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Chapter 98

Consumer Protection

by The Honorable Thomas A. Dickerson

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§ 98:1 Scope note

A cause of action based upon the violation of one or more consumer protection statutes may appear in the plaintiff's complaint¹ or less frequently as a counterclaim.² Such a claim may be the primary thrust of the complaint, particularly, when the plaintiff's claims arise from fraudulent acts and deceptive and misleading business practices. On the other hand, such a claim may be a "tag along" with common-law claims arising from breach of contract, quasi-contractual theories such as unjust enrichment, penalties, unconscionability, breach of an implied covenant of good faith and fair dealing, economic duress and money had and received and breach of fiduciary duty, negligence, and negligent

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¹See Dickerson, Consumer Protection Law 2009, 10/22/09 N.Y.L.J. 4, col. 1; Dickerson, Consumer Protection 2008: Federal, N.Y. Statutes Guide, 8/11/08 N.Y.L.J. 4, col. 1.

²See, e.g., *Lincoln Life and Annuity Co. of New York v. Bernstein*, 24 Misc. 3d 1211(A), 890 N.Y.S.2d 369 (Sup 2009) (insurance company seeks to decline coverage for death benefits; motion to dismiss GBL § 349 counterclaim denied without prejudice to renewal after discovery; "Defendants set forth in their complaint that Lincoln's representations in the policy, were misleading in a material way in that [they] were led to believe that [their] claim for payment under the policy would be investigated and processed in good faith and in a timely manner").

misrepresentation. In addition, such a claim frequently appears within the context of a consumer class action.³

This chapter will discuss New York State consumer protection statutes GBL §§ 349 (misleading and deceptive business practices) and 350 (false advertising) and the manner in which the courts have interpreted these salutary statutes. In addition, other New York State consumer protection statutes will be discussed to the extent that they have been used in conjunction with GBL §§ 349 and 350. Lastly, this chapter will discuss consumer class actions brought pursuant to CPLR Article 9 which is the primary litigation vehicle for bringing consumer claims before the New York State Supreme Court.⁴

§ 98:2 New York State consumer protection statutes

There are many New York State consumer protection statutes that frequently appear within the context of civil litigation.¹ The most popular, by far, is GBL § 349.

§ 98:3 The scope of General Business Law § 349

GBL § 349 prohibits deceptive and misleading business practices, and its scope is broad, indeed.¹ In *Karlin v. IVF America, Inc.*,² the Court of Appeals stated that GBL § 349

³See Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press, N.Y., 2010. See generally Chapter 20, "Class Actions" (§§ 20:1 et seq.).

⁴See Dickerson and Manning, *Courts Rule on Class Actions Under CPLR Article 9 in 2009*, N.Y.L.J.; *Courts Rule on Class Actions Under CPLR Article 9 in 2008*, 2/27/09 N.Y.L.J. 4, col. 1; Dickerson and Manning, *Class Actions Under CPLR Art. 9 in 2007*, 1/18/08 N.Y.L.J. 4, col. 1; Dickerson and Manning, *Summary of Article 9 Class Actions in 2006*, 1/24/07 N.Y.L.J. 4, col. 1; Dickerson and Manning, *Summary of Article 9 Class Actions in 2005*, 27 *Class Action Reports* 14 (2006). See generally Chapter 20, "Class Actions" (§§ 20:1 et seq.); Chapter 33 "Practice Before the Commercial Division" (§§ 33:1 et seq.).

[Section 98:2]

¹See Dickerson, *Consumer Law 2009, The Judge's Guide To Federal And New York State Consumer Protection Statutes*, at www.nycourts.gov/courts/9jd/taxcertatd.shtml (an annual compilation of reported cases involving the violation of one or more federal and state consumer protection statutes).

[Section 98:3]

¹Dickerson, *New York State Consumer Protection Law and Class Actions in 2007-Part I*, Vol. 80, No. 2, *New York State Bar Association Journal*, Feb. 2008, p. 42; Dickerson, *New York State Consumer Protection Law and Class Actions in 2007-Part II*, Vol. 80, No. 4, *New York State Bar Association Journal*, May 2008, p. 39; Dickerson, *New York Consumers Enjoy Statutory Protection Under Both State and Federal Statutes*, Vol. 76, No. 7, *New York State Bar Association*, September 2004, p. 10; Edwards, *The Rebate 'Rip-Off': New York's Legislative Responses to Common Consumer Rebate Complaints*, *Pace L.R.* 471

“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’”.

In *Gaidon v. Guardian Life Ins. Co. of America*,³ the Court of Appeals stated that GBL § 349

“encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law”.

Also, in *Matter of Food Parade, Inc. v. Office of Consumer Affairs*,⁴ Justice Graffeo in her dissenting opinion stated that

“[t]his Court has broadly construed general consumer protection laws to effectuate their remedial purposes, applying the state deceptive practices law to a full spectrum of consumer-oriented conduct, from the sale of ‘vanishing premium’ life insurance policies . . . to the provision of infertility services . . . We have repeatedly emphasized that (GBL § 349) and section 350, its companion . . . apply to virtually all economic activity, and their application has been correspondingly broad . . . The reach of these statutes provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State ‘. . . In determining what types of conduct may be deceptive practices under state law, this Court has applied an objective standard which asks whether the ‘representation or omission [was] likely to mislead a reasonable consumer acting reasonably under the circumstances ‘. . . taking into account not only the impact on the ‘average consumer’ but also on ‘the vast multitude which the statutes were enacted to safeguard-including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions’”.

§ 98:4 Stating a cognizable claim

Stating a cause of action for a violation of GBL § 349 is fairly straightforward and should identify the misconduct which is

(2009). For further discussions of GBL § 349, see Chapter 52, “Court-Awarded Attorney’s Fees” (§§ 50:1 et seq.); Chapter 67, “Insurance” (§§ 67:1 et seq.); Chapter 68, “Bank Litigation” (§§ 68:1 et seq.); Chapter 81 “Securities Litigation” (§§ 81:1 et seq.); Chapter 94, “Intellectual Property” (§§ 94:1 et seq.), and Chapter 97, “Commercial Defamation” (§§ 97:1 et seq.).

²*Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 290, 690 N.Y.S.2d 495, 712 N.E.2d 662 (1999).

³*Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 704 N.Y.S.2d 177, 725 N.E.2d 598 (1999). See also *New York v. Feldman*, 210 F. Supp. 2d 294, 2002-1 Trade Cas. (CCH) ¶ 73597 (S.D. N.Y. 2002) (GBL § 349 “was intended to be broadly applicable, extending far beyond the reach of common law fraud”).

⁴*Food Parade, Inc. v. Office of Consumer Affairs of County of Nassau*, 7 N.Y.3d 568, 574, 825 N.Y.S.2d 667, 859 N.E.2d 473 (2006).

deceptive and materially misleading to a reasonable consumer¹ and which causes actual damages. As stated by the Court of Appeals in *Small v. Lorillard Tobacco Co.*,² “[t]o state a claim . . . a plaintiff must allege that the defendant has engaged ‘in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof’ . . . Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim . . . However, proof that ‘a material deceptive act or practice caused actual, although not necessarily pecuniary harm’ is required to impose compensatory damages”.³

In addition, a GBL § 349 claim is governed by a three-year period of limitations,⁴ may or may not be preempted by federal statutes,⁵ “does not need to be based on an independent private

[Section 98:4]

¹See, e.g., *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995); *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dep’t 2010) (“ . . . whether a deceptive practice is likely to mislead a reasonable consumer acting reasonably may be determined as either a question of law or fact, depending upon the circumstances . . . Here . . . the reasonableness of the plaintiffs’ belief as to their responsibilities under the contract of insurance is a question of fact, and should be determined by the fact finder”); *Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 752 N.Y.S.2d 400 (2d Dep’t 2002)). For further discussion of GBL § 349, see Chapter 52, “Court-Awarded Attorney’s Fees” (§§ 52:1 et seq.); Chapter 67, “Insurance” (§§ 67:1 et seq.); Chapter 68, “Bank Litigation” (§§ 68:1 et seq.); Chapter 94, “Intellectual Property” (§§ 94:1 et seq.), and Chapter 97, “Commercial Defamation” (§§ 97:1 et seq.).

²*Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999).

³See also *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000).

⁴See, e.g., *State ex rel. Spitzer v. Daicel Chemical Industries, Ltd.*, 42 A.D.3d 301, 840 N.Y.S.2d 8, 2007-2 Trade Cas. (CCH) ¶ 75780 (1st Dep’t 2007); *Beller v. William Penn Life Ins. Co. of New York*, 8 A.D.3d 310, 778 N.Y.S.2d 82 (2d Dep’t 2004); *People ex rel. Cuomo v. Nationwide Asset Services, Inc.*, 26 Misc. 3d 258, 888 N.Y.S.2d 850 (Sup 2009).

⁵In *People ex rel. Spitzer v. Applied Card Systems, Inc.*, 11 N.Y.3d 105, 863 N.Y.S.2d 615, 894 N.E.2d 1 (2008), cert. denied, 129 S. Ct. 999, 173 L. Ed. 2d 292 (2009) the Attorney General alleged that Cross Country Bank (CCB), a purveyor of credit cards to “consumers in the ‘subprime’ credit market” . . . “had misrepresented the credit limits that subprime consumers could obtain and that it failed to disclose the effect that its origination and annual fees would have on the amount of initially available credit.” On respondent’s motion to dismiss based upon preemption by Truth in Lending Act (TILA) the Court held that “Congress also made clear that, even when enforcing the TILA disclosure requirements, states could us their unfair and deceptive trade practices acts to ‘requir[e] or obtain[] the requirements of a specific disclosure beyond those specified’ . . . Congress only intended the (Fair Credit and Charge Card Disclosure Act) to preempt a specific set of state credit card disclosure

right of action,”⁶ and does not apply to the claims of nonresidents who did not enter into contracts in New York State. 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,” the Court of Appeals has held that GBL § 349 requires that “the transaction in which the consumer is deceived must occur in New York.”⁷

§ 98:5 Consumer-oriented conduct

Where the conduct being complained of is not “a private contract dispute as to policy coverage” but instead “involves an extensive marketing scheme that has ‘a broader impact on consumers at large,’”¹ the courts will uphold a suit pursuant to

laws, not states’ general unfair trade practices acts.” See also *People ex rel. Cuomo v. First American Corp.*, 24 Misc. 3d 672, 878 N.Y.S.2d 860 (Sup 2009), *aff’d*, 902 N.Y.S.2d 521 (App. Div. 1st Dep’t 2010) (Attorney General’s action prosecuting real estate appraisal companies under GBL § 349 not preempted by federal banking regulations).

⁶*Farino v. Jiffy Lube Intern., Inc.*, 298 A.D.2d 553, 748 N.Y.S.2d 673 (2d Dep’t 2002).

⁷*Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002) and *Scott v. Bell Atlantic Corp.*, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858 (2002).

[Section 98:5]

¹See, e.g., *Denenberg v. Rosen*, 71 A.D.3d 187, 897 N.Y.S.2d 391 (1st Dep’t 2010), leave to appeal dismissed, 2010 WL 2265311 (N.Y. 2010) (“commodities trader claims that . . . defendants induced him to establish a pension plan that guaranteed tax benefits that the IRS later disallowed . . . this is essentially a private dispute among the parties relating to advice that plaintiff received and his particular plan structure, rather than conduct affecting the consuming public at large”); *Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422, 893 N.Y.S.2d 19 (1st Dep’t 2010) (“only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large”); *Moustakis v. Christie’s, Inc.*, 68 A.D.3d 637, 892 N.Y.S.2d 83 (1st Dep’t 2009) (fraud alleged in sale of Star Trek memorabilia “arises from a private contract, does not resemble the egregious wrongdoing that could be considered part of a pattern directed at the public generally”); *Emergency Enclosures, Inc. v. National Fire Adjustment Co., Inc.*, 68 A.D.3d 1658, 893 N.Y.S.2d 414 (4th Dep’t 2009) (“The gravamen of the complaint is not consumer injury or harm to the public interest but, rather, harm to plaintiff’s business”); *Western Bldg. Restoration Co., Inc. v. Lovell Safety Management Co., LLC*, 61 A.D.3d 1095, 876 N.Y.S.2d 733 (3d Dep’t 2009) (worker’s compensation claim processing; “plaintiff wholly failed to demonstrate that defendant’s alleged deceptive business practices had a broad impact on consumers at large”); *Sentlowitz v. Cardinal Development, LLC*, 63 A.D.3d 1137, 882 N.Y.S.2d 267 (2d Dep’t 2009) (buyer of real property claims that sellers concealed the fact that property contained wetlands; GBL § 349 claim dismissed because failure to allege broad impact on consumers at large); *Paltre v. General Motors Corp.*, 26 A.D.3d 481, 810 N.Y.S.2d 496 (2d Dep’t 2006) (failure to state GBL § 349 claim “because the alleged misrepresentations

GBL § 349.² Thus, in *Gaidon v. Guardian Life Ins. Co. of*

were either not directed at consumers or were not materially deceptive”); *Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095, 802 N.Y.S.2d 174 (2d Dep’t 2005) (defective synthetic stucco; “To establish prima facie violation of (GBL § 349) a plaintiff must demonstrate that a defendant is engaging in consumer-oriented conduct which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it . . . The transaction in this case was between two companies in the building construction and supply industry . . . It did not involve any direct solicitation . . . (of) the ultimate consumer . . . In short, this was not the type of ‘modest’ transaction that the statute was intended to reach”); *Biancone v. Bossi*, 24 A.D.3d 582, 806 N.Y.S.2d 694 (2d Dep’t 2005) (plaintiff’s claim that defendant contractor failed “to paint the shingles used in the construction . . . (And) add sufficient topsoil to the property” arose from “a private contract that is unique to the parties, rather than conduct that affects consumers at large”); *Continental Cas. Co. v. Nationwide Indem. Co.*, 16 A.D.3d 353, 792 N.Y.S.2d 434 (1st Dep’t 2005) (allegations that insurer misrepresented meaning of their standard comprehensive general liability policies is “at best a private contract dispute over policy coverage”); *Fulton v. Allstate Ins. Co.*, 14 A.D.3d 380, 788 N.Y.S.2d 349 (1st Dep’t 2005) (denial of insurance claim not materially deceptive nor consumer-oriented practice); *Medical Soc. of State of New York v. Oxford Health Plans, Inc.*, 15 A.D.3d 206, 790 N.Y.S.2d 79 (1st Dep’t 2005) (denial or untimely settlement of claims not consumer-oriented and too remote); *Berardino v. Ochlan*, 2 A.D.3d 556, 770 N.Y.S.2d 75 (2d Dep’t 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 (2d Dep’t 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 (1st Dep’t 2003) (claim against insurance company not “consumer-oriented”); *Canario v. Gunn*, 300 A.D.2d 332, 751 N.Y.S.2d 310 (2d Dep’t 2002) (0.78-acre property advertised as 1.5 acres in 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”); *Plaza Penthouse LLP v. CPS 1 Realty LP*, 24 Misc. 3d 1238(A), 899 N.Y.S.2d 62 (Sup 2009) (misrepresented \$5.25 million “park view apartment at the legendary Plaza Hotel”; GBL § 349 claim dismissed as involving a private dispute).

²The alleged misconduct must have “a broad impact on consumers at large” *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995)]. See also *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dep’t 2010) (“the plaintiffs allege . . . that the insurance policy, which requires that they protect the defendant’s subrogation interest while their claim is being investigated, compelled them to institute a suit against the Village before the statute of limitations expired . . . The plaintiffs allege that this provision is not unique to the plaintiffs, but is contained in every Allstate Deluxe Plus Homeowners’ Policy . . . Therefore, the conduct complained of has a ‘broad impact on consumers at large’ and is thus consumer-oriented”); *Sentlowitz v. Cardinal Development, LLC*, 63 A.D.3d 1137, 882 N.Y.S.2d 267 (2d Dep’t 2009) (alleged concealment of material facts in real estate transaction; failure to allege conduct had a broad impact on consumers at large); *Capitol Real Estate, Inc. v. Town Bd. of Town of Charlton*, 23 A.D.3d 858, 804 N.Y.S.2d 449 (3d Dep’t 2005) (“Plaintiff alleged a specific deceptive practice on the part of defendant, directed at members of the public generally who purchased its standard-form policy”).

America,³ the Court of Appeals held that the plaintiffs' allegations stated a cause of action for violation of GBL § 349, where the plaintiffs alleged that the defendants had marketed policies by giving misleading assurances that, after a certain amount of time, they would no longer have to pay insurance premiums. These promises of so-called "vanishing" premiums implicated "practices of a national scope that have generated industry-wide litigation."⁴

§ 98:6 Misleading acts

A plaintiff seeking to state a cause of action under GBL § 349 must plead that the challenged act or practice was "misleading in a material way."¹ Whether a representation or an omission, the test is whether the deceptive practice is "likely to mislead a reasonable consumer acting reasonably under the circumstances."² As stated by the Court of Appeals in "Such a test . . . may be

³*Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 334, 704 N.Y.S.2d 177, 725 N.E.2d 598 (1999).

⁴See also *Beller v. William Penn Life Ins. Co. of New York*, 8 A.D.3d 310, 314, 778 N.Y.S.2d 82 (2d Dep't 2004) (complaint stated a cause of action pursuant to GBL § 349 where the plaintiff alleged that the defendant had improperly raised insurance rates on its flexible premium life insurance policies because it had failed to consider factors such as improvements in mortality); *Beller v. William Penn Life Ins. Co. of New York*, 37 A.D.3d 747, 830 N.Y.S.2d 759 (2d Dep't 2007) (class certification granted); *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 888, 860 N.Y.S.2d 229 (3d Dep't 2008) (allegation that the defendant's practice of not informing its insureds that they had the right to choose an independent counsel states a cause of action under GBL § 349 because it "was not an isolated incident, but a routine practice that affected many similarly situated insureds").

[Section 98:6]

¹*Lonner v. Simon Property Group, Inc.*, 57 A.D.3d 100, 110, 866 N.Y.S.2d 239 (2d Dep't 2008).

²*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995). See also *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dep't 2010) ("In essence, the plaintiffs are alleging that the defendant purposely failed to reach a decision on the merits of their insurance claim in order to force plaintiffs to bring a suit against the Village before the statute of limitations expired, because, if they did not do so, the defendant could refuse reimbursement of the claim on the ground that the plaintiffs had failed to protect the defendant's subrogation rights . . . Presumably, the purpose of this alleged conduct would be to save the defendant money . . . the plaintiffs have successfully pleaded conduct . . . which was misleading in a material way"); *Morales v. AMS Mortg. Services, Inc.*, 69 A.D.3d 691, 897 N.Y.S.2d 103 (2d Dep't 2010) ("The plaintiff failed to allege or provide dates or details of any misstatements or misrepresentations made specifically by Lehman's representatives to him . . . or allude to any damages sustained by him"); *Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 752 N.Y.S.2d 400 (2d Dep't 2002).

determined as a matter of law or fact (as individual cases require).”³

§ 98:7 Injury

The plaintiffs must, of course, allege an injury as a result of the deceptive act or practice.¹ For example, in *Baron v. Pfizer, Inc.*,² the GBL § 349 claim was dismissed because of an absence of actual injury. The court stated that “Without [further] allegations that [for example] the price of the product was inflated as a result of defendant’s deception or that use of the product adversely affected plaintiff’s health . . . [plaintiff] failed even to allege . . . that Neurontin was ineffective to treat her neck pain and her claim that any off-label prescription [of Neurotin] was potentially dangerous both asserts a harm that is merely speculative and is belied [in any event] by the fact that off-label use is a widespread and accepted medical practice.”

In *Ballas v. Virgin Media, Inc.*,³ a class of consumers charged the defendant cell phone service provider with breach of contract and a violation of GBL § 349 in allegedly failing to properly reveal “the top up provisions of the pay by the minute plan” known as “Topping up [which] is a means by which a purchaser of Virgin’s cell phone [“Oystr”], who pays by the minute, adds cash to their cell phone account so that they can continue to receive cell phone

³*Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995). See also *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dep’t 2010) (“ . . . whether a deceptive practice is likely to mislead a reasonable consumer acting reasonably may be determined as either a question of law or fact, depending upon the circumstances . . . Here . . . the reasonableness of the plaintiffs’ belief as to their responsibilities under the contract of insurance is a question of fact, and should be determined by the fact finder”); *Ladino v. Bank of America*, 52 A.D.3d 571, 861 N.Y.S.2d 683 (2d Dep’t 2008) (plaintiff alleges that defendant negligently published false credit information which constituted violations of Fair Credit Reporting Act and GBL § 349; no private right of action under Fair Credit Reporting Act and plaintiff “never notified any credit reporting agency that he was disputing the accuracy of information provided by defendant”; failure to state a GBL § 349 claim; “Although Fleet’s alleged conduct may have been negligent, it did not mislead the plaintiff in any material way and did not constitute a ‘deceptive act’”).

[Section 98:7]

¹See, e.g., *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000). See also *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dep’t 2010) (“Here, the plaintiffs allege that, as a result of the defendant’s conduct, they were forced to ‘incur the costs and expense of hiring an attorney to prevent forfeiture of coverage for a covered loss’”).

²*Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 840 N.Y.S.2d 445 (3d Dep’t 2007).

³*Ballas v. Virgin Media, Inc.*, 18 Misc. 3d 1106(A), 856 N.Y.S.2d 22 (Sup 2007), *aff’d*, 60 A.D.3d 712, 875 N.Y.S.2d 523 (2d Dep’t 2009).

service. A customer may top up by (1) purchasing Top Up cell phone cards that are sold separately; (2) using a credit or debit card to pay by phone or on the Virgin Mobile USA website or (3) using the Top Up option contained on the phone." If customers do not "top up" when advised to do so, they "would be unable to send or receive calls." The court dismissed the GBL § 349 claim "because the topping-up requirements of the 18 cent per minute plan were fully revealed in the Terms of Service booklet."

In *Vigiletti v. Sears, Roebuck & Co.*,⁴ a class of consumers alleged that Sears marketed its Craftsman tools "as 'Made in USA' although components of the products were made outside the United States as many of the tools have the names of other countries, e.g., 'China' or 'Mexico' diesunk or engraved into various parts of the tools." In dismissing the GBL § 349 claim, the court found that plaintiffs had failed to prove actual injury ("no allegations . . . that plaintiffs paid an inflated price for the tools . . . that tools purchased . . . were not made in the U.S.A. or were deceptively labeled or advertised as made in the U.S.A. or that the quality of the tools purchased were of lesser quality than tools made in the U.S.A.") causation ("plaintiffs have failed to allege that they saw any of these allegedly misleading statements before they purchased Craftsman tools") and territoriality ("no allegations that any transactions occurred in New York State").

In *Florczak v. Oberriter*,⁵ involving a dispute between competitors over the origin of baseball bats, the court held that the "plaintiff alleges that defendants confused and misled potential consumers by falsely claiming in their advertisements that they 'manufacture' and 'make' baseball bats and that these bats are made in Cooperstown-the birthplace of baseball-when in fact the vast percentage of these bats are actually manufactured in a factory owned by defendants located two miles outside of Cooperstown." The court also found that no damages were shown and there was no evidence "that the allegedly false advertisements had a deceptive or misleading impact upon a 'consumer acting reasonably under the circumstances'" or "evidence . . . that such a consumer purchased a bat from defendants because they believed the bat was completely manufactured within the confines of Cooperstown."

⁴*Vigiletti v. Sears, Roebuck & Co.*, 42 A.D.3d 497, 838 N.Y.S.2d 785 (2d Dep't 2007), leave to appeal denied, 9 N.Y.3d 818, 851 N.Y.S.2d 390, 881 N.E.2d 839 (2008). See also *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651 (D. Nev. 2009) (consumer alleged scheme to sell "Old Roy" pet food as "made in the U.S.A." even though ingredients were manufactured in China; class certification denied).

⁵*Florczak v. Oberriter*, 50 A.D.3d 1440, 857 N.Y.S.2d 308 (3d Dep't 2008).

§ 98:8 No derivative claims

In addition, derivative claims may not be asserted under GBL § 349. In *City of New York v. Smokes-Spirits.Com*,¹ the Court of Appeals held that “We reject the City’s assertion that it may state a cognizable section 349(h) claim ‘simply’ by alleging ‘consumer injury or harm to the public interest.’ If a plaintiff could avoid the derivative injury bar by merely alleging that its suit would somehow benefit the public, then the very ‘tidal wave of litigation’ that we have guarded against since Oswego would look ominously on the horizon.”

§ 98:9 Recoverable damages

Under GBL § 349, consumers may recover actual damages in any amount, treble damages under GBL § 349(h) up to \$1,000,¹ and both treble damages and punitive damages.²

§ 98:10 False advertising: GBL § 350

The second most popular consumer protection statute is GBL § 350¹ which is often used in conjunction with GBL § 349. GBL § 350 prohibits false advertising which “means advertising,

[Section 98:8]

¹*City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 883 N.Y.S.2d 772, 911 N.E.2d 834 (2009).

[Section 98:9]

¹See, e.g., *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dep’t 2010); *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 630 N.Y.S.2d 769 (2d Dep’t 1995); *Hart v. Moore*, 155 Misc. 2d 203, 587 N.Y.S.2d 477 (Sup 1992).

²See *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dep’t 2010); *Volt Systems Development Corp. v. Raytheon Co.*, 155 A.D.2d 309, 547 N.Y.S.2d 280 (1st Dep’t 1989); *Bianchi v. Hood*, 128 A.D.2d 1007, 513 N.Y.S.2d 541 (3d Dep’t 1987). But see *Moustakis v. Christie’s, Inc.*, 68 A.D.3d 637, 892 N.Y.S.2d 83 (1st Dep’t 2009) (fraud alleged in sale of Star Trek memorabilia “arises from a private contract, does not resemble the egregious wrongdoing that could be considered part of a pattern directed at the public generally, so as to warrant the imposition of punitive damages”). For discussions of the imposition of civil penalties pursuant to GBL § 350-d, see *People ex rel. Spitzer v. Applied Card Systems, Inc.*, 41 A.D.3d 4, 834 N.Y.S.2d 558 (3d Dep’t 2007), *aff’d*, 11 N.Y.3d 105, 863 N.Y.S.2d 615, 894 N.E.2d 1 (2008), *cert. denied*, 129 S. Ct. 999, 173 L. Ed. 2d 292 (2009); *People ex rel. Cuomo v. Nationwide Asset Services, Inc.*, 26 Misc. 3d 258, 888 N.Y.S.2d 850 (Sup 2009).

[Section 98:10]

¹See, e.g., *Scott v. Bell Atlantic Corp.*, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002) (defective “high speed” Internet services falsely advertised); *Card v. Chase Manhattan Bank (USA)*, 175 Misc. 2d 389, 669 N.Y.S.2d 117, 121 (N.Y. City Civ. Ct. 1996) (bank misrepresented that its LifePlus Credit Insurance plan would pay off credit card balances were the user to become unemployed).

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.”² As with GBL § 349, GBL § 350 covers a broad spectrum of misconduct.

As noted by the Court of Appeals in *Karlin v. IVF America, Inc.*,³ “[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 equally straightforward, i.e., “the mere falsity of the advertising content is sufficient as a basis for the false advertising charge.”⁴

§ 98:11 GBL § 350 requires proof of reliance

Unlike a claim under GBL § 349, plaintiffs must prove reliance on false advertising to establish a violation of GBL § 350. For example, in *Berkman v. Robert’s American Gourmet Food, Inc.*,¹ a class of consumers of Pirate’s Booty, Veggie Booty, and Fruity Booty brands snack food alleged defendant’s advertising “made false and misleading claims concerning the amount of fat and calories contained in their products.” Noting that certification of a settlement class requires heightened scrutiny “where a class action is certified for settlement purposes only, the class prerequisites . . . must still be met and indeed scrutinized,” the court denied class certification to the GBL § 350 claim because individual issues of reliance predominated. The court found that “common reliance on the false representations of the fat and

²*Card v. Chase Manhattan Bank (USA)*, 175 Misc. 2d 389, 669 N.Y.S.2d 117, 121 (N.Y. City Civ. Ct. 1996). See also Chapter 94, “Intellectual Property” (§§ 94:1 et seq.) and Chapter 97, “Commercial Defamation” (§§ 97:1 et seq.) for further discussions of actions for false advertising under GBL § 350.

³*Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495, 712 N.E.2d 662, 665 (1999).

⁴*People by Vacco v. Lipsitz*, 174 Misc. 2d 571, 663 N.Y.S.2d 468, 475 (Sup 1997) (magazine salesman violated GBL § 350; “(the) (defendant’s) business practice is generally ‘no magazine, no service, no refunds’ although exactly the contrary is promised”); *People v. McNair*, 9 Misc. 3d 1121(A), 862 N.Y.S.2d 810 (Sup 2005) (“deliberate and material misrepresentations to parents enrolling their children in the Harlem Youth Enrichment Christian Academy . . . thereby entitling the parents to all fees paid (in the amount of \$182,393.00); civil penalties pursuant to GBL 350-d of \$500 for each deceptive act or \$38,500.00 and costs of \$2,000.00 pursuant to CPLR 8303(a)(6) with the re-aging of consumers’ accounts, Supreme Court justified that penalty by finding the practice ‘particularly abhorrent’”).

[Section 98:11]

¹*Berkman v. Robert’s American Gourmet Food, Inc.*, 16 Misc. 3d 1104(A), 841 N.Y.S.2d 825 (Sup 2007).

caloric content . . . cannot be presumed (in GBL 350 claims),” but noted that certification of the GBL § 349 claim may be appropriate if limited to New York residents.²

§ 98:12 Types of goods, services, and misconduct

The types of goods, services, and misconduct to which GBL § 349 applies and which may appear in commercial cases litigated in New York State Supreme Court include, inter alia, the following:

§ 98:13 Types of goods, services, and misconduct— Apartment leases

In four mass tort class actions, “former tenants of a luxury apartment complex [in] Westbury” were “instructed [by the landlord] that their leases would be terminated and they had to vacate the premises” because of water intrusion and the development of mold. In *Sorrentino v. ASN Roosevelt Center, LLC*,¹ the court held that “plaintiffs contend that the defendants continued to market and advertise their apartments, and continued to enter into new lease agreements and renew existing lease agreements even after discovering the water infiltration and mold-growth problems in the Complex without disclosing these problems to potential renters . . . plaintiffs allege that they have suffered both financial and physical injury as a result of the defendant’s deceptive acts . . . the Court finds that plaintiffs have plead the elements necessary to state a claim under GBL 349.”

²*Berkman v. Robert’s American Gourmet Food, Inc.*, 16 Misc. 3d 1104(A), 841 N.Y.S.2d 825 (Sup 2007) (“causes of action predicated on GBL 349 which do not require reliance (may be certifiable but) a nationwide class certification is inappropriate”). See also *Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F.3d 508 (2d Cir. 2005) (GBL § 350 requires proof of reliance); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 2005-1 Trade Cas. (CCH) ¶ 74683 (S.D. N.Y. 2005) (GBL § 350 requires proof of reliance); *Gale v. International Business Machines Corp.*, 9 A.D.3d 446, 781 N.Y.S.2d 45 (2d Dep’t 2004) (“Reliance is not an element of a claim under (GBL § 349) . . . claims under (GBL § 350) . . . do require proof of reliance”).

[Section 98:13]

¹*Sorrentino v. ASN Roosevelt Center LLC*, 579 F. Supp. 2d 387 (E.D. N.Y. 2008).

**§ 98:14 Types of goods, services, and misconduct—
Auctions and bid-rigging**

In *State of New York v. Feldman*,¹ the court found that a scheme to manipulate public stamp auctions comes “within the purview of (GBL § 349).”

**§ 98:15 Types of goods, services, and misconduct—
Automobiles and trucks**

GBL § 349 has been applied by many courts to the sale and service of automobiles and trucks.

**§ 98:16 Types of goods, services, and misconduct—
Disclosure of contract terms and conditions**

The courts have applied GBL § 349, in conjunction with automobile contract disclosure statutes, in *Levitsky v. SG Hylan Motors, Inc.*¹ (violation of GBL § 396-p “and the failure to adequately disclose the costs of the passive alarm and extended warranty constitute a deceptive action (per se violation of GBL § 349)”), and in *Spielzinger v. S.G. Hylan Motors Corp.*² (failure to disclose the true cost of “Home Care Warranty” and “Passive Alarm,” failure to comply with provisions of GBL § 396-p and GBL § 396-q; per se violations of GBL § 349) and *People v. Condor Pontiac*³ (used-car dealer violated GBL § 349 and Vehicle & Traffic Law [VTL] § 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).”).

[Section 98:14]

¹*New York v. Feldman*, 210 F. Supp. 2d 294, 2002-1 Trade Cas. (CCH) ¶ 73597 (S.D. N.Y. 2002).

[Section 98:16]

¹*Levitsky v. SG Hylan Motors, Inc.*, 7/3/03 N.Y.L.J. 27, col. 5 (Civ Ct, NY County).

²*Spielzinger v. S.G. Hylan Motors Corp.*, 9/10/04 19, col. 3 (Civ Ct, NY County).

³*People v. Condor Pontiac, Cadillac, Buick and GMC Trucks, Inc.*, 2003 WL 21649689 (Sup 2003).

**§ 98:17 Types of goods, services, and misconduct—
Improper billing for services**

The court applied GBL § 349 to the improper billing for services in *Joyce v. SI All Tire & Auto Center*¹ (“the invoice [violates GBL § 349]. Although the bill has the total charge for the labor rendered for each service, it does not set forth the number of hours each service took. It makes it impossible for a consumer to determine if the billing is proper. Neither does the bill set forth the hourly rate.”)

**§ 98:18 Types of goods, services, and misconduct—
Defective ignition switches**

The court applied GBL § 349 to a defective ignition switch in conjunction with GBL § 198-b (Used Car Lemon Law), breach of express warranty,¹ breach of implied warranty of merchantability (UCC §§ 2-314, 2-318), violation of VTL § 417, and strict products liability law² in *Ritchie v. Empire Ford Sales, Inc.*³ finding a car dealer liable for damages to a used car that burned up 4 1/2 years after sale.

**§ 98:19 Types of goods, services, and misconduct—
Extended warranties**

“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.”¹ In *Giarrantano v. Midas Muffler*,² the court found that the defendant would not honor its brake shoe warranty unless the consumer agreed to pay

[Section 98:17]

¹*Joyce v. SI All Tire & Auto Center*, Richmond Civil Ct., Index No: SCR 1221/05, Decision Oct. 27, 2005.

[Section 98:18]

¹See Chapter 74, “Warranties” (§§ 74:1 et seq.).

²See Chapter 79, “Products Liability” (§§ 79:1 et seq.).

³*Ritchie v. Empire Ford Sales, Inc.*, 11/7/96 N.Y.L.J. 30, col. 3 (Yks. Cty. Ct.).

[Section 98:19]

¹*Giarrantano v. Midas Muffler*, 166 Misc. 2d 390, 630 N.Y.S.2d 656, 659, 27 U.C.C. Rep. Serv. 2d 87 (City Ct. 1995).

²*Giarrantano v. Midas Muffler*, 166 Misc. 2d 390, 630 N.Y.S.2d 656, 27 U.C.C. Rep. Serv. 2d 87 (City Ct. 1995).

for additional repairs found necessary after a required inspection of the brake system. The court applied GBL § 349 in conjunction with GBL § 617(2)(a) which 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"³].

Moreover, in *Kim v. BMW of Manhattan, Inc.*,⁴ the court held that "The deceptive act that plaintiffs allege here is that, without disclosing to Chun that the Extension could not be cancelled, BMW Manhattan placed the charge for the Extension on his service invoice, and acted as though such placement gave BMW Manhattan a mechanic's lien on the Car. Such action constituted a deceptive practice within the meaning of GBL § 349 . . . As a result of that practice, plaintiffs were deprived of the use of the Car for a significant time and Chun was prevented from driving away, while he sat in the Car for several hours, until he had paid for the Extension."

§ 98:20 Types of goods, services, and misconduct—Motor oil disposal charges

In *Farino v. Jiffy Lube International, Inc.*,¹ the court found that an "Environmental Surcharge" of \$0.80 to dispose of used motor oil after every automobile oil change may be deceptive since under ECL § 23-2307, Jiffy was required to accept used motor oil at no charge.

§ 98:21 Types of goods, services, and misconduct—Bait advertising

In *Cuomo v. Dell, Inc.*,¹ the Attorney General commenced a special proceeding alleging violations of Exec. Law 63(12) and

³GBL § 617(2)(a).

⁴*Kim v. BMW of Manhattan, Inc.*, 11 Misc. 3d 1078(A), 819 N.Y.S.2d 848 (Sup 2005), order aff'd as modified, 35 A.D.3d 315, 827 N.Y.S.2d 129 (1st Dep't 2006).

[Section 98:20]

¹*Farino v. Jiffy Lube International, Inc.*, 8/14/01 N.Y.L.J. 22, col. 4 (Sup 2001), aff'd, *Farino v. Jiffy Lube Intern., Inc.*, 298 A.D.2d 553, 748 N.Y.S.2d 673 (2d Dep't 2002).

[Section 98:21]

¹*People ex rel. Cuomo v. Dell, Inc.*, 21 Misc. 3d 1110(A), 873 N.Y.S.2d 236 (Sup 2008). See also *Dell to Pay \$4 Million To Settle Consumer Case*, 9/16/09 N.Y.L.J. 4, 1 ("Computer make Dell Inc. Will pay \$4 million in restitution and penalties . . . Mr. Cuomo said Dell must clearly disclose that most customers do not qualify for free financing or 'next day' repair service").

GBL Article 22-A involving respondent's practices "in the sale, financing and warranty servicing of computers." On respondent's motion to dismiss, the court held that Dell's "ads offer such promotions such as free flat panel monitors . . . include offers of very attractive financing, such as no interest and no payments for a specified period (limited to) 'well qualified 'customers . . . ' best qualified' customers (but) nothing in the ads indicate what standards are used to determine whether a customer is well qualified . . . Petitioner's submissions indicate that as few as 7% of New York applicants qualified for some promotions . . . most applicants, if approved for credit, were offered very high interest rate revolving credit accounts ranging from approximately 16% up to almost 30% interest without the prominently advertised promotional interest deferral . . . It is therefore determined that Dell has engaged in prominently advertising the financing promotions in order to attract prospective customers with no intention of actually providing the advertised financing to the great majority of such customers. Such conduct is deceptive and constitutes improper 'bait advertising.'"

**§ 98:22 Types of goods, services, and misconduct—
Baldness products**

In *Mountz v. Global Vision Products, Inc.*,¹ the court described "Avacor, a hair loss treatment extensively advertised on television . . . as the modern day equivalent of the sales pitch of a snake oil salesman" and found that the misrepresentations of "no known side effects of Avacor is refuted by documented minoxidil side effects." The court also found that plaintiff "has sufficiently pleaded a deception bearing upon the pricing of the product . . . the argument that the money back guarantee defeats liability [is] meritless."

**§ 98:23 Types of goods, services, and misconduct—
Budget planning**

In *People v. Trescha Corp.*,¹ a 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

[Section 98:22]

¹*Mountz v. Global Vision Products, Inc.*, 3 Misc. 3d 171, 770 N.Y.S.2d 603 (Sup 2003). See also *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 291, 690 N.Y.S.2d 495, 712 N.E.2d 662 (1999) (reference to unpublished decision applying GBL § 349 to products for treatment of balding and baldness).

[Section 98:23]

¹*People v. Trescha Corp.*, 12/6/00 N.Y.L.J. 26, Col. 3 (Sup 2000).

. . . the debtor agrees to periodically send a lump sum payment to the budget planner who distributes specific amounts to the debtor's creditors."

§ 98:24 Types of goods, services, and misconduct—Cable television services: unneeded converter boxes

In *Samuel v. Time Warner, Inc.*,¹ a class of cable television subscribers claimed a violation of GBL § 349 and the breach of an implied duty of good faith and fair dealing because defendant allegedly "is charging its basic customers for converter boxes which they do not need, because the customers subscribe only to channels that are not being converted . . . (and) charges customers for unnecessary remote controls regardless of their level of service." In sustaining the GBL § 349 claim based, in part, upon "negative option billing," ("negative option billing '(violates) 47 USA § 543(f), which prohibits a cable company from charging a subscriber for any equipment that the subscriber has not affirmatively requested by name, and a subscriber's failure to refuse a cable operator's proposal to provide such equipment is not deemed to be an affirmative request' ") the court held that defendant's "disclosures regarding the need for, and/or benefits of, converter boxes and . . . remote controls are buried in the Notice, the contents of which are not specifically brought to a new subscriber's attention . . . a claim for violation of GBL § 349 is stated."

§ 98:25 Types of goods, services, and misconduct—Cable television services: unauthorized taxes and fees

In *Lawlor v. Cablevision Systems Corp.*,¹ the plaintiff claimed that his monthly bill for Internet service "contained a charge for 'Taxes and Fees' and that Cablevision had no legal rights to charge these taxes or fees and sought to recover (those charges) . . . The Agreement for Optimum Online for Commercial Services could be considered misleading."

[Section 98:24]

¹*Samuel v. Time Warner, Inc.*, 10 Misc. 3d 537, 809 N.Y.S.2d 408 (Sup 2005). See also *Brissenden v. Time Warner Cable of New York City*, 25 Misc. 3d 1084, 885 N.Y.S.2d 879 (Sup 2009) (installation of unneeded converter boxes; class certification denied).

[Section 98:25]

¹*Lawlor v. Cablevision Systems Corp.*, 15 Misc. 3d 1111(A), 839 N.Y.S.2d 433 (Sup 2007). See also *Lawlor v. Cablevision Systems Corp.*, 20 Misc. 3d 1144(A), 873 N.Y.S.2d 234 (Sup 2008) (complaint dismissed).

**§ 98:26 Types of goods, services, and misconduct—
Cellular telephones**

In *Naevus International, Inc. v. AT&T Corp.*,¹ the court, in an action in which wireless phone² subscribers sought damages for “frequent dropped calls, inability to make or receive calls and failure to obtain credit for calls that were involuntarily disconnected,” found that the GBL §§ 349, 350 claims were not preempted by Federal Communications Act of 1934.

**§ 98:27 Types of goods, services, and misconduct—
Checking accounts**

In *Sherry v. Citibank, N.A.*,¹ the court found that “plaintiff stated [GBL §§ 349, 350 claims] for manner in which defendant applied finance charges for its checking plus ‘accounts since sales literature could easily lead potential customer to reasonable belief that interest would stop accruing once he made deposit to his checking account sufficient to pay off amount due on credit line.’”

**§ 98:28 Types of goods, services, and misconduct—
Clothing sales: refund policies**

The court applied GBL § 349 in conjunction with UCC §§ 2-314, 2-714 and GBL § 218-a in *Baker v. Burlington Coat Factory*,¹ in which a clothing retailer refused to refund a purchase price in cash for defective and shedding fake fur returned two days after purchase relying upon a posted sign which stated, pursuant to

[Section 98:26]

¹*Naevus Intern., Inc. v. AT & T Corp.*, 185 Misc. 2d 655, 713 N.Y.S.2d 642 (Sup 2000), aff’d as modified, 283 A.D.2d 171, 724 N.Y.S.2d 721 (1st Dep’t 2001).

²See also *Ballas v. Virgin Media, Inc.*, 18 Misc. 3d 1106, 856 N.Y.S. 2d 22 (Sup. 2007), aff’d 60 A.D. 3d 712, 875 N.Y.S. 2d 523 (2d Dep’t 2009) (A class of consumers charged the defendant cell phone service provider with breach of contract and a violation of GBL § 349 in allegedly failing to properly reveal “the top up provisions of the pay by the minute plan” known as “Topping up (which) is a means by which a purchaser of Virgin’s cell phone (“Oystr”), who pays by the minute, adds cash to their cell phone account so that they can continue to receive cell phone service. Claims dismissed).

[Section 98:27]

¹*Sherry v. Citibank*, 5 A.D.3d 335, 773 N.Y.S.2d 553 (1st Dep’t 2004).

[Section 98:28]

¹*Baker v. Burlington Coat Factory Warehouse*, 175 Misc. 2d 951, 673 N.Y.S.2d 281, 34 U.C.C. Rep. Serv. 2d 1052 (City Ct. 1998).

GBL § 218-a,² “Merchandise, in New Condition, May be Exchanged Within 7 Days of Purchase for Store Credit . . . No Cash Refunds or Charge Credits.” The court held, however, that if the product is defective and there has been a breach of the implied warranty of merchantability [UCC § 2-314] then consumers may recover all appropriate damages including the purchase price in cash [UCC § 2-714]. In essence, UCC § 2-314 preempts GBL § 218-a. In addition, defendant’s return policy was misleading and deceptive in violation of GBL § 349.

**§ 98:29 Types of goods, services, and misconduct—
Computer software: monopolistic practices**

In *Cox v. Microsoft Corp.*,¹ a consumer class action,² the court applied GBL § 349 to allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors to inhibit competition and technological development and creating an ‘applications barrier’ in its Windows software that . . . rejected competitors’ Intel-compatible PC operating systems, and that such practices resulted in artificially inflated prices for defendant’s products and denial of consumer access to competitor’s innovations, services and products.”

²In *McCord v. Norm’s Music*, 21 Misc. 3d 133(A), 875 N.Y.S.2d 821 (App. Term 2008), the music store’s no-refund policy “was posted at each cash register.” Plaintiff failed to show the musical instrument “was defective or that there was a breach of warranty of merchantability.” *Evergreen Bank, N.A. v. Zerteck, Inc.*, 28 A.D.3d 925, 813 N.Y.S.2d 796 (3d Dep’t 2006), the “defendant violated (GBL § 218-a when it sold a boat to Jacobs . . . by failing) to post its refund policy . . . Jacobs was awarded a refund (and attorneys fees of \$2,500)”. *Perel v. Eagletronics*, 11 Misc. 3d 1075(A), 816 N.Y.S.2d 700 (N.Y. City Civ. Ct. 2006), the consumer purchased a defective air conditioner and sought a refund. The Court held that defendant’s refund policy [“No returns or exchanges”] placed “at the very bottom” of invoices and sales receipts was inconspicuous and violated GBL § 218-a(1). In addition, the air conditioner was defective and breached the implied warranty of merchantability under UCC § 2-314. Also, in *Dudzik v. Klein’s All Sports*, 158 Misc. 2d 72, 600 N.Y.S.2d 1013, 21 U.C.C. Rep. Serv. 2d 592 (J. Ct. 1993), involving a defective baseball bat, the court 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.

[Section 98:29]

¹*Cox v. Microsoft Corp.*, 8 A.D.3d 39, 778 N.Y.S.2d 147 (1st Dep’t 2004).

²*Cox v. Microsoft Corp.*, 48 A.D.3d 215, 850 N.Y.S.2d 103 (1st Dep’t 2008), leave to appeal denied, 10 N.Y.3d 711, 860 N.Y.S.2d 483, 890 N.E.2d 246 (2008) (class certification granted).

§ 98:30 Types of goods, services, and misconduct—Credit card applications

In *People v. Applied Card Systems, Inc.*,¹ involving misrepresentations regarding the availability of certain preapproved credit limits, the court held that “solicitations were misleading . . . because a reasonable consumer was led to believe that by signing up for the program, he or she would be protected in case of an income loss due to the conditions described.”

In *People v. Telehublink*,² the court held that “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 repair manual.”

In *Sims v. First Consumers National Bank*,³ the court applied GBL § 349 finding that “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.”

Also, in *Broder v. MBNA Corporation*,⁴ the court certified a consumer class action alleging that a credit card company misrepresented the application of its low introductory annual percentage rate to cash advances and violated GBL § 349.

[Section 98:30]

¹People ex rel. Spitzer v. Applied Card Systems, Inc., 27 A.D.3d 104, 805 N.Y.S.2d 175 (3d Dep’t 2005). See also People ex rel. Spitzer v. Applied Card Systems, Inc., 41 A.D.3d 4, 834 N.Y.S.2d 558 (3d Dep’t 2007), aff’d, 11 N.Y.3d 105, 863 N.Y.S.2d 615, 894 N.E.2d 1 (2008), cert. denied, 129 S. Ct. 999, 173 L. Ed. 2d 292 (2009) (restitution, penalties, and costs; members of nationwide class action involving same issues who settled their claims may not receive restitution in this action).

²People ex rel. Spitzer v. Telehublink Corp., 301 A.D.2d 1006, 756 N.Y.S.2d 285 (3d Dep’t 2003).

³Sims v. First Consumers Nat. Bank, 303 A.D.2d 288, 758 N.Y.S.2d 284 (1st Dep’t 2003).

⁴Broder v. MBNA Corp., 281 A.D.2d 369, 722 N.Y.S.2d 524 (1st Dep’t 2001).

**§ 98:31 Types of goods, services, and misconduct—
Currency conversions**

In *Relativity Travel, Ltd. v. JP Morgan Chase Bank*,¹ the court held that “Relativity has adequately alleged that the Deposit Account Agreement was deceptive despite the fact that the surcharge is described in that agreement. The issue is not simply whether the Deposit Account Agreement was deceptive, but whether Chase’s overall business practices in connection with the charge were deceptive . . . Viewing Chase’s practices as a whole including the failure to list the surcharge on the Account Statement or on Chase’s website and the failure to properly inform its representatives about the surcharge are sufficient, if proved, to establish a prima facie case . . . Relativity’s allegation that it was injured by having been charged an undisclosed additional amount on foreign currency transactions is sufficient to state a [GBL § 349] claim.”

**§ 98:32 Types of goods, services, and misconduct—
Customer information; privacy**

In *Anonymous v. CVS Corp.*,¹ the court held that the sale of confidential patient information by pharmacy to a third party is “an actionable deceptive practice” under GBL § 349. Likewise, in *Meyerson v. Prime Realty Services, LLC*,² the court held that the “landlord deceptively represented that [tenant] was required by law to provide personal and confidential information, including . . . social security number in order to secure renewal lease and avoid eviction.”

[Section 98:31]

¹*Relativity Travel, Ltd. v. JP Morgan Chase Bank*, 13 Misc. 3d 1221(A), 831 N.Y.S.2d 349 (Sup 2006).

[Section 98:32]

¹*Anonymous v. CVS Corp.*, 1/8/04 N.Y.L.J. 19, col. 1 (Sup. 2004). See also *Anonymous v. CVS Corp.*, 188 Misc. 2d 616, 728 N.Y.S.2d 333 (Sup 2001) (the court applied GBL § 349 finding that CVS acquired the customer files from 350 independent pharmacies without customers’ consent and, further, that 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”); *Smith v. Chase Manhattan Bank, USA, N.A.*, 293 A.D.2d 598, 741 N.Y.S.2d 100 (2d Dep’t 2002) (claims-based violations of GBL § 349 and Civ. Rights Law §§ 50, 51 dismissed).

²*Meyerson v. Prime Realty Services, LLC*, 7 Misc. 3d 911, 796 N.Y.S.2d 848 (Sup 2005).

§ 98:33 Types of goods, services, and misconduct—Debt settlement programs

In *People v. Nationwide Asset Services, Inc.*,¹ the court found that respondents' "debt settlement" program violated GBL §§ 349, 350 in that respondents "have persistently engaged in a deceptive business practice and false advertising in representing that their services 'typically save 25% to 40% off' a consumer's total indebtedness . . . the statistics . . . demonstrate beyond any doubt that what respondents represent to be the 'typical' . . . experience of their program participants is too atypical . . . of the 1,981 New York consumers (that) signed up . . . only 64, or fewer than 3%, had successfully completed the program . . . of those 64 consumers . . . only six, or one tenth of the 64 and .3% of the original 1,981, realized savings of 25% or more after payment of respondents' fees."

§ 98:34 Types of goods, services, and misconduct—Defective dishwashers

In *People v. General Electric Co., Inc.*,¹ the court found that misrepresentations "made by . . . GE to the effect that certain defective dishwashers it manufactured were not repairable" were deceptive under GBL § 349.

§ 98:35 Types of goods, services, and misconduct—Door-to-door sales

"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."¹ Personal Property Law Pers. Prop. Law. §§ 425 to 431 "afford(s) consumers a 'cooling-off' period to cancel contracts which are entered into as a

[Section 98:33]

¹*People ex rel. Cuomo v. Nationwide Asset Services, Inc.*, 26 Misc. 3d 258, 888 N.Y.S.2d 850 (Sup 2009).

[Section 98:34]

¹*People ex rel. Spitzer v. General Electric Co., Inc.*, 302 A.D.2d 314, 756 N.Y.S.2d 520, Prod. Liab. Rep. (CCH) P 16538 (1st Dep't 2003).

[Section 98:35]

¹*Rossi v. 21st Century Concepts, Inc.*, 162 Misc. 2d 932, 618 N.Y.S.2d 182, 185 (City Ct. 1994). See also *Wenger v. Cardo Windows, Inc.*, 2009 WL 649458 (N.J. Super. Ct. App. Div. 2009), cause remanded, 201 N.J. 496, 992 A.2d 791 (2010).

(New Jersey Door-to-Door Home Repair Sales Act).

result of high pressure door-to-door sales tactics.”² Pers. Prop. Law. § 428 provides consumers with rescission rights should a salesman fail to complete a notice of cancellation form at the back of the contract.

The courts have applied GBL § 349 in conjunction with Pers. Prop. Law. § 428 in *New York Environmental Resources v. Franklin*³ (misrepresented and grossly overpriced water purification system) and *Rossi v. 21st Century Concepts, Inc.*⁴ (misrepresented pots and pans costing \$200 each). Rescission is also appropriate if the notice of cancellation form is not in Spanish for Spanish-speaking consumers.⁵ 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 and attorney’s fees⁶ and costs.⁷ In addition, Pers. Prop. Law. § 429(3) provides for an award of attorney’s fees.

§ 98:36 Types of goods, services, and misconduct— Educational services

In *Drew v. Sylvan Learning Center*,¹ the parents enrolled their school-age children in an educational services program which promised “The Sylvan Guarantee. Your child will improve at least one full grade level equivalent in reading or math within 36

²*Rossi v. 21st Century Concepts, Inc.*, 162 Misc. 2d 932, 618 N.Y.S.2d 182, 185 (City Ct. 1994). Compare: *Millan v. Yonkers Avenue Dodge, Inc.*, 9/17/96 N.Y.L.J. 26, co. 5 (Yks. Cty. Ct.) (cooling-off period under Door-To-Door Sales Act does not apply to sale of used cars which is governed, in part, by cure requirements under New York’s Used Car Lemon Law (GBL § 198-b)).

³*New York Environmental Resources v. Franklin*, 3/4/03 N.Y.L.J. 27, col. 2 (Sup. 2003).

⁴*Rossi v. 21st Century Concepts, Inc.*, 162 Misc. 2d 932, 618 N.Y.S.2d 182 (City Ct. 1994). See also *Certified Inspections, Inc. v. Garfinkel*, 19 Misc. 3d 134(A), 859 N.Y.S.2d 901 (App. Term 2008) (“The contract provided by plaintiff failed to contain the terms required by article 10-A, particularly with regard to the right of cancellation as provided in (PPL 428). Under the circumstances, defendants effectively cancelled the contract”); *Kozlowski v. Sears*, 11/6/97 N.Y.L.J. 27, col. 3 (Yks. Cty. Ct.) (vinyl windows hard to open, did not lock properly, and leaked); *Filpo v. Credit Express Furniture Inc.*, 8/26/97 N.Y.L.J. 26, col. 4 (Yks. Cty. Ct.) (unauthorized design and fabric color changes and defects in overpriced furniture).

⁵*Filpo v. Credit Express Furniture Inc.*, 8/26/97 N.Y.L.J. 26, col. 4 (Yks. Cty. Ct.).

⁶See Chapter 52, “Court-Awarded Attorney’s Fees” (§§ 52:1 et seq.).

⁷*Rossi v. 21st Century Concepts, Inc.*, 162 Misc. 2d 932, 618 N.Y.S.2d 182, 187 (City Ct. 1994).

[Section 98:36]

¹*Drew v. Sylvan Learning Center Corp.*, 16 Misc. 3d 836, 842 N.Y.S.2d 270, 224 Ed. Law Rep. 371 (N.Y. City Civ. Ct. 2007).

hours of instruction or we'll provide 12 additional hours of instruction at no further cost to you." After securing an \$11,000 loan to pay for the defendant's services and eight months, thrice weekly, of one-hour tutoring sessions, the parents were shocked when "based on the Board of Education's standards, it was concluded that neither child met the grade level requirements. As a result plaintiff's daughter was retained in second grade." The court applied GBL § 349 in conjunction with a finding of fraudulent misrepresentation in that "defendant deceived consumers . . . by guaranteeing that its services would improve her children's grade levels and there by implying that its standards were aligned with the Board of Education's standards" and unconscionability. "There is absolutely no reason why a consumer interested in improving her children's academic status should not be made aware, prior to engaging Sylvan's services, that these services cannot, with any reasonable probability, guarantee academic success. Hiding its written disclaimer within the progress report and diagnostic assessment is unacceptable."

The courts have also applied GBL § 349 in *People v. McNair*² (deliberate and material misrepresentations to parents enrolling their children in the Harlem Youth Enrichment Christian Academy), *Andre v. Pace University*³ (failing to deliver computer programming course for beginners), *Brown v. Hambric*⁴ (failure to deliver travel agent education program), and in *Cambridge v. Telemarketing Concepts*⁵ (discharge of employee before completion of educational program).

§ 98:37 Types of goods, services, and misconduct— Excessive bail bond fees

In *McKinnon v. International Fidelity Insurance Co.*,¹ the court applied GBL § 349 in a consumer class action alleging that

defendants routinely charge and receive fees [on bail bonds] of at least 10% to 15% of the total bail amount despite the limits set forth in the Insurance Law . . . plaintiff has alleged that she relied

²*People v. McNair*, 9 Misc. 3d 1121(A), 862 N.Y.S.2d 810 (Sup 2005).

³*Andre v. Pace University*, 161 Misc. 2d 613, 618 N.Y.S.2d 975, 96 Ed. Law Rep. 192 (City Ct. 1994), judgment rev'd on other grounds, 170 Misc. 2d 893, 655 N.Y.S.2d 777, 117 Ed. Law Rep. 273 (App. Term 1996).

⁴*Brown v. Hambric*, 168 Misc. 2d 502, 638 N.Y.S.2d 873, 107 Ed. Law Rep. 942 (City Ct. 1995).

⁵*Cambridge v. Telemarketing Concepts, Inc.*, 171 Misc. 2d 796, 655 N.Y.S.2d 795 (City Ct. 1997).

[Section 98:37]

¹*McKinnon v. International Fidelity Ins. Co.*, 182 Misc. 2d 517, 704 N.Y.S.2d 774 (Sup 1999).

to her detriment on the false representations made . . . as to the amounts defendant was authorized to charge for bail premiums, which exceeded the statutory maximum, and that defendant falsely represented expenses which had no relation to actual expenses . . . plaintiff's allegations establish a prima facie case for fraud and deceptive business practices pursuant to (GBL) § 349.

**§ 98:38 Types of goods, services, and misconduct—
Excessive modeling fees**

In *Shelton v. Elite Model Management*,¹ plaintiff models claimed, inter alia, “undisclosed kickbacks to modeling agencies; circumventing the Employment Agency Law by using ‘captive’ affiliates to book Screen Actors Guild and AFTRA jobs, both of which require bookings only through licensed agents; price gouging of models; resigning their Department of Consumer Affairs (DCA) licenses in the early 1970s, then denying to the models and the DCA the modeling agencies’ legal status as employment agencies in order to avoid the 10% limit on such fees; double-dipping by charging models 20% and model employers 20% resulting in the agency collecting on their share of the amount paid plus reimbursement for expenses and without disclosing their full compensation to their client models; collusion among model agencies to set fees.” The court found that the models’ claim under GBL § 349 for charging them excessive fees in violation of the “employment agency” statute (GBL Article 11) was timely filed under the three-year statute of limitations in CPLR 214[2].

**§ 98:39 Types of goods, services, and misconduct—
Exhibitions and conferences**

In *Sharknet Inc. v. Techmarketing, NY Inc.*,¹ the court applied GBL § 349 to misrepresentations made by professional exhibitors as to the length of and the number of persons attending an Internet exhibition.

[Section 98:38]

¹*Shelton v. Elite Model Management, Inc.*, 11 Misc. 3d 345, 812 N.Y.S.2d 745 (Sup 2005).

[Section 98:39]

¹*Sharknet Inc. v. Techmarketing, NY Inc.*, 4/22/97 N.Y. L.J. 32, col. 3 (Yks. Cty. Ct.).

**§ 98:40 Types of goods, services, and misconduct—
Extended warranties**

In *Dvoskin v. Levitz Furniture Co., Inc.*,¹ involving one-year and five-year furniture extended warranties, the court applied GBL § 349, finding that “the solicitation and sale of an extended warranty to be honored by an entity that is different from the selling party is inherently deceptive if an express representation is not made disclosing who the purported contracting party is. It is reasonable to assume that the purchaser will believe the warranty is with the Seller to whom she gave consideration, unless there is an express representation to the contrary. The providing of a vague two page sales brochure, after the sale transaction, which brochure does not identify the new party . . . and which contains no signature or address is clearly deceptive.”²

§ 98:41 Types of goods, services, and misconduct—Fixed-price contracts: unilateral changes

In *Emilio v. Robinson Oil Corp.*,¹ a class of consumers of electricity asserted breach of contract, breach of the covenant of good faith and fair dealing, and violation of GBL § 349 based on claims that defendant unilaterally increased the price of electricity after they entered into fixed-price contracts. On plaintiff’s motion to amend the complaint, the court held that “plaintiff should also be allowed to assert his claim under [GBL § 349] based on the allegation that the defendant unilaterally increased the price

[Section 98:40]

¹*Dvoskin v. Levitz Furniture Co. Inc.*, 9 Misc. 3d 1125(A), 862 N.Y.S.2d 807 (Dist. Ct. 2005).

²See also *Kim v. BMW of Manhattan, Inc.*, 11 Misc. 3d 1078(A), 819 N.Y.S.2d 848 (Sup 2005), order aff’d as modified, 35 A.D.3d 315, 827 N.Y.S.2d 129 (1st Dep’t 2006) (misrepresented extended warranty; \$50 statutory damages awarded under GBL § 349(h)); *Giarratano v. Midas Muffler*, 166 Misc. 2d 390, 630 N.Y.S.2d 656, 659, 27 U.C.C. Rep. Serv. 2d 87 (City Ct. 1995) (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; “the Midas Warranty Certificate was misleading and deceptive in that it promised the replacement of worn brake pads free of charge and then emasculated that promise by requiring plaintiff to pay for additional brake system repairs which Midas would deem necessary and proper”); *Petrello v. Winks Furniture*, 5/21/98 N.Y.L.J. 32, col. 3 (Yks. Cty. Ct.) (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a five-year warranty).

[Section 98:41]

¹*Emilio v. Robison Oil Corp.*, 28 A.D.3d 417, 813 N.Y.S.2d 465 (2d Dep’t 2006).

in the middle of the renewal term of the contract.” Subsequently,² the court granted class certification noting that “the extent defendant may have issued three similar contract versions at different times . . . nothing would prevent the Supreme Court . . . from establishing sub-classes based on the particular contract at issue.”

Also, in an earlier case, the court in *Matter of Wilco Energy Corp.*³ held that “Wilco solicited contracts from the public and, after entering into approximately 143 contracts, unilaterally changed their terms. This was not a private transaction occurring on a single occasion but rather, conduct which affected numerous consumers . . . Wilco’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.”

§ 98:42 Types of goods, services, and misconduct—Food: nutritional value

In *Pelman v. McDonald’s Corp.*,¹ the court held that the following allegations challenging the nutritional value of fast-food products stated a claim for violation of GBL § 349.

“Specifically, Count I alleges that the combined effect of McDonald’s various promotional representations . . . was to create the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily. Count II alleges that McDonald’s failed adequately to disclose that its use of certain additives and the manner of its food processing rendered certain of its foods substantially less healthy than represented. Count III alleges that McDonald’s deceptively represented that it would provide nutritional information to its New York customers when in reality such information was not readily available at a significant number of McDonald’s outlets in New York visited by the plaintiffs and others . . . the amended complaint alleges that, as a result, plaintiffs have developed ‘obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, related cancers, and/or other detrimental and adverse health effects.’”

²*Emilio v. Robison Oil Corp.*, 63 A.D.3d 667, 880 N.Y.S.2d 177 (2d Dep’t 2009).

³*People v. Wilco Energy Corp.*, 284 A.D.2d 469, 728 N.Y.S.2d 471 (2d Dep’t 2001).

[Section 98:42]

¹*Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F.3d 508 (2d Cir. 2005).

§ 98:43 Types of goods, services, and misconduct—Food: posting caloric information

In *New York State Restaurant Association v. New York City Board of Health*,¹ restaurant owners challenged the constitutionality of New York City Health Code section 81.50 (“Regulation 81.50”) which “requires certain chain restaurants that sell standardized meals to post caloric content information in their menus and on their menu boards.” The court found that Regulation 81.50 is not preempted by the Federal Nutrition, Labeling and Education Act (NELA) and is reasonably related to New York City’s interest in reducing obesity. “The City submitted evidence indicating that . . . people tend to underestimate the caloric content of restaurant foods . . . that many consumers report looking at caloric information on packaged goods and changing their purchasing habits . . . that, after the introduction of mandatory nutrition labeling on packaged foods, food manufacturers began to offer reformulated and ‘nutritionally improved’ products—suggesting that consumer demand for such products is promoted by increased consumer awareness of the nutritional content of available food options.”

§ 98:44 Types of goods, services, and misconduct—Furniture sales: merchandise delivery dates

“In order to induce a sale, furniture and appliance store salesmen often misrepresent the quality, origin, price, terms of payment and delivery date of ordered merchandise.”¹ In *Walker v. Winks Furniture*,² the court applied GBL § 349 in conjunction with GBL § 396-u. The court noted that 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 a 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-

[Section 98:43]

¹New York State Restaurant Ass’n v. New York City Bd. of Health, 2008 WL 1752455 (S.D. N.Y. 2008), order aff’d, 556 F.3d 114 (2d Cir. 2009).

[Section 98:44]

¹Walker v. Winks Furniture, 168 Misc. 2d 265, 640 N.Y.S.2d 428 (City Ct. 1996).

²Walker v. Winks Furniture, 168 Misc. 2d 265, 640 N.Y.S.2d 428 (City Ct. 1996).

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 penalty.³ A violation of GBL § 396-u is a per se violation of GBL § 349 which provides for treble damages and attorney's fees and costs.⁴ In addition, GBL § 396-u(7) also provides for a trebling of damages upon a showing of a wilful violation of the statute.⁵

**§ 98:45 Types of goods, services, and misconduct—
Furniture sales: misrepresentations**

In *Petrello v. Winks Furniture*,¹ the court applied GBL § 349 to a retail store's misrepresentations that a sofa was covered in Ultrasuede HP and protected by a five-year warranty. In *Walker v. Winks Furniture*,² the court applied GBL § 349 to a retail store's false promise to deliver furniture within one week. In *Filpo v.*

³*Walker v. Winks Furniture*, 168 Misc. 2d 265, 640 N.Y.S.2d 428, 430 (City Ct. 1996). But see *Dweyer v. Montalbano's Pool & Patio Center, Inc.*, 10 Misc. 3d 135(A), 814 N.Y.S.2d 560 (App. Term 2005) ("There is nothing in the statute that permits the consumer to rescind the contract; damages are the only remedy under the statute.").

⁴*Walker v. Winks Furniture*, 168 Misc. 2d 265, 640 N.Y.S.2d 428, 431 (City Ct. 1996).

⁵*Walker v. Winks Furniture*, 168 Misc. 2d 265, 640 N.Y.S.2d 428, 431 (City Ct. 1996). In *Dweyer v. Montalbano's Pool & Patio Center, Inc.*, 10 Misc. 3d 135(A), 814 N.Y.S.2d 560 (App. Term 2005), 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 GBL § 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 GBL § 396-u(2)(b). The court awarded GBL § 396-u damages of \$287.12 for the two replacement chairs, trebled to \$861.36 under GBL § 396-u(7). In addition, the court granted rescission under UCC § 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. In *Julio v. Maurice Villency, Inc.*, 15 Misc. 3d 913, 832 N.Y.S.2d 788 (N.Y. City Civ. Ct. 2007), the court held "that an item of furniture ordered in one of several designs, materials, sizes, colors or fabrics offered by a manufacturer to all of its customers, if made pursuant to an order specifying a substantial portion of its components and elements, is in substantial part custom-made."

[Section 98:45]

¹*Petrello v. Winks Furniture*, 5/21/98 N.Y.L.J. 32, col. 3 (Yks. Cty. Ct.).

²*Walker v. Winks Furniture*, 168 Misc. 2d 265, 640 N.Y.S.2d 428 (City Ct. 1996).

Credit Express Furniture,³ the court applied GBL § 349 for failing to inform Spanish-speaking consumers of a three-day cancellation period in Spanish. Likewise, in *Colon v. Rent-A-Center, Inc.*,⁴ the court held that the retailer's rent-to-own furniture had "an overly inflated cash price" for purchase which may violate GBL § 349.

§ 98:46 Types of goods, services, and misconduct—Gift cards

In two class actions, purchasers of gift cards challenged the imposition of dormancy fees by gift card issuers. Gift cards, a multibillion business, may "eliminate the headache of choosing a perfect present (but) the recipient might find some cards are a pain in the neck. Many come with enough fees and restrictions that you might be better off giving a check. Most annoying are expiration dates and maintenance or dormancy fees."¹

In *Lonner v. Simon Property Group, Inc.*,² a class of consumers challenged the imposition of gift card dormancy fees of \$2.50 per month setting forth three causes of action seeking damages for breach of contract, violation of GBL § 349 and unjust enrichment. Within the context of defendant's motion to dismiss the amended complaint, the court found that the *Lonner* plaintiffs had pleaded sufficient facts to support causes of action for breach of contract based upon a breach of the implied covenant of good faith and fair dealing and a violation of GBL § 349.

Also, in *Goldman v. Simon Property Group, Inc.*,³ a class of consumers also challenged dormancy fees and the court found that there was no private right of action under GBL § 396-I and that CPLR 4544 applies to business gifts which involve a consumer transaction. The court also restored claims for injunctive relief and declaratory judgment and allowed plaintiffs to plead unjust enrichment and money had and received as alternative claims to the breach-of-contract cause of action.

³Filpo v. Credit Express Furniture, 8/26/97 N.Y.L.J. 26, col. 4 (Yks. Cty. Ct.).

⁴Colon v. Rent-A-Center, Inc., 276 A.D.2d 58, 716 N.Y.S.2d 7 (1st Dep't 2000).

[Section 98:46]

¹Gift-Card Gotchas, Consumer Reports, December 2006, at p. 8.

²Lonner v. Simon Property Group, Inc., 57 A.D.3d 100, 866 N.Y.S.2d 239 (2d Dep't 2008).

³Goldman v. Simon Property Group, Inc., 58 A.D.3d 208, 869 N.Y.S.2d 125 (2d Dep't 2008).

§ 98:47 Types of goods, services, and misconduct—Home inspections

In *Carney v. Coull Building Inspections, Inc.*,¹ the home buyer alleged that the defendant licensed home inspector “failed to disclose a defective heating system” which subsequently was replaced with a new “heating unit at a cost of \$3,400” although the “defendant pointed out in the report that the hot water heater was ‘very old’ and has run past its life expectancy.” In finding for the plaintiff, the court noted that although the defendant’s damages would be limited to the \$395 fee paid and no private right of action existed under the Home Improvement Licensing Statute, RPL 12-B, the plaintiff did have a claim under GBL § 349 because of defendant’s “failure . . . to comply with RPL Article 12-B” by not including important information in the contract such as the “inspector’s licensing information.”

Also, in *Ricciardi v. Frank d/b/a InspectAmerica Engineering, P.C.*,² the court applied GBL § 349, finding a civil engineer liable for failing to discover a wet basement. On appeal, the appellate term limited recoverable damages to the fee paid.

§ 98:48 Types of goods, services, and misconduct—In vitro fertilization

In *Karlin v. IVF America, Inc.*,¹ the Court of Appeals stated that “In order to ensure an honest marketplace, the General Business Law prohibits all deceptive practices, including false advertising, ‘in the conduct of any business, trade or commerce or in the furnishing of any service in this state’ . . . This appeal requires us to determine whether plaintiffs can maintain an action against defendants operating an in vitro fertilization (IVF) program for deceptive practices and false advertising under (GBL §§ 349, 350) or are instead limited to a claim of medical malprac-

[Section 98:47]

¹*Carney v. Coull Bldg. Inspections, Inc.*, 16 Misc. 3d 1114(A), 847 N.Y.S.2d 895 (N.Y. City Civ. Ct. 2007).

²*Ricciardi v. Frank*, 163 Misc. 2d 337, 620 N.Y.S.2d 918 (City Ct. 1994), judgment aff’d as modified, 170 Misc. 2d 777, 655 N.Y.S.2d 242 (App. Term 1996).

[Section 98:48]

¹*Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495, 712 N.E.2d 662 (1999). In *Stix v. Mount Sinai Hospital*, Index No: 103856/93 (N.Y. Sup. N.Y. County July 6, 1994) (Order and Final Judgment of Settlement of Class Action), the court approved the settlement of a consumer class action on behalf of a class of childless couples who paid substantial sums to Mt. Sinai Hospital for the purpose of assisting them in having children. A variety of medical techniques were used with very low success rates. The class allegedly suffered emotional distress at the delays and lack of success in having children.)

tice based on lack of informed consent. We hold that plaintiffs have properly stated causes of action under these consumer protection statutes . . . plaintiffs commenced this action alleging that defendants engaged in fraudulent and misleading conduct by disseminating false success rates and misrepresenting health risks associated with IVF. In particular, plaintiffs claim that defendants ‘exaggerated success rates, excluding certain subsets of failed treatment procedures, emphasizing numerically false and misleading overall success rates and conceal[ing] and misrepresent[ing] significant health risks, high miscarriage rates and excess neonatal deaths and abnormalities of infants even if a birth resulted from the treatment rendered by defendants.’”

**§ 98:49 Types of goods, services, and misconduct—
Insurance: coverage and rates**

In *Gaidon v. Guardian Life Insurance Co.*,¹ the court applied GBL § 349 to claims arising from misrepresentations that “out-of-pocket premium payments (for life insurance policies) would vanish within a stated period of time.”

In *Batas v. Prudential Insurance Company of America*,² the court applied GBL §§ 349 and 350 regarding, inter alia, allegations of failure “to conduct the utilization review procedures . . . promised in their contracts” and “misrepresentation of facts in materials to induce potential subscribers to obtain defendants’ health policies.”

In *Monter v. Massachusetts Mutual Life Ins. Co.*,³ the court applied GBL § 349 regarding misrepresentations with respect to the terms “Flexible Premium Variable Life Insurance Policy.”

In *Beller v. William Penn Life Ins. Co.*,⁴ the court held that “Here, the subject insurance contract imposed a continuing duty upon the defendant to consider the factors comprising the cost of insurance before changing rates and to review the cost of insurance rates at least once every five years to determine if a change

[Section 98:49]

¹*Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 704 N.Y.S.2d 177, 725 N.E.2d 598 (1999).

²*Batas v. Prudential Ins. Co. of America*, 281 A.D.2d 260, 724 N.Y.S.2d 3 (1st Dep’t 2001). See also *Batas v. Prudential Ins. Co. of America*, 37 A.D.3d 320, 831 N.Y.S.2d 371 (1st Dep’t 2007) (certification denied).

³*Monter v. Massachusetts Mut. Life Ins. Co.*, 12 A.D.3d 651, 784 N.Y.S.2d 898 (2d Dep’t 2004).

⁴*Beller v. William Penn Life Ins. Co. of New York*, 8 A.D.3d 310, 778 N.Y.S.2d 82 (2d Dep’t 2004). See also *Beller v. William Penn Life Ins. Co. of New York*, 37 A.D.3d 747, 830 N.Y.S.2d 759 (2d Dep’t 2007) (class certification granted).

should be made . . . we find that the complaint sufficiently states a [GBL § 349] cause of action.”

In *Skibinsky v. State Farm Fire and Casualty Co.*,⁵ the court applied GBL § 349 to a claim regarding a misrepresentation of the coverage of a “builder’s risk” insurance policy.

Also, in *Brenkus v. Metropolitan Life Ins. Co.*,⁶ the court applied GBL § 349 to a claim regarding misrepresentations by an insurance agent as to amount of life insurance coverage.

**§ 98:50 Types of goods, services, and misconduct—
Insurance: provision of loyal defense counsel**

In *Elacqua v. Physicians’ Reciprocal Insurers*,¹ the court applied GBL § 349 holding that “This threat of divided loyalty and conflict of interest between the insurer and the insured is the precise evil sought to be remedied . . . hence the requirement that independent counsel be provided at the expense of the insurer and that the insurer advise the insured of this right. Defendant’s failure to inform plaintiffs of this right, together with plaintiffs’ showing that undivided and uncompromised conflict-free representation was not provided to them, constituted harm within the meaning of (GBL) 349.”

**§ 98:51 Types of goods, services, and misconduct—
Insurance: unfair claims procedures**

In *Wilner v. Allstate Ins. Co.*,¹ “the plaintiffs allege . . . that the insurance policy, which requires that they protect the defendant’s subrogation interest while their claim is being investigated, compelled them to institute a suit against the Village before the statute of limitations expired . . . In essence, the plaintiffs are alleging that the defendant purposely failed to reach a decision on the merits of their insurance claim in order to force plaintiffs to bring a suit against the Village before the statute of limitations expired, because, if they did not do so, the defendant could refuse reimbursement of the claim on the ground that the plaintiffs had failed to protect the defendant’s subrogation rights

⁵*Skibinsky v. State Farm Fire and Casualty Co.*, 6 A.D.3d 975, 775 N.Y.S.2d 200 (3d Dep’t 2004).

⁶*Brenkus v. Metropolitan Life Ins. Co.*, 309 A.D.2d 1260, 765 N.Y.S.2d 80 (4th Dep’t 2003).

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¹*Elacqua v. Physicians’ Reciprocal Insurers*, 52 A.D.3d 886, 860 N.Y.S.2d 229 (3d Dep’t 2008).

[Section 98:51]

¹*Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 893 N.Y.S.2d 208 (2d Dep’t 2010).

. . . Presumably, the purpose of this alleged conduct would be to save the defendant money . . . the plaintiffs have successfully pleaded conduct . . . which was misleading in a material way.” In *Shebar v. Metropolitan Life Insurance Co.*,² the court applied GBL § 349 to claims regarding “[a]llegations that despite promises to the contrary in its standard-form policy sold to the public, defendants made a practice of ‘not investigating claims for long-term disability benefits in good faith, in a timely fashion, and in accordance with acceptable medical standards . . . when the person submitting the claim . . . is relatively young and suffers from a mental illness.’” In *Makuch v. New York Central Mutual Fire Ins. Co.*,³ the court found a “violation of [GBL § 349 for disclaiming] coverage under a homeowner’s policy for damage caused when a falling tree struck plaintiff’s home.” In *Acquista v. New York Life Ins. Co.*,⁴ the court applied GBL § 349 regarding an 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.”

Similarly, in *Rubinoff v. U.S. Capitol Insurance Co.*,⁵ the court applied GBL § 349 to a claim regarding an automobile insurance company failure to provide timely defense to its insured.

§ 98:52 Types of goods, services, and misconduct— Internet marketing and DSL services

In *Scott v. Bell Atlantic Corporation*,¹ the Court of Appeals applied GBL § 349 to claims “for only the New York plaintiffs” arising from dissatisfaction with defendants’ DSL service. The plaintiffs “allege that, contrary to defendants’ representations, the service was slow and unreliable and that customer service was woefully inadequate. Plaintiffs claim that the DSL connection ‘rarely, if ever, approaches the high speed’ expressly represented . . . Plaintiffs further maintain that the ‘set up in

²*Shebar v. Metropolitan Life Ins. Co.*, 25 A.D.3d 858, 807 N.Y.S.2d 448 (3d Dep’t 2006).

³*Makuch v. New York Cent. Mut. Fire Ins. Co.*, 12 A.D.3d 1110, 785 N.Y.S.2d 236 (4th Dep’t 2004).

⁴*Acquista v. New York Life Ins. Co.*, 285 A.D.2d 73, 730 N.Y.S.2d 272 (1st Dep’t 2001) (rejected by, *Core-Mark Intern. Corp. v. Commonwealth Ins. Co.*, 2005 WL 1676704 (S.D. N.Y. 2005)).

⁵*Rubinoff v. U.S. Capitol Insurance Co.*, 5/10/96 N.Y.L.J. 31, col. 3 (Yks. Cty. Ct.).

[Section 98:52]

¹*Scott v. Bell Atlantic Corporation*, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002). See also *Solomon v. Bell Atlantic Corp.*, 9 A.D.3d 49, 777 N.Y.S.2d 50 (1st Dep’t 2004) (misrepresented DSL services; class decertified).

minutes' self-installation kits are actually unusable by a substantial number of purchasers who are forced to wait for weeks or months to be connected . . . plaintiffs contend that defendants' technical support service is inadequate to support DSL."

In *Zurakov v. Register.Com, Inc.*,² the court applied GBL § 349 stating that "[g]iven 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 GBL § 349.

In *People v. Network Associates*,³ the court applied GBL § 349 stating that "[p]etitioner 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."

**§ 98:53 Types of goods, services, and misconduct—
"Knock-off" telephone numbers**

In *Drizin v. Sprint Corporation*,¹ the court applied GBL § 349 to claims arising from "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

²*Zurakov v. Register.Com, Inc.*, 304 A.D.2d 176, 760 N.Y.S.2d 13 (1st Dep't 2003).

³*People v. Network Associates, Inc.*, 195 Misc. 2d 384, 758 N.Y.S.2d 466 (Sup 2003).

[Section 98:53]

¹*Drizin v. Sprint Corp.*, 3 A.D.3d 388, 771 N.Y.S.2d 82 (1st Dep't 2004).

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 GBL 349]."

§ 98:54 Types of goods, services, and misconduct—Lasik eye surgery

In *Gabbay v. Mandel*,¹ the court applied GBL § 349 to claims alleging medical malpractice and deceptive advertising involving Lasik eye surgery.

§ 98:55 Types of goods, services, and misconduct—Leases, equipment

In *Pludeman v. Northern Leasing Systems, Inc.*,¹ the Court of Appeals addressed the sufficiency of a fraud cause of action asserted against individually named corporate defendants. In *Pludeman*, a class of small-business owners who had entered into lease agreements² for POS terminals asserted that defendant used "deceptive practices, hid material and onerous lease terms. According to plaintiffs, defendants' sales representatives presented them with what appeared to a one-page contract on a clip

[Section 98:54]

¹*Gabbay v. Mandel*, 11 A.D.3d 1050, 783 N.Y.S.2d 22 (1st Dep't 2004).

[Section 98:55]

¹*Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 860 N.Y.S.2d 422, 890 N.E.2d 184 (2008). See also *Pludeman v. Northern Leasing Systems, Inc.*, 24 Misc. 3d 1206(A), 890 N.Y.S.2d 370 (Sup 2009), aff'd in part, appeal dismissed in part, 2010 WL 2162221 (N.Y. App. Div. 1st Dep't 2010) (class certification granted); *Lonner v. Simon Property Group, Inc.*, 57 A.D.3d 100, 866 N.Y.S.2d 239 (2d Dep't 2008) (gift cards and small print).

²Lease renewal provisions are governed by GOL § 5-901. *Andin International Inc. v. Matrix Funding Corp.*, 194 Misc. 2d 719, 756 N.Y.S.2d 724 (Sup 2003), the court held that the automatic renewal provision in a computer lease was ineffective under GOL § 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)."

board, thereby concealing three other pages below . . . among such concealed items . . . (were a) no cancellation clause and no warranties clause, absolute liability for insurance obligations, a late charge clause, and provision for attorney's fees and New York as the chosen forum," all of which were in "small print" or "microprint." In sustaining the fraud cause of action, the Court noted that "it is the language, structure, and format of the deceptive Lease Form and the systematic failure by the sales people to provide each lessee a copy of the lease at the time of its execution that permits, at this early stage, an inference of fraud against the corporate officers in their individual capacities and not the sales agents."

In *Sterling National Bank v. Kings Manor Estates*,³ the court applied GBL § 349 and denied plaintiff's motion for summary judgment in light of "[t]he defendants . . . claim that the equipment lease was tainted by fraud and deception in the inception, was unconscionable, and gave rise to unjust enrichment . . . the bank plaintiff, knowing of the fraudulent conduct, purchased the instant equipment lease at a deep discount, and by demanding payment thereunder acted in a manner violating . . . [GBL § 349]."

**§ 98:56 Types of goods, services, and misconduct—
Liquidated damages clause**

In *Morgan Services, Inc. v. Episcopal Church Home & Affiliates Life Care Community, Inc.*,¹ the court applied GBL § 349, noting that it is deceptive for the 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."

**§ 98:57 Types of goods, services, and misconduct—
Magazine subscriptions**

In *People v. Lipsitz*,¹ the court applied GBL § 349, noting that the Attorney General "has established that respondent consis-

³*Sterling Nat. Bank v. Kings Manor Estates, LLC*, 9 Misc. 3d 1116(A), 808 N.Y.S.2d 920 (N.Y. City Civ. Ct. 2005).

[Section 98:56]

¹*Morgan Services, Inc. v. Episcopal Church Home & Affiliates Life Care Community, Inc.*, 305 A.D.2d 1105, 757 N.Y.S.2d 917 (4th Dep't 2003).

[Section 98:57]

¹*People by Vacco v. Lipsitz*, 174 Misc. 2d 571, 663 N.Y.S.2d 468 (Sup 1997).

tently fails to deliver magazines as promised and consistently fails to honor his money back guarantees . . . the Attorney General has established that the respondent's business practice is generally 'no magazines, no service, no refunds,' although exactly the contrary is promised, making the sales promises a deceptive and fraudulent practice clearly falling within the consumer fraud statutes. Additionally, by falsely advertising attentive customer services and disseminating fictitious testimonials, respondent violates [GBL § 350]. Although some of the specific advertising gimmicks—such as the disguised source of e-mail messages to group members and the references to a 'club' to which not all would be admitted—were particularly designed to inspire confidence, the mere falsity of the advertising content is sufficient as a basis for the false advertising charge."

**§ 98:58 Types of goods, services, and misconduct—
Monopolistic business practices**

In *Cox v. Microsoft Corp.*,¹ the court held that "monopolistic" activities are covered by GBL § 349, noting that the "allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors to inhibit competition and technological development and creating an 'applications barrier' in its Windows software that . . . rejected competitors' Intel-compatible PC operating systems, and that such practices resulted in artificially inflated prices for defendant's products and denial of consumer access to competitor's innovations, services and products."

**§ 98:59 Types of goods, services, and misconduct—
Mortgages: misleading practices**

In *Popular Financial Services, LLD v. Williams*,¹ a foreclosure action, the court found that a counterclaim alleging fraudulent inducement to enter a mortgage stated a claim under GBL § 349.

[Section 98:58]

¹*Cox v. Microsoft Corp.*, 8 A.D.3d 39, 778 N.Y.S.2d 147 (1st Dep't 2004). See also *Cox v. Microsoft Corp.*, 48 A.D.3d 215, 850 N.Y.S.2d 103 (1st Dep't 2008), leave to appeal denied, 10 N.Y.3d 711, 860 N.Y.S.2d 483, 890 N.E.2d 246 (2008) (class certification granted).

[Section 98:59]

¹*Popular Financial Services, LLC v. Williams*, 50 A.D.3d 660, 855 N.Y.S.2d 581 (2d Dep't 2008).

Likewise, in *Delta Funding Corp. v. Murdaugh*,² also a foreclosure action, the court held that the counterclaims stated claims under the Truth in Lending Act³ and GBL § 349.

**§ 98:60 Types of goods, services, and misconduct—
Mortgages: improper fees and charges**

In *MacDonell v. PHM Mortgage Corp.*,¹ mortgagors challenged defendant's \$40 fee "charged for faxing the payoff statements" (which plaintiffs paid) as violations of GBL § 349 and RPL § 274-a(2) ("mortgagee shall not charge for providing the mortgage-related documents, provided . . . the mortgagee may charge not more than twenty dollars, or such amount as may be fixed by the banking board, for each subsequent payoff statement") which statutory claims were sustained by the court finding that the voluntary payment rule does not apply² and noting that "To the extent that our decision in *Dowd v. Alliance Mortgage Co.*,³ holds to the contrary it should not be followed."

In *Kidd v. Delta Funding Corp.*,⁴ the court held that "[t]he defendants failed to prove that their act of charging illegal processing fees to over 20,000 customers, and their failure to

²*Delta Funding Corp. v. Murdaugh*, 6 A.D.3d 571, 774 N.Y.S.2d 797 (2d Dep't 2004).

³*People ex rel. Spitzer v. Applied Card Systems, Inc.*, 11 N.Y.3d 105, 863 N.Y.S.2d 615, 894 N.E.2d 1 (2008), cert. denied, 129 S. Ct. 999, 173 L. Ed. 2d 292 (2009), the Attorney General alleged that Cross Country Bank (CCB), a purveyor of credit cards to "consumers in the 'subprime' credit market" . . . "had misrepresented the credit limits that subprime consumers could obtain and that it failed to disclose the effect that its origination and annual fees would have on the amount of initially available credit." On respondent's motion to dismiss based upon preemption by Truth in Lending Act (TILA) the court held that "Congress also made clear that, even when enforcing the TILA disclosure requirements, states could us their unfair and deceptive trade practices acts to 'requir[e] or obtain[] the requirements of a specific disclosure beyond those specified' . . . Congress only intended the (Fair Credit and Charge Card Disclosure Act) to preempt a specific set of state credit card disclosure laws, not states' general unfair trade practices acts."

[Section 98:60]

¹*MacDonell v. PHH Mortg. Corp.*, 45 A.D.3d 537, 846 N.Y.S.2d 223 (2d Dep't 2007).

²See *Dowd v. Alliance Mortg. Co.*, 32 A.D.3d 894, 822 N.Y.S.2d 558 (2d Dep't 2006); *Dougherty v. North Fork Bank*, 301 A.D.2d 491, 753 N.Y.S.2d 130 (2d Dep't 2003). See generally *Negrin v. Norwest Mortg., Inc.*, 263 A.D.2d 39, 700 N.Y.S.2d 184 (2d Dep't 1999).

³*Dowd v. Alliance Mortg. Co.*, 32 A.D.3d 894, 822 N.Y.S.2d 558 (2d Dep't 2006).

⁴*Kidd v. Delta Funding Corp.*, 299 A.D.2d 457, 751 N.Y.S.2d 267 (2d Dep't 2002).

notify the plaintiffs of the existence and terms of the settlement agreement, were not materially deceptive or misleading.”

In *Walts v. First Union Mortgage Corporation*,⁵ consumers were induced to pay for private mortgage insurance (PMI) beyond requirements under Ins. Law § 6503. The court found that a cause of action alleging the violation of GBL § 349 was stated and noted that “Plaintiffs have adequately alleged a materially deceptive practice aimed at consumers in that Mellon and First Union continued to bill them for PMI premiums, thereby inducing them to believe that they were required to pay them, even after plaintiffs’ principal balance dropped below the 75% ratio set forth in Ins. Law § 6503.”

Also, in *Trang v. HSBC Mortgage Corp., USA*,⁶ the court applied GBL § 349 in conjunction with RPL § 274-a(2) (which prohibits charges for mortgage related documents) in finding that a \$15 special handling/fax fee for a faxed copy of mortgage payoff statement violated both statutes.

**§ 98:61 Types of goods, services, and misconduct—
Mortgages: predatory lending and property
flipping**

In *Cruz v. HSBC Bank, N.A.*,¹ the court denied the defendant’s motion to dismiss the plaintiff’s GBL § 349 claim in a case of predatory lending in which the “plaintiff . . . alleges . . . that defendant Fremont engaged in inducing the plaintiff to accept mortgages where the payments were unaffordable to him; misrepresenting the plaintiff’s income and assets, failing to disclose all the risks of the loan and concealing major defects and illegalities in the home’s structure.”

⁵*Walts v. First Union Mortg. Corp.*, 259 A.D.2d 322, 686 N.Y.S.2d 428 (1st Dep’t 1999). See also *Walts v. First Union Mortgage Corp.*, New York Law Journal, 4/25/00 N.Y.L.J. 26, col. 1 (Sup. 2000).

⁶*Trang v. HSBC Mortgage Corp., USA*, 4/17/02 N.Y.L.J. 28, col. 3 (Sup. 2002).

[Section 98:61]

¹*Cruz v. HSBC Bank, N.A.*, 21 Misc. 3d 1143(A), 2008 WL 5191428 (Sup. 2008).

**§ 98:62 Types of goods, services, and misconduct—
Mortgages and home equity loans: improper
closings**

In *Bonior v. Citibank, N.A.*,¹ the court applied GBL § 349 to a variety of deceptive business practices regarding home equity loans. “The court will set forth below several ‘problems’ with this closing that might have been remedied by the active participation of legal counsel for the borrowers, as well for the other participants.” The court found that the lenders had violated GBL § 349 by (1) failing to advise the borrowers of a right to counsel, (2) use of contradictory and ambiguous documents containing no prepayment penalty clauses and charging an early closing fee, (3) failing to disclose relationships with settlement agents, and (4) document discrepancies. “The most serious is that the equity source agreement and the mortgage are to be interpreted under the laws of different states, New York and California, respectively.”

**§ 98:63 Types of goods, services, and misconduct—
Packaging**

In *Sclafani v. Barilla America, Inc.*,¹ the court applied GBL § 349 to a claim of deceptive packaging of retail food products even though “portions of the packaging at issue comply with applicable federal regulations, [c]ompliance with regulations does not immunize misconduct outside the regulatory scope . . . Here, some of the elements of the relevant packaging alleged . . . to be deceptive fall outside the scope of the applicable federal regulations.”

[Section 98:62]

¹*Bonior v. Citibank, N.A.*, 14 Misc. 3d 771, 828 N.Y.S.2d 765 (N.Y. City Civ. Ct. 2006).

[Section 98:63]

¹*Sclafani v. Barilla America, Inc.*, 19 A.D.3d 577, 796 N.Y.S.2d 548 (2d Dep’t 2005).

§ 98:64 Types of goods, services, and misconduct—Price-matching

In *Dank v. Sears Holding Management Corporation*,¹ the court addressed the concept of deceptive “price matching.”² The court stated that “The complaint alleges that Sears published a policy promising . . . to match the ‘price on an identical branded item with the same features currently available for sale at another local retail store.’ The complaint further alleges that the plaintiff requested at three different locations that Sears sell him a flat-screen television at the same price at which it was being offered by another retailer. His request was denied at the first two Sears locations on the basis that each store manager had the discretion to decide what retailers are considered local and what prices to match. Eventually he purchased the television at the third Sears at the price offered by a retailer located 12 miles from the store, but was denied the \$400 lower price offered by a retailer located 8 miles from the store . . . the complaint states a cause of action under GBL 349 and 350.”

§ 98:65 Types of goods, services and misconduct—Professional networking

In *BNI New York Ltd. v. DeSanto*,¹ the court applied GBL § 349 to the activities of BNI New York Ltd., “a business and professional networking organization with a simple philosophy: ‘Word of mouth is the most cost-effective form of advertising possible,’” seeking to enforce an allegedly unconscionable membership fee promissory note executed by the defendant whose application was rejected by the BNI Eastchester Chapter. The court held that “At BNI the obvious costs money and, what’s more the fees are nonrefundable . . . The plaintiff has violated (GBL § 349) in the following respects: First, the plaintiff’s misrepresentation that defendant would be accepted by BNI’s Eastchester Chapter, and which induced defendant to execute the installment note,

[Section 98:64]

¹*Dank v. Sears Holding Management Corp.*, 59 A.D.3d 582, 874 N.Y.S.2d 188 (2d Dep’t 2009).

²See, e.g., *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418 (S.D. N.Y. 2009) (certification granted to class action alleging deceptive price-matching in violation of GBL § 349); *IN THE MATTER OF JAY NORRIS CORP., ET AL.*, 91 F.T.C. 751, 1978 WL 206483 (1978), modified in part, 94 F.T.C. 415, 1978 WL 206198 (1978); *IN THE MATTER OF THE COMMODORE CORPORATION, ET AL.*, 85 F.T.C. 472, 1975 WL 172200 (1975), order vacated on reconsideration, 110 F.T.C. 636, 1988 WL 1025477 (1988) (consent order).

[Section 98:65]

¹*BNI New York, Ltd. v. DeSanto*, 177 Misc. 2d 9, 675 N.Y.S.2d 752 (City Ct. 1998).

was false, deceptive and misleading . . . Second, the plaintiff's use of 'fees are non-refundable' and 'Fees Are Non-Refundable Without Exception' clauses, which are penalties, in advertising brochures and on application forms was deceptive and misleading . . . Third, the plaintiff's refusal to return defendant's initial payment of \$30 notwithstanding his rejection for membership . . . was deceptive and misleading."

**§ 98:66 Types of goods, services, and misconduct—
Pyramid schemes**

In two cases, the courts applied GBL § 349 in conjunction with GBL § 359-fff prohibiting pyramid schemes. 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."¹ Pyramid schemes are sham moneymaking schemes which prey upon consumers eager for quick riches. GBL § 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. Hambric*² 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. Curlen*,³ 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-fff,⁴ other courts have found that GBL § 359-fff gives consumers a private right of action,⁵ a violation of which also constitutes a per se violation of GBL § 349.

**§ 98:67 Types of goods, services, and misconduct—Real
property sales**

The courts have applied GBL § 349 in a variety of cases involv-

[Section 98:66]

¹*Brown v. Hambric*, 168 Misc. 2d 502, 638 N.Y.S.2d 873, 107 Ed. Law Rep. 942 (City Ct. 1995).

²*Brown v. Hambric*, 168 Misc. 2d 502, 638 N.Y.S.2d 873, 107 Ed. Law Rep. 942 (City Ct. 1995).

³*C.T.V., Inc. v. Curlen*, 12/3/97 N.Y.L.J. 35, col. 1 (Yks. Cty. Ct.).

⁴*Pacurib v. Villacruz*, 183 Misc. 2d 850, 705 N.Y.S.2d 819 (N.Y. City Civ. Ct. 1999).

⁵See, e.g., *Brown v. Hambric*, 168 Misc. 2d 502, 638 N.Y.S.2d 873, 107 Ed. Law Rep. 942 (City Ct. 1995); *C.T.V., Inc. v. Curlen*, 12/3/97 N.Y.L.J. 35, col. 1 (Yks. Cty. Ct.).

ing the marketing of real property to include (1) claims arising from misrepresentations that a house with a septic tank was connected to a city sewer system,¹ (2) claims arising from the deceptive advertisement and sale of condominium units,² (3) deceptive sale of shares in a cooperative corporation,³ (4) deceptive design and construction of a home,⁴ and (5) buying and refurbishing foreclosed homes and misrepresenting that recommended attorneys were approved by the Federal Housing Authority.⁵

§ 98:68 Types of goods, services, and misconduct—Sports nutrition products

In *Morelli v. Weider Nutrition Group, Inc.*,¹ the court applied GBL § 349 to claims that the manufacturer of Steel Bars, a high-protein nutrition bar, misrepresented the amount of fat, vitamins, minerals, and sodium therein.

§ 98:69 Types of goods, services, and misconduct—Tax advice

In *Mintz v. American Tax Relief*,¹ the court applied GBL § 349, finding that “the second and fourth mailings unambiguously state that recipients of the (post) cards ‘can be helped Today’ with their ‘Unbeatable Monthly Payment Plan(s)’ and that defendant can stop wage garnishments, bank seizures, and assessment of interest and penalties. These two mailings . . . make explicit promises

[Section 98:67]

¹*Gutterman v. Romano Real Estate*, 10/28/98 N.Y.L.J. 36, col. 3 (Yks. Cty. Ct.).

²*Board of Managers of Bayberry Greens Condominium v. Bayberry Green Associates*, 174 A.D.2d 595, 571 N.Y.S.2d 496 (2d Dep’t 1991). See also *Breakwaters Townhomes Ass’n of Buffalo, Inc. v. Breakwaters of Buffalo, Inc.*, 207 A.D.2d 963, 616 N.Y.S.2d 829 (4th Dep’t 1994) (condominium units).

³*B.S.L. One Owners Corp. v. Key Intern. Mfg., Inc.*, 225 A.D.2d 643, 640 N.Y.S.2d 135 (2d Dep’t 1996).

⁴*Latiuk v. Faber Const. Co., Inc.*, 269 A.D.2d 820, 703 N.Y.S.2d 645 (4th Dep’t 2000).

⁵*Polonetsky v. Better Homes Depot, Inc.*, 185 Misc. 2d 282, 712 N.Y.S.2d 801 (Sup 2000), aff’d as modified, 279 A.D.2d 418, 720 N.Y.S.2d 59 (1st Dep’t 2001), order rev’d, 97 N.Y.2d 46, 735 N.Y.S.2d 479, 760 N.E.2d 1274 (2001).

[Section 98:68]

¹*Morelli v. Weider Nutrition Group, Inc.*, 275 A.D.2d 607, 712 N.Y.S.2d 551 (1st Dep’t 2000).

[Section 98:69]

¹*Mintz v. American Tax Relief, LLC*, 16 Misc. 3d 517, 837 N.Y.S.2d 841 (Sup 2007).

which . . . cannot be described as 'puffery' and could . . . be found to be purposely misleading and deceptive."

**§ 98:70 Types of goods, services, and misconduct—
Termite inspections**

In *Anunziatta v. Orkin Exterminating Co., Inc.*,¹ the court found that a GBL § 349 cause of action was stated based upon misrepresentations by a pest extermination company of full and complete inspections of a house and that there were no inaccessible areas.

**§ 98:71 Types of goods, services, and misconduct—
Timberpeg homes**

In *DeAngelis v. Timberpeg East, Inc.*,¹ the court applied GBL §§ 349, 350 to a complaint that alleged "that Timberpeg engaged in consumer-oriented acts by representing itself, through an advertisement . . . as the purveyor of a 'package' of products and services necessary to provide a completed Timberpeg home . . . The complaint . . . [alleges that such language and conduct related thereto were] false and misleading in that Timberpeg was responsible for only the building supplies for Timberpeg homes."

**§ 98:72 Types of goods, services, and misconduct—Travel
services**

The courts have applied GBL § 349 in a variety of cases involving misrepresented travel services, including the (1) availability and quality of campgrounds,¹ (2) the services and facilities available aboard a cruise ship,² and (3) the refundability of tour operator tickets.³

[Section 98:70]

¹*Anunziatta v. Orkin Exterminating Co., Inc.*, 180 F. Supp. 2d 353 (N.D. N.Y. 2001).

[Section 98:71]

¹*DeAngelis v. Timberpeg East, Inc.*, 51 A.D.3d 1175, 858 N.Y.S.2d 410 (3d Dep't 2008).

[Section 98:72]

¹*Meachum v. Outdoor World Corp.*, 235 A.D.2d 462, 652 N.Y.S.2d 749 (2d Dep't 1997).

²*Vallery v. Bermuda Star Line, Inc.*, 141 Misc. 2d 395, 532 N.Y.S.2d 965 (N.Y. City Civ. Ct. 1988).

³*Pellegrini v. Landmark Travel Group*, 165 Misc. 2d 589, 628 N.Y.S.2d 1003 (City Ct. 1995).

**§ 98:73 Types of goods, services, and misconduct—
Wedding singers**

In *Bridget Griffin-Amiel v. Frank Terris Orchestras*,¹ the court applied GBL § 349 to claims arising from the bait and switch of a “40-something crooner” for the promised “20-something ‘Paul Rich’ who promised to deliver a lively mix of pop hits, rhythm-and-blues and disco classics.”

§ 98:74 Consumer class actions

As noted, the primary litigation vehicle for the assertion of consumer law claims in the New York State Supreme Court is a class action brought pursuant to CPLR Article 9.¹ Most of the issues raised in CPLR Article 9 class actions are addressed in Chapter 20, “Class Actions” (§§ 20:1 et seq.) in this treatise. In this chapter, we shall simply identify several types of claims which have been brought as consumer class actions.

§ 98:75 Types of consumer class actions

There are many types of goods and services and misconduct related thereto which have been the subject of consumer class action litigation.¹ Typically, consumer class actions allege the violation of a consumer protection statute and common-law causes of action such as breach of contract, quasi-contractual claims, breach of warranty, breach of fiduciary duty, fraud, negligence, and negligent misrepresentation. In addition to those consumer

[Section 98:73]

¹*Griffin-Amiel v. Frank Terris Orchestras*, 178 Misc. 2d 71, 677 N.Y.S.2d 908 (City Ct. 1998).

[Section 98:74]

¹See Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press, N.Y., 2010. See also Dickerson and Manning, *Courts Rule on Class Actions Under CPLR Article 9 in 2008*, 2/27/09 N.Y.L.J. 4, col. 1; Dickerson and Manning, *Class Actions Under CPLR Art. 9 in 2007*, 1/18/08 N.Y.L.J. 4, col. 1; Dickerson & Manning, *Summary of Article 9 Class Actions in 2006*, 1/24/07 N.Y.L.J. 4, col. 1; Dickerson and Manning, *Summary of Article 9 Class Actions in 2005*, 27 *Class Action Reports* 14 (2006).

[Section 98:75]

¹See, e.g., Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press, N.Y., 2010, 6.04[1]-[7]; Dickerson, *New York State Consumer Protection Law and Class Actions in 2007-Part I*, Vol. 80, No. 2, *New York State Bar Association Journal*, Feb. 2008, p. 42; Dickerson, *New York State Consumer Protection Law and Class Actions in 2007-Part II*, Vol. 80, No. 4, *New York State Bar Association Journal*, May 2008, p. 39.

class actions discussed above involving apartment leases,² motor oil disposal surcharges,³ cable television services,⁴ cellular telephones,⁵ computer software monopolization,⁶ credit card applications,⁷ misuse of customer information,⁸ excessive bail bonds,⁹ excessive modeling fees,¹⁰ fixed-price contracts,¹¹ nutritional value of food,¹² gift cards,¹³ in vitro fertilization,¹⁴ insurance coverage and claims procedures,¹⁵ Internet marketing and DSL services,¹⁶ “knock-off” telephone numbers,¹⁷ equipment leases,¹⁸ improper mortgage fees and charges,¹⁹ deceptive price-matching,²⁰ real property sales,²¹ misrepresented nutritional products,²² and travel services,²³ there have been other reported consumer class actions involving a variety of defective or misrepresented goods and services.

§ 98:76 Types of consumer class actions—Advertising

In *Nissenbaum & Associates v. Hispanic Media Group, USA*,¹ the court denied certification to a class of subscribers to a Spanish-language Yellow Pages who alleged that they entered

²See § 98:13.

³See § 98:20.

⁴See §§ 98:24, 98:25.

⁵See § 98:26.

⁶See § 98:29.

⁷See § 98:30.

⁸See § 98:32.

⁹See § 98:37.

¹⁰See § 98:38.

¹¹See § 98:41.

¹²See § 98:42.

¹³See § 98:46.

¹⁴See § 9:48.

¹⁵See §§ 98:49, 98:50.

¹⁶See § 98:52.

¹⁷See § 98:53.

¹⁸See § 98:55.

¹⁹See §§ 98:59, 98:60.

²⁰See § 98:64.

²¹See § 98:67.

²²See § 98:68.

²³See § 98:72.

[Section 98:76]

¹*Nissenbaum & Associates, LLC v. Hispanic Media Group USA, Inc.*, 13 Misc. 3d 1216(A), 824 N.Y.S.2d 756 (Sup 2006).

subscription contracts based upon false statements regarding the number of books printed and distributed annually. The court noted that the “claims of the individual plaintiffs could be dealt with as efficiently, if not more so, in the Commercial Small Claims part of the local courts.”

§ 98:77 Types of consumer class actions—Authors and readers

In *Englade v. HarperCollins Publishers, Inc.*,¹ the court granted class certification to a class of authors seeking greater royalty payments. In *Stellema v. Vantage Press, Inc.*,² the court previously granted class certification and allowed defrauded vanity press authors to prove their case at trial by inferences of fraud. However, in *Rice v. Penguin Putnam, Inc.*,³ a class action challenging actual authorship of “Chains of Command,” and in *LaCoff v. Buena Vista Publishing, Inc.*,⁴ a class action challenging the accuracy of annual rates of return in “The Beardstown Ladies Common-Sense Investment Guide,” the courts dismissed both complaints.

§ 98:78 Types of consumer class actions—Computers

The courts granted class certification in *Cox v. Microsoft Corp.*,¹ involving price-fixing and monopolization claims arising from an alleged applications barrier, decertified a class in *Solomon v. Bell Atlantic Corp.*,² involving misrepresented DSL services, and limited a GBL § 349 claim to New York residents in *Scott v. Bell*

[Section 98:77]

¹*Englade v. HarperCollins Publishers, Inc.*, 289 A.D.2d 159, 734 N.Y.S.2d 176 (1st Dep’t 2001).

²*Stellema v. Vantage Press, Inc.*, 109 A.D.2d 423, 492 N.Y.S.2d 390 (1st Dep’t 1985).

³*Rice v. Penguin Putnam, Inc.*, 289 A.D.2d 318, 734 N.Y.S.2d 98 (2d Dep’t 2001).

⁴*Lacoff v. Buena Vista Pub., Inc.*, 183 Misc. 2d 600, 705 N.Y.S.2d 183, 28 Media L. Rep. (BNA) 1307 (Sup 2000).

[Section 98:78]

¹*Cox v. Microsoft Corp.*, 48 A.D.3d 215, 850 N.Y.S.2d 103 (1st Dep’t 2008), leave to appeal denied, 10 N.Y.3d 711, 860 N.Y.S.2d 483, 890 N.E.2d 246 (2008).

²*Solomon v. Bell Atlantic Corp.*, 9 A.D.3d 49, 777 N.Y.S.2d 50 (1st Dep’t 2004).

*Atlantic Corporation.*³ There have been other consumer class actions involving computers, software, and the Internet.⁴

§ 98:79 Types of consumer class actions—Drugs

The courts have denied class certification in *Hurtado v. Purdue Pharma Co.*,¹ a mass tort involving addiction to the drug Oxycontin, and *Dimich v. Med-Pro, Inc.*,² involving the marketing of counterfeit Lipitor; dismissed the class allegations in *Asher v. Abbott Laboratories*,³ involving allegations of price-fixing; and dismissed the GBL § 349 and unjust enrichment claims in *Baron v. Pfizer, Inc.*,⁴ involving the promotion of an “off label” use of Neurontin.

§ 98:80 Types of consumer class actions—Entertainment

The courts granted class certification in *Gross v. Ticketmaster LLC*,¹ involving obstructed views at a rock concert and dismissed the complaint in *Castillo v. Tyson*,² involving a boxing match cancelled because Mike Tyson bit off part of his opponent’s ear.

³Scott v. Bell Atlantic Corporation, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858, 774 N.E. 2d 1190 (2002).

⁴See, e.g., *Wornow v. Register.Com, Inc.*, 8 A.D.3d 59, 778 N.Y.S.2d 25 (1st Dep’t 2004) (unauthorized renewal of domain names registration; money had and received claim sustained); *Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 752 N.Y.S.2d 400 (2d Dep’t 2002) (misrepresented inkjet printers; complaint dismissed); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569, 37 U.C.C. Rep. Serv. 2d 54 (1st Dep’t 1998) (failure to provide 24-hour technical support; forum selection clause and arbitration clause enforced); *Truschel v. Juno Online Services, Inc.*, 12/12/02 N.Y.L.J. 21, col. 4 (Sup. 2002) (misrepresented services of Internet provider; GBL § 349 claim dismissed).

[Section 98:79]

¹*Hurtado v. Purdue Pharma Co.*, 6 Misc. 3d 1015(A), 800 N.Y.S.2d 347 (Sup 2005).

²*Dimich v. Med-Pro, Inc.*, 34 A.D.3d 329, 826 N.Y.S.2d 3 (1st Dep’t 2006).

³*Asher v. Abbott Laboratories*, 290 A.D.2d 208, 737 N.Y.S.2d 4, 2002-1 Trade Cas. (CCH) ¶ 73558 (1st Dep’t 2002).

⁴*Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 840 N.Y.S.2d 445 (3d Dep’t 2007).

[Section 98:80]

¹*Gross v. Ticketmaster, Ticketmaster, L.L.C.*, 5 Misc. 3d 1005(A), 798 N.Y.S.2d 709 (Sup 2004).

²*Castillo v. Tyson*, 268 A.D.2d 336, 701 N.Y.S.2d 423 (1st Dep’t 2000).

§ 98:81 Types of consumer class actions—Food products

The courts rejected a proposed settlement in *Klein v. Robert's American Gourmet Foods*,¹ involving misrepresented fat and coloric content of Pirate's Booty and Fruity Booty and denied class certification in *Brandt v. CremaLita Management LLC*,² involving misrepresented fat and caloric content of CremaLita frozen desserts and in *Lieberman v. 293 Mediterranean Market Corp.*,³ involving food poisoning at a restaurant.

§ 98:82 Types of consumer class actions—Mortgages

The courts granted class certification in *Dowd v. Alliance Mortgage Company*,¹ involving priority-handling fees, dismissed the complaint for improper venue in *Kidd v. Delta Funding Corp.*,² involving illegal loan application fees, and dismissed the complaint in *Shovak v. Long Island Commercial Bank*,³ involving improper yield spread premiums.

§ 98:83 Types of consumer class actions—Tobacco products

The court in *State v. Philip Morris, Inc.*¹ resolved a dispute regarding the ongoing implementation of an agreement settling claims against several tobacco companies. Likewise, the courts in *Small v. Lorillard Tobacco Co.*² and *Geiger v. American Tobacco*

[Section 98:81]

¹*Klein v. Robert's American Gourmet Food, Inc.*, 28 A.D.3d 63, 808 N.Y.S.2d 766 (2d Dep't 2006). See also *Berkman v. Robert's American Gourmet Food, Inc.*, 16 Misc. 3d 1104(A), 841 N.Y.S.2d 825 (Sup 2007) (review of proposed settlement).

²*Brandt v. CremaLita Management LLC*, 6/9/06 N.Y.L.J. 29, col. 1.

³*Lieberman v. 293 Mediterranean Market Corp.*, 303 A.D.2d 560, 756 N.Y.S.2d 469 (2d Dep't 2003).

[Section 98:82]

¹*Dowd v. Alliance Mortg. Co.*, 32 A.D.3d 894, 822 N.Y.S.2d 558 (2d Dep't 2006).

²*Kidd v. Delta Funding Corp.*, 270 A.D.2d 81, 704 N.Y.S.2d 66 (1st Dep't 2000).

³*Shovak v. Long Island Commercial Bank*, 50 A.D.3d 1118, 858 N.Y.S.2d 660 (2d Dep't 2008), leave to appeal dismissed in part, denied in part, 11 N.Y.3d 762, 864 N.Y.S.2d 806, 894 N.E.2d 1196 (2008).

[Section 98:83]

¹*State v. Philip Morris Inc.*, 30 A.D.3d 26, 813 N.Y.S.2d 71 (1st Dep't 2006), order aff'd, 8 N.Y.3d 574, 838 N.Y.S.2d 460, 869 N.E.2d 636 (2007).

²*Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999).

Co.³ denied class certification to two smokers' mass tort class actions.⁴

§ 98:84 Types of consumer class actions—Vehicles

The court granted class certification in *Branch v. Crabtree*,¹ involving misrepresented trade-in allowances. However, the courts denied class certification in *Sperry v. Crompton Corp.*,² involving claims of price-fixing by chemical manufacturers which increased the cost of tires; *Paltre v. General Motors Corp.*,³ involving claims of price-fixing among "Japanese, American and Canadian car manufacturers to sell or lease vehicles in New York at prices 10% to 30% higher than nearly identical vehicles in Canada"; and *Gordon v. Ford Motor Co.*,⁴ involving defective Lincoln Continentals. The courts dismissed the class action complaints in *Frank v. DaimlerChrysler Corp.*,⁵ involving defective recliners and *Jurman v. Sun Company, Inc.*,⁶ involving misrepresented octane gasoline prices. The court sustained the GBL § 349 claims in *Farino v. Jiffy Lube International Inc.*,⁷ involving an unlawful oil disposal surcharge. Also, the courts approved the proposed settlements in *Drogin v. General Electric Capital*,⁸ involving lease payments and in *Jung v. The Major Automotive Companies, Inc.*,⁹ involving the sale of cars previously "totaled" in prior accident without revealing as much to consumers.

³*Geiger v. American Tobacco Co.*, 277 A.D.2d 420, 716 N.Y.S.2d 108 (2d Dep't 2000).

⁴See Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press, N.Y. 2010 at 6.04[7] for discussion of mass tort class actions.

[Section 98:84]

¹*Branch v. Crabtree*, 197 A.D.2d 557, 603 N.Y.S.2d 490 (2d Dep't 1993).

²*Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 831 N.Y.S.2d 760, 863 N.E.2d 1012, 2007-1 Trade Cas. (CCH) ¶ 75618 (2007).

³*Paltre v. General Motors Corp.*, 26 A.D.3d 481, 810 N.Y.S.2d 496 (2d Dep't 2006).

⁴*Gordon v. Ford Motor Co.*, 260 A.D.2d 164, 687 N.Y.S.2d 369, 39 U.C.C. Rep. Serv. 2d 93 (1st Dep't 1999).

⁵*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 741 N.Y.S.2d 9, 48 U.C.C. Rep. Serv. 2d 563 (1st Dep't 2002).

⁶*Jurman v. Sun Company, Inc.*, 8/8/97 N.Y.L.J. 21, col. 4 (Sup. 1997).

⁷*Farino v. Jiffy Lube International, Inc.*, 8/14/01 N.Y.L.J. 22, col. 4 (Sup. 2001), *aff'd*, *Farino v. Jiffy Lube Intern., Inc.*, 298 A.D.2d 553, 748 N.Y.S.2d 673 (2d Dep't 2002).

⁸*Drogin v. General Electric Capital*, Index No. 95/112141.

⁹*Jung v. Major Automotive Companies, Inc.*, 17 Misc. 3d 1124(A), 2007 WL 3286910 (N.Y. Sup 2007).