



# Legal ALERT!

## TORTS & PRODUCTS LIABILITY DEFENSE

Thomas B. Cronmiller  
585.295.4424  
[tcronmiller@hblaw.com](mailto:tcronmiller@hblaw.com)

Gary H. Abelson  
Jessica M. Baker  
Nikki L. Baldwin  
Frank V. Balon  
Robert A. Barrer  
Neil D. Breslin  
Samuel J. Burruano  
David B. Cabaniss  
Thomas A. Carnrike  
Brian D. Casey  
John R. Casey  
Linda J. Clark  
David M. Cost  
Timothy J. DeMore  
Nicholas J. DiCesare  
Erica M. DiRenzo  
Charles Z. Feldman  
Michael E. Ferdman  
William C. Foster  
John P. Gaughan  
Kevin P. Glasheen  
Kevin M. Hayden  
David M. Hehr  
Meredith Ireland  
Matthew J. Larkin  
Robert J. Lydford  
George G. Mackey  
Alexandra Maloney  
Brian G. Manka  
Dennis R. McCoy  
Thomas J. O'Connor  
Michael A. Oropallo  
Scott M. Pechaitis  
Alan R. Peterman  
Scott P. Rogoff  
Paul A. Sanders  
Tara J. Sciortino  
Robert M. Shaddock  
Matthew J. Skiff  
Michael J. Smith  
Stephen H. Volkheimer  
Mark T. Whitford  
Angela C. Winfield

This client alert is not intended to render legal services; the publisher assumes no liability for the reader's use of the information herein. © 2009 Hiscock & Barclay, LLP

Attorney Advertising

## Federal Appellate Court Disregards Stipulation in Class Action Suit.

The United States Court of Appeals for the Second Circuit recently issued a decision concerning class certification which impacts the certification process in tort matters and the impact of stipulations entered into by litigants regarding the jurisdiction of federal courts.

In *County of Nassau v. Hotels.com*, Plaintiff, County of Nassau (the "County"), filed a putative class action against Defendant Hotels.com, on behalf of itself and all other similarly situated counties in the State of New York contenting that Hotels.com failed to fully remit hotel taxes to the County that the defendant collected on rooms sold to the public. The County alleged that although the defendant charged and collected taxes from occupants based on their marked-up room rates, the defendant only remitted taxes to the County based on the lower, negotiated discount room rate and kept the difference for themselves.

The defendant moved to dismiss the class action alleging that the County failed to exhaust its administrative remedies for assessing and collecting taxes and to recover the taxes at issue prior to commencing its action, and therefore subject matter jurisdiction was lacking. The United States District Court for the Eastern District of New York granted the defendant's motion and dismissed the class action.

The County appealed the District Court's decision to the United States Court of Appeals for the Second Circuit arguing that no requirement of exhaustion existed, that the District Court failed to defer to the County Treasurer's interpretation of the County tax law at issue, and that exhaustion would in any event be futile. Without addressing these issues of administrative process, the Second Circuit recently reversed the District Court's decision and remanded the matter for consideration of a different jurisdictional concern.

The Second Circuit asked *nostra sponte* whether the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure for class certification were in fact met, without which both the Second Circuit Court and the District Court would lack jurisdiction over the suit as it was constituted.

(Continued on back)

Hiscock & Barclay is a full service, 210-attorney law firm, with offices throughout the major cities of New York State, as well as in Boston, Washington, D.C. and Toronto. We provide comprehensive legal and business counsel to a diverse client base in 29 specialized practice areas with statewide and regional expertise as well as with national and international capabilities.



Commercial Litigation  
Construction & Surety  
Corporate  
Creditors' Rights  
Economic & Project  
Development  
Energy & Utilities  
Environmental  
Financial Institutions &  
Lending  
Health Care & Human  
Services  
Immigration  
Indian Law  
Insurance Coverage &  
Regulation  
Intellectual Property &  
Technology  
Intellectual Property  
Litigation  
International Business  
Labor & Employment  
Lobbying & Election  
Law Compliance  
Media & First  
Amendment Law  
Municipal & Land Use  
Professional Liability  
Public Finance  
Real Estate  
Real Property Tax &  
Condemnation  
Regulatory  
Sports & Entertainment  
Tax  
Telecommunications  
Torts & Products  
Liability Defense  
Trusts & Estates

The Second Circuit, in particular, took issue with a requirement of Rule 23 whereby the County must demonstrate that “the questions of law or fact common to class members predominate over any questions affecting only individual members.”

The County had brought the action under the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d)(2), and requested certification of a “state-wide class of all New York cities, counties and other local governmental entities that have imposed hotel taxes since March 1, 1995.” CAFA grants district courts original jurisdiction over class action suits on certain conditions, among them that “the number of members of all proposed plaintiff classes in the aggregate” be no less than one hundred. The general legislative purpose of CAFA is to facilitate the litigation of large class actions in federal court.

Despite a stipulation entered into by parties in *County of Nassau v. Hotels.com* that the requirements of CAFA had been met, the Second Circuit questioned whether in fact they were met.

The Second Circuit explained that although the County’s allegation that there were more than 100 local government entities that were owed hotel taxes to satisfy the numerosity requirement under CAFA, “the allegation raises the distinct possibility that questions common to the members of the class do not predominate over those affecting only individual members” because “[a]ssuming that each locality imposes its hotel tax as Nassau does, under its own tax law, the cause of action for each member of the plaintiff class might well arise under a law unique to that class member.”

Accordingly, the Second Court ignored the stipulation between the litigants and remanded the class action to the district court to “consider in the first instance” whether class certification is appropriate.

Interpreted broadly, the Second Circuit’s opinion may require a plaintiff to prove that the class is certifiable as a threshold to establishing jurisdiction, thereby denying federal courts the original jurisdiction that the CAFA provides and circumventing the intent of Congress to broaden the jurisdiction of the federal courts. More importantly, the case highlights that federal courts may disregard stipulations entered into between litigants concerning the nature and extent of the subject matter jurisdiction. ■

*If you require further information regarding the information presented in this Legal Alert and its impact on your organization, please contact any of the members of the Practice Area listed on the front of this Alert.*