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Celebrate! The 50th Anniversary of the CPLR

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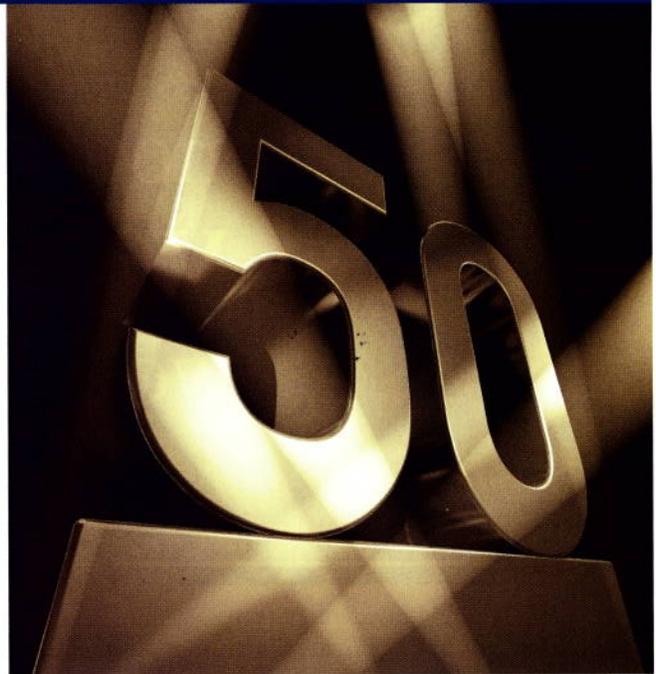
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New York State Consumer Law and Class Actions: 2012–2013

By Thomas A. Dickerson, Daniel D. Angiolillo, Cheryl E. Chambers and Leonard B. Austin

Recently, New York courts have ruled on a variety of important consumer law issues involving mortgage settlement conferences and sanctions, educational services and law school employment statistics, insurance overcharges and repair-shop steering, medical success rates and debt collections.

In addition, the Court of Appeals, the Appellate Divisions and several trial courts have continued to respond to the need for a more accessible class action statute.

Mortgage Settlement Conferences and Sanctions

In 2008, "[t]he New York State Legislature endeavored to cope with the dramatic increase in mortgage foreclosures by enacting a variety of statutes that are known, in omnibus form, as the Subprime Residential Loan and Foreclosure Laws."¹ CPLR 3408 was enacted as part of this

legislation. In November 2009, the Legislature amended the statute to, *inter alia*, mandate settlement conferences in all residential mortgage foreclosure actions in which the defendant is a resident of the property subject to foreclosure.² The amendment also, *inter alia*, added the following requirement: "Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."³ In addition, 22 N.Y.C.R.R. § 202.12-a(c)(4) directs the court to "ensure that each party fulfills its obligation to negotiate in good faith." It stands to reason that the court cannot "ensure" compliance with CPLR 3408(f) without the authority to impose some type of a sanction. Yet neither CPLR 3408(f) nor 22 N.Y.C.R.R. § 202.12-a provides sufficient guidance and as a result the courts, *inter alia*, have upon a finding of a lack of good faith, "barred them from collecting interest, legal fees, and expenses, imposed

exemplary damages against them, stayed the foreclosure proceedings, imposed a monetary sanction pursuant to 22 NYCRR part 130, dismissed the action, and vacated the judgment of foreclosure and sale and cancelled the note and mortgage.⁴ In an effort to add clarity, the Appellate Division, in *Wells Fargo Bank, N.A. v. Meyers*, noted that “it is beyond dispute that CPLR 3408 is silent as to sanctions or the remedy to be employed where a party violates its obligation to negotiate in good faith” and “the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case.”⁵

Educational Services: Working for Free

In *Apple v. Atlantic Yards Development Co., LLC*,⁶ student-trainees asserted “that in exchange for their participation in the training program, they were promised membership in a labor union and construction jobs at the Atlantic Yards construction project in Brooklyn, New York.” When they completed the program, providing two months of unpaid construction work, the promised union membership and jobs were not provided. The court found that the plaintiffs asserted a deceptive business practice covered by N.Y. General Business Law § 349 (GBL), and “[i]n addition . . . the Plaintiffs were not strictly employees in the traditional sense, but consumers of a training program offered by the Defendants. [GBL] § 349 [has been applied] to claims brought by consumers of educational or vocational training programs.”⁷

Law School Employment Statistics

Law school graduates, in *Gomez-Jimenez v. New York Law School*,⁸ alleged that their law school misrepresented post-graduation employment data and violated GBL § 349. The Appellate Division found that the plaintiffs adequately alleged consumer oriented conduct but failed to establish that the data were sufficiently deceptive or misleading. “[A]lthough there is no question that the type of employment information published by defendant (and other law schools) during the relevant period likely left some consumers with an incomplete, if not false, impression of the school’s job placement success, Supreme Court correctly held that this statistical gamesmanship, which the ABA has since repudiated in its revised disclosure guidelines, does not give rise to a cognizable claim under [GBL] § 349.”⁹

Insurance Overcharges

In *Partells v. Fidelity National Title Insurance Services*,¹⁰ (FNTIC), consumers alleged that the defendant “unlawfully overcharged them and other consumers for title insurance.” In sustaining a GBL § 349 claim, the court found “that in charging the rate that it did FNTIC implicitly represented that the rate – which, it bears repeating is set by law – was correct. . . . [I]t is not simply that FNTIC failed to disclose the correct rate, rather, it

deceived the Partells into . . . thinking the charged rate was correct. . . . [I]t is enough to conclude that a jury could find that a reasonable consumer, while closing on a mortgage, would believe that the rate he or she was charged for title insurance (to the benefit of the lender) would be the lawful rate.”¹¹

Insurance: Auto Repair Steering

In *North State Autobahn, Inc. v. Progressive Insurance Group*,¹² the court held that GBL § 349 may be used by businesses that allege deceptive practices which have an indirect impact upon consumers and, hence, are consumer oriented. The court noted,

[The] plaintiffs sufficiently alleged that they were directly injured by [Progressive’s] deceptive practices in that customers were misled into taking their vehicles . . . to competing repair shops that participated in the [Progressive’s DRP (direct repair program)]. The allegedly deceptive conduct was specifically targeted at . . . independent [auto repair] shops in an effort to wrest away customers through false and misleading statements. . . . Thus, plaintiffs adequately alleged that as a result of defendant’s misleading conduct, they suffered direct business loss of customers resulting in damages of over \$5 million.¹³

Medical Success Rates

The court, in *Gotlin ex rel. County of Richmond v. Lederman*,¹⁴ sustained a GBL § 349 claim alleging “that the defendants – in their brochures, videos, advertisements, seminars, and internet sites – deceptively marketed and advertised FSR [Fractionated Stereotactic Radiosurgery] treatment by making unrealistic claims as to its success rates . . . plaintiffs contend that defendants’ claims that FSR treatment had ‘success rates’ of greater than 90% in treating pancreatic cancer were materially deceptive.”

Debt Collections

In *Midland Funding, LLC v. Giraldo*,¹⁵ the court found that debt collection procedures involving the filing of a lawsuit without proof stated a GBL § 349 claim.

Addressing the first element – “consumer oriented” conduct – defendant’s General Business Law counterclaim is plainly sufficient . . . “the conduct complained of” at its heart involves the “routine filing” of assigned debt lawsuits by plaintiff “despite a lack of crucial, legally admissible information” or “sufficient inquiry” into whether the claims are meritorious.

[T]his court holds that deceptive conduct by a debt buyer in the course of civil litigation may violate a consumer’s legal rights under [GBL] § 349. When a debt buyer seeks the court’s aid in enforcing an assigned debt claim, the debt buyer should not

commence the action unless it can readily obtain admissible proof that would make out a prima facie case. Such proof should include evidence that it actually owns the debt, that the defendant was given notice of the assignment, and that underlying debt claim is meritorious. It commences such an action without having such readily available proof, and if it turns out that such proof is not readily available, the debt buyer may end up not only losing the case, but may also be found liable for substantial compensatory damages, punitive damages, and attorney's fees to the extent allowed by law.¹⁶

GBL § 349 may be used to allege deceptive practices which have an indirect impact upon consumers.

Positive Developments in New York Class Actions

Since the publication of *New York State Class Actions: Make It Work – Fulfill The Promise*¹⁷ (*Make It Work*) in 2010 and the Court of Appeals's game-changing decision in *Koch v. Acker, Merrall & Condit Co.*¹⁸ in 2012, there has been a noticeable change in the enthusiasm of New York courts in applying our salutary class action statute, CPLR 901-909.¹⁹

Expansive Language

In *Corsello v. Verizon New York, Inc.*,²⁰ the Court of Appeals found that the owners of a building upon which the defendant attached a box "to transmit telephone communications to and from Verizon's customers in other buildings"²¹ stated an inverse condemnation cause of action. As for class certification, the Court found that it "seems on its face well-suited to class action treatment" in that "it would be reasonable to infer that the case will be dominated by class-wide issues – whether Verizon's practice is lawful, and if not what the remedy should be" and that "expert testimony" could be used to "support an inference" of typicality.²²

Sua Sponte Certification

The Second Department, in *Globe Surgical Supply v. GEICO*,²³ a class action by medical equipment suppliers challenging denial of their claims under no fault because they exceeded so-called prevailing rates, denied certification without prejudice to reapplying for class treatment after locating an adequate class representative. In *Amer-A-Med Health Products, Inc. v. GEICO*²⁴ and *O'Brien v. GEICO*,²⁵ the trial court found a proposed intervenor to be an adequate class representative and sua sponte certified the class noting that "[i]t would be illogical and redundant for plaintiff to again bring a

further motion to demonstrate the . . . criteria set forth in 901 and 902 when the Appellate Division already ruled upon them." On appeal, the Appellate Division, Second Department approved of the concept of sua sponte class certification but remitted for the entry of a CPLR 903 order describing the certified class.²⁶

Stockbroker Overtime Claims

In *Thomas v. Meyers Associates, L.P.*,²⁷ a class of employees of a broker-dealer in the financial industry sought monetary and injunctive relief alleging defendants "'engaged in a systemic practice of failing to properly compensate stockbrokers' in violation of the New York Labor Law § 650 et seq. . . . by . . . failing to pay overtime, making unlawful deductions from paychecks, failing to pay timely and failing to pay minimum wage."²⁸ In granting certification, the court allowed the class representative to waive the statutory penalty of liquidated damages (with opt-out notice to class members) thus circumventing CPLR 901(b).²⁹ The court also noted that the "[p]laintiff and the [class] seek to vindicate rights accorded them by statute and regulation, and allegedly violated by uniform policies and practices, including . . . [defendant's] admitted failure to pay overtime." Of particular interest was the court's earlier denial of defendant's motion to compel mandatory arbitration pursuant to the rules of the Financial Industry Regulatory Authority (FINRA).³⁰

Rent Overcharges

In *Downing v. First Lenox Terrace Associates*,³¹ a class of tenants or former tenants of a residential complex alleged that the owners "unlawfully deregulated their apartments under the luxury decontrol provisions of the Rent Stabilization Law (Administrative Code of City of NY) § 26-501 et seq.) [RSL] while receiving tax incentive benefits under the City of New York's J-51 program. Plaintiffs seek . . . a declaration that all apartments in the complex are subject to rent stabilization, injunctive relief and a money judgment."³² In denying the defendant's motion to dismiss based upon CPLR 901(b) the Appellate Division, First Department expanded the application of CPLR Article 9 to allow class actions seeking actual damages consisting of rent overcharges plus interest pursuant to RSL § 26-516(a).³³

In *Casey v. Whitehouse Estates, Inc.*,³⁴ a class of tenants alleged rent overcharges and sought reimbursement. Evidently, the landlord sought to deregulate its apartments, pursuant to the luxury decontrol amendments under the RSL, and to obtain, under the J-51 program, "tax abatements and exemptions for rehabilitative work done to" its building. Allegedly the defendant landlord illegally charged market rents, violating the J-51 program.³⁵ In granting class certification, the court found that class treatment was not prohibited under CPLR 901(b) by the penalty provisions of the RSL because they could be waived³⁶ and, in any event, the penalty provisions were

not triggered because the defendant was acting in good faith. The court noted that the named plaintiffs and class members share a common goal to ensure “that the landlord charges tenants . . . no more than the maximum legal rent” and that the tenants be compensated for the rent overcharges.

County as Class Representative

Nassau County, in *County of Nassau v. Expedia, Inc.*,³⁷ sought to enforce its Hotel and Motel Tax Law and other similar taxing statutes throughout New York State on behalf of a class of 56 other local governmental agencies. “Defendants purchase blocks of rooms from hotels and motels at discounted rates and then resell the rooms to members of the public via the internet. The County alleges that the tax owed under the Hotel and Motel Tax Law is correctly calculated as a percentage of the price that occupants pay to the defendant resellers. The County further alleges that the online sellers collect the 3% hotel tax from consumers based on retail room rates but remit to the County only the portion of the tax based on defendants’ lower ‘wholesale’ rate.” In certifying the class action with Nassau County as the class representative, the trial Court relied upon the Court of Appeals’s recent decision in *Overstock.com v. Department of Taxation and Finance*³⁸ and found a predominance of common questions despite noting “that there is some variation in the tax rate among the different taxing authorities.” Accordingly, the court concluded that the “‘means and manner’ of collecting the taxes is sufficiently similar.” ■

1. See Mark C. Dillon, *Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, But Not Legislatively Perfect*, 30 Pace L Rev 855, 856 (2010).

2. CPLR 3408(a).

3. CPLR 3408(f) (emphasis added).

4. *Wells Fargo Bank, N.A. v. Meyers*, 108 A.D.3d 9, 20 (2d Dep’t 2013) (citations omitted).

5. *Id.* at 23. For subsequent cases see *Deutsche Bank Nat’l Trust Co. v. Izraelov*, 2013 WL 4799151 (Sup. Ct., N.Y. Co. 2013) (failure to negotiate in good faith; remedy: tolling of interest on note and mortgage, fees and costs); *U.S. Bank N.A. v. Shinaba*, 2013 WL 4822396 (Sup. Ct., N.Y. Co. 2013) (failure to negotiate in good faith; remedy: interest, late fees and loan modification fees barred and/or refunded; attorney fees application severed for independent review for reasonableness); *JP Morgan Chase Bank v. Butler*, 40 Misc. 3d 1205 (Sup. Ct., Kings Co. 2013) (failure to negotiate in good faith; remedy: interest, legal fees and expenses barred; hearing ordered pursuant to 22 N.Y.C.R.R. § 130-1.1 (frivolous conduct)).

6. 2012 WL 2309028, *1 (E.D.N.Y. 2012).

7. *Id.* at *5. See, e.g., *Drew v. Sylvan Learning Ctr.*, 16 Misc. 3d 836 (Civ. Ct., Kings Co. 2007); *People v. McNair*, 9 Misc. 3d 1121(A) (Sup. Ct., N.Y. Co. 2005); *Andre v. Pace Univ.*, 161 Misc. 2d 613 (Yonkers City Ct. 1994), *rev’d on other grounds*, 170 Misc. 2d 893 (App. Term, 2d Dep’t 1996); *Brown v. Hambric*, 168 Misc. 2d 502 (Yonkers City Ct. 1995); *Cambridge v. Telemarketing Concepts*, 171 Misc. 2d 796 (Yonkers City Ct. 1995).

8. 36 Misc. 3d 230 (Sup. Ct., N.Y. Co.), *aff’d*, 103 A.D.3d 13 (1st Dep’t 2012). See also *Austin v. Albany Law Sch.*, 38 Misc. 3d 988 (Sup. Ct., Albany Co. 2013) (law school graduates allege law school misrepresented post-graduate employment and salary data; complaint dismissed); *Bevelacqua v. Brooklyn Law Sch.*, 39 Misc. 3d 1216 (Sup. Ct., Kings Co. 2013) (law school graduates claim

law school misrepresented post graduate employment and salary data; GBL § 349 claims dismissed).

9. *Gomez-Jimenez*, 103 A.D.3d at 17.

10. 2012 WL 5288754, *1 (W.D.N.Y. Oct. 24, 2012).

11. *Id.* at *6.

12. 32 Misc. 3d 798 (Sup. Ct., Westchester Co. 2011), *aff’d*, 102 A.D.3d 5 (2d Dep’t 2012).

13. *North Star Autobahn*, 102 A.D.3d at 6–7.

14. 483 Fed. App’x 583, 588 (2d Cir. 2012).

15. 39 Misc. 3d 936 (Dist. Ct., Nassau Co. 2013).

16. *Id.* at 945–46, 950–51 (citations omitted).

17. Thomas A. Dickerson, *New York State Class Actions: Make It Work – Fulfill the Promise*, 74 Alb. L. Rev. 711, 725–26 (2011) (Make It Work).

18. 18 N.Y.3d 940 (2012). See Thomas A. Dickerson, *Ruling in GBL 350 Claims Serves as Game Changer*, N.Y.L.J. (Apr. 19, 2012), p. 4.

19. For a complete discussion of CPLR 901–902 see Thomas A. Dickerson, Article 9 of Weinstein Korn Miller, *New York Civil Practice: CPLR* (David Ferstendig, ed., Lexis/Nexis 2012) (WKM).

20. 18 N.Y.3d 777 (2012).

21. *Id.* at 781–82.

22. *Id.* at 791 (emphasis added). The purported class representative was subject to unique defenses such as waiver rendering his claims atypical and, by implication, an inadequate class representative. See *Globe Surgical Supply v. GEICO*, 59 A.D.3d 129, 143–45 (2d Dep’t 2008).

23. *Globe Surgical Supply*, 59 A.D.3d 129.

24. 2011 WL 1464145 (N.Y. Sup. 2011).

25. Index No. 009808/04, Decision July 19, 2011 (J. Phelan).

26. *O’Brien v. GEICO*, 99 A.D.3d 683 (2d Dep’t 2012).

27. 39 Misc. 3d 1217(A) (Sup. Ct., N.Y. Co. 2013).

28. *Id.* at *1.

29. See WKM at § 901.28. See also Thomas A. Dickerson & Leonard B. Austin, *New York State Class Actions: Making It Work – Fulfilling the Promises: Some Recent Positive Developments and CPLR § 901(b) Should Be Repealed* scheduled for publication in Albany Law Review: New York Appeals in 2014.

30. *Thomas*, 39 Misc. 3d at *10. See *Abed v. John Thomas Fin., Inc.*, 107 A.D.3d 578, 578 (1st Dep’t 2013) (“The arbitration agreement in the Form U4 signed by plaintiff provides for the arbitration of disputes ‘under the rules, constitutions or by-laws of [the Financial Industry Regulatory Authority (FINRA)]’. Accordingly, under the plain terms of the agreement, ‘arbitration shall be governed by the rules promulgated by FINRA’ including former FINRA rule 13204(d) . . . which ‘prohibits arbitration of class action claims’; motion to compel arbitration of class action denied).

31. 107 A.D.3d 86 (1st Dep’t 2013).

32. *Id.* at 88.

33. *Id.* at 88–89 (“While plaintiffs demanded treble damages pursuant to Rent Stabilization Law § 26-516(a) in their amended complaint, they have since waived that request and seek only reimbursement of the alleged rent overcharges plus interest. . . . However, even where a statute creates or imposes a penalty, the restriction of CPLR 901(b) is inapplicable where the class representative seeks to recover only actual damages and waives the penalty on behalf of the class and individual class members are allowed to opt out of the class to pursue their punitive damages claims (see *Cox v. Microsoft Corp.*, 8 A.D.3d 39 (1st Dep’t 2004); *Pesantez v. Boyle Envtl. Servs.*, 251 A.D.2d 11, 12 (1st Dep’t 1998); *Ridge Meadows Homeowners’ Ass’n v. Tara Dev. Co.*, 242 A.D.2d 947 (4th Dep’t 1997); *Super Glue Corp. v. Avis Rent A Car Sys.*, 132 A.D.2d 604, 606 (2d Dep’t 1987)).”

34. 36 Misc. 3d 1225(A) (Sup. Ct., N.Y. Co. 2012).

35. See *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 (2009).

36. See WKM at § 901.28; see also *Cox v. Microsoft Corp.*, 8 A.D.3d 39 (1st Dep’t 2004).

37. *Cnty. of Nassau v. Expedia, Inc.*, No. 013818/2011 (Sup. Ct., Nassau Co. 2013) (J. Bucaria).

38. 20 N.Y.3d 586 (2013).