Property Group, Inc.*, 33 Misc. 3d 287 (N.Y. Sup. 2011).

⁴⁶ *SPGCC, LLC v Ayotte*, 488 F. 3d 525 (1st Cir. 2007).

⁴⁷ *People v. First American Corp.*, 76 A.D. 3d 68, 902 N.Y.S. 2d 521 (1st Dept. 2010), aff'd 18 N.Y. 3d 173 (Ct. App. 2011).

⁴⁸ *Flandera v AFA America, Inc.*, 78 A.D. 3d 1639, 913 N.Y.S. 2d 441 (4th Dept. 2010).

⁴⁹. *Emigrant Mortgage Co., Inc. v Fitzpatrick*, 29 Misc. 3d 746, 906 N.Y.S. 2d 874 (N.Y. Sup. 2010).

⁵⁰ *Ippolito v TJC Development LLC*, 83 A.D. 3d 57 (2d Dept, 2011). See also: *Stern v DiMarzo, Inc.*, 77 A.D. 3d 730, 909 N.Y.S. 2d 480 (2d Dept. 2010).

⁵¹ *Bernstein v Wysocki*, 77 A.D. 3d 241, 907 N.Y.S. 2d 49 (2d Dept. 2010).

⁵². *M.V.B. Collision, Inc. v Allstate Insurance Company*, 728 F. Supp. 2d 205 (E.D.N.Y. 2010).

. *Frey v Bekins Van Lines, Inc.*, 748 F. Supp. 2d 176 (E.D.N.Y. 2010)

⁵⁴. *Chiste v Hotels.Com LP*, 756 F. Supp. 2d 382 (S.D.N.Y. 2010).

⁵⁵ The Court rejected the reasoning of the First Department case of *Digiullo v Gran, Inc.*, 74 A.D. 3d 450 (1st Dept. 2011), leave granted 16 N.Y. 3d 450 (2011), order affirmed 17 N.Y. 3d 765 (2011), reargument denied 17 N.Y. 3d 881 (2011) which found no such duty under either GBL 627-a or the common law.

⁵⁶ *Miglino v Bally Total Fitness of Greater New York, Inc.*, 2011 Slip Op 9603 (2d Dept. 2011).

⁵⁷ *Digiullo v Gran, Inc.*, 74 A.D. 3d 450 (1st Dept. 2011), leave granted 16 N.Y. 3d 701 (2011), order affirmed 17 N.Y. 3d 765 (2011), reargument denied 17 N.Y. 3d 881 (2011).

⁵⁸ *Miglino v Bally Total Fitness of Greater New York, Inc.*, 2011 Slip Op 9603 (2d Dept. 2011).

⁵⁹ *Colon v Chelsea Piers Management, Inc.*, 50 A.D. 3d 616, 855 N.Y.S. 2d 201 (2d Dept. 2008).

⁶⁰ *Rutnick v Colonie Center Court Club*, 249 A.D. 2d 873, 672 N.Y.S. 2s 451 (3d Dept. 1998).

⁶¹ *Chappill v Bally Total Fitness Corp.*, 2011 Slip Op 30246(U) (N.Y. Sup. 2011).

⁶² See e.g., *Rotolo v San Jose Sports And Entertainment*, 151 Cal. App. 4th 309 (Cal. App. 2007); *Brown v. Atlas-Kona Kai, Inc.*, 2009 Cal. App. Unpub. LEXIS 2108 (Cal. App. 2009) ("We conclude that Kona Kai's duty as operator of the health club was simply to call for help"); *Aquila v Ultimate Fitness*, 2011 Conn. Super. LEXIS 1474 (Conn. Super. 2011); *Salte v YMCA*, 814 N.E. 2d 610 (Ill. App. 2004); *Goldin v Bally Total Fitness Corp.*, 2011 Phila. Ct. Com. Pl. LEXIS 54 (Pa. Cm. Pl. 2011). See also: *Atcovitz v Gulph Mills Tennis Club, Inc.*, 571 Pa. 580 (Pa. 2002) ("the existence of a civil immunity provision for Good Samaritans who

use an AED in an emergency situation cannot impose a duty on a business establishment to acquire, maintain and use such a device on its premises");

⁶³ See e.g., *Beaudu v. Starwood Hotels and Resorts Worldwide, Inc.*, 2005 WL 1877344 (W.D. Wash. 2005) (complaint dismissed on the grounds of *forum non conveniens*); *Abramson v. The Ritz-Carlton Hotel Company, LLC*, 2011 WL 2149454 (D.N.J. 2011); See also: Nathan, Heartbreak Hotels, *The Informer/Traveler's Health*, Conde Nast Traveler January 2010, p. 47 ("Sudden cardiac arrest strikes more than 300,000 Americans annually. Only about five percent survive. 'We could save about 25,000 more people every year if AED's were more widely used'").

⁶⁴ See e.g., The FAA requires defibrillators on domestic commercial aircraft which meet certain requirements: 14 CFR 121.803(c)(4) provides: "For treatment of injuries, medical events, or minor accidents that might occur during flight time each airplane must have the following equipment that meets the specifications and requirements of appendix A of this part: In airplanes for which a flight attendant is required and with a maximum payload capacity of more than 7,500 pounds, an approved automated external Defibrillators as of April 12, 2004. See also: *Tandon v United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996) (failure to provide adequate oxygen to heart attack victim during flight); *Kemmelman v Delta Air Lines, Inc.*, 293 A.D. 2d 576 (2002) (passenger suffers heart attack; empty oxygen bottle); *Somes v United Airlines, Inc.*, 33 F. Supp. 2d 76 (D. Mass. 1999) (claim that airline failed to equip its aircraft with Defibrillators to assist passenger with cardiac arrest); *Tobin v AMR Corp.*, 637 F. Supp. 2d 406 (N.D. Texas 2009) (cardiac arrest; airline not entitled to immunity under Illinois Automated External Defibrillators Act or Good Samaritan Act).

⁶⁵ See e.g., *Aziz v. Air India Limited*, 658 F. Supp. 2d 1144 (C.D. Cal. 2009) (cardiac arrest during international flight; failure to have AED did not constitute an "event" under the Montreal Convention; complaint dismissed).