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Summary of New York State Class Actions in 2011

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

Mass Torts

The Appellate Division, Second Department, in [Osarczuk v. Associated Universities Inc.](#)¹ reversed the trial court's certification of two subclasses of property owners residing within "a ten-mile radius" of Brookhaven National Laboratories (BNL) who seek to "recover damages for personal injury and property damage alleged to be the result of various nuclear and non-nuclear materials of a hazardous and toxic nature emitted into the air, soil and groundwater" by BNL.² The court found:

Undoubtedly, there are questions common to all proposed class members that have been raised in this case, such as whether the defendant improperly handled and used hazardous and toxic material, and whether the defendant engaged in an ultrahazardous activity. Nonetheless, individualized investigation, proof and determination would need to be made, not only on complicated questions such as the extent of damage, if any, to the numerous individual properties and their diminished market value, but as to causation. Under the circumstances presented, questions of whether the emissions of various toxic materials, over several decades, from various sources and in various ways, caused injury to the individual properties and economic loss to the property owners, cannot be resolved on a class-wide basis.

And in [DeLuca v. Tonawanda Coke Corp.](#),³ a mass tort class action brought on behalf of 38,875 people who reside near defendant's facilities in Tonawanda, N.Y., for the manufacture of foundry coke and other products alleging toxic emissions and asserting 10 causes of action including negligence, gross negligence, negligence per se, strict liability, absolute liability, trespass, nuisance, unjust enrichment, battery and 'punitive damages' was removed to federal court and then remanded because the "allegations do not create a federal law question necessary to the determination of whether Defendants committed common-law torts against Plaintiffs."

Court of Claims

While the certification of mass tort class actions still remains problematic,⁴ there have been exceptions, particularly, in the Court of Claims which has been receptive to the use of the class action device. For example, in [Springer v. State of New York](#),⁵ the court allowed the filing of late notices of claim in a previously certified toxic tort and water contamination class action⁶ of an additional 1,020 putative infant plaintiffs and 817 adult individuals. In [Partridge v. State of New York](#),⁷ the court noted that the Erie Canal, known today as part of The New York State Barge Canal System, flooded between 1993 and 1995 causing damage to the property of, at least, 281 landowner-claimants. Those landowners commenced an action on behalf of a putative class of individuals who own property along the 'canalized' waterways of the Oswego River Basins. They "allege that the Canal System management practices of the Defendants were negligent or grossly negligent and effect a de facto taking of portions of their riparian properties." Defendants' motion to strike class allegations was denied, and class certification was granted to claimants who filed proper claims.

Class Notice of Claims

As for what constitutes "proper" claims and whether class notices of claim are viable in the Court of Claims, this issue seems to have been resolved in [Weaver v. State](#),⁸ with the Second Department, holding that "The weight of Court of Claims authority supports the conclusion... that class actions brought in the Court of Claims must satisfy all of the jurisdictional requirements set forth in section 11(b) and that each member must be a named claimant in a filed claim... This conclusion is consonant with the principle that 'nothing less than strict compliance with the jurisdictional requirements of the Court of Claims Act is necessary.'"

Attorney Fees

Governor Andrew Cuomo signed into law a modification to CPLR §909 which allows trial courts in CPLR Article 9 class actions to not only award attorney fees to class representative's counsel but also "to any other person that the court finds has acted to benefit the class." This excellent modification which addresses [Flemming v. Barnwell Nursing Home and Health Facilities Inc.](#)⁹ wherein the majority found no authority in CPLR 909 for an award of attorney fees to objectors' counsel, will encourage responsible objectors to, inter alia, analyze and challenge proposed settlements which may or may not benefit the class. And in [Graves v. Doar](#)¹⁰ the Appellate Division, Second Department awarded class counsel attorney fees and costs pursuant to New York State Equal Access to Justice Act (CPLR §8600) and CPLR §909 in a class action leading to the restoration of monthly food stamp benefits.

Class Wide Arbitration

In [AT&T Mobility LLC v. Concepcion](#)¹¹ the U.S. Supreme Court abrogated [Discover Bank v. Superior Court](#),¹² which had determined that consumer contracts containing clauses prohibiting class actions or class arbitration were void as unconscionable. In so ruling the Court found its earlier decision in [Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.](#)¹³ to be instructive. "The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."

Reactions to 'Concepcion'

The reaction of several federal and state courts¹⁴ including those in New York has been interesting. For example, in [JetBlue Airways Corp. v. Stephenson](#),¹⁵ 728 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-Nielsen*, 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.](#)¹⁶ The First Department held that an arbitration panel's award that an arbitration should proceed as a class arbitration "neither exceeded its powers nor manifestly disregarded the law in certifying the class." The court also found that the plaintiff's claim was typical of those of the class and that the issues raised, "at least for the liability phase," predominated over individual issues.

And in [Frankel v. Citicorp Insurance Services Inc.](#),¹⁷ 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 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 claim on an individual basis, including anticipated fees for experts and attorneys, the availability of attorneys willing to undertake such a claim and the corresponding costs likely incurred if the matter proceeded on a class-wide basis."

Refund Policies

In [Smilewicz v. Sears Roebuck Company](#),¹⁸ the Second Department affirmed the trial court's denial of class certification in an action alleging deceptive and misleading refund policies. The trial court noted, "the photographs submitted by the parties... suggest that there are significant variations in location and prominence of the return policy signs from store to store [raising] a possibility that the visibility of the return policy may change over time... [Thus,] consumers who went to different retail locations in New York likely encountered different levels of exposure to the written return policy."

Public Defense System

In [Hurrell-Harring v. State](#)¹⁹ the Appellate Division, Third Department, granted class certification to a plaintiff class against whom criminal charges were pending and which alleged systemic deficiencies in the public defense system. The court found that "the inquiry distills to whether, 'in one or more of the five counties at issue, the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions'...It is this concrete legal issue and the constitutional right to counsel sought to be vindicated, that is common to all members of the class and transcends any individual questions."

Standing

In [Lucker v. Bayside Cemetery](#),²⁰ the grandchildren of decedents who purchased perpetual care plots from a cemetery did not have standing to sue for, inter alia, false advertising and deceptive business practices under GBL §§349, 350. The plaintiffs alleged that the cemetery failed to honor the perpetual care contracts sold to their grandparents obligating defendants to keep plots in presentable condition. Claims which are "clearly derivative" may not be brought under GBL §§349, 350.²¹

And in [Ellington v. EMI Music Inc.](#)²² the plaintiff, the grandson and heir of "Duke" Ellington, sought to recover foreign music publication royalties allegedly owed pursuant to a 1961 contract. The contract provided that in exchange for the transfer of the copyrights for Ellington's music written between 1927 and 1961 the defendants would pay "cash and royalties." At issue was the manner in which defendants calculated foreign royalties.

Plaintiff on behalf of himself and a class of "all persons to whom defendant have failed to pay their full contractual share of foreign publication royalties," sought a declaration that by funneling foreign royalties through affiliated foreign subpublishers which were allowed to retain a percentage of the royalties as a fee, defendants had breached the relevant agreements. Plaintiff also sought to enjoin defendants from calculating royalties in this manner.

Prior to class certification, the court granted defendants summary judgment finding that the 1961 contract was a "net receipts" songwriters royalty agreement which allowed foreign subpublishers to retain a percentage of foreign royalties as a fee.²³ Although the court also dismissed the class claims²⁴ "on the ground that the same claims asserted by Ellington individually are not legally viable" (which suggests that the class claims were actually before the court prior to certification), clearly once plaintiff's individual claims were dismissed he had no representative standing to proceed further on behalf of the class.

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Endnotes:

1. [Osarczuk v. Associated Universities Inc.](#), 82 A.D. 3d 853, 918 N.Y.S. 2d 538 (2d Dept. 2011). See also: [Nicholson v. KeySpan Corp.](#), 65 A.D. 3d 1025, 885 N.Y.S. 2d 106 (2d Dept. 2009) (mass tort; soil contamination; certification denied; plaintiffs summary judgment motion on strict liability cause of action denied because "failed to proffer evidence that any of the defendants had engaged in an abnormally dangerous activity").
2. [Osarczuk v. Associated Universities Inc.](#), 26 Misc.3d 1209(A) (Suffolk Sup. 2009). Compare: [Suffolk County Water Authority v. Dow Chemical Company](#), 30 Misc.3d 1202(A) (Suffolk Sup. 2010) (not a class action; alleged PCE contamination in over 150 county wells).
3. [DeLuca v. Tonawanda Coke Corp.](#), 2011 WL 3799985 (W.D.N.Y. 2011).
4. Dickerson, "New York State Class Actions: Make It Work—Fulfill the Promise," 74.2 Albany LR 711 (2010/2011) ("This article identifies what types of class actions are presently certifiable and what types of class actions are not, but should be, given the broad legislative history of CPLR Article 9, and the needs of New York State residents").
5. [Springer v. State of New York](#), #2008-009-023, Claim No. 111361 J. Midey, Jr., Decision dated Sept. 29, 2008 (Ct. Cl. 2008).
6. [Arroyo v. State of New York](#), 12 Misc.3d 1197(A), 824 N.Y.S.2d 767 (N.Y. Ct. Cl. 2006) (certification of class of Spraypark patrons alleging that state was negligent in failing "to adequately maintain or monitor the sanitary conditions of the Spraypark water" which "was contaminated with cryptosporidium, a highly contagious waterborne parasite (causing abdominal cramping, diarrhea, nausea, vomiting, dehydration, fatigue, fever and loss of appetite)").
7. [Partridge v. State of New York](#), #2000-013-002, Claim No. 90710, J. Patti, Decision May 31, 2000 (N.Y. Ct. Cl. 2000).
8. [Weaver v. State of New York](#), 82 AD3d 878 (2d Dept. 2011) (no class action claims allowed in Court of Claims), aff'g #2009-010-054, Claim No. 115531, J. Ruderman, Decision of Jan. 14, 2010 (Ct. Cl. 2010); see also [Weaver v. State of](#)

[New York](#), 91 AD3d 758 (2d Dept. 2012) (affirming order granting the defendant's motion for summary judgment dismissing the amended claim, finding, inter alia, that, "[i]n enacting Mental Hygiene Law former §33.07(e), the Legislature was presumably aware that, pursuant to the foregoing regulations, a representative payee may apply the beneficiary's benefits to the cost of his or her care. Yet the Legislature did not proscribe such expenditures. As such, the application, by a representative payee, of a portion of a patient's Social Security benefits to the cost of that patient's care was not, in and of itself, a violation of the representative payee's fiduciary obligation under Mental Hygiene Law former §33.07(e)").

9. [Fleming v. Barnwell Nursing Home and Health Facilities Inc.](#), 15 N.Y.3d 375, 938 N.E.2d 937 (2010). For further discussion of the need to compensate objectors' counsel see Dickerson & Manning, [Rulings in 2010 in Class Actions Under CPLR Article 9](#), NYLJ, Feb. 24, 2011, p. 4. See generally, Dickerson, "New York State Class Actions: Make It Work—Fulfill the Promise," 74 Albany L.R. 711 (2010/2011).

10. [Graves v. Doar](#), 87 A.D. 3d 744, 928 N.Y.S.2d 771 (2d Dept. 2011).

11. [AT&T Mobility LLC v. Concepcion](#), 131 S. Ct. 1740 (April 27, 2011). See also: *CompuCredit Corp. v. Greenwood*, 565 U.S.—, —S.Ct.— (Jan. 10, 2012) (mandatory arbitration clause enforced notwithstanding apparent intent of federal Credit Repair Organizations Act (CROA) to prohibit waivers of "right to sue" and "class action").

12. [Discover Bank v. Superior Court](#), 36 Cal. 4th 148, 30 Cal Rptr 3d 76 (2005).

13. [Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.](#), 130 S. Ct. 1758 (2010).

14. See e.g., [Medina v. Sonic-Denver T Inc.](#), 2011 WL 915780 (Colo. App. 2011); [McKenzie v. Betts](#), 55 So. 3d 615 (Fla. App. 2011); [Feeney v. Dell Inc.](#), 2011 WL 5127806 (Mass. Super. 2011); [Picardi v. Eighth Judicial District Court](#), 251 P. 3d 723 (2011); [Herron v. Century BMW](#), 2011 WL 6347845 (S.C. Sup. 2011); *State ex rel. Richmond American Homes of West Virginia v. Sanders*, 2011 WL 5903509 (W.Va. 2011). See also: [In re American Express Merchants' Association](#), —F.3d— (Feb. 1, 2012) ("We turn to this case for the third time, as the Supreme Court released its latest views on class arbitration waivers in [*Concepcion*] just weeks after we issued our decision in *In re American Express Merchants' Litigation*, 634 F. 3d 187 (2d Cir. 2011) (*Amex II*). ... *Concepcion* does not alter our analysis and we again reverse the district court's decision and remand for further proceedings"); NLRB decision Jan. 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."

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

16. [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).

17. [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)).

18. [Smilewicz v. Sears Roebuck Company](#), 82 A.D. 3d 744, 917 N.Y.S.2d 904 (2d Dept. 2011), aff'g Index No. 17525/07, J. Pfau, decision dated Nov. 24, 2009 (Kings Sup. 2009). See also: [Baker v. Burlington Coat Factory Warehouse](#), 175 Misc.2d 951, 673 N.Y.S.2d 281 (Yks. Cty. Ct. 1998) (defective fake fur; no cash, no refund return policy violates GBL §349).

19. [Hurrell-Harring v. State](#), 81 A.D.3d 69, 914 N.Y.S.2d 367 (3d Dept. 2011).

20. [Lucker v. Bayside Cemetery](#), 33 Misc. 3d 1203(A) (N.Y. Sup. 2011).

21. See e.g., [City of New York v. Smokes-Spirits.Com Inc.](#), 12 N.Y. 3d 616, 883 N.Y.S. 2d 772 (2009)(derivative claims may not be asserted under GBL 349). See also: Dickerson, Chapter 98 Consumer Protection, Commercial Litigation In New York State Courts, 3d, Robert L. Haig, Ed., West (2010), Supp. (2012).

22. [Ellington v. EMI Music Inc.](#), 33 Misc.3d 1209(A) (N.Y. Sup. 2011).

23. See [Jobim v. Songs of Universal Inc.](#), 732 F.Supp.2d 407, 415-416 (S.D.N.Y. 2010).

24. For a discussion of a class action brought by music publishers seeking compensation for the alleged misuse of "synchronization rights" see [Angel Music Inc. v. ABC Sports Inc.](#), 631 F.Supp. 429 (S.D.N.Y. 1986) (summary judgment denied); 112 F.R.D. 70 (S.D.N.Y. 1986) (class certification denied; lack of standing).

