S T A T E O F N E W Y O R K

1031

2011-2012 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 5, 2011

Introduced by M. of A. PHEFFER -- read once and referred to the Committee on Consumer Affairs and 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:

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

(a) [Deceptive] UNCONSCIONABLE OR DECEPTIVE 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.

(h) (1) In addition to the right of action granted to the attorney general pursuant to this section, any 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] FIVE HUNDRED dollars, whichever is greater, or both such actions. 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] TEN thousand dollars, if the court finds the defendant willfully or knowingly violated this section. THE COURT MAY ALSO AWARD PUNITIVE DAMAGES IN AN AMOUNT NOT TO EXCEED THREE TIMES THE ACTUAL DAMAGES AND PROVIDE ANY EQUITABLE RELIEF THE COURT CONSIDERS NECESSARY OR PROPER.

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

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

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

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

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

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

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

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

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

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

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

S 350-d. Civil penalty. Any person, firm, corporation or association or agent or employee thereof who engages in any of the acts or practices stated in this article to be unlawful shall be liable to a civil penalty of not more than [five] TEN 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. In any such action it shall be a complete defense that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the state of New York.

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

3. Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his or her own name to enjoin such unlawful act or practice, an action to recover his or her actual damages or five hundred dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages, up to ten thousand dollars, if the court finds that the defendant willfully or knowingly violated this section.

The court [may] SHALL award reasonable attorney's fees AND COSTS to a prevailing plaintiff.

4. (A) IN ADDITION TO ANY OTHER APPLICABLE PENALTY, ANY PERSON WHO INTENTIONALLY VIOLATES ANY INJUNCTION PROHIBITING UNCONSCIONABLE OR DECEPTIVE ACTS OR PRACTICES ISSUED PURSUANT TO THIS ARTICLE SHALL BE LIABLE FOR A CIVIL PENALTY NOT TO EXCEED FIVE THOUSAND DOLLARS FOR EACH VIOLATION. WHERE THE CONDUCT CONSTITUTING A VIOLATION IS OF A CONTINUING NATURE, EACH DAY OF THAT CONDUCT IS A SEPARATE AND DISTINCT VIOLATION. IN DETERMINING THE AMOUNT OF THE CIVIL PENALTY, THE COURT SHALL CONSIDER ALL RELEVANT CIRCUMSTANCES, INCLUDING, BUT NOT LIMITED TO, THE EXTENT OF THE HARM CAUSED BY THE CONDUCT CONSTITUTING A VIOLATION, THE NATURE AND PERSISTENCE OF THAT CONDUCT, THE LENGTH OF TIME OVER WHICH THE CONDUCT OCCURRED, THE ASSETS, LIABILITIES, AND NET WORTH OF THE DEFENDANT, WHETHER CORPORATE OR INDIVIDUAL, AND ANY CORRECTIVE ACTION TAKEN BY THE DEFENDANT.

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

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