

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

LORI SCHLESSINGER, ET AL.,

Appellants,

-against-

No. 66

VALSPAR CORPORATION,

Respondent.

-----

20 Eagle Street  
Albany, New York 12207  
March 19, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

LAWRENCE KATZ, ESQ.  
LAW OFFICES OF LAWRENCE KATZ  
Attorneys for Appellants  
445 Central Avenue, Suite 201  
Cedarhurst, NY 11516

DAVID JACOBY, ESQ.  
SCHIFF HARDIN, LLP  
Attorneys for Respondent  
666 Fifth Avenue  
Suite 1700  
New York, NY 10103

PAULA J. MORENCY, ESQ.  
SCHIFF HARDIN LLP  
Attorneys for Respondent  
233 South Wacker Drive, Suite 6600  
Chicago, IL 60606

Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Schlessinger v.  
2 Valspar.

3 MR. KATZ: Your Honor, I would request two  
4 minutes for rebuttal, please.

5 CHIEF JUDGE LIPPMAN: You've got it. Go  
6 ahead.

7 MR. KATZ: Lawrence Katz for the  
8 plaintiffs-appellants.

9 Valspar is a company that sells furniture  
10 maintenance agreements, among other things, and in  
11 fact, sold such agreement to both Ms. Pianko and Ms.  
12 Schlessinger. When Ms. Pianko made a claim, and it  
13 was determined that in fact her claim was valid,  
14 Valspar refused to pay on the claim and instead  
15 insisted that it had the right, pursuant to the  
16 contract, to return the premium that Ms. Pianko paid  
17 instead of making good on the claim.

18 JUDGE PIGOTT: That's what it says, doesn't  
19 it?

20 MR. KATZ: The contract provides for such a  
21 refund. However, that provision is in violation of  
22 New York State law, pursuant to GBL 395-a.

23 JUDGE PIGOTT: Is there a private right of  
24 action under that statute?

25 MR. KATZ: We would submit that there is a

1 private right of action, and as we - - - as the  
2 Second Circuit in fact suggested, the analysis, where  
3 there is a contract, is in fact such that one can  
4 first find that the statute itself provides for  
5 contracts such as this one to be read in a way that's  
6 consistent with law.

7 In essence, when we look at a private right  
8 of action analysis or a contract analysis,  
9 essentially, the two coalesce, because in this case  
10 what we have is a legislator that certainly  
11 understood that contracts are legally enforceable and  
12 any illegal terms that might be contained in a  
13 contract are not enforceable.

14 So in this case, the first thing that we  
15 would look at is the contract, with an eye towards  
16 what is legal in the State of New York. That is  
17 essentially how we read every contract in the State  
18 of New York.

19 JUDGE SMITH: So you're saying you don't  
20 need a private right of action, all you need is an  
21 ordinary case for breach of contract, and you look at  
22 the statute to see what the contract must be deemed  
23 to say?

24 MR. KATZ: Correct. Further, if you look  
25 at this specific statute, the statute was actually

1           enacted in 1979, and at that time, the statute had no  
2           provision that provided for a 300-dollar penalty to  
3           be enforced by the Attorney General. Also, there was  
4           added additional provisions at the same time - - - I  
5           think it was 1987 - - - which also called for certain  
6           notification in regard to this type of contract. But  
7           what you had was a legislator very specifically  
8           enacting a law which prohibited termination of this  
9           very type of contract. And the legislator clearly  
10          felt that this industry needed to be regulated. In  
11          fact, while we have a statute in 1979 making this  
12          provision illegal, here we are in the year 2013  
13          because the company has tried to do just that.

14                 So clearly, what the legislator intended by  
15          enacting this statute is exactly what the plaintiffs  
16          tried to do in this case. They tried to enforce a  
17          maintenance agreement, which is exactly what this is.  
18          And the company tries to thwart them by suggesting  
19          that it can enforce an illegal provision.

20                         JUDGE SMITH: You say the plaintiffs. As I  
21          understand it, only - - - only one of your clients  
22          actually wants the company to make good on the  
23          warranty, right?

24                         MR. KATZ: Well, both clients have such an  
25          agreement, and only one of them made a claim.

1 JUDGE GRAFFEO: One didn't have any damage

2 - - -

3 MR. KATZ: Correct.

4 JUDGE GRAFFEO: - - - correct?

5 MR. KATZ: So one of them made a claim, and  
6 in fact, that claim's been denied, based upon this  
7 illegal provision. The other one's standing with a  
8 contract that essentially has this provision and  
9 seeks, essentially, to have it adjudicated that, in  
10 fact, this provision is unenforceable.

11 JUDGE SMITH: Isn't she - - - I guess, is  
12 she also looking for damages?

13 MR. KATZ: I would say that she has no  
14 actual damage in the sense that Ms. Pianko has made a  
15 claim - - -

16 JUDGE SMITH: Well, what - - -

17 MR. KATZ: - - - that's been denied.

18 JUDGE SMITH: What relief are you going to  
19 get on your Section 349 claim?

20 MR. KATZ: Well, as to Ms. Pianko, she  
21 would be paid what she should have been paid - - -

22 JUDGE SMITH: Okay. But you don't - - -

23 MR. KATZ: - - - under the claim.

24 JUDGE SMITH: But your argument is you  
25 don't really need Section 349 for that; you've got a

1 contract.

2 MR. KATZ: We don't - - - we don't need it,  
3 but you would need it for any kind of statutory  
4 damage. 349-h provides for a statutory damage.

5 JUDGE GRAFFEO: But where's the deception,  
6 since the store closure provision is right in the  
7 contract?

8 MR. KATZ: Well, the deception - - -

9 JUDGE GRAFFEO: How do you even get in 349?

10 MR. KATZ: Well, the deception here is,  
11 inasmuch as you have inserted a provision in a  
12 contract that is illegal, when you insert such a  
13 provision, it implies that that is legal and  
14 enforceable. And of course, since they have enforced  
15 it, that, too, would be a deception. At no time did  
16 Valspar - - - and I would say, even now, in  
17 litigation, they haven't quite admitted that this  
18 provision violates 395-a. That's the deception. So  
19 - - -

20 JUDGE SMITH: Are you saying that everyone  
21 who violates any law is thereby asserting that he's  
22 allowed to do what he's doing and therefore he's  
23 deceiving people?

24 MR. KATZ: No, you could have instances  
25 where somebody is asserting something that everybody

1 knows is against the law. But over here what you  
2 have is a contract provision, and that provision,  
3 standing alone, certainly implies that you are within  
4 your rights to have such a provision within the  
5 contract. I believe - - -

6 JUDGE SMITH: So everyone - - - so everyone  
7 who inserts an illegal clause in a contract is  
8 committing a deception?

9 MR. KATZ: Is committing a deception, not  
10 necessarily one that's actionable. Over here, of  
11 course, we have instances where in fact the deception  
12 has arisen to a point where it affects the contract  
13 itself, because we have Fortunoff closing and we have  
14 Valspar claiming a right under that provision. So we  
15 have a situation where not only is there a deception  
16 contained within the contract, but we have now a  
17 situation where that is going to affect the rights of  
18 Ms. Pianko, and has already affected her rights, as  
19 well as Ms. Schlessinger, who's standing with a  
20 contract that, again, is being read in such a way  
21 that it means that she cannot make a claim if she  
22 does have damage to her furniture.

23 Essentially, if you look at it as a sort of  
24 insurance policy - - - and of course it's called a  
25 Guardsman furniture maintenance policy - - - what one

1 would have expected here is to get their furniture  
2 repaired or replaced. That's the natural performance  
3 in this case. And instead, what you have is a  
4 nonperformance. And I would point out that until  
5 someone makes a claim, there is no refund. This is  
6 not a situation where Fortunoff closed and Valspar  
7 mailed out checks; that didn't happen. What Valspar  
8 did is it waits until you have a claim, and then if  
9 you have a claim they will then refund your money.  
10 But until you have a claim, they do nothing. So it  
11 clearly isn't any kind of a refund or any kind of a  
12 real performance.

13 JUDGE PIGOTT: But isn't that the claim  
14 that the Attorney General is supposed to bring?  
15 Isn't - - -

16 MR. KATZ: Well, again, if you look at it  
17 from the perspective of a statute that was created in  
18 1979, without any mention of the Attorney General,  
19 clearly it was the legislative intent to do exactly  
20 what we say it did, which is to - - -

21 JUDGE GRAFFEO: Is there any precedent?  
22 Have there been any court cases that have found a  
23 private right of action under 395-a?

24 MR. KATZ: Specifically 395-a, no, I don't  
25 believe so. I just checked in McKinney's; they now

1 cite this case and nothing else. So I would say that  
2 the answer is no, and certainly I have found no such  
3 cases, and I don't believe either side has cited a  
4 case specifically dealing with 395-a.

5 JUDGE RIVERA: Would finding such a right  
6 of action adversely affect the enforcement powers of  
7 the Attorney General?

8 MR. KATZ: Well, in truth, again, in terms  
9 of the scheme of the statute, which is the third  
10 prong of the test in private right of action, I don't  
11 see how any of this would interfere with anything  
12 that the Attorney General has the right to do. And  
13 in addition, if you read the statute, it's hard to  
14 see what the Attorney General's role really is  
15 supposed to be.

16 JUDGE PIGOTT: I think you just described  
17 it. I mean, if you have a situation as you  
18 described, and the Attorney General is aware that  
19 they have kept all of these -- these payments, the  
20 store closed and they should refund them, then you  
21 can go after them to refund them.

22 MR. KATZ: Well - - -

23 JUDGE PIGOTT: Your clients - - - one of  
24 your clients got a refund, and the other one would be  
25 eligible if they asked, right?

1                   MR. KATZ: Except the statute doesn't say  
2 they're entitled to a refund; the statute says  
3 they're entitled not to have their agreement  
4 terminated. So it wouldn't be a situation where the  
5 Attorney General would be asking for a refund. And  
6 further, if you read the statute, what the Attorney  
7 General can do is fine them 300 dollars.

8                   JUDGE PIGOTT: I'm not so sure about that,  
9 I mean, whether they could require that. I mean,  
10 aren't some of these franchises? I mean, you know, I  
11 could picture a Guardsman franchise that operates in  
12 a particular area where there are a certain number of  
13 stores saying, you know, I'm out of business if these  
14 stores close and I have to give this money back and  
15 that's what happens. And that may not be considered  
16 deceptive in any way.

17                   MR. KATZ: But again, the legislator has  
18 decided that you cannot terminate and simply give a  
19 refund.

20                   JUDGE PIGOTT: That's why the Attorney  
21 General can go after somebody if in fact that's what  
22 happened.

23                   MR. KATZ: Well, the Attorney - - - again,  
24 the Attorney General can go after them for having  
25 terminated it, and the question would be how would

1 the Attorney General - - - what relief would the  
2 Attorney General get?

3 JUDGE PIGOTT: He can fine them 300 dollars  
4 and tell them to give the money back.

5 MR. KATZ: I - - - I would say that the  
6 statute does not specifically say that the Attorney  
7 General will get them the money back, and as I  
8 pointed out, the statute was made in 1979, and at  
9 that time there was no mention of the - - -

10 JUDGE PIGOTT: You keep saying that, and I  
11 get that, but now it's changed, and this is what it  
12 is and this is - - - you know, this is during a time  
13 that you had your contracts.

14 MR. KATZ: Except that what you would have  
15 to do, in essence, is say that where the - - - what  
16 the legislator had done is, in 1979, given a private  
17 right of action, and then you would have to say that  
18 because they added a provision that allowed the  
19 Attorney General to ask for a 300-dollar penalty,  
20 that somehow implies that they eradicated the private  
21 right of action. I don't know why anyone would read  
22 a provision that essentially tells us how to read a  
23 contract, any differently. We have two contracting  
24 parties. The legislator must have known that when  
25 somebody has a contract, when a judge looks at the

1 contract to enforce it, the judge is going to look at  
2 395-a.

3 JUDGE PIGOTT: And you can sue and get your  
4 money back.

5 MR. KATZ: Under 395-a - - -

6 JUDGE PIGOTT: No, under the contract. I  
7 mean, they say if the store closes we'll give you  
8 your money back.

9 MR. KATZ: You could sue and get your money  
10 back - - -

11 JUDGE PIGOTT: No, because they didn't give  
12 it to you.

13 MR. KATZ: - - - but you wouldn't be  
14 getting what the legislator wanted you to get.

15 JUDGE PIGOTT: What do you want?

16 MR. KATZ: The legisla - - - we want - - -  
17 we want the court to decide that, in fact, the  
18 contract between the parties is still in existence  
19 and - - -

20 JUDGE PIGOTT: You want to sue for specific  
21 performance?

22 MR. KATZ: Yes, we want to - - - we made a  
23 claim and we would like that claim paid, pursuant to  
24 the contract, as though this clause, which the  
25 legislator has decided is ille - - -

1 JUDGE SMITH: Ms. Pianko is the one who has  
2 damaged furniture?

3 MR. KATZ: Correct.

4 JUDGE SMITH: I understand that for her you  
5 want - - - she wants the furniture fixed. Tell me  
6 again what Ms. Schlessinger wants.

7 MR. KATZ: Ms. Schlessinger wants her - - -  
8 her agreement declared as though this provision,  
9 which essentially limits the agreement to a refund,  
10 if she does make a claim - - -

11 JUDGE SMITH: Is she making any claim for  
12 damages?

13 MR. KATZ: She's not making any claim for  
14 damages. She has - - - she hasn't made a claim, in  
15 terms of any kind of damage for her furniture, and  
16 she's not claiming that her furniture is damaged.  
17 What she is claiming is that she has an agreement  
18 that essentially Valspar has now modified illegally.

19 JUDGE SMITH: Well, then I don't see why  
20 you need Section 349 at all. If you're right, and  
21 this thing is invalid, if you have to read the  
22 contract as though that clause is not there, then Ms.  
23 Pianko gets her furniture fixed, Ms. Schlessinger  
24 gets her declaratory judgment, and where's the 349  
25 issue?

1 MR. KATZ: Well, there can be a 349 issue  
2 in addition, but I agree with Your Honor, we do not  
3 need the 349 issue to get that far; that's correct.

4 JUDGE SMITH: Now, when you say "that far",  
5 that's as far as you're asking - - - I mean, that's  
6 as far as your client's going to get, right?

7 MR. KATZ: Well, yes, except that if you  
8 have 349 you can have a statutory damage.

9 JUDGE SMITH: Well, but you're not asking  
10 for those. You're not asking for that money, or are  
11 you?

12 MR. KATZ: I - - - I think in - - - in this  
13 case we are, in fact - - - because it is a class  
14 action, we are, in fact, asking for a statutory  
15 damage - - -

16 JUDGE PIGOTT: You're hoping it will be a  
17 class - - - you're looking for class certification -  
18 - -

19 MR. KATZ: Correct.

20 JUDGE PIGOTT: - - - of attorney's fees on  
21 a big lawsuit against everybody that has a contract  
22 of this nature with Valspar.

23 MR. KATZ: Correct.

24 JUDGE PIGOTT: All right.

25 JUDGE SMITH: But you don't - - - neither

1 one of your two named clients is asking for damages?

2 MR. KATZ: Again, Judge, I think because  
3 Ms. Pianko had the actual damage, the way the statute  
4 is read - - -

5 JUDGE SMITH: Okay. And you - - -

6 MR. KATZ: - - - she would exceed the  
7 fifty-dollar statutory damage. However, there may be  
8 class members who in fact - - -

9 JUDGE SMITH: But at the moment you don't  
10 have a class action; it hasn't been certified, right?

11 MR. KATZ: That's correct. At the moment  
12 we have two - - -

13 JUDGE SMITH: And then you have two - - -

14 MR. KATZ: - - - in the class.

15 JUDGE SMITH: So you have two individual  
16 plaintiffs, neither one of which is seeking statutory  
17 damages, right?

18 MR. KATZ: I would say that that's correct.  
19 As to Ms. Schlessinger, she is - - - I would say that  
20 - - - that as to Ms. - - - she's really seeking  
21 declaratory relief in this case.

22 CHIEF JUDGE LIPPMAN: Okay, counselor.  
23 Thank you.

24 MR. KATZ: Thank you, Judge.

25 CHIEF JUDGE LIPPMAN: Counselor?

1 MR. JACOBY: Good afternoon, Your Honors.  
2 May it please the Court. I am David Jacoby with my  
3 partner Paula Morency. We appear for respondent,  
4 Valspar Corporation.

5 We respectfully submit the Court should  
6 answer both of the certified questions no. On the  
7 first one, nothing in GBL 395-a says a particular  
8 provision must be or can't be in a service contract.

9 JUDGE SMITH: Do - - - I mean, is it really  
10 your position that when the legislature says this - -  
11 - the following kind of contract provision is illegal  
12 and the Attorney General can enforce this and put a  
13 300-dollar fine, your position is you can still  
14 enforce the contract, you just have to pay the fine  
15 if the Attorney General sues?

16 MR. JACOBY: Your Honor, I think that the  
17 three situations that are set out in subsection 2 of  
18 395-a deal with a different situation. They're from  
19 a box that you might call unilateral termination; the  
20 statute uses that phrase.

21 JUDGE SMITH: I read it as being the three  
22 termina - - - kinds of termination that are allowed.  
23 Am I wrong about - - -

24 MR. JACOBY: At the election of the party  
25 providing the plan. This termination was not at the

1 election of a party - - -

2 JUDGE SMITH: Okay.

3 MR. JACOBY: - - - providing the plan.

4 JUDGE SMITH: Well, are we - - - don't we  
5 have to assume - - - I mean, maybe the Second Circuit  
6 does, but don't we have to assume, for the purposes  
7 of this certified - - - these certified questions  
8 that the provision in question is illegal, is  
9 contrary to the statute?

10 MR. JACOBY: I don't think so, Your Honor,  
11 and the Second Circuit specifically said it was  
12 deferring to this Court to frame, narrow, revise the  
13 questions and to apply a doctrine to such - - -

14 JUDGE SMITH: Okay. Suppose we don't  
15 revise it - - -

16 MR. JACOBY: Um-hum.

17 JUDGE SMITH: - - - the first question is:  
18 May parties seek to have contractual provisions that  
19 run contrary to General Business Law 395-a declared  
20 void as against public policy? It sort of assumes  
21 that we've got such a provision, right?

22 MR. JACOBY: Yes, but I think given that  
23 this came up in the posture of a motion to dismiss,  
24 the Second Circuit may well simply have say - - -  
25 have said if that's the case as alle - - - if that's

1 the allegation, can they get relief. If they can't  
2 get the relief, therefore the allegation would fail  
3 and it doesn't need to be determined.

4 JUDGE SMITH: Well, I mean, we don't, but  
5 maybe my real question is: May the parties seek to  
6 have contractual provisions that run contrary to the  
7 statute declared void as against public policy; how  
8 can the answer to that be no?

9 MR. JACOBY: Well, Your Honor, I think if  
10 you'll indulge me, there are a couple of reasons.  
11 One is, as I say, this was not a termination at the  
12 election of the party providing the plan. I think  
13 those three examples were meant to deal with that  
14 situation.

15 JUDGE PIGOTT: Well, these contracts are  
16 still in effect.

17 MR. JACOBY: Unless they've expired by  
18 their terms. We don't have the actual contracts for  
19 Ms. Pianko and Ms. Schlessinger in the record, but  
20 assuming that they haven't run out of time - - -  
21 there are different time periods that are offered - -  
22 - then yes, those would still be in effect. And this  
23 is what was, as the district court said, fully  
24 disclosed, fully carried out according to its terms.  
25 So I don't think - - -

1                   JUDGE PIGOTT:  What's the reason you didn't  
2                   fix Ms. Pianko's furniture?

3                   MR. JACOBY:  As I understand it, and again,  
4                   it's not in the record, a technician went out - - -  
5                   it was a stone top table - - - and said it can't be  
6                   fixed.  And if I may elaborate on that, because you  
7                   may well be wondering, why is this provision in  
8                   there?  There's a very practical reason.  If what's  
9                   broken is something like, let's say, the wooden  
10                  handle on the side of a reclining chair, that's not  
11                  going to be very hard for Valspar to find; they could  
12                  make that repair.  If, on the other hand, what's  
13                  involved is something that's been customized, it's  
14                  unclear where the store got the items it used to  
15                  customize it, or even how it was made and got to the  
16                  store, if the store's gone, there's no way to figure  
17                  that out.

18                  JUDGE PIGOTT:  But doesn't - - - didn't you  
19                  just say that 395 binds you, and the only three ways  
20                  you can cancel this contract is nonpayment and the  
21                  other two?

22                  MR. JACOBY:  I didn't mean to, Your Honor.  
23                  I think what I was trying to say, and perhaps I  
24                  wasn't clear, was that what 395-a regulates is the  
25                  situation where one party decides, after the contract

1 is in force, suddenly to say I'm terminating it.  
2 There isn't much legislative history here, but my  
3 understanding is that the evil at which this was  
4 directed was people who were selling repair plans  
5 that required certain parts - - -

6 JUDGE SMITH: You're saying that this  
7 clause, as written, did not violate the statute.

8 MR. JACOBY: Yes, Your Honor.

9 JUDGE SMITH: But you admit that that is  
10 not the question the Second Circuit has asked us.  
11 You're saying we can reformulate it, if you want, but  
12 that's not what they're asking us, is it?

13 MR. JACOBY: No, but I think they're asking  
14 you the policy question of should we determine that  
15 this particular contract - - -

16 JUDGE SMITH: Okay. Hear me for a minute.  
17 Assume - - - assume we have - - - let's take a  
18 statute that says no lender shall charge more than  
19 six percent interest.

20 MR. JACOBY: Um-hum.

21 JUDGE SMITH: And assume it says that if he  
22 does, the Attorney General can bring a lawsuit and  
23 give fines.

24 MR. JACOBY: Um-hum.

25 JUDGE SMITH: Are you saying that - - - can

1 I make a loan at eight percent interest and collect  
2 it?

3 MR. JACOBY: No, Your Honor. I don't - - -

4 JUDGE SMITH: How is this different?

5 MR. JACOBY: Well, first off - - - and I  
6 may not be saying it clearly enough, I don't think  
7 this statute applies to this situation.

8 JUDGE SMITH: Okay. I am asking you to  
9 assume, for the sake of argument, that it does apply  
10 to this situation; can you enforce it?

11 MR. JACOBY: Your Honor, I think - - -

12 JUDGE SMITH: Enforce the clause?

13 MR. JACOBY: I'm sorry. I think the remedy  
14 here for enforcement is that the Attorney General - -  
15 -

16 JUDGE SMITH: Can you try to give me a yes  
17 or no on that? Assume that this clause, as written,  
18 violates this statute; may you, nevertheless, enforce  
19 the clause as written?

20 MR. JACOBY: In that situation, Your Honor,  
21 I'd have to ask a further question to answer your  
22 question, if you'll indulge me.

23 JUDGE SMITH: Go ahead.

24 MR. JACOBY: And it goes to the analysis in  
25 the Benjamin case, which dealt with a lawyer who had

1 not paid his registration fee but was duly admitted,  
2 and the court said a referral - - -

3 JUDGE SMITH: Ask me the question you want  
4 to ask me; I'll give you the answer.

5 MR. JACOBY: Okay. Thank you, Judge. The  
6 question is, is the public interest being served here  
7 disproportionate to the harm that would be caused to  
8 one of the parties? Valspar --

9 JUDGE SMITH: Okay. So your implicit  
10 answer is that every time the legislature says no  
11 contract shall say X, and you put in a - - - and  
12 there's a contract that says X, to decide whether  
13 it's enforceable you have to decide whether the  
14 public policy outweighs the hardship?

15 MR. JACOBY: That seemed to be the test in  
16 the Benjamin case, Your Honor, and here you have a  
17 company that's been writing protection plans for four  
18 decades.

19 JUDGE SMITH: Yeah, but the Benjamin case  
20 didn't say that - - - didn't say that no lawyer who  
21 hasn't paid his registration dues can be retained.  
22 It just says all lawyers had to pay their dues,  
23 right?

24 MR. JACOBY: Well, actually, what it said  
25 there was that a lawyer who hadn't paid his dues

1           could nevertheless enforce a contract.

2                   JUDGE SMITH:   That's what the case said.

3                   MR. JACOBY:   Yeah.

4                   JUDGE SMITH:   What did the statute say?

5                   MR. JACOBY:   The statute required you to  
6           pay your registration fee.

7                   JUDGE SMITH:   But it didn't say nobody who  
8           - - - no unregistered lawyer can collect a fee.

9                   MR. JACOBY:   I don't know, Your Honor; I  
10           suspect you're right.  I would argue here, this  
11           statute doesn't say you can't have this provision,  
12           and it also doesn't say this provision is void and  
13           unenforceable.

14                   JUDGE PIGOTT:   But isn't that for the  
15           Second Circuit to decide?  They just want to know  
16           from us if there's - - - if there's a contractual  
17           provision that's void against public policy, can it  
18           be enforced, and we would answer that no.  Now, you  
19           would then go back over to - - - downstate, I guess,  
20           and say now that they know the answer is no, the  
21           question is does yours violate public policy.  That's  
22           not for us to decide that.

23                   MR. JACOBY:   Well, I think they were posing  
24           a further question when they identified the tension  
25           between the doctrine that you could excise a contract

1 that violates law and the question of whether if  
2 there's no private right of action you can go ahead  
3 and imply it, and I think this is a really bad case  
4 to imply a private right of action. You have the  
5 Attorney General provision which strongly suggests -  
6 - -

7 JUDGE SMITH: Well, but do you need - - -  
8 assume we think the clause as written is invalid or  
9 that we assume - - - or that we have to assume the  
10 contract as written is invalid, do you need a private  
11 right of action to say it's not valid?

12 MR. JACOBY: Your Honor, I think you still  
13 do.

14 JUDGE SMITH: The statute begins, "No  
15 maintenance agreement covering parts and/or service  
16 shall be terminated at the election", et cetera.  
17 Assume - - - I realize you don't agree - - - assume  
18 that this is a kind - - - that this thing is exactly  
19 the kind of termination that they described in that  
20 statute; are you saying it can be terminated at the  
21 election of the party providing such parts?

22 MR. JACOBY: Your Honor, if I can point you  
23 to the Varela case, which also involves - - -

24 JUDGE SMITH: Can you try yes or no on that  
25 one?

1                   MR. JACOBY:   Okay.  I think the answer is  
2                   yes, there's still a problem with private  
3                   enforcement.

4                   JUDGE SMITH:   But I mean, I guess I have  
5                   trouble when a legislature says no agreement shall be  
6                   terminated, and you're coming here saying I've got a  
7                   right to terminate.

8                   MR. JACOBY:   Well, I think if the  
9                   assumption is correct, the answer is the Attorney  
10                  General, not under this statute, but under Executive  
11                  Law Section 6312, has the power to go to court and  
12                  get a restitutionary order.  That's what this Court  
13                  approved in the Ford Motor case, where individuals  
14                  had been charged a hundred-dollar deductible when the  
15                  Lemon Law, in GBL 198-a, I think, said it has to be  
16                  for free.  That seems, to me, to be very similar.

17                  JUDGE RIVERA:   And how would allowing a  
18                  private - - - or recognizing a private right of  
19                  action here undermine, or otherwise obstruct, the  
20                  Attorney General's ability to enforce - - - to pursue  
21                  enforcement against the violator of the law?

22                  MR. JACOBY:   I don't know that it would  
23                  obstruct it.  I think it would fly in the face of  
24                  CPLR 901(b), which says you can't pursue a penalty in  
25                  a class action on behalf of private plaintiffs.  And

1           that was the law at the time this law took effect.  
2           So presumably, the legislature had that in mind as  
3           well.

4                         JUDGE GRAFFEO:  So what is it that you  
5           think the consumer is purchasing here?

6                         MR. JACOBY:  Well, if you look at the  
7           actual contract, I think what the consumer is  
8           purchasing is a package of obligations to try to do  
9           certain steps.  And if you look at the contract  
10          itself, it sets out a number of alternatives.  
11          Because this covers such a variety of circumstances,  
12          it's going to be very hard, in any given case, to say  
13          this is what'll happen, this will be what'll happen.  
14          So that's why there's a lot of flexibility.

15                        As I've indicated, in some contexts, it  
16          becomes effectively impossible to carry out the  
17          contract if the store is closed.  For example, one of  
18          the things Valspar can do is to go back to the store  
19          that sold the furniture and say give them a store  
20          credit.  They can't do that if the store's not there.  
21          They can go back and say try to negotiate an  
22          exchange.  Again, they can't do that if the store's  
23          there (sic).  So that's why they say if we can't do  
24          some of those things, we'll give you back your money.

25                        JUDGE GRAFFEO:  When they determined they

1           couldn't fix the tabletop, what next happened?

2                       MR. JACOBY: I believe, at that point, Ms.  
3           Pianko was offered a refund.

4                       JUDGE SMITH: A refund of what she'd paid  
5           for the warranty?

6                       MR. JACOBY: A refund of what she paid - -  
7           - well, I wouldn't say it's a warranty, but a refund  
8           of what she paid for the plan.

9                       JUDGE SMITH: Not what she paid for the  
10          table?

11                      MR. JACOBY: No. No. But that was never a  
12          right that she had under the contract. Valspar had a  
13          right to offer a settlement payment; it wasn't an  
14          obligation to offer a settlement payment.

15                      If I may turn to the question of Ms.  
16          Schlessinger for a moment - - -

17                      CHIEF JUDGE LIPPMAN: Go ahead, counselor.

18                      MR. JACOBY: - - - the contract very  
19          clearly says you have to make a claim. Valspar can  
20          try to figure out whether or not the claim is within  
21          the contract. There are certain things that are  
22          excluded. If you deliberately wreck your furniture,  
23          you're not entitled to ask to have it fixed under the  
24          contract. Ms. Schlessinger hasn't made that claim.  
25          It's not a good case for declaratory relief because

1 we don't know what will happen if she ever does.

2 Valspar - - -

3 JUDGE SMITH: Well, but isn't it - - -

4 JUDGE PIGOTT: Mr. Katz thinks he's found,  
5 you know, a problem here, that let's assume you've  
6 got 1,000 people who paid you, you know, a hundred  
7 dollars for this, and you haven't paid them back, and  
8 you now know that you don't - - - you don't have to  
9 pay them back unless and until they come up with  
10 something, and you know you're not going to have any  
11 claims because you have this get-out-of-jail-free  
12 provision that says if the store closes we don't have  
13 to honor our contract anymore. So at least in his  
14 mind, you're sitting there with 100,000 dollars that  
15 you shouldn't have, and he wants to bring a class  
16 action to make you give it up.

17 MR. JACOBY: And the problem with that  
18 argument - - - and I'm mindful of Your Honor's  
19 dissent in the Ovitz case - - - in the Ovitz Case,  
20 Bloomberg had said, yeah, we - - - the company, not  
21 the Mayor - - - we know that there is a policy and a  
22 statute that says if you have a nonrenewal option  
23 coming up, under which a contract automatically would  
24 renew, we, Bloomberg Company, have an obligation to  
25 notify you before that date so you can cancel if you

1 want to. And they had made a decision they wouldn't  
2 do it. And as I understood your dissent, Judge  
3 Pigott, that was the basis on which you thought there  
4 should be declaratory relief. Here, until Ms.  
5 Schlessinger makes a claim, we don't know what's  
6 going to happen.

7 JUDGE PIGOTT: But can't you give - - -  
8 can't you - - - you know the store's closed. You say  
9 we've got 100 people that - - -

10 MR. JACOBY: Right.

11 JUDGE PIGOTT: - - - that we have contracts  
12 with that we now are not going to honor. So we're  
13 going to take those hundred people and we're going to  
14 mail them their - - - their original deposit, if you  
15 want to call it, their original payment back. Mr.  
16 Katz is saying you haven't done that, and he thinks  
17 that's wrong, and he wants to bring a class action to  
18 say pay them back.

19 MR. JACOBY: Well, Your Honor, again, I  
20 would say they have to make a claim. We don't always  
21 know - - -

22 JUDGE GRAFFEO: What if the consumer  
23 doesn't know the furniture store closed?

24 MR. JACOBY: Then they would make a claim.  
25 It wouldn't be a problem, presumably. They would

1 say, well, the furniture's damaged, and it's news to  
2 me that Fortunoff is now gone.

3 JUDGE SMITH: But I mean - - -

4 JUDGE GRAFFEO: But they don't know to ask  
5 for the refund.

6 MR. JACOBY: I beg your pardon?

7 JUDGE GRAFFEO: They don't know to ask for  
8 the refund when the store closes.

9 MR. JACOBY: But they would know to make  
10 the claim - - -

11 JUDGE PIGOTT: So you - - -

12 MR. JACOBY: - - - if the furniture is  
13 damaged.

14 JUDGE SMITH: Why shouldn't even - - - if  
15 the store's closed, so that you're never going to fix  
16 any furniture again, why shouldn't they all get the  
17 money back, even the ones that aren't going to make  
18 claims?

19 MR. JACOBY: Because, Judge Smith, we may  
20 make repairs, if we can do it; that's the point I was  
21 just trying to make. If we can do it, we'll do it.

22 JUDGE SMITH: But you recognize no  
23 obligation after the - - - you do it out of the  
24 goodness of your heart?

25 MR. JACOBY: No, it's that we have the

1 option to say we can't do this because the store is  
2 closed, if that arises in the - - -

3 JUDGE SMITH: So you - - -

4 JUDGE PIGOTT: Well, if I were treating - -  
5 -

6 JUDGE SMITH: You read your store closure  
7 provision as saying we'll do our best, but if we  
8 can't do it, we'll give you your money back?

9 MR. JACOBY: Essentially, Your Honor, yes.

10 JUDGE SMITH: Well, so if the repair's  
11 going to be 300 bucks, and you say, well, they only  
12 paid us 100, you know, even if we could repair it  
13 we're not going to. We would lose 200 dollars; we'll  
14 give them the 100 dollars back.

15 MR. JACOBY: But the repair might cost two  
16 dollars, and so we might do the repair - - -

17 JUDGE PIGOTT: All at your option?

18 MR. JACOBY: Well, we do reserve that  
19 right, clearly, in the contract.

20 If I may, the other thing I really need to  
21 tell the Court on this is we don't know who bought  
22 the contracts; the store knows that. So oftentimes,  
23 we don't know who the people are. We couldn't even  
24 send out checks. We don't know who that universe is.  
25 So again, they have to come to us and say I have a

1 claim.

2 JUDGE PIGOTT: You don't know who's got  
3 contracts? Well, how did they get the contracts?

4 MR. JACOBY: They buy them from the store.

5 JUDGE PIGOTT: And they get a commission?

6 MR. JACOBY: Well, they - - -

7 JUDGE PIGOTT: You pay them or they pay  
8 you? I forget how that works.

9 MR. JACOBY: The complaint alleges that the  
10 average payment is twenty-eight dollars. These are  
11 contracts for 100 dollars and 295 dollars.

12 JUDGE PIGOTT: You pay the - - -

13 MR. JACOBY: It's a payment to Valspar - -  
14 -

15 JUDGE PIGOTT: You pay the store?

16 MR. JACOBY: No.

17 JUDGE PIGOTT: The store pays you?

18 MR. JACOBY: The store remits to us a small  
19 portion of what it collected from the consumer. So  
20 when we do a refund, we're out of pocket  
21 automatically.

22 JUDGE RIVERA: Counsel, I know your time is  
23 up, but just very quickly, I just want to clarify.  
24 You said you have the option to refund, but I think  
25 the provision says Guardsman will give you a refund.

1 How is that an option?

2 MR. JACOBY: Well, Your Honor, if you look  
3 at the italic print at the very top, it says  
4 "Guardsmen will perform one or more of the  
5 following".

6 JUDGE RIVERA: Okay.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.  
8 Thanks.

9 MR. JACOBY: Thank you very much, Your  
10 Honors.

11 CHIEF JUDGE LIPPMAN: Counselor?

12 MR. KATZ: Yeah, Your Honor, just very  
13 briefly. I would say that the - - - the contract  
14 here is quite clear, inasmuch as it uses the word  
15 "refund", that this is essentially a termination of  
16 the policy. When one talks about refunding what was  
17 paid, that's what's meant; you get your money back  
18 and that ends our relationship. So it's obvious that  
19 they've terminated the agreement, and it's also  
20 obvious that they violated GBL Section 395-a.

21 And so we're really back to where we  
22 started from, which is how is it that you can enforce  
23 a contract that is illegal under the laws of the  
24 State of New York. And if you look at all the cases,  
25 I don't think you could find a single case that - - -

1           wherein the party that wishes to rely on its own  
2           illegal behavior could somehow win in litigation.  
3           Yes, there are times when somebody ends up with a  
4           windfall because someone else has acted illegally,  
5           even though they've benefitted in a certain way.  
6           Nonetheless, for example, the licensing cases, you  
7           might prevail. But you can't find a case where  
8           someone has inserted a contract provision that is  
9           illegal and in litigation relies on that very  
10          provision.

11                         Thank you.

12                         CHIEF JUDGE LIPPMAN: Okay. Thank you  
13           both.

14                         (Court is adjourned)

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of LORI SCHLESSINGER, ET AL. v. VALSPAR CORPORATION, No. 66 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: March 22, 2013