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:

Section 1. This act shall be known and may be cited as the "consumer and small business protection act (CSPA)".

§ 2. Legislative findings and intent. The Legislature declares that the State has a responsibility to protect individuals and businesses within the State from unfair and abusive business acts and practices. The Legislature further declares that the State's law, which guarded only against deceptive business acts and practices, has been insufficient to meet this responsibility and has become out of date as other states' laws provide far greater protections. Consumers and small businesses have long been vulnerable to unscrupulous business practices that are unfair and abusive without being expressly deceptive. The State must not allow bad actors to peddle predatory products and services as long as they are clever enough not to get caught in a lie. To that end, and to better level the playing field for the State's many honest businesses, this legislation defines unfair and abusive acts and practices expansively.

The State must also ensure that this protection covers small businesses, 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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exploitation, along with all consumer transactions. This legislation therefore rejects the limitation, imposed by courts, that prohibited conduct be "consumer oriented," have an impact on the public at large, or be part of a broader pattern. Consumers and small businesses are entitled to redress whenever they are harmed by deceptive, unfair, or abusive conduct.

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

§ 3. 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**~~] **Unfair, deceptive, or abusive acts** and practices unlawful. (a) [~~**Deceptive**~~] **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 it causes or is likely to cause substantial injury, the injury is not reasonably avoidable, and the injury is not outweighed by countervailing benefits.

(2) 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; or

(B) a person's inability to protect such person's interests in selecting or using a product or service.

(b) Whenever the attorney general shall believe from evidence satisfactory to [~~**him**~~] **the attorney general** 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 [~~**he**~~]**, deceptive or abusive, the attorney general** 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~~] **such person**, unless the attorney general shall find, in any case in which [~~he~~] **the attorney general** 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 **or digital** advertising, who broadcasts, publishes, or prints the advertisement.

(e-1) Nothing in this section pertaining to abusive or unfair practices, or the provisions of subdivision (h) of this section, shall apply to:

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

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

(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~~] **unfair, deceptive, or abusive** acts or 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~~] **such person's** own name to enjoin such unlawful act or practice, an action to recover [~~his actual damages or fifty dollars, whichever is greater, or both such actions~~] **one thousand dollars and such person's actual damages, if any, or both such actions. Such actions may be brought regardless of whether or not the underlying violation is consumer-oriented, has a public impact or involves the offering of goods, services or property for personal, family or household purposes**. 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.

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

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

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

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

(i) such action is brought as a counterclaim or crossclaim;

(ii) the sending of such notice would cause immediate and irreparable injury, loss, or damages;

(iii) the person bringing the action is not represented by an attorney;

(iv) a mailing address for the respondent is not reasonably discernible;

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

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

(vii) the respondent has already received a notice pursuant to paragraph four of this subdivision for substantially similar conduct; or

(viii) there are other exigent circumstances.

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

(6) A failure by a respondent to file with the attorney general pursuant to paragraph five of this subdivision within seven days of delivering a response to a notice sent pursuant to paragraph two of this subdivision shall itself be considered a violation of this section subject to an action brought by the attorney general through subdivision b of this section, provided, however, that any failure filed with the attorney general prior to the attorney general having established a process for such filing shall not be actionable. A violation for failure to file on time shall be subject to a civil penalty not to exceed five hundred dollars for each day such violation continues, in addition to any other penalties available under this section for prohibited acts or practices.

(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.

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

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

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