STATE OF NEW YORK

2407--C

Cal. No. 1093

2019-2020 Regular Sessions

IN SENATE

January 24, 2019

Introduced by Sens. COMRIE, BAILEY, BIAGGI, GIANARIS, HOYLMAN, JACKSON, KAVANAGH, KRUEGER, LIU, MONTGOMERY, MYRIE, PARKER, RAMOS, RIVERA, SALAZAR, SEPULVEDA, SKOUFIS, THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

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:

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

§ 349. [~~Deceptive acts~~] **Prohibited acts** and practices unlawful. (a) [~~Deceptive~~] **This section prohibits any unfair, deceptive or abusive** 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~~].

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

(i) it causes or is likely to cause substantial injury, the injury is not reasonably avoidable, and the injury is not outweighed by countervailing benefits; or

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

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

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

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

(i) it materially interferes with the ability of a person to understand a term or condition of a product or service; or

(ii) takes unreasonable advantage of:

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

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

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

(b) Whenever the attorney general shall believe from evidence satisfactory to him or her that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unfair, unlawful, deceptive or abusive, he or she may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules. Such actions may be brought regardless of whether or not the underlying violation is directed at individuals or businesses, is consumer-oriented, or involves the offering of goods, services, or property for personal, family or household purposes.

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

(d) In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, 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 United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts.

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

(f) In connection with any proposed proceeding under this section, the attorney general is authorized to take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules.

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

(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 or her own name to enjoin such unlawful act or practice, an action to recover his or her actual damages [~~or fifty~~] and statutory damages of one thousand dollars, [~~whichever is greater,~~] or both such actions. Such actions may be brought regardless of whether or not the underlying violation is consumer-oriented or has a public impact. 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 thousand dollars,~~] if the court finds the defendant willfully or knowingly violated this section. The court [~~may~~] shall award reasonable attorney's fees and costs to a prevailing plaintiff.

[~~(j)~~] (i) For purposes of this section, a "person" is defined as an individual, firm, corporation, partnership, cooperative, association, coalition or any other organization's legal entity, or group of individuals however organized;

(ii) For purposes of this section "non-profit organization" is defined as an organization that is (1) not an individual; and (2) is neither organized nor operating in whole, or in significant part, for profit;

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

(2) Any individual or non-profit organization entitled to bring an action under this article may, if the prohibited act or practice has caused damage to others similarly situated, bring an action on behalf of himself or herself and such others to recover actual, statutory and/or punitive damages or obtain other relief as provided for in this article. Statutory damages under this section will be limited to (i) such amount for each named plaintiff as could be recovered under paragraph one of this subdivision; and (ii) such amount as the court may allow for all other class members without regard to a minimum individual recovery, not to exceed the lesser of one million dollars or two per centum of the net worth of the business. Thus, any action brought under this subdivision shall comply with article nine of the civil practice law and rules.

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

(4) Before any violation of this section is sought to be enjoined, the person bringing the action shall be required to give the person against whom such action is contemplated notice by certified mail, to the place where the transaction occurred or to the principal place of business within the state of the person against whom such action is contemplated, and an opportunity to show in writing within ten business days after mailing of notice why proceedings should not be instituted against him or her, unless, in any case in which the person seeks preliminary relief, the giving of such notice and opportunity would cause immediate and irreparable injury, loss or damages.

(i) Notwithstanding any law to the contrary, all monies recovered or obtained under this article by a state agency or state official or

employee acting in their official capacity shall be subject to subdivision eleven of section four of the state finance law.

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