NORTON ROSE FULBRIGHT

Claims for deceptive trade practices and false advertising

New York Law Journal

October 17, 2024 | By **Thomas J. Hall** and **Judith A. Archer**

New York General Business Law (GBL) Sections 349 and 350, modeled after the Federal Trade Commission Act, are intended to protect consumers from economic injuries caused by deceptive trade practices and misleading or false advertisements. Under Section 349(a), it is unlawful to engage in "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Section 349(h) extends the right of action to private individuals. Under Section 350, "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service is declared unlawful."

Consumers bringing a cause of action under Section 349 or 350 thus must satisfy three elements, that (1) the defendant engaged in an act that was directed at consumers or that the false advertisement impacted consumers at large, (2) the act engaged in or advertisement was materially deceptive or misleading and (3) the plaintiff was injured as a result. See *Andre Strishak & Assocs. v. Hewlett Packard*, 300 A.D.2d 608, 609 (2d Dep't 2002).

A 1995 New York Court of Appeals decision added some meat to the bone of each of these elements. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20 (1995). There, bank depositors accused a bank of deceptive practices for failing to disclose that the savings accounts the bank recommended would not accrue interest. The court found that the threshold question in analyzing both Sections 349 and 350 is whether the defendant's conduct is consumer-oriented with a broad impact on consumers at large, rather than a private dispute between the parties. Second, the test for determining if the conduct was materially deceptive or misleading is whether the acts or omissions are "likely to mislead a reasonable consumer acting reasonably under the circumstances." Third, plaintiffs must show that defendant's conduct "caused actual, although not necessarily pecuniary, harm."

We examine below how recent Commercial Division cases have applied each of these elements to a variety of fact settings.

Consumer-oriented conduct

Determining the first element, whether conduct complained of is consumer-oriented, can be challenging as the statute does not define the term "consumer." New York courts have held that consumer-oriented conduct need not be directed to all members of the consuming public but can include sub-classes of public consumers targeted for specific products or services.

Justice Carolyn E. Demarest of the Kings County Commercial Division grappled with whether Verizon's failing to inform building owners of their right to full compensation for the affixation or removal of telephone line boxes to their buildings constituted consumer-oriented conduct. *Corsello v. Verizon New York*, 873 N.Y.S.2d 510, at *10-12 (Kings Co. 2008), aff'd as modified, 77 A.D.3d 344 (2d Dep't 2010). Plaintiffs brought a putative class action alleging Verizon affixed the terminal boxes onto whichever buildings they deemed best suited from an engineering perspective, without first contacting the owners, without seeking consent, and without offering compensation. Finding this to clearly constitute deceptive or misleading conduct, Demarest noted the "more difficult issue is … whether the practices herein alleged to be deceptive are sufficiently consumer-oriented to fall within the purview of GBL Section 349." The court concluded that plaintiffs, as property owners and landlords to Verizon's customers, had standing as consumers to bring this action, finding that the number of similarlysituated owners and landlords in New York City likely numbered in the thousands.

Justice Charles E. Ramos of the New York County Commercial Division addressed the question of whether a subclass of legal professionals qualified as a consumer in *Himmelstein v. Matthew Bender & Co.*, 2018 WL 984850, at *5-6 (N.Y. Co. Feb. 6, 2018), aff'd, 172 A.D.3d 405 (2019), rev'd, 37 N.Y.3d 169 (2021). The plaintiff law firm brought a putative class action suit alleging the publisher of a New York-Tenant Law "Tanbook" engaged in deceptive trade practices for misleading its target audience on the completeness and accuracy of the legal analyses in that book. Ramos held that the marketing and publication of the Tanbook primarily targeted professionals and, therefore, did not qualify as consumer-oriented conduct under Section 349. On appeal, the Court of Appeals disagreed, holding "there is no textual support in GBL Section 349 for a limitation on the definition of 'consumer' based on use. Indeed, any such narrowing of the term 'consumer' would be contrary to the legislative intent to protect the public against all forms of deceptive business practices."

While *Himmelstein* held that a sub-class of professionals can be classified as consumers for the purposes of this statute, the caselaw addressing sub-classes of business entities is less clear. Justice Richard Platkin of the Albany County Commercial Division oversaw two cases brought by for-profit corporations against workers' compensation trusts, holding that these sophisticated corporate plaintiffs were not consumers under the statute. In the first case, the employer brought counterclaims against a self-insured trust formed pursuant to New York Workers' Compensation Law, alleging the trust and its agents made materially misleading statements in their marketing and advertising materials to induce employers to join the trust and that the employer relied on these deceptive representations in joining the trust and maintaining its membership, resulting in damages in the amount of money paid to the trust. *NYAHSA Servs., Inc. Self Ins. Tr. v. People Care*, 5 N.Y.S.3d 329, at *10-11 (Albany Co. 2014), aff'd as modified, 36 N.Y.S.3d 252 (3d Dep't 2016). Platkin held that the alleged misconduct was not consumer-oriented because the counterclaimant, as a "large, for-profit entity with a statutory obligation to maintain insurance for a substantial workforce … is not itself a 'consumer,'" and its allegations "boil down to nothing more than a private contract dispute, unique to the parties, which does not fall within the ambit of the statute."

In *Belair Care Ctr. v. Cool Insuring Agency*, 46 N.Y.S.3d 473, *10-11 (Albany Co. 2016), rev'd in part, 161 A.D.3d 1263 (3d Dep't 2018), Platkin reached a similar result, but was reversed by the Third Department. In Belair, health care providers required to pay workers' compensation became members of a self-insured trust formed under New York Workers' Compensation laws and moved to amend their complaint to add a false advertising claim against the trust. Platkin concluded the amendments would be futile because plaintiffs are "large health care employers with a statutory obligation" and "[s]uch enterprises are not 'consumers' within the meaning of the statute." The Third Department reversed, finding that, because the defendant allegedly made materially misleading statements through advertisements, marketing materials and on websites that were disseminated to the general public, and because this deceptive behavior allegedly harmed the plaintiffs, other trust members and jeopardized worker's compensation benefits, the proposed amendment adequately stated a claim under the statute.

Deceptive or misleading acts, omissions or advertisements

As to the second element, courts next decide if the alleged act or omission or advertisement was materially deceptive or misleading, meaning under *Oswego* whether the conduct or advertisement is likely to mislead a reasonable consumer acting reasonably under the circumstances. In defending actions brought under Sections 349 and 350, defendants can submit evidentiary material to rebut plaintiff's allegations that their conduct or advertisement would mislead a reasonable consumer. New York courts have ruled that "[a] disclaimer may not bar a GBL Section 349 claim at the pleading stage unless it utterly refutes plaintiff's allegations, and thus establishes a defense as a matter of law;" the "disclaimer must address the deceptive conduct precisely, so as to eliminate any possibility that a reasonable consumer would be misled." *Himmelstein*, 37 N.Y.3d 169, 180 (2021).

In *Himmelstein*, the Court of Appeals found the complaint was properly dismissed because defendant provided documentary evidence that refuted plaintiff's claims, including the contract for purchase which made it clear that the manual at issue was periodically updated and not a "completely accurate compilation of the law." Defendants also provided an express disclaimer, which stated: "We do not warrant the accuracy, reliability, or currentness of the materials contained in the publications." The court ruled that the manual's "susceptibility to revision at any time, coupled with the fact that the disclaimer addresses the precise deception alleged in plaintiffs' complaint, leaves no possibility that a reasonable consumer would have been misled about the contents" of the manual.

Justice Daniel J. Doyle of the Monroe County Commercial Division made a similar determination recently with regards to a disclaimer on the box of a new Samsung Smartphone. *Murray v. Samsung Elecs. Am.*, 216 N.Y.S.3d 898, *2-3 (Monroe Co. Sept. 12, 2024). The plaintiff alleged she was misled about the items that were included with her new Samsung phone, and that, had she known the box did not include a wall charger, she would not have purchased the phone. Defendants submitted a photo of the box in which the phone was sold, which clearly stated in bold lettering: "Wall charger … sold separately." Doyle held that a reasonable consumer would be aware that the purchase of the smartphone did not include a wall charger.

New York County Commercial Division Justice Robert R. Reed also found evidentiary submissions sufficient to defeat plaintiff's claims of misleading or deceptive practices in a purported class alleging that the New York MTA short-dated purchasers of unlimited-ride MetroCards by one day less than was advertised (depending on what time the card is used on the first day). *Hollander v. Metro. Transp. Auth.*, 20 N.Y.S.3d 292, at *2-3 (N.Y. Co. 2015). Reed relied on the MTA's website, which disclosed the unlimited-ride cards are "[g]ood for unlimited subway or local bus rides until midnight, 7 [or 30] days from day of first use," which the court found "the average consumer of reasonable intelligence" would understand to mean that, regardless of what time the card is swiped on the first day, it would expire at midnight 7 or 30 days after that.

Actual injury

The final element New York courts must evaluate is injury. As the Court in *Oswego* held, a plaintiff must also establish that defendant's conduct or advertisement caused actual, although not necessarily pecuniary, harm. Reed evaluated this element in *Hollander*, holding plaintiff had not suffered any actual injury. 20 N.Y.S.3d 292, at *6. Plaintiff did not allege that he would not have purchased the unlimited ride MetroCards if he understood that he may lose several hours on the first day of use, and even testified that he continued to purchase the unlimited ride MetroCards, after discovery of the alleged deceptiveness, because they provided a better price on a per-ride basis. Because of this, Reed found that, even if the MTA had engaged in deceptive or misleading advertising for its unlimited ride MetroCards (which the court held it did not), plaintiff would be unable to show any actual injury, and his claims were dismissed.

Conclusion

GBL Sections 349 and 350 are invoked by plaintiffs who believe they have been deceived or misled by deceptive practices. The caselaw is clear that, to have standing, the plaintiff must be a consumer, and the conduct or advertisement at issue must affect the consuming public at large or a sub-class of the consuming public. Private disputes between competing companies do not usually impact the public, and the question of whether sophisticated corporate entities qualify as consumers will depend on the context of the case. Next, the allegedly deceptive or misleading acts or advertisements must objectively be found to be likely to mislead a reasonable consumer acting reasonably, and New York courts weigh whether evidence submitted in defense has rebutted plaintiff's allegations. Finally, plaintiff must establish actual injury; New York courts will dismiss the claims where there was no actual harm.

Thomas J. Hall and **Judith A. Archer** are partners with Norton Rose Fulbright US. Associate Kimberly Fetsick assisted in the preparation of this column.

More than 50 locations, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg.