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I N   S E N A T E

March 29, 2010

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Introduced by Sen. PERALTA -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to consumer protection from deceptive acts and practices

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Subdivisions (a) and (h) of section 349 of the general  
2 business law, subdivision (a) as added by chapter 43 of the laws of 1970  
3 and subdivision (h) as amended by chapter 157 of the laws of 1984, are  
4 amended and a new subdivision (i) is added to read as follows:

5     (a) [Deceptive] UNCONSCIONABLE OR DECEPTIVE acts or practices in the  
6 conduct of any business, trade or commerce or in the furnishing of any  
7 service in this state are hereby declared unlawful.

8     (h) (1) In addition to the right of action granted to the attorney  
9 general pursuant to this section, any person who has been injured by  
10 reason of any violation of this section may bring an action in his own  
11 name to enjoin such unlawful act or practice, an action to recover his  
12 actual damages or [fifty] FIVE HUNDRED dollars, whichever is greater, or  
13 both such actions. The court may, in its discretion, increase the award  
14 of damages to an amount not to exceed three times the actual damages up  
15 to [one] TEN thousand dollars, if the court finds the defendant willful-  
16 ly or knowingly violated this section. THE COURT MAY ALSO AWARD PUNITIVE  
17 DAMAGES IN AN AMOUNT NOT TO EXCEED THREE TIMES THE ACTUAL DAMAGES AND  
18 PROVIDE ANY EQUITABLE RELIEF THE COURT CONSIDERS NECESSARY OR PROPER.

19     (2) The court [may] SHALL award reasonable attorney's fees AND COSTS  
20 to a prevailing plaintiff.

21     (I)(1) IN DETERMINING WHETHER AN ACT OR PRACTICE IS UNCONSCIONABLE,  
22 THE COURT SHALL CONSIDER CIRCUMSTANCES OF WHICH THE DEFENDANT KNEW OR  
23 REASONABLY SHOULD HAVE KNOWN, INCLUDING, BUT NOT LIMITED TO THE FOLLOW-  
24 ING:

25     (A) THAT THE DEFENDANT TOOK ADVANTAGE OF THE INABILITY OF THE CONSUMER  
26 TO REASONABLY PROTECT THE CONSUMER'S INTERESTS BECAUSE OF THE CONSUMER'S  
27 PHYSICAL INFIRMITY, ILLITERACY OR INABILITY TO UNDERSTAND THE LANGUAGE  
28 OF AN AGREEMENT;

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

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1 (B) THAT AT THE TIME THE CONSUMER TRANSACTION WAS ENTERED INTO, THE  
2 PRICE GROSSLY EXCEEDED THE PRICE AT WHICH SIMILAR PROPERTY OR SERVICES  
3 WERE READILY OBTAINABLE IN SIMILAR TRANSACTIONS BY SIMILAR CONSUMERS;

4 S 2. Paragraph (a) of subdivision 2 of section 349-c of the general  
5 business law, as added by chapter 687 of the laws of 1996 and such  
6 section as renumbered by chapter 189 of the laws of 1999, is amended to  
7 read as follows:

8 (a) In addition to any liability for damages or a civil penalty  
9 imposed pursuant to sections three hundred forty-nine, THREE HUNDRED  
10 FORTY-NINE-D, three hundred fifty-c and three hundred fifty-d of this  
11 [chapter] ARTICLE, regarding deceptive practices and false advertising,  
12 and subdivision twelve of section sixty-three of the executive law,  
13 regarding proceedings by the attorney general for equitable relief  
14 against fraudulent or illegal consumer fraud, a person or entity who  
15 engages in any conduct prohibited by said provisions of law, and whose  
16 conduct is perpetrated against one or more elderly persons, may be  
17 liable for an additional civil penalty not to exceed [ten] TWENTY thou-  
18 sand dollars, if the factors in paragraph (b) of this subdivision are  
19 present.

20 S 3. The general business law is amended by adding a new section 349-d  
21 to read as follows:

22 S 349-D. CIVIL ACTION. ANY CONSUMER ENTITLED TO BRING AN ACTION UNDER  
23 THIS ARTICLE MAY, IF THE UNLAWFUL ACT OR PRACTICE HAS CAUSED DAMAGE TO  
24 OTHER CONSUMERS SIMILARLY SITUATED, BRING AN ACTION ON BEHALF OF HIMSELF  
25 AND SUCH OTHER CONSUMERS TO RECOVER DAMAGES OR OBTAIN OTHER RELIEF AS  
26 PROVIDED FOR IN THIS ARTICLE.

27 ANY ACTION BROUGHT UNDER THIS SUBDIVISION SHALL COMPLY WITH ARTICLE  
28 NINE OF THE CIVIL PRACTICE LAW AND RULES.

29 S 4. Section 350-d of the general business law, as amended by chapter  
30 208 of the laws of 2007, is amended to read as follows:

31 S 350-d. Civil penalty. Any person, firm, corporation or association  
32 or agent or employee thereof who engages in any of the acts or practices  
33 stated in this article to be unlawful shall be liable to a civil penalty  
34 of not more than [five] TEN thousand dollars for each violation, which  
35 shall accrue to the state of New York and may be recovered in a civil  
36 action brought by the attorney general. In any such action it shall be a  
37 complete defense that the advertisement is subject to and complies with  
38 the rules and regulations of, and the statutes administered by the  
39 Federal Trade Commission or any official department, division, commis-  
40 sion or agency of the state of New York.

41 S 5. Subdivision 3 of section 350-e of the general business law, as  
42 amended by chapter 328 of the laws of 2007, is amended and a new subdi-  
43 vision 4 is added to read as follows:

44 3. Any person who has been injured by reason of any violation of  
45 section three hundred fifty or three hundred fifty-a of this article may  
46 bring an action in his or her own name to enjoin such unlawful act or  
47 practice, an action to recover his or her actual damages or five hundred  
48 dollars, whichever is greater, or both such actions. The court may, in  
49 its discretion, increase the award of damages to an amount not to exceed  
50 three times the actual damages, up to ten thousand dollars, if the court  
51 finds that the defendant willfully or knowingly violated this section.  
52 The court [may] SHALL award reasonable attorney's fees AND COSTS to a  
53 prevailing plaintiff.

54 4. (A) IN ADDITION TO ANY OTHER APPLICABLE PENALTY, ANY PERSON WHO  
55 INTENTIONALLY VIOLATES ANY INJUNCTION PROHIBITING UNCONSCIONABLE OR  
56 DECEPTIVE ACTS OR PRACTICES ISSUED PURSUANT TO THIS ARTICLE SHALL BE

1 LIABLE FOR A CIVIL PENALTY NOT TO EXCEED FIVE THOUSAND DOLLARS FOR EACH  
2 VIOLATION. WHERE THE CONDUCT CONSTITUTING A VIOLATION IS OF A CONTINUING  
3 NATURE, EACH DAY OF THAT CONDUCT IS A SEPARATE AND DISTINCT VIOLATION.  
4 IN DETERMINING THE AMOUNT OF THE CIVIL PENALTY, THE COURT SHALL CONSIDER  
5 ALL RELEVANT CIRCUMSTANCES, INCLUDING, BUT NOT LIMITED TO, THE EXTENT OF  
6 THE HARM CAUSED BY THE CONDUCT CONSTITUTING A VIOLATION, THE NATURE AND  
7 PERSISTENCE OF THAT CONDUCT, THE LENGTH OF TIME OVER WHICH THE CONDUCT  
8 OCCURRED, THE ASSETS, LIABILITIES, AND NET WORTH OF THE DEFENDANT,  
9 WHETHER CORPORATE OR INDIVIDUAL, AND ANY CORRECTIVE ACTION TAKEN BY THE  
10 DEFENDANT.

11 (B) UPON PETITION BY THE ATTORNEY GENERAL, THE COURT MAY FOR HABITUAL  
12 VIOLATION OF INJUNCTIONS ISSUED PURSUANT TO THIS ARTICLE ORDER THE  
13 CANCELING OF ANY CERTIFICATE FILED UNDER AND BY VIRTUE OF THE PROVISIONS  
14 OF SECTION ONE HUNDRED THIRTY OF THIS CHAPTER.

15 S 6. This act shall take effect on the ninetieth day after it shall  
16 have become a law.