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## Summary of New York State Class Actions in 2012

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Recently, New York courts ruled on a variety of important class action issues involving counterfeit wines and GBL §350, inverse condemnation and terminal boxes, gift cards, overdrafts and federal preemption, denial of no-fault medical equipment claims and sua sponte class certification, post-graduate employment prospects for law students, rent overcharges and the J-51 program, and run-flat tires and causation.

### The Dynamic Duo

Within a five-year period, the state Legislature enacted two important salutary statutes, one procedural, in 1975, Article 9 of the CPLR (class actions),<sup>1</sup> and the other substantive, in 1980, creating a private right of action<sup>2</sup> for the enforcement of GBL §349 (misleading and deceptive business practices) and GBL §350 (false advertising). The enactment of this "dynamic duo" of remedial devices heralded, some thought,<sup>3</sup> a new dawn of consumer remedies.

However, the receptivity of the courts in making CPLR Article 9 class actions readily available to consumers and others has been problematic, at best.<sup>4</sup> As far as GBL §§349 and 350 are concerned, the courts as early as 1982<sup>5</sup> imposed upon consumer plaintiffs the need to prove individual reliance rendering, inter alia, GBL §350 unavailable in consumer class actions for 30 years.<sup>6</sup>

### GBL §350: Born Again

In [Koch v. Acker, Merrall & Condit](#),<sup>7</sup> the Court of Appeals clarified that justifiable reliance is not an element of a GBL §350 claim. In *Koch* the plaintiff alleged that the defendant auction house described its wines as "extraordinary" when, in fact, some were counterfeit. After disposing of an "As Is" disclaimer as inapplicable to a claim for deceptive trade practices the Court of Appeals found that "[t]o the extent that the Appellate Division order imposed a reliance requirement on General Business Law §§349 and 350 claims, it was error.<sup>8</sup> Justifiable reliance by the plaintiff is not an element of the statutory claim."<sup>9</sup>

The Court of Appeals' determination in this regard is in conformity with the language of both statutes, and appears to overrule a long line of Appellate Division cases dating to 1982.<sup>10</sup> In addition to making GBL §350 more accessible to injured consumers, the *Koch* decision is equally important for classes of consumers seeking to utilize not only GBL §349 but GBL §350. While consumer class actions alleging violations of GBL §349 are generally certifiable,<sup>11</sup> the courts have declined to certify GBL §350 class actions, finding that reliance is not subject to class wide proof.<sup>12</sup>

### Inverse Condemnation

In [Corsello v. Verizon New York](#),<sup>13</sup> 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" 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. However, the named plaintiff was subject to unique defenses such as waiver rendering his claims atypical and, by implication, an inadequate class representative.<sup>14</sup>

The court found that individual issues predominated defeating typicality because, inter alia, plaintiff gave defendant "oral permission" to attach a terminal box. In addition, defendant produced a 1911 document stating "[p]ermission is hereby granted' for the attachment of a '[c]able with terminal box' on the rear wall of the building plaintiffs now own."

#### **New York Law School**

In [Gomez-Jimenez v. New York Law School](#),<sup>15</sup> one of several similar class actions brought nationwide, a class of graduate law school students alleged that New York Law School (NYLS) "has been able to attract a large number of applicants and charge an expensive price for its educational services because the school has disseminated... misleading information about its graduates' employment profiles." Allegedly the misleading information caused prospective students to misjudge post-graduate employment prospects and commit to earning a NYLS degree which has less marketplace currency than they reasonably had expected. Plaintiffs allege that many of the school's working graduates in the legal sector hold part-time or temporary employment and may be impoverished and unable to pay off student loans.

The Supreme Court, New York County, dismissed the GBL §349 claim, stating, "The Court does not view these post-graduate employment statistics to be misleading in a material way...reasonable consumers—college graduates—seriously considering law schools are a sophisticated subset of education consumers, capable of sifting through data and weighing alternatives before making a decision regarding their post-college options... These reasonable consumers have available to them any number of sources of information to review when making their decisions."

[The First Department affirmed](#) last week,<sup>16</sup> but did so in a manner that reflected its strong disapproval of how some law schools market their educational services. First, the court properly noted that what you fail to say is as important as the promises you make "[o]mission-based claims under Section 349 are appropriate where the business alone possesses information that is relevant to the consumer and fails to provide this information". Second, the court found that the defendant's "statistical gamesmanship" was "[i]ikely [to leave] some consumers with an incomplete, if not false, impression of the schools' job placement success." And third, the court raised the duty of law schools to their students to the ethical standard of "absolute candor" stating law schools owe "prospective students more than just barebones compliance with their legal obligations."<sup>17</sup>

#### **Gift Cards and Debit Cards**

New York consumers have been vigorously challenging the fees imposed by the issuers of gift cards.<sup>18</sup> The struggle between gift card issuers, a multi-billion dollar business, and cooperating banks and consumers has shifted to whether or not actions that rely upon the common law and violations of salutary consumer protection statutes such as GBL §§349, 396-I and CPLR §4544 are preempted by federal law.<sup>19</sup> Although this issue seemingly was resolved earlier in [Goldman v. Simon Property Group](#),<sup>20</sup> very recently, the Appellate Division, Second Department, in [Sharabani v. Simon Property Group](#),<sup>21</sup> a gift card class action challenging the imposition of a \$15 renewal fee on expired gift cards as a deceptive business practice, found that GBL §349 is not preempted by the Home Owners' Loan Act (HOLA) or the Office of Thrift Supervision (OTS) regulations.

In [Levin v. HSBC](#),<sup>22</sup> a class of debit card holders asserted that defendant bank "uses a computer program that is designed to manipulate customers' transaction records in order to maximize overdraft fees (\$35). Generally this means that HSBC posts transactions from largest to smallest...called 'high-to-low' posting...HSBC charges customers the same \$35 fee for each overdraft...[U]sing high-to-low posting, customers' funds are depleted as quickly as possible, which leads to overdraft fees on multiple small transactions."

The Supreme Court, New York County, denied defendant's assertion that all claims were preempted by the National Bank Act and the regulations of the Office of the Comptroller of the Currency and sustained the state law causes of action except for unjust enrichment and conversion.

#### **No Fault Claims**

In [Globe Surgical Supply v. GEICO](#),<sup>23</sup> a class action by medical equipment suppliers challenging denial of their claims under no fault because they exceeded so-called prevailing rates, the Second Department denied certification without prejudice for lack of an adequate class representative. In [Amer-A-Med Health Products v. GEICO](#)<sup>24</sup> and [O'Brien v. GEICO](#)<sup>25</sup> the court found a proposed intervenor to be an adequate class representative and sua sponte certified the class noting that "It 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<sup>26</sup> approved of the concept of sua sponte class certification but remitted for the entry of a CPLR 903 order describing the certified class.

#### **Rent Overcharges**

In [Casey v. Whitehouse Estates](#)<sup>27</sup> 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 Rent Stabilization Law (RSL) and obtain "tax abatements and exemptions for rehabilitative work done to" its

building under the J-51 program. Allegedly the defendant landlord illegally charged market rents violating the J-51 Program "to keep apartments rent stabilized."<sup>28</sup>

In granting class certification the Supreme Court, New York County, found that class treatment was not prohibited under CPLR 901(b) by the penalty provisions of the RSL because they could be waived<sup>29</sup> and, in any event, the penalty provisions were not triggered because the defendant was acting in good faith reliance upon the housing agency's own interpretation of the RSL.<sup>30</sup> 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 they be compensated for the rent overcharges.

#### Run-Flat Tires

Relying upon [Morrissey v. Nextel Partners](#),<sup>31</sup> wherein the Third Department held that GBL §349 claims require proof of causation, the federal district court in [Oscar v. BMW](#)<sup>32</sup> denied certification under FRCP 23 to a GBL §§349, 350 class action alleging BMW failed to disclose that its run-flat tires (RFTs), which allegedly allow drivers to drive to a service station even after becoming flat, cannot be repaired, cost more than regular tires to replace and replacing RFTs entails more 'inconvenience and delay' and greater cost than replacing a normal tire.

The court found a predominance of "individual inquiries to determine whether BMW's allegedly deceptive acts or omissions 'caused actual...harm' to any particular class member...as to both theories of injury [including] purchase price injury [and] the incremental cost to replace RFTs, above the replacement cost of normal tires."

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#### Endnotes:

1. See Weinstein Korn Miller, New York Civil Practice CPLR, Article 9, Lexis-Nexis (MB) 2012(WKM).
2. See Dickerson, *Chapter 98 Consumer Protection, Commercial Litigation in New York Courts* (3d ed), Robert L. Haig (ed) N.Y.C.L.A & West 2012. See also Moldavan, "New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor," *48 Brook. L. Rev.* 209 (1982).
3. See Dickerson, "Class Actions Under Article 9 of the CPLR-The Dynamic Duo," *NYLJ*, March 15, 1982, p. 1 ("The timely combination of Article 9 of the C.P.L.R. with GBL Sections 349, 350...provides proponents of New York's class action statute with a re-vitalized procedural remedy").
4. Dickerson, "New York State Class Actions: Make It Work-Fulfill The Promise," *74.2 Albany Law Review* 711 (2010-2011) ("Notwithstanding the broad language in the legislative history of CPLR Article, New York courts have not implemented this salutary statute as broadly as they might have. As a remedial vehicle, CPLR Article 9 is operating at approximately forty percent of its intended potential").
5. See *Burns v. Volkswagen of America*, 118 Misc.2d 289, 292, 460 N.Y.S.2d 410 (Monroe Sup. 1982), aff'd 97 A.D.2d 977, 468 N.Y.S.2d 1017 (4th Dept. 1983)("A necessary element of any action based upon deception is reliance" citing as authority a 1978 common law fraud (not asserting GBL 349, 350 claims) class action in *Strauss v. Long Island Sports*, 60 A.D.2d 501, 506, 401 N.Y.S.2d 233 (2d Dept. 1978)).
6. See Dickerson & Cohen, "Ruling in GBL 350 Claims Serves as Game Changer," *NYLJ*, April 19, 2012, p. 4.
7. *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940 (2012).
8. It should be noted that the Court of Appeals previously has not expressly stated on whether claims pursuant to GBL §350 include a reliance requirement. The Court has stated, however, that "[t]he standard for recovery under General Business Law §350, while specific to false advertising, is otherwise identical to section 349."
9. *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y. 3d 940 (2012).
10. See *Dank v. Sears Holding Mgt. Corp.*, 93 A.D.3d 627 (2d Dept. 2012); *Morrissey v. Nextel Partners*, 72 A.D.3d 209, 217 (3d Dept. 2010); *Klein v. Robert's Am. Gourmet Food*, 28 A.D.3d 63, 72 (2d Dept. 2006); *Gale v. International Bus. Machines Corp.*, 9 A.D.3d 446, 447 (2d Dept. 2004); *Gershon v. Hertz Corp.*, 215 A.D.2d 202, 203 (1st Dept. 1995)("cause of action under General Business Law §350 for false advertising is legally insufficient absent an allegation that he relied upon or even knew of defendant's advertising") *Butler v. Caldwell & Cook*, 122 A.D.2d 559, 505 N.Y.S.2d 288 (4th Dept. 1986)(GBL 349, 350 claims dismissed "because of the failure to state facts showing that plaintiffs relied to their detriment upon deceptive practices"); *Bello v. Cablevision Sys. Corp.*, 185 A.D.2d 262, 587 N.Y.S.2d 1 (2d Dept. 1992)(GBL 349 and 350 claims dismissed "for failure to sufficiently demonstrate reliance"); *Burns v. Volkswagen of America*, 118 Misc.2d 289, 292, 460 N.Y.S.2d 410 (Monroe Sup. 1982), aff'd 97 A.D.2d 977, 468 N.Y.S.2d 1017 (4th Dept. 1983).
11. See WKM at Section 901.23[6][a].

12. See WKM at Section 901.23[6][b].
13. *Corsello v. Verizon New York*, 18 N.Y.3d 777, 967 N.E.2d 1177 (2012).
14. See *Globe Surgical Supply v. GEICO*, 59 A.D. 3d 129, 143-145, 871 N.Y.S.2d 263 (2d Dept. 2008).
15. *Gomez-Jimenez v. New York Law School*, 36 Misc.3d 230, 943 N.Y.S.2d 834 (N.Y. Sup. 2012). See also: *Richins v. Hofstra University*, 2012 WL 6163090 (E.D.N.Y. 2012)(similar state court class action removed to federal court under Class Action Fairness Act remanded to state court).
16. *Gomez-Jimenez v. New York Law School*, 2012 WL 6620602 (1st Dept. 2012)(the court also found that defendant's statistical formulations did not rise to the level of being materially deceptive or misleading "simply [by] publishing information and allowing consumers to make their own assumptions about the nature of the information").
17. See *Andre v. Pace University*, 161 Misc.2d 613, 618 N.Y.S.2d 975 (1994)(students seek tuition refund; breach of contract; rescission; breach of fiduciary duty; educational malpractice; consumer protection statute, GBL 349, rev'd 170 Misc.2d 893, 655 N.Y.S.2d 777, N.Y.A.T. 1996).
18. For example, in *Lonner v. Simon Property Group*, 57 A.D.3d 100, 866 N.Y.S.2d 239 (2d Dept. 2008), a class of consumers challenged the imposition of gift card dormancy fees of \$2.50 per month setting forth three causes of action seeking damages for breach of contract, violation of General Business Law 349 (GBL 349) and unjust enrichment. Within the context of defendant's motion to dismiss the amended complaint, the court found that the *Lonner* plaintiffs had pleaded sufficient facts to support causes of action for breach of contract based upon a breach of the implied covenant of good faith and fair dealing and a violation of GBL 349. See also: *Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, 289, 750 N.Y.S.2d 284 (1st Dept. 2003).
19. 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).
20. *Goldman v. Simon Property Group*, 31 A.D.3d 382, 383, 818 N.Y.S.2d 245 (2d Dept. 2006).
21. *Sharabani v. Simon Property Group*, 96 A.D.3d 24, 942 N.Y.S.2d 551 (2d Dept. 2012).
22. *Levin v. HSBC Bank USA*, 650562/11, NYLJ 1202561791602, at \*1 (Sup., N.Y. Co., Decided June 26, 2012).
23. *Globe Surgical Supply v. GEICO*, 59 A.D.3d 129, 871 N.Y.S.2d 263 (2d Dept. 2008).
24. *Amer-A-Med Health Products v. GEICO*, 2011 WL 1464145 (N.Y. Sup. 2011).
25. *O'Brien v. GEICO*, Index No. 009808/04, Decision July 19, 2011 (J. Phelen).
26. *O'Brien v. GEICO*, 2012 WL 4513107 (2d Dept. 2012).
27. *Casey v. Whitehouse Estates*, 36 Misc.3d 1225(A) (N.Y. Sup. 2012).
28. See *Roberts v. Tishman Speyer Properties*, 13 N.Y.3d 270 (2009).
29. See WKM at 901.28; See also: *Cox v. Microsoft Corp.*, 8 A.D.3d 39 (1st Dept. 2004).
30. Relying upon *Roberts v. Tishman Speyer Properties*, 13 N.Y.3d 270 (2009) and *27A Realty Assoc. v. Lucas*, 32 Misc.3d 47, 49-50 (N.Y.A.T. 2011), the court found that "the Landlord in the instant action was acting in good faith reliance upon the DHCR's own interpretation of the law...the facts alleged cannot support a finding that the landlord fraudulently or purposefully evaded the Rent Stabilization Law, so the treble damage provisions of the rent regulations do not apply under the facts alleged."
31. *Morrissey v. Nextel Partners*, 72 A.D.3d 209, 213 (3d Dept. 2010).
32. *Oscar v. BMW*, 2012 WL 2359964 (S.D.N.Y. 2012). For another run-flat tire class action, see *Marcus v. BMW of North America*, 2012 WL 3171560 (3d Cir. 2012)(certification denied because of a lack of uniform causation as to the reason a tire could "go flat").