Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
April 2015

This article is the sixth in a quarterly series reviewing decisions from the Federal District Court and State Supreme Court (Commercial Division) judges located in White Plains. This article reviews decisions from the first quarter of 2015.

Justice Scheinkman Dismisses Proposed Class Action Under New York's Bottle Bill Based on Contractual Forum Selection Clause

In *USA-India Export-Import, Inc. v. Coca-Cola Refreshments USA, Inc.*, 46 Misc. 3d 1215(A), 2015 N.Y. Slip. Op. 50091(U) (N.Y. Sup. Ct., Westchester Cty. Jan. 30, 2015), **Justice Alan D. Scheinkman** granted Defendant's motion to dismiss a putative class action complaint alleging violations of New York's Returnable Container Act (Environmental Conservation Law Article 27, Title 10) (the "Bottle Bill") and New York's General Business Law § 349. As amended in 2009, the Bottle Bill requires beverage producers like Defendant to pay all deposits received from the sale of containers (and not refunded to consumers) into an interest bearing account in trust for the State. Plaintiffs alleged Defendant improperly attempted to shift the costs of complying with the Bottle Bill onto Plaintiffs as beverage distributors via certain provisions in written agreements between Plaintiffs and Defendant. Defendant moved to dismiss the complaint based on a Georgia forum selection and choice of law clause in those agreements. Plaintiffs opposed the motion, arguing that because Georgia did not have a bottle bill, enforcing the forum selection clause would violate New York public policy. The Court rejected Plaintiffs' argument and granted the motion. The Court first noted New York's strong judicial policy in favor of enforcing forum selection and choice of law clauses. Justice Scheinkman went on to conclude that, notwithstanding its lack of a bottle bill, Georgia law was not "truly obnoxious" to New York law and there was no reason why the Georgia courts would not be fairly able to decide the contract issues underlying the litigation. Finally, the Court declined to sever Plaintiffs' claims predating the parties' written agreements, finding the forum selection clause had no temporal limitation and there was no indication the clause was divisible.

Judge Román Denies Motion in Limine to Preclude Opinions of Biomechanical Engineer in Automobile Accident Litigation

In *Boykin v. Western Express, Inc.*, No. 12-cv-7428 (NSR)(JCM), 2015 WL 539423 (S.D.N.Y. Feb. 6, 2015), **Judge Nelson S. Román** denied Defendant's motion *in limine* to bar the testimony of Plaintiff's expert, an epidemiologist who was retained to perform an automobile accident

reconstruction and biomechanical analysis and to offer a rebuttal to the opinions of Defendant's expert that the forces Plaintiff experienced during the crash were not consistent with injury causation. Defendant's motion focused principally on the fact that the expert was performing biomechanical analyses but was not an engineer. Judge Román rejected Defendant's arguments, finding that even though the expert was not a biomechanical engineer, he was qualified in the areas of injury biomechanics, accident reconstruction, forensic epidemiology and medicine. In particular, the Court noted Defendant provided no support for its assertion that the court should bar a witness with biomechanics expertise because he was not a biomechanical or other engineer. The Court went on to reject the remainder of Defendants' arguments *seriatim*, concluding the expert's opinions were relevant and reliable, were "amply supported by published, peer-reviewed, scientific research," and would be helpful to the trier of fact on the issue of causation, which was complex, scientific and technical on the facts of the case.

Judge Karas Denies Pro Se Petition for Write of Error Coran Nobis Arising Out of 1997 Robbery Conviction

In *Dixon v. United States*, No. 14-CV-960 (KMK), 2015 WL 851794 (S.D.N.Y. Feb. 27, 2015), **Judge Kenneth M. Karas** denied Plaintiff's motion for summary judgment and dismissed his petition for a writ of error coram nobis to vacate his conviction. In 1997, Plaintiff was convicted of bank robbery, which conviction was affirmed by the Second Circuit. Plaintiff was incarcerated until 2010 and subject to supervised release until the end of 2013. In his petition, Plaintiff alleged that he was actually innocent and that he suffered continued harm as a result of his conviction because he was unable, as a convicted felon, to find gainful employment. As an initial matter, the Court declined to enter a default judgment against the Government despite the fact that its opposition to Plaintiff's motion was untimely, finding the Second Circuit's strong preference is to decide cases on their merits. With respect to the petition itself, Judge Karas first noted that a writ of coram nobis is a "limited and exceptional remedy" that should be issued only where errors of fact exist "of the most fundamental character" and that "rendered the proceeding itself irregular and invalid." Turning to the petition itself, the Court concluded that although Plaintiff had provided "sound reasons" as to why his filing of a petition more than 15 years after his conviction was timely, Plaintiff failed to demonstrate a fundamental error in that conviction or that he suffered continuing legal consequences. The Court held any stigma or reputational harm from the conviction, while unfortunate, was insufficient to constitute an actionable legal harm.

Judge Briccetti Grants in Parts and Denies in Part Motion for Class Certification in Case Against Grass Seed Seller

In *In re Scotss EZ Seed Litigation*, No. 12 CV 4727 (VB), -- F.R.D. - (2015), 2015 WL 670162 (S.D.N.Y. Jan. 26, 2015), **Judge Vincent Briccetti** granted in part and denied in part Plaintiffs' motion for class certification. Defendants Scotts companies produce and sell Scotts Turf Builder EZ Seed. The product packaging included the claim that EZ Seed grows grass "50% thicker with half the water" compared to "ordinary seed." Plaintiffs filed a putative class action alleging the 50% thicker claim was untrue and constituted false advertising, breach of warranty, breach of contract and unjust enrichment under New York and California law. The Court first determined Plaintiffs satisfied the Rule 23(a) class action prerequisites of numerosity, commonality, typicality and adequacy. The Court then turned to the Second Circuit's additional requirement of ascertainability of class members. Although he recognized potential difficulties in ascertaining class members where consumers often discard their purchase receipts, Judge Briccetti concluded the class definition was sufficiently specific to identify class members and to hold otherwise would effectively eliminate

consumer class actions against producers. The Court went on to certify the class under Rule 23(b)(3) as to all claims except the New York breach of warranty claim. As to that claim, the Court found because Plaintiffs would need to show "basis of the bargain" reliance to state a New York warranty claim, individual questions would predominate over common questions of law and fact, rendering class certification inappropriate. Finally, the Court permitted the class action to go forward on full compensatory and price premium damages theories, but rejected a disgorgement of money theory of damages as unsuitable for class-wide resolution.

Judge Seibel Grants Defendant's Motion for Summary Judgment in Discrimination Case

In *Fontecchio v. ABC Corp.*, No. 12-CV6998 (CS), 2015 WL 327838 (S.D.N.Y. Jan. 23, 2015), **Judge Cathy Seibel** granted Defendant's motion for summary judgment and dismissed Plaintiff's complaint alleging age and gender discrimination under Title VII, the ADEA and the New York State Human Rights Law. Plaintiff was employed by Defendant for 29 years, first as a branch manager and then as a market manager. The market manager position was eliminated in July 2011 as part of a nationwide reorganization of Defendant's retail bank management structure. Plaintiff was not selected for one of the new positions created in the reorganization but was offered the opportunity to apply for other jobs in the organization. On summary judgment, the Court applied the *McDonnell-Douglas* burden-shifting framework for discrimination claims. As an initial matter, the Court held Plaintiff established a *prima facie* case of discrimination. In so doing, the Court rejected Defendant's argument that Plaintiff had not suffered an adverse employment action because she had not been terminated, but rather her position had been eliminated. The Court found an issue of fact existed as to whether Defendant's attempt to separate "elimination" from "termination" was a distinction without a difference. Judge Seibel went on to conclude, however, that Defendant had proffered a non-discriminatory reason for Plaintiff's termination - that Plaintiff did not rank as highly as other market managers and so was not offered a position in the reorganized business - and Plaintiff failed to establish that reason was pretext for her termination.