Chapter 127

Deceptive and Misleading Business Practices

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[*]We could not have prepared this chapter without the invaluable hard work, including research and drafting assistance, of our partner Charles Morse; associates Justin Harris, Trent Fujii, and Avelino Garcia; and legal intern Samuel Hickey. We also received indispensable assistance from Leah Murphy (also a Jones Day summer associate), Zhilin Chen, and Taylor Carman, each law students at the Benjamin N. Cardozo School of Law, and from Jones Day summer associate Julia A. Gebhardt, a law student at the Cornell Law School.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

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Haig, Business and Commercial Litigation in Federal Courts §§ 95:1 et seq. (4th ed.)

§ 127:1 Scope note

This chapter addresses the New York statutory provisions enacted to protect consumers from deceptive and misleading practices. The main consumer protection provision is New York General Business Law ("GBL") § 349, which pronounces a general prohibition against deception in commerce and grants private

plaintiffs the right to sue for that deception.[1] The chapter focuses on GBL § 349 and, to a lesser extent, GBL § 350, its false-advertising counterpart. Though limited to deception in advertising and labeling,[2] GBL § 350 is otherwise similarly broad, grants private plaintiffs a right of action,[3] and is frequently invoked in actions also alleging GBL § 349 violations.[4] Covering "virtually all economic activity,"[5] GBL §§ 349 and 350 provide formidable protections for consumers who allege they were harmed by deceptive or misleading practices, including deceptive or misleading advertising and marketing.

Discussion focuses first on strategic points litigants should consider in pursuing and defending against claims under GBL §§ 349 and 350[6] and the sections' legislative history.[7] Second, the chapter explores GBL § 349,[8] including its elements[9] and pleading requirements;[10] limitations[11] and defenses; the legal and equitable relief it authorizes;[12] examples illustrating how and with what results the section has been deployed;[13] and areas like alleged trademark[14] and securities violations,[15] in which case law applying the section has grown more complex. Also, since apart from a private right of action, GBL § 349 authorizes the New York Attorney General to initiate investigations and enforcement actions,[16] the chapter addresses the New York Attorney General's

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[Section 127:1]

[1]GBL § 349(a), (h).

[2]GBL § 350-a; Galaxy Export, Inc. v. Bedford Textile Products, Inc., 84 A.D.2d 572, 443 N.Y.S.2d 439, 439 (2d Dep't 1981) (holding that false advertising includes mislabeling). See § 127:34.

[3]GBL § 350-a, -e(3). See § 127:34.

[4]See, e.g., Salvatore Ferragamo S.p.A. v. Does 1-56, 2020 WL 774237, at *3 (S.D. N.Y. 2020); People of the State of New York v. Sec. Elite Group, Inc., 2019 WL 5191214, at *7 (N.Y. Sup 2019).

[5]Karlin v. IVF America, Inc., 93 N.Y.2d 282, 690 N.Y.S.2d 495, 712 N.E.2d 662, 665 (1999). See § 127:34.

[6]See §§ 127:2 to 127:3.

[7]See §§ 127:4 to 127:7.

[8]See §§ 127:8 to 127:33.

[9]See §§ 127:9 to 127:15.

[10]See § 127:16.

[11]See § 127:17.

[12]See §§ 127:18 to 127:20.

[13]See § 127:22.

[14]See § 127:24.

[15]See § 127:29.

[16]See GBL § 349(b).

authority under the section,[17] how it differs from that of a private plaintiff,[18] and examples illustrating how and with what results the New York Attorney General has wielded it.[19]

Third, this chapter explores GBL § 350,[20] much like it does GBL § 349: the chapter addresses how the section differs from GBL § 349,[21] GBL § 350's elements and pleading requirements,[22] examples of its use by plaintiff consumers,[23] the New York Attorney General's authority under it,[24] and examples of its use by the New York Attorney General.[25] Fourth, the chapter briefly sketches the wide range of other laws, including federal consumer protection statutes and the consumer protection statutes of other states, to which conduct giving rise to GBL §§ 349 or 350 claims may also be subject.[26] Given the prevalence of national and interstate product marketing and sales, counsel for both plaintiffs and defendants should keep themselves apprised of the broader consumer protection law landscape. Finally, this chapter provides practitioners with checklists of essential allegations and defenses[27] and model jury instructions[28] for GBL §§ 349 and 350 claims.

A number of topics closely related to consumer protection law, such as class actions,[29] sales of goods,[30] and the privacy and security of personal information,[31] are discussed at length in other chapters and therefore minimally, if at all, here. Instead, this chapter focuses on GBL §§ 349 and 350, the main statutory liability provisions in New York's consumer protection arsenal.

§ 127:2 Strategic considerations for defendants

Counsel for defendants confronted with a GBL §§ 349 or 350 claim should be mindful of the following strategic considerations:

- As in responding to any new claim, determine whether

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[17]See § 127:30.

[18]See § 127:31.

[19]See §§ 127:32 to 127:33.

[20]See §§ 127:34 to 127:38.

[21]See § 127:34.

[22]See § 127:35.

[23]See § 127:36.

[24]See § 127:37.

[25]See § 127:38.

[26]See § 127:39.

[27]See § 127:40.

[28]See § 127:41.

[29]See Chapter 24 "Class Actions" (§§ 24:1 et seq.).

[30]See Chapter 98 "Sale of Goods" (§§ 98:1 et seq.).

[31]See Chapter 137 "Privacy and Security" (§§ 137:1 et seq.).

federal court jurisdiction exists and, if so, the merits of removing a GBL § 349 claim to federal court.[1]

- Given that consumer transactions typically involve multiple parties, consider whether any third-party claims should be asserted against potentially responsible retailers, wholesalers, suppliers, or other potentially responsible parties.[2]
- Consider whether the client has followed all FTC and state rules and regulations and can thus assert a safe harbor defense under GBL § 350-d.[3]
- Consider whether the client's alleged conduct is consumer oriented; if the alleged act is not consumer oriented, consider moving to dismiss the action.[4]
- Make sure the client explores whether insurance coverage might be available to help defray litigation or other costs, and if so, that any policy claim notice requirements are timely fulfilled.[5]
- Consider with the client whether existing sales practices, labeling techniques, or marketing campaigns should be changed to preempt future claims and to minimize potential liability and damages in pending litigation.[6]
- Before a claim arises, consider advising the client to take steps to understand the consumer protection laws that govern its business and any penalties that may be enforced on the business for a failure to follow the law.[7]
- Consider advising a client facing an inquiry from the New York Attorney General to preserve any documents related to the inquiry, discuss the timeline for and scope of production and methods of review with the Attorney General's office (such as the use of any agreed upon list of document custodians and search terms to be used to search electronic

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[Section 127:2]

[1]See § 127:8; see generally Chapter 10 "Removal to Federal Court" (§§ 10:1 et seq.).

[2]See § 127:8; see generally Chapter 9 "Third Party Actions" (§§ 9:1 et seq.).

[3]See § 127:34.

[4]See § 127:10.

[5]See § 127:8; see generally Chapter 90 "Insurance" (§§ 90:1 et seq.).

[6]See § 127:11; see generally Chapter 71 "Litigation Avoidance Prevention" (§§ 71:1 et seq.).

[7]See § 127:30; Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

information), and to prepare to negotiate with the Attorney General about the scope and confidentiality of the inquiry.[8]

- Consider with the client whether the business or transactions subject to an actual or potential claim can be construed to target elderly individuals over 65, and if so, work to ensure sales practices and marketing campaigns comply with GBL § 349-c.
- Consider whether the allegedly misleading practices could be defended on First Amendment grounds.[9]
- Consider whether the consumer bringing a GBL § 350 claim could be held to a higher reasonableness standard than the average consumer given the circumstances.[10]
- If the client is advertising job opportunities, advise the client to include any necessary disclaimers regarding required equipment and expected salary.[11]
- If the New York Attorney General is investigating the client, be sure to respond promptly to any notice of injunction. Once a complaint is filed, consider whether the client is entitled to a prompt hearing, and whether the request for an injunction is untimely.[12]

§ 127:3 Strategic considerations for both plaintiffs and defendants

Counsel for both plaintiffs and defendants litigating a GBL §§ 349 or 350 claim should bear in mind the following strategic considerations:

- Although New York remains a liberal pleading jurisdiction under CPLR 3013,[1] bare conclusory allegations simply reciting the elements of GBL §§ 349 or 350 remain susceptible to a motion to dismiss. Scrutinize GBL § 349 claims for sufficient factual detail regarding the consumer transactions, advertising, or other conduct at issue.[2]
  - Where was the subject product purchased?
  - When and how was it purchased?

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[8]See § 127:30; Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

[9]See § 127:36.

[10]See § 127:35.

[11]See § 127:35.

[12]See § 127:31.

[Section 127:3]

[1]See § 127:3; see generally Chapter 7 "The Complaint" (§§ 7:1 et seq.).

[2]See § 127:8.

- What specific conduct, statements, excerpts, or images in or on the product or its packaging, or in general marketing materials, are alleged to be misleading, false, or unsubstantiated?
- Why are they alleged to be misleading, false, or unsubstantiated?
- Was there a disclaimer? If so, was it accurate and prominently displayed?[3]
- Was there any post-sale conduct that may be construed as materially misleading?[4]
- What details and documentation support any damages claim, whether based on a purchase price, invoices, receipts, or other support?[5]

- Although plaintiffs pursuing GBL §§ 349 or 350 claims, unlike those suing for common law fraud,[6] need not allege reliance, the common law fraud reliance element and Section 349's and 350's actual injury causation element[7] are close cousins. Review the allegations carefully to ensure that the alleged misleading, false, or unsubstantiated statements led to an actual, identifiable, and confirmed injury to the plaintiff.
- GBL §§ 349 and 350 claims are frequently brought as proposed class actions. Counsel pursuing or defending a putative Section 349 or 350 class claim in New York state court will need to carefully consider whether the requirements of CPLR Article 9, which contains New York's class action rules, are met.[8]
  - Are the proposed class members sufficiently numerous to satisfy the numerosity requirement?
  - Is the class sufficiently ascertainable?
  - Did the proposed class members purchase products in a sufficiently similar manner, based upon the same or similar statements or conduct, and around the same time, and did they suffer the same or similar alleged actual injuries, so that there is sufficient commonality and predominance of factual issues?

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[3]See § 127:11.

[4]See § 127:11.

[5]See § 127:8.

[6]See generally Chapter 128, "Fraud" (§§ 128:1 et seq.).

[7]See § 127:12.

[8]See § 127:21. See generally Chapter 24 "Class Actions" (§§ 24:1 et seq.).

- Counsel should ask themselves these questions, as well as whether other CPLR Article 9 requirements are met.[9]
- Counsel should consider the merits of pursuing a GBL §§ 349 or 350 claim in New York's Commercial Division, assuming proper venue lies in a county in which a Commercial Division has been established, and the monetary thresholds required for a Commercial Division case can be met.[10] Defense counsel can seek reassignment of a matter to a Commercial Division initially filed in a county's general Civil Term of the Supreme Court. New York's Commercial Division Rules have in part incorporated a federal court-style approach, with limitations on written,[11] document,[12] and deposition[13] discovery, and the ability to depose testifying experts, which is generally not allowed in New York state court actions short of agreement among the parties or a court order authorizing expert depositions.[14]
- Consider whether the client, plaintiff or defendant, has taken steps to implement a litigation hold process, so that any potentially discoverable purchase receipts; consumer, retailer, or manufacturer communications; marketing campaign material and advertisements; and other potentially discoverable electronic and hardcopy material are maintained.[15]
- To the extent multiple similar actions arise, either in the same or multiple New York counties, consider the merits of seeking or opposing consolidation or coordination pursuant to CPLR 602[16] and the procedures of New York's Litigation Coordination Panel, set forth in Rule 202.69 of New York's Uniform Civil Rules for the Supreme Court.[17]
- With regard to the element of deception, consider whether

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[9]See § 127:21.

[10]See Chapter 39 "Practice Before the Commercial Division" (§§ 39:1 et seq.).

[11]See Chapter 31 "Interrogatories" (§§ 31:1 et seq.).

[12]See Chapter 30 "Document Discovery" (§§ 30:1 et seq.).

[13]See Chapter 29 "Depositions" (§§ 29:1 et seq.).

[14]See § 127:8. See Chapter 33 "Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony" (§§ 33:1 et seq.) for discussion of depositions.

[15]See § 127:8. See Chapter 30 "Document Discovery" (§§ 30:1 et seq.) for discussion of litigation holds generally.

[16]See Chapter 17 "Joinder, Consolidation, and Severance" (§§ 17:1 et seq.).

[17]See § 127:8; see also Chapter 18 "Coordination of Litigation within New York and Between Federal and State Courts" (§§ 18:1 et seq.).

expert testimony[18] might help. Depending on the monetary value of a claim and the type of deception alleged, counsel might, for example, consider a consumer perception expert, who could if warranted undertake a consumer perception survey regarding the allegedly deceptive conduct or statements involved.[19]

- Given the prevalence of national or multi-state consumer product marketing and sales, monitor relevant product recalls, federal or state government investigations, and other private claims, both in and outside New York. Developments in related industry, manufacturer, and government and private litigation may inform how and when to pursue GBL §§ 349 or 350 claims, and how to defend them.[20]

§ 127:4 New York consumer protection statute legislative history

Sections 349[1] and 350[2] of New York's General Business Law share the same general purpose of protecting New York consumers. New York courts have said the consumer protection statutes were designed to protect the "vast multitude which includes the ignorant, the unthinking and the credulous."[3] The statutes are thus geared toward securing an "honest market place where trust, and not deception, prevail."[4] The legislative history of Sections 349 and 350 accordingly reveals a gradual expansion of this agenda over the decades to counteract the development of new forms of misleading and deceptive business practices. Sections 127:5 to 127:7 of this chapter provides a brief overview of the legislative history and backgrounds of Sections 349 and 350, with a particular focus on the amendments of 1980 that saw a private right of action added to both statutes.[5]

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[18]See generally Chapter 48 "Expert Witness" (§§ 48:1 et seq.).

[19]See § 127:14.

[20]See § 127:4.

[Section 127:4]

[1]See §§ 127:8 to 127:33.

[2]See §§ 127:34 to 127:38.

[3]Quinn v. Aetna Life and Cas. Co., 96 Misc. 2d 545, 554, 409 N.Y.S.2d 473, 478, 4 Media L. Rep. (BNA) 1049 (Sup 1978); see also Floersheim v. Weinburger, 346 F. Supp. 950, 957, 1973-1 Trade Cas. (CCH) ¶ 74310 (D.D.C. 1972).

[4]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995), citing Mem. of Gov. Rockefeller, 1970 N.Y. Legis. Ann., at 472.

[5]See § 127:6.

§ 127:5 New York consumer protection statute legislative history—Passage of GBL §§ 349 and 350

Section 350[1] was enacted in 1963 amid concerns that neither common law causes of action nor the New York Penal Law were effective in combatting false advertising.[2] New York's Attorney General thereafter lent public support to the enactment of a new statute that would provide the Attorney General with the regulatory power to "cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State."[3] The resulting statute, General Business Law 350, was intended to serve as "a strong deterrent against deceptive business practice," "supplement the activities of the Attorney General in the prosecution of consumer fraud complaints," and provide consumers with "an honest market place where trust prevails between buyer and seller."[4] The proposed language of Section 350 borrowed heavily from the Federal Trade Commission Act of 1915. In fact, the phrase "deceptive acts or practices" was lifted from an equivalent provision under that legislation, so as to achieve a degree of consistency between state and federal law.[5] Debate ensued in the lead-up to the enactment of Section 350 about whether identically worded federal and state statutes would lead to confusion, causing a divergence of jurisprudence, as state and federal judges might produce inconsistent readings of the same text. However, Governor Rockefeller took the view that the new Section 350 would produce uniformity between state and federal law.[6] Early applications of Section 350 unsurprisingly acknowledged that the state legislature had "intended to adopt

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[Section 127:5]

[1]See §§ 127:34 to 127:38.

[2]Mulroney, Deceptive Practices in the Marketplace: Consumer Protection by New York Government Agencies, 3 Fordham Urb. L.J. 491, 499 (1975).

[3]Hansen, Consumer Protection Provisions Prohibiting "Deceptive Practices" and "False Advertising": Proper Vehicles for the Protection of Intellectual Property, 2 Fordham Intell. Prop. Media & Ent. L.J. 31, 31–32 (1991). Attorney General, Memorandum for the Governor re Senate Int. 1581, Pr. 1604, 1 (Jan. 8, 1963).

[4]Hansen, Consumer Protection Provisions Prohibiting "Deceptive Practices" and "False Advertising": Proper Vehicles for the Protection of Intellectual Property, 2 Fordham Intell. Prop. Media & Ent. L.J. 31, 31–32 (1991) (citing Attorney General, Mem. for the Governor re Senate Int. 1581, Pr. 1604 (Jan. 8, 1963)).

[5]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995) (citing Mem. of Governor Rockefeller approving L 1970, chs. 43, 44, 1970 McKinney's Session Laws of NY, at 3074 (Mar. 3, 1970)).

[6]Hansen, Consumer Protection Provisions Prohibiting "Deceptive Practices" and "False Advertising": Proper Vehicles for the Protection of Intel-

requirements identical to those established by the Federal Trade Commission Act of 1915 and to apply them to intrastate transactions in New York."[7] It is for this reason that Section 350-C provided a complete defense if a defendant could show "that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission."[8]

Section 349[9] was added to New York's General Business Law in 1970[10] to broaden existing protections provided to consumers from simply false advertising to "the many varied forms of deception, present and future, whether committed intentionally or not."[11] Section 349 was effectively "drawn from" Section 350 and the Federal Trade Commission Act, and so each of these statutes have proved influential in construing Section 349.[12]

§ 127:6 New York consumer protection statute legislative history—Addition of a private right of action and subsequent amendments

GBL Sections 349[1] and 350[2] were amended to include a private right of action in 1980 because the New York Attorney General

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lectual Property, 2 Fordham Intell. Prop. Media & Ent. L.J. 31, 33 (1991). Governor's Memorandum on S.I. 1581, Pr. 1604, Anderson Ch. 813, New York Legislative Annual (1963) 465, 466.

[7]Hansen, Consumer Protection Provisions Prohibiting "Deceptive Practices" and "False Advertising": Proper Vehicles for the Protection of Intellectual Property, 2 Fordham Intell. Prop. Media & Ent. L.J. 31, 32 (1991) (citing Governor's Mem. on S.I. 1581, Pr. 1604, Anderson Ch. 813, New York Legislative Annual (1963) 465, 466).

[8]Metropolitan New York Retail Merchants Ass'n v. City of New York, 60 Misc. 2d 805, 807, 303 N.Y.S.2d 612, 614 (Sup 1969).

[9]See §§ 127:8 to 127:33.

[10]Why the New York legislature enacted GBL §§ 349 and 350 in reverse order is a bit of a mystery. GBL § 350 was previously enacted in 1909 under Article 23, titled "Conspiracies to control transportation prohibited." GBL § 350 (1909). This law was later repealed in 1957. 1957 N.Y. Laws 1934. In 1963, GBL § 350 was enacted under a new article, Article 22-a, which was titled "False advertising unlawful." 1963 N.Y. Laws 2652.

In 1970, GBL § 349 was also enacted under Article 22-A, titled "Deceptive acts and practices unlawful." 1970 N.Y. Laws 103. It is likely that the NY legislature assigned "Deceptive acts and practices unlawful" to the unused provision, GBL § 349, rather than renumber GBL § 350 and then make what became GBL § 349 a new section GBL § 351.

[11]State by Lefkowitz v. Colorado State Christian College of Church of Inner Power, Inc., 76 Misc. 2d 50, 54, 346 N.Y.S.2d 482, 487 (Sup 1973).

[12]State by Lefkowitz v. Colorado State Christian College of Church of Inner Power, Inc., 76 Misc. 2d 50, 54, 346 N.Y.S.2d 482, 487 (Sup 1973).

[Section 127:6]

[1]See §§ 127:8 to 127:33.

was unable to adequately enforce the General Business Law's consumer protection provisions. Then Attorney General Robert Abrams submitted a memorandum to the State Governor explaining that the resources of the Office of the Attorney General were simply too thinly spread to effectively investigate every instance of alleged consumer fraud.[3] The Attorney General had been forced to focus only on those instances of fraud that impacted large numbers of New Yorkers while individual complaints, however meritorious, were ignored.[4] As the volume of consumer complaints continued to increase without a corresponding increase in enforcement, New York's consumer protection laws came to be seen as an "empty promise" to consumers.[5] In the years prior to 1980, the Attorney General's Bureau of Consumer Fraud and Protection had initiated only 10 to 15 actions each year to combat alleged instances of consumer fraud.[6] The lack of enforcement by the Attorney General created an obvious justification for allowing consumers to sue in their own names. Added to this, 42 other States and the District of Columbia had already bolstered their own consumer protection regimes by adding a private right of action, and it was thought appropriate that New Yorkers should also benefit from the same protections available in most other states.[7]

These amendments were controversial at the time. Many prominent members of the New York business community submitted letters to the New York legislature arguing that new private rights of action would pose a threat to procedural fairness because the proposed wording was dangerously vague and open-

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[2]See §§ 127:34 to 127:38.

[3]Hansen, Consumer Protection Provisions Prohibiting "Deceptive Practices" and "False Advertising": Proper Vehicles for the Protection of Intellectual Property, 2 Fordham Intell. Prop. Media & Ent. L.J. 31, 33 (1991) (citing Mem. of the New York Attorney General for the Governor on A 7223B, 2 (May 21, 1980) and Letter from the Mayor of City of New York to Governor Hugh L. Carey (May 20, 1980)).

[4]Moldovan, Note: New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, 48 Brook L. Rev. 509, 516 (1982).

[5]Moldovan, Note: New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, 48 Brook L. Rev. 509, 517 (1982).

[6]Moldovan, Note: New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, 48 Brook L. Rev. 509, 517 (1982) (citing Traiger, Consumer Fraud Laws in New York Require Private Right of Action, N.Y.L.J., Mar. 17, 1980, 1, col. 1, at 4, col. 4).

[7]Moldovan, Note: New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, 48 Brook L. Rev. 509, 563 (1982) (citing Report of the Committee on New York State Antitrust Law of the Antitrust Law Section of the New York State Bar Association: A Proposed New State Law Making Deceptive Acts or Practices Unlawful, 1968 N.Y. St. B.A. Antitrust L. Symp. 114, at 119, 129.).

ended.[8] Moreover, they asserted, private rights of action would lead to "floodgates" style litigation that would harm New York's economy.[9] These complaints did not have their intended influence, as Governor Carey signed the amending legislation introducing Section 349, proclaiming that "private enforcement" would "add a strong deterrent against deceptive business practices and supplement the activities of the Attorney General."[10]

Both Section 349 and 350 have been amended on occasion since 1980 in less significant ways. The statutes were amended in 1984 to clarify that private claimants could bring an action for either an injunction,[11] damages,[12] or both. Section 350 was amended in 1989 to deal with false advertising in the employment setting, and in 1989 and 1991 to address the misleading use of the title "doctor" in advertisements. Section 349 was amended in 2014 to provide that monies recovered under Section 349 by government agencies would be subject to Section 4 of the New York Finance Law.

§ 127:7 New York consumer protection statute legislative history—GBL § 350 The Consumer and Small Business Protection Act

On January 24, 2019 a bill was introduced in the New York State Legislature that would drastically liberalize GBL 349 if passed.[1] The bill proposes to add three new standards of prohibited acts and practices to Section 349. Acts and practices that are either "unfair," "deceptive," or "abusive," would be made unlawful. Although arguably vague, the bill defines each of these standards. An act or practice will be unfair if "it causes or is

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[8]Hansen, Consumer Protection Provisions Prohibiting "Deceptive Practices" and "False Advertising": Proper Vehicles for the Protection of Intellectual Property, 2 Fordham Intell. Prop. Media & Ent. L.J. 31, 33–34 (1991) (citing Letter from Schuler, President, Associated Industries of New York State, to Richard A. Brown, Counsel to the Governor, (June 11, 1980)).

[9]Moldovan, Note: New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, 48 Brook L Rev 509, 563 (1982) (citing Letter from Edward W. Duffy, Chairman of the Board, Marine Midland Bank, N.A. to Hugh L. Carey, Governor of New York (May 1, 1980)).

[10]Hansen, Consumer Protection Provisions Prohibiting "Deceptive Practices" and "False Advertising": Proper Vehicles for the Protection of Intellectual Property, 2 Fordham Intell. Prop. Media & Ent. L.J. 31, 33–34 (1991) (citing Mem. of the Governor on Approving L. 1980, Chs. 345 and 346 (June 19, 1980)).

[11]See § 127:20.

[12]See § 127:19

[Section 127:7]

[1]S. Res. A00.679/S.2407, 2019-2020 Reg. Sess. /S2407 (N.Y. 2019).

likely to cause substantial injury, the injury is not reasonably avoidable, and the injury is not outweighed by counter-vailing benefits, [. . .] or it takes unreasonable advantage of the inability of a person to protect his or her interests because of the person's infirmity, illiteracy or inability to understand the language of an agreement." An act or practice will be deceptive if it "misleads or is likely to mislead a person and the person's interpretation is reasonable under the circumstances."[2] Finally, an act or practice will be considered abusive if it materially interferes with the ability of a person to understand a term or condition of a product or service, or it takes unreasonable advantage of a person's lack of understanding. Further, the bill also increases the statutory damages award limit from $50 to $1,000 per violation. It would also enable courts to award punitive damages, and to make orders for the award of attorneys' fees and costs to successful claimants.

The bill's accompanying materials reveal that its stated purpose is that "New York's business law is outdated and incapable of providing the protections needed for modern commerce and service."[3] Moreover, because Section 349 does not currently include any prohibition against unfairness generally, New York supposedly "lags behind general business statutes in at least 39 other states." The materials accompanying the bill also provide that "[m]aking attorney's fees mandatory will increase access to justice for persons seeking legal action against violators."[4] Ultimately, "[t]he Consumer and Small Business Protection Act seeks to protect consumers and small businesses against actions that are likely to cause substantial injury, take advantage of vulnerable consumers and small businesses, and defends them against practices that are likely to mislead under reasonable circumstances."[5]

Unsurprisingly, the proposed introduction of an unfairness standard has caused significant debate. The unfairness standard has been described by one New York public interest legal organization as filling significant gaps in New York law: "[t]here are many actions today by industries that are not specifically prohibited by law, but which are unfair and abusive to consumers . . . . This bill and the amendments to New York's UDAP statute provid[e] a critical protection for consumers against ever-

[2]S. Res. A00.679/S.2407, 2019-2020 Reg. Sess. /S2407 (N.Y. 2019).

[3]S. Res. A00.679/S.2407, 2019-2020 Reg. Sess. /S2407 (N.Y. 2019).

[4]S. Res. A00.679/S.2407, 2019-2020 Reg. Sess. /S2407 (N.Y. 2019).

[5]S. Res. A00.679/S.2407, 2019-2020 Reg. Sess. /S2407 (N.Y. 2019).

evolving business practices and scammer[s'] nefarious conduct."[6] Additionally, the unfairness standard "brings New York in line with a majority of states' laws."[7] On the other hand, the bill would obviously increase the risks shouldered by businesses operating in New York.[8] The proposed amendment to available damages has also proved contentious because of what it would mean for the New York class action landscape.[9] One commentator remarked that the amendments should "terrify all companies that do business in the state" because they would "raise the guaranteed minimum recovery forty-fold [. . .] and it would expressly make this minimum award recoverable thousands or even millions of times over in class actions."[10]

As of this writing, the bill has not been passed in either New York legislative chamber. However, as the proposed bill would drastically change Section 349, practitioners should check its status.

§ 127:8 GBL § 349

To bring a cause of action under GBL § 349, a plaintiff must plead[1] that a defendant's conduct was deceptive and materially misleading to a reasonable consumer.[2] Though the courts construe

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[6]Keefe Empire Justice Center Memo of Support: Make NY's Unfair Deceptive Acts And Practices Laws Fair (May 13, 2019), https://empirejustice.org/resources_post/empire-justice-center-memo-support-make-nys-unfair-deceptive-acts-practices-laws-fair/.

[7]Keefe, Empire Justice Center Memo of Support: Make NY's Unfair Deceptive Acts And Practices Laws Fair (May 13, 2019), https://empirejustice.org/resources_post/empire-justice-center-memo-support-make-nys-unfair-deceptive-acts-practices-laws-fair/.

[8]Knobler, Extreme Pro-Plaintiff Changes Proposed To New York's Consumer-Protection Law (May 15, 2019), https://www.pbwt.com/misbranded/extreme-pro-plaintiff-changes-proposed-to-new-yorks-consumer-protection-law.

[9]See generally Chapter 24 "Class Actions" (§§ 24:1 et seq.).

[10]Knobler, NY's Legislature Should Fix Runaway Consumer Class Action Damages—Not Make Them Worse, 5/16/2019 N.Y.L.J.

[Section 127:8]

[1]For more on pleadings in general, see Chapter 7 "The Complaint" (§§ 7:1 et seq.) and Chapter 8 "Responses to Complaints" (§§ 8:1 et seq.).

[2]Himmelstein v. Matthew Bender & Co. Inc., 2018 WL 984850, 2018 NY Slip Op 30294(U), at *5 (N.Y. Sup 2018), aff'd, 172 A.D.3d 405, 100 N.Y.S.3d 227 (1st Dep't 2019), leave to appeal granted, 34 N.Y.3d 908, 115 N.Y.S.3d 782, 139 N.E.3d 406 (2020) ("To assert a claim under section 349 of the GBL, a plaintiff must plead facts that allow a court to reasonably infer that: (1) the challenged act was consumer-oriented; (2) misleading in a material way; and (3) the plaintiff must have suffered injury as a result . . . . The Court of Appeals has stated that a standard marketing scheme directed at consumers at large or a multi-media dissemination of information tends to show an impact on consum-

"consumer-oriented" broadly,[3] a "reasonable consumer" generally does not include a "sophisticated party" allegedly harmed in the course of a transaction with an equally sophisticated defendant.[4] However, businesses may have standing to assert Section 349 claims against competitors where the alleged misconduct materially misled a plaintiff business's customers, thereby causing harm to the plaintiff.[5] GBL § 349 does not apply to claims brought against municipalities.[6] A plaintiff must allege misconduct that is consumer-oriented and materially misleading and that it caused the plaintiff's injury.[7]

Additionally, there are a number of possible bars to bringing a claim under GBL § 349, including: a three-year statute of limita-

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ers at large . . . .") (internal quotations and citations omitted). See § 127:11.

[3]See Gold v. Shapiro, Dicaro & Barak, LLC, 2019 WL 4752093, at *10 (E.D. N.Y. 2019) ("The consumer-oriented requirement may be satisfied by showing that the conduct at issue potentially affects similarly situated consumers . . . . [C]onsumer-oriented conduct has been construed liberally.") (internal quotations and citation omitted); see also Hunter v. Palisades Acquisition XVI, LLC, 2017 WL 5513636, at *7 (S.D. N.Y. 2017) (noting "the critical question is whether the conduct alleged in the complaint affects the public interest in New York (internal quotations and citation omitted)). See § 127:10.

[4]Singh v. The City of New York, 2017 WL 4791469, at *6 (N.Y. Sup 2017) (rejecting plaintiff's claim because "[t]hese individuals are obviously not the small consumers intended to be protected by GBL§ 349, but rather investors with substantial personal assets or access to substantial financing . . . . Moreover, the acts of the city defendants did not have a broad impact on the public at large, but merely upon a relative handful of entities interested in investing in taxi medallions."); Houston Cas. Co. v. Cavan Corp. of NY, Inc., 2017 WL 2998844, at *3 (N.Y. Sup 2017) ("Where the alleged deceptive practices occur between relatively sophisticated entities with equal bargaining power, such does not give rise to liability under GBL § 349.") (internal quotations and citation omitted).

[5]See North State Autobahn, Inc. v. Progressive Ins. Group Co., 102 A.D.3d 5, 19, 953 N.Y.S.2d 96, 107, (2d Dep't 2012) ("So long as the allegedly deceptive conduct is sufficiently consumer-oriented, a business competitor protecting its own interest will ultimately serve to protect the interests of the consuming public . . . . [W]e note that the right to bring a private action was not limited to those acting in a consumer role, but rather, it was provided to 'any person who has been injured by reason of any violation of [GBL § 349(h)].' ").

[6]Singh v. The City of New York, 2017 WL 4791469, at *5 (N.Y. Sup 2017) (finding "that GBL § 349 applies only against a 'person, firm, corporation or association'; the statute does not expressly or by implication apply to municipal defendants.").

[7]Petrosino v. Stearn's Products, Inc., 95 U.C.C. Rep. Serv. 2d 679, 2018 WL 1614349, at *7 (S.D. N.Y. 2018) ("To recover under GBL § 349, a plaintiff must prove 'that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.' ") (citation omitted). See § 127:12.

tions;[8] potential preemption by state[9] or federal[10] statutes; and preclusion by the "safe harbor" provision of GBL § 349(d),[11] the

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[8]Bristol Village, Inc. v. Louisiana-Pacific Corporation, 170 F. Supp. 3d 488, 497, 89 U.C.C. Rep. Serv. 2d 218 (W.D. N.Y. 2016) ("Claims brought pursuant to GBL § 349 are subject to a three-year statute of limitations . . . . The accrual of a GBL claim begins to run at the time of the plaintiff's injury, or when all of the factual circumstances necessary to establish a right of action have occurred, so that plaintiff would be entitled to relief.") (internal quotations and citations omitted). See § 127:17.

[9]See Board of Managers of 550 Grand Street Condominium v. Schlegel LLC, 43 Misc. 3d 1211(A), 990 N.Y.S.2d 436 (Sup 2014) (finding "the Martin Act does not bar claims under General Business Law § 349"); Kupferstein v. TJX Companies, Inc., 2017 WL 590324, at *3 (E.D. N.Y. 2017) (finding "plaintiff cannot avoid the force of New York Tax Law § 1139 by characterizing her claim as brought under New York General Business Law § 349. The state legislature established the New York Tax Commission and conferred on it exclusive responsibility for examining these kinds of claims.").

[10]Burkett v. Smith & Nephew Gmbh, 2014 WL 1315315, at *8 (E.D. N.Y. 2014) (concluding that because plaintiff's GBL § 349 claim, arising out of personal injury from an allegedly defective medical device, was "based on theories of failure to warn and false representations," it was preempted by the Medical Device Amendment of 1976); Carias v. Monsanto Company, 83 Env't. Rep. Cas. (BNA) 1396, Prod. Liab. Rep. (CCH) P 19923, 2016 WL 6803780, at *7 (E.D. N.Y. 2016) (concluding plaintiffs' request for injunctive relief under GBL 349 was preempted by FIFRA because the "EPA has the exclusive authority to approve changes to Roundup's label," and "this Court cannot order defendant to alter its labeling in order to remedy a violation of state law"); Fishman v. Philadelphia Financial Life Assurance Company, 2016 WL 2347921, at *8 (S.D. N.Y. 2016) (finding "that plaintiff's claims of . . . violation of N.Y. GBL § 349 . . . are precluded" by the Securities Litigation Uniform Standards Act); Aretakis v. Federal Exp. Corp., 2011 WL 1226278, at *4 (S.D. N.Y. 2011), report and recommendation adopted, 2011 WL 1197596 (S.D. N.Y. 2011) (finding plaintiff "cannot pursue his GBL § 349" claim because "state deceptive business practice laws, when applied to the airline industry, relate to airline prices, routes and services and, consequently, are preempted by the" Airline Deregulation Act). But see People ex rel. Spitzer v. Applied Card Systems, Inc., 11 N.Y.3d 105, 120, 863 N.Y.S.2d 615, 894 N.E.2d 1, 10, 61 A.L.R. Fed. 2d 739 (2008) ("Congress also made clear that, even when enforcing the TILA disclosure requirements, states could use their unfair and deceptive trade practices acts to 'requir[e] or obtain[ ] the requirements of a specific disclosure beyond those specified in Section [1637](c) in the settlement or adjudication of a specific case or cases' . . . In sum, the legislative record shows that Congress only intended FCCCDA to preempt a specific set of state credit card disclosure laws, not states' general unfair trade practices acts." (citation omitted)); Aaberg v. Francesca's Collections, Inc., 2018 WL 1583037, at *9 (S.D. N.Y. 2018) (finding that "that if the nature of the rights asserted under GBL § 349 is that of consumer deception, the claim may not be preempted" by the Copyright Act).

[11]Greene v. Gerber Products Co., 262 F. Supp. 3d 38, 70 (E.D. N.Y. 2017) (explaining that the "safe harbor provisions require Defendant to identify a 'rule' or 'regulation' with which it has complied," and finding that "it is not clear that Defendant's labeling 'compl[ied] with' the FDA's guidance, even if that guidance qualifies as a rule or regulation under the safe harbor provisions.").

filed rate doctrine,[12] the doctrine of primary jurisdiction,[13] or the voluntary payment doctrine.[14] A claim under GBL § 349 need not "be based on an independent private right of action since the statute applies to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state."[15] A GBL § 349 claim may not, however, be used to bootstrap a claim under a different consumer protection statute explicitly lacking a private right of action.[16] Further, where the transaction giving rise to a dispute between a plaintiff and defendant is subject to an arbitration agreement,[17] a plaintiff may not invoke Section 349 to circumvent the arbitration agreement.[18] Finally,

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[12]Fero v. Excellus Health Plain, Inc., 236 F. Supp. 3d 735, 779 (W.D. N.Y. 2017), on reconsideration, 304 F. Supp. 3d 333 (W.D. N.Y. 2018) (finding plaintiffs cannot recover damages under their GBL § 349 claim because "[t]he filed rate doctrine holds that any 'filed rate'—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers.") (internal quotation and citation omitted).

[13]Scholder v. Riviana Foods Inc., 2017 WL 2773586, at *2 (E.D. N.Y. 2017) (explaining how "several courts . . . have invoked the doctrine of primary jurisdiction to stay federal court cases arising from allegedly false or misleading claims on food packaging, pending the outcome of the FDA's most recent rulemaking process," and applying the doctrine to stay the plaintiff's claim that defendant violated GBL § 349 for labeling its pasta product "all natural" when it allegedly contained trace amounts of herbicide).

[14]Wurtz v. Rawlings Company, LLC, 2016 WL 7174674, at *8 (E.D. N.Y. 2016) (finding it "likely that the New York Court of Appeals would find that the voluntary payment doctrine bars recovery of payments made voluntarily and with full knowledge of the facts, regardless of whether such recovery is sought via a statutory or common law claim" and thus barring plaintiff's GBL 349 claim for recovery of payments made to the defendant).

[15]Farino v. Jiffy Lube Intern., Inc., 298 A.D.2d 553, 554, 748 N.Y.S.2d 673, 674, (2d Dep't 2002) (internal quotation and citation omitted).

[16]Seller v. Citimortgage, Inc., 118 A.D.3d 511, 512, 988 N.Y.S.2d 32, 33 (1st Dep't 2014) (noting "that a cause of action under General Business Law § 349 alleging violations of HAMP rules and directives would constitute an impermissible 'end run' around the absence of a private right of action under HAMP") (citation omitted); Nick's Garage, Inc. v. Progressive Casualty Insurance Company, 875 F.3d 107, 127 (2d Cir. 2017) ("[W]hen the challenged acts are not inherently deceptive so as to violate GBL § 349, regardless of whether they violate another statute, such acts cannot be re-characterized as 'deceptive' simply on the grounds that they violate another statute which does not allow for private enforcement; otherwise, GBL § 349 would be permitted to derogate the policy embodied in the other statute precluding private enforcement.").

[17]See generally Chapter 69 "Arbitration" (§§ 69:1 et seq.).

[18]Andersen v. Walmart Stores, Inc., 2017 WL 661188, at *8 (W.D. N.Y. 2017) (rejecting plaintiff's argument that "the arbitration clause is invalid because his claims are brought pursuant to statute, not contract," and concluding that "courts routinely enforce arbitration agreements in cases involving alleged violations of GBL §§ 349 & 350 and other consumer protection statutes.").

only claims arising out of allegedly deceptive transactions occurring in New York are subject to GBL § 349.[19]

§ 127:9 GBL § 349—Elements

To establish a prima facie case under GBL § 349, a plaintiff must allege (1) consumer-oriented conduct,[1] that is (2) misleading in a material way,[2] and (3) that the plaintiff was harmed as a result.[3] A deceptive practice does not have to rise to "the level of common-law fraud to be actionable under section 349."[4] While intent to defraud and justifiable reliance are not elements of the prima facie case, as they would be with a common law fraud claim,[5] courts may cite the presence of such intent or reliance to justify treble damages.[6] The harm need not be pecuniary, but must be actual;[7] recently courts appear more willing to recognize damages for emotional harm.[8]

Although the New York Court of Appeals has not yet addressed the issue, the Second Department has held that the pleading-with-particularity requirement of CPLR 3016(b) normally

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[19]Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 325, 746 N.Y.S.2d 858, 774 N.E.2d 1190, 1195 (2002) ("The phrase 'deceptive acts or practices' under the statute is not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer . . . . Thus, to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York.") (citation omitted).

[Section 127:9]

[1]See § 127:10.

[2]See § 127:11.

[3]Plavin v. Group Health Incorporated, 35 N.Y.3d 1, 10, 124 N.Y.S.3d 5, 146 N.E.3d 1164 (2020) (internal citation omitted); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995) (internal citation omitted). See § 127:12.

[4]Boule v. Hutton, 328 F.3d 84, 94, 31 Media L. Rep. (BNA) 1793, 66 U.S.P.Q.2d 1659, 2003-2 Trade Cas. (CCH) ¶ 74095 (2d Cir. 2003) (citing Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 343, 704 N.Y.S.2d 177, 725 N.E.2d 598 (1999)).

[5]Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 343, 704 N.Y.S.2d 177, 725 N.E.2d 598 (1999); Stutman v. Chemical Bank, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000). For more on fraud in general, see Chapter 128, "Fraud" (§§ 128:1 et seq.).

[6]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995). See § 127:19.

[7]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995). See § 127:12.

[8]See Michelo v. National Collegiate Student Loan Trust 2007-2, 419 F. Supp. 3d 668, 708 (S.D. N.Y. 2019) (affirming a recent line of cases holding emotional harm is a sufficient injury under GBL § 349 where it "flows directly from the defendants' violative conduct, and not the risk of a speculative future event."). See § 127:12.

required for claims sounding in fraud does not apply to GBL §§ 349 and 350 causes of action.[9] At least three New York County decisions have followed the Second Department's lead.[10]

§ 127:10 GBL § 349—Elements—Consumer-oriented conduct

GBL § 349 "is directed at wrongs against the consuming public," and as such a plaintiff bringing claims under Section 349 "must allege conduct of the defendant that is consumer-oriented."[1] Whether the complained-of conduct is consumer-oriented is a threshold question; claims that are "private in nature" or based on "a single shot transaction" will not lie.[2] A plaintiff need not allege a defendant engaged in recurring acts to have a cognizable claim, "but instead must demonstrate that the acts or practices have a broader impact on consumers at large."[3] Thus, private contract disputes typically do not amount to consumer-oriented conduct; however, courts have recognized exceptions to this element where a plaintiff can show, despite the existence of a private contract, a defendant's conduct had an effect on consumers at large.[4] Like common law fraud claims,[5] GBL § 349 claims cannot simply be duplicative of a contract claim.[6] An alleged GBL § 349

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[9]Joannou v. Blue Ridge Ins. Co., 289 A.D.2d 531, 735 N.Y.S.2d 786, 787 (2d Dep't 2001).

[10]See Farokhi v. The Guardian Life Ins. Co. of America, 2008 WL 3996274, at *2 (N.Y. Sup 2008); The People of the State of New York v. Marolda Properties, Inc., 2017 WL 5890773, at *3 (N.Y. Sup 2017); Underwood v. Insys Therapeutics, Inc., 2019 WL 1557510, at *5 (N.Y. Sup 2019).

[Section 127:10]

[1]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 24–25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995). See § 127:22 for additional discussion of Oswego.

[2]Plavin v. Group Health Incorporated, 35 N.Y.3d 1, 10, 124 N.Y.S.3d 5, 146 N.E.3d 1164 (2020) (quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995)).

[3]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995).

[4]See Carroll v. U.S. Equities Corp., R.I.C.O. Bus. Disp. Guide (CCH) P 13231, 2019 WL 4643786, at *13 (N.D. N.Y. 2019) (allowing the GBL § 349 claim to proceed despite arising from a private contract dispute "because Plaintiff asserts that Defendants' actions in his case were consistent with a pattern and practice Defendants utilized in thousands of other cases affecting others . . . .").

[5]For more on fraud, see Chapter 128, "Fraud" (§§ 128:1 et seq.).

[6]See Chapter 89 "Contracts" (§§ 89:1 et seq.).

loss must be distinct from an alleged loss suffered as a result of a purported breach of contract.[7]

For example, in *Winslow v. Forster & Garbus, LLP*, a case concerning debt-collection,[8] the court found the consumer-oriented element could be "satisfied where the conduct forming the basis of the complaint was a 'normal part of defendants' business,' in which case the practice could 'have a broad impact on consumers at large.' "[9] Additionally, in *KS Trade LLC v. International Gemological Institute, Inc.*, the court found it immaterial that the plaintiff had been in a business relationship with the defendant because the "crux of [the] dispute," which involved fraudulent certificates and appraisals of gemstones, was "conduct ultimately aimed at the public. Consumers are not just incidental parties . . . rather, the conduct was ultimately directed at misleading the consumers, in fraudulently grading and selling stones that consumers are buying at artificially inflated prices."[10]

However, drug manufacturers' warnings have been found not to be consumer-oriented because the warnings are directed at the prescribing doctor and not the patient.[11] In *Amos v. Biogen Idec Inc.*,[12] the Western District of New York dismissed the plaintiff's GBL § 349 claim against the defendant drug manufacturer because the defendant's alleged act, concealing a dangerous side effect of a drug, was not consumer oriented.[13] The court reasoned that the manufacturer has a duty to warn prescribing physicians of side effects; this duty is not owed to consumers, so the manufacturer's act is not consumer oriented.[14]

§ 127:11 GBL § 349—Elements—Materially misleading

To state a cognizable GBL § 349 claim, a plaintiff must show a defendant engaged in conduct that was "misleading in a material

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[7]Spagnola v. Chubb Corp., 574 F.3d 64, 66–73 (2d Cir. 2009) ("[A]lthough a monetary loss is a sufficient injury to satisfy the requirement under § 349, that loss must be independent of the loss caused by the alleged breach of contract.").

[8]See § 127:26. See generally Chapter 95, "Collections" (§§ 95:1 et seq.).

[9]Winslow v. Forster & Garbus, LLP, 2017 WL 6375744, at *9 (E.D. N.Y. 2017),appeal withdrawn, 2018 WL 1840195 (2d Cir. 2018) (quoting Jordan v. Tucker, Albin and Associates, Incorporated, 2017 WL 2223918 (E.D. N.Y. 2017)).

[10]KS Trade LLC v. Intern. Gemological Institute, Inc., 2019 WL 1243080, at *3 (N.Y. Sup 2019).

[11]Amos v. Biogen Idec Inc., 28 F. Supp. 3d 164, 173–74 (W.D. N.Y. 2014).

[12]Amos v. Biogen Idec Inc., 28 F. Supp. 3d 164 (W.D. N.Y. 2014).

[13]Amos v. Biogen Idec Inc., 28 F. Supp. 3d 164, 173 (W.D. N.Y. 2014).

[14]Amos v. Biogen Idec Inc., 28 F. Supp. 3d 164, 173–74 (W.D. N.Y. 2014).

way."[1] This is an objective standard, under which the court or factfinder must determine whether the act or omission would be "misleading to a reasonable consumer acting reasonably" under the circumstances.[2] The *Oswego* court adopted this objective standard for determining whether a deceptive act is unlawful to mitigate "the potential . . . tidal wave of litigation against businesses that was not intended by the Legislature."[3]

For example, in *Petrosino v. Stern's Products, Inc.*, the plaintiff claimed the defendant violated GBL § 349 by erroneously labeling its product as "natural," and the court found the "[p]laintiff need not establish whether the product is not 'natural' but rather, if a reasonable consumer acting reasonably would be misled."[4] The court thus rejected the defendant's argument that the "[p]laintiff did not provide sufficient factual allegations to show that their [sic] product was not natural."[5] Likewise, in *Singleton v. Fifth Generation, Inc.*, the court denied the defendant's motion to dismiss the plaintiff's GBL § 349 claim after finding the defendant's labels, which stated the product was "Handmade" and "Crafted in an Old Fashioned Pot Still," "could plausibly mislead a reasonable consumer to believe that its vodka [was] made in a hands-on, small-batch process, when it [was] allegedly mass-produced in a highly automated one."[6]

However, courts will generally not sustain a cause of action under GBL § 349 where the allegedly misleading conduct is mere puffery. In *Avola v. Louisiana-Pacific Corp.*, the United States District Court for the Eastern District of New York offered the following criteria as factors distinguishing puffery from materially misleading acts: "(i) vagueness; (ii) subjectivity; and (iii) in-

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[Section 127:11]

[1]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995).

[2]Petrosino v. Stearn's Products, Inc., 95 U.C.C. Rep. Serv. 2d 679, 2018 WL 1614349, at *7 (S.D. N.Y. 2018); see Goldemberg v. Johnson & Johnson Consumer Companies, Inc., 8 F. Supp. 3d 467, 478 (S.D. N.Y. 2014) (noting that while "usually such a determination is a question of fact," the "court may make this determination as a matter of law.").

[3]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995). See § 127:22 for additional discussion of Oswego.

[4]Petrosino v. Stearn's Products, Inc., 95 U.C.C. Rep. Serv. 2d 679, 2018 WL 1614349, at *7 (S.D. N.Y. 2018).

[5]Petrosino v. Stearn's Products, Inc., 95 U.C.C. Rep. Serv. 2d 679, 2018 WL 1614349, at *7 (S.D. N.Y. 2018).

[6]Singleton v. Fifth Generation, Inc., 2016 WL 406295, at *1, *9 (N.D. N.Y. 2016).

ability to influence the buyers' expectations."[7] The court explained that "[t]he 'vagueness' factor applies when the disputed statements fail to describe a specific characteristic of the product on which the claims are based," such as statements touting "high-speed internet service as the 'fastest, easiest way to get online' " or "a truck as the 'most dependable, long-lasting.' "[8] In contrast, representations that "are far more specific, describing key characteristics" of a product are distinguishable from vague puffery.[9] "The 'subjectivity' factor applies when the disputed statements may not be measured on an objective basis, such as by reference to clinical studies or comparison with the product's competitors," and examples include "statements that a stereo system reflects the 'most life-like reproduction of orchestral and vocal sounds' or that a chain of hotels maintains 'standards proud enough to bear [the founder's] name.' "[10] However, where claims in an advertisement "are quantifiable" by some objective measure, they are not defensible as mere puffery.[11] Finally, "[t]he 'inability to influence' factor applies when . . . the disputed statements are made by all of the product's competitors, or these statements cannot mean everything that they suggest."[12] In other words, when the representation is "so exaggerated as to preclude reliance by consumers," it may be dismissed as puffery.[13] For example, "a statement that a sports beverage will 'Upgrade your game' is plainly an exaggeration, because no buyer truly believes that consuming this beverage 'result[s] in improved athletic abilities.' "[14] On the other hand, where an advertisement represents that "LP SmartSide acts like 'traditional wood' siding products, these statements are not so overblown that they imply more than the buyers ought to anticipate from a siding product."[15]

Whether the case involves mere puffery or not, counsel

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[7]991 F. Supp. 2d 381, 392 (E.D.N.Y. 2013).

[8]Avola v. Louisiana-Pacific Corp., 991 F. Supp. 2d 381, 392, 81 U.C.C. Rep. Serv. 2d 509 (E.D. N.Y. 2013) (citations omitted).

[9]Avola v. Louisiana-Pacific Corp., 991 F. Supp. 2d 381, 393, 81 U.C.C. Rep. Serv. 2d 509 (E.D. N.Y. 2013).

[10]Avola v. Louisiana-Pacific Corp., 991 F. Supp. 2d 381, 393, 81 U.C.C. Rep. Serv. 2d 509 (E.D. N.Y. 2013) (alteration in original) (citation omitted).

[11]Avola v. Louisiana-Pacific Corp., 991 F. Supp. 2d 381, 393, 81 U.C.C. Rep. Serv. 2d 509 (E.D. N.Y. 2013).

[12]Avola v. Louisiana-Pacific Corp., 991 F. Supp. 2d 381, 393, 81 U.C.C. Rep. Serv. 2d 509 (E.D. N.Y. 2013).

[13]Avola v. Louisiana-Pacific Corp., 991 F. Supp. 2d 381, 394, 81 U.C.C. Rep. Serv. 2d 509 (E.D. N.Y. 2013).

[14]Avola v. Louisiana-Pacific Corp., 991 F. Supp. 2d 381, 394, 81 U.C.C. Rep. Serv. 2d 509 (E.D. N.Y. 2013).

[15]Avola v. Louisiana-Pacific Corp., 991 F. Supp. 2d 381, 394, 81 U.C.C. Rep. Serv. 2d 509 (E.D. N.Y. 2013).

representing a retailer whose product marketing has been called into question pursuant to a GBL § 349 claim should discuss with the client whether existing sales practices or marketing campaigns should be changed to preempt future claims and minimize potential liability and damages in pending litigation.[16]

Attorneys should also beware that a retailer's inducing a consumer to spend more money post-sale may constitute misleading conduct under GBL § 349. For example, in *Marshall v. Hyundai Motor America*,[17] the United States District Court for the Southern District of New York found the plaintiffs' claim could survive a motion to dismiss where plaintiffs argued the defendant's "post-sale conduct, including Defendant's failure to cover the repair or replacement of the allegedly defective parts amounts to deceptive conduct . . . ."[18]

Additionally, the presence of a disclaimer may not be enough to avoid a claim of misleading conduct. In *Delgado v. Ocwen Loan Servicing, LLC*,[19] the United States District Court for the Eastern District of New York found a "consumer who receives a negotiable check in an envelope from his mortgage servicer could reasonably believe it to be a small refund," despite a disclosure stating that by cashing the check, the recipient would be entering into an annual home warranty plan with monthly charges of $44.95.[20] Whether a disclaimer is sufficient to defeat a claim of deception depends on the "font size and placement of the disclaimer as well as the relative emphasis placed on the disclaimer and the allegedly misleading statement."[21] Even an accurate disclaimer may not be sufficient to defeat a claim of misleading conduct under GBL § 349 if the overall "net impression" of the communication is nonetheless misleading.[22]

§ 127:12 GBL § 349—Elements—Injury and causation

Finally, a plaintiff must allege an actual injury—that is, that she was actually injured by a defendant's alleged deceptive or

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[16]See generally Chapter 71, "Litigation Avoidance and Prevention" (§§ 71:1 et seq.).

[17]Marshall v. Hyundai Motor America, 51 F. Supp. 3d 451 (S.D. N.Y. 2014).

[18]Marshall v. Hyundai Motor America, 51 F. Supp. 3d 451 (S.D. N.Y. 2014).

[19]Delgado v. Ocwen Loan Servicing, LLC, R.I.C.O. Bus. Disp. Guide (CCH) P 12537, 2014 WL 4773991 (E.D. N.Y. 2014).

[20]Delgado v. Ocwen Loan Servicing, LLC, R.I.C.O. Bus. Disp. Guide (CCH) P 12537, 2014 WL 4773991, at *2, *9 (E.D. N.Y. 2014).

[21]Nelson v. MillerCoors, LLC, 246 F. Supp. 3d 666, 675 (E.D. N.Y. 2017) (quoting Stoltz v. Fage Dairy Processing Industry, S.A., 2015 WL 5579872, *16 (E.D. N.Y. 2015)).

[22]See Delgado v. Ocwen Loan Servicing, LLC, R.I.C.O. Bus. Disp. Guide (CCH) P 12537, 2014 WL 4773991, at *9 (E.D. N.Y. 2014).

misleading acts to state a cognizable claim.[1] The alleged injury must be actual, and cannot be speculative or based on the "perceived . . . risk of future injury that may never occur."[2] In *Michelo v. National Collegiate Student Loan Trust 2007-2*, the court examined claims by two different plaintiffs under GBL § 349 and found it was the form of alleged injury that allowed one claim to survive and not the other. The court granted the defendant's motion to dismiss the plaintiff's claim where the alleged injury was based on a fear she might be subject to future wage garnishment as a result of the defendant's "unlawfully procured judgment."[3] In contrast, the court sustained the GBL § 349 claim where the plaintiff alleged that her credit score was negatively impacted by the defendant's false "report[ ] to credit bureaus that the underlying alleged debt was valid and owed."[4] Because the defendant's false report "negatively affected [her] credit," the court found "Michelo's claimed injury is also sufficiently causally connected to the alleged deceptive practices."[5]

Although plaintiffs pursuing GBL § 349 claims, unlike those suing for common law fraud,[6] need not allege reliance,[7] the common law fraud reliance element and Section 349's actual injury causation element[8] are closely related. Both plaintiff and defense counsel should accordingly review GBL § 349 allegations carefully to ensure that, whether called reliance or actual injury causation, the alleged misleading, false, or unsubstantiated statements led to an actual, identifiable, and confirmed injury to the plaintiff.

Further, the injury need not be pecuniary to state a GBL § 349 claim.[9] The court in *Guzman v. Mel S. Harris and Associates, LLC*, acknowledged that "[e]motional harm . . . satisf[ies] the

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[Section 127:12]

[1]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995).

[2]Michelo v. National Collegiate Student Loan Trust 2007-2, 419 F. Supp. 3d 668, 709 (S.D. N.Y. 2019) (quoting Shafran v. Harley-Davidson, Inc., 2008 WL 763177 (S.D. N.Y. 2008)).

[3]Michelo v. National Collegiate Student Loan Trust 2007-2, 419 F. Supp. 3d 668, 708 (S.D. N.Y. 2019).

[4]Michelo v. National Collegiate Student Loan Trust 2007-2, 419 F. Supp. 3d 668, 707 (S.D. N.Y. 2019).

[5]Michelo v. National Collegiate Student Loan Trust 2007-2, 419 F. Supp. 3d 668, 707 (S.D. N.Y. 2019) (alteration in original).

[6]See generally Chapter 128, "Fraud" (§§ 128:1 et seq.).

[7]See § 127:16.

[8]See § 127:16.

[9]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995) ("[A] plaintiff seeking

injury requirement for a claim under . . . GBL § 349," and found the plaintiff's "emotional injuries" were sufficient to withstand a summary judgment motion where he claimed to be "stressed and frustrated . . . to the extent that he left his job as a truck driver because he feared having an accident, and experienced difficulty sleeping and concentrating."[10]

§ 127:13 GBL § 349—Other statutory requirements

In addition to the elements established by the court in *Oswego*,[1] there are other statutory requirements to bringing a cognizable GBL § 349 claim. The allegedly misleading act must be "deceptive,"[2] and the deceptive transaction giving rise to a plaintiff's injury must occur in New York State.[3]

§ 127:14 GBL § 349—Other statutory requirements—"Deceptive act or practice"

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce."[1] While deception itself is not an element of the prima facie case, it goes to the "consumer protective purpose"[2] of the statute, which safeguards consumers' "right to an honest market place where trust prevails between buyer and seller."[3] It is also closely related to the "materially misleading" standard,[4] which "require[es] a showing that a reasonable consumer would have been misled" by the deceptive conduct.[5]

In *Kronenberg v. Allstate Insurance Company*, the plaintiff

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compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm."). See § 127:19.

[10]Guzman v. Mel S. Harris and Associates, LLC, 2018 WL 1665252, at *12 (S.D. N.Y. 2018).

[Section 127:13]

[1]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 745 (1995). See §§ 127:9 to 127:12, 127:22.

[2]See § 127:14.

[3]See § 127:15.

[Section 127:14]

[1]GBL § 349(a).

[2]See § 127:10.

[3]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995) (quoting Mem. of Governor Rockefeller, 1970 N.Y. Legis. Ann., at 472).

[4]See § 127:11.

[5]Kronenberg v. Allstate Insurance Company, 2020 WL 1234603, at *3

claimed defendant Allstate violated GBL § 349 by purporting to cover the "actual cash value" of cars damaged in collisions, when Allstate's "valuation method, which, rel[ied] on at least one non-comparable market vehicle as well as an unexplained condition adjustment," allegedly "produce[d] an artificially low value for the vehicle."[6] The court rejected Allstate's argument that "a fully disclosed practice cannot be deceptive" because the plaintiff was claiming "the insurer *did not do* what its policy said it would do," and as such "an insurer cannot overcome a claim of deception by disclosing estimates stating the rates to be paid."[7]

Deception need not be an affirmative act, but can also be accomplished through omission. In *Miller v. Kaminer*, the plaintiff sought a refund for a deposit and prepayment of child care services paid to the defendant, who knew at the time of payment that the owner of the business was terminally ill.[8] The court found that "[t]he failure to inform claimant at the time his child was placed in child care that his deposit and pre-payment would not be reimbursed because of the imminent dire health circumstances is an omission which constitutes a deceptive act."[9] Further, the court found "the omission need not be recurring," to qualify as deceptive, as long as it satisfied the consumer-oriented prong.[10] The party asserting a claim under GBL § 349 must allege not merely that the adversary engaged in deceptive conduct, but that the claimant was directly deceived as a result. In *Center for Rheumatology, LLP v. Shapiro*, the defendant counter-claimed that "plaintiffs failed to inform patients that defendant left the Partnership and relocated" in violation of GBL § 349.[11] However, the court found the defendant failed to state a claim because he "failed to allege that he was deceived by this practice in any man-

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(E.D. N.Y. 2020) (internal quotations and citation omitted).

[6]Kronenberg v. Allstate Insurance Company, 2020 WL 1234603, at *3 (E.D. N.Y. 2020).

[7]Kronenberg v. Allstate Insurance Company, 2020 WL 1234603, at *4 (E.D. N.Y. 2020) (internal quotations and citation omitted) (alteration in original).

[8]Miller v. Kaminer, 62 Misc. 3d 397, 398, 88 N.Y.S.3d 792 (N.Y. City Civ. Ct. 2018).

[9]Miller v. Kaminer, 62 Misc. 3d 397, 410, 88 N.Y.S.3d 792, 802 (N.Y. City Civ. Ct. 2018).

[10]Miller v. Kaminer, 62 Misc. 3d 397, 410, 88 N.Y.S.3d 792 (N.Y. City Civ. Ct. 2018).

[11]Center for Rheumatology, LLP v. Shapiro, 65 Misc. 3d 1205(A), 118 N.Y.S.3d 380 (Sup 2019).

ner, and defendant may not maintain a derivative action on behalf of [the Partnership's] patients."[12]

With regard to the element of deception, practitioners pursuing or defending a GBL § 349 claim should consider whether expert testimony might help.[13] Depending on the monetary value of a claim and the type of deception alleged, counsel might, for example, consider a consumer perception expert, who could if warranted undertake a consumer perception survey regarding the allegedly deceptive conduct or statements involved. Consumer surveys can reveal consumer expectations concerning the level of support or evidence for potential GBL § 349 or GBL § 350 claims based on the reactions of survey participants sufficiently comparable to a current or proposed plaintiff. As with any expert witness work product, defense counsel should scrutinize the methodology employed in conducting any such surveys and the qualifications of the consumer perception and survey experts utilized.

§ 127:15 GBL § 349—Other statutory requirements—"In this state"

GBL § 349 states that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service *in this state* are hereby declared unlawful."[1] The Court of Appeals has construed this provision to mean that "the transaction in which the consumer is deceived must occur in New York."[2] The court reasoned that "deceptive acts or practices" does not refer to "the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission . . . . Thus, to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York."[3] In *Goshen v. Mutual Life Insurance Co.*, the court found the transaction at issue did not occur in New York because the plaintiff "received MONY's information in Florida. He purchased his policy and paid his premiums in Florida, through a Florida insurance agent."[4] It was therefore immaterial that the defendant's principal place of business was

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[12]Center for Rheumatology, LLP v. Shapiro, 65 Misc. 3d 1205(A), 118 N.Y.S.3d 380 (Sup 2019).

[13]See generally Chapter 48, "Expert Witnesses" (§§ 48:1 et seq.).

[Section 127:15]

[1]GBL § 349 (McKinney) (emphasis added).

[2]Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 324, 746 N.Y.S.2d 858, 774 N.E.2d 1190, 1195 (2002).

[3]Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 325, 746 N.Y.S.2d 858, 774 N.E.2d 1190, 1195 (2002).

[4]Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326, 746

in New York, or that the allegedly deceptive scheme "was conceived and orchestrated in New York."[5]

However, in *Cruz v. FXDirectDealer, LLC*, the Second Circuit "recognize[d] that a split of authority has developed subsequent to *Goshen* about the appropriate territorial test to employ under section[ ] 349 . . .: a 'transaction-based' test . . ., or . . . a test premised on where the victim is deceived, regardless of where the transaction occurs."[6] While the latter line of cases "focus on where the deception of the plaintiff occurs and require, for example, that a plaintiff actually view a deceptive statement while in New York," the former are more in line with the *Goshen* test focusing "on where the underlying deceptive 'transaction' takes place, regardless of the plaintiff's location or where the plaintiff is deceived."[7] The *Cruz* court concluded "that a deceptive transaction in New York falls within the territorial reach of section 349 and suffices to give an out-of-state victim who engaged in the transaction statutory standing."[8] The court based this conclusion on several factors, including that the defendant "is paid in New York and refuses to disburse funds from customer accounts until it receives a 'Funds Redemption Form' at its New York office," defendant "requires that all customer communications . . . be sent to its New York office," and the contract at issue "specifies that New York law governs all disputes . . . . [I]ndeed, it provides that all suits relating to the Agreement are to be adjudicated in state or federal courts located in New York."[9]

Conversely, in *Wright v. Publishers Clearing House, Inc.*, the court found the plaintiffs lacked standing under GBL § 349 because they failed to "remedy the lack of a transactional nexus" with New York.[10] Despite alleging the defendants "sent the relevant advertising materials from New York[,] . . . received payment and processed orders in New York,"[11] and included a provision in their "Terms of Use" that "provided that any lawsuit

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N.Y.S.2d 858, 774 N.E.2d 1190, 1196 (2002).

[5]Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 325, 746 N.Y.S.2d 858, 774 N.E.2d 1190, 1196 (2002).

[6]Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 122, R.I.C.O. Bus. Disp. Guide (CCH) P 12382 (2d Cir. 2013).

[7]Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 123, R.I.C.O. Bus. Disp. Guide (CCH) P 12382 (2d Cir. 2013).

[8]Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 123, R.I.C.O. Bus. Disp. Guide (CCH) P 12382 (2d Cir. 2013).

[9]Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 123–24, R.I.C.O. Bus. Disp. Guide (CCH) P 12382 (2d Cir. 2013).

[10]Wright v. Publishers Clearing House, Incorporated, 439 F. Supp. 3d 102, 110 (E.D. N.Y. 2020).

[11]Wright v. Publishers Clearing House, Incorporated, 439 F. Supp. 3d 102,

brought against PCH must be filed in a New York court and governed by New York law,"[12] the court distinguished *Cruz* and found the out-of-state plaintiffs lacked standing. While the *Cruz* plaintiffs "directly participated in a marketplace located in New York," the court concluded that "[h]ere, the transactions have no locus in New York beyond the Defendants' residency," and as such, "conferring standing to such out-of-state plaintiffs would have the effect of extending the extraterritorial reach of Section 349 to every out-of-state transaction where a New York seller negotiates for a choice-of-law provision favoring its home state."[13]

§ 127:16 GBL § 349—Diminished pleading requirement

GBL § 349 does not require proof of a plaintiff's justifiable reliance. The Court of Appeals in *Stutman v. Chemical Bank* said, "[A]s we have repeatedly stated, reliance is not an element of a section 349 claim."[1] Thus, *Stutman* held that the borrowers, who sued their bank for a GBL § 349 violation, were not required to show that they entered into the loan agreement relying on the note's allegedly fraudulent language.[2] In *Koch v. Acker, Merrall & Condit Co.*,[3] the Court of Appeals again emphasized that justifiable reliance is not required and held that the lower court improperly dismissed the plaintiff's action to the extent that it considered the disclaimer clause in the sales contract rendered the plaintiff's reliance unreasonable.[4]

Even though justifiable reliance is not required, a claim under GBL § 349 still requires a showing of causation.[5] "To satisfy the causation requirement, the plaintiffs must allege that he or she

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110 (E.D. N.Y. 2020).

[12]Wright v. Publishers Clearing House, Incorporated, 439 F. Supp. 3d 102, 105 (E.D. N.Y. 2020).

[13]Wright v. Publishers Clearing House, Incorporated, 439 F. Supp. 3d 102, 112 (E.D. N.Y. 2020).

[Section 127:16]

[1]Stutman v. Chemical Bank, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000) (citing Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 55–56, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999)).

[2]Stutman v. Chemical Bank, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000).

[3]Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 941, 944 N.Y.S.2d 452, 967 N.E.2d 675 (2012).

[4]Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 941, 944 N.Y.S.2d 452, 967 N.E.2d 675 (2012).

[5]See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995) ("[W]hile the statute does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material

suffered a loss because of defendants' deceptive act."[6] Thus, some courts have required plaintiffs to show that they actually saw the defendants' misleading representations.[7] Others have held, however, that the plaintiffs sufficiently pleaded causation if the court could draw a reasonable inference that the plaintiffs saw the misleading statements.[8] In addition, a pleading of causation could also fail if there were alternative explanations for the injury unrelated to the defendant's deceptive acts.[9]

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deceptive act or practice that caused actual, although not necessarily pecuniary, harm."); see also Stutman v. Chemical Bank, 95 N.Y.2d 24, 29, 30, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000) (holding that where the defendant bank promised no attorneys' fees, the fact that the borrower plaintiffs were forced to pay attorneys' fee was sufficient pleading of causation). Cf. JD & K Associates, LLC v. Selective Ins. Group, Inc., 143 A.D.3d 1232, 38 N.Y.S.3d 658, 661–662 (4th Dep't 2016) (holding that insured's GBL § 349 claim against the insurer failed, in part because the injury was not caused by the insurer's misrepresentation of its investigators' credentials). See § 127:12 for discussion of causation.

[6]Rodriguez v. It's Just Lunch, Intern., 300 F.R.D. 125, 147 (S.D. N.Y. 2014) (alteration in original) (quoting Stutman v. Chemical Bank, 95 N.Y.2d 24, 30, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000)).

[7]Goldemberg v. Johnson & Johnson Consumer Companies, Inc., 8 F. Supp. 3d 467, 480 (S.D. N.Y. 2014) ("To properly allege causation, a plaintiff must state in his complaint that he has seen the misleading statements of which he complains before he came into possession of the products he purchased." (internal citation omitted)).

[8]O'Neill v. Standard Homeopathic Company, 346 F. Supp. 3d 511, 530, 96 U.C.C. Rep. Serv. 2d 1134 (S.D. N.Y. 2018) (holding that the pleading was sufficient, since reasonable inference can be drawn that the plaintiffs saw the misleading statements, even though the plaintiffs did not affirmatively plead seeing them); see also Wurtzburger v. Kentucky Fried Chicken, 2017 WL 6416296, at *4 (S.D. N.Y. 2017) (holding that the plaintiffs sufficiently pled causation by describing misleading advertisements and alleging that the defendant's conduct caused her injuries); Ward v. TheLadders.com, Inc., 3 F. Supp. 3d 151, 169–170 (S.D. N.Y. 2014) (holding that the plaintiffs sufficiently pled causation by alleging that they used the defendant's website as a result of seeing its representations).

[9]See Bevelacqua v. Brooklyn Law School, 39 Misc. 3d 1216(A), 975 N.Y.S.2d 365, 2013 WL 1761504, at *9 (Sup 2013) (stating that the law student plaintiffs failed to show that the allegedly misleading employment statistics of their law school caused the injury, since their bleak employment outcome could be explained by the 2008 economic recession); see also Koch v. Christie's International PLC, 785 F. Supp. 2d 105, 119 (S.D. N.Y. 2011), judgment aff'd, 699 F.3d 141, R.I.C.O. Bus. Disp. Guide (CCH) P 12275 (2d Cir. 2012) (holding that the misleading statements on counterfeit wine did not cause the injury since the plaintiff bought the wine knowing that it was counterfeit to gather evidence against the defendants).

§ 127:17 GBL § 349—Limitations period

A three-year statute of limitations under CPLR 214(2) governs GBL § 349 claims brought by private plaintiffs.[1] The same period generally applies to claims by the Attorney General,[2] except when the Attorney General seeks prospective injunctive relief.[3] In addition, a GBL § 349 claim against public utilities authorities may be governed by a four-month statute of limitations, if the proper vehicle for bringing the claim should be a CPLR Article 78 proceeding.[4]

The limitations period for a GBL § 349 claim begins to run at the time of the injury, not at the time when the injured plaintiff learned or reasonably should have learned of the deception.[5] The time of injury depends on specific facts of the deceptive acts alleged.[6] For example, in *Gaidon v. Guardian Life Insurance Co.*

[Section 127:17]

[1]Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 789, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (2012); Gaidon v. Guardian Life Ins. Co. of America, 96 N.Y.2d 201, 210, 727 N.Y.S.2d 30, 750 N.E.2d 1078 (2001).

[2]State ex rel. Spitzer v. Daicel Chemical Industries, Ltd., 42 A.D.3d 301, 303, 840 N.Y.S.2d 8, 2007-2 Trade Cas. (CCH) ¶ 75780 (1st Dep't 2007) (holding that three-year statute of limitations barred the Attorney General's GBL § 350 claim); see also People ex rel. Spitzer v. County Bank of Rehoboth Beach, Del., 45 A.D.3d 1136, 1138, 846 N.Y.S.2d 436, 439 (3d Dep't 2007). But cf. People by Schneiderman v. Northern Leasing Systems, Inc., 60 Misc. 3d 867, 871, 75 N.Y.S.3d 785, 793 (Sup 2017),aff'd as modified, 169 A.D.3d 527, 94 N.Y.S.3d 259 (1st Dep't 2019) (where the Attorney General alleged violations of both GBL § 349 and Exec. Law § 63(12), limitations period of six years still applied to Exec. Law § 63(12) claim). See §§ 127:30 to 127:33 for discussion of New York State Attorney General enforcement of GBL § 349.

[3]People ex rel. Cuomo v. Nationwide Asset Services, Inc., 26 Misc. 3d 258, 269, 888 N.Y.S.2d 850, 860 (Sup 2009) (to the extent that the Attorney General seeks prospective relief in the form of permanent injunction against continuing fraud, limitations period will not bar the claim.). See § 127:31 for discussion of claims by the Attorney General for injunction relief.

[4]In re Long Island Power Authority Ratepayer Litigation, 47 A.D.3d 899, 900, 850 N.Y.S.2d 609, 610 (2d Dep't 2008); Stevens v. American Water Services, Inc., 32 A.D.3d 1188, 1189, 823 N.Y.S.2d 639, 639 (4th Dep't 2006). See Chapter 143, "CPLR Article 78 Challenges to Administrative Determinations" (§§ 143:1 et seq.).

[5]Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 789–790, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (2012) ("[S]tatute runs from the time when the plaintiff was injured."); Wender v. Gilberg Agency, 276 A.D.2d 311, 312, 716 N.Y.S.2d 40, 42–43 (1st Dep't 2000) (holding that the date of discovery rule cannot extend the limitations period of GBL § 349). Cf. The People of the State of New York v. The Trump Entrepreneur Initiative LLC, 2014 WL 344047 (N.Y. Sup 2014) (holding that the Attorney General's GBL § 349 claim runs from the time of commission of the fraudulent practices, not when they were discovered).

[6]See, e.g., Loiodice v. BMW of North America, LLC, 125 A.D.3d 723, 726, 4

of America,[7] the Court of Appeals held that when a plaintiff alleged a defendant induced unrealistic expectations, the injury occurred when the expectations were not realized. In *Gaidon*, the defendant sold life insurance policies to the plaintiffs promising that after a certain date, the plaintiffs would no longer need to pay the premium, since the dividends on the policy would be sufficient to cover the premium.[8] The Court held that the injury occurred when the plaintiffs were called upon to pay premiums contradicting the defendant's promise, as opposed to when the plaintiffs purchased the life insurance.[9]

In addition, a defendant's active concealment of the deception is sufficient to toll the limitations period,[10] even though the mere failure to disclose is insufficient.[11] Under limited circumstances, the courts have also held that the "continuing wrongs" doctrine applied to toll the limitations periods to the date of the last wrongful act.[12] However, continuing effects of earlier unlawful acts cannot toll the limitations period under the doctrine.[13]

N.Y.S.3d 102, 104, 85 U.C.C. Rep. Serv. 2d 831 (2d Dep't 2015) (holding that where the car owner sued manufacturer, injury occurred at the time of the purchase); Enzinna v. D'Youville College, 84 A.D.3d 1744, 1744, 922 N.Y.S.2d 729, 730, 266 Ed. Law Rep. 943 (4th Dep't 2011) (holding that the injury of students, who sued their school based on a false promise of their eligibility for chiropractic licenses, occurred when they graduated and learned their ineligibility, as opposed to when they enrolled and paid tuition).

[7]Gaidon v. Guardian Life Ins. Co. of America, 96 N.Y.2d 201, 727 N.Y.S.2d 30, 750 N.E.2d 1078 (2001).

[8]Gaidon v. Guardian Life Ins. Co. of America, 96 N.Y.2d 201, 206, 727 N.Y.S.2d 30, 750 N.E.2d 1078 (2001).

[9]Gaidon v. Guardian Life Ins. Co. of America, 96 N.Y.2d 201, 206, 211, 727 N.Y.S.2d 30, 750 N.E.2d 1078 (2001).

[10]See Pirrelli v. OCWEN Loan Servicing, LLC, 129 A.D.3d 689, 693, 12 N.Y.S.3d 110, 115 (2d Dep't 2015) (holding that the defendants' affirmative concealment of deceptive business practices tolled the limitations period); see also Michelo v. National Collegiate Student Loan Trust 2007-2, 419 F. Supp. 3d 668, 699–700 (S.D. N.Y. 2019). But cf. State ex rel. Spitzer v. Daicel Chemical Industries, Ltd., 42 A.D.3d 301, 303, 840 N.Y.S.2d 8, 12, 2007-2 Trade Cas. (CCH) ¶ 75780 (1st Dep't 2007) (holding that limitations period did not toll because the plaintiff failed to allege concealment existed after the conspiracy ended).

[11]See Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 789, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (2012) (internal citation omitted) ("[W]here the alleged concealment consisted of . . . failure to disclose the wrongs . . . the defendants were not estopped from pleading a statute of limitations defense.").

[12]See Harvey v. Metropolitan Life Ins. Co., 34 A.D.3d 364, 827 N.Y.S.2d 6 (1st Dep't 2006); Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 178 F. Supp. 2d 198, 273 (E.D. N.Y. 2001),rev'd on other grounds in part, question certified, 344 F.3d 211 (2d Cir. 2003), certified question accepted, 100 N.Y.2d 636, 769 N.Y.S.2d 196, 801 N.E.2d 417 (2003) and certified question answered, 3 N.Y.3d 200, 785 N.Y.S.2d 399, 818 N.E.2d 1140 (2004) and judgment

In *Harvey v. Metropolitan Life Insurance Co.*, the court held that the "continuing wrongs" doctrine tolled the limitations period.[14] In *Harvey*, the plaintiff who purchased term life insurance for his children up until they reached 25 alleged that he was led to believe the insurance coverage could continue until after reaching 25 by continuing payment.[15] The court held that the defendant's acceptance of continuous payments without coverage were "continuing wrongs" that tolled the limitations period.[16] However, the court in *Pike v. New York Life Insurance Co.*[17] held that the "continuous wrong" doctrine did not apply where the plaintiff was allegedly induced to purchase unsuitable life insurance policies, since the plaintiffs did not point to any specific wrong accompanying each premium payment.

§ 127:18 GBL § 349—Legal and equitable relief

GBL § 349 permits plaintiffs to obtain actual or nominal damages,[1] injunctive relief,[2] and at the court's discretion, treble damages[3] and attorneys' fees.[4] Moreover, courts may grant any of

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rev'd on other grounds, 393 F.3d 312 (2d Cir. 2004) (holding that tobacco company's extended campaigns constitute continuing violations sufficient to toll limitations period). Cf. The People of the State of New York v. The Trump Entrepreneur Initiative LLC, 2014 WL 344047 (N.Y. Sup 2014) (holding that the continuing wrong doctrine did not apply where the deception was a discrete event occurred at particular time).

[13]Lucker v. Bayside Cemetery, 114 A.D.3d 162, 175, 979 N.Y.S.2d 8, 18 (1st Dep't 2013) (holding that where there were only recurring injuries, continuing violation doctrine did not apply).

[14]Harvey v. Metropolitan Life Ins. Co., 34 A.D.3d 364, 827 N.Y.S.2d 6 (1st Dep't 2006).

[15]Harvey v. Metropolitan Life Ins. Co., 34 A.D.3d 364, 827 N.Y.S.2d 6 (1st Dep't 2006).

[16]Harvey v. Metropolitan Life Ins. Co., 34 A.D.3d 364, 827 N.Y.S.2d 6 (1st Dep't 2006).

[17]Pike v. New York Life Ins. Co., 72 A.D.3d 1043, 1048, 901 N.Y.S.2d 76 (2d Dep't 2010).

[Section 127:18]

[1]See § 127:19.

[2]GBL § 349(b) (The Attorney General can bring an action "to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices"), § 349(h) ("[A]ny person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions."). See § 127:20.

[3]See § 127:19.

[4]GBL § 349(h); Karlin v. IVF America, Inc., 93 N.Y.2d 282, 690 N.Y.S.2d 495, 712 N.E.2d 662, 666 (1999) ("Among the remedies available to private

these forms of relief in tandem with civil penalties[5] and possibly punitive damages.[6]

§ 127:19 GBL § 349—Legal and equitable relief—Damages and attorneys' fees

To obtain *compensatory damages*,[1] the plaintiff bringing a GBL § 349 action must show that the defendant's deception caused her "actual, although not necessarily pecuniary, harm."[2] Non-pecuniary harm, such as emotional distress or privacy violations, may result in damages;[3] however, annoyance at the inability to purchase products confidently or the act of deception itself is not a cognizable injury.[4]

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plaintiffs are compensatory damages, limited punitive damages and attorneys' fees." (citing GBL § 349(h)). See § 127:19.

[5]See, e.g., GBL § 350-d (Violators of this article "shall be liable to a civil penalty of not more than five thousand dollars for each violation, which shall accrue to the state of New York and may be recovered in a civil action brought by the attorney general."); see also, e.g., People ex rel. Schneiderman v. Sign FX, Inc., 43 Misc. 3d 1234(A), 993 N.Y.S.2d 645 (Sup 2014) (awarding $16,992.27 in restitution, $5,000.00 in civil penalties for each deceptive act and practice pursuant to GBL 350-d, and statutory costs in the amount of $2,000.00).

[6]Wilner v. Allstate Ins. Co., 71 A.D.3d 155, 893 N.Y.S.2d 208, 218 (2d Dep't 2010) ("[P]laintiffs may seek both treble damages and punitive damages."). But see Guzman v. Mel S. Harris and Associates, LLC, 2018 WL 1665252, at *14 (S.D. N.Y. 2018) (rejecting Wilner and finding that punitive damages are not recoverable under GBL § 349). See § 127:19.

[Section 127:19]

[1]For more on compensatory damages in general, see Chapter 54, "Compensatory Damages" (§§ 54:1 et seq.).

[2]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 745 (1995). See § 127:12.

[3]See, e.g., Mount v. PulsePoint, Inc., 684 Fed. Appx. 32, 35 (2d Cir. 2017),as amended, (May 3, 2017) ("§ 349 injury has been recognized only where confidential, individually identifiable information—such as medical records or a Social Security number—is collected without the individual's knowledge or consent." (internal citation omitted)); Wood v. Capital One Services, LLC, 718 F. Supp. 2d 286, 292 (N.D. N.Y. 2010) (humiliation, anger, anxiety, emotional distress, fear, frustration, and embarrassment).

[4]See, e.g., Daniel v. Mondelez International, Inc., 287 F. Supp. 3d 177, 185–86 (E.D. N.Y. 2018) ("Plaintiff's annoyance at being unable to confidently purchase Defendant's Product does not rise to the type of non-pecuniary injury recognized under New York law."); Vaughn v. Consumer Home Mortg. Co., Inc., 470 F. Supp. 2d 248, 271 (E.D. N.Y. 2007), decision aff'd, 297 Fed. Appx. 23 (2d Cir. 2008) ("Because the plaintiffs have failed to offer evidence of pecuniary harm, and the only non-pecuniary harm they have alleged is the act of deception itself, Silver's motion for summary judgment as to their § 349 claim must be granted.").

To obtain *treble damages*, the plaintiff must show the defendant willfully and knowingly violated the law.[5] Once this burden has been met, the "court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars."[6] Though treble damages already serve a punitive function, some courts have held that they may be awarded in conjunction with punitive damages.[7]

GBL § 349 also grants courts the discretion to award reasonable[8] attorneys' fees to a prevailing plaintiff.[9] Courts have held that contemporaneous records are not required for GBL § 349 attorneys' fees claims brought in New York state courts,[10] but they are generally required for those brought in federal court.[11]

Additional penalties may be available under GBL § 349-c, which applies to deceptive conduct perpetrated against an elderly individual aged 65 or above. GBL § 349-c allows for additional penalties up to $10,000 based on the following factors: (1) whether the defendant knew its conduct was directed to an elderly person, or was in willful disregard for the rights of an elderly person; (2) whether the defendant's conduct caused the elderly person to suffer certain enumerated losses related to property or retirement assets, assets essential to the health or welfare of the elderly person; or (3) whether the elderly person was substantially more vulnerable to the defendant's conduct due to certain physical or mental infirmities and suffered physical, emotional or economic damage as a result of the conduct.

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[5]GBL § 349(h); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 745 (1995) ("Although it is not necessary under the statute that a plaintiff establish the defendant's intent to defraud or mislead, proof of scienter permits the court to treble the damages up to $ 1,000." (citing GBL § 349(h)).

[6]GBL § 349(h).

[7]Wilner v. Allstate Ins. Co., 71 A.D.3d 155, 893 N.Y.S.2d 208, 218 (2d Dep't 2010) ("[P]laintiffs may seek both treble damages and punitive damages."). But see Guzman v. Mel S. Harris and Associates, LLC, 2018 WL 1665252, at *14 (S.D. N.Y. 2018) (rejecting Wilner and finding that punitive damages are not recoverable under GBL § 349).

[8]For help determining what attorney fees are reasonable, see Chapter 61, "Court-Awarded Attorneys' Fees" (§§ 61:1 et seq.).

[9]GBL § 349(h); for more on attorneys' fees in general, see Chapter 61, "Court-Awarded Attorneys' Fees" (§§ 61:1 et seq.).

[10]Serin v. Northern Leasing Systems, Inc., 2013 WL 1335662, at *2 (S.D. N.Y. 2013) ("With regard to the recovery of fees under New York General Business Law § 349, New York State courts do not generally demand contemporaneous records.").

[11]Samms v. Abrams, 198 F. Supp. 3d 311, 321 (S.D. N.Y. 2016) ("Absent unusual circumstances, attorneys are required to submit contemporaneous records with their fee applications.").

§ 127:20 GBL § 349—Legal and equitable relief—Injunctive relief

A consumer may seek to enjoin[1] a violation of GBL § 349.[2] The Attorney General may do the same and may also seek an injunction for the return of property obtained through conduct unlawful under the statute.[3]

What the plaintiff must show to obtain an injunction varies with the court and whether a private plaintiff or the Attorney General brings the action.[4] To obtain a permanent injunction in New York state court actions, a consumer must show (1) that the offense is occurring, threatened, or imminent;[5] (2) that she has no remedy at law; and (3) that, without an injunction, she will suffer irreparable injury.[6] To do so in federal court, the consumer must typically show elements (2) and (3), that (4) the balance of hardships between the parties favors an injunction, and (5) that an injunction is not contrary to the public interest.[7]

[Section 127:20]

[1]See Chapter 20, "Provisional Remedies" (§§ 20:1 et seq.) for discussion of preliminary injunctions generally.

[2]GBL § 349(h).

[3]GBL § 349(b).

[4]To see what requirements the Attorney General must satisfy to obtain an injunction, see § 127:31.

[5]The Constitution may require that all plaintiffs, including the Attorney General, show that future injury is likely. Sitt v. Nature's Bounty, Inc., 2016 WL 5372794, at *7 (E.D. N.Y. 2016) ("Despite the absence of Supreme Court or Second Circuit law applying this standard to consumer plaintiffs seeking injunctive relief, the requirement that a plaintiff allege a risk of future injury in order to obtain injunctive relief is a constitutional requirement that all plaintiffs must satisfy."). But courts have not applied this requirement to the Attorney General. See, e.g., F.T.C. v. Crescent Pub. Group, Inc., 129 F. Supp. 2d 311, 320, 2001-1 Trade Cas. (CCH) ¶ 73165 (S.D. N.Y. 2001) (enjoining a former violator the Attorney General sued so as to not leave "the defendant free to return to his old ways" (citation omitted)); People v. Network Associates, Inc., 195 Misc. 2d 384, 758 N.Y.S.2d 466, 469 (Sup 2003) (enjoining a former violator the Attorney General sued because "voluntary discontinuance provides no guaranty that such practices will not recommence" (citation omitted)).

[6]Board of Managers of Crest Condominium v. City View Gardens Phase II, LLC, 35 Misc. 3d 1223(A), 951 N.Y.S.2d 85, 2012 WL 1660679, at *12 (Sup 2012) (internal citation omitted); see also Ovitz v. Bloomberg L.P., 18 N.Y.3d 753, 944 N.Y.S.2d 725, 967 N.E.2d 1170, 1174 (2012) ("Plaintiff's General Business Law § 349 claim must be similarly dismissed for lack of injury. . . . In light of the absence of actual injury . . ., there is . . . [no] irreparable harm necessary for injunctive relief." (internal citation omitted)).

[7]eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641, 78 U.S.P.Q.2d 1577, 27 A.L.R. Fed. 2d 685 (2006) ("[A] plaintiff seeking a permanent injunction must . . . demonstrate: (1) that it has

§ 127:21 GBL § 349—Consumer class actions

When initially analyzing potential consumer class action claims, both plaintiff and defense counsel must carefully consider the underlying merits of the claims as well as the strategic considerations of class certification. Although the plaintiff has the burden of establishing that a claim is suitable for class certification, defense counsel should develop a strategy for defeating class certification at the initial stages of the case. For instance, defense counsel should consider discovery before any briefing on a class certification motion (required to be made on a sufficient factual record on class issues) on such questions as whether the allegedly deceptive conduct uniformly impacted or injured proposed class members, whether the consumer transactions at issue occurred in a sufficiently similar manner and with the required New York nexus, whether the allegations of the named proposed class representatives make them appropriate class representatives, and whether class-wide damages are appropriate.[1]

Furthermore, defense counsel should impress upon the client the significance of receiving a pre-suit demand letter. Some state consumer protection laws require plaintiffs to send defendants demand letters 30 days before filing suit. Often unfamiliar with demand letters, company leadership or other personnel may ignore them.[2] Rather than waiting, use this time period to investigate the circumstances surrounding the allegations in any demand letter.

When initiating an investigation, defense counsel, with the as-

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suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."). The Eastern District of New York does not require GBL § 349 injunctions to meet any of these requirements. Barkley v. United Homes, LLC, 848 F. Supp. 2d 248, 273 (E.D. N.Y. 2012),aff'd, 557 Fed. Appx. 22 (2d Cir. 2014), as amended, (Jan. 30, 2014) ("To obtain an injunction under GBL § 349, plaintiffs need only show that the defendants engaged in 'deceptive acts or practices,' . . . ." (internal citation omitted)). But the Southern District of New York, which disagrees with Barkley's reasoning, does. See, e.g., Samms v. Abrams, 198 F. Supp. 3d 311, 316 (S.D. N.Y. 2016).

[Section 127:21]

[1]Henry, Food & Beverage Class Actions: Early and comprehensive legal frameworks and defense strategies, Corporate Counsel Business Journal, https://ccbjournal.com/articles/food-beverage-class-actions-early-and-comprehensive-legal-frameworks-and-defense-stra.

[2]Henry, Food & Beverage Class Actions: Early and comprehensive legal frameworks and defense strategies, Corporate Counsel Business Journal, https://ccbjournal.com/articles/food-beverage-class-actions-early-and-comprehensive-legal-frameworks-and-defense-stra.

sistance of in-house counsel or another client contact, should speak with the marketing, advertising, or public relations departments, or another relevant department responsible for the allegedly deceptive conduct at issue. Determine who in a department is responsible for the advertising or marketing material or other conduct at issue. These individuals may have information helpful to the merits of the case, such as why the particular information or approach to product sales was chosen and potential reasons a plaintiff's interpretation may be wrong. Marketing, advertising, public relations, or other personnel may also have information to help devise a strategy to defeat class certification, such as whether the allegedly false advertising is one of hundreds of messages received by the consumers or a single uniform message.[3] Marketing departments may also have consumer case studies indicating what is important to consumers and explaining why some consumers buy the products, including reasons potentially unrelated to any allegations about deceptive or false conduct or advertising or marketing.

Another potentially helpful resource may be a company's customer service department. Defense counsel should speak with customer service representatives to discern how the company receives and retains customer feedback.[4] The customer service department may be able to describe what is important to consumers and what, if anything, has resulted in consumer complaints or inquiries. They may even have information about a particular plaintiff bringing or threatening a claim that may be helpful in understanding the dispute and its merits or lack thereof.

Along with conducting an initial fact investigation, counsel should research both plaintiffs' counsel and the judge if a claim has already been filed. Researching how often plaintiffs' counsel has sued the company or similar companies as well as their past litigation experience, both generally and in similar cases, and how their prior cases have unfolded, can be helpful when developing a litigation strategy.[5] Additionally, knowing whether the judge has previously dealt with an analogous fact pattern,

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[3]Henry, Food & Beverage Class Actions: Early and comprehensive legal frameworks and defense strategies, Corporate Counsel Business Journal, https://ccbjournal.com/articles/food-beverage-class-actions-early-and-comprehensive-legal-frameworks-and-defense-stra.

[4]Henry, Food & Beverage Class Actions: Early and comprehensive legal frameworks and defense strategies, Corporate Counsel Business Journal, https://ccbjournal.com/articles/food-beverage-class-actions-early-and-comprehensive-legal-frameworks-and-defense-stra.

[5]Henry, Food & Beverage Class Actions: Early and comprehensive legal frameworks and defense strategies, Corporate Counsel Business Journal, https://ccbjournal.com/articles/food-beverage-class-actions-early-and-comprehensive-legal-frameworks-and-defense-stra.

dismissed similar claims or proposed class actions at the motion-to-dismiss or class certification stage, the judge's views on accepting damages models or other expert evidence concerning consumer claims will help counsel devise a strategy and plan for efficiently litigating the case.[6]

Since consumer class actions are frequently based on state law, counsel must carefully choose the best arguments given the applicable laws in each state when bringing or defending a multistate consumer class action, including how material differences among such laws may be leveraged to argue against class certification. Even if the case involves a single fact pattern, differing state deceptive trade practice laws can impact the case as early as any threshold motion to dismiss or in opposing any motion for class certification.[7] Additionally, counsel should keep in mind the extraterritorial effect and limits of statutory prohibitions on deceptive conduct (that is, whether a plaintiff's allegations improperly seek to impose statutory consumer protection liability for out of state conduct), as well as questions of personal jurisdiction.[8]

Counsel pursuing or defending a putative GBL § 349 class claim in New York state court will need to scrutinize whether the requirements of CPLR Article 9, which contains New York's class action rules,[9] are met. Are the proposed class members sufficiently numerous to satisfy the numerosity requirement? Is the class sufficiently ascertainable? Did the proposed class members purchase products in a sufficiently similar manner, based upon the same or similar statements or conduct, and around the same time, and did they suffer the same or similar alleged actual injuries so that there is sufficient commonality and predominance of factual issues? Counsel should ask themselves these questions, as well as whether other Article 9 requirements are met.

§ 127:22 GBL § 349—Common claims

In 1995, the New York Court of Appeals decided an archetypal GBL § 349 case. In *Oswego Laborers' Local 214 Pension Fund v.*

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[6]Henry, Food & Beverage Class Actions: Early and comprehensive legal frameworks and defense strategies, Corporate Counsel Business Journal, https://ccbjournal.com/articles/food-beverage-class-actions-early-and-comprehensive-legal-frameworks-and-defense-stra.

[7]Feldman, How Variations in the Law on Deceptive Conduct Can Affect Litigation Strategy, Ellis Winters (Aug. 22, 2017), https://www.elliswinters.com/trade/variations-law-deceptive-conduct-can-affect-litigation-strategy/.

[8]Feldman, How Variations in the Law on Deceptive Conduct Can Affect Litigation Strategy, Ellis Winters (Aug. 22, 2017), https://www.elliswinters.com/trade/variations-law-deceptive-conduct-can-affect-litigation-strategy/.

[9]See generally Chapter 24, "Class Actions" (§§ 24:1 et seq.).

Marine Midland Bank, N.A.,[1] the court reversed the Appellate Division's summary judgment order, which affirmed the New York Supreme court's opinion that the "conduct complained of d[id] not, as a matter of law, rise to the level of a deceptive business practice."[2] Finding that the statute did not define "[d]eceptive acts or practices," the Court derived from GBL § 349's "language and background" that plaintiffs must prove "that the acts or practices have a broader impact on consumers at large" and are "likely to mislead a reasonable consumer acting reasonably under the circumstances."[3]

The plaintiffs, two not-for-profit union funds, had sued their bank for lost interest.[4] The fund administrator told the bank's branch manager that he wanted to transfer the funds to interest-bearing accounts, the transfer occurred, and seven years later the branch manager advised the plaintiffs for the first time that the bank had not paid interest past a regulatory cap on accounts for commercial entities that the bank had applied to the not-for-profit funds.[5] The court found that the bank treated the funds' representative as it would "any customer entering the bank to open a savings account" and therefore that the plaintiffs had satisfied the consumer-oriented conduct test.[6] The court also found that the bank's "liability under the statute w[ould] depend, in part, on whether plaintiffs possessed or could reasonably have obtained the relevant information they [claimed] the Bank failed to provide."[7]

In *Oswego*'s wake, GBL § 349 litigation tends to focus on whether the conduct at issue was sufficiently consumer-oriented and deceptive. For example, in *Haygood v. Prince Holdings 2012, LLC*,[8] the defendants, a landlord company and its officers, moved to dismiss the plaintiff renter's claim for failing to state a cause

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[Section 127:22]

[1]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995).

[2]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995).

[3]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 745 (1995).

[4]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 743–44 (1995).

[5]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995).

[6]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 745 (1995).

[7]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995).

[8]Haygood v. Prince Holdings 2012, LLC, 60 Misc. 3d 1220(A), 110 N.Y.S.3d

of action, first, because landlord-tenant and overcharge complaints, as private, contract-specific disputes, "do not fall within the ambit of the statute."[9] The court disagreed, accepting that "[a]n apartment dweller is today viewed, functionally, as a consumer of housing services," and noting that the State had sued the defendants "for widespread practices constituting unfair and illegal business practices against tenants."[10] Second, the defendants claimed that the renter's claim was similar to another case in which the tenants did not allege that the defendants made materially misleading statements of fact.[11] The court once again disagreed, finding adequate the renter's allegations that the defendants lied about the regulatory status of the apartment, which was rent-stabilized, and that those lies deceived him.[12] The defendants' motion to dismiss was denied.[13]

§ 127:23 GBL § 349—More complex issues

Sections 127:24 to 127:29 of this chapter discuss areas in which courts applying GBL § 349 have developed finer, topic-specific case law. These areas, in sequence, are trademark cases,[1] mortgage cases,[2] debt collection cases,[3] derivative claims,[4] freestanding claims,[5] and securities cases.[6]

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488 (Sup 2018) (internal citation and quotation marks omitted).

[9]Haygood v. Prince Holdings 2012, LLC, 60 Misc. 3d 1220(A), 110 N.Y.S.3d 488, 2018 WL 3765205, at *8 (Sup 2018).

[10]Haygood v. Prince Holdings 2012, LLC, 60 Misc. 3d 1220(A), 110 N.Y.S.3d 488, 2018 WL 3765205, at 98 (Sup 2018).

[11]Haygood v. Prince Holdings 2012, LLC, 60 Misc. 3d 1220(A), 110 N.Y.S.3d 488, 2018 WL 3765205, at *9 (Sup 2018).

[12]Haygood v. Prince Holdings 2012, LLC, 60 Misc. 3d 1220(A), 110 N.Y.S.3d 488, 2018 WL 3765205, at *9 (Sup 2018).

[13]Haygood v. Prince Holdings 2012, LLC, 60 Misc. 3d 1220(A), 110 N.Y.S.3d 488, 2018 WL 3765205, at *10 (Sup 2018).

[Section 127:23]

[1]See § 127:24.

[2]See § 127:25.

[3]See § 127:26.

[4]See § 127:27.

[5]See § 127:28.

[6]See § 127:29.

§ 127:24 GBL § 349—More complex issues—Trademark cases

Courts permit GBL § 349 actions based on trademark claims[1] even if they are brought by corporate competitors rather than consumers;[2] however, such claims generally "are not cognizable under GBL §§ 349 and 350 unless there is a specific and substantial injury to the public interest *over and above ordinary trademark infringement* or dilution."[3] Trademark confusion alone is insufficient because it "does not pose a significant risk of harm to the public health or interest."[4]

§ 127:25 GBL § 349—More complex issues—Mortgage cases

A number of specific mortgage practices[1] may be misleading and cognizable under GBL § 349, including each of the following:

- Predatory lending practices;[2]

[Section 127:24]

[1]See Chapter 133, "Intellectual Property" (§§ 133:1 et seq.) for discussion of trademarks generally.

[2]Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264, R.I.C.O. Bus. Disp. Guide (CCH) P 8884, 42 Fed. R. Evid. Serv. 1388 (2d Cir. 1995) ("[C]orporate competitors now have standing to bring a claim under [GBL § 349] . . . so long as some harm to the public at large is at issue." (internal citation and quotation marks omitted)).

[3]Salvatore Ferragamo S.p.A. v. Does 1-56, 2020 WL 774237, at *3 (S.D. N.Y. 2020) (citation and quotation marks omitted) (emphasis in original); see also Deep Foods Inc. v. Deep Foods Inc., 419 F. Supp. 3d 569 (W.D. N.Y. 2019).

[4]DePinto v. Ashley Scott, Inc., 222 A.D.2d 288, 289, 635 N.Y.S.2d 215 (1st Dep't 1995) (citations omitted); see also Salvatore Ferragamo S.p.A. v. Does 1-56, 2020 WL 774237, at *4 (S.D. N.Y. 2020) ("Here, Ferragamo alleges nothing beyond general consumer confusion—the kind ordinarily found in a trademark infringement case. Thus, Ferragamo has failed to establish a threshold requirement of a claim under section 349 or section 350."); Kaplan, Inc. v. Yun, 16 F. Supp. 3d 341, 352 (S.D. N.Y. 2014) ("[C]ourts in New York have routinely dismissed trademark claims brought under [GBL §§ 349 and 350] as being outside the scope of the statutes, because ordinary trademark disputes do not 'pose a significant risk of harm to the public health or interest' and are therefore not the type of deceptive conduct that the statutes were designed to address.' " (internal citations omitted)).

[Section 127:25]

[1]See Chapter 145, "Commercial Real Estate" (§§ 145:1 et seq.) for discussion of mortgages generally.

[2]See, e.g., Cruz v. HSBC Bank, N.A., 21 Misc. 3d 1143(A), 2008 WL 5191428 (N.Y. Sup 2008) (denying the defendant's motion to dismiss a GBL § 349 claim, where the plaintiff alleged the defendant "induc[ed] the plaintiff to accept mortgages where the payments were unaffordable to him [by] misrepre-

- Knowingly charging improper or illegal fees for mortgage-related documents or actions;[3]
- "Force-placing" or "lender-placing" (requiring mortgagors to buy) insurance not required under the loan agreements or applicable law;[4]
- Failing to disclose conflicts of interest;[5] and
- Failing to advise mortgagors of their right to counsel at closing.[6]

§ 127:26 GBL § 349—More complex issues—Debt collection cases

Courts initially struggled with claims concerning debt collection conduct[1] that violates both GBL § 349 and GBL § 601,[2] which addresses how and when creditors may collect from debtors, but

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senting the plaintiff's income and assets, failing to disclose all the risks of the loan and concealing major defects and illegalities in the home's structure").

[3]See, e.g., Banks v. Consumer Home Mortg., Inc., 2003 WL 21251584, at *7 (E.D. N.Y. 2003) ("As to plaintiff's injuries, they clearly allege that because of the deceptive practices alleged, plaintiffs are no burdened with a mortgage far in excess of the value of the house, . . . and unwittingly paid numerous fees and other charges. The Complaint states a claim against the [defendant] under Section 349."); Walts v. First Union Mortg. Corp., 259 A.D.2d 322, 323, 686 N.Y.S.2d 428 (1st Dep't 1999) ("Plaintiffs have adequately alleged a materially deceptive practice aimed at consumers in that Mellon and First Union continued to bill them for PMI premiums, thereby inducing them to believe that they were required to pay them, even after plaintiffs' principal balance dropped below the 75% ratio set forth in Ins. Law § 6503.").

[4]Casey v. Citibank, N.A., 915 F. Supp. 2d 255, 266 (N.D. N.Y. 2013) ("[T]he defendants force-placed flood insurance that was both in excess of federal requirements and not contemplated by the mortgage agreement . . . . This would likely mislead a reasonable consumer as to the amount of flood insurance he was required to maintain under the contract.").

[5]Hoover v. HSBC Mortg. Corp. (USA), 9 F. Supp. 3d 223 (N.D. N.Y. 2014) ("[T]he HSBC Defendants do not contend that the system of kickbacks and commissions alleged by Plaintiffs was authorized or disclosed to Plaintiffs. Thus, the conduct alleged by Plaintiffs is likely to mislead a reasonable consumer as to the amounts of flood insurance coverage required, as well as the appropriateness of the HSBC Defendants' process of selecting and exchanging financial benefits with a force-placed insurance provider."); see also Bonior v. Citibank, N.A., 14 Misc. 3d 771, 828 N.Y.S.2d 765, 778 (N.Y. City Civ. Ct. 2006) (finding the lenders had violated GBL § 349 by inter alia failing to disclose relationships with settlement agents).

[6]See Bonior v. Citibank, N.A., 14 Misc. 3d 771, 828 N.Y.S.2d 765, 786–87 (N.Y. City Civ. Ct. 2006) (finding the lenders had violated GBL § 349 by inter alia failing to advise the borrowers of a right to counsel).

[Section 127:26]

[1]See generally Chapter 95, "Collections" (§§ 95:1 et seq.).

[2]Morales v. Kavulich & Associates, P.C., 294 F. Supp. 3d 193, 197 (S.D. N.Y. 2018) ("In *Gomez*, the court . . . held that defendant's conduct, which

does not provide a private right of action.[3] Now, however, courts tend to allow GBL § 349 claims based on conduct that also violates GBL § 601 so long as the allegations meet all the requirements of GBL § 349.[4]

Additionally, "abusive debt collection—even of a debt actually owed—is a harm in itself," at least for the sake of constitutional standing.[5] Counsel should be aware that plaintiffs could argue that the practice also satisfies the harm requirement under GBL § 349.

§ 127:27 GBL § 349—More complex issues—Derivative claims

Under GBL § 349, plaintiffs cannot assert "derivative" claims, or those claims alleging *indirect* injuries resulting from deception experienced by third parties.[1] Therefore, to state a claim under the statute, the plaintiff must generally allege that the defendant directed its unlawful conduct at the plaintiff.[2] The bar to derivative claims may not apply, however, if the plaintiff alleges that,

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involved enforcing sewer service default judgments on time-barred debts and the 'robo-signing' of the execution paperwork, was a violation of § 601 and thus precludes § 349 . . . . The Court finds *Gomez* unpersuasive and joins the weight of the authority in finding that a plaintiff can bring a § 349 claim based on conduct that is also violative of a § 601 claim, as long as the conduct meets all of the elements of a § 349 claim.").

[3]See GBL § 601(2) ("No principal creditor, as defined by this article, or his agent shall: . . . [k]nowingly collect, attempt to collect, or assert a right to any collection fee, attorney's fee, court cost or expense unless such changes are justly due and legally chargeable against the debtor.").

[4]Morales v. Kavulich & Associates, P.C., 294 F. Supp. 3d 193, 197 (S.D. N.Y. 2018).

[5]Im v. Bayview Loan Servicing LLC, 2018 WL 840088, at *6 (S.D. N.Y. 2018) ("Even though Plaintiff is not injured by the allegedly invalid assignments, he can claim an injury from Bayview's *misrepresentation of its right to foreclose*, because abusive debt collection—even of a debt actually owed—is a harm in itself." (emphasis in original)).

[Section 127:27]

[1]In re Nassau County Consol. MTBE (Methyl Tertiary Butyl Ether) Products Liability Litigation, 29 Misc. 3d 1219(A), 918 N.Y.S.2d 399, 2010 WL 4400075, at *17 (Sup 2010), judgment entered, 2011 WL 12521632 (N.Y. Sup 2011) ("A plaintiff may not recover damages under GBL § 349 for purely indirect or derivative losses that were the result of third-parties being allegedly misled or deceived."); see also City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 883 N.Y.S.2d 772, 911 N.E.2d 834, 839 (2009) ("If a plaintiff could avoid the derivative injury bar by merely alleging that its suit would somehow benefit the public, then the very 'tidal wave of litigation' . . . would loom ominously on the horizon." (internal citations omitted)).

[2]See, e.g., UnitedHealthcare Services, Inc. v. Asprinio, 49 Misc. 3d 985, 16 N.Y.S.3d 139, 150 (Sup 2015) ("[S]uch allegedly deceptive acts were not directed at the consumer but rather to a large institutional provider of health insurance

even though the defendant directed her deceptive acts or practices at others, she directed the harm to or intended it for the plaintiff.[3]

§ 127:28 GBL § 349—More complex issues—Freestanding claims

A GBL § 349 action may also allege that the defendant's conduct violates other laws. But a plaintiff may not re-characterize the violation of another statute as deception in order to satisfy the required elements of such a GBL § 349 action. Rather, the predicate conduct must be inherently and independently deceptive or "freestanding."[1] Freestanding claims of deception under GBL § 349 are viable, even if they overlap with other nonactionable or actionable laws.[2]

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or, even more indirectly to the plan sponsors who might see their premiums increase. Such conduct cannot be viewed as consumer related.").

[3]See, e.g., North State Autobahn, Inc. v. Progressive Ins. Group Co., 102 A.D.3d 5, 953 N.Y.S.2d 96, 105 (2d Dep't 2012) ("Here, the plaintiffs alleged that they were directly injured by the Progressive defendants' deceptive practices in that customers were misled into taking their vehicles from the plaintiffs to competing repair shops that participated in the DRP [(Direct Repair Program)]. The allegedly deceptive conduct was . . . in an effort to wrest away customers through false and misleading statements. The plaintiffs' alleged injury did not require a subsequent consumer transaction; rather, it was sustained when customers were unfairly induced into taking their vehicles from the plaintiffs' shop to a DRP shop . . . . The plaintiffs adequately alleged that as a result of this misleading conduct, they suffered direct business loss . . . .").

[Section 127:28]

[1]Nick's Garage, Inc. v. Progressive Casualty Insurance Company, 875 F.3d 107, 127 (2d Cir. 2017) ("[W]hen the challenged acts are not inherently deceptive so as to violate GBL § 349, regardless of whether they violate another statute, such acts cannot be re-characterized as "deceptive" simply on the grounds that they violate another statute which does not allow for private enforcement; otherwise, GBL § 349 would be permitted to derogate the policy embodied in the other statute precluding private enforcement.").

[2]Nick's Garage, Inc. v. Progressive Casualty Insurance Company, 875 F.3d 107, 127 (2d Cir. 2017) ("[A] GBL claim is viable where the plaintiff 'make[s] a free-standing claim of deceptiveness under GBL § 349 that happens to overlap with a possible claim' under another statute that is not independently actionable, but fails where the violation of the other statute by conduct that is not inherently deceptive is claimed to constitute a deceptive practice that serves as the basis for the GBL § 349 claim."); M.V.B. Collision, Inc. v. Allstate Ins. Co., 728 F. Supp. 2d 205, 219–20 (E.D. N.Y. 2010) ("Here, by contrast, there is evidence of a 'free-standing claim of deceptiveness' that simply 'happens to overlap' with a claim under the Insurance Law. Specifically, the deceptive practices at issue here extend beyond 'unfair claim settlement practices[;]' . . . there is evidence that the scheme extended beyond steering, beyond settlement practices, and, accordingly, beyond § 2601.").

§ 127:29 GBL § 349—More complex issues—Securities cases

Depending on the court, deception in securities transactions may not be actionable under GBL § 349. Securities are usually investments held for investment purposes, frequently by sophisticated parties, rather than goods to be used by the consuming public.[1] Because the statute was enacted to protect consumers, the First and Third Departments have found that securities claims fall outside its scope.[2] The Second Department, however, has permitted securities-based GBL § 349 claims in the limited context of the sale of shares in a residential cooperative.[3] The Fourth Department has issued directly conflicting opinions,[4] and the New York Court of Appeals has yet to address the issue.

Even in courts where securities claims are barred, the plaintiff

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[Section 127:29]

[1]See, e.g., Morris v. Gilbert, 649 F. Supp. 1491, 1497, Fed. Sec. L. Rep. (CCH) P 93132, R.I.C.O. Bus. Disp. Guide (CCH) P 6502 (E.D. N.Y. 1986) ("On the other hand, people do not generally buy securities in the same way that they buy an automobile, a television set, or the myriad consumer goods found in supermarkets. For one thing, securities are purchased as investments, not as goods to be 'consumed' or 'used.' "); JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana S.A.B. De C.V., 29 Misc. 3d 1227(A), 920 N.Y.S.2d 241, 2010 WL 4868142, at *11 (Sup 2010) ("GBL § 349 was not intended to cover big-dollar financial transactions between private and sophisticated parties . . . ." (internal citation omitted)). See Chapter 112, "Securities Litigation" (§§ 112:1 et seq.).

[2]Gray v. Seaboard Securities, Inc., 14 A.D.3d 852, 853–54, 788 N.Y.S.2d 471, Blue Sky L. Rep. (CCH) P 74513 (3d Dep't 2005) ("Thus, the clear weight of authority is that claims arising out of securities transactions are not the type of consumer transactions for which General Business Law § 349 was intended to provide a remedy."); Fesseha v. TD Waterhouse Investor Services, Inc., 305 A.D.2d 268, 268, 761 N.Y.S.2d 22 (1st Dep't 2003) ("Plaintiff's claim based on an alleged violation of General Business Law § 349 was properly dismissed since that statute is inapplicable to securities transactions.").

[3]B.S.L. One Owners Corp. v. Key Intern. Mfg., Inc., 225 A.D.2d 643, 644, 640 N.Y.S.2d 135 (2d Dep't 1996) ("[T]the instant sale of securities in a cooperative corporation to the residential shareholders is a consumer-oriented transaction within the meaning of the statute and the plaintiff is a proper party to bring such an action.").

[4]Scalp & Blade, Inc. v. Advest, Inc., 281 A.D.2d 882, 883, 722 N.Y.S.2d 639 (4th Dep't 2001) ("Plaintiffs have sufficiently alleged consumer-oriented misconduct on defendants' part . . . . Given the statute's explicit prohibition of '[d]eceptive acts or practices . . . in the furnishing of any service' and given the Court of Appeals' characterization of the statute as 'appl[ying] to virtually all economic activity,' we see no basis for invoking any blanket exception under the statute for securities transactions." (internal citations omitted)); Smith v. Triad Mfg. Group, Inc., 255 A.D.2d 962, 964, 681 N.Y.S.2d 710 (4th Dep't 1998) ("Section 349 'was designed to protect consumers from various forms of consumer fraud and deception' . . . and '[p]rivate contract disputes, unique to the parties . . . would not fall within the ambit of the statute'. . . .").

may be able to obtain relief under GBL § 349 if she successfully argues that the deception merely related to but was not based on a securities transaction.[5]

§ 127:30 GBL § 349—New York State Attorney General enforcement

GBL § 349 grants rights of action to the Attorney General and injured consumers,[1] but not equal power. The statute and the case law applying it reserve greater investigative authority,[2] reduced pleading requirements,[3] and some significant remedies[4] for the Attorney General that are unavailable to a private plaintiff.

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[5]Deer Consumer Products, Inc. v. Little Group, 37 Misc. 3d 1224(A), 961 N.Y.S.2d 357, 2012 WL 5898052, at *13 (Sup 2012) ("[P]laintiff's claims derive from alleged defamatory statements made about plaintiff's alleged involvement in land fraud and a potential securities action against plaintiff. Although EOS Funds's alleged statements regarding these matters *affected* the stock of plaintiff, plaintiff's claim does not arise from a securities transaction." (emphasis in original)).

[Section 127:30]

[1]GBL § 349(h). Even under GBL § 349, however, enforcement of charitable trusts may be limited to the Attorney General. See, e.g., Lucker v. Bayside Cemetery, 114 A.D.3d 162, 979 N.Y.S.2d 8 (1st Dep't 2013) ("Five individuals whose relatives are buried in Bayside Cemetery allege that their grandparents' graves . . . are inaccessible due to overgrowth, despite their grandparents' purchase . . . of a perpetual care agreement from defendants . . . . Defendants moved to dismiss . . . for lack of standing under the General Business Law[:] . . . plaintiffs were not parties to the perpetual care arrangements, but merely relatives of deceased family members who allegedly purchased such care. Defendants argued that if such claims were permitted, they could be brought by hundreds, if not thousands, of family members of deceased relatives . . . . [and] that the law limits the right to enforce such charitable trusts to the New York State Attorney General." The court dismissed the complaint since "enforcement of the subject charitable trusts is therefore best left to the Attorney General, so as not to expose the trust funds to money-draining multiple lawsuits, and to avoid setting a precedent of allowing a broad, vague beneficiary base to commence multiple actions against a charitable trust.").

[2]GBL § 349(f) to (g) ("[T]he attorney general is authorized to take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules. This section . . . shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry.").

[3]See § 127:31.

[4]Unlike private plaintiffs, the Attorney General may seek civil penalties and the return of illegally obtained property. See, e.g., GBL § 349(b) (The Attorney General can bring an action "to obtain . . . property obtained directly or indirectly by any such unlawful acts or practices."); GBL § 350-d (Violators of this article "shall be liable to a civil penalty of not more than five thousand dollars for each violation, which shall accrue to the state of New York and may be recovered in a civil action brought by the attorney general.").

To attempt to avoid or minimize investigations or actions by the New York Attorney General, businesses and their counsel should take steps to understand the New York laws that govern or regulate the business and its industry and any penalties that may be enforced on the business for a failure to follow the law.[5] Counsel should also ensure that customer complaints received by phone or from comments on the company's website or through its social media pages are monitored and that customer complaints are promptly resolved.[6] The Attorney General may act if she notices numerous unresolved consumer complaints.[7] This vigilance in addressing complaints is especially important for companies that do business in more than one state, as the Attorney General may collaborate with other states to launch multi-state investigations against businesses and industries, which can be very costly to respond to and defend.[8] Counsel should ensure that their consumer business clients maintain a record of any actions taken to comply with the laws applicable to the business and to resolve any complaints that the business receives.[9]

Counsel representing a business facing an inquiry from the Attorney General should act as though there is a pending litigation: the business should preserve any documents related to the inquiry and advise others in the company to do the same.[10] Counsel should discuss the scope of and timeline for production and methods of review with the Attorney General's office, including whether the Attorney General would like a privilege log and whether an agreed upon list of document custodians and search terms can be utilized to manage the burden of search any

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[5]Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

[6]Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

[7]Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

[8]Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

[9]Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

[10]Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

electronic information.[11] Counsel should also ask the Attorney General's office to enter into a confidentiality agreement if the documents requested contain any sensitive information and prepare to negotiate with her about the scope of the inquiry, as an Attorney General inquiry may be too broad.[12] Counsel should also consider at the appropriate time discussing with the Attorney General new or improved compliance procedures and other remedial measures related to the conduct under investigation.

§ 127:31 GBL § 349—New York State Attorney General enforcement—Pleading requirements

Unlike a private plaintiff,[1] the Attorney General may not need to show injury to sustain an action under GBL § 349. GBL § 349(b) permits the Attorney General to "enjoin . . . and obtain restitution" for violations the offender "has engaged in or *is about to engage in*."[2] The Second Circuit has read this provision to mean that, with respect to the Attorney General, the statute "does not require a demonstration of injury at all."[3] The New York State courts, however, have stated only that the Attorney General need not show injury to seek *injunctive relief*.[4] Moreover, though some

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[11]Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

[12]Pryor, Be Prepared: State AG Inquiries, in Advertising Law Tool Kit 85 (7th ed. 2019), http://books.venable.com/advertising-toolkit/#page=84-85&zoom=z.

[Section 127:31]

[1]Petrosino v. Stearn's Products, Inc., 95 U.C.C. Rep. Serv. 2d 679, 2018 WL 1614349, at *6 (S.D. N.Y. 2018) ("To recover under GBL § 349, a plaintiff must prove that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." (citation and quotation marks omitted)).

[2]GBL § 349(b) (emphasis added).

[3]Mount v. PulsePoint, Inc., 684 Fed. Appx. 32, 36 (2d Cir. 2017),as amended, (May 3, 2017) (citing GBL § 349(b)); see also Porwick v. Fortis Benefits Ins. Co., 2004 WL 2793186, at *4 (S.D. N.Y. 2004) ("Although the New York State Attorney General may seek injunctive relief without a showing of injury, a private plaintiff may not." (citation omitted)).

[4]Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 324, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002) ("Unlike private plaintiffs, the Attorney General may, for example, seek injunctive relief without a showing of injury." (citing GBL § 349(b))); see also People ex rel. Schneiderman v. One Source Networking, Inc., 125 A.D.3d 1354, 1358, 3 N.Y.S.3d 505 (4th Dep't 2015) (upholding denial of restitution for non-testifying consumers because the Attorney General "failed to meet his burden of establishing the total number of victims and their possible range of damages").

older state court decisions on GBL § 349 Attorney General actions omit the injury requirement,[5] recent ones recite it.[6]

Beyond the requirements of GBL § 349 itself, the Attorney General is subject to a lesser burden than private plaintiffs in actions to permanently enjoin violations of GBL § 349.[7] To obtain a permanent injunction, consumers must prove several equitable elements.[8] By contrast, courts have held that the Attorney General need only[9] invoke Executive Law § 63(12)[10] and, pursuant to that provision, show that the deceptive conduct occurred multiple

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[5]See, e.g., People by Lefkowitz v. Volkswagen of America, Inc., 47 A.D.2d 868, 868, 366 N.Y.S.2d 157 (1st Dep't 1975) ("Deceptive and misleading advertising has a tendency to deceive or mislead the purchasing public and is therefore per se a violation of the statute as well as the public policy of New York."); People v. Network Associates, Inc., 195 Misc. 2d 384, 758 N.Y.S.2d 466, 469 (Sup 2003) ("Respondent argues that there is no evidence that consumers were misled by the language . . . [restricting publication] or that it deterred them from publishing their reviews and results of tests . . . . The standard to be used . . . is not whether the actual practice is deceptive, but whether it has the capacity to deceive consumers . . . . [T]he Attorney General has made a showing that the language at issue may be deceptive, and as such, the language . . . warrants an injunction and the imposition of civil sanctions according to Executive Law § 63(12) and GBL § 349.").

[6]See, e.g., People ex rel. Schneiderman v. One Source Networking, Inc., 125 A.D.3d 1354, 1356, 3 N.Y.S.3d 505 (4th Dep't 2015); People of the State of New York v. Sec. Elite Group, Inc., 2019 WL 5191214, at *7 (N.Y. Sup 2019).

[7]For preliminary injunctive relief, both the Attorney General and private plaintiffs must satisfy the requirements of CPLR Article 63. See GBL § 349(c). See Chapter 20, "Provisional Remedies" (§§ 20:1 et seq.) for discussion of preliminary injunctions generally.

[8]See § 127:20.

[9]Beyond these requirements, the Constitution may require that the Attorney General show that future injury is likely. Sitt v. Nature's Bounty, Inc., 2016 WL 5372794, at *7 (E.D. N.Y. 2016) ("Despite the absence of Supreme Court or Second Circuit law applying this standard to consumer plaintiffs seeking injunctive relief, the requirement that a plaintiff allege a risk of future injury in order to obtain injunctive relief is a constitutional requirement that all plaintiffs must satisfy."). But courts have not applied this requirement to the Attorney General. See, e.g., F.T.C. v. Crescent Pub. Group, Inc., 129 F. Supp. 2d 311, 320, 2001-1 Trade Cas. (CCH) ¶ 73165 (S.D. N.Y. 2001) (enjoining a former violator the Attorney General sued so as to not leave "the defendant free to return to his old ways" (citation omitted)); People v. Network Associates, Inc., 195 Misc. 2d 384, 758 N.Y.S.2d 466, 469 (Sup 2003) (enjoining a former violator the Attorney General sued because "voluntary discontinuance provides no guaranty that such practices will not recommence" (citation omitted)).

[10]See, e.g., People v. Network Associates, Inc., 195 Misc. 2d 384, 758 N.Y.S.2d 466, 468 (Sup 2003) ("Petitioner commenced this proceeding alleging: deceptive acts and practices in violation of GBL § 349, and seeking a permanent injunction based on fraud and illegality of respondent's acts, pursuant to Executive Law § 63(12).").

times or affected multiple consumers.[11] Furthermore, courts in the Eastern District of New York have held that the Attorney General may obtain a permanent injunction simply by "show[ing] that the defendants engaged in 'deceptive acts or practices,' as defined under [GBL § 349]."[12]

But the Attorney General is subject to one requirement that private litigants are not—in most cases, she must issue notice and an opportunity to respond to those she seeks to enjoin under the statute. An exception applies to preliminary injunction cases in which the Attorney General finds that doing so would not be in the public interest.[13] The Attorney General may also issue demand or cease-and-desist letters.[14] Where the only proof of a defendant's allegedly misleading conduct is based on an unsworn complaint letter and affirmation of an attorney unfamiliar with the facts, a defendant may be entitled to a hearing.[15] A court may reject a request for an injunction as untimely where the conduct

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[11]Exec. Law § 63(12) ("Whenever any person shall engage in repeated fraudulent or illegal acts . . ., the attorney general may apply, . . . on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, . . . and the court may award the relief applied for . . . . The term 'repeated' as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.").

[12]See Barkley v. United Homes, LLC, 848 F. Supp. 2d 248, 273 (E.D. N.Y. 2012),aff'd, 557 Fed. Appx. 22 (2d Cir. 2014), as amended, (Jan. 30, 2014) ("When an injunction is expressly authorized by statute, the standard preliminary injunction test is not applied. Instead, the Court must look to the statutory conditions for injunctive relief . . . ." (internal citation and quotation marks omitted)). But see Samms v. Abrams, 198 F. Supp. 3d 311, 311 (S.D. N.Y. 2016) (disagreeing with *Barkley*, but stating the Attorney General " 'need not prove irreparable injury or the inadequacy of other remedies *as required in private litigation suits*.' " (quoting City of New York v. Golden Feather Smoke Shop, Inc., 597 F.3d 115, 121 (2d Cir. 2010),certified question accepted, 14 N.Y.3d 880, 903 N.Y.S.2d 335, 929 N.E.2d 398 (2010) and certified question withdrawn, 2010 WL 9593680 (2d Cir. 2010) and certified question withdrawn, 15 N.Y.3d 799, 907 N.Y.S.2d 749, 934 N.E.2d 318 (2010) (emphasis in original)).

[13]GBL § 349(c).

[14]See, e.g., Attorney General James Orders Craigslist to Remove Posts Selling Fake Coronavirus Treatments and Exorbitantly-Priced Items, Press Releases, New York State Office Of The Attorney General (Mar. 20, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-orders-craigslist-remove-posts-selling-fake-coronavirus (announcing the Attorney General's letter demanding that Craigslist.com remove posts advertising items purported to provide immunity to or test for COVID-19 in violation of GBL § 349, and reporting that she sent cease and desist letters to others selling and marketing false treatments for the virus).

[15]People by Abrams v. D.B.M. Intern. Photo Corp., 135 A.D.2d 353, 521 N.Y.S.2d 246 (1st Dep't 1987).

at issue consists of a single offense unlikely to be repeated.[16] However, voluntary cessation of a deceptive practice is not always enough to prevent the Attorney General from bringing a claim to permanently enjoin such practices in the future.[17]

§ 127:32 GBL § 349—New York State Attorney General enforcement—Recent Internet-based deception cases[1]

In *People ex rel. Schneiderman v. Jamail*, the Bronx County Supreme Court held that the owner of an online business that sold substances marketed as medicinal, psychoactive, or dream-enhancing botanicals "engaged in deceptive practices and false advertising" in violation of GBL §§ 349 and 350 and N.Y. Executive Law § 63(12).[2] The Attorney General, whose undercover investigator pretended to be a wholesaler and purchased the respondent's products, asserted that the "products [we]re designer drugs . . . promoted as safe for human consumption and then insufficiently labeled, thus depriving consumers from making informed decisions about the products they purchase or their health risks."[3] The court agreed, relying in part on the business's online representation that it sold "lab quality medicine and drugs" over its online disclaimer that its goods were "for research, education and propagation purposes only."[4] The court found by clear and convincing evidence[5] that "the paucity and illegibility of the respondent's labeling constitute[d] a persistent and fraudulent

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[16]People by Lefkowitz v. Alexanders Dept. Store, Inc., 42 A.D.2d 532, 344 N.Y.S.2d 719 (1st Dep't 1973).

[17]People ex rel. Spitzer v. Applied Card Systems, Inc., 27 A.D.3d 104, 805 N.Y.S.2d 175 (3d Dep't 2005).

[Section 127:32]

[1]Though the Attorney General's strategy may change with the administration, remedying internet scams will likely be an enduring priority. Attorney General James Releases Top 10 Consumer Frauds of 2019, Press Releases, New York State Office Of The Attorney General (Mar. 2, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-releases-top-10-consumer-frauds-2019 ("After analyzing consumer complaints received statewide throughout 2019, the Office of the New York Attorney General found that internet-related complaints topped the list of complaints for the 14th year in a row, with 4,436 complaints last year.").

[2]32 N.Y.S.3d 828, 829, 836 (Sup. Ct. 2016).

[3]People ex rel. Schneiderman v. Jamail, 51 Misc. 3d 940, 32 N.Y.S.3d 828, 829–31 (Sup 2016).

[4]People ex rel. Schneiderman v. Jamail, 51 Misc. 3d 940, 32 N.Y.S.3d 828, 832, 836 (Sup 2016).

[5]People ex rel. Schneiderman v. Jamail, 51 Misc. 3d 940, 32 N.Y.S.3d 828, 836 (Sup 2016) ("To the extent that the bulk of the Attorney General's allegations sound in fraud and the standard of proof for common law fraud is clear

misrepresentation that is injurious to the public."[6] Accordingly, the business owner was permanently enjoined from violating the statutes again, held subject to civil penalties under GBL § 350-d, and directed to provide the Attorney General with an accounting of the products he sold or offered to sell.[7]

In *In re TicketNetwork, Inc.*, the Attorney General reached a settlement with online ticket resellers,[8] which the Attorney General accused of violating GBL §§ 349, 350, and 396, and Executive Law § 63(12), by tricking consumers into buying tickets to live events that the sellers did not have yet.[9] According to the complaint, the defendants represented that their offers were for real tickets, whereas the defendants only attempted to procure tickets after consumers paid for them.[10] Among other things, the Attorney General alleged that, by exploiting this misconception—that is, by offering to sell tickets when demand was sky high because tickets were not yet available to the public—the defendants extracted exorbitant premiums from consumers.[11] In exchange for the action's dismissal without prejudice and not admitting guilt or liability, the defendants agreed to pay $1,550,000 and provide consumers with disclosures intended to prevent further deception.[12]

In *People ex rel. James v. Dunkin' Brands, Inc.*, the Attorney General filed a complaint against the franchisor of the Dunkin' Donuts restaurant chain for violating GBL §§ 349, 350, and 899-aa and Executive Law § 63(12).[13] The defendant sold cards, which a consumer could use to buy restaurant items after creating an account online.[14] According to the defendant's privacy

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and convincing evidence, the Court accordingly applies that heightened standard of proof, a standard favorable to the respondent.").

[6]People ex rel. Schneiderman v. Jamail, 51 Misc. 3d 940, 32 N.Y.S.3d 828, 836 (Sup 2016).

[7]People ex rel. Schneiderman v. Jamail, 51 Misc. 3d 940, 32 N.Y.S.3d 828, 832, 836–37 (Sup 2016).

[8]Consent Order and J., In re TicketNetwork, Inc., No. 451858/2018 (N.Y. Sup. Ct. Aug. 7, 2019), NYSEF No. 104.

[9]Compl. at 1, People ex rel. Underwood v. TicketNetwork, Inc., No. 451858/2018 (N.Y. Sup. Sept. 14, 2018), NYSEF No. 1.

[10]Compl. at 1, People ex rel. Underwood v. TicketNetwork, Inc., No. 451858/2018 (N.Y. Sup. Sept. 14, 2018), NYSEF No. 1.

[11]Compl. at 2, People ex rel. Underwood v. TicketNetwork, Inc., No. 451858/2018 (N.Y. Sup. Sept. 14, 2018), NYSEF No. 1.

[12]Consent Order and J. at 3–7, In re TicketNetwork, Inc., No. 451858/2018 (N.Y. Sup. Ct. Aug. 7, 2019), NYSEF No. 104.

[13]Compl. at 1, 3, People ex rel. James v. Dunkin' Brands, Inc., No. 451787/2019 (N.Y. Sup. Ct. Sept. 26, 2019), NYSEF No. 2.

[14]Compl. at 1, People ex rel. James v. Dunkin' Brands, Inc., No. 451787/

policy, "reasonable safeguards designed to prevent loss, misuse and unauthorized access, disclosure or modification of Personal Information" protected the accounts.[15]

The Attorney General alleged that this policy was deceptive because, in 2015, the defendant did not take steps to prevent data breaches it knew were being attempted, did not investigate or analyze the breaches once they occurred, and did not notify or reset the passwords of consumers whose accounts had been compromised.[16] The Attorney General also alleged that the defendant misrepresented the nature of a 2018 data breach, which led to the unauthorized access of more than 300,000 accounts, but which the defendant told consumers led only to failed attempts to access accounts.[17] To remedy this alleged deception, the Attorney General is currently seeking, among other relief, a permanent injunction against further statutory violations, an accounting of what the defendant's illegal conduct cost consumers, and $5,000 in civil penalties for each violation of GBL §§ 349 or 350.[18]

§ 127:33 GBL § 349—New York State Attorney General enforcement—Other deceptive acts and practices

In *People v. North Leasing System, Inc.*, the Appellate Division for the First Department affirmed the Supreme Court's dismissal of the Attorney General's claim that the respondents violated GBL § 349 by knowingly misrepresenting and omitting facts to induce merchants to enter into predatory leasing agreements.[1] The court held that the Attorney General had failed to state a cause of action under the statute because (1) the Attorney General had not alleged that the merchants the respondents targeted were "consumers" and (2) "the underlying transactions did not involve goods or services for personal, family or household

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2019 (N.Y. Sup. Ct. Sept. 26, 2019), NYSEF No. 2.

[15]Compl. at 1, People ex rel. James v. Dunkin' Brands, Inc., No. 451787/2019 (N.Y. Sup. Ct. Sept. 26, 2019), NYSEF No. 2.

[16]Compl. at 1-2, People ex rel. James v. Dunkin' Brands, Inc., No. 451787/2019 (N.Y. Sup. Ct. Sept. 26, 2019), NYSEF No. 2.

[17]Compl. at 2–3, People ex rel. James v. Dunkin' Brands, Inc., No. 451787/2019 (N.Y. Sup. Ct. Sept. 26, 2019), NYSEF No. 2.

[18]Compl. at 24–25, People ex rel. James v. Dunkin' Brands, Inc., No. 451787/2019 (N.Y. Sup. Ct. Sept. 26, 2019), NYSEF No. 2.

[Section 127:33]

[1]People v. Northern Leasing Systems, Inc., 169 A.D.3d 527, 527–28, 94 N.Y.S.3d 259 (1st Dep't 2019).

purposes."[2] The action's other claims, including that the respondents committed common-law fraud in violation of Executive Law § 63(12), survived the respondents' motion to dismiss.[3]

In *People ex rel. James v Security Elite Group, Inc.*, the New York County Supreme Court held that the respondents "engaged in repeated and persistent fraudulent and deceptive conduct in violation of Executive Law § 63(12) and GBL §§ 349 and 350."[4] One set of respondents operated a security guard school, and another "advertised . . . vacancies within the security field, informed consumers who responded to those ads that it had jobs available, accepted fees, referred consumers to security guard training schools for training supposedly required for those specific jobs, and, once training was complete, purported to send its customers on 'interviews' with security guard companies."[5] Altogether, the respondents placed ads that "offered nonexistent job openings, . . . guaranteed jobs[,] . . . lied to consumers about the amount of coursework required to be licensed as a security guard in New York[,] . . . and sent consumers on fake 'job interviews.' "[6] After a trial, the court awarded the Attorney General, among other things, $1,125,000 in restitution, $75,000 in civil penalties under GBL § 350-d, and a permanent injunction prohibiting the respondents from offering employment opportunities, employment placement assistance, or any type of training.[7]

In *Consumer Financial Protection Bureau v. RD Legal Funding, LLC*, the Southern District of New York held that the Attorney General had adequately alleged that the defendants violated GBL § 349.[8] The defendants had offered cash advances to consumers in exchange for their rights to payments from the NFL Concussion Litigation Settlement Agreement or September

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[2]People v. Northern Leasing Systems, Inc., 169 A.D.3d 527, 527, 94 N.Y.S.3d 259 (1st Dep't 2019).

[3]People v. Northern Leasing Systems, Inc., 169 A.D.3d 527, 530–31, 94 N.Y.S.3d 259 (1st Dep't 2019).

[4]People of the State of New York v. Sec. Elite Group, Inc., 2019 WL 5191214, at *18 (N.Y. Sup. 2019).

[5]People of the State of New York v. Sec. Elite Group, Inc., 2019 WL 5191214, at *19, *23 (N.Y. Sup 2019).

[6]People of the State of New York v. Sec. Elite Group, Inc., 2019 WL 5191214, at *18–19 (N.Y. Sup 2019).

[7]People of the State of New York v. Sec. Elite Group, Inc., 2019 WL 5191214, at *1–3 (N.Y. Sup 2019).

[8]332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018). But see Gibson v. SCE Group, Inc., 391 F. Supp. 3d 228, 251 (S.D. N.Y. 2019) (referring to RD Legal Funding, LLC's view of the consumer-oriented prong of Section 349 as a "minority view").

11th Victim Compensation Fund.[9] The Attorney General alleged that, in doing so, the defendants had misrepresented that they could expedite a consumer's payment, that they would deliver payments on the promised date, and that the cash advance agreements were valid sales instead of usurious loans void under state law.[10]

The defendants challenged the Attorney General's assertion of jurisdiction under GBL § 349 by arguing that the defendants' " 'principal place of business is New Jersey' " and the New York Attorney General " 'ha[d] not made any allegations regarding the residences of the customers.' "[11] But the court dismissed the argument because the complaint referred to "New York consumers . . . and loans made in New York," and "the relevant inquiry is whether there are New York transactions that are deceptive or that occur as a result of out-of-state deceptive conduct."[12]

§ 127:34 GBL § 350

GBL § 350, which is often used in connection with GBL § 349, prohibits "false advertising," including false product labels.[1] Both private plaintiffs and the Attorney General can bring this claim.[2] The scope of GBL § 350 is broad. The New York Court of Appeals in *Karlin v. IVF America, Inc.,* has stated that GBL § 350 on its face "appl[ies] to virtually all economic activity."[3] However, similar to GBL § 349,[4] GBL § 350 is restricted to transactions that occurred in New York state.[5]

Prevailing private plaintiffs are entitled to damages and/or

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[9]Consumer Financial Protection Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 746 (S.D. N.Y. 2018).

[10]Consumer Financial Protection Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 748 (S.D. N.Y. 2018).

[11]Consumer Financial Protection Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 779 (S.D. N.Y. 2018).

[12]Consumer Financial Protection Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 779–80 (S.D. N.Y. 2018).

[Section 127:34]

[1]GBL § 350-a; Galaxy Export, Inc. v. Bedford Textile Products, Inc., 84 A.D.2d 572, 573, 443 N.Y.S.2d 439, 439 (2d Dep't 1981) (holding that false advertising includes mislabel). Cf. Bader v. Siegel, 238 A.D.2d 272, 272, 657 N.Y.S.2d 28, 29 (1st Dep't 1997) (holding that enrollment materials for the class were not advertisement).

[2]GBL § 350-d (Attorney General's right of action), § 350-e (private party's right of action).

[3]Karlin v. IVF America, Inc., 93 N.Y.2d 282, 290, 690 N.Y.S.2d 495, 712 N.E.2d 662 (1999) (citation omitted).

[4]See § 127:15.

[5]Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 746 N.Y.S.2d

injunctive relief.[6] In addition, the court can award reasonable attorneys' fees[7] and treble damages at its discretion.[8] Treble damages, which the court may impose if the defendant willfully violated GBL § 350, are limited to ten thousand dollars.[9] Upon a successful claim by the Attorney General, the court can assess civil penalties up to five thousand dollars per violation pursuant to GBL § 350-d.[10] And the Supreme Courts have broad discretion to determine the amount of the civil penalties considering factors such as the defendant's profitability, ability to pay, and the extent of the violations.[11]

However, GBL § 350-d provides a "safe harbor." Compliance with rules, regulations, or statutes administered by the FTC or New York state agencies is a complete defense.[12] Although GBL § 350-d only refers to compliance with the FTC as a defense, the courts have construed it to cover compliance with other federal agencies.[13] However, the courts have held that federal agency approval of product labels did not constitute compliance with rules or regulations under GBL §§ 349-c, 350 (d).[14] Neither did the FDA's non-binding guidance provide a defense.[15]

858, 774 N.E.2d 1190, 1195 (2002).

[6]GBL § 350-e.

[7]GBL § 350-e; Koch v. Greenberg, 14 F. Supp. 3d 247, 280, 94 Fed. R. Evid. Serv. 52 (S.D. N.Y. 2014), aff'd, 626 Fed. Appx. 335 (2d Cir. 2015) (denying attorneys' fees under GBL § 350-e and GBL § 349-h).

[8]GBL § 350-e.

[9]GBL § 350-e.

[10]GBL § 350-d; People ex rel. Schneiderman v. Sangamon Mills, Inc., 42 Misc. 3d 1225(A), 992 N.Y.S.2d 159 (Sup 2014) ($25,000 civil penalty awarded to New York State under GBL § 350-d); People ex rel. Schneiderman v. Sign FX, Inc., 43 Misc. 3d 1234(A), 993 N.Y.S.2d 645 (Sup 2014) ("civil penalties of $5,000 awarded to the State of New York for each deceptive act and practice pursuant to GBL § 350-d").

[11]People ex rel. Spitzer v. Applied Card Systems, Inc., 41 A.D.3d 4, 10, 834 N.Y.S.2d 558, 563 (3d Dep't 2007), aff'd, 11 N.Y.3d 105, 863 N.Y.S.2d 615, 894 N.E.2d 1, 61 A.L.R. Fed. 2d 739 (2008); see also People ex rel. Schneiderman v. Hudson River Rafting Co., Inc., 40 Misc. 3d 1210(A), 975 N.Y.S.2d 711 (Sup 2013).

[12]GBL § 350-d.

[13]American Home Products Corp. v. Johnson & Johnson, 672 F. Supp. 135, 144, 5 U.S.P.Q.2d 1571 (S.D. N.Y. 1987) ("Although § 350-c refers only to regulations administered by the Federal Trade Commission ("FTC"), the New York courts have construed that statute to cover regulations by other federal agencies as well." (citing Mendelson v. Trans World Airlines, Inc., 120 Misc. 2d 423, 466 N.Y.S.2d 168 (Sup 1983))).

[14]Greene v. Gerber Products Co., 262 F. Supp. 3d 38, 70 (E.D. N.Y. 2017) (finding that the FDA letter approving the defendant's label did not provide a defense under GBL §§ 350-d, 349 (d), since the letter did not constitute a rule or

§ 127:35 GBL § 350—Elements

The elements of a GBL § 350 claim for a private plaintiff are identical to those of a GBL § 349 claim;[1] however, GBL § 350 applies only to "false advertising."[2] In order for a private plaintiff to state a claim under GBL § 350, she "must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice."[3] Courts will conduct a factual analysis to determine whether conduct is sufficiently consumer-oriented under GBL § 350.[4] The test for misleadingness is objective: whether the advertisement is likely to mislead a reasonable person acting reasonably under the circumstances.[5] However, the reasonableness standard may change depending on

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regulation, and the defendant failed to prove compliance with the letter); Carias v. Monsanto Company, 83 Env't. Rep. Cas. (BNA) 1396, Prod. Liab. Rep. (CCH) P 19923, 2016 WL 6803780, at *8 (E.D. N.Y. 2016) (finding that the EPA's approval of the pesticide labels did not provide a safe harbor under GBL §§ 350-d, 349 (d), since it was not conclusive on the compliance with the FIFRA).

[15]In re Frito-Lay North America, Inc. All Natural Litigation, 2013 WL 4647512, at *22 (E.D. N.Y. 2013) ("Again, it is not clear that FDA's guidance on "natural" labeling is a "rule or regulation" within the meaning of §§ 349(d) and 350-d.").

[Section 127:35]

[1]See §§ 127:9 to 127:12.

[2]Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190, 1195 n.1 (2002) ("The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349.").

[3]Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 944 N.Y.S.2d 452, 967 N.E.2d 675, 675 (2012) (internal quotation marks and citation omitted).

[4]Koch v. Greenberg, 14 F. Supp. 3d 247, 94 Fed. R. Evid. Serv. 52 (S.D. N.Y. 2014), aff'd, 626 Fed. Appx. 335 (2d Cir. 2015) (finding conduct consumer-oriented where the defendant sold a large number of allegedly counterfeit wine bottles at auction to a number of people in addition to the plaintiff).

[5]Andre Strishak & Associates, P.C. v. Hewlett Packard Co., 300 A.D.2d 608, 609, 752 N.Y.S.2d 400, 403 (2d Dep't 2002) (internal quotation marks and citation omitted). Note, however, that there are older cases which differ on this point. "The standard to be applied to determine whether an advertisement is misleading is not whether it is deceptive to the hypothetical reasonable person, but to 'the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions" De Santis v. Sears, Roebuck and Co., 148 A.D.2d 36, 38, 543 N.Y.S.2d 228, 229 (3d Dep't 1989). "In weighing a statement's capacity, tendency or effect in deceiving or misleading customers, we do not look to the average customer but to the vast multitude which the statutes were enacted to safeguard including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17, 19 (1977).

the type of transaction at issue. For example, in two similar cases involving law school graduates who sued their schools for misrepresenting students' post-graduate career prospects, the courts analyzed the allegedly misleading statements according to how the reasonably well-educated individual would interpret them.[6] Under related statute GBL § 350-a, it is materially misleading for an employer to advertise a job opportunity without disclosing that the position is contingent upon the purchase or leasing of additional supplies, material, equipment, or other property, or that advertised salaries are available only if a sufficient commission is earned.[7]

Consistent with GBL § 349,[8] the New York Court of Appeals held in *Koch v. Acker, Merrall & Condit Co.* that plaintiffs no longer need to prove justifiable reliance under GBL § 350.[9] The *Koch* decision made class actions under GBL § 350 potentially more accessible; before *Koch* courts had generally found that plaintiffs could not prove reliance class-wide and declined certification.[10] Now plaintiffs must still prove a "causal connection between some injury to [them] and some misrepresentation made by defendants," but "see[ing] the misleading statements . . . before com[ing] into possession of the products" is sufficient to establish that connection.[11]

Although the New York Court of Appeals has not yet addressed the issue, the Second Department has held that the pleading-with-particularity requirement of CPLR 3016(b) normally required for claims sounding in fraud does not apply to GBL

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[6]See Austin v. Albany Law School of Union University, 38 Misc. 3d 988, 957 N.Y.S.2d 833, 840 (Sup 2013); Bevelacqua v. Brooklyn Law School, 39 Misc. 3d 1216(A), 975 N.Y.S.2d 365, 2013 WL 1761504, at *9 (Sup 2013).

[7]See, e.g., Mumin v. Uber Technologies, Inc., 239 F. Supp. 3d 507, 2017 Wage & Hour Cas. 2d (BNA) 74368 (E.D. N.Y. 2017).

[8]See § 127:16.

[9]Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 944 N.Y.S.2d 452, 967 N.E.2d 675 (2012).

[10]See, e.g., Morrissey v. Nextel Partners, Inc., 22 Misc. 3d 1124(A), 880 N.Y.S.2d 874 (Sup 2009), aff'd as modified on other grounds, 72 A.D.3d 209, 895 N.Y.S.2d 580 (3d Dep't 2010) ("Not surprisingly, in light of the element of reliance attendant upon any GBL § 350 claim, this Court's research has failed to disclose a single reported New York case in which a class certification motion for such a cause of action was ultimately successful.").

[11]Oden v. Boston Scientific Corporation, 330 F. Supp. 3d 877, 902 (E.D. N.Y. 2018), adhered to on reconsideration, 2019 WL 1118052 (E.D. N.Y. 2019).

§§ 349 and 350 causes of action.[12] At least three New York County decisions have followed the Second Department's lead.[13]

§ 127:36 GBL § 350—Illustrative cases

Courts have held that advertisements for services used exclusively by small businesses do not satisfy "consumer-oriented conduct," even though the services were widely used.[1] Similarly, an advertisement for the sale of a single unique real property do not "impact consumers at large," since they affect only the plaintiff and the defendant in the case.[2]

Even though GBL § 350-a directs the court to consider failure to reveal material facts, in determining whether the advertisement is misleading, the courts seem reluctant to rule that omission alone is sufficiently misleading. For example, in *Andre Strishak & Assocs., P.C. v. Hewlett Packard Co.*,[3] the court held that the packaging of a printer, which indicated that cartridges were included, without disclosing that the cartridges were small-economy sized, was not materially misleading, because the printer package did not say anything specific about the cartridges' sizes. Similarly, in *Canestaro v. Raymour & Flanigan Furniture Co.*,[4] where the furniture store advertised "0% financing" with the purchase but failed to disclose that the financing option came with a higher price, the court held that the advertisements were not materially misleading, since no specific price was promised.[5]

However, prominent and explicit disclosures could defeat a

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[12]Joannou v. Blue Ridge Ins. Co., 289 A.D.2d 531, 735 N.Y.S.2d 786, 787 (2d Dep't 2001). See § 127:9.

[13]See Farokhi v. The Guardian Life Ins. Co. of America, 2008 WL 3996274, at *2 (N.Y. Sup 2008); The People of the State of New York v. Marolda Properties, Inc., 2017 WL 5890773, at *3 (N.Y. Sup 2017); Underwood v. Insys Therapeutics, Inc., 2019 WL 1557510, at *5 (N.Y. Sup 2019).

[Section 127:36]

[1]Cruz v. NYNEX Information Resources, 263 A.D.2d 285, 286, 703 N.Y.S.2d 103, 104 (1st Dep't 2000) ("[T]erm 'consumer' [does not] encompass small businesses which purchase a widely-sold service that can only be used by businesses.") (alteration in original); see also Bitsight Technologies, Inc. v. SecurityScorecard, Inc., 143 A.D.3d 619, 621, 40 N.Y.S.3d 375, 378 (1st Dep't 2016). But cf. Verizon Directories Corp. v. Yellow Book USA, Inc., 338 F. Supp. 2d 422, 428, 2004-2 Trade Cas. (CCH) ¶ 74582 (E.D. N.Y. 2004).

[2]Canario v. Gunn, 300 A.D.2d 332, 333, 751 N.Y.S.2d 310, 311–312 (2d Dep't 2002) (also held that the plaintiffs failed to prove injury).

[3]Andre Strishak & Associates, P.C. v. Hewlett Packard Co., 300 A.D.2d 608, 752 N.Y.S.2d 400 (2d Dep't 2002).

[4]Canestaro v. Raymour and Flanigan Furniture Co., 42 Misc. 3d 1210(A), 984 N.Y.S.2d 630 (Sup 2013).

[5]See also Anunziatta v. Orkin Exterminating Co., Inc., 180 F. Supp. 2d 353, 362–363 (N.D. N.Y. 2001) (holding that GBL § 350 claim failed because the

plaintiff's claim that an advertisement was materially misleading. For example, courts have held that advertisements for beer did not mislead consumers into believing that they are foreign when there were express disclaimers stating their domestic origin.[6]

Furthermore, a GBL § 350 claim could also fail due to lack of injury. In *Frank v. DaimlerChrysler Corp.*, car purchasers who sued the manufacturer for allegedly concealing a dangerous design failed to sufficiently plead a GBL § 350 claim because their alleged injury—the risk that, in a rear-end collision, the defect would result in harm—did not constitute "actual injury."[7] In addition, the plaintiff cannot frame the deceptive act itself as the injury. In *Donahue v. Ferolito, Vultaggio & Sons*,[8] the court dismissed the plaintiffs' claim that a false promise of health benefits on beverage labels violated GBL § 350, since the plaintiffs' only alleged injury was the deception: they did not receive the advertised health benefits. On the other hand, consumers' overpayment or an inflated price as a result of an advertisement that contained a false promise could constitute a cognizable injury.[9]

While compliance with FTC or New York State rules and regulations creates a complete defense,[10] defendants may not rely on agency guidance letters to have the same effect.[11] In *Greene v. Gerber Products Co.*,[12] the Eastern District of New York found that the defendant did not assert that a guidance letter from the FDA regarding labeling was a rule or regulation under § 350-d, and thus, the defendant could not use the safe harbor provision

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advertisement did not address deception alleged by the plaintiffs).

[6]Nelson v. MillerCoors, LLC, 246 F. Supp. 3d 666, 674–676 (E.D. N.Y. 2017); Bowring v. Sapporo U.S.A., Inc., 234 F. Supp. 3d 386, 391–392 (E.D. N.Y. 2017). But cf. People by Schneiderman v. Orbital Publishing Group, Inc., 169 A.D.3d 564, 566, 95 N.Y.S.3d 28, 30 (1st Dep't 2019) (holding that disclaimers were insufficiently prominent to negate misleading impression).

[7]741 N.Y.S.2d 9, 13, 17 (App. Div. 1st Dep't 2002).

[8]Donahue v. Ferolito, Vultaggio & Sons, 13 A.D.3d 77, 78, 786 N.Y.S.2d 153, 154 (1st Dep't 2004).

[9]Lazaroff v. Paraco Gas Corp., 38 Misc. 3d 1217(A), 967 N.Y.S.2d 867 (Sup 2011), order aff'd, 95 A.D.3d 1080, 945 N.Y.S.2d 326 (2d Dep't 2012) (holding that the plaintiff's GBL § 350 claim was sufficient as they "paid a higher, inflated price . . . ."); Segedie v. Hain Celestial Group, Inc., 2015 WL 2168374, at *12 (S.D. N.Y. 2015) (internal citation omitted) (stating that allegation of paying a price premium was sufficient injury); Ackerman v. Coca-Cola Co., 2010 WL 2925955, at *23 (E.D. N.Y. 2010) (holding that paying a premium price was sufficient injury).

[10]GBL § 350-d.

[11]See Greene v. Gerber Products Co., 262 F. Supp. 3d 38, 71 (E.D. N.Y. 2017).

[12]Greene v. Gerber Products Co., 262 F. Supp. 3d 38, 71 (E.D. N.Y. 2017).

as a defense.[13] The court also noted that it "[was] not convinced" that the FDA guidance letter would qualify for use under the safe harbor provision.[14]

However, if the court does not consider the advertisements commercial speech, the First Amendment will protect them from an allegation of GBL § 350 violations. In *New York Public Interest Research Group, Inc. v. Insurance Information Institute*,[15] where the plaintiffs alleged advertisements by the defendant, an insurance industry advocacy group, violated GBL § 350, the court held that, since the advertisements did not propose a commercial transaction, they were not commercial speech and therefore protected under the First Amendment. Conversely, in *Marcus v. Jewish National Fund (Keren Kayemeth Leisrael), Inc.*,[16] the court held the First Amendment was not implicated where the goal of the defendant's speech was to raise money, rather than to make an educational or persuasive argument, despite defendant's status as a nonprofit.[17]

In addition, the courts have generally held that federal laws do not preempt GBL § 350 claims.[18]

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[13]Greene v. Gerber Products Co., 262 F. Supp. 3d 38, 71 (E.D. N.Y. 2017).

[14]Greene v. Gerber Products Co., 262 F. Supp. 3d 38, 71 (E.D. N.Y. 2017).

[15]New York Public Interest Research Group, Inc. v. Insurance Information Institute, 161 A.D.2d 204, 206, 554 N.Y.S.2d 590, 592, 17 Media L. Rep. (BNA) 1974, 14 U.S.P.Q.2d 2067 (1st Dep't 1990).

[16]Marcus v. Jewish Nat. Fund (Keren Kayemeth Leisrael), Inc., 158 A.D.2d 101, 557 N.Y.S.2d 886 (1st Dep't 1990).

[17]Marcus v. Jewish Nat. Fund (Keren Kayemeth Leisrael), Inc., 158 A.D.2d 101, 105, 557 N.Y.S.2d 886, 889 (1st Dep't 1990).

[18]People ex rel. Spitzer v. Applied Card Systems, Inc., 11 N.Y.3d 105, 863 N.Y.S.2d 615, 894 N.E.2d 1, 8, 61 A.L.R. Fed. 2d 739 (2008) (holding that the Truth-in-Lending Act did not preempt the Attorney General's claim that the bank's credit card solicitations violated GBL §§ 349, 350); Naevus Intern., Inc. v. AT & T Corp., 283 A.D.2d 171, 173, 724 N.Y.S.2d 721, 723 (1st Dep't 2001) (holding that the Federal Communications Act did not preempt the plaintiffs' claim that cellular company's defecting services violated GBL §§ 349, 350); Morelli v. Weider Nutrition Group, Inc., 275 A.D.2d 607, 607, 712 N.Y.S.2d 551, 552 (1st Dep't 2000) (holding that the Nutritional Labeling and Education Act did not preempt the plaintiffs' claim that misrepresentations of nutritional content violated GBL §§ 349, 350). See also Geffner v. Coca-Cola Company, 343 F. Supp. 3d 246, 250–252 (S.D. N.Y. 2018), aff'd, 928 F.3d 198 (2d Cir. 2019) (holding that the FDCA did not preempt the plaintiffs' claim that the defendant's "diet" labeling on soft drinks violated GBL §§ 349, 350); In re Kind LLC "Healthy and All Natural" Litigation, 287 F. Supp. 3d 457, 464 (S.D. N.Y. 2018) (holding that the National GMO standard law did not preempt the Plaintiffs' claim that defendant's "Non-GMO" labels violated GBL §§ 349, 350); Canale v. Colgate-Palmolive Co., 258 F. Supp. 3d 312, 323 (S.D. N.Y. 2017) (holding that the plaintiffs' claim that the defendant's representation of the whitening effects of its toothpaste violated GBL §§ 349, 350 was not preempted by FDCA since the

§ 127:37 GBL § 350—Elements of a claim by the New York Attorney General

In order for the Attorney General to bring a claim under GBL § 350, she has to allege that the defendant "engaged in an act or practice that is deceptive or misleading in a material way and that the consumer has been injured by reason thereof."[1]

§ 127:38 GBL § 350—Illustrative claims pursued by the New York Attorney General

In *People ex rel. Schneiderman v. Orbital Publishing Group, Inc.*,[1] the First Department held that the defendant's solicitations of magazine subscriptions were materially misleading as a matter of law and that the disclaimers were insufficiently prominent, where the defendant falsely implied that the solicitations came directly from the publisher or its agents and that the lowest rates were offered.

In *People ex rel. Spitzer v. Applied Card System, Inc.*,[2] the Third Department held that lender's mail solicitations, which informed the receivers that they were "pre-approved" up to a certain credit limit, were materially misleading, since most consumers did not even receive half of that credit limit.

In *People ex rel. Cuomo v. Nationwide Asset Services, Inc.*[3] the court found that a debt reduction service provider violated GBL § 350 in representing that its services "'typically save 25% to 40% off' a consumer's total indebtedness," whereas only 0.3% of consumers achieved that result.

In *People ex rel. Cuomo v. City Model and Talent Development,*

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federal and state requirements were identical).

[Section 127:37]

[1]People ex rel. Spitzer v. Applied Card Systems, Inc., 27 A.D.3d 104, 106, 805 N.Y.S.2d 175, 177 (3d Dep't 2005) (internal quotation marks and citations omitted). But see People by Vacco v. Lipsitz, 174 Misc. 2d 571, 582–583, 663 N.Y.S.2d 468, 476 (Sup 1997) ("[T]he mere falsity of the advertising content is sufficient as a basis for the false advertising charge."); People by Lefkowitz v. Volkswagen of America, Inc., 47 A.D.2d 868, 868, 366 N.Y.S.2d 157, 158 (1st Dep't 1975) ("Deceptive and misleading advertising has a tendency to deceive or mislead the purchasing public and is therefore per se a violation of the statute as well as the public policy of New York.").

[Section 127:38]

[1]People by Schneiderman v. Orbital Publishing Group, Inc., 169 A.D.3d 564, 565–566, 95 N.Y.S.3d 28, 29–30 (1st Dep't 2019).

[2]People ex rel. Spitzer v. Applied Card Systems, Inc., 27 A.D.3d 104, 107–08, 805 N.Y.S.2d 175, 178 (3d Dep't 2005).

[3]People ex rel. Cuomo v. Nationwide Asset Services, Inc., 26 Misc. 3d 258, 272–273, 888 N.Y.S.2d 850, 863 (Sup 2009).

Inc.,[4] the court found that the defendant violated GBL § 350 by holding itself out as a reputable modeling and talent agency that would provide employment opportunities, where it merely solicited customers and charged them for photoshoots.

In *People ex rel. Cuomo v. Gagnon Bus Company, Inc.*,[5] a school bus company violated GBL § 350 because its marketing materials falsely represented that the collected fees will be used to purchase new buses and that it provided safe and reliable transportation, whereas in reality it used the fees for corporate expenses and the buses experienced vandalism and mechanical problems.

The Attorney General also settles many false advertising claims: she settled a claim that DraftKings's advertising inflated consumers' chances of winning,[6] a claim that an education company's advertising falsely promised academic growth,[7] and claims that multiple businesses advertised through deceptive reviews,[8] including a claim that one business paid reviewers without even requiring the reviewer to use the business's services.[9]

§ 127:39 Select federal and state consumer protection statutes

Practitioners analyzing potential GBL §§ 349[1] and 350 claims,[2] or defenses thereto, will frequently need to consider the possibility of claims under federal consumer protection statutes and the

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[4]People, ex rel. Cuomo v. City Model and Talent Development, Inc., 29 Misc. 3d 1205(A), 958 N.Y.S.2d 310 (Sup 2010).

[5]People, ex rel. Cuomo v. Gagnon Bus Co., Inc., 30 Misc. 3d 1225(A), 926 N.Y.S.2d 345 (Sup 2011).

[6]Practical Law Commercial Transactions, New York's False Advertising Laws: Overview (citing Matter of DraftKings, Inc. Settlement Agreement (2016)).

[7]Practical Law Commercial Transactions, New York's False Advertising Laws: Overview (citing Attorney General Announces Settlement from Company that Target Chinese Speaking Parents with False Advertisements for Academic Enrichment Program, Indian Panorana (Jul. 23, 2016, 5:02 A.M.), https://www.theindianpanorama.news/unitedstates/attorney-general-announces-settlement-company-targeted-chinese-speaking-parents-false-advertisements-academic-enrichment-program/).

[8]Practical Law Commercial Transactions, New York's False Advertising Laws: Overview.

[9]New York Attorney General Settles with MedRite and Carmel Over Paid Online Consumer Reviews, Davis and Gilbert LLP (Dec. 12, 2016), https://www.dglaw.com/press-alert-details.cfm?id=690#.WFjPQ9KyqgB?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

[Section 127:39]

[1]See §§ 127:8 to 127:33.

[2]See §§ 127:34 to 127:38.

consumer protection statutes of other states given the prevalence of national and interstate product marketing and sales.

Conduct actionable under New York's consumer protection statutes may also be actionable under a number of federal statutes. Often such statutes are only enforced by federal agencies without a corresponding private right of action. The Federal Trade Commission (FTC) enforces a host of consumer protection laws, including Section 5 of the FTC Act, which bans unfair and deceptive acts and practices in or affecting commerce.[3] The Food & Drug Administration enforces the Federal Food, Drug, and Cosmetic Act, which bans the adulteration or misbranding of "any food, drug, device, tobacco product, or cosmetic."[4]

But a few federal consumer protection laws authorize private rights of action. The Consumer Product Safety Act of 1972 empowers the Consumer Product Safety Commission to regulate consumer products by issuing safety standards and banning or recalling hazardous products,[5] but consumers may enforce the regulations, which the Commission and state attorneys general also enforce,[6] if they have been injured by "any knowing (including willful) violation."[7] Likewise, consumers, the FTC, and the Department of Justice enforce the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,[8] which in conjunction with FTC regulations, requires that written warranties for consumer goods disclose certain information about their terms and conditions.[9] In contrast, the Lanham Act, which prohibits misleading advertising and labeling,[10] reserves enforcement not for mislead consumers, but for injured competitors.[11]

In addition to New York and federal law, those considering consumer deception claims should also look to the laws of other states if there are no jurisdictional impediments. Every state and the District of Columbia has one or more consumer protection

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[3]15 U.S.C.A. § 45(a)(1) (2018).

[4]21 U.S.C.A. § 331(a) (2018).

[5]15 U.S.C.A. §§ 2056(a), 2057, 2064(c) (2018).

[6]15 U.S.C.A. §§ 2069(b) to (c), 2070(c), 2073(b) (2018).

[7]15 U.S.C.A. § 2072(a) (2018).

[8]15 U.S.C.A. §§ 2310(c), (d)(1) (2018).

[9]15 U.S.C.A. § 2306(a) (2018); see also, e.g., 16 C.F.R. § 701.3 (2019). See Chapter 99, "Warranties" (§§ 99:1 et seq.).

[10]15 U.S.C.A. § 1125(a)(1)(B) (2018); POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107, 134 S. Ct. 2228, 189 L. Ed. 2d 141, 110 U.S.P.Q.2d 1877, 2014-1 Trade Cas. (CCH) ¶ 78800 (2014).

[11]POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107, 134 S. Ct. 2228, 189 L. Ed. 2d 141, 110 U.S.P.Q.2d 1877, 2014-1 Trade Cas. (CCH) ¶ 78800 (2014).

statutes.[12] Often called Unfair and Deceptive Acts and Practices laws, these statutes are ultimately modeled on Section 5 of the FTC Act, which declares "unfair or deceptive acts or practices in or affecting commerce" unlawful.[13]

State consumer protection statutes vary greatly in scope. Whereas New York's GBL §§ 349 and 350 cover "virtually all economic activity,"[14] many states exempt entire industries from suit, and Michigan's and Rhode Island's statutes, as interpreted by their courts, cover very few consumer transactions.[15] Also, some states prohibit only certain enumerated acts, whereas New York broadly prohibits deceptive,[16] but not unfair, acts and California broadly prohibits unfair or fraudulent business practices and deceptive advertising.[17] On the other hand, in most states, consumer protection statutes grant local agencies the power to make rules expanding these prohibitions, but those of New York and California do not.[18]

Consumer protection statutes also vary greatly in strength. Though all states now permit consumers to enforce their statutes, some impose restrictions that significantly reduce the viability of such enforcement: ten states bar class actions, and five bar awards of attorneys' fees to prevailing consumers.[19] Other states restrict enforcement of their consumer protection statutes in general by requiring more proof. For example, some states impose scienter requirements, and New York requires the plaintiff to prove that the conduct at issue was directed at consumers at

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[12]Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practice Statutes 9 (Maggie Eggert et al. eds., 2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf.

[13]15 U.S.C.A. § 45(a)(1) (2018).

[14]Karlin v. IVF America, Inc., 93 N.Y.2d 282, 690 N.Y.S.2d 495, 712 N.E.2d 662, 665 (1999) (internal citations omitted). See § 127:1.

[15]Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 1 (Maggie Eggert et al. eds., 2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf.

[16]See § 127:11.

[17]Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 1, 54, 60 (Maggie Eggert et al. eds., 2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf.

[18]Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 17, 54, 60 (Maggie Eggert et al. eds., 2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf.

[19]Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 2, 36 (Maggie Eggert et al. eds., 2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf.

large.[20] Moreover, the civil penalties available to plaintiffs who overcome these obstacles range from nothing for an initial violation in Rhode Island to $5,000 per violation in New York[21] to $25,000 per violation in Alaska.[22]

In addition to consideration of other potential statutory claims, allegations supporting GBL §§ 349 and 350 claims may also potentially lend themselves to certain New York common law claims, such as breach of express or implied warranties,[23] intentional or negligent misrepresentation,[24] and unjust enrichment.

§ 127:40 Checklist of essential allegations and defenses

Essential allegations for private plaintiffs' claims under GBL §§ 349 or 350:

1. A consumer-oriented statement or conduct,[1]
2. Which related to a transaction that occurred in New York[2]
3. And was materially misleading,[3]
4. Caused[4]
5. The plaintiff consumer to suffer an actual injury.[5]

Defenses to claims under GBL §§ 349 or 350:[6]

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[20]Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 1-2, 60 (Maggie Eggert et al. eds., 2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf. See § 127:10.

[21]See § 127:18.

[22]GBL § 350-d; Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 30 (Maggie Eggert et al. eds., 2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf.

[23]See Chapter 99, "Warranties" (§§ 99:1 et seq.).

[24]See Chapter 130, "Negligence" (§§ 130:1 et seq.) for discussion of negligent misrepresentation.

[Section 127:40]

[1]See § 127:10.

[2]See §§ 127:15 (GBL § 349) and 127:35 (GBL § 350).

[3]See §§ 127:11 (GBL § 349) and 127:35 (GBL § 350).

[4]See §§ 127:12 (GBL § 349) and 127:35 (GBL § 350).

[5]See §§ 127:12 (GBL § 349) and 127:35 (GBL § 350).

[6]Though this chapter has discussed some of the defenses listed below only in the context of one of either GBL § 350 or GBL § 349, each defense logically rebuts at least some claims under both laws.

- The allegedly misleading statement or conduct was nonactionable puffery.[7]
- The statute of limitations has expired.[8]
- The dispute is subject to a valid and binding arbitration agreement.[9]
- A safe harbor provision—GBL § 349(d) or GBL § 350-d—applies to the statement or conduct at issue.[10]
- The claim is derivative and therefore barred.[11]
- A federal law or another New York law preempts the claim.[12]
- The statement or conduct at issue constitutes constitutionally protected free speech.[13]
- GBL §§ 349 or 350 does not apply to the statements or conduct of municipalities.[14]
- The filed rate doctrine, pursuant to which any filed rate is per se reasonable and unassailable in judicial proceedings brought by ratepayers, applies.[15]
- The primary jurisdiction doctrine, pursuant to which proceedings are stayed pending the outcome of an agency's rulemaking process, applies.[16]
- The voluntary payment doctrine, which bars recovery of payments made voluntarily and with full knowledge of the facts, applies.[17]

§ 127:41 Model jury instructions

GBL §§ 349 or 350 claim

Each Plaintiff must prove the following[1] by a preponderance of the evidence to succeed on [his or her] claim under General Business Law section [349 or 350]:

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[7]See § 127:11.

[8]See § 127:17.

[9]See § 127:8.

[10]See §§ 127:8 (GBL § 349) and 127:34 (GBL § 350).

[11]See § 127:27.

[12]See §§ 127:8 (GBL § 349) and 127:36 (GBL § 350).

[13]See § 127:36.

[14]See § 127:8.

[15]See § 127:8.

[16]See § 127:8.

[17]See § 127:8.

[Section 127:41]

[1]With one exception, the elements described below conform with those

1. That the Defendants' [describe conduct or statement at issue] was consumer-oriented—that is, that it had a broad impact on consumers at large, instead of only affecting a single transaction or the Plaintiffs[2]—although the [conduct or statement] need not recur[3] and the Plaintiffs need not identify any other specific consumers who suffered harm;[4]
2. That the [describe conduct or statement at issue] was deceptive in a material way—that is, that a reasonable consumer acting reasonably in the Plaintiffs' circumstances would have been misled by the Defendants' [statement or conduct][5]—although [describe the conduct or statement] need not rise to the level of fraud;[6]
3. That the Plaintiffs saw or heard the [describe conduct or quote statement at issue] before they came into possession of the products they purchased;[7]
4. That the [describe conduct or quote statement at issue] actually caused the Plaintiffs [describe the damage they allege],[8] and
5. That the [describe the damage they allege] was a direct, actual injury—that is, not necessarily added ex-

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described in Committee on Pattern Jury Instructions Association of Supreme Court Justices, New York Pattern Jury Instructions—Civil § 3:20 (2020). Relying on cases from 2004 and earlier, the New York Pattern Jury Instructions state that plaintiffs need to prove reliance to succeed on a GBL § 350 claim. Committee on Pattern Jury Instructions Association of Supreme Court Justices, New York Pattern Jury Instructions—Civil § 3:20 (2020) (internal citations omitted). Because the New York Court of Appeals has since eliminated the reliance requirement, it is omitted here. Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 944 N.Y.S.2d 452, 967 N.E.2d 675, 676 (2012) (internal citation omitted). For discussion of the elimination of the requirement, see § 127:35.

[2]Plavin v. Group Health Incorporated, 35 N.Y.3d 1, 10, 124 N.Y.S.3d 5, 146 N.E.3d 1164 (2020) (quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995)).

[3]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995).

[4]North State Autobahn, Inc. v. Progressive Ins. Group Co., 102 A.D.3d 5, 953 N.Y.S.2d 96, 103 (2d Dep't 2012).

[5]Petrosino v. Stearn's Products, Inc., 95 U.C.C. Rep. Serv. 2d 679, 2018 WL 1614349, at *7 (S.D. N.Y. 2018).

[6]Boule v. Hutton, 328 F.3d 84, 94, 31 Media L. Rep. (BNA) 1793, 66 U.S.P.Q.2d 1659, 2003-2 Trade Cas. (CCH) ¶ 74095 (2d Cir. 2003) (citing Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 343, 704 N.Y.S.2d 177, 725 N.E.2d 598 (1999)).

[7]Oden v. Boston Scientific Corporation, 330 F. Supp. 3d 877, 902 (E.D. N.Y. 2018), adhered to on reconsideration, 2019 WL 1118052 (E.D. N.Y. 2019).

[8]Oden v. Boston Scientific Corporation, 330 F. Supp. 3d 877, 902 (E.D. N.Y. 2018), adhered to on reconsideration, 2019 WL 1118052 (E.D. N.Y. 2019).

penses or lost money,[9] but some harm beyond the deception itself,[10] which did not arise solely as the result of harm to another party.[11]

If you find that any of the above conditions are not met by a preponderance of the evidence for one or more of the Plaintiffs, then with respect to that Plaintiff's New York General Business Law section [349 or 350] claim, you must find in favor of the Defendants.

Statutory defense to GBL §§ 349 or 350 claim[12]

Even if you find that the Plaintiffs have proven each of the above elements of their General Business Law section [349 or 350] claim, the Defendants have a complete defense to that claim if you find the following:

1. The [agency's name]'s [description of rule] applies to or covers the Defendants' [describe conduct or quote statement at issue], if the rule's requirement that the [statement or conduct] be in interstate commerce—that is, cross state lines—is removed; and
2. The Defendants' [describe conduct or quote statement at issue] meets the requirements of the [agency's name]'s [description of rule], if the rule's requirement that the [statement or conduct] be in interstate commerce—that is, cross state lines—is removed.

If you find that the facts meet both of the above conditions by a preponderance of the evidence, then with respect to that the Plaintiffs' New York General Business Law section [349 or 350] claim, you must find in favor of the Defendants.

Damages[13]

If you find in favor of a Plaintiff with respect to his or her claim under New York General Business Law section [349 or 350], you may award that Plaintiff the greater of [$50 (for GBL § 350) or $500 (for GBL § 350)] or the amount of money the [description of the alleged injury] cost the Plaintiffs.

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[9]Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 745 (1995).

[10]Vaughn v. Consumer Home Mortg. Co., Inc., 470 F. Supp. 2d 248, 271 (E.D. N.Y. 2007), decision aff'd, 297 Fed. Appx. 23 (2d Cir. 2008).

[11]North State Autobahn, Inc. v. Progressive Ins. Group Co., 102 A.D.3d 5, 953 N.Y.S.2d 96, 105 (2d Dep't 2012) (internal citation omitted)).

[12]GBL §§ 349(d), 350-d.

[13]GBL §§ 349(h), 350-e(3); see also Committee on Pattern Jury Instructions Association of Supreme Court Justices, N.Y. Pattern Jury Instr.—Civil 3:20 (2020).