

# STATE OF NEW YORK

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2495--A

2021-2022 Regular Sessions

## IN ASSEMBLY

January 19, 2021

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Introduced by M. of A. NIOU, STECK, BARRON, KIM, DINOWITZ, EPSTEIN, FRONTUS, RICHARDSON, FALL, REYES, SIMON, QUART, SOLAGES, BICHOTTE HERMELYN, BARNWELL, GOTTFRIED, JACOBSON, L. ROSENTHAL, ABBATE, OTIS, CRUZ, MONTESANO, DeSTEFANO, WEPRIN, TAYLOR, WALKER, DICKENS, J. RIVERA, REILLY, HEVESI, GLICK, RODRIGUEZ, GALEF -- Multi-Sponsored by -- M. of A. COOK, ENGLEBRIGHT, FERNANDEZ, SAYEGH -- 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, the financial services law and the insurance law, in relation to enacting the "Consumer and Small business Protection Act"

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 "Consumer  
2 and Small business Protection Act (CSPA)".  
3 § 2. Legislative findings and intent. The Legislature declares that  
4 the State has a responsibility to protect individuals and businesses  
5 within the State from unfair and abusive business acts and practices.  
6 The Legislature further declares that the State's law, which guarded  
7 only against deceptive business acts and practices, has been insuffi-  
8 cient to meet this responsibility and has become out of date as other  
9 states' laws provide far greater protections. Consumers and small busi-  
10 nesses have long been vulnerable to unscrupulous business practices that  
11 are unfair and abusive without being expressly deceptive. The State must  
12 not allow bad actors to peddle predatory products and services as long  
13 as they are clever enough not to get caught in a lie. To that end, and  
14 to better level the playing field for the State's many honest busi-  
15 nesses, this legislation defines unfair and abusive acts and practices  
16 expansively.

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

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1 The State must also ensure that this protection covers small busi-  
2 nesses, which are frequent targets of predatory loans and other forms of  
3 exploitation, along with all consumer transactions. This legislation  
4 therefore rejects the limitation, imposed by courts, that prohibited  
5 conduct be "consumer oriented," have an impact on the public at large,  
6 or be part of a broader pattern. Consumers and small businesses are  
7 entitled to redress whenever they are harmed by deceptive, unfair, or  
8 abusive conduct.

9 Finally, for any of these protections to be meaningful, the State must  
10 ensure that the remedies for prohibited conduct provide an effective  
11 deterrent. This legislation therefore updates the statutory damages for  
12 violations for the first time in decades, from \$50 to \$1,000, and allows  
13 meaningful punitive damages for particularly egregious behavior. The  
14 Legislature recognizes that unfair, deceptive, and abusive practices  
15 have a particular impact on poor individuals, people of color, and those  
16 affected by natural disasters and health emergencies, including the  
17 COVID-19 pandemic. For this reason, the State must ensure that limited  
18 resources not prevent individuals and small businesses from seeking  
19 remedies. This legislation therefore opens access to justice by making  
20 recovery of attorney's fees mandatory for a prevailing plaintiff and  
21 authorizing class actions.

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

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

30 (1) For the purposes of this section, an act or practice is unfair  
31 when it causes or is likely to cause substantial injury, the injury is  
32 not reasonably avoidable, and the injury is not outweighed by counter-  
33 vailing benefits.

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

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

39 (i) it materially interferes with the ability of a person to under-  
40 stand a term or condition of a product or service; or

41 (ii) takes unreasonable advantage of:

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

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

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

48 (b) Whenever the attorney general shall believe from evidence satis-  
49 factory to him or her that any person, firm, corporation or association  
50 or agent or employee thereof has engaged in or is about to engage in any  
51 of the acts or practices stated to be unfair, unlawful, deceptive or  
52 abusive, he or she may bring an action in the name and on behalf of the  
53 people of the state of New York to enjoin such unlawful acts or prac-  
54 tices and to obtain restitution of any moneys or property obtained  
55 directly or indirectly by any such unlawful acts or practices. In such  
56 action preliminary relief may be granted under article sixty-three of

1 the civil practice law and rules. Such actions may be brought regard-  
2 less of whether or not the underlying violation is directed at individ-  
3 uals or businesses, is consumer-oriented, or involves the offering of  
4 goods, services, or property for personal, family or household purposes.

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

13 (d) In any such action it shall be a complete defense that the act or  
14 practice is, or if in interstate commerce would be, subject to and  
15 complies with the rules and regulations of, and the statutes adminis-  
16 tered by, the federal trade commission or any official department, divi-  
17 sion, commission or agency of the United States as such rules, regu-  
18 lations or statutes are interpreted by the federal trade commission or  
19 such department, division, commission or agency or the federal courts.

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

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

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

33 (h) (1) In addition to the right of action granted to the attorney  
34 general pursuant to this section, any person who has been injured by  
35 reason of any violation of this section may bring an action in his or  
36 her own name to enjoin such unlawful act or practice, an action to  
37 recover [~~his actual damages or fifty dollars, whichever is greater, or~~  
38 ~~both such actions~~] one thousand dollars and his or her actual damages,  
39 if any, or both such actions. Such actions may be brought regardless of  
40 whether or not the underlying violation is consumer-oriented, has a  
41 public impact or involves the offering of goods, services or property  
42 for personal, family or household purposes. The court may, in its  
43 discretion, increase the award of damages [~~to an amount not to exceed~~  
44 ~~three times the actual damages up to one thousand dollars,~~] if the court  
45 finds the defendant willfully or knowingly violated this section. The  
46 court [~~may~~] shall award reasonable attorney's fees and costs to a  
47 prevailing plaintiff.

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

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

55 (iii) Given the remedial nature of this section, standing to bring an  
56 action under this section, including but not limited to organizational

1 standing and third-party standing, shall be liberally construed and  
2 shall be available to the fullest extent otherwise permitted by law.

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

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

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

33 (i) Notwithstanding any law to the contrary, all monies recovered or  
34 obtained under this article by a state agency or state official or  
35 employee acting in their official capacity shall be subject to subdivi-  
36 sion eleven of section four of the state finance law.

37 (j) This section is intended to expand and not take away existing  
38 consumer rights.

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