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New York Court of Appeals Clarifies Reach of New York Consumer Protection Statute

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Last week, the New York Court of Appeals issued an important decision clarifying the reach of New York's consumer protection statute, which broadly prohibits any deceptive, "consumer-oriented" business conduct.[1] The Court's holding confirms the expansive reach of what constitutes "consumer-oriented" conduct, making clear that it extends beyond products and services directed to individuals for personal or home use, and includes sales and marketing directed to businesses and professionals. The Court went on to hold that the alleged deception in the case was not actionable because it would not have deceived a reasonable consumer under the circumstances, particularly in light of the parties' contract and the language in a disclaimer, and the Court avoided a question relating to what constitutes a cognizable injury under the statute.

New York's Consumer Protection Statute

Several provisions of New York's consumer protection statute protect consumers from deceptive and fraudulent practices,[2] including General Business Law ("GBL") § 349(a), which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce in the furnishing of any service in the state." This statute was intended to provide "authority to cope with the numerous, ever-changing types of false and deceptive business practices" that impact New York consumers,[3] and it "seeks to secure an honest market place where trust, and not deception, prevails."[4] Accordingly, much like its federal counterpart, the Federal Trade Commission Act, GBL § 349 "is intentionally broad, applying to virtually all economic activity."[5]

Nevertheless, the broad provision "does not apply to every improper action"[6] and is "directed at wrongs against the consuming public" at large rather than private individuals.[7] "Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute."[8] Moreover, "whether a representation or an omission, the deceptive practice must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'"[9]

Although initially only the New York Attorney General's Office could sue to enforce the consumer protection statute, the Legislature subsequently added a private right of action in 1980 for any person who has been injured by reason of a violation, allowing injunctive relief, damages, and attorney's fees.[10] To state a claim under GBL § 349, a plaintiff bringing such a cause of action must allege that: (1) the defendant has engaged in "consumer-oriented" conduct (2) that conduct was materially misleading; and (3) the plaintiff suffered an injury as a result.[11] Each of these elements was at issue in the Court of Appeals case.

The Court of Appeals Ruling

In *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Company, Inc.*, a law firm and various tenant advocates brought an action on behalf of

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themselves and other purchasers of "the Tanbook," a compilation of New York materials discussing landlord-tenant law, against Matthew Bender & Company, the Tanbook's publisher.[12] Plaintiffs alleged that Matthew Bender engaged in deceptive business practices under GBL § 349 because the company had materially misrepresented that part of the Tanbook contained a complete and accurate compilation of the statutes and regulations governing rent-controlled and rent-stabilized apartments in New York City, when in fact, key portions were omitted or inaccurate.[13] The Court affirmed the grant of Matthew Bender's motion to dismiss, but on different grounds from those accepted by the trial and intermediate appellate courts.[14]

A. Consumer Oriented Conduct

The Court held that Matthew Bender's actions were "consumer-oriented" because the alleged misrepresentations were "contained in a manual that was then marketed to and available for purchase by consumers."[15] The Court reasoned that Matthew Bender allegedly "advertised the Tanbook and made it available for sale to the general public, including through its website and a public, online shopping service."[16] Moreover, Matthew Bender's conduct was "not unique to the parties," as its "marketing and sale of the Tanbook [was] not limited to a single transaction," and it was sold "to a robust consumer base, including through a subscription plan whereby purchasers (including plaintiffs) automatically received new annual editions and updates."[17] "Nor [was] the sales agreement designed to the specifications of a particular buyer"; rather, the company had relied "on a form contract with its customers."[18]

Notably, the Court rejected the argument—endorsed by the trial court, pursuant to precedent from the Appellate Division, First Department—that GBL § 349 did not apply to the sale and marketing of the Tanbook because the treatise "could only be used by businesses" and was "not directed at consumers at large for personal, family, or household use."[19] The Court explained that the "text and purpose" of the statute broadly prohibit deceptive acts or practices in the conduct of business or services, and that practices can be "consumer-oriented" when they have "a broader impact on consumers at large."[20] Thus, although the consumer-oriented element precludes a GBL § 349 claim based on "[p]rivate contract disputes, unique to the parties," it does not "depend on the use to be made of the product, and "what matters is whether the defendant's allegedly deceptive act or practice is directed to the consuming public and the marketplace."[21]

The Court similarly rejected the argument that GBL § 349 did not apply because the Tanbook was marketed and sold to businesses and "legal professionals" such as lawyers, judges, and tenant advocates, rather than to the general consuming public.[22] The Court explained that "persons and businesses working in the legal field purchase the Tanbook to assist in their professional endeavors," but legal professionals "are merely a subclass of consumers," and "'consumer-oriented conduct' need not 'be directed to *all* members of the public.'"[23]

B. Deception and Injury

Despite this ruling, the Court held that the complaint was properly dismissed on the second element of GBL § 349—the requirement that conduct be "materially misleading."[24] The Court explained that the Tanbook's susceptibility to revision at any time based on legislative developments, coupled with the fact that a disclaimer in the parties' contract had "addresse[d] the precise deception alleged in the complaint," left no possibility that a reasonable consumer would have been misled by the treatise's content.[25] Ultimately, "that a purchaser might not buy the Tanbook without an accurate and complete reproduction of the statutes and regulations—because, as plaintiffs allege, that would render the Tanbook unreliable—[went] to whether the defendant [was] offering an item worth buying," not whether consumers were deceived.[26]

Finally, the Court did not reach the ground on which the Appellate Division had affirmed

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dismissal in the court below—namely, that prior Court of Appeals precedent in *Small v. Lorillard Tobacco Co.*, which had rejected an injury theory claiming that consumers bought a product they would not have purchased because such a theory amounted to "deception as both act and injury,"[27] could be read to foreclose the plaintiffs in this case from claiming that they were injured in the "amount that plaintiffs paid for the book" because they would not have paid for it but for the acts and omissions that rendered the Tanbook inaccurate.[28] The parties had disputed, among other things, the extent to which broad language in *Small* should be revisited or limited to certain facts.

Judge Fahey dissented in part. Although he agreed that Matthew Bender's marketing and sale of the Tanbook was consumer-oriented conduct,[29] he believed that plaintiffs adequately pleaded that the Tanbook was materially misleading.[30] Turning to the injury requirement, he would have re-examined the Court's precedent in *Small*, explaining that "[t]he underlying legislative purpose behind GBL § 349, as well as common sense, require the conclusion that when a consumer would not have purchased a product but for the defendant's deceptive conduct, that consumer has suffered a cognizable injury, i.e., the price that the consumer paid for the product."[31]

Conclusion

The Court's ruling in *Himmelstein* signals a willingness to read the consumer protection statute expansively, especially as to what constitutes "consumer-oriented" behavior—a key requirement that appears to be of recent interest to the Court and serves to distinguish a violation from common law fraud. Savvy practitioners may find this development unsurprising, as just last year, the Court decided two additional cases interpreting the scope of "consumer-oriented" behavior and appeared to take an expansive view of the statute's reach in those cases as well.[32]

Nevertheless, the Court's ruling contains language that could be read to restrict these claims in the future, suggesting that the Court will vigorously examine allegations of deception, even at the motion to dismiss stage. Indeed, the Court ultimately dismissed plaintiffs' cause of action, finding that documentary evidence such as a disclaimer "refuted" plaintiffs' allegations that a reasonable consumer would be deceived under the circumstances, despite the fact that the Tanbook was allegedly inaccurate at various times. And the Court has previously expressed caution at reading GBL § 349 too broadly, lest the statute be permitted to result in "a tidal wave of litigation against businesses that was not intended by the Legislature."[33]

The future of such claims also remains unclear in several respects. The Court left open what constitutes a cognizable injury under the statute, even though plaintiffs in *Himmelstein* had expressly sought leave to appeal in part on that issue.[34] Moreover, Judge Fahey made clear in his dissent that he believed the Court's precedent "should be corrected . . . at the appropriate opportunity, or, alternatively, by the legislature," because broad language in *Small* was incorrect,[35] and he would have held that "[t]he use of deception to induce a consumer to buy a product is precisely the kind of conduct the legislature sought to prohibit with GBL § 349."[36]

How the Court will apply GBL § 349 in future cases is all the more unclear in light of the rapidly changing composition of the Court. Judge Fahey is set to leave the Court at the end of this year, and Judges Singas and Cannataro have already replaced Judges Feinman and Stein. It remains to be seen how the new judges will impact these types of challenges moving forward, but the *Himmelstein* decision is likely to have an impact on this area for years to come.

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[1] *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, --- N.Y.3d ---, 2021 WL 2228800 (N.Y. Ct. App. June 3, 2021).

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[2] *See, e.g.*, *Plavin v. Group Health Inc.*, 35 N.Y.3d 1, 9 (2020); *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621 (2009).

[3] *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 291 (1999).

[4] *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 (2002).

[5] *Id.* (quotation marks omitted); *see City of New York*, 12 N.Y.3d at 205.

[6] *Collazo v. Netherland Prop. Assets*, 35 N.Y.3d 987, 992 (2020) (quotation marks omitted).

[7] *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 24-25 (1995).

[8] *Id.* at 25.

[9] *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000) (quoting *Oswego*, 85 N.Y.2d at 26).

[10] *See, e.g.*, *Plavin*, 35 N.Y.3d at 9; *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 205 (2004); *Stutman*, 95 N.Y.2d at 29.

[11] *Plavin*, 35 N.Y.3d at 10.

[12] 2021 WL 2228800, at *1.

[13] *Id.*

[14] *See id.* at *2; *see also Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 172 A.D.3d 405, 406 (1st Dep't 2019);.*Himmelstein v. Matthew Bender & Co. Inc.*, 2018 WL 984850, at *5-6 (Sup. Ct. N.Y. County Feb. 6, 2018).

[15] *Himmelstein*, 2021 WL 2228800, at *1.

[16] *Id.* at *3.

[17] *Id.* at *4.

[18] *Id.*

[19] *Id.* at *3-4.

[20] *Id.* at *3.

[21] *Id.*

[22] *Id.* at *3-4.

[23] *Id.* at *4 (quoting *Plavin*, 35 N.Y.3d at 13).

[24] *Id.* at *1, *4, *6.

[25] *Id.* at *4-6.

[26] *Id.* at *5.

[27] *See Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56 (1999).

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[28] *Himmelstein*, 172 A.D.3d at 406; *see Himmelstein*, 2021 WL 2228800, at *6 n.4.

[29] *Himmelstein*, 2021 WL 2228800, at *6 (Fahey, dissenting).

[30] *Id.*

[31] *Id.* at *8.

[32] *See Plavin*, 35 N.Y.3d 1 (2020) (finding consumer-oriented conduct even where there was an underlying insurance contract negotiated by sophisticated entities, and explaining that the statute does not impose a requirement that consumer-oriented conduct be directed to all members of the public); *Collazo*, 35 N.Y.3d 987 (2020) (assuming without deciding that a claim may lie for a landlord's representation about an apartment's exemption from rent regulation); *id.* at 991-92 (Rivera, J., dissenting in part) (rejecting a per se rule adopted by lower courts); *see also* Mylan L. Denerstein, Akiva Shapiro, Seth M. Rokosky & Genevieve Quinn, *New York Court of Appeals Roundup & Preview* (2020), https://www.gibsondunn.com/new-york-court-of-appeals-round-up-december-2020/.

[33] *City of New York*, 12 N.Y.3d at 622 (quotation marks omitted).

[34] *See* Mot. for Lv. to Appeal to the N.Y. State Ct. of App. at 18-20, *Himmelstein*, 2021 WL 2228800 (dated Sept. 4, 2019).

[35] *Himmelstein*, 2021 WL 2228800, at *8-9 (Fahey, J., dissenting).

[36] *Id.* at *8.

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