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INTRODUCTION

The most significant change in New York commercial law during the 2001-02 year was the enactment of revised Uniform Commercial Code Article 9, which became effective July 1, 2001, although the full impact of this change will not be felt for several years.¹ These revisions have been discussed in great detail in the previous two Surveys.² In *Indosuez International Finance B.V. v. National Reserve Bank*, the New York Court

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of Appeals continued its choice of law jurisprudence, finding that New York had the paramount interest in having its law applied to the entire dispute between a Netherlands bank and a Russian bank that selected New York law to govern a portion of their transactions.\(^3\)

During the Survey year, the Court of Appeals dealt a blow to automobile lessees.\(^4\) In *DiCintio v. DaimlerChrysler Corp.*, the Court held that Magnuson-Moss Warranty Act lessees do not have standing to bring suit under the Warranty Act because they are not consumers.\(^5\) New York state and federal courts continue to develop product liability jurisprudence, especially in the area of defective design product theory.\(^6\) During the year, the Second Circuit heard a case involving a conflict between New York State law and the Federal Arbitration Act.\(^7\) The Court decided in *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, that the Act preempts the long standing New York rule that, where the parties dispute whether an arbitration clause is part of their agreement, unequivocal evidence that the parties intended the clause to be part of their agreement is required in order to compel arbitration.\(^8\) Instead, under the Act, in the sales of goods context, courts must use the section 2-207(2) analysis to determine whether the disputed arbitration provisions will enter a contract between merchants.\(^9\) In a case of first impression in the Second Circuit, the Southern District held in *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, that the Convention for International Sale of Goods ("CISG") preempts state law contract claims, possibly preempts promissory estoppel claims, but not tort claims brought under state law.\(^10\)

### I. PRODUCTS LIABILITY

During the year, New York federal and state courts issued numerous reported opinions on products liability cases. The Southern District returned to *Colon v. BIC USA, Inc.*, to decide defendant’s summary judgment motion.\(^11\) The previous year, the Court had issued an opinion on defendant’s motion to dismiss.\(^12\) The plaintiff brought an action based on

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5. Id.
8. Id. at 101.
9. Id. at 99-100 (citing 9 U.S.C. § 1 et seq).
commercial law tort theories of negligence, strict products liability and breach of warranty in connection with the design, manufacturing, testing, merchandising, and marketing of a BIC disposable butane lighter." 13 As to the negligence claim,

in New York, a plaintiff must show (1) that the manufacturer owed plaintiff a duty to exercise reasonable care; (2) a breach of that duty by failure to use reasonable care so that a product is rendered defective, i.e. reasonably certain to be dangerous; (3) that the defect was the proximate cause of the plaintiff’s injury; and (4) loss or damage. 14

On the one hand “[a] manufacturer has a duty to use reasonable care in designing a product for use in the manner for which it was intended as well as any unintended yet reasonably foreseeable use.” 15 On the other hand, “A manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user no matter how careless or even reckless.” 16 However, “[i]n New York, manufacturers of disposable lighters have a duty of care to children who may use them because such misuse is foreseeable.” 17 As to the strict liability claim, under New York law plaintiffs must show that the product was defective and caused plaintiff’s injury. 18 Once plaintiff establishes these points, the manufacturer will be held strictly liable. 19 “A manufacturer who places into the stream of commerce a defective product which causes injury may be held strictly liable.” 20 Under New York law, product defects fall into one of three categories: “(1) design defect, (2) a failure to warn, or (3) defect as a result of a manufacturing flaw.” 21 In actions in which plaintiffs bring defective products claims, New York courts use identical tests to analyze negligence and strict liability theories. 22 Plaintiffs must “present[]

13. Colon II, 199 F. Supp. 2d at 64.
14. Id. at 82.
16. Id. at 357, 734 N.Y.S.2d at 619.
17. Colon II, 199 F. Supp. 2d at 82.
18. Id. at 82.
19. Id.
21. Id. at 82-83 (citing Sage v. Fairchild-Swearingen Corp., 70 N.Y.2d 579, 517 N.E.2d 1304, 523 N.Y.S.2d 418 (1987)).
evidence that (1) the product as designed posed a substantial likelihood of harm, (2) [a] feasible [design] alternative existed, . . . (3) the defective design caused plaintiff’s injury.”23 There is also a fourth requirement “that the design defect existed at the time the product left the defendant’s control.”24 To prevail on manufacturing defect claims based “either [on] negligence or strict liability, the plaintiff must show that a specific product unit was defective as a result of ‘some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction,’ and that the defect was the cause of plaintiff’s injury.”25 Thus, “[a] defectively designed product ‘is [a product] which, at the time it leaves the seller’s hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use . . . .’”26

In Colon II, BIC moved for summary judgment based in pertinent part on the ground that there was “no duty to warn when additional warnings would be superfluous under the circumstances.”27 “It is well established that ‘[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known.’”28 Under New York law, to prevail on a duty to warn claim, a plaintiff “must show (1) that a manufacturer has a duty to warn; (2) against dangers resulting from foreseeable uses about which it knew or should have known; and (3) that failure to do so was the proximate cause of harm.”29 As with design defect claims, New York courts use identical tests to analyze negligence and strict liability theories.30 Judge Scheindlin granted

23. Id.
24. Id. (internal citations omitted); see also Daley v. McNeil Consumer Prods. Co., 164 F. Supp. 2d 367, 374 (S.D.N.Y. 2001) (granting defendant manufacturer’s summary judgment motion where plaintiff’s allergic reaction to “Lactaid” pills placed her in a “microscopic fraction of potential users”); Marshall v. Sheldahl, Inc., 150 F. Supp. 2d 400, 403 (N.D.N.Y. 2001) (granting defendant manufacturer’s summary judgment motion where plaintiff fails to show that the machine “feasibly could have been designed more safely”).
27. Colon II, 199 F. Supp. 2d at 64.
30. Id.
BIC’s motion in part, as to the design defect claims including the failure to warn claim and denied the motion in part, as to the manufacturing defect claim, finding that the plaintiffs failed to raise genuine issues of material fact on the design defect claim. Plaintiffs did not show that the alternative designs would have either prevented the injuries or lessen their severity. As to the failure to warn claim, the Judge found that BIC did not have a duty to warn because (1) the danger was “open and obvious” and (2) the failure to warn was not the proximate cause of the injuries. However, the plaintiffs did raise genuine issues of material fact on the manufacturing defect claim regarding the ease of removing the safety latch on the particular unit involved.

In another products liability opinion, Judge Motley explained the plaintiff’s burden of proof in defective product causes of action.

In New York, to survive a motion for summary judgment on a defective products claim, a plaintiff must demonstrate by a preponderance of the evidence that (1) the product is defective because it is not reasonably safe at the time it was manufactured and sold; (2) the product was used for a normal purpose; (3) the defect was a substantial factor in causing the plaintiff’s injuries; (4) the plaintiff, by the exercise of reasonable care, would not have both discovered the defect and apprehended its danger; and (5) the plaintiff could not have otherwise avoided the injury by exercise of ordinary care.

Furthermore, “[a] product may be defective because the manufacturer failed to provide adequate warnings regarding dangers associated with the product.” However, in duty to warn cases, the plaintiff must show that the failure to warn was the proximate cause of the injuries. As Judge Motley noted in Hutton v. Globe Hoist Co., “[i]n duty to warn cases, New York recognizes two circumstances that preclude a finding of proximate cause between warning and accident: obviousness and knowledgeable user.” Thus, “[a] manufacturer has no duty to warn of an obvious danger that could or should have been recognized as a matter of common sense.”

31. Id. at 64.
32. Id. at 91.
33. Id. at 92-93.
34. Id. at 94-95.
36. Id. at 375 (citing Fane v. Zimmer, Inc., 927 F.2d 124, 128 (2d Cir. 1991)).
37. Id. at 376.
38. Id. (citing Andrulonis v. U.S., 924 F.2d 1210, 1222-23 (2d Cir. 1991)).
39. Id.; see also Marshall v. Sheldahl, Inc., 150 F. Supp. 2d 400, 405 (granting defendant manufacturer’s summary judgment motion where dangers of the machine were
Hutton's admission in his deposition testimony that he was aware of the danger posed by the allegedly defective product damaged his argument that the manufacturer's failure to provide warnings about the product's dangers was a proximate cause of his injuries.  

Furthermore, manufacturers do not have a "duty to warn of potential reactions unless a product contains an ingredient 'to which a substantial number of the population are allergic.'" Before courts will impose a duty to warn on manufacturers, the plaintiff must "show (1) that she was one of a substantial number or of an identifiable class of persons who were allergic to the defendant's product, and (2) that defendant knew, or with reasonable diligence should have known of the existence of such number or class of persons." Where the manufacturer of a widely marketed product has not received any reports of allergic reactions by persons taking its product similar to the allergic reaction suffered by the plaintiff, courts will grant the defendant manufacturer's summary judgment motion.

A. Optional Safety Features

During the year, the Second Circuit, in an unreported opinion, held that under certain conditions "a manufacturer will not be found liable for selling a product without an optional safety feature." In *Campos v. Crown Equipment Corp.*, the court applied the three prong *Scarangella* test to the plaintiff's claim that a "forklift was defective because it was not equipped with certain optional safety equipment, including a backup alarm and warning lights." A product is not defectively designed:

Where the evidence and reasonable inferences therefrom show that:

1. the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available;
2. there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and
3. the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in

"open and obvious").

42. *id.* at 373 (quoting *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 A.D.2d 197, 200, 249 N.Y.S.2d 840, 844 (1st Dep't 1964)).
43. *See id.* at 373-74.
45. *id.* at 32.
the specifically contemplated circumstances of the buyer's use of the product. 46

The Second Circuit found that the manufacturer met all of the foregoing factors, and thus was not liable for manufacturing a defectively designed product. 47 The Court also noted, that under New York law, forklifts not equipped with optional back-up warning alarms are not defectively designed. 48

B. Choice of Law

In products liability cases, "New York applies the law of the victim's or plaintiff's domicile where the state in which the injury occurred has only minimal interest in the litigation." 49

In Colon II, the victim was visiting family members in Massachusetts when injured; thus, Massachusetts' interest in having its laws applied was outweighed by New York's interest in protecting its domiciliaries. 50

II. SALES

"It is well-settled under New York law that to establish a claim for breach of contract, a plaintiff must prove the following elements: (1) the existence of a contract; (2) breach by the other party; and (3) damages suffered as a result of the breach." 51 "[A] breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." 52 Thus, where a plaintiff "fails to plead a specific duty that arises separate and apart from the contractual duty imposed on defendant" under a breach of warranty claim, the court will dismiss the claim. 53

Similarly, although authority exists to the contrary, under New York law, a plaintiff cannot generally sustain both fraud and breach of contract claims where those claims are duplicative. In VTech Holdings Ltd. v.

46. Id. at 32-33.
47. Id. at 33.
49. Colon II, 199 F. Supp. 2d at 81 (holding that Massachusetts, the place of injury, had only a minimal interest in the litigation as the victim was only visiting there at the time of the accident).
50. Id.
53. Id. at 225.
Lucent Technologies, Inc., plaintiff brought claims inter alia, alleging fraud, breach of warranties, and breach of covenants.\textsuperscript{54} Defendant moved to dismiss plaintiff's fraud claim, alleging that it was duplicative of the breach of contract claims.\textsuperscript{55} Where the fraud claim is based on allegations of misrepresentations of future intention, New York courts will dismiss that claim.\textsuperscript{56} For example, "[t]he mere allegation that 'a defendant did not intend to perform a contract with a plaintiff when he made it' generally fails to state a claim for fraud ...."\textsuperscript{57} However, New York courts have allowed both fraud and breach of contract claims to stand where the "claims [are] based on alleged misrepresentations of present fact."\textsuperscript{58} Under the Bridgestone/Firestone test,

to maintain a claim for fraud [simultaneously with a breach of contract claim], "a plaintiff must either: (i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages."\textsuperscript{59}

While leaving open a finding that the Bridgestone/Firestone test might not apply to the Vtech case, nonetheless, the Southern District denied the motion to dismiss, finding that (1) the plaintiff's fraud claims were based on allegations of misrepresentations of present fact and not future intent, and (2) the plaintiff's claims might fall within the special damages exception of the test.\textsuperscript{60}

However, to maintain a breach of contract action against a seller, a buyer must prove that the intermediary with whom the buyer dealt was an agent of the seller.\textsuperscript{61} In Cotton Field, Inc. v. Samsung America, Inc., plaintiffs alleged that they entered into a contract with the defendant manufacturer to purchase finished designer garments, but when the garments were delivered, they were counterfeit.\textsuperscript{62} However, the First

\textsuperscript{55} Id. at 439.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 439 (quoting Gordon v. Dino De Laurentiis Corp., 141 A.D.2d 435, 436, 529 N.Y.S.2d 777, 779 (1st Dep't 1988)).
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 440 (quoting Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 20 (2d Cir. 1996) (internal citations omitted)).
\textsuperscript{60} Id. at 441.
\textsuperscript{61} See New York Times Co. v. Glynn-Palmer Assoc., Inc., 138 Misc.2d 862, 865, 525 N.Y.S.2d 565, 568 (NY City Civ. Ct. 1988) ("party asserting an agency defense has the burden of proof as to agency relationship").
\textsuperscript{62} 295 A.D.2d 259, 259, 746 N.Y.S.2d 474, 475 (1st Dep't 2002).
Department found that the parties with whom the plaintiffs negotiated "had no actual authority to contract on defendant's behalf," nor did these parties have apparent agency authority.\(^{63}\) Thus, the court found that there was no contract with respect to finished garments; there was a contact between the parties for unfinished fabric, but that was irrelevant for purposes of this action.\(^{64}\) Furthermore, even if the parties who negotiated with the plaintiffs had apparent authority, this would be insufficient to hold defendant liable for misrepresentation or fraud as the court found that at least one of the plaintiffs ignored "numerous opportunities to obtain knowledge of the allegedly misrepresented matters."\(^{65}\)

\section*{A. Arbitration}

During the year, the Second Circuit heard a case involving a conflict between New York State law and the Federal Arbitration Act.\(^{56}\) Under long-standing New York law, "parties to a commercial transaction will not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect; absent such an explicit commitment neither party may be compelled to arbitrate."\(^{67}\) This rule has been interpreted as creating a stricter standard of proof for arbitration clauses than the preponderance of the evidence required for nonarbitration clauses.\(^{68}\) However, although "state law generally governs issues of contract interpretation in cases arising under the FAA, such disparate treatment of arbitration provisions is not permitted."\(^{69}\) Thus, in a breach of sales contract action in which the plaintiff challenged an arbitration clause incorporated by reference into the parties' agreement, the Second Circuit decided the applicability of the arbitration provision under a UCC section 2-207(2)(b)\(^{70}\) material alteration analysis, reversing

\begin{itemize}
\item\(^{63}\) \textit{Id.}
\item\(^{64}\) \textit{Id.} at 260, 746 N.Y.S.2d at 475.
\item\(^{65}\) \textit{Id.}
\item\(^{66}\) 9 U.S.C. \$ 1 et seq.
\item\(^{68}\) \textit{See id.} at 100.
\item\(^{69}\) \textit{Id.} (citing Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 46 (2d Cir. 1993); Perry v. Thomas, 482 U.S. 483, 489-90 (1987)).
\item\(^{70}\) U.C.C. \$ 2-207(2) provides:

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;
(b) they materially alter it; or
(c) notification of objection to them has already been given or is given within
the district court’s holding that the arbitration clause constituted a material alteration of the agreement as a matter of law.\textsuperscript{71} In conducting its section 2-207(2)(b) analysis, the court must decide whether the clause “would result in surprise or hardship if incorporated without express awareness by the other party.”\textsuperscript{72} Under Second Circuit jurisprudence construing New York law, the “surprise or hardship” test contains both objective and subjective elements.\textsuperscript{73} “Surprise includes both a subjective element of what a party actually knew and an objective element of what a party should have known.”\textsuperscript{74} One of the factors to determine whether a term materially alters an agreement is industry custom or trade usage.\textsuperscript{75} “Under New York law, an arbitration agreement does not result in surprise or hardship where arbitration is the custom and practice within the relevant industry.”\textsuperscript{76} Given the presumption that additional terms will enter contracts between merchants, the party opposing the inclusion of a term carries the burden of proof.\textsuperscript{77} In Aceros Prefabricados, S.A. v. TradeArbed, Inc., the Second Circuit, after finding that arbitration clauses are common in the steel industry, held that the plaintiff failed to establish that the arbitration clause materially altered the contract in this case.\textsuperscript{78}

\begin{center}
\textbf{B. Choice of Law/Forum Selection Clauses}
\end{center}

Under UCC section 2-207,\textsuperscript{79} a forum selection clause that requires an out-of-state defendant buyer not only to litigate in New York but also to waive a jury trial materially alters the terms of oral contracts in which the parties did not specifically address these points.\textsuperscript{80} In Hugo Boss Fashions, Inc. v. Sam’s European Tailoring, Inc., based on testimony by the defendant’s president denying that his company agreed to New York jurisdiction, the First Department found that a forum selection clause in the plaintiff seller’s confirmatory memoranda did not come into the parties

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a reasonable time after notice of them is received.


\textsuperscript{71} Aceros Prefabricados, 282 F.3d at 100-02.

\textsuperscript{72} Id. at 100 (quoting N.Y. U.C.C. § 2-207 cmt. 4).

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} Id. at 101-02; see also N.Y. U.C.C. § 2-207 cmt. 4.

\textsuperscript{76} Aceros Prefabricados, 282 F.3d at 101.

\textsuperscript{77} Id. at 100.

\textsuperscript{78} Id. at 102.

\textsuperscript{79} N.Y. U.C.C. § 2-207(2)(b) provides in pertinent part: “The additional terms are to be construed as proposal for addition to the contract. Between merchants such terms become part of the contract unless: . . . they materially alter it . . . .” N.Y. U.C.C. § 2-207(2)(b); see supra notes 7-9.

\textsuperscript{80} See id.
contract under section 2-207(b) because the clause materially altered the parties oral agreements.  

C. UCC Warranties

Under New York law, unless disclaimed, "products are sold with an implied warranty of fitness that the product is 'fit for the ordinary purpose for which such goods are used.'" However, "the implied warranty will not be breached if only a small number of people relative to the total number of persons using the product suffer an allergic reaction." Plaintiffs do not have to show privity under a breach of an implied UCC warranty where the victim sustains bodily injury. Under New York law, a plaintiff bringing a cause of action based on a breach of a warranty under the UCC must commence the action within four years of when the cause of action accrues. Under UCC section 2-725, "[a] cause of action accrues when the breach occurs . . . [which is] when tender of the delivery is made." In Orlando v. Novurania of America, Inc., the plaintiff missed his filing deadline on the breach of implied warranty claim when he filed the complaint four years and three months after he purchased the boat involved, even though he did not become aware of the defects until two years after the purchase. Similarly, in Richard A. Rosenblatt & Co., Inc. v. Davidge Data Systems Corp., the four year UCC statute of limitations barred the plaintiff's breach of warranty claim despite the contractual provision requiring the defendant to perform maintenance services for a monthly fee.

D. CISG

In Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., plaintiff pharmaceutical manufacturer brought inter alia a breach of an implied-in-fact contract claim against the supplier of the main ingredient.

81. 293 A.D.2d 296, 297, 742 N.Y.S.2d 1, 2 (1st Dep't 2002).
83. Daley, 164 F. Supp. 2d at 375.
85. Orlando, 162 F. Supp. 2d at 223 (citing N.Y. U.C.C. § 2-725 (McKinney 2001)).
86. Id. at 223 (citing N.Y. U.C.C. § 2-725); see Richard A. Rosenblatt & Co., Inc. v. Davidge Data Systems Corp., 295 A.D.2d 168, 168-69, 743 N.Y.S.2d 471, 472 (1st Dep't 2002).
for one of its drugs. The Southern District analyzed the claims under the
Convention for the International Sale of Goods ("CISG") because the
alleged sales contract involve[d] international trade. The issue before the
court was whether there was an implied-in-fact contract as the defendant
denied the existence of such a contract. "The CISG, intended to ensure
the observance of good faith in international trade, CISG Art. 7(1),
embodies a liberal approach to contract formation and interpretation..." Under Art. 11 of the CISG, parties may present "a
document, oral representations, conduct, or some combination of the three"
to establish a contract. Furthermore, any course of dealings or trade
usage are part of the agreement unless the parties expressly negate these
factors. The district court found that an offer existed and that there were
material factual disputes regarding whether an acceptance existed. This
fact, as well as whether consideration existed under New Jersey law, caused the court to deny the summary judgment motion on this count. The
court further denied the summary judgment motion on the question of the
performance of the implied-in-fact contract.

The court also held that the CISG preempts state contract claims, but
not tort claims brought under state law. In order to determine whether

89. 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002). See infra notes 165-87 for a discussion
of the plaintiff's antitrust claims.
91. Geneva Pharmaceuticals, 201 F. Supp. 2d at 281. While the plaintiff corporations
maintained their primary places of business in New Jersey, several of the defendants were
domiciled in Canada. Id. at 241-43.
92. Id. at 281.
93. Id.
94. Id.
95. Id.
96. Id. at 282.
97. "Under the CISG, the validity of an alleged contract is decided under domestic
law." Id. (citing CISG Art. 4(a) commentary at 43). In order to determine which
jurisdiction's law to apply, New Jersey or Canada, the district court undertook a choice of
law analysis. Id. at 283. Using New York's choice of law rules, the court found that the
appropriate approach was the "center of gravity" test that New York courts use in contract
cases "to determine the jurisdiction with the most significant relationship to the dispute."
Id. The center of gravity "approach looks to the place of contracting, the places of
negotiation and performance, the location of the subject matter of the contract, and the
domicile of place of business of the contracting parties." Id. (internal citations omitted).
Using this approach, the district court determined that New Jersey law should apply to this
issue as "it has the greater contacts with the subject matter of the case [being] the place of
contracting, negotiation and performance and is the plaintiff's domicile." Id. The contacts
Canada had with the contract was that one of the defendants had a manufacturing plant in
Canada and sent its shipments from there. Id.
99. Id. at 286.
federal statutes preempt state law, the court must determine what Congress intended when enacting the federal statute.100 “Confronting the question of preemption by a treaty, the court focuses on the intent of the treaty’s contracting parties.”101 By looking at the introductory text of the CISG to determine the intent of the contracting parties, the court held that “the expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action.”102 Thus, the CISG preempts state contract claims, including those brought under the UCC.103 The court found that the CISG might preempt state law promissory estoppel claims in some instances, although not in the instant case.104

III. CONSUMER PROTECTION

During the year, the Fourth Department revisited a dispute it had initially heard in 1999. In the first opinion, (“Coty I”), the court held that although comparative fault principles apply to a cause of action for breach of a fiduciary duty, they did not apply in cases such as this where the plaintiff did not have a duty to avoid “excessive” spending.105 The plaintiff brought suit alleging breach of fiduciary duty, conversion, negligent misrepresentation and violation of the Consumer Protection Act, section 349(a) of the General Business Law against her bank and an individual banker.106 In Coty II, the Fourth Department held that the plaintiff had the burden of proving damages and that these damages could be offset by the loans the defendant bank lent plaintiff, even though it previously held that the bank could not counterclaim for unjust enrichment because the bank’s unclean hands precluded it from equitable relief.107 Thus, where the defendants lost money in their dealings with plaintiff, the jury verdict awarding plaintiff zero damages was upheld.108

100. Id. at 285 (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987)).
101. Id. (citing Husmann v. Trans. World Airlines, Inc., 169 F.3d 1151, 1153 (8th Cir. 1999)).
102. Id. (citing Asante Tech., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001)).
103. Id. at 285-86.
104. Id. at 286-87.
107. Id. at 796, 737 N.Y.S.2d at 745.
108. Id.
A. Magnuson-Moss

The New York Court of Appeals held in DiCintio v. DaimlerChrysler Corp. that the Magnuson-Moss Warranty Act does not apply to automobile leases.\textsuperscript{109} In analyzing the DiCintio case, the Court began by looking at several definitions relevant to the provisions of the Act.\textsuperscript{110} First, the Court looked at the requirement that the plaintiff be a "consumer," which Magnuson-Moss defines as

a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) ... to enforce against the warrantor ...\textsuperscript{111}

Thus, for a plaintiff to have standing to bring suit under Magnuson-Moss, the plaintiff must qualify as a "consumer."\textsuperscript{112} In order for the plaintiff to be a consumer, the underlying transaction must be a sale.\textsuperscript{113} This point is supported by the Magnuson-Moss definition of "written warranty" as a "written affirmation of fact or written promise made in connection with the sale of a consumer product ..."\textsuperscript{114} and implied warranty as "an implied warranty arising under State law ... in connection with the sale by a supplier of a consumer product."\textsuperscript{115} Because Magnuson-Moss does not define either "sale" or "buyer," the Court of Appeals turned to the legislative history of the Act, found that is was "enacted against the backdrop of the UCC," and consequently turned to the UCC for the definitions of "sale" and "buyer."\textsuperscript{116} Finding that "[t]he UCC definitions of these terms require the passing of title for a sale," the Court ruled that the plaintiff was not a buyer.\textsuperscript{117} Furthermore, because the plaintiff did not satisfy the other prongs of the Magnuson-Moss consumer test (being neither a "transferee" nor "other person entitled to enforce,"') the Court found that the plaintiff did not have standing to bring an action under the Act.\textsuperscript{118} The Court looked to the legislative history of the Act, as well as

\begin{itemize}
  \item \textsuperscript{109} 97 N.Y.2d 463, 466, 768 N.E.2d 1121, 1121, 742 N.Y.S.2d 182-83 (2002).
  \item \textsuperscript{110} \textit{Id}. at 469, 768 N.E.2d at 1123, 742 N.Y.S.2d at 184.
  \item \textsuperscript{111} \textit{Id}. (citing 15 U.S.C. § 2301(3)).
  \item \textsuperscript{112} \textit{Id}. at 468-69, 768 N.E.2d at 1123-24, 742 N.Y.S.2d at 184-85.
  \item \textsuperscript{113} \textit{Id}. at 469-70, 768 N.E.2d at 1124, 742 N.Y.S.2d at 185.
  \item \textsuperscript{114} \textit{Id}. at 470, 768 N.E.2d at 1124, 742 N.Y.S.2d at 185 (citing 15 U.S.C. § 2301(6)) (emphasis in original).
  \item \textsuperscript{115} \textit{Id}. (citing 15 U.S.C. § 2301(7)) (emphasis in original).
  \item \textsuperscript{116} \textit{Id}. at 470-71, 768 N.E.2d at 1124, 742 N.Y.S.2d at 185.
  \item \textsuperscript{117} \textit{Id}. (citing U.C.C. §§ 2-106(1), 2-103(1)(a)).
  \item \textsuperscript{118} \textit{Id}.
\end{itemize}
other related legislation, and determined that Congress intentionally did not extend the Act to protect lessees.119

IV. BANKING & NEGOTIABLE INSTRUMENTS LAW

During the year, several New York courts reaffirmed the principle that depositors cannot benefit from erroneous credits to their accounts. In *Mahopac National Bank v. Gelardi*, the Second Department held that good faith is not an element in the rule allowing a depositary bank to seek a refund from its depositors where the bank did not receive final settlement on a check they deposited into their account.120 In August 2002, the defendants deposited a third party check into their checking account at the plaintiff bank drawn on another bank and withdrew all but $500 of the funds two days later.121 Later that day, the plaintiff received a notice that the payor bank was dishonoring the check based on a stop payment request by the drawer.122 The payor bank returned the check unpaid the next day; subsequently, the plaintiff sent a notice to the defendants demanding payment of the overdraft.123 When defendants refused, based on the plaintiff’s announced two day funds availability policy for local checks, the bank commenced the instant action and moved for summary judgment on the ground that the depositor’s checking account “agreement provided that each account holder ‘agrees to be jointly and severally liable for any account deficit resulting from charges or overdrafts.’”124 The trial court denied the Bank’s summary judgment motion, but the Second Department reversed, not only based on the deposit agreement, but also on UCC section 4-212(1), which provides in pertinent part:

If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer’s account or obtain refund from its customer whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge-back and obtain refund terminate if and

119. *Id.* at 472-73, 768 N.E.2d at 1125-26, 742 N.Y.S.2d at 186-87.
120. 299 A.D.2d 460, 461, 750 N.Y.S.2d 115, 116 (2d Dep’t 2002).
121. *Id.* at 460, 750 N.Y.S.2d at 115.
122. *Id.* at 461, 750 N.Y.S.2d at 116.
123. *Id.*
124. *Id.*
when a settlement for the item received by the bank is or becomes final (subsection (3) of Section 4-211 and subsections (2) and (3) of Section 4-213).125

New York courts have held that section 4-212(1) provides a remedy to depositary banks as well.126 Furthermore, under New York law:

[A] collecting bank acts as the agent of its customer, and until such time as the collecting bank receives final payment, the risk of loss continues in the customer, [as] the owner of the item. . . . Thus, the provisional credit to the customer remains provisional and revocable until the collecting bank has received the funds.127

Thus, the Second Department held that the plaintiff bank was entitled to a refund from its depositors, even if they did act in good faith in waiting the two days before withdrawing the funds from their account.128

In United States v. Madakor, the Second Circuit noted that "New York law clearly recognizes the 'mistake of fact' doctrine, and 'money paid under a mistake of fact may be recovered back.'"129 The defendant appealed her conviction for bank fraud and bank larceny on the ground that a series of misdirected wire transfers Chase Manhattan Bank credited to her account became her property; the Second Circuit upheld the convictions.130

Under the UCC, depositors have one year to notify payor banks of forgeries, alterations, or other unauthorized transactions.131 "UCC section 4-406(4) bars suit to recover amounts paid by a bank on a forged instrument unless the customer gives written notice of the forgery within one year of the time the account statement was made available."132

128. Id. at 462, 750 N.Y.S.2d at 116.
130. Id.
131. N.Y. U.C.C § 4-406(4) (McKinney 2002) provides in pertinent part:
Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.
Ryan v. Fleet Bank of New York, the Fourth Department reversed the trial court's summary judgment in favor of the defendant bank, holding that the plaintiff depositor could recover losses suffered from a continuing fraud by his employees that occurred within one year of his first written notice to the bank.\(^{133}\)

During the year, the Second Circuit reaffirmed that the doctrine of judicial estoppel bars separate conversion actions by payees against drawee banks where payees previously settled with depositary banks and converter.\(^{134}\) In an unreported opinion, Whalen v. Chase Manhattan Bank, the Second Circuit upheld the dismissal of an action by plaintiff who brought a conversion action under New York UCC section 3-419\(^{135}\) against the drawee bank that honored a check stolen by a financial planner and deposited into an account belonging to the financial planner's wife.\(^{136}\) Plaintiff Whalen had previously settled an action against the depositary bank, the financial planner who converted the check, and the financial planner's employer based on the same facts.\(^{137}\) The Second Circuit quoted its decision in Wight v. Bankamerica Corp., to support its decision to uphold the district court's dismissal of the action on grounds of judicial estoppel.\(^{138}\) In the opinion, the court clarified the doctrine of ratification which several states other than New York have adopted; “[t]he ratification doctrine primarily concerns whether a payee can institute an action to recover against a depository bank in the first instance, not whether a payee can institute an action against a drawee bank after she has already recovered money from a depository bank.”\(^{139}\)

\(\text{A. Certified Checks}\)

A bank that issues a certified check may revoke its certification unless a holder in due course has taken possession of the check or a third party has changed position in reliance of the certification.\(^{140}\) In Industrial Bank of Korea v. JP Morgan, plaintiff depository bank that accepted a certified

\(^{133}\) 2001).

\(^{134}\) N.Y. U.C.C. § 3-419 (McKinney 2001).

\(^{135}\) 286 A.D.2d at 924, 730 N.Y.S.2d at 629-30.


\(^{137}\) Id.

\(^{138}\) Id. (quoting Wight v. Bankamerica Corp., 219 F.3d 79, 89 (2d Cir. 2000)).

\(^{139}\) Id.

\(^{140}\) 2002).
check for deposit brought an action against the issuing bank that stopped payment on the certified check.\(^\text{141}\) In this case, Chase Manhattan Bank ("Chase") certified a check for a depositor against funds that were deposited the previous day in the form of a check drawn on Chase by another depositor.\(^\text{142}\) The drawee of that check had placed a stop payment order prior to Chase certifying the check, but Chase did not learn of the stop payment until after the check had been delivered to the depositor requesting the certified check.\(^\text{143}\)

Where a bank certifies a check through error, mistake or fraud, the bank may revoke its certification. However, if the rights of a third party have intervened, and the check has reached the hands of a holder in due course or a party who has changed [its] position, between the certification and the revocation, the mistake or fraud cannot be used as a defense against the holder.\(^\text{144}\)

The reason is that, under New York UCC, a bank that issues a certified check is "legally bound to pay the check to one rightfully entitled to the funds."\(^\text{145}\) Section 3-411(1) provides in pertinent part that "[c]ertification of a check is [an] acceptance," while section 3-418 provides in pertinent part that "acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment."\(^\text{146}\)

**B. Letters of Credit**

In *Kvaerner U.S., Inc. v. Merita Bank PLC*, the First Department reaffirmed that issuing banks must honor demands for payment under letters of credit unless the party challenging the draw down can submit proof of fraud going to the "heart of the transaction" as opposed to a mere breach of contract.\(^\text{147}\) In *Kvaerner*, the plaintiff "failed to support its allegation of fraud in the transaction underlying issuance of the subject letter of credit" where the problems in the underlying transaction, involving the construction of a mine, do not appear to have been fabricated by the letter of credit beneficiary to allow it to draw down on the letter of credit.\(^\text{148}\) Thus, the First Department affirmed the trial court's decision

\(^{141}\) *Id.* at 220, 745 N.Y.S.2d at 647-48.

\(^{142}\) *Id.* at 220, 745 N.Y.S.2d at 648.

\(^{143}\) *Id.*

\(^{144}\) *Id.* at 221, 745 N.Y.S.2d at 648.

\(^{145}\) *Id.*

\(^{146}\) N.Y. U.C.C. §§ 3-411, 3-418 (McKinney 2002).

\(^{147}\) 288 A.D.2d 6, 732 N.Y.S.2d 215 (1st Dep't 2001).

\(^{148}\) *Id.*
denying plaintiff’s motion to enjoin the issuing bank from honoring a demand upon the subject letter of credit.149

C. Foreign Banks

During the year, the New York Court of Appeals heard a case challenging New York’s position as a leading banking center in a case in which New York courts’ in personam jurisdiction was based in part on a course of dealing between the parties and in part on choice of forum clauses selecting New York in less than half of the transactions between the parties and in which the courts exercised subject matter jurisdiction under Banking Law section 200-b.150 In *Indosuez International Finance B.V. v. National Reserve Bank*, defendant, a Russian bank, disputed the jurisdiction of New York courts to hear the dispute between itself and a Netherlands bank involving currency exchange agreements.151 The Netherlands bank brought a breach of contract action in New York state court when, subsequent to a Russian government moratorium that “prohibited Russian residents from making payments to nonresidents under forward currency exchange transactions,” the Russian bank missed four settlement dates.152 The Russian bank moved to dismiss the cause of action, alleging *inter alia* that it did not have sufficient contacts with the state to make New York courts’ exercise of personal jurisdiction proper.153 The agreement consisted of fourteen confirmations between the parties; six of these contained forum selection clauses naming New York.154 Furthermore, the Court found that not only did the Russian bank maintain a New York bank account for currency exchange payments, but also that the parties engaged in five similar transactions in the past through a New York bank.155 The Court affirmed the lower courts’ holdings that New York courts could exercise both personal and subject matter jurisdiction over the Russian bank.156

Subject matter jurisdiction was based on New York Banking Law

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149. *Id.*
151. *Id.* at 242-44, 774 N.E.2d at 698-700, 746 N.Y.S.2d at 633-35.
152. *Id.* at 243, 774 N.E.2d at 699, 746 N.Y.S.2d at 634. “A forward exchange transaction is an obligation to purchase or sell a specific currency on a future date (settlement date) for a fixed price set on the date of the contract (trade date).” *Id.* at 242, 774 N.E.2d at 698, 746 N.Y.S.2d at 633.
153. *Id.* at 246, 774 N.E.2d at 701, 746 N.Y.S.2d at 636.
154. *Id.* at 242-43, 774 N.E.2d at 698, 746 N.Y.S.2d at 633.
155. *Id.* at 246-47, 774 N.E.2d at 701, 746 N.Y.S.2d at 636.
156. *Id.* at 244, 774 N.E.2d at 699, 746 N.Y.S.2d at 634.
section 200-b. Finding that "subject matter jurisdiction under Banking Law section 200-b extends to claims where a party chooses New York for the place of performance even after the contract is formed," the Court held that the plaintiff Netherlands bank, which had the right to select the place of performance under the agreement, selected New York as the place of performance.

The Court continued its choice of law jurisprudence during the year in this case as well. In *Indosuez*, the Court reaffirmed its position that "the law of the state with the most significant relationship with the particular issue in conflict" should apply where the laws of the interested states vary. Thus, the first inquiry the Court undertook in *Indosuez* was whether New York or Russian law applied to the question of the authority of the corporate officer who entered into currency exchange agreements on behalf of the Russian bank with a Netherlands bank. Because ten of the fourteen confirmations in the parties' transactions contained choice of law clauses selecting New York law, and the nature of the transactions which called for payments to be made in US dollars, the Court found that "New

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157. *Id.* at 248, 774 N.E.2d at 702, 746 N.Y.S.2d at 637. Section 200-b provides:

1. An action or special proceeding against a foreign banking corporation may be maintained by a resident of this state for any cause of action. For purposes of this subdivision one, the term "resident of this state" shall include any corporation formed under any law of this state.

2. Except as otherwise provided in this chapter, an action or special proceeding against a foreign banking corporation may be maintained by another foreign corporation or foreign banking corporation or by a non-resident in the following cases only:

(a) where the action is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract;

(b) where the subject matter of the litigation is situated within this state;

(c) where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state;

(d) where the action or special proceeding is based on a liability for acts done within this state by a foreign banking corporation;

(e) where the defendant is a foreign banking corporation doing business in this state.

3. The limitations contained in subdivision two do not apply to a corporation formed and existing under the laws of the United States and which maintains an office in this state.

N.Y. Banking Law § 200-b (McKinney 2001).

158. *Indosuez*, 98 N.Y.2d at 248, 774 N.E.2d at 702, 746 N.Y.S.2d at 637.

159. *Id.* at 244-45, 774 N.E.2d at 699-700, 746 N.Y.S.2d at 634-35.

160. *Id.* at 245, 774 N.E.2d at 700, 746 N.Y.S.2d at 635.

161. *Id.* at 244-45, 774 N.E.2d at 699-700, 746 N.Y.S.2d at 634-35.
York [had] the paramount interest” in having its laws applied.\textsuperscript{162}

The Court further found that, under New York law, the Russian bank official who signed the agreements was “clothed with [the Bank’s] apparent authority.”\textsuperscript{163} As “each of the fourteen confirmations was signed on behalf of [the defendant Russian bank] by its deputy chairperson [and the Russian bank] accepted payment into its New York bank account on six of the [related] transactions” the plaintiff Netherlands bank reasonably relied on the deputy chairperson’s apparent authority.\textsuperscript{164} The Court also held that the Russian bank ratified the confirmations in a letter from the chair of its board to the plaintiff’s parent corporation.\textsuperscript{165}

V. ANTITRUST

In \textit{Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.}, plaintiffs pharmaceutical companies involved in a “joint venture” brought an action against a competitor and raw material supplier, alleging antitrust and related state law claims stemming from the purchase of the supplier by the competitor.\textsuperscript{166} Plaintiff Geneva Pharmaceuticals, a New Jersey corporation with its principal place of business in New Jersey, manufactures generic drugs; plaintiff Apothecon, Inc., a Delaware corporation with its principal place of business in New Jersey that is a wholly-owned subsidiary of Bristol-Myers Squibb Company, also manufactures generic drugs.\textsuperscript{167} Defendants are manufacturers of pharmaceutical ingredients, generic and branded pharmaceuticals, and their owners.\textsuperscript{168} The lawsuit involves the raw material necessary to produce an oral anti-coagulant medication know as warfarin sodium;\textsuperscript{169} one brand name of this product is “Coumadin.”\textsuperscript{170} Rejecting the plaintiff’s argument that “summary judgment is inappropriate in complex antitrust litigation,” the Southern District, (1) citing Supreme Court and Second Circuit jurisprudence that encourages the use of summary judgments in antitrust litigation to “isolate and dispose of factually unsupported claims . . . [and]

\begin{footnotesize}
\begin{enumerate}
\item[162.] \textit{Id.} at 245, 774 N.E.2d at 700, 746 N.Y.S.2d at 635.
\item[163.] \textit{Id.}
\item[164.] \textit{Id.} at 246, 774 N.E.2d at 701, 746 N.Y.S.2d at 636.
\item[165.] \textit{Id.}
\item[166.] 201 F. Supp. 2d 236, 242-43 (S.D.N.Y. 2002). Although the plaintiffs alleged that they formed a joint venture, the district court held that they failed to satisfy New Jersey State partnership law. \textit{Id.} at 242, 280. The court thus found that one of the plaintiffs did not have standing to bring its claims and dismissed its state law claims. \textit{Id.}
\item[167.] \textit{Id.} at 241.
\item[168.] \textit{Id.} at 242.
\item[169.] \textit{Id.} at 243.
\item[170.] \textit{Id.} at 245.
\end{enumerate}
\end{footnotesize}
to avoid unnecessary trials,” and (2) finding that “the antitrust claims in this case may be resolved without regard to issues of intent or motive and without reliance on facts in the hands of defendants or hostile witnesses,” factors that make summary judgment inappropriate in some antitrust litigation, partially granted and partially denied defendants’ summary judgment motion.

The district court dismissed counts 1 and 2 of the complaint; these counts alleged violations of § 2 of the Sherman Act monopolization and attempted monopolization of both the generic warfarin sodium market and in the market for clathrate, the bulk material that is the primary ingredient in the drug. In order to establish a § 2 violation for the offense of monopolization, the plaintiff must prove “two elements: (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.” In order to establish a § 2 violation for the offense of attempted monopolization, the plaintiffs must prove “(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” The district court rejected the plaintiff’s argument that the market for generic warfarin sodium solely, excluding the market for the branded pharmaceutical, constituted the relevant market; using the combined generic and branded warfarin sodium market, the court found that the defendants’ 8% market share when they allegedly engaged in anticompetitive activities was “insufficient as a matter of law to create a dangerous probability that [the defendants] would achieve monopoly power” in the relevant market. The court further found that the plaintiffs failed to produce evidence that the defendants took steps for the purpose of preventing competitors from gaining access to the primary ingredient in warfarin sodium and dismissed the Sherman Act § 2 claims for clathrate as

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171. Id. at 266 (quoting H.L. Hayden Co. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1011-12 (2d Cir. 1989)).
172. Id.
173. Id. at 271.
174. Id.
177. Id. at 266 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).
178. Id. (quoting Spectrun Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)).
179. Id. at 266-71.
180. Id. at 271.
The district court also dismissed counts 3, 4 and 5 of the complaint; counts 3 and 4 alleged a conspiracy to monopolize under § 1 and 2 of the Sherman Act, holding that the plaintiff failed to produce evidence of concerted action. Count 5 alleged a violation of § 7 of the Clayton Act, based on the acquisition of a supplier of clathrate. The court dismissed this claim based on the plaintiffs' failure to produce economic evidence that the acquisition of the supplier "reduced competition in any relevant market or that [the plaintiffs] claimed injury ... flowed from the allegedly unlawful acquisition."

One of the plaintiffs brought a cause of action under the New York state antitrust act, the Donnelly Act, stated in count VI of the complaint. Because "[t]he Donnelly Act was modeled on the Sherman Act and is to be construed in accordance with it," the court also dismissed this claim. Where plaintiff’s complaint: [S]imply re-alleges the federal antitrust claims under the Donnelly Act and fails to allege any state policy, differences in statutory language or legislative history that would justify giving the Donnelly Act a different interpretation than the federal antitrust statutes ... its claim under the state antitrust law fails for the same reasons as it does under federal law.

181. Id. at 274.
182. Id. at 274-78.
183. Id. at 278.
185. Geneva Pharmaceuticals, 201 F. Supp. 2d at 278.
186. Id. at 279.
189. Id.