

## CLASS ACTIONS UNDER CPLR ARTICLE 9 IN 2007

By Thomas A. Dickerson & Kenneth A. Manning<sup>1</sup>

Last year, the Court of Appeals in a matter of first impression ruled that CPLR 901(b)'s prohibition against class actions seeking a penalty or minimum recovery applied to GBL 340 ( Donnelly Act ). In addition, the Appellate Divisions and numerous trial Courts ruled on a variety of class actions in 2007.

### No Penalty Class Actions

In Sperry v. Crompton<sup>1</sup>, a class of tire purchasers claimed consumers of tires " that defendants entered into a price-fixing agreement, overcharging tire manufacturers for ( rubber processing chemicals ), and that the overcharges trickled down the distribution chain to consumers " and further alleged violations of GBL 340 ( Donnelly Act ) seeking " three fold the actual damages ", GBL 349 and unjust enrichment. After a careful analysis of the 1975 legislative histories of both CPLR Article 9

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<sup>1</sup>Thomas A. Dickerson is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court and author of Class Actions: The Law of 50 States, Law Journal Press, 2008. Kenneth A. Manning is a partner in the law firm of Phillips Lytle LLP in Buffalo, New York.

and the amendments to GBL 340 [ adding " treble damages provision and... costs and attorneys fees " ], the Court concluded that when " Read together, we conclude that Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned...Where a statute is already designed to foster litigation through an enhanced award, CPLR 901(b) acts to restrict recoveries in class actions absent statutory authorizations ". Although CPLR 901(b) has also been applied to deny class certification in actions alleging violations of the Telephone Consumer Protection Act<sup>2</sup> it has not been applied to GBL 349 class actions as long as class members seek only actual damages<sup>3</sup>.

#### **Mass Torts**<sup>4</sup>

In Osarczuk v. Associated Universities, Inc.<sup>5</sup>, a class of residents living near a nuclear facility commenced a mass tort class action alleging property damage and personal injuries arising from exposure to nuclear radiation and to non-nuclear materials. As for exposure to nuclear radiation the Court dismissed these claims on the grounds of no subject matter jurisdiction since they were preempted by the federal Atomic Energy Act [ all " state common-law causes of action and theories of relief which might otherwise address radiological exposure

from nuclear facilities including negligence, strict liability based on engagement in an ultrahazardous activity and nuisance " ]. However, as to exposure to non-nuclear hazardous materials such as trichloroethane...and other volatile organic compounds...cannot be the cause of a ' nuclear incident ' that renders a particular discharge, emission or occurrence subject to prosecution by means of the federal public liability action ". The matter was remitted for a determination of the issue of class certification of those claims based upon personal injury and property damages " arising from exposure to non-nuclear and toxic materials "6.

In the Matter of Oxycontin<sup>7</sup> the Court had previously denied certification<sup>8</sup> to a mass tort class action brought on behalf of " all prescribed users of the pain reliever drug, OxyContin "9. After the Court forwarded the case to the New York Litigation Coordinating Panel some 1,117 individual cases [ plaintiffs resided in virtually all of the states on the nation as well as in Canada and the United Kingdom ] were consolidated for discovery and pre-trial matters. Thereafter defendants moved to dismiss the 924 out-of-state cases on the grounds of inconvenient forum [ CPLR 327 ] or require out of state plaintiffs to post a security for costs bond [ CPLR 8501 ]. The Court denied the motion to dismiss the out of state claims but required each to post a security bond of \$500 for a total of \$462,000. In

addition, the Court suggested that a few cases be tried " as soon as possible to establish a ' bell weather ' or bench mark " to evaluate the merits the remaining cases<sup>10</sup>.

In Continental Casualty Co. V. Employers Insurance Co. Of Wausau<sup>11</sup>, the Court certified a class [ " by order and stipulation " ] " consisting of over 20,000 individuals who had asbestos-related personal injuries and had actions pending against defendant Robert A. Keasbey Company, most of which were in Supreme Court, New York County ". The plaintiff insurance companies sought " the interpretation of certain insurance policies that they issued to defendant Keasbey " .

### **Fruity Booty Settlement**

In Berkman v. Robert's American Gourmet Food, Inc.<sup>12</sup>, a class of consumers of Pirate's Booty, Veggie Booty and Fruity Booty brands snack food alleged defendant's advertising " made false and misleading claims concerning the amount of fat and calories contained in their products ". A proposed nationwide settlement and the objections of Meredith Berkman were extensively reviewed in Klein v. Robert's American Gourmet Food<sup>13</sup> which was remanded [ and consolidated with the Berkman class action ] for further consideration of the settlement's

reasonableness including " whether a nationwide ( settlement ) class or indeed any class should be certified ". The settlement provided for the issuance and guaranteed redemption of \$3.5 million worth of discount coupons<sup>14</sup> for the purchase of defendant's snack products and label monitoring and product testing<sup>15</sup>. Noting that certification of a settlement class requires heightened scrutiny [ " where a class action is certified for settlement purposes only, the class prerequisites ...must still be met and indeed scrutinized " ]<sup>16</sup>, the Court denied class certification to the GBL 350 claim because individual issues of reliance predominated [ " common reliance on the false representations of the fat and caloric content...cannot be presumed ( in GBL 350 claims ) " ]<sup>17</sup>, but noted that certification of the GBL claim may be appropriate if limited to New York residents [ " causes of action predicated on GBL 349 which do not require reliance ( may be certifiable but ) a nationwide class certification is inappropriate " ]<sup>18</sup>.

### **Craftsman Tools**

In Vigiletti v. Sears, Roebuck & Co.<sup>19</sup> a class of 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 " ].

### **Drug Misbranding**

In Baron v. Pfizer, Inc.<sup>20</sup> a class of purchasers of the drug Neurontin asserted claims of fraud, violation of GBL 349 and unjust enrichment " based on claims arising from ' off-label ' uses " for which FDA approval had not been received. Although the FDA had approved Neurontin only for the treatment of epilepsy, " From June 1995 to April 2000...Warner Lambert...engaged in a broad campaign to promote Neurontin for a variety of pain uses, psychiatric conditions such as bipolar disorder and anxiety and for certain other unapproved uses...Warner Lambert...ultimately

agreed to plead guilty to (1) introducing into interstate commerce a misbranded drug that did not have adequate directions on the label for the intended uses of the drug and (2) introducing an unapproved new drug into interstate commerce...consented to a criminal fine of \$240 million...civil fines of \$190 million ". The Court dismissed the GBL 349 claim because of an absence of actual injury [ " Without allegations that...the price of the product was inflated as a result of defendant's deception or that use of the product adversely affected plaintiff's health...failed even to allege...that Neurontin was ineffective to treat her neck pain and her claim that any off-label prescription was potential dangerous both asserts a harm that is merely speculative and is belied...by the fact that off-label use is a widespread and accepted medical practice " ] and the unjust enrichment claim.

### **Snapple Distributors**

In McGuckin v. Snapple Distributors, Inc.<sup>21</sup> The plaintiff marketed, sold and distributed Snapple products to retail outlets in a certain area in New York City and commenced this class action after Snapple entered into agreements " with the New York City Department of Education to directly sell their products to public schools and with the New York City Marketing Development

Corporation to directly sell their products to municipal entities ". The Court dismissed the complaint finding that the distribution contract allowed Snapple to sell directly to public schools and municipal entities.

### **Blue Tooth & Cells Phones Too**

In Naftulin v. Sprint Corp.<sup>22</sup> a class of cell phone users claimed that defendant misrepresented the availability of its " Add-A-Phone " cell phone plan " distributed by Staples as a newspaper insert in approximately 200 newspapers nationwide<sup>23</sup>. The plaintiff decided to sign up but claimed that defendants " never fully honored the contract she entered into on September 18, 2001 ". According to defendant the plan was erroneously offered in New York because of Staples' error and retracted within 24 hours of discovery. Of the 16,000 individuals nationwide who activated the plan, over 900 were in New York but only 26 complained about the billing overcharges and of those only 4 resided in New York. In denying class certification the Court found (1) a lack of numerosity [ " Based upon the history of restitution provided to those who complained...there is only a minuscule number of actual potential class members who suffered injury as a result of defendants' allegedly fraudulent advertising " ], (2) lack of uniformity in advertising and plan

contracts [ " no uniformity in the terms of the contracts...nor the plans " ] and (3) lack of typicality [ " Plaintiff herself did not sign up at Staples, the acknowledged source of the ' false ' advertising, but contracted at a local...store using a contract not demonstrated to be identical to that used by Staples ". In addition the proposed nationwide class was unmanageable because of the Court would need " to apply the law of 50 different jurisdictions to the claims presented "24.

In Mollins v. Nissan Motor Co., Ltd.<sup>25</sup>, a class of leasees claimed " deficiencies in a ' Blue Tooth ' phone system in the 2006 Infiniti M35X ". Initially, the Court addressed the issue of mootness and found that " Despite the surrender of the vehicle, termination of the lease and a full refund of all money paid on account of the lease " there was insufficient evidence of the " payment or settlement of the Mollins claim ". However, the Court then proceeded to dismiss each cause of action including breach of contract [ no privity ], breach of warranty [ all warranties fully and properly disclaimed ], fraud [ no cognizable damages ], violation of GBL 198(a) [ New Car Lemon Law ][ dealer fully complied ] and GBL 349 [ private dispute ] and strict products liability [ no economic loss damages recoverable ]. Since the plaintiff had no claim and hence no standing the class allegations were dismissed as well.

### **Cablevision Taxes & Fees**

In Lawlor v. Cablevision Systems Corp.<sup>26</sup> a class of Cablevision subscribers challenged the imposition of taxes and fees on internet services [ " Lawlor alleges Cablevision had no legal right to charge these taxes or fees and seeks to recover...for the taxes and fees wrongfully collected " ]. The Court sustained the GBL 349 claim [ " If the services had not been provided by a telecommunications provider, these services would not have been subject to the...taxes " ] and held that class certification of the GBL 349 would be appropriate, notwithstanding CPLR 901(b), as long as only actual damages are sought.

### **Mortgages: Document Preparation Fees**

In Fuchs v. Wachovia Mortgage Corp.<sup>27</sup>, a class of mortgagees challenged the imposition of a \$100 document preparation fee for services as constituting the unauthorized practice of law and violative of Judiciary Law 478, 484 and 495(3). Specifically, it was asserted that bank employees " completed certain blank lines contained in a standard ` Fannie Mae/Freddie Mac Uniform Instrument `...limited to the name and address of the borrower, the date of the loan and the terms of the loan, including the

principal amount loaned, the interest rate and the monthly payment ". The plaintiffs, represented by counsel did not allege the receipt of any legal advice from the defendant at the closing. In dismissing the complaint that Court held that charging " a fee and the preparation of the documents...did not transform defendant's actions into the unauthorized practice of law ". Other States have addressed this issue as well<sup>28</sup>.

### **Mortgages: Yield Spread Premiums**

In Shovak v. Long Island Commercial Bank<sup>29</sup> a class of borrowers sued a mortgage broker alleging that a " yield spread premium paid to the defendant by the nonparty lender was a kickback in exchange for the defendant procuring an interest rate on the plaintiff's loan higher than the lender's market or par rate ". In denying class certification the Court found the predominance of individual issues [ " the two-pronged test promulgated by the Department of Housing and Urban Development...to determine if a yield spread premium was a kickback or bribe under the Real Estate Settlement Procedures Act ( is ) applicable to State actions [ such as plaintiff's ] asserting claims for breach of fiduciary duty, money had and received, unjust enrichment and violations of GBL 349 and Penal Law 180.08...is an individualized, fact-intensive analysis " ].

### **Mortgages: Payoff Statement Fee**

In MacDonell v. PHM Mortgage Corp.<sup>30</sup>, a class of mortgagors challenged defendant's \$40 fee " charged for faxing the payoff statements " [ which plaintiffs paid ] asserting violations of GBL 349 and RPL 274-a(2) [ " mortgagee shall not charge for providing the mortgage-related documents, provided...the mortgagee may charge not more than twenty dollars, or such amount as may be fixed by the banking board, for each subsequent payoff statement " ] and common law causes of action alleging unjust enrichment, money had and received and conversion. The Court sustained the statutory claims finding that the voluntary payment rule does not apply<sup>31</sup> but does serve to bar the common law claims and noting that " To the extent that our decision in Dowd v. Alliance Mortgage Company<sup>32</sup> holds to the contrary it should not be followed ".

### **DHL Processing Fees**

In Kings Choice Neckwear, Inc. v. DHL Airways, Inc.<sup>33</sup> a class of recipients of DHL packages sent from foreign countries challenged the imposition of a " processing fee " [ \$5.00 or more ]. The processing fee was defined in DHL's " Conditions of Carriage: ` In the event that DHL advances customs or import

duties/assessments on behalf of the consignee...a surcharge may...be assessed based on a flat rate or a percentage of the total amount advanced ". The class alleged breach of contract and sought class certification on behalf of a class of New York recipients and those residing in all other states. The Court denied class certification on the grounds of a lack of standing [ " they were not parties to the contracts with the shippers of the merchandise received by defendants...Nor have they demonstrated that they...were intended third-party beneficiaries of the contracts " ].

### **Equipment Leases**

In Pludeman v. Northern Leasing Systems, Inc.<sup>34</sup> a class of equipment leasees asserted claims of breach of contract and violations of federal RICO and GBL 349 arising from allegations that defendant " purposely concealed three pages of the four-page equipment lease...the concealment finds support in the first page...which contains all of the elements that would appear to form a binding contract including the signature line, a personal guaranty and forum selection, jury waiver and merger clauses, with the only references to the additional pages of the lease being in very small print...defendants did not provide plaintiffs with fully executed copies of the leases and overcharged them by

deducting amounts from their bank accounts greater than those called for by the leases ". The Court sustained the breach of contract and GBL 349 claims but denied class certification as premature<sup>35</sup>.

### **Health Insurance**

In Batas v. The Prudential Insurance Company<sup>36</sup>, a class of health participants alleged that defendant's contracts provide " all care-including hospitalization-that is deemed to be medically necessary in accordance with the prevailing medical opinion within the appropriate speciality of the United States medical profession '". Plaintiffs allege that it is defendant's " practice to have unqualified lay personnel ( rather than physicians ) determine what care is medically necessary ...based on actuarial utilization review guidelines that allegedly conflict with generally accepted medical standards ". After previously sustaining the breach of contract and GBL 349 claims<sup>37</sup>, the Court denied class certification because (1) the class definition was overbroad [ includes all participants to Prudential's healthcare plans " regardless of whether these individuals were ever denied promised care or treatment based on allegedly improper procedures and guidelines " ] and (2) predominance of individuals issues in the breach of contract and

GBL 349 claims [ " the medical necessity issue-unique and complex in each class member's particular case-would predominate...The difficulty of [ directing Prudential to reevaluate the each class member's claim using appropriate procedures ] is that reprocessing...would be only the first step; every new claim review...that resulted in a denial of care would then require individualized scrutiny of the medical necessity issue ". The Court also denied certification to a subclass alleging tortious interference with contract.

In Cohen v. Nassau Educators Federal Credit Union<sup>38</sup> a class of credit union members alleged breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment and violation of GBL 349 by their credit union. In dismissing the complaint the Court found that the documentary evidence " flatly contradicted the plaintiff's claim that the defendant... was obligated to maintain a group insurance policy for its members... that the credit union was authorized to terminate the insurance policy at any time "

### **Life Insurance**

In Beller v. William Penn Life Ins. Co.<sup>39</sup>, a class of policyholders of flexible premium adjustable life insurance policies alleged that defendant " was not following the cost of

insurance provisions in the policies when calculating the annual premiums...( which ) were in excess of what they should have been according to the terms of the policies " and asserted, inter alia, claims of breach of contract, constructive trust and fraud in the sale of insurance contracts . The Court certified the class finding that CPLR Article 9 " is to be liberally construed ( and ) that plaintiff satisfied the statutory criteria set forth in CPLR 901 ". The trial Court also addressed discovery issues in " a class action swiftly approached trial " allowing plaintiff's counsel to submit written questions to defendant's expert witnesses.<sup>40</sup>

In Fiala v. Metropolitan Life Ins. Co.<sup>41</sup>, a class of 10,000,000 former policyholders " in Metropolitan Life Insurance Company ( MetLife ), a mutual company, until MetLife converted to a stock insurance company " alleging, inter alia, dilution of equity<sup>42</sup> [ injuries included " policyholders receiving a lower initial public offering price for the shares allotted to them " ], sought approval of an opt-out notice, primarily, by publication together with a limited direct mailing of printed notices. Based upon a finding that the direct mail cost of individual notice " will certainly run into the millions of dollars " and " It seems doubtful that significant numbers of class-members would desire to exclude themselves " the Court provided for (1) notice by publication in the national and local

editions of the Wall Street Journal and New York Post once a week for three consecutive weeks, (2) sending a mail notice to a random sample of 500,000 class members selected from MetLife's lists and (3) piggyback mailings of printed notices along with any periodic mailings to class members. The plaintiffs were to pay the cost of the publication notice and one half of the cost of the 500,000 random mailing except that the culling of names will be done by MetLife.

### **Wrecked Cars**

In Jung v. The Major Automotive Companies, Inc.<sup>43</sup> a class of 40,000 car purchasers charged the defendant with fraud " in purchas(ing) automobiles that were ' wrecked ' or ' totaled ' in prior accidents, had them repaired and sold them to unsuspecting consumers...purposely hid the prior accidents from consumers in an attempt to sell the repaired automobiles at a higher price for a profit ". The parties jointly moved for preliminary approval of a proposed settlement featuring (1) a \$250 credit towards the purchase of any new or used car, (2) a 10% discount for the purchase of repairs, parts or services, (3) for the next three years each customer who purchases a used car shall receive a free CarFax report and a description of a repair, if any and (4) training of sales representatives " to explain a car's

maintenance history ", (5) projected settlement value of \$4 million, (6) class representative incentive award of \$10,000, and (7) \$480,000 for attorneys fees, costs and expenses. The Court preliminarily certified the settlement class, approved the proposed settlement and set a date for a fairness hearing.

### **Employees: Wages & Overtime**

In Lamarca v. Great Atlantic & Pacific Tea Co. Inc.,<sup>44</sup> a class of full time hourly employees sought overtime wages. Notwithstanding a prior federal action<sup>45</sup> which denied certification to plaintiffs' New York Labor Law claims, the court held that plaintiffs were not precluded from seeking other relief under the statute as a class.<sup>46</sup> After considering the adequacy of the class representatives [ alleged violations of defendant's time and attendance policies and two plaintiffs previously disciplined ] the Court certified the proposed class.

In Alix v. Wal-Mart Stores, Inc.,<sup>47</sup> a class of employees sought overtime wages alleging that defendant required employees to work through their earned rest breaks and lunch periods without pay and that plaintiffs were required to work without compensation, either before their shifts began or after their shifts had ended. The Court denied class certification because (1) the class definition included numerous individuals who had no

colorable claim, (2) predominance of individual issues [ rejection of expert testimony and statistical evidence as a substitute for individualized proof ], (3) lack of typicality [ "as plaintiffs' individual claims do not encompass many of those which plaintiffs seek to advance on behalf of the class " ], (4) inadequacy of representation [ conflict of interest between assistant managers and employees ] and (5) lack of superiority [ administrative remedies available under the Labor Law ].

#### **Employees: Davis-Bacon Act**

In Cox v. NAP Construction Co., Inc.,<sup>48</sup> a class of workers sought prevailing wages, supplemental benefits and overtime compensation by defendant for work performed on federally funded public works projects in New York City.<sup>49</sup> Defendant asserted that plaintiffs claims were preempted by federal law because no private right of action exists under the Davis-Bacon Act to recover prevailing wages. The Court held that " the Davis-Bacon Act neither preempts nor otherwise precludes state law causes of action, whether common law or statutory, which seek payment of the very wages that Davis-Bacon Act requires " .

In Gawez v. Inter-Connection Electric Inc.,<sup>50</sup> a class of workers sought to recover wages at the prevailing rate mandated by Labor Law 220. The Court found that (1) " no private right

of action exists to enforce contracts requiring payment of prevailing wages pursuant to the Federal Davis-Bacon Act ", (2) private entities are not subject to prevailing wage guidelines and (3) with respect to the sureties " none of the named plaintiffs did any work on these projects " .

### **Undocumented Aliens: Wage Claims**

In Jara v. Strong Steel Doors, Inc.,<sup>51</sup> a class of workers sought prevailing wages and supplemental benefits, including overtime compensation. Defendants moved for partial summary judgment based upon plaintiffs' submission of fraudulent documents in connection with his employment. The court held that an employee may sue an employer for unpaid wages, notwithstanding an alleged violation of the Immigration and Reform Control Act.<sup>52</sup>

### **Lien Law Class Actions**

In ADCO Electric Corp. v. McMahon,<sup>53</sup> plaintiffs brought a class action suit to enforce a Lien Law trust for funds paid to a contractor. Defendant moved to dismiss the complaint for failure to state a cause of action, claiming that plaintiffs failed to seek class certification, as required by the New York Lien Law. The Court held that such a motion should be denied thus affording

the plaintiffs an opportunity to comply with the class certification requirement of New York Lien Law.

In ARA Plumbing & Heating Corp. v. Abcon Assoc's Inc.,<sup>54</sup> the Court reversed the award of punitive damages holding that not every violation of Article 3-A of New York Lien Law constitutes the criminal offense of larceny, and that the Lien Law does not create a strict liability crime. Therefore, a conviction of larceny, by misappropriation of trust funds, requires proof of larcenous intent which plaintiffs had failed to do.

In Matros Automated Electrical Const. Corp. v. Libman,<sup>55</sup> the Court granted summary judgment finding that defendants made a *prima facie* showing that no funds were due and owing at the time of the filing of the liens. In addition, the Court denied class certification since the plaintiff had no claim and, hence, no representative standing.

### **Investments**

In Vladimir v. Cowperthwait,<sup>56</sup> the plaintiff closed his account and commenced a class action on behalf of himself and all others who invested in defendant's portfolio after plaintiff's initial investment declined in value by 39% . The investment policy statement provided that the portfolio would be managed in a "prudent manner" and further provided that "the equity portions

of the portfolio should be well diversified to avoid any undue exposure." The Court granted defendant summary judgment finding that plaintiff had not been misled since he had been provided with a list of stocks held in the portfolio and knew that defendant possessed discretionary authority with respect to the portfolio's stocks.

In Brody v. Catell,<sup>57</sup> a class of investors alleged that the proffered consideration for National Grid's acquisition of Keyspan Corporation was undervalued, inadequate and unfair. The parties moved for final approval of a proposed settlement. The Court certified a settlement class and found the plaintiffs to be appropriate representatives. The Court found the settlement [ which provided for any disclosure to shareholders deemed necessary by plaintiff and the opportunity afforded to plaintiff's counsel to scrutinize the merits of the proposed merger and confirm its fairness to the class ] to have been negotiated at arms length and awarded attorneys fees of \$350,000.

In Pressnar v. MortgageIT Holdings Inc.,<sup>58</sup> a class of investors challenged various aspects of the proposed merger of defendant MortgageIT Holdings, Inc. with Titan Acquisition Corp. In response, the defendant agreed to provide plaintiff with the materials that were provided to the Board of Directors in connection with its approval of the proposed merger, to include additional information in its proxy statement, and to release any

and all claims relating to the merger. The Court held that "in view of the fact that the proposed settlement was arrived at by the parties who [we]re represented by able counsel, and since there ha[d] been no objection to the proposed settlement and the broad release that the class [wa]s giving, the settlement is approved."

### **Publishing Legal Notices**

In NCJ Cleaners, LLC v. ALM Media Inc.,<sup>59</sup> a class of advertisers alleged that the mandatory use of the New York Law Journal to publish legal notices created a *de facto* monopoly, which allowed the publisher to inflate its publication rates for business entities doing business within the City of New York. The court dismissed the Complaint noting that "differential prices have long been a familiar characteristic of our free enterprise system, never thought to be either immoral or unlawful " and that plaintiffs' allegations that defendants restrained competition was more properly directed against the County Clerk or the New York State Legislature in mandating that publications be made only in defendants' newspaper.

## **Constitutional Rights**

In Brown v. State,<sup>60</sup> the trial of a certified class action on behalf of 67 claimants was concluded with the dismissal of all claims based on an alleged violation of constitutional rights. On appeal, the Court held that the testimony and documentary evidence adduced at trial failed to demonstrate that the State Police ever adopted a policy which expressly classified persons on the basis of race so as to constitute the type of express racial classification triggering strict scrutiny.

## **Disclosure of Class Counsel's File**

In Wyly v. Milberg Weiss Bershad & Schulman LLP,<sup>61</sup> an investor, as a former class member, brought a special proceeding against class counsel alleging that he had the right to disclosure of files created and maintained in connection with class counsel's prior representation. The action stemmed from plaintiff's request that respondents move to relieve a settlement class from the settlement that respondents had brokered in a Federal Court action against Computer Associates, because of the existence of numerous documents not known to Respondents at the time of the fairness hearing in the Federal Court action. Petitioner brought a special proceeding in New York State court

alleging that as a former client of class counsel, he had a right to the files created in connection with Federal Court action. The Court determined that Petitioner was not precluded from seeking the disclosure because the Petitioner's relationship with Respondents was sufficiently similar to a traditional attorney-client relationship, to create a presumption in favor of affording Petitioner access to Respondents' files.<sup>62</sup>

### **Vendors: Charge Backs & Late Payments**

In The CLC/CFI Liquidating Trust v. Bloomingdales, Inc.,<sup>63</sup> a class of 4,000 vendors who sold goods to defendant sought monetary damages based upon defendants alleged uniform policy and practice of improper conduct towards vendors. Plaintiffs alleged that defendants took deductions for non-conforming goods without giving the vendors notice that the goods were non-conforming. The plaintiffs also alleged that defendants systemically made late payments to vendors and failed to pay interest on late payments. The Court denied certification because of (1) a lack of commonality given the differences between vendors in regard to notice and charge backs and (2) inadequacy of representation since there may be conflict of interest between the bankruptcy trustees' duties to the bankrupt party plaintiffs and to the proposed class.

## FOOTNOTES

<sup>1</sup> Sperry v. Crompton, 8 N.Y. 3d 204, 863 N.E. 2d 1012, 831 N.Y.S. 2d 760 ( 2007 ), aff'g 26 A.D. 3d 488, 810 N.Y.S. 2d 498 ( 2d Dept. 2006 ).

<sup>2</sup> See 3 Weinstein Korn & Miller, New York Civil Practice (MB) ( 2008 ) 901.28 ( WKM ). In Giovanniello v. Carolina Wholesale Office Machine Co., 29 A.D. 3d 737, 815 N.Y.S. 2d 248 ( 2d Dept. 2006 ); Rudgayzer & Gratt v. Cape Canaveral Tours & Travel, Inc., 22 A.D. 3d 148, 799 N.Y.S. 2d 795 ( 2d Dept. 2005 ); Leyse v. Flagship Capital Services Corp., 22 A.D. 3d 426, 803 N.Y.S. 2d 52 ( 1<sup>st</sup> Dept. 2005 ); Ganci v. Cape Canaveral Tour & Travel, Inc., 21 A.D. 3d 399, 799 N.Y.S. 2d 737 ( 2d Dept. 2005 ); Bonime v. Discount Funding Associates, Inc., 21 A.D. 3d 393, 799 N.Y.S. 2d 418 ( 2d Dept. 2005 ) the Courts have held that class action treatment of TCPA claims is inappropriate under CPLR § 901(b)'s prohibition of class actions seeking a penalty.

<sup>3</sup> See WKM, supra, at 901.23[6][c]. Lawlor v. Cablevision Systems Corp., 15 Misc 3d 1111( Nassau Sup. 2007 ).

<sup>4</sup> For discussions of mass tort class actions see Dickerson, Class Actions: The Law of 50 States, Law Journal Press, N.Y. ( 2008 ) ( Class Actions ) at 6.04[7].

<sup>5</sup> Osarczuk v. Associated Universities, Inc., 36 A.D. 3d 872, 830 N.Y.S. 2d 711 ( 2d Dept. 2007 ).

<sup>6</sup> For a discussion of the certifiability of mass tort class actions under CPLR Article 9 see WKM, supra, at 901.23[9].

<sup>7</sup> In the Matter of Oxycontin, 15 Misc. 3d 388, 833 N.Y.S. 2d 357 ( Richmond Sup. 2007 )

<sup>8</sup> Id. ( " various plaintiffs were legally prescribed the pain reliever...by different physicians for different physical conditions ranging from back pain, post surgical pain and lymphoma...each plaintiff had a different injury ranging from sexual dysfunction to nightmares, to symptoms of withdrawal and social ineptitude...no typical injury or signature disease " ).

<sup>9</sup> See Hurtado v. Purdue Pharma. Co., 6 Misc. 3d 1015, 800 N.Y.S. 2d 347 ( Richmond Sup. 2005 ).

<sup>10</sup> See Weller & Ortega, Coordination of Mass Torts in State Court, New York Law Journal, September 10, 2007, p. 4.

<sup>11</sup> Continental Casualty Co. v. Employers Insurance Co. Of Wausau, 16 Misc. 3d 223 ( N.Y. Sup. 2007 ).

<sup>12</sup> Berkman v. Robert's American Gourmet Food, Inc., 16 Misc. 3d 1104 ( N.Y. Sup. 2007 ).

<sup>13</sup> Klein v. Robert's American Gourmet Food, 28 A.D. 3d 63, 808 N.Y.S. 2d 766 ( 2d Dept. 2006 ).

<sup>14</sup> Berkman v. Robert's American Gourmet Food, Inc., 16 Misc. 3d 1104 ( N.Y. Sup. 2007 )( " These discount coupons could be redeemed by consumers at the point of purchase...in the following amounts 1. At least \$0.40 for the purchase of a 4 once bag of any Robert's snack food product; or 2. At least \$0.20 for the purchase of a 1 once or 1 -3/8 ounce bag of any Robert's snack food product, 3. To the extent that Robert's replaces the size of the above product packages with other sizes Robert's will offer discount coupons redeemable against such new packaging in an amount calculated in good faith to equal 20% of the average retail selling price...no claim forms were needed to be completed or submitted to Defendants. Moreover, the nature of the Coupon Distribution-a completely ' fluid recovery '- meant that consumers did not have to prove that they purchased the Products or were otherwise damaged " ).

<sup>15</sup> Id. ( " The parties agreed that the fat and caloric testing would be carried out monthly for eighteen months...quarterly for the next thirty months " ).

<sup>16</sup> See also Class Actions, supra, at 9.03[2]; WKM, supra, at 903.10.

<sup>17</sup> See also WKM, supra, at 901.23[6][c].

<sup>18</sup> Id.

<sup>19</sup> Vigiletti v. Sears, Roebuck & Co., Index No: 2573/05, Sup. Ct. Westchester County, J. Rudolph, Decision September 23, 2005, aff'd 42 A.D. 3d 497, 838 N.Y.S. 2d 785 ( 2d Dept. 2007 ).

<sup>20</sup> Baron v. Pfizer, Inc., 42 A.D. 3d 627, 840 N.Y.S. 2d 445 ( 3d Dept. 2007 ).

<sup>21</sup> McGuckin v. Snapple Distributors, Inc., 41 A.D.3d 795, 837 N.Y.S. 2d 576 ( 2d Dept. 2007 ).

<sup>22</sup> Naftulin v. Sprint Corp., 16 Misc. 3d 1131 ( Kings Sup. 2007).

<sup>23</sup> Id. ( The advertisement " offered a ' 2 Phones 1 Rate Plan ' with 3000 minutes at a rate of \$49.99 per month ( and ) also stated that more phones could be added for an additional \$10.00 per month...( Plaintiff purchased ) the advertised plan and three phones...and paid \$364.00 for the phones and paid an activation fee of \$34.99 " ).

<sup>24</sup> See also Class Actions, supra, at 6.07[5] and WKM, supra, at 902.07.

<sup>25</sup> Mollins v. Nissan Motor Co., Ltd., 14 Misc. 3d 1226 ( Nassau Sup. 2007 ).

<sup>26</sup> Lawlor v. Cablevision Systems Corp., 15 Misc 3d 1111 ( Nassau Sup. 2007 ).

<sup>27</sup> Fuchs v. Wachovia Mortgage Corp., 41 A.D. 3d 424, 838 N.Y.S. 2d 148 ( 2d Dept. 2007 ).

<sup>28</sup> See Charter One Mortgage Corp. v. Condra, 847 N.E. 2d 207 ( Ind. App. 2006 ), transfer granted 860 N.E. 2d 599 ( Ind. Sup. 2006 ), rev'd 865 N.E. 2d 602 ( Ind. Sup. 2007 )( " if the completion of legal documents is incident to a lender's financing activities, it is generally not the practice of law, whether or not a fee is charged " ); King v. First Capital Fin. Servs. Corp., 215 Ill. 2d 1, 293 Ill. Dec. 657, 828 N.E. 2d 1155 ( 2005 )( " [T]he charging of a fee, without more, for the preparation of the loan documents by the lenders' employees did not transform their [ permissible ] conduct into the unauthorized practice of law " ); Dressel v. Ameribank, 468 Mich. 557, 664 N.W. 2d 151 ( 2003 )( completion of standard mortgage documents by non-attorney employees did not constitute the practice of law; " [i]t is immaterial that [ the bank ] charged a fee for its services. Charging a fee for nonlegal services does not transmogrify those services into the practice of law ' ); cf, Eisel v. Midwest Bankcentre, 2006 WL 3408185 ( Mo. App. E.D. )( " The trial court did not err in finding that Midwest engaged in the unauthorized business of law when it charged customers a separate document preparation fee for the completion of loan forms " ), aff'd 230 S.W. 3d 335 ( Mo. Sup. 2007 ) ].

<sup>29</sup> Shovak v. Long Island Commercial Bank, 35 A.D. 3d 837, 829 N.Y.S. 2d 546 ( 2d Dept. 2006 ).

<sup>30</sup> MacDonell v. PHM Mortgage Corp., 846 N.Y.S. 2d 223, 2007 WL 3317808 ( 2d Dept. 2007 ).

<sup>31</sup> See Dowd v. Alliance Mortgage Co., 32 A.D. 3d 894, 822 N.Y.S. 2d 558 ( 2d Dept. 2006 ); Dougherty v. North Fork Bank, 301 A.D.

2d 491, 753 N.Y.S. 2d 130 ( 2d Dept. 2003 ); see generally Negrin v. Norwest Mortgage, 263 A.D. 2d 39, 700 N.Y.S. 2d 184 ( 2d Dept. 1999 ).

<sup>32</sup> Dowd v. Alliance Mortgage Co., 32 A.D. 3d 894, 822 N.Y.S. 2d 558 ( 2d Dept. 2006 ). See generally Dillon v. U-A Columbia Cablevision of Westchester, 100 N.Y. 2d 525, 760 N.Y.S. 2d 726, 790 N.E. 2d 1155 ( 2003 ).

<sup>33</sup> Kings Choice Neckwear, Inc. V. DHL Airways, Inc., 41 A.D. 3d 117, 836 N.Y.S. 2d 605 ( 1<sup>st</sup> Dept. 2007 ), aff'g New York Law Journal, May 5, 2006, p. 22, col. 1 ( N.Y. Sup. 2006 ).

<sup>34</sup> Pludeman v. Northern Leasing Systems, Inc., 40 A.D. 3d 366, 837 N.Y.S. 2d( 1<sup>st</sup> Dept. 2007 ).

<sup>35</sup> See Bernstein v. Kelso & Co., 231 A.D. 2d 314, 323, 659 N.Y.S. 2d 276 ( 1<sup>st</sup> Dept. 1997 ).

<sup>36</sup> Batas v. The Prudential Insurance Company, 37 A.D. 3d 320, 831 N.Y.S. 2d 371 ( 1<sup>st</sup> Dept. 2007 ).

<sup>37</sup> Batas v. The Prudential Insurance Company, 281 A.D. 2d 260, 724 N.Y.S. 2d 3 ( 1<sup>st</sup> Dept. 2007 ).

<sup>38</sup> Cohen v. Nassau Educators Federal Credit Union, 37 A.D. 3d 751, 832 N.Y.S. 2s 50 ( 2d Dept. 2007 ).

<sup>39</sup> Beller v. William Penn Life Ins. Co., 37 A.D. 3d 747, 830 N.Y.S. 2d 759 ( 2d Dept. 2007 ).

<sup>40</sup> Beller v. William Penn Life Ins. Co., 15 Misc. 3d 350, 828 N.Y.S. 2d 869 ( N.Y. Sup. 2007 ).

<sup>41</sup> Fiala v. Metropolitan Life Ins. Co., 17 Misc. 3d 1102 ( N.Y. Sup. 2007 ).

<sup>42</sup> Fiala v. Metropolitan Life Ins. Co., 6 A.D. 3d 320, 776 N.Y.S. 2d 29 ( 1<sup>st</sup> Dept. 2004 )( claim stated against insurer for dilution of equity ).

<sup>43</sup> Jung v. The Major Automotive Companies, Inc., 17 Misc. 3d 1124 ( Bronx Sup. 2007 ).

<sup>44</sup> Lamarca v. Great Atlantic & Pacific Tea Co. Inc., 16 Misc. 3d 1115(A), 2007 WL 2127354 (N.Y. Supp. 2007).

<sup>45</sup> Foster v. The Food Emporium, 2000 WL 1737858 (S.D.N.Y. 2000).

<sup>46</sup> The court said a "class action for actual damages may be maintained under the Labor Law so long as claims for liquidated damages are waived." Lamarca, 2007 WL 2127354 at \*2.

<sup>47</sup> Alix v. Wal-Mart Stores, Inc., 16 Misc. 3d 844, 838 N.Y.S.2d 885 (Albany Sup. Ct. 2007).

<sup>48</sup> Cox v. NAP Co., Inc., 40 A.D.3d 459, 837 N.Y.S.2d 612 (1st Dep't 2007).

<sup>49</sup> The contracts required defendant to "pay to all laborers and mechanics employed [under the contract] not less than the wages prevailing in the locality of the project . . . pursuant to the Davis-Bacon Act."

<sup>50</sup> Gawez v. Inter-Connection Electric Inc., 44 A.D.3d 898, 2007 N.Y. Slip. Op. 08034 (2d Dep't 2007).

<sup>51</sup> Jara v. Strong Steel Doors, Inc., 16 Misc. 3d 1139 (A), 2007 WL 2696110 (Kings Sup. Ct. 2007).

<sup>52</sup> Immigration and Reform Control Act of 1986, 8 U.S.C. § 1324 c. The Court noted that disregarding a statutory mandate to pay prevailing wages where the claimant is an undocumented alien would encourage employers to pay illegal aliens lower wages than legal workers, or simply not pay them at all, knowing that the employee would have no legal recourse.

<sup>53</sup> ADCO Electric Corp. v. McMahon, 38 A.D.3d 805, 835 N.Y.S.2d 588 (2d Dep't 2007).

<sup>54</sup> ARA Plumbing & Heating Corp. v. Abcon Assoc's Inc., 44 A.D.3d 598, 843 N.Y.S.2d 154 (2d Dep't 2007).

<sup>55</sup> Matros Automated Electrical Const. Corp. v. Libman, 37 A.D.3d 313, 830 N.Y.S.2d 127 (1st Dep't 2007).

<sup>56</sup> Vladimir v. Cowperthwait, 42 A.D.3d 413, 839 N.Y.S.2d 761 (1st Dep't 2007).

<sup>57</sup> Brody v. Catell, 16 Misc. 3d 1105(A), 841 N.Y.S.2d 825 (Kings Sup. Ct. 2007).

<sup>58</sup> Pressnar v. MortgageIT Holdings Inc., 16 Misc. 3d 1103 (A), 841 N.Y.S.2d 828, 2007 WL 1794935 (NY Sup. Ct. 2007).

<sup>59</sup> NCJ Cleaners, LLC v. ALM Media Inc., 17 Misc. 3d 209, 844 N.Y.S.2d 619 (Richmond Sup. Ct. 2007).

<sup>60</sup> Brown v. State, 45 A.D.3d 15, 841 N.Y.S.2d 698 (3d Dep't 2007).

<sup>61</sup> Wyly v. Milberg Weiss Bershad & Schulman LLP, 15 Misc. 3d 583, 834 N.Y.S.2d 631, 2007 N.Y. Slip. Op. 27077 (N.Y. Sup. Ct. 2007).

<sup>62</sup> See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997).

<sup>63</sup> The CLC/CFI Liquidating Trust v. Bloomingdales, Inc., 2007 WL 3101249, 2007 N.Y. Slip. Op. 52062 (N.Y. Sup. Ct. 2007).