

STATE OF NEW YORK

795--A

2023-2024 Regular Sessions

IN SENATE

January 6, 2023

Introduced by Sens. COMRIE, BAILEY, BRISPORT, BROUK, CHU, CLEARE, FERNANDEZ, GIANARIS, GONZALEZ, GOUNARDES, HARCKHAM, HINCHEY, HOYLMAN-SIGAL, JACKSON, KAVANAGH, KRUEGER, LIU, MAY, MAYER, MYRIE, PALUMBO, PARKER, RAMOS, RIVERA, RYAN, SALAZAR, SANDERS, SEPULVEDA, SERRANO, SKOUFIS, THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- recommitted to the Committee on Consumer Protection in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business 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8 cient to meet this responsibility and has become out of date as other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.
17 The State must also ensure that this protection covers small busi-
18 nesses, which are frequent targets of predatory loans and other forms of

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

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1 exploitation, along with all consumer transactions. This legislation
2 therefore rejects the limitation, imposed by courts, that prohibited
3 conduct be "consumer oriented," have an impact on the public at large,
4 or be part of a broader pattern. Consumers and small businesses are
5 entitled to redress whenever they are harmed by deceptive, unfair, or
6 abusive conduct.

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

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

24 § 349. [~~Deceptive acts~~] Unfair, deceptive, or abusive acts and prac-
25 tices unlawful. (a) [~~Deceptive~~] Any unfair, deceptive or abusive acts or
26 practices in the conduct of any business, trade or commerce or in the
27 furnishing of any service in this state are hereby declared unlawful.

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

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

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

36 (ii) takes unreasonable advantage of:

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

39 (B) a person's inability to protect such person's interests in select-
40 ing or using a product or service.

41 (b) Whenever the attorney general shall believe from evidence satis-
42 factory to [~~him~~] the attorney general that any person, firm, corporation
43 or association or agent or employee thereof has engaged in or is about
44 to engage in any of the acts or practices stated to be unfair, unlawful
45 [~~he~~], deceptive or abusive, the attorney general may bring an action in
46 the name and on behalf of the people of the state of New York to enjoin
47 such unlawful acts or practices and to obtain restitution of any moneys
48 or property obtained directly or indirectly by any such unlawful acts or
49 practices. In such action preliminary relief may be granted under arti-
50 cle sixty-three of the civil practice law and rules. Such actions may
51 be brought regardless of whether or not the underlying violation is
52 directed at individuals or businesses, is consumer-oriented, or involves
53 the offering of goods, services, or property for personal, family or
54 household purposes.

55 (c) Before any violation of this section is sought to be enjoined, the
56 attorney general shall be required to give the person against whom such

1 proceeding is contemplated notice by certified mail and an opportunity
2 to show in writing within five business days after receipt of notice why
3 proceedings should not be instituted against [~~him~~] such person, unless
4 the attorney general shall find, in any case in which [~~he~~] the attorney
5 general seeks preliminary relief, that to give such notice and opportu-
6 nity is not in the public interest.

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

14 (e) Nothing in this section shall apply to any television or radio
15 broadcasting station or to any publisher or printer of a newspaper,
16 magazine or other form of printed or digital advertising, who broad-
17 casts, publishes, or prints the advertisement.

18 (e-1) Nothing in this section pertaining to abusive or unfair prac-
19 tices, or the provisions of subdivision (h) of this section, shall apply
20 to:

21 (1) a federal covered investment adviser, an investment adviser as
22 defined in 13 NYCRR Part 11, a broker or dealer as those terms are
23 defined in section three hundred fifty-nine-e of this chapter, or a
24 federally chartered bank, other than for an act or practice in
25 connection with loans for the purpose of financing the purchase of a
26 motor vehicle as defined in section one hundred twenty-five of the vehi-
27 cle and traffic law, or loans for the purpose of financing postsecondary
28 education and expenses related thereto; or

29 (2) any person or entity subject to article twenty-four of the insur-
30 ance law, or their affiliates.

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

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

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

55 (2) At least thirty days before any person other than the attorney
56 general may bring an action pursuant to paragraph one of this subdivi-

1 sion, such person shall send the party against whom any such action is
2 contemplated, the "respondent", notice by certified mail to the respond-
3 ent's place of business. Such notice must reasonably describe the
4 unfair, deceptive, or abusive acts or practices at issue, state a demand
5 for relief, and include the sender's mailing address or e-mail address.

6 (3) A respondent receiving notice pursuant to paragraph two of this
7 subdivision may, within ten days of delivery of such notice, make a
8 written tender of settlement by certified mail or by e-mail, if provided
9 in the notice. If such relief is rejected, in any subsequent action on
10 the basis of the noticed conduct, the respondent may file the written
11 tender of settlement with an affidavit concerning its rejection and if
12 such settlement is deemed complete relief by the court or tribunal, the
13 court or tribunal may limit any recovery to the relief tendered therein.
14 A settlement shall be deemed complete only if the respondent provides
15 statutory damages, actual damages, if any, and corrects and permanently
16 ceases such acts or practices described in the notice as to all other
17 impacted persons, and if such settlement was filed with the attorney
18 general in accordance with paragraph seven of this subdivision.

19 (4) A notice pursuant to paragraph two of this subdivision shall not
20 be required prior to the filing of an action if:

21 (i) such action is brought as a counterclaim or crossclaim;
22 (ii) the sending of such notice would cause immediate and irreparable
23 injury, loss, or damages;

24 (iii) the person bringing the action is not represented by an attor-
25 ney;

26 (iv) a mailing address for the respondent is not reasonably discerni-
27 ble;

28 (v) filing suit is necessary to prevent the expiration of the statute
29 of limitations;

30 (vi) the respondent has previously been the subject of an action by
31 the attorney general for substantially similar conduct;

32 (vii) the respondent has already received a notice pursuant to para-
33 graph four of this subdivision for substantially similar conduct; or

34 (viii) there are other exigent circumstances.

35 (5) Any respondent seeking to tender settlement pursuant to paragraph
36 three of this subdivision shall file documentation of such offer, along
37 with the underlying notice provided to the respondent pursuant to para-
38 graph four, with the attorney general. The attorney general shall
39 promulgate regulations establishing the process for filing such notices
40 and responses in the state register. The attorney general may amend the
41 process for filing such notices and responses at any time.

42 (6) A failure by a respondent to file with the attorney general pursu-
43 ant to paragraph five of this subdivision within seven days of deliver-
44 ing a response to a notice sent pursuant to paragraph two of this subdi-
45 vision shall itself be considered a violation of this section subject to
46 an action brought by the attorney general through subdivision b of this
47 section, provided, however, that any failure filed with the attorney
48 general prior to the attorney general having established a process for
49 such filing shall not be actionable. A violation for failure to file on
50 time shall be subject to a civil penalty not to exceed five hundred
51 dollars for each day such violation continues, in addition to any other
52 penalties available under this section for prohibited acts or practices.

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

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

3 § 4. Severability. If any part or provision of this act or its appli-
4 cation to a person is held invalid, the invalidity of that part,
5 provision or application does not affect other parts, provisions or
6 applications of this act that can be given effect without the invalid
7 provision or application.

8 § 5. This act shall take effect on the one hundred twentieth day
9 after it shall have become a law.