

STATE OF NEW YORK

9770

IN ASSEMBLY

February 6, 2018

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

AN ACT to amend the general business law, in relation to the delegation of state enforcement authority to private actors

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

1 Section 1. This act shall be known and may be cited as the "Empowering
2 People in Rights Enforcement ("EMPIRE") Consumer Act".

3 § 2. Legislative findings and declaration. 1. The legislature finds
4 and declares that limits on the availability of public enforcement
5 resources have deleterious effects on the marketplace by allowing abuses
6 targeting consumers to persist unprosecuted. To ensure the robust
7 enforcement of consumer claims, while minimizing the outlay of scarce
8 state funds, this act allows private individuals to bring public
9 enforcement actions in certain contexts in which the state does not have
10 the means to fully enforce state consumer protections.

11 2. The legislature further finds and declares that unfair business
12 practices and abuses targeting consumers often affect large numbers of
13 consumers.

14 3. The legislature further finds and declares that the purpose of the
15 EMPIRE Consumer Act is to create a means of empowering citizens as
16 private attorneys general to enforce consumer protections.

17 4. The legislature further finds and declares that the purpose of the
18 EMPIRE Consumer Act is to incentivize private parties to recover civil
19 penalties and remedies for the government that otherwise may not have
20 been assessed and collected by overburdened state enforcement agencies.
21 Such representative actions are an efficient mechanism to limit system-
22 atic violations, will enforce the rights of more consumers, and can
23 benefit the New York state attorney general's office with enhanced
24 resources.

25 5. The legislature further finds and declares that the purpose of the
26 EMPIRE Consumer Act is to benefit those businesses that are operating
27 within the law and who, as a result, face unfair competition from indi-
28 viduals and entities shirking the law and victimizing consumers.

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

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6. The legislature further finds and declares that the purpose of the EMPIRE Consumer Act is to incentivize not-for-profit consumer groups to aid consumers to report abuses and violations of the law.

7. The legislature further finds and declares that the EMPIRE Consumer Act is part of a history both in New York state and the United States of laws enabling private citizens to aid in public enforcement. In similar qui tam legislation enabling private citizens to aid in public enforcement, the resulting action is in reality a public enforcement action.

§ 3. The general business law is amended by adding a new article 22-AA to read as follows:

ARTICLE 22-AA

EMPOWERING PEOPLE IN RIGHTS ENFORCEMENT CONSUMER ACT

Section 350-f-2. Definitions.

350-f-3. Public enforcement actions.

350-f-4. Procedure.

350-f-5. Construction of this article.

§ 350-f-2. Definitions. For the purposes of this article the following terms shall have the following meanings:

1. "Consumer" is a natural person who buys, leases, contracts for or otherwise obtains goods or services primarily for personal, family or household purposes. In this article, unless the context clearly indicates otherwise, the term "consumer" shall include one or more consumers bringing a public enforcement action or for whose benefit a not-for-profit consumer group brought a public enforcement action.

2. "Consumer claim" means any cause of action primarily intended to benefit consumers involving conduct which could otherwise be brought by the attorney general pursuant to subdivision twelve of section sixty-three of the executive law or any other provision of law. Such term shall include, but not be limited to, violations of articles eleven, twenty-two-A, twenty-five, and twenty-nine-H and section three hundred ninety-six-r of this chapter, and articles nine, nine-A and ten of the personal property law, but shall not include sections one hundred ninety-eight-a and one hundred ninety-eight-b of this chapter.

3. "Corrective notice" means a notice issued by an injured consumer pursuant to subdivision two of section three hundred fifty-f-four of this article, after notice by the attorney general that the consumer's or not-for-profit consumer group's original notice pursuant to subdivision one of section three hundred fifty-f-four was not in compliance with subdivision one of such section or the regulations issued thereunder.

4. "Public enforcement action" means an action brought under this article by one or more consumers or a not-for-profit consumer group intended to enforce consumer claims enforceable by the attorney general.

5. "Underlying claim" means a consumer claim alleging illegal conduct which serves as the basis of a public enforcement action. Such term shall not include an action under subdivision twelve of section sixty-three of the executive law.

§ 350-f-3. Public enforcement actions. 1. Any injured consumer or consumers or not-for-profit consumer group may initiate a public enforcement action on behalf of the attorney general for any consumer claim, on behalf of the injured consumer or other consumers in regard to the conduct of any business, trade or commerce or in the furnishing of any service in this state, pursuant to the procedures specified in section three hundred fifty-f-four of this article. If a not-for-profit consumer group brings the action, the consumer must elect the not-for-profit consumer group in writing in a form which the attorney general

1 shall by regulation prescribe. Plaintiffs may allege multiple violations
2 affecting more than one consumer.

3 2.(a) In any public enforcement action, the injured consumer or not-
4 for-profit consumer group shall be entitled to receive any relief that
5 the attorney general or injured consumer would be entitled to under the
6 underlying claim, including injunctive relief, restitution, civil penal-
7 ties or damages. The injured consumer or not-for-profit consumer group
8 may receive either the civil penalty provided for in the underlying
9 claim or up to five thousand dollars for each violation, whichever is
10 higher. Notwithstanding the preceding sentence, a court may award a
11 lesser amount if, based on the facts and circumstances of the particular
12 case, to do otherwise would result in an award that is unjust, arbitrary
13 and oppressive, or confiscatory.

14 (b) Any injured consumer or not-for-profit consumer group that
15 prevails in a public enforcement action shall be entitled to an award of
16 reasonable attorney's fees and costs.

17 3. Civil penalties recovered by injured consumers or not-for-profit
18 consumer groups shall be distributed as follows:

19 (a) If the injured consumer initiated the public enforcement action
20 without electing a not-for-profit consumer group pursuant to subdivision
21 one of this section, forty-five percent to the consumer or consumers and
22 fifty-five percent to the attorney general for enforcement of this arti-
23 cle, to be continuously appropriated to supplement and not supplant the
24 funding to the attorney general for those purposes.

25 (b) If the injured consumer or consumers elected a not-for-profit
26 consumer group pursuant to subdivision one of this section, thirty
27 percent to the injured consumer, fifteen percent to the not-for-profit
28 consumer group, and fifty-five percent to the attorney general for
29 enforcement of this article, to be continuously appropriated to supple-
30 ment and not supplant the funding to the attorney general for those
31 purposes.

32 4. The right to bring a public enforcement action under this article
33 shall not be subject to private agreements between a consumer and a
34 business or other defendant.

35 5. Notwithstanding any other provision of law, public enforcement
36 actions must be commenced within three years, subject to the tolling
37 provisions in subdivision five of section three hundred fifty-f-four of
38 this article.

39 § 350-f-4. Procedure. 1. No public enforcement action may be commenced
40 prior to thirty days after written notice by certified mail, return
41 receipt requested, has been provided by the injured consumer or not-for-
42 profit consumer group to the attorney general in a form in compliance
43 with regulations in regard to this action which shall be prescribed by
44 the attorney general. Such regulations shall at a minimum provide that
45 the notice shall include:

46 (a) the legal name, address, telephone number (if any), and email (if
47 any) of the business;

48 (b) the name, address, telephone number (if any), and email (if any)
49 of the injured consumer;

50 (c) the legal name, address, telephone number (if any), and email (if
51 any) of the not-for-profit consumer group, if applicable; and

52 (d) a statement of the underlying claim.

53 2. Such regulations pursuant to subdivision one of this section shall
54 provide for the right of the injured consumer or not-for-profit consumer
55 group to furnish a corrective notice after notice by the attorney gener-
56 al to the consumer or not-for-profit consumer group, whichever is appli-

1 cable, that the original notice was not in compliance with this section
2 or the regulations issued thereunder, specifying with particularity the
3 deficiencies in the original notice. Such notice shall be provided by
4 the attorney general within thirty days of the original notice or the
5 original notice shall be deemed in compliance with subdivision one of
6 this section. The consumer or not-for-profit consumer group shall have
7 thirty days after the attorney general's notice that the original notice
8 was not in compliance to submit a corrective notice to the attorney
9 general by certified mail, return receipt requested. For purposes of
10 determining whether the injured consumer or not-for-profit consumer
11 group complied with this subdivision or subdivision one of this section
12 in an action under this article, the notice shall be construed in a
13 light favorable to the consumer or not-for-profit consumer group.

14 3. No public enforcement action shall be brought if the attorney
15 general is actively investigating the same matter which is the subject
16 of the notice provided for in subdivision one of this section with the
17 intent to determine whether it will file an action or special proceeding
18 over such conduct, provided that the attorney general informs the
19 injured consumer or not-for-profit consumer group of the same by certi-
20 fied mail, return receipt requested, within thirty days of the consum-
21 er's or not-for-profit consumer group's original notice made pursuant to
22 subdivision one of this section or the consumer's or not-for-profit
23 consumer group's corrective notice, whichever is later.

24 4. Notwithstanding subdivision three of this section, if after provid-
25 ing the notice to the injured consumer or not-for-profit consumer group
26 pursuant to subdivision three of this section, the attorney general does
27 not commence an action within one hundred eighty days of the later of
28 the time periods specified in subdivision three of this section, the
29 consumer or not-for-profit consumer group may file a public enforcement
30 action.

31 5. The statute of limitations in subdivision five of section three
32 hundred fifty-f-three of this article shall be tolled:

33 (a) for the thirty day period in subdivision one of this section, if
34 the attorney general does not issue a corrective notice;

35 (b) for the period from the providing of the original notice by the
36 consumer or not-for-profit consumer group pursuant to subdivision one of
37 this section to the date permitted for the consumer or not-for-profit
38 consumer group to submit a corrective notice, if the attorney general
39 requested a corrective notice pursuant to subdivision two of this
40 section; or

41 (c) for the period from the providing of the original notice by the
42 consumer or not-for-profit consumer group pursuant to subdivision one of
43 this section to the later of the periods provided in subdivision four of
44 this section, if the attorney general provides the notice provided in
45 subdivision three of this section that it is actively investigating the
46 same matter and then does not commence an action in the time periods
47 provided in subdivision four of this section.

48 6. In any public enforcement action, the plaintiff shall notify the
49 attorney general of the action and the attorney general may intervene as
50 a matter of right.

51 7. The attorney general shall establish a publicly available database
52 of actions brought pursuant to this article, including the parties, the
53 disposition and any other information which the attorney general shall
54 by regulation prescribe.

55 § 350-f-5. Construction of this article. 1. Nothing in this article
56 shall operate to limit any party's right to pursue any other remedies

1 available under state or federal law, either separately or concurrently
2 with an action taken under this article.

3 2. This article shall not supersede any other law of this state under
4 which the attorney general is authorized to take any action or conduct
5 any inquiry, including subdivision twelve of section sixty-three of the
6 executive law.

7 3. This article shall be construed in light of its purposes to expand
8 the enforcement of laws that protect injured consumers.

9 § 4. Subdivision (h) of section 349 of the general business law, as
10 amended by chapter 157 of the laws of 1984, is amended to read as
11 follows:

12 (h) In addition to the right of action granted to the attorney general
13 pursuant to this section, any person who has been injured by reason of
14 any violation of this section may bring an action in his or her own name
15 to enjoin such unlawful act or practice, an action to recover his or her
16 actual damages or [~~fifty~~] five hundred dollars, whichever is greater, or
17 both such actions. The court may, in its discretion, increase the award
18 of damages to an amount not to exceed three times the actual damages up
19 to [~~one~~] ten thousand dollars, if the court finds the defendant willful-
20 ly or knowingly violated this section. The court may award reasonable
21 attorney's fees to a prevailing plaintiff.

22 § 5. Severability. If any word, phrase, clause, sentence, paragraph,
23 section or part of this act or the application thereof to any person or
24 circumstances shall be adjudged invalid by a court of competent juris-
25 diction, such order or judgment shall be confined in its operation to
26 the controversy in which it was rendered, and shall not affect or inval-
27 idate the remainder thereof, but shall be confined in its operation to
28 the word, phrase, clause, sentence, paragraph, section or part thereof
29 directly involved in the controversy in which such judgment shall have
30 been rendered.

31 § 6. This act shall take effect on the one hundred eightieth day after
32 it shall have become a law, provided, however, that effective immediate-
33 ly, the addition, amendment and/or repeal of any rule or regulation
34 necessary for the implementation of this act on its effective date are
35 authorized to be made and completed on or before such date.