

CONSUMER LAW 2004 UPDATE

THE JUDGE'S GUIDE TO FEDERAL AND NEW YORK STATE CONSUMER PROTECTION STATUTES

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Causes of action alleging the violation of one or more Federal and/or New York State consumer protection statutes are frequently asserted in civil cases. This paper discusses those consumer protection statutes most frequently used in New York State courts.

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1] Table Of New York State Consumer Protection Statutes

[A] **G.B.L. § 349** [Deceptive & Misleading Business Practices];

[B] **G.B.L. § 350** [False Advertising];

[C] **G.B.L. § 198-a** [New Car Lemon Law];

[D] **G.B.L. § 198-b** [Used Car Lemon Law];

[E] **G.B.L. § 201** [Overcoats Lost At Restaurants];

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[G] **G.B.L. § 359-fff** [Pyramid Schemes];

[H] **G.B.L. § 396-p(5)** [New Car Purchase Contract Disclosure Requirements];

[I] **G.B.L. § 396-u** [Merchandise Delivery Dates];

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[K] **G.B.L. § 399-pp** [Telemarketing And Consumer Fraud And Abuse Prevention Act];

[L] **G.B.L. § 399-z** [No Telemarketing Sales Call Registry];

[M] **G.B.L. § 617(2)(a)** [New Parts Warranties];

[N] **G.B.L. §§ 752 et seq** [Sale Of Dogs And Cats];

[O] **G.B.L. § 772** [Home Improvement Frauds];

[P] **C.P.L.R. § 3015(e)** [Licensing To Do Business];

[Q] **C.P.L.R. § 4544** [Consumer Transaction Documents Must Be
In 8 Point Type];

[R] **M.D.L. § 78** [Duty To Keep Premises In Good Repair];

[S] **P.P.L. §§ 425-431** [Door-To-Door Sales];

[T] **P.P.L. §§ 500 et seq** [Rental Purchase Agreements];

[U] **R.P.L. § 235-b** [Warranty Of Habitability];

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2] Table Of Federal Consumer Protection Statutes

[A] **12 U.S.C. § 2601** [Real Estate Settlement Procedures
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[B] **15 U.S.C. §§ 1601-1665** [Truth In Lending Act];

[C] **15 U.S.C. § 1639** [Home Ownerships and Equity Protection

Act of 1994 (HOEPA)];

[D] **15 U.S.C. §§ 2301 et seq** [Magnuson-Moss Warranty Act];

[E] **47 U.S.C. § 227** [Federal Telephone Consumer Protection Act Of 1991];

[F] **12 C.F.R. §§ 226.1 et seq** [Regulation Z].

3] Deceptive & Misleading Business Practices: G.B.L. § 349

The most popular of New York State's many consumer protection statutes is General Business Law § 349 [" GBL § 349 "] which prohibits deceptive and misleading business practices². GBL § 349 allows consumers and even corporations³ to sue for \$50.00 or actual damages which may be trebled up to \$1,000.00 upon a finding of a " wil(ful) or know(ing) violat(ion) ".⁴ An additional civil penalty not to exceed \$10,000 may be imposed for a violation if the " conduct is perpetrated against one or more elderly persons "⁵. G.B.L. § 349 may be pre-empted by other consumer protection statutes⁶. Attorneys fees and costs may be recovered as well. As long as the deceptive business practice has " a broad impact on consumers at large "⁷ and constitutes " consumer-oriented conduct "⁸ proving a violation of GBL § 349 is straight forward. As stated in BNI N.Y. v. DeSanto⁹ " (GBL § 349) is a broad, remedial statute... directed towards

giving consumers a powerful remedy. The elements of a violation of (GBL § 349) are (1) proof that the practice was deceptive or misleading in a material respect and (2) proof that plaintiff was injured...There is no requirement under (GBL § 349) that plaintiff prove that defendant's practices and acts were intentional, fraudulent or even reckless. Nor does plaintiff have to prove reliance upon defendant's deceptive practices " .

A well pled G.B.L. § 349 claim need not particularize the deceptive practice but should, at a minimum, allege " that (defendants) engaged in consumer-related activity that effected consumers at large, utilized tactics that were deceptive and misleading in material respects, disseminated advertising through various mediums, that was false in material respects, and injury¹⁰ resulting from (defendants') business practices and advertising ") [Gabbay v. Mandel¹¹].

[A] **Threshold Of Deception**

Initially GBL § 349 had a low threshold for a finding of deception, i.e., misleading and deceptive acts directed to " the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions " [Guggenheimer v. Ginzburg]¹². Recently, the Court of Appeals raised the threshold to those

misleading and deceptive acts " likely to mislead a reasonable consumer acting reasonably under the circumstances " [Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.¹³].

[B] **Scope; Time To File; Accrual; Non-Residents; Independent Claim**

GBL § 349 applies to a broad spectrum of goods and services [Karlin v. IVF America¹⁴ (GBL 349... " on (its) face appl(ies) to virtually all economic activity and (its) application has been correspondingly broad...The reach of (this) statute ` provides needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State ` ")]. GBL § 349 is broader than common law fraud [Gaidon v. Guardian Life Insurance Company¹⁵ (" encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law "); State of New York v. Feldman¹⁶ (GBL § 349 " was intended to be broadly applicable, extending far beyond the reach of common law fraud ")]. Hence, GBL § 349 claims are governed by a three-year period of limitations [C.P.L.R. 241(2)]. GBL § 349 claims accrue when the consumer " has been injured by a deceptive act "¹⁷. GBL § 349 does not apply to the claims of non-residents

who did not enter into contracts in New York State [Goshen v. Mutual Life Insurance Company¹⁸] or received services in New York State [Scott v. Bell Atlantic Corp.¹⁹]. And, lastly, a GBL § 349 claim " does not need to be based on an independent private right of action " [Farino v. Jiffy Lube International, Inc.²⁰].

[C] **Territorial Limitations**

In Goshen v. The Mutual Life Ins. Co.²¹ [consumers of vanishing premium insurance policies] and Scott v. Bell Atlantic Corp.²², [consumers of Digital Subscriber Line (DSL)²³ Internet services], the Court of Appeals, not wishing to " tread on the ability of other states to regulate their own markets and enforce their own consumer protection laws " and seeking to avoid " nationwide, if not global application " , held that GBL § 349 requires that " the transaction in which the consumer is deceived must occur in New York ". Following this latest interpretation²⁴ of the " territorial reach " of GBL § 349 the Court in Truschel v. Juno Online Services, Inc.²⁵, a consumer class action alleging misrepresentations by a New York based Internet service provider, dismissed the GBL § 349 claim because the named representative entered into the Internet contract in Arizona. Notwithstanding the Goshen territorial limitation, the Court in Peck v. AT&T Corp.²⁶, a GBL 349 consumer class action involving cell phone

service which " improperly credited calls causing (the class) to lose the benefit of weekday minutes included in their calling plans ", approved a proposed settlement on behalf of residents in New York, New Jersey and Connecticut [" it would be a waste of judicial resources to require a different [GBL § 349] class action in each state...where, as here, the defendants have marketed their plans on a regional (basis) "].

[D] **Types Of Goods & Services Covered**

The types of goods and services to which GBL § 349 applies include the following:

[1] **Apartment Rentals** [Bartolomeo v. Runco²⁷ and Anilesh v. Williams²⁸ (renting illegal apartments); Yochim v. McGrath²⁹ (renting illegal sublets)];

[2] **Attorney Advertising** [People v. Law Offices of Andrew F. Capoccia³⁰(" The alleged conduct the instant lawsuit seeks to enjoin and punish is false, deceptive and fraudulent advertising practices "); Aponte v. Raychuk³¹(deceptive attorney advertisements [" Divorce, Low Fee, Possible 10 Days, Green Card "] violated Administrative Code of City of New York

§§ 20-70C et seq)];

[3] **Aupair Services** [Oxman v. Amoroso³²

(misrepresenting the qualifications of an abusive aupair to care for handicapped children)];

[4] **Arbitrator's Award; Refusal To Pay** [Lipscomb v.

Manfredi Motors³³ (auto dealer's refusal to pay arbitrator's award under GBL § 198-b (Used Car Lemon Law) is unfair and deceptive business practice under GBL § 349)];

[5] **Auctions; Bid Rigging** [State of New York v.

Feldman³⁴ (scheme to manipulate public stamp auctions comes " within the purview of (GBL § 349) ")];

[6] **Automotive; Contract Disclosure Rule** [Levitsky v.

SG Hylan Motors, Inc³⁵. (violation of G.B.L. § 396-p " and the failure to adequately disclose the costs of the passive alarm and extended warranty constitute a deceptive action (in violation of G.B.L. § 349)];

[7] **Budget Planning** [People v. Trescha Corp.³⁶

(company misrepresented itself as a budget planner which

" involves debt consolidation and...negotiation by the budget planner of reduced interest rates with creditors and the cancellation of the credit cards by the debtors...the debtor agrees to periodically send a lump sum payment to the budget planner who distributes specific amounts to the debtor's creditors ")];

[8] **Cars** [People v. Condor Pontiac³⁷ (used car dealer violated G.B.L. § 349 and V.T.L. § 417 in failing to disclose that used car was " previously used principally as a rental vehicle "; " In addition (dealer violated) 15 NYCRR §§ 78.10(d), 78.11(12),(13)...fraudulently and/or illegally forged the signature of one customer, altered the purchase agreements of four customers after providing copies to them, and transferred retail certificates of sale to twelve (12) purchasers which did not contain odometer readings...(Also) violated 15 NYCRR § 78.13(a) by failing to give the purchaser a copy of the purchase agreement in 70 instances (all of these are deceptive acts) "];

[9] **Cell Phones** [Naevus International, Inc. v. AT&T Corp.³⁸, (wireless phone subscribers seek damages for " frequent dropped calls, inability to make or receive calls and failure to obtain credit for calls that were involuntarily disconnected ")];

[10] **Clothing Sales** [Baker v. Burlington Coat Factory³⁹ (refusing to refund purchase price in cash for defective and shedding fake fur)];

[11] **Credit Cards** [People v. Telehublink⁴⁰ (" telemarketers told prospective customers that they were pre-approved for a credit card and they could receive a low-interest credit card for an advance fee of approximately \$220. Instead of a credit card, however, consumers who paid the fee received credit card applications, discount coupons, a merchandise catalog and a credit repaid manual "); Sims v. First Consumers National Bank⁴¹, (" The gist of plaintiffs' deceptive practices claim is that the typeface and location of the fee disclosures, combined with high-pressure advertising, amounted to consumer conduct that was deceptive or misleading "); Broder v. MBNA Corporation⁴² (credit card company misrepresented the application of its low introductory annual percentage rate to cash advances)];

[12] **Customer Information** [Anonymous v. CVS Corp.⁴³ (CVS acquired the customer files from 350 independent pharmacies without customers' consent; the " practice of intentionally declining to give customers notice of an impending transfer of their critical prescription information in order to increase the value of that information appears to be deceptive ")];

[13] **Defective Automobile Ignition Switches** [Ritchie v. Empire Ford Sales, Inc.⁴⁴ (dealer liable for damages to used car that burned up 4 ½ years after sale)];

[14] **Defective Brake Shoes** [Giarrantano v. Midas Muffler⁴⁵ (Midas Muffler fails to honor brake shoe warranty)];

[15] **Defective Dishwashers** [People v. General Electric Co., Inc⁴⁶(misrepresentations " made by...GE to the effect that certain defective dishwashers it manufactured were not repairable " was deceptive under G.B.L. § 349)];

[16] **Door-To-Door Sales** [New York Environmental Resources v. Franklin⁴⁷, (misrepresented and grossly overpriced water purification system); Rossi v. 21st Century Concepts, Inc.⁴⁸ (selling misrepresented and overpriced pots and pans)];

[17] **Educational Services** [Andre v. Pace University⁴⁹ (failing to deliver computer programming course for beginners); Brown v. Hambric⁵⁰ (failure to deliver travel agent education program)];

[18] **Employee Scholarship Programs** [Cambridge v. Telemarketing Concepts, Inc.⁵¹ (refusal to honor agreement to

provide scholarship to employee]];

[19] **Excessive & Unlawful Bail Bond Fees** [McKinnon v. International Fidelity Insurance Co.⁵²(misrepresentation of expenses in securing bail bonds)];

[20] **Exhibitions and Conferences** [Sharknet Inc. v. Telemarketing, NY Inc.⁵³ (misrepresenting length of and number of persons attending Internet exhibition)];

[21] **Furniture Sales** [Petrello v. Winks Furniture⁵⁴ (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty); Walker v. Winks Furniture⁵⁵ (falsely promising to deliver furniture within one week); Filpo v. Credit Express Furniture Inc.⁵⁶ (failing to inform Spanish speaking consumers of a three day cancellation period); Colon v. Rent-A-Center, Inc.⁵⁷ (rent-to-own furniture; " an overly inflated cash price " for purchase may violate GBL § 349)];

[22] **Hair Loss Treatment** [Mountz v. Global Vision Products, Inc.⁵⁸ (" marketing techniques (portrayed) as the modern day equivalent of the sales pitch of a snake oil salesman ", alleged misrepresentations of " no known side effects " without revealing documented side effects " which include cardiac

changes, visual disturbances, vomiting, facial swelling and exacerbation of hair loss "; G.B.L. § 349 claim stated for New York resident " deceived in New York ")];,

[23] **Home Heating Oil; Unilateral Price Increase**

[State v. Wilco Energy Corp.⁵⁹ (home heating oil company's " conduct constituted a deceptive practice. It offered a fixed-price contract and then refused to comply with its most material term-an agreed-upon price for heating oil ")];

[24] **Home Inspections** [Ricciardi v. Frank d/b/a/ InspectAmerica Enginerring,P.C.⁶⁰ (civil engineer liable for failing to discover wet basement)];

[25] **In Vitro Fertilization** [Karlin v. IVF America, Inc.⁶¹ (misrepresentations of in vitro fertilization rates of success)];

[26] **Insurance** [Gaidon v. Guardian Life Insurance Co. & Goshen v. Mutual Life Insurance Co.⁶² (misrepresentations that " out-of-pocket premium payments (for life insurance policies) would vanish within a stated period of time "); Brenkus v. Metropolitan Life Ins. Co.⁶³(misrepresentations by insurance agent as to amount of life insurance coverage); Acquista v. New

York Life Ins. Co..⁶⁴ (" allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability " " may be said to fall within the parameters of an unfair or deceptive practice "); Rubinoff v. U.S. Capitol Insurance Co..⁶⁵ (automobile insurance company fails to provide timely defense to insured); Makastchian v. Oxford Health Plans, Inc..⁶⁶ (practice of terminating health insurance policies without providing 30 days notice violated terms of policy and was a deceptive business practice because subscribers may have believed they had health insurance when coverage had already been canceled)];

[27] **Internet Marketing & Services** [Zurakov v. Register.Com, Inc..⁶⁷(" Given plaintiff's claim that the essence of his contract with defendant was to establish his exclusive use and control over the domain name ` Laborzionist.org ` and that defendant's usurpation of that right and use of the name after registering it for plaintiff defeats the very purpose of the contract, plaintiff sufficiently alleged that defendant's failure to disclose its policy of placing newly registered domain names on the ` Coming Soon ` page was material " and constitutes a deceptive act under G.B.L. § 349); People v. Network Associates, Inc..⁶⁸ (" Petitioner argues that the use of the words ` rules and regulations ` in the restrictive clause (prohibiting testing

and publication of test results of effectiveness of McAfee antivirus and firewall software) is designed to mislead consumers by leading them to believe that some rules and regulations outside (the restrictive clause) exist under state or federal law prohibiting consumers from publishing reviews and the results of benchmark tests...the language is (also) deceptive because it may mislead consumers to believe that such clause is enforceable under the lease agreement, when in fact it is not...as a result consumers may be deceived into abandoning their right to publish reviews and results of benchmark tests "); People v. Lipsitz⁶⁹ (failing to deliver purchased magazine subscriptions); Scott v. Bell Atlantic Corp.⁷⁰, (misrepresented Digital Subscriber Line (DSL)⁷¹ Internet services)];

[28] " **Knock-Off Telephone Numbers** [Drizin v. Sprint Corp.⁷² (" defendants' admitted practice of maintaining numerous toll-free call service numbers identical, but for one digit, to the toll-free call service numbers of competitor long-distance telephone service providers. This practice generates what is called ' fat-fingers ' business, i.e., business occasioned by the misdialing of the intended customers of defendant's competing long-distance service providers. Those customers, seeking to make long-distance telephone calls, are, by reason of their dialing

errors and defendants' many ' knock-off ' numbers, unwittingly placed in contact with defendant providers rather than their intended service providers and it is alleged that, for the most part, they are not advised of this circumstance prior to completion of their long-distance connections and the imposition of charges in excess of those they would have paid had they utilized their intended providers. These allegations set forth a deceptive and injurious business practice affecting numerous consumers (under G.B.L. 349) ")];

[29] **Lasik Eye Surgery** [Gabbay v. Mandel⁷³ (medical malpractice and deceptive advertising arising from lasik eye surgery)];

[30] **Liquidated Damages Clause** [Morgan Services, Inc. v. Episcopal Church Home & Affiliates Life Care Community, Inc⁷⁴. (it is deceptive for seller to enter " into contracts knowing that it will eventually fail to supply conforming goods and that, when the customer complains and subsequently attempts to terminate the contract (seller) uses the liquidated damages clause of the contract as a threat either to force the customer to accept the non-conforming goods or to settle the lawsuit ")];

[31] **Loan Applications** [Dunn v. Northgate Ford, Inc.⁷⁵

(automobile dealer completes and submits loan application to finance company and misrepresents teenage customer's ability to repay loan which resulted in default and sale of vehicle)];

[32] **Mislabeled** [Lewis v. Al DiDonna⁷⁶(pet dog dies from overdose of prescription drug, Feldene, mislabeled " 1 pill twice daily " when should have been " one pill every other day ")];

[33] **Mortgages** [Kidd v. Delta Funding Corp.⁷⁷(" The defendants failed to prove that their act of charging illegal processing fees to over 20,000 customers, and their failure to notify the plaintiffs of the existence and terms of the settlement agreement, were not materially deceptive or misleading "); Walts v. First Union Mortgage Corp⁷⁸. (consumers induced to pay for private mortgage insurance beyond requirements under New York Insurance Law § 6503); Negrin v. Norwest Mortgage, Inc.⁷⁹ (mortgagors desirous of paying off mortgages charged illegal and unwarranted fax and recording fees); Trang v. HSBC Mortgage Corp., USA⁸⁰ (\$15.00 special handling/fax fee for a faxed copy of mortgage payoff statement violates R.P.L. § 274-a(2)(a) which prohibits charges for mortgage related documents and is deceptive as well)];

[34] **Motor Oil Changes** [Farino v. Jiffy Lube International, Inc.⁸¹ (an " Environmental Surcharge " of \$.80 to dispose of used motor oil after every automobile oil change may be deceptive since under Environmental Conservation Law § 23-2307 Jiffy was required to accept used motor oil at no charge)];

[35] **Movers; Household Goods** [Goretsky v. ½ Price Movers, Inc⁸². (" failure to unload the household goods and hold them ' hostage ' is a deceptive practice under " G.B.L. § 349)];

[36] **Professional Networking** [BNI New York Ltd. v. DeSanto⁸³ (enforcing an unconscionable membership fee promissory note)];

[37] **Privacy** [Anonymous v. CVS Corp⁸⁴. (sale of confidential patient information by pharmacy to a third party is " an actionable deceptive practice " under G.B.L. 349); Smith v. Chase Manhattan Bank⁸⁵ (same)];

[38] **Pyramid Schemes** [C.T.V. Inc. v. Curlen⁸⁶ (selling bogus " Beat The System Program " certificates); Brown v. Hambric⁸⁷ (selling misrepresented instant travel agent credentials and educational services)];

[39] **Real Estate Sales** [Gutterman v. Romano Real Estate⁸⁸ (misrepresenting that a house with a septic tank was connected to a city sewer system); Board of Mgrs, of Bayberry Greens Condominium v. Bayberry Greens Associates⁸⁹ (deceptive advertisement and sale of condominium units); B.S.L. One Owners Corp. v. Key Intl. Mfg. Inc.⁹⁰(deceptive sale of shares in a cooperative corporation); Breakwaters Townhouses Ass'n. v. Breakwaters of Buffalo, Inc.⁹¹(condominium units); Latiuk v. Faber Const. Co.⁹²(deceptive design and construction of home); Polonetsky v. Better Homes Depot, Inc.⁹³(N.Y.C. Administrative Code §§ 20-700 et seq (Consumer Protection Law) applies to business of buying foreclosed homes and refurbishing and reselling them as residential properties; misrepresentations that recommended attorneys were approved by Federal Housing Authority deceptive)];

[40] **Securities** [Not Covered By GBL § 349] [Fesseha v. TD Waterhouse Investor Services, Inc.⁹⁴(" Finally, section 349 does not apply here because, in addition to being a highly regulated industry, investments are not consumer goods "); Berger v. E*Trade Group, Inc.⁹⁵ (" Securities instruments, brokerage accounts and services ancillary to the purchase of securities have been held to be outside the scope of the section ")];

[41] **Sports Nutrition Products** [Morelli v. Weider Nutrition Group, Inc.⁹⁶, (manufacturer of Steel Bars, a high-protein nutrition bar, misrepresented the amount of fat, vitamins, minerals and sodium therein)];

[42] **Termite Inspections** [Anunziata v. Orkin Exterminating Co., Inc.⁹⁷(misrepresentations of full and complete inspections of house and that there were no inaccessible areas are misleading and deceptive)];

[43] **Tobacco Products** [Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris Inc.⁹⁸(tobacco companies' scheme to distort body of public knowledge concerning the risks of smoking, knowing public would act on companies' statements and omissions was deceptive and misleading)];

[44] **Transportation Services, E-Z Passes** [Kinkopf v. Triborough Bridge & Tunnel Authority⁹⁹ (E-Z pass contract fails to reveal necessary information to customers wishing to make a claim and " on its face constitutes a deceptive practice ")];

[45] **Travel Services** [Meachum v. Outdoor World Corp.¹⁰⁰ (misrepresenting availability and quality of vacation campgrounds; Vallery v. Bermuda Star Line, Inc.¹⁰¹

(misrepresented cruise); Pellegrini v. Landmark Travel Group¹⁰²
(refundability of tour operator tickets misrepresented); People
v. P.U. Travel, Inc.¹⁰³(Attorney General charges travel agency
with fraudulent and deceptive business practices in failing to
deliver flights to Spain or refunds)];

[46] **TV Repair Shops** [Tarantola v. Becktronix, Ltd¹⁰⁴.
(TV repair shop's violation of " Rules of the City of New York
(6 RCNY 2-261 et seq)...that certain procedures be followed
when a licensed dealer receives an electronic or home appliance
for repair...constitutes a deceptive practice under (G.B.L. §
349)")];

[47] **Wedding Singers** [Bridget Griffin-Amiel v. Frank
Terris Orchestras¹⁰⁵ (the bait and switch¹⁰⁶ of a " 40-something
crooner " for the " 20-something " Paul Rich " who promised to
deliver a lively mix of pop hits, rhythm-and-blues and disco
classics ")]. For broken engagements and disputes over wedding
preparations, generally, see DeFina v. Scott¹⁰⁷.

4] **False Advertising: G.B.L. § 350**

Consumers who rely upon false advertising and purchase
defective goods or services may claim a violation of G.B.L. § 350

[Scott v. Bell Atlantic Corp.¹⁰⁸ (defective ` high speed ` Internet services falsely advertised); Card v. Chase Manhattan Bank¹⁰⁹ (bank misrepresented that its LifePlus Credit Insurance plan would pay off credit card balances were the user to become unemployed)]. GBL § 350 prohibits false advertising which " means advertising, including labeling, of a commodity...if such advertising is misleading in a material respect...(covers)....representations made by statement, word, design, device, sound...but also... advertising (which) fails to reveal facts material "¹¹⁰. GBL § 350 covers a broad spectrum of misconduct [Karlin v. IVF America¹¹¹ (" (this statute) on (its) face appl(ies) to virtually all economic activity and (its) application has been correspondingly broad ")]. Proof of a violation of GBL 350 is simple, i.e., " the mere falsity of the advertising content is sufficient as a basis for the false advertising charge " [People v. Lipsitz¹¹² (magazine salesman violated GBL § 350; " (the) (defendant's) business practice is generally ` no magazine, no service, no refunds " although exactly the contrary is promised "]).

5] Cars, Cars, Cars

There are a variety of consumer protection statutes available to purchasers and lessees of automobiles, new and used.

A comprehensive review of five of these statutes [GBL § 198-b¹¹³ (Used Car Lemon Law), express warranty¹¹⁴, implied warranty of merchantability¹¹⁵ (U.C.C. §§ 2-314, 2-318), Vehicle and Traffic Law [V&T] § 417, strict products liability¹¹⁶] appears in Ritchie v. Empire Ford Sales, Inc.¹¹⁷, a case involving a used 1990 Ford Escort which burned up 4 ½ years after being purchased because of a defective ignition switch. A comprehensive review of two other statutes [GBL § 198-a (New Car Lemon Law) and GBL § 396-p (New Car Contract Disclosure Rules)] appears in Borys v. Scarsdale Ford, Inc.¹¹⁸, a case involving a new Ford Crown Victoria, the hood, trunk and both quarter panels of which had been negligently repainted prior to sale.

[A] **Automotive Parts Warranty: G.B.L. § 617(2)(a)**

" The extended warranty and new parts warranty business generates extraordinary profits for the retailers of cars, trucks and automotive parts and for repair shops. It has been estimated that no more than 20% of the people who buy warranties ever use them... Of the 20% that actually try to use their warranties... (some) soon discover that the real costs can easily exceed the initial cost of the warranty certificate "¹¹⁹. In Giarratano v. Midas Muffler¹²⁰, Midas would not honor its brake shoe warranty unless the consumer agreed to pay for additional repairs found

necessary after a required inspection of the brake system. G.B.L. § 617(2)(a) protects consumers who purchase new parts or new parts' warranties from breakage or a failure to honor the terms and conditions of a warranty [" If a part does not conform to the warranty...the initial seller shall make repairs as are necessary to correct the nonconformity "¹²¹]. A violation of G.B.L. § 617(2)(a) is a per se violation of G.B.L. § 349 which provides for treble damages, attorneys fees and costs¹²².

[B] **Auto Repair Shop Duty To Perform Quality Repairs**

Service stations should perform quality repairs. Quality repairs are those repairs held by those having knowledge and expertise in the automotive field to be necessary to bring a motor vehicle to its pre malfunction or predamage condition [Welch v. Exxon Superior Service Center¹²³ (consumer sought to recover \$821.75 from service station for failing to make proper repairs to vehicle; " While the defendant's repair shop was required by law to perform quality repairs, the fact that the claimant drove her vehicle without incident for over a year following the repairs indicates that the vehicle had been returned to its pre malfunction condition following the repairs by the defendant, as required "); Shalit v. State of New York¹²⁴ (conflict in findings in Small Claims Court in auto repair case

with findings of Administrative Law Judge under VTL § 398).

[C] **Implied Warranty Of Merchantability: U.C.C. §§ 2-314, 2-318**

Both new and used cars carry with them an implied warranty of merchantability [U.C.C. §§ 2-314, 2-318][Denny v. Ford Motor Company¹²⁵]. Although broader in scope than the Used Car Lemon Law the implied warranty of merchantability does have its limits, i.e., it is time barred four years after delivery [U.C.C. § 2-725; Hull v. Moore Mobile Homes Stebra, Inc¹²⁶., (defective mobile home; claim time barred)] and the dealer may disclaim liability under such a warranty [U.C.C. § 2-316] if such a disclaimer is written and conspicuous [Natale v. Martin Volkswagen, Inc.¹²⁷ (disclaimer not conspicuous)].

[D] **Magnuson-Moss Warranty Act & Leased Vehicles: 15 U.S.C. §§ 2301 et seq**

In Tarantino v. DaimlerChrysler Corp.¹²⁸, DiCinto v. Daimler Chrysler Corp.¹²⁹ and Carter-Wright v. DaimlerChrysler Corp.¹³⁰, it was held that the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq. applies to automobile lease transactions. However, in DiCintio v. DaimlerChrysler Corp.¹³¹, the Court of Appeals held

that the Magnuson-Moss Warranty Act does not apply to automobile leases.

[E] **New Car Contract Disclosure Rule: G.B.L. § 396-p**

In Borys v. Scarsdale Ford, Inc¹³², a consumer demanded a refund or a new car after discovering that a new Ford Crown Victoria had several repainted sections. The Court discussed liability under GBL § 198-a (New Car Lemon Law) and GBL § 396-p(5) (Contract Disclosure Requirements) [" gives consumers statutory rescission rights ` in cases where dealers fail to provide the required notice of prior damage and repair(s)' (with a) ` retail value in excess of five percent of the lesser of manufacture's or distributor's suggested retail price ` "]. In Borys the Court dismissed the complaint finding (1) that under GBL § 198-a the consumer must give the dealer an opportunity to cure the defect and (2) that under GBL § 396-p(5) Small Claims Court would not have jurisdiction [money damages of \$3,000] to force " defendant to give...a new Crown Victoria or a full refund, minus appropriate deductions for use " .

In Levitsky v. SG Hylan Motors, Inc¹³³ a car dealer overcharged a customer for a 2003 Honda Pilot and violated G.B.L. 396-p by failing to disclose the " estimated delivery date and place of delivery...on the contract of sale ". The Court found

that the violation of G.B.L. § 396-p " and the failure to adequately disclose the costs of the passive alarm and extended warranty constitutes a deceptive act (in violation of G.B.L. § 349). Damages included " \$2,251.50, the \$2,301.50 which he overpaid, less the cost of the warranty of \$50.00 " and punitive damages under G.B.L. § 349(h) bringing the award up to \$3,000.00, the jurisdictional limit of Small Claims Court.

[F] **New Car Lemon Law: G.B.L. § 198-a**

New York State's New Car Lemon Law [GBL § 198-a] provides that " If the same problem cannot be repaired after four or more attempts; Or if your car is out of service to repair a problem for a total of thirty days during the warranty period; Or if the manufacturer or its agent refuses to repair a substantial defect within twenty days of receipt of notice sent by you...Then you are entitled to a comparable car or refund of the purchase price " [Borys v. Scarsdale Ford, Inc.¹³⁴]. Before commencing a lawsuit seeking to enforce the New Car Lemon Law the dealer must be given an opportunity to cure the defect [Chrysler Motors Corp. v. Schachner¹³⁵ (dealer must be afforded a reasonable number of attempts to cure defect)]. See, generally, Kucher v. DaimlerChrysler Corp¹³⁶. (judgment for defendant)].

[G] **Used Car Dealer Licensing: C.P.L.R. § 3015(e)**

In B & L Auto Group, Inc. v. Zilog¹³⁷ a used car dealer sued a customer to collect the \$2,500.00 balance due on the sale of a used car. Because the dealer failed to have a Second Hand Automobile Dealer's license pursuant to New York City Department of Consumer Affairs when the car was sold the Court refused to enforce the sales contract pursuant to C.P.L.R. § 3015(e).

[H] **Used Car Extended Warranty**

In Barthley v. Autostar Funding LLC¹³⁸ the consumer purchased a 1993 Lexus with over 110,000 miles and an extended warranty on the vehicle. After the vehicle experienced engine problems and a worn cam shaft was replaced at a cost of \$1,733.66 the consumer made a claim under the extended warranty. The claim was rejected by the warranty company " on the basis that a worn camshaft was a pre-existing condition ". The Court found this rejection unconscionable and awarded damages to cover the cost of the new camshaft. " In effect, the warranty company has chosen to warranty a ten year old car with over 110,000 miles on the odometer and then rejects a timely claim on the warranty on the basis that the car engine's internal parts are old and worn ".

[I] Used Car Lemon Law: G.B.L. § 198-b

New York State's Used Car Lemon Law [GBL § 198-b] provides limited warranty protection for ninety days or 4,000 miles, whichever comes first, for vehicles with odometer readings of less than 36,000 [Cintron v. Tony Royal Quality Used Cars, Inc.¹³⁹ (defective 1978 Chevy Malibu returned within thirty days and full refund awarded)]. Used car dealers must be given an opportunity to cure a defect before the consumer may commence a lawsuit enforcing his or her rights under the Used Car Lemon Law [Milan v. Yonkers Avenue Dodge, Inc.¹⁴⁰ (dealer must have opportunity to cure defects in used 1992 Plymouth Sundance)]. The Used Car Lemon Law does not preempt other consumer protection statutes [Armstrong v. Boyce¹⁴¹] and has been applied to used vehicles with coolant leaks [Fortune v. Scott Ford, Inc.¹⁴²], malfunctions in the steering and front end mechanism [Jandreau v. LaVigne¹⁴³], stalling and engine knocking [Ireland v. JL's Auto Sales, Inc.¹⁴⁴] and vibrations [Williams v. Planet Motor Car, Inc.¹⁴⁵] . An arbitrator's award may be challenged in a special proceeding [C.P.L.R. 7502] [Lipscomb v. Manfredi Motors¹⁴⁶]. Recoverable damages include the return of the purchase price and repair and diagnostic costs [Williams v. Planet Motor Car, Inc.¹⁴⁷].

[J] Warranty Of Serviceability: V.T.L. § 417

Used car buyers are also protected by Vehicle and Traffic Law § 417 [" V&T § 417 "] which requires used car dealers to inspect vehicles and deliver a certificate to buyers stating that the vehicle is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery. V&T § 417 is a non-waiveable, nondisclaimable, indefinite, warranty of serviceability which has been liberally construed [Barilla v. Gunn Buick Cadillac-GNC, Inc.¹⁴⁸; Ritchie v. Empire Ford Sales, Inc.¹⁴⁹ (dealer liable for Ford Escort that burns up 4 ½ years after purchase); People v. Condor Pontiac¹⁵⁰ (used car dealer violated G.B.L. § 349 and V.T.L. § 417 in failing to disclose that used car was " previously used principally as a rental vehicle "; " In addition (dealer violated) 15 NYCRR §§ 78.10(d), 78.11(12), (13)...fraudulently and/or illegally forged the signature of one customer, altered the purchase agreements of four customers after providing copies to them, and transferred retail certificates of sale to twelve (12) purchasers which did not contain odometer readings...(Also) violated 15 NYCRR § 78.13(a) by failing to give the purchaser a copy of the purchase agreement in 70 instances (all of these are deceptive acts) "];

Recoverable damages include the return of the purchase

price and repair and diagnostic costs [Williams v. Planet Motor Car, Inc.¹⁵¹].

6] Homes

[A] Home Improvement Frauds: G.B.L. § 772

G.B.L. § 772 provides homeowners victimized by unscrupulous home improvement contractors [who make " false or fraudulent written statements "] with statutory damages of \$500.00, reasonable attorneys fees and actual damages [Udezeh v. A+Plus Construction Co.¹⁵² (statutory damages of \$500.00, attorneys fees of \$1,500.00 and actual damages of \$3,500.00 awarded)].

[B] Home Improvement Contractor Licensing: C.P.L.R. §

3015(e)

Homeowners often hire home improvement contractors to repair or improve their homes or property. Home improvement contractors must, at least, be licensed by the Department of Consumer Affairs of New York City, Westchester County, Suffolk County, Rockland County, Putnam County and Nassau County if they are to perform services in those Counties [C.P.L.R. § 3015(e)]. Should the home improvement contractor be unlicensed he will be unable to

sue the homeowner for non-payment for services rendered [Tri-State General Remodeling Contractors, Inc v. Inderdai Baijnauth¹⁵³ (salesmen do not have to have a separate license); Routier v. Waldeck¹⁵⁴ (" The Home Improvement Business provisions...were enacted to safeguard and protect consumers against fraudulent practices and inferior work by those who would hold themselves out as home improvement contractors "); Cudahy v. Cohen¹⁵⁵ (unlicensed home improvement contractor unable to sue homeowner in Small Claims Courts for unpaid bills); Moonstar Contractors, Inc. v. Katsir¹⁵⁶(license of sub-contractor can not be used by general contractor to meet licensing requirements)]. Obtaining a license during the performance of the contract may be sufficient [Mandioc Developers, Inc. v. Millstone¹⁵⁷] while obtaining a license after performance of the contract is not sufficient [B&F Bldg. Corp. V. Liebig¹⁵⁸ (" The legislative purpose...was not to strengthen contractor's rights, but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor is licensed ")].

[C] **Housing Merchant Implied Warranty: G.B.L. § 777**

G.B.L. § 777 provides, among other things, for a statutory housing merchant warranty for the sale of a new house which for (1) one year warrants " the home will be free from defects due to

a failure to have been constructed in a skillful manner " and for (2) two years warrants that " the plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such systems in a skillful manner " and for (3) six years warrants " the home will free from material defects ". The statute also requires timely notice from aggrieved consumers [Rosen v. Watermill Development Corp.¹⁵⁹ (notice adequately alleged in complaint); Taggart v. Martano¹⁶⁰(failure to allege compliance with notice requirements (G.B.L. § 777-a(4)(a)) fatal to claim for breach of implied warranty)].

[D] **Movers, Household Goods: 17 N.Y.C.R.R. § 814.7**

In Goretsky v. ½ Price Movers, Inc¹⁶¹ claimant asserted that a mover hired to transport her household goods " did not start at time promised, did not pick-up the items in the order she wanted and when she objected (the mover) refused to remove her belongings unless they were paid in full ". The Court noted the absence of effective regulations of movers. " The biggest complaint is that movers refuse to unload the household goods unless they are paid...The current system is, in effect, extortion where customers sign documents that they are accepting delivery without complaint solely to get their belongings back.

This situation is unconscionable ". The Court found a violation of 17 N.Y.C.R.R. § 814.7 when the movers " refused to unload the entire shipment ", violations of G.B.L. § 349 in " that the failure to unload the household goods and hold them ' hostage ' is a deceptive practice " and a failure to disclose relevant information in the contract and awarded statutory damages of \$50.00.

7] Loans & Credit

- [A] Fair Credit Reporting Act: 15 U.S.C. §§ 1681 et seq
- [B] Home Ownership and Equity Protection: 15 U.S.C. § 1639
- [C] Real Estate Settlement Procedures Act: 12 U.S.C. § 2601
- [D] Regulation Z: 12 C.F.R. §§ 226.1 et seq.
- [E] Truth In Lending Act: 15 U.S.C. §§ 1601 et seq

Consumers may sue for a violation of several federal statutes which seek to protect borrowers, e.g., including the (1) Truth In Lending Act, 15 U.S.C.A. §§ 1601-1665 [TILA], (2) the Fair Credit Reporting Act, 15 U.S.C. § 1681, (3) the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 [RESPA], (4) the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639 [HOEPA] and (5) Regulation Z, 13 C.F.R. §§ 226.1 et seq. and recover appropriate damages [See e.g., Bank of New York v.

Walden¹⁶² (counterclaiming borrowers allege violations of TILA, HOEPA and Regulation Z; " mortgages were placed on...defendants' properties without their knowledge or understanding. Not the slightest attempt at compliance with applicable regulations was made by the lenders. No Truth in Lending disclosures or copies of any of the loan documents signed at the closing were given to the defendants. Thus, plaintiffs did not comply with TILA and Regulation Z...It also appears that the lenders violated HOEPA and Regulation Z in that they extended credit to the defendant based on their collateral rather than considering their incomes...The lenders also violated Regulation Z which prohibits lenders from entering into a balloon payment note with borrowers on high-interest, high fee loans "; injunction preventing eviction issued); Community Mutual Savings Bank v. Gillen¹⁶³ (borrower counterclaims in Small Claims Court for violation of TILA and is awarded rescission of loan commitment with lender and damages of \$400.00; " TILA (protects consumers) from the inequities in their negotiating position with respect to credit and loan institutions...(TILA) requir(es) lenders to provide standard information as to costs of credit including the annual percentage rate, fees and requirements of repayment...(TILA) is liberally construed in favor of the consumer...The borrower is entitled to rescind the transaction ' until midnight of the third business day following the consummation of the transaction or the

delivery of the information and rescission forms required ... together with a statement containing the material disclosures required... whichever is later...The consumer can opt to rescind for any reasons, or for no reason "); Rochester Home Equity, Inc. v. Upton¹⁶⁴ (mortgage lock-in fee agreements are covered by TILA and RESPA; " There is nothing in the New York regulations concerning lock-in agreements that sets out what disclosures are required and when they must be made...In keeping with the trend toward supplying consumers with more information than market forces alone would provide, TILA is meant to permit a more judicious use of credit by consumers through a ' meaningful disclosure of credit terms '...It would clearly violate the purpose behind TILA and RESPA to allow fees to be levied before all disclosures were made...the court holds that contracts to pay fees such as the lock-in agreements must be preceded by all the disclosures that federal law requires "); Tyk v. Equifax Credit Information Services, Inc.¹⁶⁵ (consumer who recovered damages under the Fair Credit Reporting Act denied an award of attorneys fees (" more must be shown than simply prevailing in litigation. It must be shown that the party who did not prevail acted in bad faith or for purposes of harassment ")]. TILA has been held to preempt Personal Property Law provisions governing retail instalment contracts and retail credit agreements [Albank, FSB v. Foland¹⁶⁶] and both TILA and RESPA have been held to " preempt

any inconsistent state law " [Rochester Home Equity, Inc. v. Upton¹⁶⁷)].

[F] Fees For Mortgage Related Documents: R.P.L. § 274-a(2)(a)

In Dougherty v. North Ford Bank¹⁶⁸ the Court found that the lender had violated R.P.L. § 274-a(2)(a) which prohibits the charging of fees for " for providing mortgage related documents " by charging consumer a \$5.00 " Facsimile Fee " and a \$25.00 " Quote Fee ". See also: Negrin v. Norwest Mortgage¹⁶⁹.

8] Overcoats Lost At Restaurants: G.B.L. § 201

" For over 100 years consumers have been eating out at restaurants, paying for their meals and on occasion leaving without their simple cloth overcoats...mink coats...mink jackets...raccoon coats...Russian sable fur coats...leather coats and, of course, cashmere coats..."¹⁷⁰. In DiMarzo v. Terrace View¹⁷¹, restaurant personnel encouraged a patron to remove his overcoat and then refused to respond to a claim after the overcoat disappeared from their coatroom. In response to a consumer claim arising from a lost overcoat the restaurant may seek to limit its liability to \$200.00 as provided for in General

Business Law § 201 [" GBL § 201 "]. However, a failure to comply with the strict requirements of GBL § 201 ["` as to property deposited by...patrons in the...checkroom of any...restaurant, the delivery of which is evidenced by a check or receipt therefor and for which no fee or charge is exacted...'"¹⁷²] allows the consumer to recover actual damages upon proof of a bailment and/or negligence¹⁷³. The enforceability of liability limiting clauses for lost clothing will often depend upon adequacy of notice [Tannenbaum v. New York Dry Cleaning, Inc.¹⁷⁴ (clause on dry cleaning claim ticket limiting liability for lost or damaged clothing to \$20.00 void for lack of adequate notice)].

9] **Pyramid Schemes: G.B.L. § 359-fff**

"` (a pyramid scheme) is one in which a participant pays money...and in return receives (1) the right to sell products, and (2) the right to earn rewards for recruiting other participants into the scheme "`¹⁷⁵. Pyramid schemes are sham money making schemes which prey upon consumers eager for quick riches. General Business Law § 359-fff [" GBL § 359-fff "] prohibits " chain distributor schemes " or pyramid schemes voiding the contracts upon which they are based. Pyramid schemes were used in Brown v. Hambric¹⁷⁶ to sell travel agent education programs

[" There is nothing new ' about NU-Concepts. It is an old scheme, simply, repackaged for a new audience of gullible consumers mesmerized by the glamour of travel industry and hungry for free or reduced cost travel services "] and in C.T.V., Inc. v. Curlen¹⁷⁷, to sell bogus " Beat The System Program " certificates. While, at least, one Court has found that only the Attorney General may enforce a violation of GBL 359-fff¹⁷⁸, other Courts have found that GBL 359-fff gives consumers a private right of action¹⁷⁹, a violation of which also constitutes a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs¹⁸⁰.

10] Real Property, Apartments & Co-Ops

[A] Real Property Condition Disclosure Act: R.P.L. §§ 462-465

With some exceptions [Real Property Law § 463] Real Property Law § 462 [" RPL "] requires sellers of residential real property to file a disclosure statement detailing known defects. Sellers are not required to undertake an inspection but must answer 48 questions about the condition of the real property. A failure to file such a disclosure statement allows the buyer to receive a \$500 credit against the agreed upon price

at closing [RPL § 465] . A seller who files such a disclosure statement " shall be liable only for a willful failure to perform the requirements of this article. For such a wilfull failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory relief " [RPL 465(2)]. For an excellent discussion of this statute see Malach v. Chuang¹⁸¹(improper completion of disclosure form regarding water damage caused by swimming pool; only monetary remedy available is \$500 credit to purchaser; by accepting disclosure form with answers " unknown " purchasers waived claims of defects)].

[B] **Warranty Of Habitability: R.P.L. § 235-b**

Tenants in Spatz v. Axelrod Management Co.¹⁸² and coop owners in Seecharin v. Radford Court Apartment Corp.¹⁸³ brought actions for damages done to their apartments by the negligence of landlords, managing agents or others, i.e., water damage from external or internal sources. Such a claim may invoke Real Property Law § 235-b [" RPL § 235-b "] , a statutory warranty of habitability in every residential lease " that the premises...are fit for human habitation ". RPL § 235-b " has provided consumers with a powerful remedy to encourage landlords to maintain apartments in a decent, livable condition "¹⁸⁴ and may

be used affirmatively in a claim for property damage¹⁸⁵ or as a defense in a landlord's action for unpaid rent¹⁸⁶. Recoverable damages may include apartment repairs, loss of personal property and discomfort and disruption¹⁸⁷.

[C] **Duty To Keep Rental Premises In Good Repair: M.D.L. § 78.**

In Goode v. Bay Towers Apartments Corp.¹⁸⁸ the tenant sought damages from his landlord arising from burst water pipes under Multiple Dwelling Law § 78 which provides that " Every multiple dwelling...shall be kept in good repair ". The Court applied the doctrine of *res ipsa loquitur* and awarded damages of \$264.87 for damaged sneakers and clothing, \$319.22 for bedding and \$214.98 for a Playstation and joystick.

11] **Retail Sales & Leases**

[A] **Consumer Contract Type Size: C.P.L.R. § 4544**

C.P.L.R. § 4544 provides that " any printed contract... involving a consumer transaction...where the print is not clear and legible or is less than eight points in depth...May not be received in evidence in any trial ". C.P.L.R. § 4544 has been

applied in consumer cases involving property stolen from a health club locker¹⁸⁹, car rental agreements¹⁹⁰, home improvement contracts¹⁹¹, dry cleaning contracts¹⁹² and financial brokerage agreements¹⁹³. However, this consumer protection statute does not apply to cruise passenger contracts which are, typically, in smaller type size and are governed by maritime law [see e.g., Lerner v. Karageorgis Lines, Inc.¹⁹⁴ (maritime law preempts state consumer protection statute regarding type size; cruise passenger contracts may be in 4 point type) and may not apply if it conflicts with federal Regulation Z [Sims v. First Consumers National Bank¹⁹⁵(" Regulation Z does not preempt state consumer protection laws completely but requires that consumer disclosures be ` clearly and conspicuously in writing ` (12 CFR 226.5(a)(1)) and, considering type size and placement, this is often a question of fact ")].

[B] **Dogs And Cat Sales: G.B.L. § 752**

Disputes involving pet animals are often brought in Small Claims Courts [see e.g., Mongelli v. Cabral¹⁹⁶ (" The plaintiffs ...and the defendants...are exotic bird lovers. It is their passion for exotic birds, particularly, for Peaches, a five year old white Cockatoo, which is at the heart of this controversy"); Mathew v. Klinger¹⁹⁷ (" Cookie was a much loved Pekinese who

swallowed a chicken bone and died seven days later. Could Cookie's life have been saved had the defendant Veterinarians discovered the presence of the chicken bone sooner? "); O'Brien v. Exotic Pet Warehouse, Inc.¹⁹⁸ (pet store negligently clipped the wings of Bogey, an African Grey Parrot, who flew away); Nardi v. Gonzalez¹⁹⁹ (" Bianca and Pepe are diminutive, curly coated Bichon Frises (who were viciously attacked by) Ace...a large 5 year old German Shepherd weighing 110 pounds "); Mercurio v. Weber²⁰⁰ (two dogs burned with hair dryer by dog groomer, one dies and one survives, damages discussed)].

General Business Law §§ 752 et seq applies to the sale of dogs and cats by pet dealers and gives consumers rescission rights fourteen days after purchase if a licensed veterinarian " certifies such animal to be unfit for purchase due to illness, a congenital malformation which adversely affects the health of the animal, or the presence of symptoms of a contagious or infectious disease " [GBL § 753]. The consumer may (1) return the animal and obtain a refund of the purchase price plus the costs of the veterinarian's certification, (2) return the animal and receive an exchange animal plus the certification costs, or (3) retain the animal and receive reimbursement for veterinarian services in curing or attempting to cure the animal. In addition, pet dealers are required to have animals inspected by a veterinarian prior to sale [GBL § 753-a] and provide consumers

with necessary information [GBL §§ 753-b, 753-c]. Several Courts have applied GBL §§ 752 et seq in Small Claims Courts [see e.g., Fuentes v. United Pet Supply, Inc.²⁰¹ (miniature pinscher puppy diagnosed with a luxating patella in left rear leg; claims under GBL § 753 must be filed within fourteen days; claim valid under UCC § 2-324); Saxton v. Pets Warehouse, Inc.²⁰² (consumer's claims for unhealthy dog are not limited to GBL § 753(1) but include breach of implied warranty of merchantability under UCC § 2-714); Smith v. Tate²⁰³ (five cases involving sick German Shepherds); Sacco v. Tate²⁰⁴ (buyers of sick dog could not recover under GBL § 753 because they failed to have dog examined by licensed veterinarian)].

[C] **Door-To-Door Sales: G.B.L. §§ 425-431**

" Some manufacturers...favor door-to-door sales (because) ...the selling price may be several times greater than...in a more competitive environment (and)...consumers are less defensive...in their own homes and...are, especially, susceptible to high pressure sales tactics "²⁰⁵. Personal Property Law [" PPL "] §§ 425-431 " ` afford(s) consumers a ` cooling-off' period to cancel contracts which are entered into as a result of high pressure door-to-door sales tactics' "²⁰⁶. PPL § 428 provides consumers with rescission rights should a salesman fail to

complete a Notice Of Cancellation form on the back of the contract. PPL § 428 has been used by consumers in New York Environmental Resources v. Franklin²⁰⁷ (misrepresented and grossly overpriced water purification system), Rossi v. 21st Century Concepts, Inc.²⁰⁸ [misrepresented pots and pans costing \$200.00 each], Kozlowski v. Sears²⁰⁹ [vinyl windows hard to open, did not lock properly and leaked] and in Filpo v. Credit Express Furniture Inc²¹⁰. [unauthorized design and fabric color changes and defects in overpriced furniture]. Rescission is also appropriate if the Notice of Cancellation form is not in Spanish for Spanish speaking consumers²¹¹. A failure to " comply with the disclosure requirements of PPL 428 regarding cancellation and refund rights " is a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs²¹². In addition PPL 429(3) provides for an award of attorneys fees.

[D] **Lease Renewal Provisions: G.O.L. § 5-901**

In Andin International Inc. v. Matrix Funding Corp.²¹³ the Court held that the automatic renewal provision in a computer lease was ineffective under G.O.L. § 5-901 because the lessor failed to notify lessee of lessee's obligation to provide notice of intention not to renew. In addition, the provision may be unconscionable (under terms of lease unless lessee " is willing

to meet the price unilaterally set for the purchase of the equipment, (lessee) will be bound for a successive 12-month period to renting the equipment. This clause, which, in essence, creates a perpetual obligation, is sufficiently one-sided and imbalanced so that it might be found to be unconscionable (under Utah law) ")].

[E] **Licensing To Do Business: C.P.L.R. § 3015(e)**

C.P.L.R. § 3015(e) provides, in part, that " Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed...the complaint shall allege...that plaintiff is duly licensed...The failure of the plaintiff to comply...will permit the defendant (consumer) to move for dismissal ". This rule has been applied to

[1] **Home Improvement Contractors** [Tri-State General Remodeling Contractors, Inc v. Inderdai Baijnauth²¹⁴ (salesmen do not have to have a separate license); Routier v. Waldeck²¹⁵ (" The Home Improvement Business provisions...were enacted to safeguard and protect consumers against fraudulent practices and inferior work by those who would hold themselves out as home improvement contractors "); Cudahy v. Cohen²¹⁶ (unlicensed home

improvement contractor unable to sue homeowner in Small Claims Courts for unpaid bills); Moonstar Contractors, Inc. v. Katsir²¹⁷(license of sub-contractor can not be used by general contractor to meet licensing requirements). Obtaining a license during the performance of the contract may be sufficient (Mandioc Developers, Inc. v. Millstone²¹⁸) while obtaining a license after performance of the contract is not sufficient (B&F Bldg. Corp. V. Liebig²¹⁹ (" The legislative purpose...was not to strengthen contractor's rights, but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor is licensed ")]);

[2] **Used Car Dealers** [B & L Auto Group, Inc. v. Zilog²²⁰ (used car dealer's claim against consumer for balance of payment for used car of \$2,500.00 dismissed for a failure to have a Second Hand Automobile Dealer's license pursuant to New York City Department of Consumer Affairs Regulation when the car was sold)];

[3] **Other Licensed Businesses** [B & L Auto Group, Inc. v. Zilog²²¹ (" The legal consequences of failing to maintain a required license are well known. It is well settled that not being licensed to practice in a given field which requires a license precludes recovery for the services performed " either

pursuant to contract or in quantum merit...This bar against recovery applies to...architects and engineers, car services, plumbers, sidewalk vendors and all other businesses...that are required by law to be licensed ")].

[F] **Merchandise Delivery Dates: G.B.L. § 396-u**

" In order to induce a sale furniture and appliance store salesman often misrepresent the quality, origin, price, terms of payment and delivery date of ordered merchandise "²²². In Walker v. Winks Furniture²²³, a salesman promised delivery of new furniture within one week and then refused to return the consumer's purchase price when she canceled two weeks later unless she paid a 20% cancellation penalty. GBL § 396-u protects consumers from unscrupulous salesmen who promise that merchandise will be delivered by specific date when, in fact, it is not. A violation of GBL § 396-u [failing to disclose an estimated delivery date in writing when the order is taken [GBL § 396-u(2)], failing to advise of a new delivery date and giving the consumer the opportunity to cancel [GBL § 396-u(2)(b)], failing to honor the consumer's election to cancel without imposing a cancellation penalty [GBL § 396-u(s)©)], failing to make a full refund within two weeks of a demand without imposing a cancellation penalty [GBL § 396-u(2)(d)]] allows the consumer

to rescind the purchase contract without incurring a cancellation penalty²²⁴. A violation of GBL 396-u is a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs²²⁵. In addition, GBL 396-u(7) provides for a trebling of damages upon a showing of a wilful violation of the statute²²⁶.

In Dweyer v. Montalbano's Pool & Patio Center, Inc²²⁷ a furniture store failed to timely deliver two of six purchased chairs. The Court found that the delayed furniture was not " custom-made " and that the store violated G.B.L. § 396-u(2) in failing to fill in an " ` estimated delivery date ` on the form as required by statute ", failing to give notice of the delay and advising the customer of her right to cancel under G.B.L. § 396-u(2)(b). The Court awarded G.B.L. § 396-u damages of \$287.12 for the two replacement chairs, trebled to \$861.36 under G.B.L. 396-u(7). In addition the Court granted rescission under U.C.C. § 2-601 [" if the goods or tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole..."] awarding the customer the contract price of \$2,868.63 upon return of the furniture.

[G] **Retail Refund Policies: G.B.L. § 218-a**

Some stores refuse to refund the consumer's purchase price in cash upon the return of a product [" Merchandise, in New

Condition, May be Exchanged Within 7 Days of Purchase for Store Credit...No Cash Refunds or Charge Credits "²²⁸]. In Baker v. Burlington Coat Factory Warehouse²²⁹, a clothing retailer refused to refund the consumer's cash payment when she returned a shedding and defective fake fur two days after purchase. General Business Law § 218-a [" GBL § 218-a "] permits retailers to enforce a no cash refund policy if there are a sufficient number of signs notifying consumers of " its refund policy including whether it is ` in cash, or as credit or store credit only `"²³⁰. If, however, the product is defective and there has been a breach of the implied warranty of merchantability [U.C.C. § 2-314] then consumers may recover all appropriate damages including the purchase price in cash [U.C.C. § 2-714]²³¹. In essence, U.C.C. § 2-314 preempts²³² GBL § 218-a [Baker v. Burlington Coat Factory Warehouse²³³ (defective shedding fake fur); Dudzik v. Klein's All Sports²³⁴ (defective baseball bat)]. It has been held that a " failure to inform consumers of their statutory right to a cash or credit card charge refund when clothing is defective and unwearable " is a violation of GBL 349 which provides for treble damages, attorneys fees and costs²³⁵.

[H] **Rental Purchase Agreement: P.P.L. § 500**

Personal Property Law §§ 500 et seq [" PPL §§ 500 et seq]

provides consumers who enter into rental purchase agreements with certain reinstatement rights should they fall behind in making timely payments or otherwise terminate the contract [PPL § 501]. In Davis v. Rent-A-Center of America, Inc²³⁶ the Court awarded the consumer damages of \$675.73 because the renter had failed to provide substitute furniture of a comparable nature after consumer reinstated rental purchase agreement after skipping payment. In Sagiede v. Rent-A-Center²³⁷ the Court awarded the consumers damages of \$2,124.04 after their TV was repossessed (" this Court finds that, in keeping with the intent of Personal Property Law which attempts to protect the consumer while simultaneously allowing for a competitive business atmosphere in the rental-purchase arena, that the contract at bar fails to reasonably assess the consumer of his rights concerning repossession ").

[I] **Implied Warranty Of Merchantability: U.C.C. § 2-314**

U.C.C. § 2-314 provides consumers with an implied warranty of merchantability for products and has arisen in consumer lawsuits involving alarm and monitoring systems [Cirillo v. Slomin's Inc.²³⁸ (contract clause disclaiming express or implied warranties enforced), kitchen cabinet doors [Malul v. Capital Cabinets, Inc.²³⁹ (kitchen cabinets that melted in close

proximity to stove constitutes a breach of implied warranty of merchantability; purchase price proper measure of damages), fake furs [Baker v. Burlington Coat Factory Warehouse²⁴⁰ (U.C.C. § 2-314 preempts²⁴¹ GBL § 218-a), baseball bats [Dudzik v. Klein's All Sports²⁴²] and dentures [Shaw-Crummel v. American Dental Plan²⁴³ (" Therefore implicated in the contract ...was the warranty that the dentures would be fit for chewing and speaking. The two sets of dentures...were clearly not fit for these purposes ")].

12] Telemarketing

It is quite common for consumers to receive unsolicited phone calls at their homes from mortgage lenders, credit card companies and the like. Many of these phone calls originate from automated telephone equipment or automatic dialing-announcing devices, the use of which is regulated by Federal and New York State consumer protection statutes.

[A] Federal Telemarketing Rule: 47 U.S.C. § 227

On the Federal level the Telephone Consumer Protection Act²⁴⁴ [TCPA] prohibits users of automated telephone equipment " to initiate any telephone call to any residential telephone line

using an artificial or prerecorded voice to deliver a message without express consent of the called party "245. The purpose of the TCPA is to provide " a remedy to consumers who are subjected to telemarketing abuses and ' to encourage consumers to sue and obtain monetary awards based on a violation of the statute ' "246

The TCPA may be used by consumers in New York State Courts including Small Claims Court [Kaplan v. Democrat & Chronicle²⁴⁷; Shulman v. Chase Manhattan Bank,²⁴⁸ (TCPA provides a private right of action which may be asserted in New York State Courts)]. Some Federal Courts have held that the states have exclusive jurisdiction over private causes of action brought under the TCPA²⁴⁹ while some scholars have complained that " Congress intended for private enforcement actions to be brought by *pro se* plaintiffs in small claims court and practically limited enforcement to such tribunals "250. Under the TCPA consumers may recover their actual monetary loss for each violation or up to \$500.00 in damages, whichever is greater [Kaplan v. Life Fitness Center²⁵¹ (" that plaintiff is entitled to damages of \$500 for the TCPA violation (and) an additional award of damages of \$500 for violation of the federal regulation "; treble damages may be awarded upon a showing that " defendant willfully and knowingly violated "252 the Act); Antollino v. Hispanic Media Group, USA, Inc²⁵³. (plaintiff who received 33 unsolicited fax transmissions awarded " statutory

damages of \$16,500 or \$500 for each violation ")]. In 2001 a Virginia state court class action against Hooters resulted in a jury award of \$12 million on behalf of 1,321 persons who had received 6 unsolicited faxes²⁵⁴. Recently, the Court in Redgayzer & Gratt v. Enine, Inc.²⁵⁵ held that the TPCA, to the extent it restricts unsolicited fax advertisements, is unconstitutional as violative of freedom of speech while in Bonime v. Management Training International²⁵⁶ the Court declined to pass on the constitutionality of TPCA for a lack of jurisdiction.

[B] **New York's Telemarketing Rule: G.B.L. § 399-p**

On the State level, General Business Law § 399-p [" GBL § 399-p "] " also places restrictions on the use of automatic dialing-announcing devices and placement of consumer calls in telemarketing "²⁵⁷ such as requiring the disclosure of the nature of the call and the name of the person on whose behalf the call is being made. A violation of GBL § 399-p allows recovery of actual damages or \$50.00, whichever is greater, including trebling upon a showing of a wilful violation.

Consumers aggrieved by telemarketing abuses may sue in Small Claims Court and recover damages under both the TCPA and GBL § 399-p [Kaplan v. First City Mortgage²⁵⁸ (consumer sues telemarketer in Small Claims Court and recovers \$500.00 for a

violation of TCPA and \$50.00 for a violation of GBL § 399-p);
Kaplan v. Life Fitness Center²⁵⁹ (consumer recovers \$1,000.00 for
violations of TCPA and \$50.00 for a violation of GBL § 399-p)].

[C] **Telemarketing Abuse Act: G.B.L. § 399-pp**

Under General Business Law § 399-z [" GBL § 399-z "],
known as the " Do Not Call " rule, consumers may prevent
telemarketers from making unsolicited telephone calls by filing
their names and phone numbers with a statewide registry. " No
telemarketer...may make...any unsolicited sales calls to any
customer more than thirty days after the customer's name and
telephone number(s)...appear on the then current quarterly no
telemarketing sales calls registry ". Violations of this rule may
subject the telemarketer to a maximum fine of \$2,000.00. In March
of 2002 thirteen telemarketers accepted fines totaling \$217,000
for making calls to persons who joined the Do Not Call
Registry.²⁶⁰ In addition " [n]othing (in this rule) shall be
construed to restrict any right which any person may have under
any other statute or at common law " .

[D] **Telemarketing Abuse Prevention Act: G.B.L. § 399-pp**

Under General Business Law § 399-pp [" GBL § 399-pp "]

known as the Telemarketing And Consumer Fraud And Abuse Prevention Act, telemarketers must register and pay a \$500 fee [GBL § 399-pp(3)] and post a \$25,000 bond " payable in favor of (New York State) for the benefit of any customer injured as a result of a violation of this section " [GBL § 399-pp(4)]. The certificate of registration may be revoked and a \$1,000 fine imposed for a violation of this section and other statutes including the Federal TCPA. The registered telemarketer may not engage in a host of specific deceptive [GBL § 399-pp(6)(a)] or abusive [GBL § 399-pp(7)] telemarketing acts or practices, must provide consumers with a variety of information [GBL § 399-pp(6)(b)] and may telephone only between 8:00AM to 9:00PM. A violation of GBL § 399-pp is also a violation of GBL § 349 and also authorizes the imposition of a civil penalty of not less than \$1,000 nor more than \$2,000.

FOOTNOTES

1. Thomas A. Dickerson is a Justice of the New York State Supreme Court, Ninth Judicial District, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York, 10606. See Justice Dickerson's Web Page at <http://members.aol.com/judgetad/index.html>. Justice Dickerson is the author of Travel Law, Law Journal Press, New York, 1981-2004, see Travel Law's Web Page at <http://members.aol.com/travellaw/index.html>, Class Actions: The Law of 50 States, Law Journal Press, 1988-2004, See Class Action's Web Page at <http://members.aol.com/class50/index.html>, and over 200 articles and papers on consumer law issues, many of which are available at www.consumerlaw.org/links/#travel_articles and www.classactionlitigation.com/library/ca_articles.html
2. For an excellent discussion of General Business Law § 349 see Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris Inc., 178 F. Supp. 2d 198 (E.D.N.Y. 2001).
3. See e.g., Blue Cross and Blue Shield v. Philip Morris USA, 344 F. 3d 211 (2d Cir 2003)("...a plaintiff need neither be a consumer nor be someone standing in the shoes of a consumer to have an actionable claim under (G.B.L. § 349)..." although the statute is, at its core, a consumer protection device...it does provide a right of action to any person who has been injured by reason of any violation of this section '...We therefore held that a party has standing under Section 349 when its complaint alleges a ` consumer injury or harm to the public interest `... Thus ` the critical question...is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer `. Here Appellants' deceptive practices involved serious harm to the public...induced consumers to smoke and discouraged them from quitting smoking, thus significantly increasing their risk of illness and even death. Accordingly, we find that the fact that (plaintiff) was not a consumer of defendants' products does not prevent it from having standing to sue on its own behalf under Section 349 "). New York Court of Appeals accepted two certified questions on scope of G.B.L. § 349 at 100 N.Y. 2d 636, 801 N.E. 2d 417, 769 N.Y.S. 2d 196 (2003).
4. See e.g., Hart v. Moore, 155 Misc. 2d 203, 587 N.Y.S. 2d 477, 480 (1992). However, at least, one court has awarded damages exceeding the \$1,000.00 limit. See Lipscomb v. Manfredi Motors, New York Law Journal, April 2, 2002, p. 21 (N.Y. Civ.) (damages consisted of the " balance owed to the claimant pursuant to the arbitrator's award...reduced to the jurisdictional amount of \$3,000 ") and Levitsky v. SG Hylan

Motors, Inc., New York Law Journal, July 3, 2003, p. 27, col. 5 (N.Y. Civ. 2003)(" In addition GBL 349(h) allows the court to award punitive damages. The actions of the defendant entitled the claimant to an award of actual damages and punitive damages up to the \$3,000.00, the jurisdictional limit of small claims part ").

5. **State of New York v. Justin**, 2003 WL 23269283 (N.Y. Sup. 2003)(investment scheme for the purchase of payphones marketed to elderly).

6. **People v. Gift & Luggage Outlet**, 194 Misc. 2d 582 (N.Y. Sup. 2003)(G.B.L. §§ 870 et seq. prohibiting the sale of imitation weapons preempts G.B.L. § 349 (G.B.L. § 873 was enacted " to prescribe the enforcement mechanisms and penalties to be imposed for violations of (G.B.L. § 872). To accept the...argument that a violation of section 872 should also lead to the imposition of additional penalties pursuant to (G.B.L. §§ 349 and 350-d) would upset the statutory scheme and impose double penalties for the same violation in a manner not intended by the Legislature ").

7. **Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.**, 85 N.Y. 2d 20, 623 N.Y.S. 2d 529, 532, 647 N.E. 2d 741 (1995). See also **Walts v. Melon Mortgage Corporation**, 259 A.D. 2d 322, 686 N.Y.S. 2d 428 (1999)(" Plaintiffs have adequately alleged a materially deceptive practice aimed at consumers "), **appeal dismissed** 94 N.Y. 2d 795, 700 N.Y.S. 2d 424, 722 N.E. 2d 504 (1999); **Dunn v. Northgate Ford, Inc.**, 1 Misc. 3d 911(A)(N.Y. Sup. 2004)(" there is evidence from other affiants that similar omissions and/or misstatements of fact, known to the dealer to be false or misleading...occurred in other sales at the same dealership...such practices are not isolated instances and would have a ` broader impact on consumers at large ` "); **McKinnon v. International Fidelity Insurance Co.**, 182 Misc. 2d 517, 522 (N.Y. Sup. 1999)(" the conduct must be consumer-oriented and have a broad impact on consumers at large ").

8. See e.g., **Berardino v. Ochlan**, 2 A.D. 3d 556, 770 N.Y.S. 2d 75 (2003)(claim against insurance agent for misrepresentations not consumer oriented); **Martin v. Group Health, Inc.**, 2 A.D. 3d 414, 767 N.Y.S. 2d 803 (2003)(dispute over insurance coverage for dental implants not consumer oriented); **Goldblatt v. MetLife, Inc.**, 306 A.D. 2d 217, 760 N.Y.S. 2d 850 (2003)(claim against insurance company not " consumer oriented "); **Rosenberg v. Chicago Ins. Co.**, 2003 WL 21665680 (N.Y. Sup. 2003)(conduct not consumer oriented; " Although the complaint includes

allegations that the insurer's alleged bad acts had an impact on the public (plaintiff) is a large law firm, which commenced this action to protect its interests under a specific insurance policy "); **Canario v. Prudential Long Island Realty**, 300 A.D. 2d 332, 751 N.Y.S. 2d 310 (2002)(.78 acre property advertised as 1.5 acres is size; " the misrepresentation had the potential to affect only a single real estate transaction involving a single unique piece of property...There was no impact on consumers or the public at large "); **Cruz v. NYNEX Information Resources**, 263 A.D. 2d 285, 290, 703 N.Y.S. 2d 103 (1st Dept. 2000).

9. **BNI New York Ltd. v. DeSanto**, 177 Misc. 2d 9, 14-15, 675 N.Y.S. 2d 753 (1998).

10. See **Anonymous v. CVS Corp.**, New York Law Journal, January 8, 2004, p. 19, col. 1 (N.Y. Sup.)(" Deception itself with no other injury is not actionable under § 349 (citing) **Small v. Lorillard Tobacco, Co.**, 94 NY 2d 43 (1999) ").

11. **Gabbay v. Mandel**, New York Law Journal, March 10, 2004, p. 19, col. 3 (N.Y. Sup. 2004).

12. **Guggenheimer v. Ginzburg**, 43 N.Y. 2d 268, 401 N.Y.S. 2d 182, 184, 372 N.E. 2d 17 (1977).

13. **Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.**, 85 N.Y. 2d 20, 623 N.Y.S. 2d 529, 532, 647 N.E. 2d 741 (1995).

14. **Karlin v. IVF America, Inc.**, 93 N.Y. 2d 282, 690 N.Y.S. 2d 495, 712 N.E. 2d 662 (1999).

15. **Gaidon v. Guardian Life Insurance Company**, 96 N.Y. 2d 201, 727 N.Y.S. 2d 30, 750 N.E. 2d 1078 (2001).

16. **State of New York v. Feldman**, 2002 W.L. 237840 (S.D.N.Y. 2002).

17. Id. See also: **Soskel v. Handler**, 189 Misc. 2d 795, 736 N.Y.S. 2d 853(2001)(unsatisfactory performance of hair transplant procedures; GBL § 349 claim accrued when last surgical procedure was performed).

18. **Goshen v. Mutual Life Insurance Company**, 286 A.D. 2d 229, 730 N.Y.S. 2d 46 (2001)

19. Scott v. Bell Atlantic Corp., 282 A.D. 2d 180, 726 N.Y.S. 2d 60 (2001).
20. Farino v. Jiffy Lube International, Inc., 298 A.D. 2d 553, 748 N.Y.S. 2d 673 (2002)..
21. Goshen v. The Mutual Life Ins. Co., 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002).
22. Scott v. Bell Atlantic Corp., 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002).
23. In Croak v. Bell Atlantic Corp., N.Y.L.J., January 10, 2002, p. 20, col. 4 (N.Y. Sup.), the Court dismissed a consumer class action claiming that DSL services were misrepresented as to speed and quality citing as authority Scott v. Bell Atlantic Corp., 282 A.D. 2d 180 (1st Dep. 2001). The Scott decision was later modified by the Court of Appeals restoring the GBL 349 claim.
24. See e.g., Murrin v. Ford Motor Co., 303 A.D. 2d 475, 756 N.Y.S. 2d 596 (2003)(G.B.L. § 349 claim dismissed for failing to " allege that the deceptive acts complained of took place within the State of New York "); Mountz v. Global Vision Products, Inc., 770 N.Y.S. 2d 603 (N.Y. Sup. 2003)(" this complaint pleads no consumer action or contact occurring within New York State as the out-of-state plaintiffs ").
25. Truschel v. Juno Online Services, Inc., N.Y.L.J., December 12, 2002, p. 21, col. 4 (N.Y. Sup.).
26. Peck v. AT&T Corp., N.Y.L.J., August 1, 2002, p. 18, col. 3 (N.Y. Sup.).
27. Bartolomeo v. Runco, 162 Misc. 2d 485, 616 N.Y.S. 2d 695 (1994).
28. Anilesh v. Williams, New York Law Journal, Nov. 15, 1995, p. 38, col. 2 (Yks. Cty. Ct.)(landlord can not recover unpaid rent for illegal apartment).
29. Yochim v. McGrath, 165 Misc. 2d 10, 626 N.Y.S. 2d 685 (1995).
30. People v. Law Offices of Andrew F. Capoccia, Albany County Sup., Index No: 6424-99, August 22, 2000.

31. Aponte v. Raychuk, 160 A.D. 2d 636, 559 N.Y.S. 2d 255 (1990).
32. Oxman v. Amoroso, 172 Misc. 2d 773, 659 N.Y.S. 2d 963 (1997).
33. Lipscomb v. Manfredi Motors, New York Law Journal, April 2, 2002, p. 21 (Richmond Civ. Ct.)
34. State of New York v. Feldman, 2002 W.L. 237840 (S.D.N.Y. 2002).
35. Levitsky v. SG Hylan Motors, Inc., New York Law Journal, July 3, 2003, p. 27., col. 5 (N.Y. Civ. 2003).
36. People v. Trescha Corp., New York Law Journal, December 6, 2000, p. 26, col. 3 (N.Y. Sup.).
37. People v. Condor Pontiac, 2003 WL 21649689 (N.Y. Sup. 2003).
38. Naevus International, Inc. v. AT&T Corp., 2000 WL 1410160 (N.Y. Sup. 2000).
39. Baker v. Burlington Coat Factory, 175 Misc. 2d 951, 673 N.Y.S. 2d 281 (1998).
40. People v. Telehublink, 301 A.D. 2d 1006, 756 N.Y.S. 2d 285 (2003).
41. Sims v. First Consumers National Bank, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (2003).
42. Broder v. MBNA Corporation, New York Law Journal, March 2, 2000, p. 29, col. 4 (N.Y. Sup.), aff'd 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (2001).
43. Anonymous v. CVS Corp., 188 Misc. 2d 616, 728 N.Y.S. 2d 333 (2001).
44. Ritchie v. Empire Ford Sales, Inc., New York Law Journal, November 7, 1996, p. 30, col. 3 (Yks. Cty. Ct.).
45. Giarrantano v. Midas Muffler, 166 Misc. 2d 390, 630 N.Y.S. 2d 656 (1995).
46. People v. General Electric Co., Inc., 302 A.D. 2d 314, 756 N.Y.S. 2d 520 (2003).

47. New York Environmental Resources v. Franklin, New York Law Journal, March 4, 2003, p. 27 (N.Y. Sup.).
48. Rossi v. 21st Century Concepts, Inc., 162 Misc. 2d 932, 618 N.Y.S. 2d 182 (1994).
49. Andre v. Pace University, 161 Misc. 2d 613, 618 N.Y.S. 2d 975 (1994), rev'd on other grounds 170 Misc. 2d 893, 655 N.Y.S. 2d 777 (1996).
50. Brown v. Hambric, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995). Web Page, supra.
51. Cambridge v. Telemarketing Concepts, Inc., 171 Misc. 2d 796, 655 N.Y.S. 2d 795 (1997).
52. McKinnon v. International Fidelity Insurance Co., 182 Misc. 2d 517, 704 N.Y.S. 2d 774 (1999).
53. Sharknet Inc. v. Techmarketing, NY Inc., New York Law Journal, April 22, 1997, p. 32, col. 3 (Yks. Cty. Ct.), aff'd N.Y.A.T., Decision dated Dec. 7, 1998.
54. Petrello v. Winks Furniture, New York Law Journal, May 21, 1998, p. 32, col. 3 (Yks. Cty. Ct.).
55. Walker v. Winks Furniture, 168 Misc. 2d 265, 640 N.Y.S. 2d 428 (1996).
56. Filpo v. Credit Express Furniture Inc., New York Law Journal, Aug. 26, 1997, p. 26, col. 4 (Yks. Cty. Ct.).
57. Colon v. Rent-A-Center, Inc., 2000 N.Y. App. Div. LEXIS 11289 (1st Dept. 2000).
58. Mountz v. Global Vision Products, Inc., 770 N.Y.S. 2d 603 (N.Y. Sup. 2003).
59. State v. Wilco Energy Corp., 283 A.D. 2d 469, 728 N.Y.S. 2d 471 (2001).
60. Ricciardi v. Frank d/b/a InspectAmerica Engineering, P.C., 163 Misc. 2d 337, 620 N.Y.S. 2d 918 (1994), mod'd 170 Misc. 2d 777, 655 N.Y.S. 2d 242 (N.Y.A.T. 1996).
61. Karlin v. IVF America, Inc., 93 N.Y. 2d 282, 690 N.Y.S. 2d 495, 712 N.E. 2d 662 (1999).

62. Gaidon v. Guardian Life Insurance Co., 94 N.Y. 2d 330, 338, 704 N.Y.S. 2d 177, 725 N.E. 2d 598 (1999).
63. Brenkus v. Metropolitan Life Ins. Co., 309 A.D. 2d 1260, 765 N.Y.S. 2d 80 (2003).
64. Acquista v. New York Life Ins. Co., 285 A.D. 2d 73, 730 N.Y.S. 2d 272 (2001).
65. Rubinoff v. U.S. Capitol Insurance Co., New York Law Journal, May 10, 1996, p. 31, col. 3 (Yks. Cty. Ct.).
66. Makastchian v. Oxford Health Plans, Inc., 270 A.D. 2d 25, 704 N.Y.S. 2d 44 (2000).
67. Zurakov v. Register.Com, Inc., 304 A.D. 2d 176, 760 N.Y.S. 2d 13(2003).
68. People v. Network Associates, 195 Misc. 2d 384, 758 N.Y.S. 2d 466 (2003).
69. People v. Lipsitz, 174 Misc. 2d 571, 663 N.Y.S. 2d 468 (1997).
70. Scott v. Bell Atlantic Corp., 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002).
71. In Croak v. Bell Atlantic Corp., N.Y.L.J., January 10, 2002, p. 20, col. 4 (N.Y. Sup.), the Court dismissed a consumer class action claiming that DSL services were misrepresented as to speed and quality citing as authority Scott v. Bell Atlantic Corp., 282 A.D. 2d 180 (1st Dep. 2001). The Scott decision was later modified by the Court of Appeals restoring the GBL 349 claim.
72. Drizin v. Sprint Corporation, 3 A.D. 3d 388, 771 N.Y.S. 2d 82 (2004).
73. Gabbay v. Mandel, New York Law Journal, March 10, 2004, p. 19, col. 3 (N.Y. Sup.).
74. Morgan Services, Inc. V. Episcopal Church Home & Affiliates Life Care Community, Inc., 305 A.D. 2d 1106, 757 N.Y.S. 2d 917 (2003).
75. Dunn v. Northgate Ford, Inc., 1 Misc. 3d 911(A)(N.Y. Sup. 2004).

76. Lewis v. Al DiDonna, 294 A.D. 2d 799, 743 N.Y.S. 2d 186 (3d Dept. 2002).
77. Kidd v. Delta Funding Corp., 299 A.D. 2d 457, 751 N.Y.S. 2d 267 (2002).
78. Walts v. First Union Mortgage Corp., New York Law Journal, April 25, 2000, p. 26,col. 1 (N.Y. Sup. 2000). See also Walts v. First Union Mortgage Corp., 259 A.D. 2d 322, 686 N.Y.S. 2d 428 (1999), appeal dismissed 94 N.Y. 2d 795, 700 N.Y.S. 2d 424, 722 N.E. 2d 504 (1999)(no private right of action under New York Insurance Law § 6503; money had and received, breach of fiduciary duty and tortious interference with contractual relation claims dismissed).
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245. 47 USC § 227[b][1][B].
246. Kaplan v. First City Mortgage, 183 Misc. 2d 24, 28, 701 N.Y.S. 2d 859 (1999).
247. Kaplan v. Democrat & Chronicle, 266 A.D. 2d 848, 698 N.Y.S. 2d 799 (3rd Dept. 1998).
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249. See e.g., International Science & Tech. Inst., Inc. v. Inacom Communications, Inc., 106 F. 3d 1146 (4th Cir. 1997);

Murphey v. Lanier, 204 F. 3d 911 (9th Cir. 2000); United Artists Theater Circuit, Inc. v. F.C.C., 2000 WL 33350942 (D. Ariz. 2000).

250. Miller and Biggerstaff, Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes, 52 Federal Communications Law Journal, 667, 668-669 (2000)(" The TCPA presents ` an unusual constellation of statutory features `. It provides a federal right to be free from certain types of telephone solicitations and facsimiles (faxes), but it does permit a victim to enforce that right in federal court. The TCPA's principal enforcement mechanism is a private suit, but the TCPA does not permit an award of attorney fees to the prevailing party, as do most other private attorney general statutes. The TCPA is practically incapable of forming the basis of a class action...").

251. Kaplan v. Life Fitness Center, Rochester City Court, December 13, 1999.

252. 47 USC § 227[b][3].

253. Antollino v. Hispanic Media Group, USA, Inc., New York Law Journal, May 9, 2003, p. 21, col. 3 (N.Y. Sup.).

254. See Glaberson, Dispute Over Faxed Ads Draws Wide Scrutiny After \$12 Million Award, N.Y. Times Sunday National Section, July 22, 2001, p. 18 (" The basic damages were set by multiplying the six faxes received by the 1,321 recipients by \$500-and then tripling the amount ").

255. Rudgayzer & Gratt v. Enine, Inc., 2002 WL 31369753 (N.Y. Civ. 2002).

256. Bonime v. Management Training International, New York Law Journal, February 6, 2004, p. 19, col. 1 (N.Y. Sup. 2004).

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260. See 13 telemarketers accept fines for violating No Not Call law, The Journal News, March 10, 2002, p. 3A (" In most cases the settlement is for \$1,000 per call, compared with a maximum fine of \$2,000 per call. More than 200 more companies are being investigated...More than 4,000 complaints have been field and nearly 2 million households have signed up to bar calls from telemarketers nationwide ".)