

STATE OF NEW YORK

2495

2021-2022 Regular Sessions

IN ASSEMBLY

January 19, 2021

Introduced by M. of A. NIOU, STECK, BARRON, KIM, DINOWITZ, EPSTEIN, FRONTUS, RICHARDSON, FALL, REYES, SIMON, QUART, SOLAGES, BICHOTTE HERMELYN, BARNWELL, GOTTFRIED, JACOBSON, L. ROSENTHAL, ABBATE, OTIS, CRUZ, MONTESANO, DeSTEFANO, WEPRIN, TAYLOR, WALKER, DICKENS, J. RIVERA, REILLY, HEVESI, GLICK, RODRIGUEZ, GALEF -- Multi-Sponsored by -- M. of A. COOK, ENGLEBRIGHT, FERNANDEZ, SAYEGH -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, in relation to standing for persons affected by prohibited or unlawful business practices

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 349 of the general business law, as added by chapter 43 of the laws of 1970, subdivision (h) as amended by chapter 157 of the laws of 1984, and subdivision (j) as added by section 6 of part HH of chapter 55 of the laws of 2014, is amended to read as follows:

§ 349. ~~[Deceptive acts]~~ Prohibited acts and practices unlawful. (a) ~~[Deceptive]~~ This section prohibits any unfair, deceptive or abusive 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) For the purposes of this section, an act or practice is unfair when:

(i) it causes or is likely to cause substantial injury, the injury is not reasonably avoidable, and the injury is not outweighed by countervailing benefits; or

(ii) 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.

(2) For the purposes of this section, an act or practice is deceptive when the act or practice misleads or is likely to mislead a person and the person's interpretation is reasonable under the circumstances.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets ~~[-]~~ is old law to be omitted.

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1 (3) For the purposes of this section, an act or practice is abusive
2 when:

3 (i) it materially interferes with the ability of a person to under-
4 stand a term or condition of a product or service; or

5 (ii) takes unreasonable advantage of:

6 (A) a person's lack of understanding of the material risks, costs, or
7 conditions of the product or service;

8 (B) a person's inability to protect his or her interests in selecting
9 or using a product or service; or

10 (C) a person's reasonable reliance on a person covered by this section
11 to act in his or her interests.

12 (b) Whenever the attorney general shall believe from evidence satis-
13 factory to him or her that any person, firm, corporation or association
14 or agent or employee thereof has engaged in or is about to engage in any
15 of the acts or practices stated to be unfair, unlawful, deceptive or
16 abusive, he or she may bring an action in the name and on behalf of the
17 people of the state of New York to enjoin such unlawful acts or prac-
18 tices and to obtain restitution of any moneys or property obtained
19 directly or indirectly by any such unlawful acts or practices. In such
20 action preliminary relief may be granted under article sixty-three of
21 the civil practice law and rules. Such actions may be brought regard-
22 less of whether or not the underlying violation is directed at individ-
23 uals or businesses, is consumer-oriented, or involves the offering of
24 goods, services, or property for personal, family or household purposes.

25 (c) Before any violation of this section is sought to be enjoined, the
26 attorney general shall be required to give the person against whom such
27 proceeding is contemplated notice by certified mail and an opportunity
28 to show in writing within five business days after receipt of notice why
29 proceedings should not be instituted against him or her, unless the
30 attorney general shall find, in any case in which he or she seeks
31 preliminary relief, that to give such notice and opportunity is not in
32 the public interest.

33 (d) In any such action it shall be a complete defense that the act or
34 practice is, or if in interstate commerce would be, subject to and
35 complies with the rules and regulations of, and the statutes adminis-
36 tered by, the federal trade commission or any official department, divi-
37 sion, commission or agency of the United States as such rules, regu-
38 lations or statutes are interpreted by the federal trade commission or
39 such department, division, commission or agency or the federal courts.

40 (e) Nothing in this section shall apply to any television or radio
41 broadcasting station or to any publisher or printer of a newspaper,
42 magazine or other form of printed advertising, who broadcasts,
43 publishes, or prints the advertisement.

44 (f) In connection with any proposed proceeding under this section, the
45 attorney general is authorized to take proof and make a determination of
46 the relevant facts, and to issue subpoenas in accordance with the civil
47 practice law and rules.

48 (g) This section shall apply to all [~~deceptive~~] prohibited acts [~~or~~]
49 and practices [~~declared to be unlawful~~], whether or not subject to any
50 other law of this state, and shall not supersede, amend or repeal any
51 other law of this state under which the attorney general is authorized
52 to take any action or conduct any inquiry.

53 (h) (1) In addition to the right of action granted to the attorney
54 general pursuant to this section, any person who has been injured by
55 reason of any violation of this section may bring an action in his or
56 her own name to enjoin such unlawful act or practice, an action to

1 recover his or her actual damages [~~or fifty~~] and statutory damages of
2 one thousand dollars, [~~whichever is greater,~~] or both such actions. Such
3 actions may be brought regardless of whether or not the underlying
4 violation is consumer-oriented or has a public impact. The court may, in
5 its discretion, increase the award of damages [~~to an amount not to~~
6 ~~exceed three times the actual damages up to one thousand dollars,~~] if
7 the court finds the defendant willfully or knowingly violated this
8 section. The court [~~may~~] shall award reasonable attorney's fees and
9 costs to a prevailing plaintiff.

10 [~~(j)~~] (i) For purposes of this section, a "person" is defined as an
11 individual, firm, corporation, partnership, cooperative, association,
12 coalition or any other organization's legal entity, or group of individ-
13 uals however organized;

14 (ii) For purposes of this section "non-profit organization" is defined
15 as an organization that is (1) not an individual; and (2) is neither
16 organized nor operating in whole, or in significant part, for profit;

17 (iii) Given the remedial nature of this section, standing to bring an
18 action under this section, including but not limited to organizational
19 standing and third-party standing, shall be liberally construed and
20 shall be available to the fullest extent otherwise permitted by law.

21 (2) Any individual or non-profit organization entitled to bring an
22 action under this article may, if the prohibited act or practice has
23 caused damage to others similarly situated, bring an action on behalf of
24 himself or herself and such others to recover actual, statutory and/or
25 punitive damages or obtain other relief as provided for in this article.
26 Statutory damages under this section will be limited to (i) such amount
27 for each named plaintiff as could be recovered under paragraph one of
28 this subdivision; and (ii) such amount as the court may allow for all
29 other class members without regard to a minimum individual recovery, not
30 to exceed the lesser of one million dollars or two per centum of the net
31 worth of the business. Thus, any action brought under this subdivision
32 shall comply with article nine of the civil practice law and rules.

33 (3) A non-profit organization may bring an action under this section,
34 on behalf of itself or any of its members, or on behalf of those members
35 of the general public who have been injured by reason of any violation
36 of this section, including a violation involving goods or services that
37 the non-profit organization purchased or received in order to test or
38 evaluate qualities pertaining to use for personal, household, or family
39 purposes. A non-profit organization may seek the same remedies and
40 damages that a person may seek under paragraph one of this subdivision.

41 (4) Before any violation of this section is sought to be enjoined, the
42 person bringing the action shall be required to give the person against
43 whom such action is contemplated notice by certified mail, to the place
44 where the transaction occurred or to the principal place of business
45 within the state of the person against whom such action is contemplated,
46 and an opportunity to show in writing within ten business days after
47 mailing of notice why proceedings should not be instituted against him
48 or her, unless, in any case in which the person seeks preliminary
49 relief, the giving of such notice and opportunity would cause immediate
50 and irreparable injury, loss or damages.

51 (i) Notwithstanding any law to the contrary, all monies recovered or
52 obtained under this article by a state agency or state official or
53 employee acting in their official capacity shall be subject to subdivi-
54 sion eleven of section four of the state finance law.

55 § 2. This act shall take effect on the sixtieth day after it shall
56 have become a law.