

CONSUMER PROTECTION 2010: FEDERAL, NEW YORK STATUTES GUIDE

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By Thomas A. Dickerson & Cheryl E. Chambers¹

Each year " Consumer Law: The Judge's Guide to Federal and New York State Consumer Protection Statutes " is updated and the 2010 version is now available on the Internet¹. There have been several exciting recent developments including two important decisions from the Court of Appeals involving the enforceability of mandatory arbitration and choice of law clauses in consumer contracts. There has also been an increase in food litigation involving unhealthy and/or misrepresented ingredients, misleading labeling and excessive slack fill. Not surprisingly there has also been an increase in abusive debt collection practices and deceptive debt reduction services. New developments in the ongoing battle over excessive fees charged by gift card issuers may mean a lessening of consumer protection for gift card

¹Thomas A. Dickerson and Cheryl E. Chambers are Associate Justices of the Appellate Division, Second Department. Justice Dickerson is the author of Class Actions: The Law of 50 States, Law Journal Press, 2010 and Consumer Law 2010: The Judge's Guide To Federal And New York State Consumer Protection Statutes at www.nycourts.gov/courts/9jd/taxcertatd.shtml and http://webcontent.courtnet.org/w1_www/Courts/NYCCivil/Library/reference.htm

recipients in New York State. And lastly, 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 "2.

Paying Arbitration Costs

Generally, mandatory arbitration clauses in consumer contracts [including class action waivers] are routinely enforced³ in New York State, notwithstanding, disparities in the ability to pay arbitration costs⁴. However, in *Brady v. Williams Capital Group, LP*⁵, involving an employee/employer dispute over the enforceability of an " equal share " provision regarding the payment of arbitration costs the Court of Appeals held that a "litigant's financial ability is to be resolved on a case-by-case basis and the inquiry should at a minimum consider the litigant's ability to pay fees and costs, the expected differential between the costs of arbitration and litigating in court and whether the cost differential deters bringing claims in the arbitral forum. The *Brady* decision may signal a shift⁶ in the routine enforcement of mandatory arbitration clauses in consumer contracts.

Debt Collection Abuses

Abusive debt collection practices have increased dramatically⁷ and have been the subject of reports issued by the federal Government Accountability Office⁸ and the New York Urban Justice Center⁹ and appropriate responses from Civil Court and District Court Judges¹⁰. In *Portfolio Recovery Associates, LLC v. King*¹¹, an action by an assignee seeking to recover the balance due of a credit debt, the Court of Appeals held that a Delaware choice of law clause in the credit card agreement did not require the application of Delaware's three-year statute of limitations period to bar Portfolio's claims, and the agreement did not contain an express intention that Delaware's statute of limitations was to apply to the dispute. However, Delaware's three-year statute of limitations nevertheless applied under CPLR 202 and barred Portfolio's claims. The Court noted that its holding was "consistent with one of the key policies underlying CPLR 202, namely, to prevent forum shopping by nonresidents attempting to take advantage of a more favorable statute of limitations in this State".

Debt Reduction Services

Along with abusive debt collectors are those eager to prey upon the willingness of consumers to pay their debts. In *People v. Nationwide Asset Services, Inc.*¹² the Court found that a debt

reduction service repeatedly and persistently engaged in deceptive business practices and false advertising in violation of GBL §§ 349, 350 (1) "in representing that their services 'typically save 25% to 40% off' a consumer's total indebtedness," (2) "fail[ing] to take account of the various fees paid by the consumer in calculating the overall percentage of savings experienced by that consumer", (3) "failing to honor their guarantee", and (4) "failing to disclose all of their fees".

Gift Cards Again

We have been following the ongoing struggle 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. In three New York State class actions purchasers of gift cards challenged, *inter alia*, the imposition of dormancy fees by gift card issuers¹³ [See *Lonner v. Simon Property Group, Inc.*¹⁴, *Llanos v. Shell Oil Company*¹⁵ and *Goldman v. Simon Property Group, Inc.*¹⁶]. 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 law¹⁷. Although this issue seemingly was resolved earlier

in *Goldman*¹⁸, very recently, the Court *L.S. v. Simon Property Group, Inc.*¹⁹, a consumer 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. This may not bode well for gift card purchasers in New York State. In addition this may be an area for legislative efforts to limit, if not otherwise prohibit, expiration dates and service fees of any kind as enacted by other States²⁰.

Packaging; Excessive Slack Fill

Recently, there has been an increase in food litigation involving unsubstantiated health claims, misrepresented ingredients and misleading labeling²¹. Last year we examined the constitutionality of New York City's Health Code Section 81.50 which " requires certain chain restaurants that sell standardized meals to post coloric content information on their menus and on their menu boards"²².

This year's hot food topic is the ubiquitous half empty package. In *Waldman v. New Chapter, Inc.*²³ the Court found that the packaging of a retail product violated GBL § 349. " In 2009, Plaintiff 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 that 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"²⁴.

Backdating Renewal Memberships

It is disappointing, indeed, to discover that some "consumer oriented" big box retailers may be taking advantage of their customers. In *Argento v. Wal-Mart Stores, Inc.*,²⁵ 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 2006²⁶.

Delays In Processing Insurance Claims

The delayed response of some insurance companies to claims made is quite often the subject of consumer litigation. For example, in *Wilner v. Allstate Insurance Company*²⁷ 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 successfully pleaded conduct on the

part of the defendant which was misleading in a material way" and "the plaintiffs' belief as to their responsibilities under the contract of insurance is a question of fact".

Cellular Telephone Services

Along with increased use of cellular telephones has been a concomitant increase in the number of consumer lawsuits alleging misleading and deceptive business practices. In *Morrissey v. Nextel Partners, Inc.*²⁸ 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 allege, however, 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 cases²⁹ and one credit card case³⁰ involving inadequate disclosures.

Excessive Mortgage Fees

In *Dowd v. Alliance Mortgage Company*³¹ the Court granted certification to a class of mortgagors asserting claims under RPL § 274-a and GBL § 349 for " charging...a 'priority handling fee' in the sum of \$20, along with unspecified 'additional fees ' for providing...a mortgage note payoff statement' during a six year period. The Court, however, found that the defendant's assertion of an affirmative defense based upon the voluntary payment doctrine in response to a quasi contractual claim of money had and received " necessitates individual inquiries of class members " .

In *Cohen v. J.P. Morgan Chase & Co.*³² 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 " .

Dating Services

In *Robinson v. Together Member Service*³³ 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 " .

ENDNOTES

1. See www.nycourts.gov/courts/9jd/taxcertatd.shtml; See also http://webcontent.courtnet.org/wl_www/Courts/NYCCivil/Library/reference.htm

2. 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.

3.

See e.g., *State of New York v. Philip Morris, Inc.*, 30 A.D. 3d 26 (1st Dept. 2006)(" Arbitration is strongly favored under New York law "); *Ranieri v. Bell Atlantic Mobile*, 304 A.D. 2d 353 (1st Dept. 2003)(" contractual proscription against class actions...is neither unconscionable nor violative of public policy "). See also: Weinstein Korn & Miller, New York Civil Practice CPLR 901.06[4]; Dickerson, Class Actions: The Law of 50 States, Law Journal Press, 2010, 4.03[5].

4. See e.g., *Tsadilas v. Providian National Bank*, 13 AD 3d 190 (1st Dept. 2004)("Plaintiff contends that the arbitration agreement exposes her to potentially unaffordable fees. However, 'the risk' that plaintiff will be saddled with prohibitive costs is too speculative to justify invalidation of an arbitration agreement").

5. *Brady v. Williams Capital Group, LP*, 14 N.Y. 3d 459 (2010).

6. Another shift in enforcement may be reflected in the First Department's recent decision in *Machmani v. By Design, LLC*, 74 A.D. 3d 478 (1st Dept. 2010) finding that the language " in accordance with the AAA Commercial Rules " appearing in a mandatory arbitration clause is a choice of law provision and not a forum selection provision. See Reisberg & Pauley, *First Department Decisions Raises Drafting Issue for Arbitration Clauses*, N.Y.L.J., August 24, 2010, p. 4.

7. Dee Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. Times Online July 12, 2010.

8. See GAO, "Debt Settlement: Fraudulent, Abusive and Deceptive Practices Pose Risk To Consumers " GAO 10-593T (April 22, 2010) available at www.gao.gov/cgi-bin/getrpt?GAO-10-593T

9. See The Legal Aid Society, Neighborhood Economic Development Advocacy Project, " Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers " (May 2010) available at www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf.

10. See e.g., *LVNV Funding Corp v. Delgado*, 2009 NY Slip Op 51677 (Nassau Dist. Ct. 2009); *Palisades Collection, LLC v. Diaz*, 25 Misc. 3d 1221 (Nassau Dist. Ct. 2009); *Chase Bank USA N.A. v. Cardello*, 27 Misc. 3d 791 (N.Y. Civ. 2010)(" Allowing the assignee to give notice would enable dishonest debt collectors to search the court records, obtain the names of judgment debtors and send the debtor a letter "); *Emigrant Mortgage Co., Inc. v. Corcione*, 900 N.Y.S. 2d 608 (Suffolk Sup. 2010)(the Court found a loan modification agreement " unconscionable, shocking or egregious (and) forever barred and prohibited (the plaintiff) from collecting any of the claimed interest accrued on the loan...recovering any claimed legal fees and expenses as well as any and all claimed advances to date (and imposed) exemplary damages in the sum of \$100,000 ").

11. Portfolio Recovery Associates, LLC v. King, 14 N.Y. 3d 410 (Ct. App. 2010). See also: Glacatos, Sheftel-Gomes & Martin, Borrowed Time: Applying Statute Of Limitations in Consumer Debt Cases, N.Y.L.J., March 3, 2010, p. 3.
12. People v. Nationwide Asset Services, Inc., 26 Misc. 3d 258 (Erie Sup. 2009).
13. See Lonner v. Simon Property Group, Inc., __A.D. 3d__, 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. ").
14. Lonner v. Simon Property Group, Inc., __A.D. 3d__, 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).
15. Llanos v. Shell Oil Company, __A.D. 3d__, 866 N.Y.S. 2d 309 (2d Dept. 2008).
16. Goldman v. Simon Property Group, Inc., __A.D. 3d__, 2008 WL_5006453 (2d Dept. 2008).
17. 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).
18. Goldman v. Simon Property Group, Inc., 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).
19. L.S. v. Simon Property Group, Inc., New York Law Journal, July 21, 2010, p. 26, col. 5 (N.Y. Sup.).
20. See Conn. Gen. Stat, 42-460 (prohibits expiration dates), Conn. Gen. Stat. 3-65c (prohibits service fees); Ill. Rev. Stat. Ch. 815, 505/2SS(b)(minimum expiration period 5 years, all post-purchase fees prohibited, face value of gift card may not be reduced in value and the holder may not be penalized in any way for non-use or untimely redemption); Mont. Code Ann. 30-14-108(1)(expiration date prohibited; all service fees including dormancy fees prohibited).
21. See Elliot and Jacobsen, Food Litigation: The New Frontier, New York Law Journal, July 8, 2010, p. 4.

22. 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).
23. Waldman v. New Chapter, Inc., 2010 WL 2076024 (E.D.N.Y. 2010).
24. See Mennen Co. v. Gillette Co., 565 F. Supp. 648, 655 (S.D.N.Y. 1983).
25. Argento v. Wal-Mart Stores, Inc., 2009 WL 3489222 (2d Dept. 2009).
26. 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 " certain 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.
27. Wilner v. Allstate Insurance Company, 71 A.D. 3d 155, 893 N.Y.S. 2d 208 (2d Dept. 2010).
28. Morrissey v. Nextel Partners, Inc., 72 A.D. 3d 209, 895 N.Y.S. 2d 580 (3d Dept. 2010).
29. 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).
30. Sims v. First Consumers National Bank, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (1st Dept. 2003).
31. Dowd v. Alliance Mortgage Company, __A.D. 2d__, 2010 WL 2309095 (2d Dept. 2010).
32. Cohen v. J.P. Morgan Chase & Co., 608 F. Supp. 2d 330 (E.D.N.Y. 2009).
33. Robinson v. Together Member Service, 25 Misc. 3d 230 (N.Y. Civ. 2009).