

# STATE OF NEW YORK

9824--A

## IN ASSEMBLY

February 14, 2018

Introduced by M. of A. NIOU -- read once and referred to the Committee on Consumer Affairs and Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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:

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

5 § 349. [~~Deceptive acts~~] Prohibited acts and practices [~~unlawful~~]. (a)  
6 [~~Deceptive~~] This section prohibits any unfair, unlawful, deceptive or  
7 abusive acts or practices in the conduct of any business, trade or  
8 commerce or in the furnishing of any service [~~in this state are hereby~~  
9 ~~declared unlawful~~].

10 (1) For the purposes of this section, an act or practice is unfair  
11 when:

12 (i) it causes or is likely to cause substantial injury, the injury is  
13 not reasonably avoidable, and the injury is not outweighed by counter-  
14 vailing benefits; or

15 (ii) it takes unreasonable advantage of the inability of a person to  
16 protect his or her interests because of the person's infirmity, illiter-  
17 acy or inability to understand the language of an agreement.

18 (2) For the purposes of this section, an act or practice is unlawful  
19 when it violates any law be it civil or criminal, federal, state, munic-  
20 ipal, statutory, administrative or any other law applicable in this  
21 state.

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

25 (4) For the purposes of this section, an act or practice is abusive  
26 when:

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

LBD14112-02-8

1 (i) it materially interferes with the ability of a person to under-  
2 stand a term or condition of a consumer financial product or service; or  
3 (ii) takes unreasonable advantage of:

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

6 (B) a person's inability to protect his or her interests in selecting  
7 or using a consumer financial product or service; or

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

10 (b) Whenever the attorney general shall believe from evidence satis-  
11 factory to him or her that any person, firm, corporation or association  
12 or agent or employee thereof has engaged in or is about to engage in any  
13 of the acts or practices stated to be unfair, unlawful, deceptive or  
14 abusive, he or she may bring an action in the name and on behalf of the  
15 people of the state of New York to enjoin such unlawful acts or prac-  
16 tices and to obtain restitution of any moneys or property obtained  
17 directly or indirectly by any such unlawful acts or practices. In such  
18 action preliminary relief may be granted under article sixty-three of  
19 the civil practice law and rules.

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

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

35 ~~(e)]~~ Nothing in this section shall apply to any television or radio  
36 broadcasting station or to any publisher or printer of a newspaper,  
37 magazine or other form of printed advertising, who broadcasts,  
38 publishes, or prints the advertisement.

39 ~~[(f)]~~ (e) In connection with any proposed proceeding under this  
40 section, the attorney general is authorized to take proof and make a  
41 determination of the relevant facts, and to issue subpoenas in accord-  
42 ance with the civil practice law and rules.

43 ~~[(g)]~~ (f) This section shall apply to all [~~deceptive~~] prohibited acts  
44 [~~or~~] and practices [~~declared to be unlawful~~], whether or not subject to  
45 any other law of this state, and shall not supersede, amend or repeal  
46 any other law of this state under which the attorney general is author-  
47 ized to take any action or conduct any inquiry.

48 ~~[(h)]~~ (g) (1) In addition to the right of action granted to the attor-  
49 ney general pursuant to this section, any person who has been injured by  
50 reason of any violation of this section may bring an action in his or  
51 her own name to enjoin such unlawful act or practice, an action to  
52 recover his or her actual damages [~~or fifty~~] and statutory damages of  
53 two thousand dollars, [~~whichever is greater~~], or both such actions. Such  
54 actions may be brought regardless of whether or not the underlying  
55 violation is consumer-oriented or has a public impact. The court may, in  
56 its discretion, increase the award of damages [~~to an amount not to~~

1 ~~exceed three times the actual damages up to one thousand dollars,~~ if  
2 the court finds the defendant willfully or knowingly violated this  
3 section. The court [~~may~~] shall award reasonable attorney's fees and  
4 costs to a prevailing plaintiff.

5 (i) For purposes of this section, a "person" is defined as an individ-  
6 ual, firm, corporation, partnership, cooperative, association, coalition  
7 or any other organization's legal entity, or group of individuals howev-  
8 er organized;

9 (ii) Given the remedial nature of this section, standing to bring an  
10 action under this section, including but not limited to organizational  
11 standing and third-party standing, shall be liberally construed and  
12 shall be available to the fullest extent otherwise permitted by law.

13 (2) Any person entitled to bring an action under this article may, if  
14 the prohibited act or practice has caused damage to others similarly  
15 situated, bring an action on behalf of himself or herself and such  
16 others to recover actual, statutory and/or punitive damages or obtain  
17 other relief as provided for in this article. Thus, any action brought  
18 under this subdivision shall comply with article nine of the civil prac-  
19 tice law and rules.

20 (3) An organization may bring an action under this section, on behalf  
21 of itself or any of its members, or on behalf of those members of the  
22 general public who have been injured by reason of any violation of this  
23 section, including a violation involving goods or services that the  
24 organization purchased or received in order to test or evaluate quali-  
25 ties pertaining to use for personal, household, or family purposes. An  
26 organization may seek the same remedies and damages that a person may  
27 seek under paragraph one of this subdivision.

28 [~~(j)~~] (h) Notwithstanding any law to the contrary, all monies recov-  
29 ered or obtained under this article by a state agency or state official  
30 or employee acting in their official capacity shall be subject to subdi-  
31 vision eleven of section four of the state finance law.

32 § 2. Section 389-c of the general business law, as added by chapter  
33 309 of the laws of 1996, is amended to read as follows:

34 § 389-c. Special application of section three hundred forty-nine of  
35 this chapter. In addition to the power set forth in subdivision (b) of  
36 section three hundred forty-nine of this chapter, the attorney general  
37 shall have the power to assess a fine of up to one thousand dollars for  
38 each violation of this article[~~, and the defense under subdivision (d)~~  
39 ~~of section three hundred forty-nine of this chapter shall not be avail-~~  
40 ~~able in connection with any violation of this article].~~

41 § 3. This act shall take effect on the sixtieth day after it shall  
42 have become a law.