

CONSUMER PROTECTION 2009: FEDERAL, N.Y. STATUTES GUIDE

By Thomas A. Dickerson¹

[Submitted To The New York Law Journal For Publication:
This Paper May Not Be Reproduced Without The Permission Of Thomas
A. Dickerson]

Each year I update " Consumer Law: The Judge's Guide to Federal and New York State Consumer Protection Statutes " and the 2009 version will be available on the Internet soon¹.

Since last year's update the Courts in New York State, both state and federal, have dealt with a variety of consumer law issues involving Truth In Lending Act, posting of coloric content information in restaurants, arbitration clauses and class action waivers, price matching, bait advertising, mid-term price increases, giftcards, Timberpeg homes, " Topping Up " cell phone plans, Craftmans's Tools, moldy apartments, predatory lending and property flipping and improper debt collection practices.

¹Thomas A. Dickerson is an associate justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Dickerson also is the author of " Class Actions: The Law of 50 States ", Law Journal Press, 2009; " Travel Law ", Law Journal Press, 2009 and over 280 articles on consumer law, class actions, travel law and tax certiorari and eminent domain.

TILA

In People v. Applied Card Systems, Inc.² the Attorney General alleged that Cross Country Bank (CCB), a purveyor of credit cards to " consumers in the ' subprime ' credit market "... " had misrepresented the credit limits that subprime consumers could obtain and that it failed to disclose the effect that its origination and annual fees would have on the amount of initially available credit ". On respondent's motion to dismiss based upon preemption by Truth in Lending Act (TILA) the Court held that " Congress also made clear that, even when enforcing the TILA disclosure requirements, states could us their unfair and deceptive trade practices acts tp ' requir[e] or obtain[] the requirements of a specific disclosure beyond those specified...Congress only intended the (Fair Credit and Charge Card Disclosure Act) to preempt a specific set of state credit card disclosure laws, not states' general unfair trade practices acts ".

Posting Caloric Information

In New York State Restaurant Association v. New York City Board of Health³ restaurant owners challenged constitutionality of New York City Health Code Section 81.50 (" Regulation

81.50 ") which " requires certain chain restaurants that sell standardized meals to post coloric content information on their menus and on their menu boards ". The Court found that Regulation 81.50 is not preempted by the federal Nutrition, Labeling and Education Act (NELA) and is reasonably related the New York City's interest in reducing obesity. " The City submitted evidence that...people tend to underestimate the calorie content of restaurant foods...that many consumers report looking at calorie information on packaged goods and changing their purchasing habits...that, after the introduction of mandatory nutrition labeling on packaged foods, food manufacturers began to offer reformulated and ' nutritionally improved ' product- suggesting that consumer demand for such products is promoted by increased consumer awareness of the nutritional content of available food options " .

Arbitration Clauses And Class Action Waivers

In In re American Express Merchants' Litigation, a consumer anti-trust class action, the Court, noting that it frequently enforces mandatory arbitration clauses contained in commercial contracts based on " the strong federal policy in favor of arbitration " addressed the enforceability of such clauses featuring a class action waiver " that is, a provision which

forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. This is a matter of first impression in our Court...We therefore hold that the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery "4.

Deceptive Price Matching

In Dank v. Sears Holding Management Corporation⁵ the Court addressed the concept of deceptive " price matching "6. The Court stated that "The complaint alleges that Sears published a policy promising...to match the 'price on an identical branded item with the same features currently available for sale at another local retail store'. The complaint further alleges that the plaintiff requested at three different locations that Sears sell him a flat-screen television at the same price at which it was being offered by another retailer. His request was denied at the first two Sears locations on the basis that each store manager had the discretion to decide what retailers are considered local and what prices to match. Eventually he purchased the television at the third Sears at the price offered by a retailer located 12 miles from the store, but was denied the \$400 lower price offered by a

retailer located 8 miles from the store...the complaint states a cause of action under GBL 349 and 350".

Giftcards: Dormancy Fees

In three class actions consumers challenged the imposition of dormancy fees by gift card issuers⁷. Gift cards, a multi-billion business⁸, may "eliminate the headache of choosing a perfect present (but) the recipient might find some cards are a pain in the neck. Many come with enough fees and restrictions that you might be better off giving a check. Most annoying are expiration dates and maintenance or dormancy fees"⁹. In Lonner v. Simon Property Group, Inc.¹⁰ consumers challenged gift card dormancy fees of \$2.50 per month setting forth three causes of action seeking damages for breach of contract, violation of General Business Law 349 ("GBL 349") and unjust enrichment. On defendant's motion to dismiss the Court found that the Lonner plaintiffs 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. In Llanos v. Shell Oil Company¹¹, consumers challenged gift card dormancy fees of \$1.75 per month asserting breach of contract, breach of the implied covenant of good faith and fair

dealing, unjust enrichment and violation of GBL 349. On defendant's motion to dismiss the complaint as preempted by GBL 396-I and failing to state a cause of action, the Court found that the Llanos claims were not preempted by GBL 396-I and remitted the matter for consideration of the merits of each cause of action. And in Goldman v. Simon Property Group, Inc.¹², consumers also challenged dormancy fees. The Court found that there was no private right of action under GBL 396-I and that CPLR 4544 applies to business gifts which involve a consumer transaction. The Court also restored claims for injunctive relief and declaratory judgment and allowed plaintiffs to plead unjust enrichment and money had and received as alternative claims to the breach of contract cause of action. In an earlier decision the Court found that these claims were not preempted by federal law¹³.

Mid-Term Price Increases

In Emilio v. Robinson Oil Corp.¹⁴ consumers of electricity asserted breach of contract, breach of the covenant of good faith and fair dealing and violation of GBL 349 based on claims that defendant unilaterally increasing the price of electricity after they entered into fixed price contracts. On plaintiff's motion to amend the complaint the Court held that " plaintiff should also

be allowed to assert his claim under (GBL § 349) based on the allegation that the defendant unilaterally increased the price in the middle of the renewal term of the contract"). And in a recent decision¹⁵ the Court in Emilio granted class certification noting that " the extent defendant may have issued three similar contract versions at different times...nothing would prevent the Supreme Court... from establishing sub-classes based on the particular contract at issue "¹⁶.

Bait Advertising

In Cuomo v. Dell, Inc.¹⁷ the Attorney General commenced a special proceeding alleging violations of Executive Law 63(12) and GBL article 22-A involving respondent's practices " in the sale, financing and warranty servicing of computers ". On respondent's motion to dismiss the Court held that Dell's " ads offer such promotions such as free flat panel monitors...include offers of very attractive financing, such as no interest and no payments for a specified period (limited to) ` well qualified ` customers...' best qualified ` customers (but) nothing in the ads indicate what standards are used to determine whether a customer is well qualified...Petitioner's submissions indicate that as few as 7% of New York applicants qualified for some promotions...most applicants, if approved for credit, were

offered very high interest rate revolving credit accounts ranging from approximately 16% up to almost 30% interest without the prominently advertised promotional interest deferral...It is therefore determined that Dell has engaged in prominently advertising the financing promotions in order to attract prospective customers with no intention of actually providing the advertised financing to the great majority of such customers. Such conduct is deceptive and constitutes improper 'bait advertising'".

Moldy Apartments

Former tenants whose leases were terminated because of water intrusion and the development of mold commenced several class actions removed to and remanded from federal court. In Sorrentino v. ASN Roosevelt Center, LLC¹⁸, the Court held that " plaintiffs contend that the defendants continued to market and advertise their apartments, and continued to enter into new lease agreements and renew existing lease agreements even after discovering the water infiltration and mold-growth problems in the Complex without disclosing these problems to potential renters...plaintiffs allege that they have suffered both financial and physical injury as a result of the defendant's deceptive acts...the Court finds that plaintiffs have plead the

elements necessary to state a claim under GBL 349"¹⁹.

Timberpeg Homes

In DeAngelis v. Timberpeg East, Inc.²⁰ the plaintiffs purchased a " Timber Frame Home " expecting delivery of the building materials and the construction of the home on their property. They received the former but not the latter and in their complaint alleged " that Timberpeg engaged in consumer-oriented acts by representing itself, through an advertisement... as the purveyor of a 'package' of products and services necessary to provide a completed Timberpeg home...The complaint...(alleges that such language and conduct related thereto were) false and misleading in that Timberpeg was responsible for only the building supplies for Timberpeg homes...plaintiffs have stated viable causes of action under GBL 349 and 350 against defendants".

Insurance: Providing Independent Counsel

In Elacqua v. Physicians' Reciprocal Insurers²¹ (" Elacqua I ") the Court held that " when the existence of covered and

uncovered claims gives rise to a conflict of interest between and insurer and its insureds, the insured is entitled to independent counsel of his or her choosing at the expense of the insurer ". Subsequently, in *Elacqua II*²² the Court, allowing plaintiff to amend her complaint asserting a violation of GBL 349, noted that " the partial disclaimer letter sent by defendant to its insureds...failed to inform them that they had the right to select independent counsel at defendant's expense, instead misadvising that plaintiffs could retain counsel to protect their uninsured interests ' at [their] own expense '. Equally disturbing is the fact that defendant continued to send similar letters to its insureds, failing to inform them of their rights, even after this Court's pronouncement in *Elacqua I* ". The Court held that "This threat of divided loyalty and conflict of interest between the insurer and the insured is the precise evil sought to be remedied...Defendant's failure to inform plaintiffs of this right, together with plaintiffs' showing that undivided and uncompromised conflict-free representation was not provided to them, constituted harm within the meaning of (GBL) 349".

Predatory Lending And Property Flipping

In *Cruz v. HDBC Bank, N.A.*²³ the home owner stated a GBL 349 claim based on allegations that defendant " engaged in inducing

the plaintiff to accept mortgages where the payments were unaffordable to him; misrepresenting the plaintiff's income and assets, failing to disclose all the risks of the loan and concealing major defects and illegalities in the homes structure ".

Topping Up

In Ballas v. Virgin Media, Inc.²⁴ consumers charged the defendant cell phone service provider with breach of contract and a violation of GBL 349 in allegedly failing to properly reveal " the top up provisions of the pay by the minute plan " known as "Topping up (which) is a means by which a purchaser of Virgin's cell phone ("Oystr"), who pays by the minute, adds cash to their cell phone account so that they can continue to receive cell phone service. A customer may top up by (1) purchasing Top Up cell phone cards that are sold separately; (2) using a credit or debit card to pay by phone or on the Virgin Mobile USA website or (3) using the Top Up option contained on the phone ". If customers do not "top up" when advised to do so they " would be unable to send or receive calls". The Court dismissed the GBL 349 claim "because the topping-up requirements of the 18 cent per minute plan were fully revealed in the Terms of Service booklet".

Debt Collection Lawsuits

In Centurion Capital Corp. v. Druse²⁵ (plaintiff, a purchaser of credit card debt, was held to be a debt collector as defined in Administrative Code of City of New York 20-489 and because it was not licensed its claims against defendant must be dismissed. The defendant's counter-claim asserting that plaintiff violated GBL 349 by ` bringing two actions for the same claim...is sufficient to state a (GBL 349) cause of action `)].

Craftman's Tools

In Vigiletti v. Sears, Roebuck & Co.²⁶ consumers alleged that Sears marketed its Craftsman tools ` as ` Made in USA ` although components of the products were made outside the United States as many of the tools have the names of other countries, e.g., `China` or `Mexico` diesunk or engraved into various parts of the tools`. In dismissing the GBL 349 claim the Court found that plaintiffs had failed to prove actual injury [“no allegations ...that plaintiffs paid an inflated price for the tools...that tools purchased...were not made in the U.S.A. or were deceptively labeled or advertised as made in the U.S.A. or that the quality of the tools purchased were of lesser quality than tools made in the U.S.A.”], causation [“plaintiffs have failed to allege that

they saw any of these allegedly misleading statements before they purchased Craftsman tools"] and territoriality ["no allegations that any transactions occurred in New York State"].

ENDNOTES

1. See www.courts.state.ny.us/courts/ad2/justice_dickerson.shtml, www.nycourts.gov/courts/9jd/taxcertatd.shtml and www.classactionlitigation.com/library/ca_articles.html

2. People v. Applied Card Systems, Inc., 11 N.Y. 3d 105, 894 N.E. 2d 1 (2008).

3. New York State Restaurant Association v. New York City Board of Health, 2008 WL 1752455 (S.D.N.Y. 2008), aff'd 556 F. 3d 114 (2d Cir. 2009).

4. See 3 Weinstein Korn & Miller [2d Ed] New York Civil Practice, CPLR, Section 901.06[4], Lexis-Nexis (MB), 2009. See also Tsadilus v. Providian National Bank, 13 A.D. 3d 190, 786 N.Y.S. 2d 468 (1st Dept. 2004) (motion to stay class and enforce arbitration agreement enforced; " The arbitration agreement is enforceable even though it waives plaintiff's right to bring a class action "); Raneri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (1st Dept. 2003) (" given the strong public policy favoring arbitration...and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual prescription against class actions...in neither unconscionable nor violative of public policy ").

5. Dank v. Sears Holding Management Corporation, 59 AD3d 582 (2d Dept. 2009).

6. See e.g., Jay Norris, Inc., 91 F.T.C. 751 (1978) (modified 598 F. 2d 1244 (2d Cir. 1979); Commodore Corp., 85 F.T.C. 472 (1975) (consent order).

7. 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. ").

8. See Alterio, Store closings deal blow to holiday gift-card sales, The Journal News, November 27, 2008, p. 1 (" The National Retail Federation estimates that gift-card sales will dip 5% this holiday season to \$24.9 billion, down from \$26.3 billion last year ").

9. Gift-Card Gotchas, Consumer Reports, December 2006, at p. 8.

10. Lonner v. Simon Property Group, Inc., 55 A.D. 3d 100, 866 N.Y.S. 2d 239 (2d Dept. 2008). See also: Sims v First Consumers Nat'l Bank, 303 AD2d 288, 289, 750 N.Y.S. 2d 284 (1st Dept. 2003).

11. Llanos v. Shell Oil Company, 55 A.D. 3d 796, 866 N.Y.S. 2d 309 (2d Dept. 2008).

12. Goldman v. Simon Property Group, Inc., __ A.D. 3d __, 2008 WL_ 5006453 (2d Dept. 2008).

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

14. Emilio v. Robison Oil Corp., 28 A.D. 3d 418 (2d Dept. 2006).

15. Emilio v. Robison Oil Corp., 28 A.D. 3d 418 (2d Dept. 2009).

16. See also: Matter of Wilco Energy Corp., 284 AD2d 469 (2d Dept. 2001) (" Wilco solicited contracts from the public and, after entering into approximately 143 contracts, unilaterally changed their terms. This was not a private transaction occurring on a single occasion but rather, conduct which affected numerous consumers...Wilco's conduct constituted a deceptive practice. It offered a fixed-price contract and then refused to comply with its most material term-an agreed-upon price for heating oil ").

17. In Cuomo v. Dell, Inc., 21 Misc. 3d 1110(A), 873 N.Y.S. 2d 236 (Albany Sup. 2008).

18. Sorrentino v. ASN Roosevelt Center, LLC, __ F. Supp.2d __, 2008 WL 4410369 (E.D.N.Y. 2008).

19. In Sorrentino v. ASN Roosevelt Center, LLC, 588 F. Supp. 2d 350 (E.D.N.Y. 2008) and Ventimiglia v. Tishman Speyer Archstone-Snith Westbury, L.P., 588 F. Supp. 2d 329 (E.D.N.Y. 2008) the U.S. District Court remanded all of the class actions back to Nassau County Supreme Court. Earlier the Court had found that the New York Court of Appeals would recognize an independent cause of action for medical monitoring and that the plaintiffs " have stated a rational basis for exposure to a disease-causing agent and there is a rational basis for their fear of contracting the disease " .

20. DeAngelis v. Timberpeg East, Inc., 51 AD3d 1175 (3d Dept. 2008).

21. Elacqua v. Physicians' Reciprocal Insurers, 21 A.D. 3d 702 (3d Dept. 2005).

22. Elacqua v. Physicians Reciprocal Insurers 52 AD3d 886 (3d Dept. 2008).

23. Cruz v. HDBC Bank, N.A., 2008 NY Slip Op 52484(U) (N.Y. Sup. 2008).

24. Ballas v. Virgin Media, Inc., 18 Misc3d 1106, 856 N.Y.S. 2d 22 aff'd 60 A.D. 3d 712, 875 N.Y.S. 2d 523 (2d Dept. 2009).

25. Centurion Capital Corp. v. Druse, 14 Misc. 3d 564, 828 N.Y.S. 2d 851 (N.Y. Civ. 2006).

26. Vigiletti v. Sears, Roebuck & Co., Index No: 2573/05, Sup. Ct. Westchester County, J. Rudolph, Decision September 23, 2005, aff'd 42 AD3d 497 (2d Dept. 2009)