STATE OF NEW YORK

8035

2017-2018 Regular Sessions

IN ASSEMBLY

May 25, 2017

Introduced by M. of A. KAVANAGH -- 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) a statement of the underlying claim.

2. Such regulations pursuant to subdivision one of this section shall provide for the right of the injured consumer or not-for-profit consumer group to furnish a corrective notice after notice by the attorney general to the consumer or not-for-profit consumer group, whichever is applicable, that the original notice was not in compliance with this section or the regulations issued thereunder, specifying with particularity the deficiencies in the original notice. Such notice shall be provided by the attorney general within thirty days of the original notice or the original notice shall be deemed in compliance with subdivision one of this section. The consumer or not-for-profit consumer group shall have thirty days after the attorney general's notice that the original notice was not in compliance to submit a corrective notice to the attorney general by certified mail, return receipt requested. For purposes of determining whether the injured consumer or not-for-profit consumer group complied with this subdivision or subdivision one of this section in an action under this article, the notice shall be construed in a light favorable to the consumer or not-for-profit consumer group.

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

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

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

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

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

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

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

7. The attorney general shall establish a publicly available database of actions brought pursuant to this article, including the parties, the

disposition and any other information which the attorney general shall by regulation prescribe.

§ 350-f-5. Construction of this article. 1. Nothing in this article shall operate to limit any party's right to pursue any other remedies available under state or federal law, either separately or concurrently with an action taken under this article.

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

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

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

(h) 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 **or her** own name to enjoin such unlawful act or practice, an action to recover his **or her** 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 award reasonable attorney's fees to a prevailing plaintiff.

§ 5. Severability. If any word, phrase, clause, sentence, paragraph, section or part of this act or the application thereof to any person or circumstances shall be adjudged invalid by a court of competent jurisdiction, such order or judgment shall be confined in its operation to the controversy in which it was rendered, and shall not affect or invalidate the remainder thereof, but shall be confined in its operation to the word, phrase, clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

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