CONSUMER LAW 2015 UPDATE

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

July 23, 2015

[This Paper May Not Be Reproduced Without The Permission Of Thomas A. Dickerson]

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Causes of action alleging the violation of one or more Federal and/or New York State consumer protection statutes are

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www.courts.state.ny.us/courts/ad2/justice_dickerson.shtml
www.nycourts.gov/courts/9jd/taxcertatd.shtml
www.classactionlitigation.com/library/ca_articles.html
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frequently asserted in civil cases[1]. This annual survey of recent consumer law cases discusses those consumer protection statutes most frequently used in New York State Courts and in the Federal Courts in the Second Circuit.

2014-2015 Positive Developments

New York State Class Actions: A Sea Change

The most exciting development in New York State consumer law has been in the class action field involving CPLR Sections 901-909. While there is still more to do in expanding the use of CPLR Article 9 to areas in which it was intended to be used [i.e., mass environmental, property and personal injury torts; governmental operations], the Court of Appeals has over the last three years breathed new life into New York State's underutilized class action statute. See Dickerson & Duffy, *'Borden': a Welcome Sea Change on New York State Class Actions*, New York Law Journal, June 29, 2015, p. 4.

"Starting in 2012 the Court of Appeals decided to take a role in encouraging the use of CPLR Article 9.

First, there was Koch v. Acker, Merrall & Condit Co., 18 N.Y. 3d 940 (2012), a wine fraud case, wherein the Court of

Appeals resuscitated General Business Law 350 (false advertising) by declaring that reliance is not an element of this statutory cause of action. This important decision made GBL 350 as available in consumer class actions as is GBL 349 (deceptive and misleading business practices)(See Dickerson, Chapter 111, Consumer Protection, Commercial Litigation In New York State Courts, 4th Edition, R. Haig, ed., Thomson Reuters West (2015).

Second, there was Corsello v. Verizon, New York, 18 N.Y. 3d 777, 781-782 (2012), an inverse condemnation class action, in which the Court of Appeals stated that the case "seems on its face well-suited to class action treatment" because "it would be reasonable to infer that the case will be dominated by class wide issues-whether Verizon's practice is lawful, and if not what the remedy should be" and that expert testimony could be used to "support an inference" of typicality.

And third, there was the important policy statement by the Court of Appeals in Borden v. 400 East 55th Street Assoc. L.P., 24 N.Y. 3d 382 (2014), "From a policy standpoint, permitting plaintiffs to bring these claims as a class accomplishes the purpose of CPLR 901(b)...The State Consumer Protection Board emphasized the importance of class actions: 'The class action device responds to the problem of inadequate information as well as the need for economies of scale' for '...a person contemplating illegal action will not be able to rely on the fact

that most people will be unaware of their rights-if even one typical person files a class action, the suit will go forward and the other members of the class will be notified of the action".

This article will address the application of CPLR 901(b), which has prevented or delayed the salutary use of Article 9 prior to Borden and the sea change produced by Borden.

Penalties and Class Actions

CPLR 901(b), which is unique amongst class rules whether state[2] or federal, provides, in relevant part, that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" unless authorized by the statute creating the penalty. In 1975, as the Legislature, at the urging of the Court of Appeals (see Moore v. Metropolitan Life Ins. Co., 33 NY2d 304, 313 (1973) was about to enact CPLR Article 9, CPLR 901(b) was engrafted onto an otherwise modern class action statute equal to or better than Federal Rule 23. The Empire State Chamber of Commerce requested enactment of CPLR 901(b) asserting without benefit of any studies or scholarly support that "Penalties and class actions simply do not mix"(See Memo of Empire State Chamber of Commerce in Opposition to A. 1252-A, Feb. 14, 1975, N.Y. Bill Jacket, 1975 A.B. 1252-B, 198th Leg. Reg. Sess. (1975), ch. 207, at 3).

CPLR 901(b) is inconsistent with the trend in federal and other state courts to enable citizens with small and/or complex claims to seek and obtain adequate representation within the context of a class action lawsuit. CPLR 901(b) has prevented or delayed the salutary use of Article 9 of the CPLR by, *inter alia*, consumers, employees and tenants until very recently. CPLR 901(b) should be repealed as soon as possible (Dickerson, Austin & Zucco, *New York State Class Actions: Making It Work-Fulfilling The Promise: Some Recent Positive Developments And Why CPLR 901(b) Should Be Repealed*, 77.1 Albany L.R. 59 (2014)).

No Penalty Class Actions Allowed

A review of court decisions dealing with CPLR 901(b) rendered by New York State courts from 1978 through 2014 reveals the following. In the early years from 1975 to 1987 nearly all class actions alleging the violation of a statute which provided for a "penalty" were denied class certification (See e.g., Klapak v. Pappas, 79 AD2d 602 (1980)(dismissing class action brought pursuant to Social Services Law 131-o); Carter v. Frito-Lay, Inc., 74 AD2d 550 (1980)(dismissing class action brought pursuant to Labor Law 198); Burns v. Volkswagen of Am., 118 Misc. 2d 289 (1982), aff'd 97 AD2d 977 (1983)(dismissing class action brought pursuant to (GBL) 349(h); Vickers v. Home Fed. Sav. & Loan Ass,

56 AD2d 62, 64 (1977)). In addition these cases denied plaintiff's attempt to waive the "penalty" and seek only actual damages. Typical of these cases was Lennon v. Philip Morris Cos., 189 Misc. 2d 577 (N.Y. Sup. 2001)(GBL 340). In *Lennon* the Court stated "Even where treble damages are discretionary and need not be sought by the injured party, it is this court's understanding that no New York court has sustained such a claim either under the Donnelly Act (GBL 340) or any other statutory provision".

Waiving The Statutory Penalty

The introduction of the concept that a class action plaintiff could waive a "penalty" with the proviso that absent class members be given the opportunity to opt-out and seek individual statutory damages was first accepted in 1987 in a case involving GBL 349 (see Super Glue Corp. v. Avis Rent A Car Sys., 132 AD2d 604, 606 (2d Dept. 1987)). As noted by the Court in Cox v. Microsoft Corp., 8 AD3d 39 (1st Dept. 2004) "We also reject Microsoft's argument that plaintiffs are not entitled to class action relief under (GBL 349) since the statutorily prescribed $50 minimum damages to be awarded for a violation of that section constitutes a 'penalty' within the meaning of CPLR 901(b). In as much as plaintiffs in their amended complaint expressly seek only actual damages, the motion court correctly found CPLR 901(b)

which prohibits class actions for recovery of minimum or punitive damages, inapplicable" (citing Ridge Meadows Homeowners' Ass. v. Tara Dev. Co., 242 AD2d 947 (4th Dept. 1997); Super Glue Corp. v. Avis Rent A Car Sys., 132 AS2s 604, 606 (2d Dept. 1987)).

Expansion Of The Waiver Concept

The waiver concept began to spread from GBL 349 class actions to class actions brought by employees alleging violation of various Labor Law provisions. For example, in the 1998 employee class action, Pesantz v. Boyle Environmental Services, Inc., 251 AD2d 11 (1st Dept. 1998), the Court stated "To the extent certain individuals may wish to pursue punitive claims pursuant to Labor Law 198(1-a) which cannot be maintained in a class action (CPLR 901(b)) they may opt out of the class action". In addition, the waiver concept has recently been applied in a class action alleging violation of the Arts and Cultural Affairs Law 25.33 (see Pires v. Bowery Presents, LLC, 44 Misc. 3d 704 (N.Y. Sup. 2014) and Labor Law 663 (see Rutella v. Craig Scott Capital, LLC, N.Y.L.J., N.Y. Sup., J. Bucaria, 5/21/2015 (class of unlicensed securities firm cold callers seeking minimum wages and overtime pay certified; "Because liquidated damages for unpaid wages are a penalty, plaintiff may not recover liquidated damages in a class action") but not in a class action brought by

Nassau County seeking hotel taxes from online travel sellers (see County of Nassau v. Expedia, Inc., 120 AD3d 1181 (2d Dept. 2014)).

***Sperry*: An Economic Analysis**

The Court of Appeals first addressed CPLR 901(b) in Sperry v. Crompton Corp. 8 N.Y. 3d (2007). In *Sperry*, a class action alleging violation of GBL 340, the Court held "Although we never construed the term 'penalty' within the meaning of CPLR 901(b), nor have we had occasion to characterize the treble damages provision of the Donnelly Act...It is evident that by including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status. This makes sense, given that class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred". While this economic analysis may apply to corporations with potentially large individual damages it may not apply to consumers and small

businesses that may have small individual damage claims arising from, *inter alia*, pricing fixing.

***Borden*: A Legislative Analysis**

In *Borden*, three class actions seeking to obtain rent overcharges under Roberts v. Tishman Speyer Properties, L.P., 13 N.Y. 3d 270 (2009) and alleging violations of the Rent Stabilization Law of 1969, the Court seemed to take a more expansive view than it had in *Sperry*. "The language of CPLR 901(b) itself says it is not dispositive that a statute imposes a penalty so long as the action brought pursuant to that statute does not seek to recover the penalty. This view is bolstered by the legislative history of CPLR 901(b), which provides that the statute requires a liberal reading and allows class-action recovery of actual damages despite a statute's additional provision of treble damages...Waiver does not circumvent CPLR 901(b); on the contrary, the drafters not only foresaw but intended to enable plaintiffs to waive penalties to recover through a class action...It is abundantly clear that plaintiffs seek a refund, i.e., actual damages, which CPLR 901(b) did not intend to bar...Where a statute imposes a nonmandatory penalty plaintiffs may waive the penalty in order bring the case as a class action...Although CPLR 901(b) intended to restrict the

types of cases that could be brought as class actions, in our cases (before us) the CPLR is not contravened by allowing waiver because plaintiffs will not receive a windfall. They will only receive compensatory damages in the form of rent overcharges...".

Antitrust Class Actions

A close reading of *Sperry* and *Borden* suggests that the Court of Appeals may be signaling that the waiver concept may be viable in GBL 340 class actions. "This Court signaled that the 'determination of whether a certain provision constitutes a penalty may vary depending on the context'(*Sperry*, 9 NY3d at 213). In *Sperry* where we found the treble damages provision of (GBL) 340(5) constituted a penalty, we also found that 'one third of the award unquestionably compensates a plaintiff for actual damages' while 'the remainder necessarily punishes...violations, deters such behavior (the traditional purposes of penalties) or encourages plaintiffs to commence litigation' (*Sperry*, 8 NY3d at 214). *We disallowed class action recovery in Sperry, but the plaintiff plainly sought treble damages, refusing to waive the penalty...Plaintiffs here seek that first third of the treble damages award, which we have determined is a compensatory form of relief")* [emphasis added].

Conclusion

An appropriate question, of course, is why did it take so long for the waiver concept to be introduced and expanded upon until very recently. A clear example, perhaps, of justice delayed due to the unnecessary engrafting of CPLR 901(b) upon an otherwise well intended class action statute. While there is still more to do in expanding the use of CPLR Article 9 to areas in which it was intended to be used [i.e., mass environmental, property and personal injury torts; governmental operations], the Court of Appeals has over the last three years breathed new life into New York State's underutilized class action statute.

Updated Treatise On Consumer Protection

I have updated my treatise on Consumer Protection as it now appears in Chapter 111 of *Commercial Litigation In New York State Courts*: Fourth Edition (Robert L. Haig ed.)(West & NYCLA 2015).

Loss Of Consumer Rights In Internet Age

The enforcement of forum selection clauses, arbitration clauses, class action and class arbitration waivers and choice of law clauses in Internet contracts [with such clauses often only

noticeable by clicking on hyper-links] is a serious issue which the Courts are addressing [See e.g., *Berkson v. GoGo LLC*, 2015 WL 1600755 (S.D.N.Y. 2015)][See also: Dickerson & Berman, *Consumers' Loss of Rights in the Internet Age*, New York State Bar Association Journal October 2014 available at http://www.nycourts.gov/courts/9jd/taxcertatd.shtml

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[C.1] **15 U.S.C. §§ 1692e, 1969k** [Fair Debt Collection Practices Act];

[C.2] **15 U.S.C. § 1693f** [Electronic Fund Transfer Act];

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

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

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

[3] **General Business Law § 349**

[A] **Scope**

General Business Law (GBL) 349 prohibits deceptive and

misleading business practices and its scope is broad, indeed (see Dickerson, Consumer Protection Chapter 111 in Commercial Litigation In New York State Courts: Fourth Edition (Robert L. Haig ed.)(West & NYCLA 2015); Karlin v. IVF America, Inc., 93 NY2d 282, 290 (GBL 349... "on (its) face appl(ies) to virtually all economic activity and (its) application has been correspondingly broad ...The reach of (this) statute 'provides needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State'"); see the dissenting opinion of Justice Graffeo in Matter of Food Parade, Inc. v. Office of Consumer Affairs, 7 NY3d 568, 574 ("This 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'"); Gaidon v. Guardian Life Ins. Co. of America, 94 NY3d 330 ("encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law "); State of New York v. Feldman, 2002 W.L. 237840 (S.D.N.Y. 2002)(GBL § 349 "was intended to be broadly applicable, extending far beyond the reach of common law fraud")].

Issue Resolved: Relationship To Other Statutes

On occasion some Courts have found a violation of GBL § 349 and/or § 350 based upon the violation of another consumer protection which may not be enforceable by consumers [private of action] by only by governmental authorities such as the New York State Attorney General. For example, in three deceptive gift card

class actions, the Appellate Division, Second Department in Llanos v. Shell Oil Company, 55 A.D. 3d 796 (2d Dept. 2008), Lonner v. Simon Property Group, Inc., 57 A.D. 3d 100 (2d Dept. 2008) and Goldman v. Simon Property Group Inc., 58 A.D. 3d 208 (2d Dept. 2008) the Court found a violation of GBL § 349 based upon a contractual print size which violated GBL § 396-I. However, in Broder v. Cablevision System Corp., 418 F. 3d 187, 200 (2d Cir. 2005) the Second Circuit Court of Appeals affirmed the dismissal of a GBL § 349 claim where plaintiff did not "make a free-standing claim of deceptiveness under GBL § 349 that happens to overlap with a possible claim under (another state statute)".

In Schlessinger v. Valspar Corporation, 21 N.Y. 3d 166 (2013), a federal case, the Court of Appeals addressed two certified questions presented by the Court of Appeals of the Second Circuit, one of which was the viability of a GBL § 349 claim based solely upon a violation of GBL § 395-a. In *Schlessinger*, Fortunoffs Department Store sold furniture to plaintiff and a "Guardsman Elite 5 Year Furniture Protection Plan which provided various services "if the furniture became stained or damaged during the contract period, ir would 'perform...a number of service-ranging from advice on stain removal to replacement of the furniture-or would arrange a store credit or offer a financial settlement".

The Plan also contained a "store closure provision" which provided only for a refund of the Plan purchase price. Fortunoffs declared bankruptcy and offered plaintiff the return of $100 purchase price. This was inadequate since the furniture had already become stained and damaged during the contract period. Alleging that this meager settlement offer violated GBL § 395-a(2) which provides that "'[n]o maintenance agreement covering parts and/or service shall be terminated at the election of the party providing such parts and/or service during the term of te agreement". In dismissing the GBL § 349 claim the Court noted that "there is no express or implied right of action to enforce section 395-a. Instead the legislature chose to assign enforcement exclusively to governmental officials. The Court found the "violation of GBL § 395-a alone does not give rise to a cause of action under (GBL) § 349". And lastly, "Thus, assuming, *Llanos, Lonner and Goldman* to be correctly decided, they involved broader deceptive conduct not covered by section 396i".

[B] **Goods, Services And Misconduct**

The types of goods and services to which G.B.L. § 349 applies include, *inter alia*, the following:

Apartment Rentals; Illegal Apartments [Bartolomeo v. Runco 162 Misc2d 485 (landlord can not recover unpaid rent for illegal apartment)[3] and Anilesh v. Williams, New York Law Journal, Nov. 15, 1995, p. 38, col. 2 (Yks. Cty. Ct.)(same); Yochim v. McGrath, 165 Misc. 2d 10, 626 N.Y.S. 2d 685 (1995)(renting illegal sublets)];

Apartment Rentals; Security Deposits [Blend v. Castor, 25 Misc. 3d 1215 (Watertown City Ct. 2009)(" The Court finds... that Ms. Castor once she collected Mr. Dases's $600 security deposit she had no intention of returning it, but rather, she intended to use it to pay for maintenance of this house built in 1890...(Mr. Dase) is awarded $500 of the $600 security deposit ...Ms. Castor (wrongfully withheld) Mr. Dase's security deposit and then (offered) a bogus claim for damages in her counterclaim...under GBL 349(h) (the Court) awards in addition to the $500 in damages an increase of the award by $500 resulting in a total judgment due of $1,000 together with costs of $15.00 "); Miller v. Boyanski, 25 Misc. 3d 1228 (Watertown City Ct. 2009)(landlord " had no intention of returning the $850 security deposit..the defendant by his conduct ' willfully or knowingly violated this section ' (349(h)) and...awards in addition to the $850 refund of the security deposit, $1,000 due to the defendant's egregious behavior...along with costs of

$20.00 ")];

Apartment Rentals; Water Infiltration [Sorrentino v. ASN Roosevelt Center, LLC[4] ("Here, the 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")];

Appraisals [*People v First American Corp.*[5] "[t]he (AG) claims that defendants engaged in fraudulent, deceptive and illegal business practices by allegedly permitting eAppraisalIT residential real estate appraisers to be influenced by nonparty Washington Mutual, Inc. (WaMu) to increase real estate property values on appraisal reports in order to inflate home prices." The court concluded that "neither federal statutes nor the regulations and guidelines implemented by the Office of Thrift Supervision preclude the Attorney General of the State of New York from pursuing [this action]...the [Attorney General also]

has standing to pursue his claims pursuant to (GBL) § 349...[that] defendants had implemented a system [allegedly] allowing WaMu's loan origination staff to select appraisers who would improperly inflate a property's market value to WaMu's desired target loan amount." In *Flandera v AFA America, Inc.*[6] the court found that plaintiffs' allegation that defendants' appraisal of the property purchased contained 'several misrepresentations concerning the condition and qualities of the home, including ...who owned the property, whether the property had municipal water, the type of basement and the status of repairs on the home'" stated claims for fraud and violation of GBL § 349].

Attorney Advertising [Aponte v. Raychuk[7](deceptive attorney advertisements ["Divorce, Low Fee, Possible 10 Days, Green Card"] violated Administrative Code of City of New York §§ 20-70C et seq)];

Aupair Services [Oxman v. Amoroso, 172 Misc2d 773 (misrepresenting the qualifications of an abusive aupair to care for handicapped children)];

Auctions; Bid Rigging [State of New York v. Feldman, 2002 WL 237840 (S.D.N.Y. 2002) (scheme to manipulate public stamp

auctions comes "within the purview of (GBL § 349)")];

Automotive; Contract Disclosure Rule [Levitsky v. SG Hylan Motors, Inc., New York Law Journal, July 3, 2003, p. 27., col. 5 (N.Y. Civ.)(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); Spielzinger v. S.G. Hylan Motors Corp., New York Law Journal, September 10, 2004, p. 19, col. 3 (Richmond Civ. 2004) (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); People v. Condor Pontiac, 2003 WL 21649689 (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)"); Laino v. Rochella's Auto Service, Inc., 46 Misc. 3d 479 (N.Y. Civ. 2014)(dealer failed to

disclose acting as a broker; failed to enter into written contract; failed to make requisite disclosures; compensatory damages of $5,000; punitive damages of $1,000];

Automotive: Sales Practices: [In Ramirez v. National Cooperative Bank, 91 A.D. 3d 204, 938 N.Y.S. 2d 280 (1st Dept. 2011) a customer was induced to purchase three different cars by a car dealer who allegedly engaged in a scheme to entice customers to the dealership with false promises of a cash prize or a free cruise...the plaintiff, an uneducated Spanish-speaking Honduran immigrant on disability and food stamps, went to the dealership to collect (his prize)...rather than collecting any prize the plaintiff was induced by...'fraudulent and unfair sales practices' to purchase three cars in seriatim, when he could afford none of them...These allegations...state claims for fraud, fraud in the inducement, unconscionability and violation of (GBL 349)". In addition, the Court held that plaintiff's action was not preempted by 15 U.S.C. 1641(a)(TILA) because "the plaintiff does not state a 'paradigmatic TILA hidden finance charge claim' merely because he alleges that he was charged a grossly inflated price for the Escape. A hidden finance charge claim requires proof of a causal connection' between the higher base price of the vehicle and the purchaser's status as a credit customer'...there is no evidence supporting a connection between the inflated [price of the Escape

and his status as a credit customer”].

Automotive: Repair Shop Labor Charges [Tate v. Fuccillo Ford, Inc., 15 Misc3d 453 (While plaintiff agreed to pay $225 to have vehicle towed and transmission “ disassembled...to determine the cause of why it was malfunctioning “ he did not agreed to have repair shop install a re-manufactured transmission nor did he agree to pay for “flat labor time“ national time standard minimum of 10 hours for a job that took 3 hours to complete [“defendant’s policy of fixing its times to do a given job on a customer’s vehicle based on a national time standard rather than being based upon the actual time it took to do the task without so advising each customer of their method of assessing labor costs is ‘a deceptive act or practice directed towards consumers and that such...practice resulted in actual injury to a plaintiff‘”)];

Automotive: Improper Billing For Services [Joyce v. SI All Tire & Auto Center, Richmond Civil Ct, Index No: SCR 1221/05, Decision Oct. 27, 2005(“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“)];

Automotive: Defective Ignition Switches [Ritchie v. Empire Ford Sales, Inc., New York Law Journal, November 7, 1996, p. 30, col. 3 (Yks. Cty. Ct.)(dealer liable for damages to used car that burned up 4 ½ years after sale)];

Automotive: Defective Brake Shoes & Braking Systems [Giarrantano v. Midas Muffler, 166 Misc2d 390 (Yks. Cty. Ct. 1997); (Midas Muffler fails to honor brake shoe warranty); Marshall v. Hyundai Motor America, 2014 WL 5011049 (S.D.N.Y. 2014)(allegations that defendant "misrepresented [the functionality of the brake system] to Plaintiffs at the time of purchase or lease"; GBL 349 claim stated)];

Automotive: Motor Oil Changes [Farino v. Jiffy Lube International, Inc., New York Law Journal, August 14, 2001, p. 22, col. 4 (N.Y. Sup), aff'd 298 AD2d 553 (an "Environmental Surcharge" of $.80 to dispose of used motor oil after every automobile oil change may be deceptive since under Environmental Conservation Law § 23-2307 Jiffy was required to accept used motor oil at no charge)];

Automotive: Extended Warranties [In [Giarrantano v. Midas Muffler, 166 Misc2d 390 the court found that the defendant 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 court applied GBL § 349 in conjunction with G.B.L. § 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"; Kim v. BMW of Manhattan, Inc., 11 Misc3d 1078, *affirmed as modified* 35 AD3d 315 (Misrepresented extended warranty; "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 have 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")];

Automotive: Refusal To Pay Arbitrator's Award [Lipscomb v. Manfredi Motors, New York Law Journal, April 2, 2002, p. 21 (Richmond Civ. Ct.)(auto dealer's refusal to pay arbitrator's award under GBL § 198-b (Used Car Lemon Law) is unfair and deceptive business practice under GBL § 349)];

Backdating [In Argento v. Wal-Mart Stores, Inc.,[8] the court granted certification to a class of customers who alleged that defendant violated GBL § 349 by routinely backdating renewal memberships at Sam's Club stores. " [A]s a result of the backdating policy, members who renew after the date upon which their one-year membership terms expire are nevertheless required to pay the full annual fee for less than a full year of membership". Defendant admitted that Sam's Club had received $940 million in membership fees in 2006[9]].

Bait Advertising [In Cuomo v. Dell, Inc.[10] the Attorney General commenced a special proceeding alleging violations of Executive Law 63(12) and 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'"];

Baldness Products [Karlin v. IVF, 93 NY2d 283, 291 (reference to unpublished decision applying GBL § 349 to products for treatment of balding and baldness); Mountz v. Global Vision Products, Inc., 3 Misc3d 171 ("Avacor, a hair loss treatment extensively advertised on television...as the modern day equivalent of the sales pitch of a snake oil salesman"; allegations of misrepresentations of "no known side effects of Avacor is refuted by documented minoxidil side effects")];

Budget Planning [Pavlov v. Debt Resolvers USA, Inc.[11](the "Defendant is engaged in the business of budget planning. Under New York law such activity must be licensed. Defendant in neither licensed nor properly incorporated. Defendant's contract is unenforceable. Defendant is required to refund all monies paid by the claimant...this court has consistently held that the failure to be properly licensed constitutes a deceptive business practice

under (GBL 349)”); People v. Trescha Corp., New York Law Journal, December 6, 2000, p. 26, col. 3 (N.Y. Sup.)(company misrepresented itself as a budget planner which “involves debt consolidation and...negotiation by the budget planner of reduced interest rates with creditors and the cancellation of the credit cards by the debtors...the debtor agrees to periodically send a lump sum payment to the budget planner who distributes specific amounts to the debtor’s creditors“)];

Building products; defective [Bristol Villages, Inc. v. Louisiana-Pacific Corp., 79 U.C.C. Rep. Serv. 2d 462 (W.D.N.Y. 2013)(misrepresentation of the quality of TrimBoard, a construction material, as “typical exterior application in which lumber would typically be used”)];

Bus Services [People v. Gagnon Bus Co., Inc., 30 Misc. 3d 1225(A)(N.Y. Sup. 2011)(bus company violated GBL 349, 350 in promising to use new school buses and provide “safe, injury-free, reliable and affordable transportation for Queen’s students” and failing to so and failing to return fees collected for said services].

Cable TV: Charging For Unneeded Converter Boxes [In Samuel v. Time Warner, Inc., 10 Misc3d 537, 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"];

Cable TV: Imposition Of Unauthorized Taxes [Lawlor v. Cablevision Systems Corp., 15 Misc3d 1111 (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"); Lawlor v. Cablevision Systems Corp., 20 Misc3d 1144 (complaint dismissed)];

Cable TV: Inverse Condemnation [Not since the 1980's case of Loretto v. Teleprompter Manhattan CATV Corp.[12] have the courts been called upon to address the equities of the use of private property in New York City by telecommunication companies for the allegedly uncompensated placement of terminal boxes, cables and other hardware. In Corsello v. Verizon New York, Inc.[13], property owners challenged defendant's use of "inside-block cable architecture" instead of "pole-mounted aerial terminal architecture " often turning privately owned buildings into "community telephone pole(s)". On a motion to dismiss, the Appellate Division, Second Department held that an inverse condemnation claim was stated noting that the allegations "are sufficient to describe a permanent physical occupation of the plaintiffs' property". The court also found that a GBL 349 claim was stated for "[t]he alleged deceptive practices committed by Verizon...of an omission and a misrepresentation; the former is based on Verizon's purported failure to inform the plaintiffs that they were entitled to compensation for the taking of a portion of their property, while the latter is based on Verizon's purported misrepresentation to the plaintiffs that they were obligated to accede to its request to

attach its equipment to their building, without any compensation, as a condition to the provision of service". The court also found that although the inverse condemnation claim was time barred, the GBL 349 claim was not ["A 'defendant may be estopped to plead the Statute of Limitations...where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action'"];

Cell Phones [In Morrissey v. Nextel Partners, Inc.[14] consumers entered into contracts with defendant "for the purchase of a'bonus minutes' promotional rate plan...Plaintiffs were also required to enroll in defendant's 'Spending Limit Program' which imposed a monthly fee for each phone based on their credit rating "... Plaintiffs...alleged that defendant's notification of the increased Spending Limit Program maintenance fee, which was ' burie[d] ' within a section of the customer billing statement... constitutes a deceptive practice". In granting certification to the Spending Limit sub-class on the GBL § 349 claim only, the Court noted the "Plaintiffs allege, however, that the small typeface and inconspicuous location of the spending limit fee increase disclosures were deceptive and misleading in a material way" citing two gift card cases[15] and one credit card case[16] involving inadequate disclosures); Naevus International, Inc. v. AT&T Corp., 2000 WL 1410160 (N.Y. Sup. 2000)(wireless phone subscribers seek damages

for "frequent dropped calls, inability to make or receive calls and failure to obtain credit for calls that were involuntarily disconnected"); But see Ballas v. Virgin Media, Inc.[17] (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. 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")];

Charities [In State of New York v. Coalition Against Breast Cancer, 40 Misc. 3d 1238 (N.Y. Sup. 2013) the State claimed that defendant "raised millions of dollars from public donations over many years, and which it alleges were diverted to pay the charity's fundraisers, officers and directors". After a Consent Order and Judgment were entered into providing for a judgment of $1,555,000

and the dissolution of Coalition Against Breast Cancer (CABC), the State sought additional relief including "ordering Morgan and the Campaign Center to disgorge profits and pay restitution for their violations of Executive Law §§ 63(12) and 172-d(2) and General Business Law § 349". In finding that a GBL § 349 was stated the Court noted that "the conduct need not amount to the level of fraud and even omissions may be the basis for such claims...In order to determine whether any particular solicitations fall within the prohibitions of the Executive law and/or the (GBL), they must be viewed as a whole under the totality of the circumstances...The solicitation materials, consisting of scripts and mailings, falsely stated that CABC was involved with research and education activities (when in fact CABC was not)...The aforementioned solicitation materials' reference to the fact that contributions would be used to facilitate 'early detection' and 'help provide mammographies (sic) for women that have no insurance'...was deceptive and misleading when less than $50,000 of over $9.9 million dollars raised was expended for approximately 40 women between 2005 and 2011"].

Checking Accounts [Sherry v. Citibank, N.A., 5 AD3d 335 ("plaintiff stated (G.B.L. §§ 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'")];

Clothing Sales [Baker v. Burlington Coat Factory, 175 Misc2d 951 (refusal to refund purchase price in cash for defective and shedding fake fur)];

Computer Software [Cox v. Microsoft Corp., 8 AD3d 39 (allegations that Microsoft engaged in purposeful, deceptive monopolistic business practices, including entering into secret agreements with computer manufacturers and distributors in 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")];

Condominiums [The Appellate Division, Second Department [Note: *There is a split in the Appellate Departments as to whether sales of condominiums within a development meet the consumer oriented threshold. Compare Quail Ridge Association v. Chemical Bank, 162 A.D. 2d 917 (3d Dept. 1990) and Thompson v. Parkchester Apartments*

Company, 271 A.D. 2d 311 (1st Dept. 2000) with Gallup v. Somerset Homes, LLC, 82 A.D. 3d 1658 (2d Dept. 2011) and Breakwaters Townhouses Association of Buffalo, Inc. v. Breakwaters of Buffalo, Inc., 207 A.D. 2d 963 (4th Dept. 1994)] has held that GBL § 349 [Board of Managers of Bayberry Greens Condominium v. Bayberry Greens Associates, 174 A.D. 2d 595 (2d Dept. 1991] and § 359 [Board of Managers of Bayberry Greens Condominium v. Bayberry Greens Associates, 39 Misc. 3d 1221 (N.Y. Sup. 2013)] apply in actions alleging deceptive practices in "the advertisement and sale of condominium units". These rulings have been applied recently in Board of Managers of 14 Hope Street Condominium v. Hope St. Partners, LLC, 40 Misc. 3d 1215 (N.Y. Sup. 2013) where plaintiffs alleged that "defendants ' disseminated advertising and promotional information that had an impact on consumers...who were also potential home buyers...the advertising and promotional information was false in material ways, including...by misrepresenting the quality of construction of the Building (including the common areas and units of the Condominium) and its primary features'" and in Board of Managers of 550 Grand Street Condominium v. Schlegel LLC, 43 Misc. 3d 1211 (N.Y. Sup. 2014) where plaintiffs sought to "recover compensatory and punitive damages allegedly sustained as a result of purported defects in the renovation of a four-storey, mixed-use walk-up building (and alleging violations GBL §§ 349)...the Martin Act does not bar claims under General Business

Law §§ 349 and 350 (and 350)...complainant's allegations...of deceptive practices in the advertisement and sale of condominium units are sufficient to state a claim under §§ 349-350".

Credit Cards [People v. Applied Card Systems, Inc., 27 AD3d 104 (misrepresenting the availability of certain pre-approved credit limits; "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"), mod'd 11 N.Y. 3d 105, 894 N.E. 2d 1 (2008); People v. Telehublink, 301 AD2d 1006 ("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"); Sims v. First Consumers National Bank, 303 AD2d 288 ("The gist of plaintiffs' deceptive practices claim is that the typeface and location of the fee disclosures, combined with high-pressure advertising, amounted to consumer conduct that was deceptive or misleading"); Broder v. MBNA Corporation, New York Law Journal, March 2, 2000, p. 29, col. 4 (N.Y. Sup.), aff'd 281 AD2d 369 (credit card company misrepresented the application of its low introductory annual percentage rate to cash advances)];

Currency Conversion [Relativity Travel, Ltd. v. JP Morgan Chase Bank, 13 Misc3d 1221 ("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 ")];

Customer Information [Anonymous v. CVS Corp., 188 Misc2d 616 (CVS acquired the customer files from 350 independent pharmacies without customers' consent; the "practice of intentionally declining to give customers notice of an impending transfer of their critical prescription information in order to increase the value of that information appears to be deceptive")];

Dating Services [Robinson v. Together Member Svc., 25 Misc. 3d 230 (N.Y. Civ. Ct. 2009)("The agreement entered into between the

parties does not comply [GBL 394-c]...Clearly, plaintiff was grossly overcharged"); Rodriguez v. It's Just Lunch International, 300 F.R.D. 125 (S.D.N.Y. 2014)(allegations of deceptive business practices by provider of match making services; GBL claim stated)];

Debt Collection: Lack Of Licensing [Centurion Capital Corp. v. Guarino[18] ("The failure of the plaintiff...to be properly authorized to do business in New York State or licensed as a debt collector and to commence this lawsuit and in excess of 13,700 in the City of New York is a deceptive business practice")].

Debt Collection: Filing Lawsuits Without Proof [In Midland Funding, LLC v. Giraldo[19] the Court found that debt collection procedures involving the filing of lawsuit without proof stated a GBL 349 claim. "Addressing the first element-'consumer oriented' conduct-defendant's GBL counterclaim is plainly sufficient...'the conduct complained of' at its heart involves the 'routine filing' of assigned debt lawsuits by plaintiff'despite a lack of crucial, legally admissible information' or 'sufficient inquiry' into whether the claims are meritorious...this Court holds that deceptive conduct by a debt buyer in the course of civil litigation may violate a consume's legal rights under GBL 349. When a debt buyer seeks the courts' aid in enforcing an assigned debt claim, the debt buyer should not commence the action unless it can readily

obtain admissible proof that would make out a prima facie case. Such proof should include evidence that it actually owns the debt, that the defendant was given notice of the assignment and that underlying debt claim is meritorious...it commences such an action without having such readily available proof and if it turns out that such proof is not readily available, the debt buyer may end up not only losing the case, but may also be found liable for substantial compensatory damages, punitive damages and attorney's fees to the extent allowable by law"].

Debt Collection: Sewer Service [Sykes v. Mel Harris and Associates, LLC[20]("Plaintiffs allege that (defendants) entered into joint ventures to purchase debt portfolios, pursued debt collection litigation en masse against alleged debtors and sought to collect millions of dollars in fraudulently obtained default judgments...In 2006, 207 and 2008 they filed a total of 104,341 debt collection actions in New York City Civil Court...Sewer service was integral to this scheme"; GBL 349 claim sustained as to one plaintiff)];

Debt Collection; Misidentification

In Midland Funding LLC v. Tagliafferro, 33 Misc. 3d 937, 935 N.Y.S. 2d 249 (N.Y. Civ. 2011),an action to collect an assigned consumer credit card debt, the Court found the plaintiff's mis-

identification of the debt collector's license may constitute a violation of GBL 349. "In fact, this practice may be a 'deceptive' act or practice under (GBL 349) in that it is impossible for the defendant to know which entity is the correct plaintiff...It is impossible for either the defendant or the court to determine which of the twp Midland LLC's named in the complaint is the proper one".

Debt Reduction Services [People v. Nationwide Asset Services, Inc., 26 Misc. 3d 258 (Erie Sup. 2009)(court found that a debt reduction service repeatedly and persistently engaged in deceptive business practices and false advertising in violation of GBL §§ 349, 350 (1) " in representing that their services ' typically save 25% to 40% off ' a consumer's total indebtedness ", (2) " failed to take account of the various fees paid by the consumer in calculating the overall percentage of savings experienced by that consumer ", (3) " failing to honor their guarantee ", and (4) " failing to disclose all of their fees ")];

Deceptive Litigation Practices [In Midland Funding, LLC v. Giraldo, 39 Misc. 3d 936 (Dist. Ct. 2013) a debt collection action, the defendant consumer counterclaimed alleging that plaintiff "'used false, deceptive and misleading' means to try to collect a debt (such as) bringing an action against defendant without any basis and without any valid evidentiary support, bringing an

account stated claim...when no account statements were ever mailed...attempting to collect on an assigned account when the defendant had not been notified of any assignment...attempting to collect amounts, including contractual interest, without admissible proof of its legal authority to collect the same...maintaining its collection efforts against defendant after being made aware that defendant was not the true debtor". These charges formed, in part, the basis for a GBL § 349 claim which asserted that plaintiff's activities "'are part of a recurring practice' of using a 'business model' that has a tendency to 'deceive and mislead' a significant percentage of New York consumers". The Court held that "'deceptive' litigation practices by a debt buyer may form the basis of a General Business Law § 349 claim or counterclaim"]

Defective Dishwashers [People v. General Electric Co., Inc., 302 AD2d 314 (misrepresentations "made by...GE to the effect that certain defective dishwashers it manufactured were not repairable " was deceptive under GBL § 349)];

Defective Ignition Switches [Ritchie v. Empire Ford Sales, Inc., N.Y.L.J. (11/7/1996), p. 30, col. 3 (Yks. Cty. Ct.)(The court applied GBL 349 to a defective ignition switch in conjunction with GBL 198-b (Used Car Lemon Law), breach of express warranty, breach of implied warranty of merchantability (UCC 2-314, 2-318),

violation of VTL 417)];

Dental Work; Bait And Switch; *Unnecessary Work Performed On Children* [Lopez v. Novy, 2009 WL 4021196 (Mt. Vernon City Ct. 2009)(" The Court finds that the defendant(Dentist)...engaged in a deceptive business practice by having plaintiff apply for a loan for dental work, though defendant was a plan participant. Plaintiff...went to defendant's office because he was a plan provider (and) communicated her coverage and desire to use it to defendant...For the defendant's office to allow a non plan provider to provide the services is improper...Judgment to plaintiff (for $3,000.00) which is the amount of coverage plaintiff would have had plus interest "); Matter of Small Smiles Litigation, 125 A.D. 3d 1354 (4th Dept. 2015)(allegations of unnecessary dental work performed on children without informed consent; 349 claim sustained)];

Disclosure of Contract Terms & Conditions [Levitsky v. SG Hylan Motors, Inc., N.Y.L.J., July 3, 2003, p. 27, col. 5 (N.Y. Civ.); Spielzinger v. S.G. Hyland Motors Corp., N.Y.L.J., September 10, 2004, p. 19, col. 3)(N.Y. Civ.); People v. Condor Pontiac, 2003 WL 21649689 (N.Y. Sup.)(failure to disclose contract terms violated GBL 349)];

Dog & Cat Sales [People v. Imported Quality Guard Dogs, Inc., 88 A.D. 3d 800 (2d Dept. 2011)(permanent injunction granted pursuant to GBL 349, 350 preventing defendant from 'selling, breeding or training dogs, or advertising or soliciting the sale, breeding or training of dogs' based upon allegedly 'repeated or illegal acts...persistent fraud")][See section 14[B], infra];

Door-To-Door Sales [New York Environmental Resources v. Franklin, New York Law Journal, March 4, 2003, p. 27 (N.Y. Sup.) (misrepresented and grossly overpriced water purification system); Rossi v. 21st Century Concepts, Inc., 162 Misc2d 932 (selling misrepresented and overpriced pots and pans)];

Educational Services [In Apple v. Atlantic Yards Development Co., LLC[21]. student/trainees asserted "various claims arising from their participation in what they allege was represented to be an employment training program. They alleged that in exchange for their participation in the program, they were promised membership in a labor union and construction jobs at the Atlantic Yards construction project in Brooklyn, New York. They further allege that even they completed the program and provided two months of unpaid construction work, the promised union membership and jobs were not provided...I see no reason to hold categorically that § 349 does not apply in the employment context...a deceptive practice

violates § 349 if it is broadly used to solicit potential employees. On the other hand, § 349 does not apply to negotiated employment contracts that are unique to a particular set of parties. The fact alleged here are that the defendants recruited a large number of potential trainees with allegedly misleading promises of union membership and jobs. This constitutes a sufficient public impact to satisfy the consumer-orientation prong of § 349. In addition...the Plaintiffs were not strictly employees in the traditional sense, but consumers (students) of a training program offered by the Defendants. (GBL) § 349 (has been applied) to claims brought by consumers of educational or vocational training programs"; Gomez-Jimenez v. New York Law School[22](graduated law students sue law school for misrepresenting post graduation employment data0 no GBL 349 claim found), aff'd ("a plaintiff 'must at the threshold, charge conduct that is consumer oriented...Here the challenged practice was consumer-oriented insofar as it was part and parcel of defendant's efforts to sell its services as a law school to prospective students...Nevertheless, although there is no question that the type of employment information published by defendant (and other law schools) during the relevant period likely left some consumers with an incomplete, if not false, impression of the school's job placement, Supreme Court correctly held that this statistical gamesmanship, which the ABA has since repudiated in its revised disclosure guidelines, does not give rise to a cognizable

claim under (GBL) § 349. First, with respect to the employment data, defendant made no express representations as to whether the work was full-time or part-time. Second, with respect top the salary data, defendant disclosed that the representations were based on small samples of self-reporting graduates. While we are troubled by the unquestionably less than candid and incomplete nature of defendant's disclosures, a party does not violate (GBL) § 349 by simply publishing truthful information and allowing consumers to make their own assumptions about the nature of the information...we find that defendant's disclosures were not materially deceptive or misleading..."We are not unsympathetic to plaintiffs' concerns. We recognize that students may be susceptible to misrepresentations by law schools. As such 'this Court does not necessarily agree [with Supreme Court] that [all] college graduates are particularly sophisticated in making career or business decisions'...As a result, prospective students can make decisions to yoke themselves and their spouses and/or their children to a crushing burden of student loan debt, sometimes because the schools have made less than complete representations giving the impression that a full-time job is easily obtainable, when, in fact, it is not. Given this reality, it is important to remember that the practice of law is a noble profession that takes price in its high ethical standards. Indeed, in order to join and continue to enjoy the privilege of being an active member of the legal profession,

every prospective and active member of the profession is called upon to demonstrate candor and honesty in their practice...Defendant and its peers owe prospective students more than just barebones compliance with their legal obligations...In that vein, defendant and its peers have at least an ethical obligation of absolute candor to their prospective students”); Austin v. Albany Law School[23](Albany Law School’s “publication of aggregated ‘employment rates’ cannot be considered deceptive or misleading to a reasonable consumer acting reasonably”).

Drew v. Sylvan Learning Center, 16 Misc3d 838 (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 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, on 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 found fraudulent misrepresentation, unconscionability and a violation of GBL 349 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 (3) 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"); People v. McNair, 9 Misc2d 1121 (deliberate and material misrepresentations to parents enrolling their children in the Harlem Youth Enrichment Christian Academy); Andre v. Pace University, 161 Misc2d 613, rev'd on other grounds 170 Misc2d 893 (failing to deliver computer programming course for beginners); Brown v. Hambric, 168 Misc2d 502 (failure to deliver travel agent education program)]; Cambridge v. Telemarketing Concepts, 171 Misc2d 796)];

Electricity Rates [Emilio v. Robinson Oil Corp., 28 AD3d 418 ("the act of unilaterally changing the price (of electricity) in the middle of the term of a fixed-price contract has been found to constitute a deceptive practice... Therefore, the plaintiff should also be allowed to assert his claim under (GBL § 349) based on the allegation that the defendant unilaterally increased the price in the middle of the renewal term of the contract"); Emilio v. Robison Oil Corp., 28 A.D. 3d 418 (2d Dept. 2009)(Plaintiff alleges that defendant breached its contract by "unilaterally adjusting alleged

fixed-price electrical supply charges mid-term"; certification granted); Compare: Matter of Wilco Energy Corp., 284 A.D. 2d 469, 728 N.Y.S. 2d 471 (2d Dept. 2001)("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");

Employee Scholarship Programs [Cambridge v. Telemarketing Concepts, Inc., 171 Misc2d 796 (refusal to honor agreement to provide scholarship to employee)];

Excessive & Unlawful Bail Bond Fees [McKinnon v. International Fidelity Insurance Co., 182 Misc2d 517 misrepresentation of expenses in securing bail bonds)];

Excessive Modeling Fees [Shelton v. Elite Model Management, Inc., 11 Misc3d 345 (models' claims of excessive fees caused "by reason of any misstatement, misrepresentation, fraud and deceit, or any unlawful act or omission of any licensed person stated a private right of action under GBL Article 11 and a claim under GBL

§ 349)];

Exhibitions and Conferences [Sharknet Inc. v. Techmarketing, NY Inc., New York Law Journal, April 22, 1997, p. 32, col. 3 (Yks. Cty. Ct.), aff'd __Misc2d__, N.Y.A.T., Decision dated Dec. 7, 1998 (misrepresenting length of and number of persons attending Internet exhibition)];

Extended Warranties [Dvoskin v. Levitz Furniture Co., Inc., 9 Misc3d 1125 (one year and five year furniture extended warranties; "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"); Kim v. BMW of Manhattan, Inc., 11 Misc3d 1078 (misrepresented extended warranty; $50 statutory damages awarded under GBL 349(h)); Giarrantano v. Midas Muffler, 166 Misc2d 390 (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, New York Law Journal, May 21, 1998, p. 32, col. 3 (Yks. Cty. Ct.)(misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty)];

Fixed price contracts; unilateral changes [Emilio v. Robison Oil Corp., 28 A.D. 3d 417 (2d Dept. 2006)(unilateral increase of price in fixed price contract violates GBL 349); See also: People v. Wilco Energy Corp., 284 A.D. 2d 469 (2d Dept. 2001)];

Flushable Wipes [Belfiore v. Proctor & Gamble Co., 2015 WL 1402313 (S.D.N.Y. 2015)(plaintiff alleges damages "stemming from the use of 'Charmin Freshmates" flushable wipes...plaintiff purchased Freshmates from a supermarket (and) flushed one to two Freshmates at a time down the toilet in his Great Neck, New York residence...Toilet clogging and sewer back-up resulted from flushing the Freshmates. A plumber removed them from the residence's plumbing charging $526.83"; GBL 349 claim stated)];

Food : Nutritional Value & Fat Free [Pelman v. McDonald's

Corp.[24](misrepresentation of nutritional value of food products); Pelman v. McDonald's Corp.[25](" In their (complaint) Plaintiffs list a number of specific advertisements which they allege to comprise the nutritional scheme that is the subject of this litigation. Plaintiffs contend that 'the cumulative effect' of these representations was to constitute a marketing scheme that misleadingly 'conveyed, to the reasonable consumer...that Defendant's foods are nutritious, healthy and can be consumed easily every day without incurring any detrimental health effects'...As the court held in Pelman IV, an extensive marketing scheme is actionable under GBL 349"; class certification denied; Koenig v. Boulder Brands, Inc., 995 F. Supp. 2d 274 (S.D.N.Y. 2014)(milk products labeled as "fat free"; GBL 349 claim stated; claims not preempted by FDA)];

Furniture Sales [Petrello v. Winks Furniture, New York Law Journal, May 21, 1998, p. 32, col. 3 (Yks. Cty. Ct.) (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty); Walker v. Winks Furniture, 168 Misc2d 265 (falsely promising to deliver furniture within one week); Filpo v. Credit Express Furniture Inc., New York Law Journal, Aug. 26, 1997, p. 26, col. 4 (Yks. Cty. Ct.)(failing to inform Spanish speaking consumers of a three day cancellation period); Colon v. Rent-A-Center, Inc., 276 A.D. 2d 58, 716 N.Y.S.

2d 7 (1st Dept. 2000)(rent-to-own furniture; "an overly inflated cash price" for purchase may violate GBL § 349)];

Giftcards [The controversy between gift card issuers [a multi-billion dollar business] and cooperating banks and consumers over the legality of excessive fees including expiration or dormancy fees persists with gift card issuers trying to morph themselves into entities protected from state consumer protection statutes by federal preemption. In three New York State class actions purchasers of gift cards challenged, *inter alia*, the imposition of dormancy fees by gift card issuers[26] (See Lonner v Simon Property Group, Inc.[27], Llanos v Shell Oil Company[28] and Goldman v Simon Property Group, Inc.[29]). The most recent battle is over whether or not actions (which rely upon the common law and violations of a salutary consumer protection statutes such as GBL §§ 349, 396-I and CPLR § 4544) brought by New York residents against gift card issuers and cooperating banks are preempted by federal law[30].

Although this issue seemingly was resolved earlier in *Goldman*[31] two recent Nassau Supreme Court decisions have taken opposite positions on the issue of federal preemption. In L.S. v Simon Property Group, Inc.[32], a class action challenging, inter alia, a renewal fee of $15.00 imposed after a six months expiration period, raised the issue anew by holding that the claims stated therein were preempted by federal law. However, most recently the

Court in Sheinken v Simon Property Group, Inc.[33], a class action challenging dormancy fees and account closing fees, held that "the National Bank Act and federal law do not regulate national banks exclusively such that *all* state laws that might affect a national bank's operations are preempted." Distinguishing *SPGCC, LLC v Ayotte*[34] and replying on *Lonner* and *Goldman* the Court denied the motion to dismiss on the grounds of federal preemption.

However, in Preira v. Bancorp Bank[35] the Court found plaintiff's claim of deception in issuing pre-paid gifts which some retailers would not allow the use of when the balance was below a particular retail price to be problematic. "Because Plaintiff has failed to allege, for example, that the cost of the gift card 'was inflated as a result of [Defendants'] deception' or that Plaintiff attempted, without success, to recoup the balance of the funds on her gift card, Plaintiff's claim 'sets forth deception as both act and injury' and, thus, 'contains no manifestation of either pecuniary or 'actual harm'...Further, all of the terms of the gift card-including those concerning the limitations on split transactions and the ability to recoup funds on the card-were fully disclosed to Plaintiff before she engaged in her first transaction, although after the card had been activated".

Guitars [In Wall v. Southside Guitars, LLC, 17 Misc3d 1135 the claimant, " a vintage Rickenbacker guitar enthusiast... purchased

the guitar knowing that there were four changed tuners, as represented by the advertisement and the sales representative. What he did not bargain for were the twenty or so additional changed parts as found by his expert. Defendants claim that the changed parts do not affect this specific guitar as it was a 'player's grade' guitar...While determining how much can be replaced in a vintage Rickenbacker guitar before it is just a plain old guitar may be intriguing, this court need not entertain it because an extensively altered guitar was not one that claimant saw advertised and not one that he intended to buy"; violation of GBL 349 found)];

Hair Loss Treatment [Mountz v. Global Vision Products, Inc., 3 Misc 3d 171 ("marketing techniques (portrayed) as the modern day equivalent of the sales pitch of a snake oil salesman", alleged misrepresentations of "no known side effects" without revealing documented side effects "which include cardiac changes, visual disturbances, vomiting, facial swelling and exacerbation of hair loss"; GBL § 349 claim stated for New York resident "deceived in New York")];

Home Heating Oil Price Increases [Matter of Wilco Energy Corp., 283 AD2d 469 ("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")];

Home Inspections [In Carney v. Coull Building Inspections, Inc., 16 Misc3d 1114 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 $395.00 fee paid and no private right of action existed under the Home Improvement Licensing Statute, Real Property Law 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 on the contract such as the "inspector's licensing information"); Ricciardi v. Frank d/b/a InspectAmerica Engineering, P.C., 163 Misc2d 337, mod'd 170 Misc2d 777 (civil engineer liable for failing to discover wet basement; violation of GBL 349 but damages limited to fee paid)];

Housing; Three Quarter Housing [David v. #1 Marketing Service,

Inc., 113 A.D. 3d 810 (2d Dept. 2014)(defendants "are the operators of several three-quarter houses in Brooklyn and Queens (which is) a rapidly growing ad highly profitable industry, which involved recruiting people with disabilities and histories of substance abuse, as well as those living in shelters ...residents of three-quarter houses commit their personal incomes or housing allowances to the operators of these three-quarter houses, only to find themselves living in abject poverty and overcrowded conditions with no support services on site'; GBL 349 claim sustained)];

Job Search Services [Ward v. Theladders.com, 3 F. Supp. 3d 151 (S.D.N.Y. 2014)(users of job search website alleged website misrepresented quality of job postings and resume re-writing services; GBL 349 claim stated)];

In Vitro Fertilization [Karlin v. IVF America, Inc., 93 NY2d 282 (misrepresentations of in vitro fertilization rates of success)];

Insurance Coverage & Rates [In Partells v. Fidelity National Title Insurance Services[36] consumers alleged that defendant "Unlawfully overcharged them and other consumers for title insurance". In sustaining a GBL 349 claim the Court found "that in charging the rate that it did FNTIC implicitly represented that the

rate-which, it bears repeating is set by law-was correct....it is not simply that FNTIC failed to disclose the correct rate, rather, it deceived the Partels into thinking the charged rate was correct...it is enough to conclude that a jury could find that a reasonable consumer, while closing on a mortgage, would believe that the rate he or she was charged for title insurance (to the benefit of the lender) would be the lawful rate"; Gaidon v. Guardian Life Insurance Co., 94 NY2d 330 (misrepresentations that "out-of-pocket premium payments (for life insurance policies) would vanish within a stated period of time"); Batas v. Prudential Insurance Company of America, 281 AD2d 260 (GBL 349 and 350 claims properly sustained regarding, inter alia, allegations of failure "to conduct the utilization review procedures...promised in their contracts", "misrepresentation of facts in materials to induce potential subscribers to obtain defendants' health policies"); Monter v. Massachusetts Mutual Life Ins. Co., 12 AD3d 651 (misrepresentations with respect to the terms "Flexible Premium Variable Life Insurance Policy"); Beller v. William Penn Life Ins. Co., 8 AD3d 310 ("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 should be made...we find that the complaint sufficiently states a (GBL § 349) cause of action");

Skibinsky v. State Farm Fire and Casualty Co., 6 AD3d 976 (misrepresentation of the coverage of a "builder's risk" insurance policy); Brenkus v. Metropolitan Life Ins. Co., 309 AD2d 1260 (misrepresentations by insurance agent as to amount of life insurance coverage); Makastchian v. Oxford Health Plans, Inc., 270 AD2d 25(practice of terminating health insurance policies without providing 30 days notice violated terms of policy and was a deceptive business practice because subscribers may have believed they had health insurance when coverage had already been canceled)];

Insurance: Provision Of Non-OEM Parts [In Patchen v. GEICO, 2011 WL 49579 (E.D.N.Y. 2011) vehicle owners challenged GEICO's policy of using cheaper and allegedly inferior non original equipment manufacturer (non-OEM) parts(2) in estimating the cost of repairs. "The crux of the plaintiff's claims is that the estimates by the GEICO claims adjusters were too low, and that the checks that GEICO issued did not fully compensate them for the damage to their vehicles...the claims adjuster prepared his estimate using prices for 'non-OEM crash parts' rather the 'OEM crash parts'". In addition, plaintiffs alleged that GEICO actively corralled claimants into 'captive' repair shops that would recommended substandard non-OEM replacement parts, while failing to inform claimants that non-OEM parts were inferior". While such conduct was

“arguably both consumer-oriented and materially misleading” it did not allege actual injury because plaintiffs failed to assert facts “to show that the non-OEM parts specified for their vehicles were deficient, but rather attempt to show that non-OEM parts are inferior without exception, The Court has found that their theory of universal inferiority is not plausible”].

Insurance; Provision Of Defense Counsel [Elacqua v. Physicians’ Reciprocal Insurers, 52 AD3d 886 (“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")];

Insurance Claims Procedures [Wilner v. Allstate Ins. Co., 71 AD3d 155 (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...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"); Shebar v. Metropolitan Life Insurance Co., 23 AD3d 858 ("Allegations that despite promises to the contrary in its standard-form policy sold to the public, defendants made 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', stated cause of action pursuant to (GBL) § 349"); Ural v. Encompass Ins. Co. Of America[37] (GBL 349 claim stated for "a general practice of inordinately delaying the settlement of insurance claims against policyholders"); Nick's Garage, Inc. v. Progressive Casualty Ins. Co.[38](GBL 349 claim stated where "Plaintiff claims that 'Defendant impeded and delayed fair settlement by, among other things, dictating and allocating price allowances, setting arbitrary price caps, refusing to negotiate labor rates, refusing to pay proper amounts for paint and parts

invoices and in many cases failing to inspect or re-inspect the Vehicles with the time frames specified by regulations'...the Court finds that plaintiff has sufficiently pleaded that Defendant engaged in deceptive acts that caused injury"); Makuch v. New York Central Mutual Fire Ins. Co., 12 AD3d 1110 ("violation of (GBL § 349 for disclaiming) coverage under a homeowner's policy for damage caused when a falling tree struck plaintiff's home"); Acquista v. New York Life Ins. Co., 285 AD2d 73 (allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability""may be said to fall within the parameters of an unfair or deceptive practice"); Rubinoff v. U.S. Capitol Insurance Co., New York Law Journal, May 10, 1996, p. 31, col. 3 (Yks. Cty. Ct.)(automobile insurance company fails to provide timely defense to insured); see also: Kurschner v. Massachusetts Casualty Insurance Co., 2009 WL 537504 (E.D.N.Y. 2009)(" inappropriate delays in processing claims, denials of valid claims, and unfair settlement practices regarding pending claims have all been found under New York law to run afoul of § 349's prohibition on deceptive practices...since plaintiff had pled that defendants delayed, denied and refused to pay disability income insurance policy claims and waiver of premium claims is a matter of conduct that amounted to unfair claim settlement practices that ultimately resulted in the termination of her benefits, the Court finds that she has successfully satisfied the

pleading requirement of Section 349 as it related to deceptive and misleading practices and injuries incurred therefrom ")];

Insurance: Forced Placed [In Casey v. Citibank, N.A.[39] the Court found that plaintiffs mortgagors stated a GBL 349 claim which alleged "that the defendants force-placed flood insurance that was both in excess of federal requirements and not contemplated by the mortgage agreement. Indeed, defendants accepted approximately $30,000 worth of flood insurance on Casey's property for almost eight years before claiming he was deficient and demanding $107,780 in additional coverage. This would likely mislead a reasonable consumer as to the amount of flood insurance he was required to maintain under the contract. Casey further alleges that defendants profited from undisclosed commissions and/or kickbacks in violation of federal law"); Hoover v. HSBC Mortgage Corporation (USA), 9 F. Supp. 3d 223 (N.D.N.Y. 2014)(mortgagors allege they were forced to purchase flood insurance which was not required in the mortgage agreements; GBL 349 claim stated)];

Insurance Claims; Steering [North State Autobahn, Inc. V. Progressive Ins. Group[40]("Here, the plaintiffs alleged that they were directly injured by the Progressive defendants' deceptive practices in that customers were misled into taking their vehicles from the plaintiffs to competing repair shops tat participated in

the DRP (direct repair program). The allegedly deceptive conduct was specifically targeted at the plaintiffs and other independent (auto repair) shops in an effort to wrest away customers through false and misleading statements. The plaintiffs' alleged injury did not require a subsequent consumer transaction; rather, it was sustained when customers were unfairly induced into taking their vehicles from the plaintiffs' shop to a DRP shop regardless of whether the customers ultimately ever suffered pecuniary injury as a result of the Progressive defendants' deception. The plaintiffs adequately alleged that as a result of this misleading conduct, they suffered direct business loss of customers resulting in damages of over $5 million"); M.V.B. Collision, Inc. V. Allstate Insurance Company[41] ("Mid Island is an auto-body shop. Mid Island and Allstate have had a long-running dispute over the appropriate rate for auto-body repairs. Mid Island alleges that, as a result of that dispute, Allstate agents engaged in deceptive practices designed to dissuade Allstate customers from having their cars repaired at Mid Island and to prevent Mid Island from repairing Allstate customers' cars"; GBL 349 claim sustained)];

Interior Design & Decorating [In Weinstein v. Natalie Weinstein Design Assoc. Inc., 86 A.D. 3d 641, 928 N.Y.S. 2d 305 (2d Dept. 2011) the homeowners enter into contract for the provision of "certain interior design and decorating services at their home in

exchange for their payment of a stated fee". A dispute arose between the parties and the plaintiff sued the corporate defendants and its principals and alleged violation of GBL § 349. The court dismissed the GBL 349 claims against the individuals because "plaintiff failed to allege any deceptive acts committed by those defendants broadly impacting consumers at large". However, the court sustained the GBL §§ 349, 350 claims against corporation because "plaintiffs alleged the type of misleading consumer-oriented conduct sufficient to state claims for deceptive business practices and false advertising"].

Internet Marketing & Services [Scott v. Bell Atlantic Corp., 98 NY2d 314 (misrepresented Digital Subscriber Line (DSL) Internet services); Zurakov v. Register.Com, Inc., 304 AD2d 176 ("Given plaintiff's claim that the essence of his contract with defendant was to establish his exclusive use and control over the domain name 'Laborzionist.org' and that defendant's usurpation of that right and use of the name after registering it for plaintiff defeats the very purpose of the contract, plaintiff sufficiently alleged that defendant's failure to disclose its policy of placing newly registered domain names on the 'Coming Soon' page was material" and constitutes a deceptive act under GBL § 349); People v. Network Associates, 195 Misc2d 384 ("Petitioner argues that the use of the words 'rules and regulations' in the restrictive clause

(prohibiting testing and publication of test results of effectiveness of McAfee antivirus and firewall software) is designed to mislead consumers by leading them to believe that some rules and regulations outside (the restrictive clause) exist under state or federal law prohibiting consumers from publishing reviews and the results of benchmark tests...the language is (also) deceptive because it may mislead consumers to believe that such clause is enforceable under the lease agreement, when in fact it is not...as a result consumers may be deceived into abandoning their right to publish reviews and results of benchmark tests"); People v. Lipsitz, 174 Misc2d 571 (failing to deliver purchased magazine subscriptions)];

Inverse Condemnation [Corsello v. Verizon New York Inc., 77 A.D. 3d 344 (2d Dept. 2010), *aff'd as mod'd* 18 N.Y. 3d 777 (2012) ("Plaintiffs claim that Verizon acted deceptively by attaching its box to their building without telling plaintiffs that that act entitled plaintiffs to compensation and by falsely telling plaintiffs that Verizon had a right to affix the box. We assume (without deciding) that these allegations state a legally sufficient claim under section 349");

" *Knock-Off* " *Telephone Numbers* [Drizin v. Sprint Corporation, 3 AD3d 388 ("defendants' admitted practice of maintaining numerous

toll-free call service numbers identical, but for one digit, to the toll-free call service numbers of competitor long-distance telephone service providers. This practice generates what is called ‘fat-fingers‘ business, i.e., business occasioned by the misdialing of the intended customers of defendant’s competing long-distance service providers. Those customers, seeking to make long-distance telephone calls, are, by reason of their dialing errors and defendants’ many ‘knock-off‘ numbers, unwittingly placed in contact with defendant providers rather than their intended service providers and it is alleged that, for the most part, they are not advised of this circumstance prior to completion of their long-distance connections and the imposition of charges in excess of those they would have paid had they utilized their intended providers. These allegations set forth a deceptive and injurious business practice affecting numerous consumers (under GBL 349)“)];

Lasik Eye Surgery [Gabbay v. Mandel, New York Law Journal, March 10, 2004, p. 19, col. 3 (N.Y. Sup.)(medical malpractice and deceptive advertising arising from lasik eye surgery)];

Layaway Plans [Amiekumo v. Vanbro Motors, Inc., 3 Misc. 3d 1101 (failure to deliver vehicle purchased on layaway plan and comply with statutory disclosure requirements; a violation of GBL § 396-t is a *per se* violation of GBL § 349)];

Leases [Pludeman v Northern Leasing Systems, Inc.,[42] a class of small business owners who had entered into lease agreements for POS [Point Of Sale] 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 be a one-page contract on a clip 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 attorneys' fees and New York as the chosen forum"; all of which were in "small print" or "microprint". The Appellate Division, First Department certified the class[43] noting that, "liability could turn on a single issue. Central to the breach of contract claim is whether it is possible to construe the first page of the lease as a complete contract...Resolution of this issue does not require individualized proof." Subsequently, the trial court awarded the plaintiff class partial summary judgment on liability on the breach of contract/ overcharge claims[44].

In Toyota Motor Credit Corp. v. Glick, 34 Misc. 3d 1217(A) the consumer challenged the type size on an automobile lease as violative of Personal Property Law 337(2) and CPLR 4544 which provides that "The agreement shall contain the following items printed or written in a size equal to at least ten-point bold type". In denying plaintiff's summary judgment the Court noted that

"The underlying purpose of Section 4544 consumer statute provisions is to render contractual provisions 'unenforceable' if printed in too small print...Whether a contract's print size violates Sec. 4544 is inherently a triable issue of fact that precludes the grant of summary judgment"); Sterling National Bank v. Kings Manor Estates, 9 Misc3d 1116 ("The 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)")];

Liquidated Damages Clause [Morgan Services, Inc. v. Episcopal Church Home & Affiliates Life Care Community, Inc., 305 AD2d 1106 (it is deceptive for seller to enter "into contracts knowing that it will eventually fail to supply conforming goods and that, when the customer complains and subsequently attempts to terminate the contract (seller) uses the liquidated damages clause of the contract as a threat either to force the customer to accept the non-conforming goods or to settle the lawsuit")];

Loan Applications [Dunn v. Northgate Ford, Inc., 1 Misc3d 911 (automobile dealer completes and submits loan application to finance company and misrepresents teenage customer's ability to

repay loan which resulted in default and sale of vehicle)];

Low Balling [Frey v. Bekins Van Lines, Inc.[45]("Broadly stated, Plaintiffs claim that Defendants are engaged in a pattern and practice of quoting lower shipping prices than those ultimately charged-a practice referred to as 'low-balling' estimates-with the intent of charging higher amounts. Defendants are also accused of overcharging their customers (for) a variety of add-on services, including fuel supplements and insurance premiums on policies that Defendants are alleged never to have obtained"; GBL 349 and 350 claims stated)];

Magazine Subscriptions [People v. Lipsitz, 174 Misc. 2d 571 (Attorney General "has established that respondent consistently 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"];

Medical Procedures: Success Rates [In Gotlin v. Lederman, M.D.[46] the Court sustained a GBL 349 claim alleging "that the defendants-in their brochures, videos, advertisements, seminars and internet sites-deceptively marketed and advertised FRS (Fractionated Stereotactice Radiosurgery) treatment by making unrealistic claims as to its success rates...plaintiffs contend that defendants' claims that FSR treatment had 'success rates' of greater than 90% in treating pancreatic cancer were materially deceptive"].

Mislabeling [Lewis v. Al DiDonna, 294 AD2d 799 [pet dog dies from overdose of prescription drug, Feldene, mislabeled "1 pill twice daily" when should have been "one pill every other day")];

Misidentification in collecting debts [Midland Funding LLC v. Tagliafferro, 33 Misc. 3d 937 (N.Y. Sup. 2011)(misidentification of debt collector's license may constitute violation of GBL 349)];

Modeling [People v. City Model and Talent Development, Inc.[47] ("evidence sufficient to establish, prima facie, that the

respondents violated (GBL 349) by luring at least one potential customer to their office with promises of future employment as a model or actor and then, when the customer arrived at the office for an interview, convincing her, by subterfuge...to sign a contract for expensive photography services; that they violated (GBL) 350 by falsely holding CMT out as a modeling and talent agency")];

Monopolistic Business Practices [Cox v. Microsoft Corp., 8 AD3d 39 (monopolistic activities are covered by GBL § 349; "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")];

Mortgages: Misleading Practices [Emigrant Mortgage Co., Inc. v. Fitzpatrick[48](foreclosure action; two affirmative defenses; loan unconscionable "because the monthly mortgage payments...were in excess of the (home owner's) fixed monthly income"; GBL 349 violated because "the conduct of the plaintiff in extending the subject

loan...without determining her ability to repay when a reasonable person would expect such an established bank...to offer a loan that he or she could afford was materially misleading...said conduct had the potential to affect similarly situated financially vulnerable consumers"); Popular Financial Services, LLD v. Williams, 50 A.D. 3d 660, 855 N.Y.S. 2d 581 (2d Dept. 2008)(foreclosure action; counterclaim alleging fraudulent inducement to enter mortgage states a claim under GBL 349); Delta Funding Corp. v. Murdaugh, 6 A.D. 3d 571, 774 N.Y.S. 2d 797 (2d Dept. 2004)(foreclosure action; counterclaims state claims under Truth In Lending Act and GBL 349)]; See also: Ng v. HSBC Mortgage Corp., 2010 WL 889256 (E.D.N.Y. 2010) (numerous misrepresentations involving home mortgage transaction; GBL 349 claim stated)];

Mortgages: improper assignments and foreclosures [In two mortgage foreclosure cases, the Appellate Division, Second Department clarified the notice requirements of RPAPL 1304 and the standing of Mortgage Electronic Registration Systems, Inc. (MERS). See Bank of New York v. Silverberg, 86 A.D. 274 (2d Dept. 2011) and Aurora Loan Services, LLC v. Weisblum, 85 A.D. 3d 95 (2d Dept. 2011)];

Mortgages: Improper Fees & Charges [MacDonell v. PHM Mortgage Corp., 846 N.Y.S. 2d 223 (N.Y.A.D.) (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 apply [see Dowd v. Alliance Mortgage Company [49] (a class of mortgages alleged that defendant violated Real Property Law [RPL] 274-a and GBL 349 by charging a "'priority handling fee' in the sum of $20, along with unspecified 'additional fees' for providing her with a mortgage note payoff statement". The Appellate Division, Second Department, granted class certification to the RPL 274-a and GBL 349 claims but denied certification as to the money had and received causes of action "since an affirmative defense based on the voluntary payment doctrine...necessitates individual inquiries of class members"); Dougherty v. North Fork Bank, 301 AD2d 491; see generally Negrin v. Norwest Mortgage, 263 AD2d 39] and noting that "To the extent that our decision in Dowd v. Alliance Mortgage Co., 32 AD3d 894 holds to the contrary it should not be followed"); Kidd v. Delta Funding Corp., 299 AD2d 457 (" The defendants failed to prove that their act of charging illegal processing fees to over 20,000 customers, and their failure to notify the plaintiffs of the existence and terms of the settlement agreement, were not materially

deceptive or misleading"); Walts v. First Union Mortgage Corp., New York Law Journal, April 25, 2000, p. 26,col. 1 (N.Y. Sup. 2000)(consumers induced to pay for private mortgage insurance beyond requirements under New York Insurance Law § 6503); Trang v. HSBC Mortgage Corp., USA, New York Law Journal, April 17, 2002, p. 28, col. 3 (Queens Sup.)($15.00 special handling/fax fee for a faxed copy of mortgage payoff statement violates RPL § 274-a(2)(a) which prohibits charges for mortgage related documents and is deceptive as well); see also: Cohen v. J.P. Morgan Chase & Co., 608 F. Supp. 2d 330 (E.D.N.Y. 2009)(" Because the RESPA claims survives summary judgment, it is now appropriate to determine whether the illegality of a fee does in fact satisfy the ' misleading ' element of § 349 even if the fee is properly disclosed. There is authority under New York law for finding that collecting an illegal fees constitutes a deceptive business conduct...If it is found that collection of the post-closing fee was in fact illegal under RESPA, then (the) first element of § 349 is established ")];

Mortgages & Home Equity Loans: Improper Closings [Bonior v. Citibank, N.A., 14 Misc3d 771 ("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 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")];

Mortgages: Property Flipping [Cruz v. HSBC Bank, N.A., 21 Misc. 3d 1143 (GBL § 349 claim stated " 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")];

Movers; Household Goods [Frey v. Bekins Van Lines, Inc.[50] ("Broadly stated, Plaintiffs claim that Defendants are engaged in a pattern and practice of quoting lower shipping prices than those ultimately charged-a practice referred to as 'low-balling' estimates-with the intent of charging higher amounts. Defendants are also accused of overcharging their customers (for) a variety of add-on services, including fuel supplements and insurance premiums on policies that Defendants are alleged never to have obtained"; GBL 349 and 350 claims stated); Goretsky v. ½ Price Movers, New York Law

Journal, March 12, 2004, p. 19, col. 3 (N.Y. Civ. 2004) ("failure to unload the household goods and hold them 'hostage' is a deceptive practice under (GBL § 349)")];

Packaging [Sclafani v. Barilla America, Inc., 19 AD3d 577 (deceptive packaging of retail food products)];

Packaging; Excessive Slack Fill [Waldman v. New Chapter, Inc., 2010 WL 2076024 (E.D.N.Y. 2010)(" In 2009, Plaintiff purchased a box of Berry Green, a ' Spoonable Whole-Food '...Berry Green comes in a box that is 6 5/8 inches tall...The box contains a jar that is 5 5/8 inches tall...And the jar itself is only half-filled with the product...(GBL 349 claim stated in that) Defendant's packaging is ' misleading ' for purposes of this motion...Plaintiff alleges that packaging ' gives the false impression that the consumer is buying more than they are actually receiving ' and thus sufficiently pleads that the packaging was ' misleading in a material way '")];

Personal Care Products [Goldemberg v. Johnson & Johnson Consumer Companies, Inc., 8 F. Supp. 3d 467 (S.D.N.Y. 2014) (consumers allege that defendant misrepresented personal care products being made exclusively from natural ingredients; GBL 349 claim stated)];

Pets; Disclosure Of Rights Under GBL Article 35-D [Rizzo v. Puppy Boutique, 27 Misc. 3d 117 (N.Y. Civ. 2010)(defective puppy sold to consumer; failure to advise consumer of rights under GBL Article 35-D which regulates " Sale of Dogs and Cats " deceptive business practice under GBL § 349)];

Predatory Lending [Cruz v. HSBC Bank, N.A., 21 Misc. 3d 1143 ("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 illegality in the home's structure "; GBL 349 claim stated ")];

Price Matching [Dank v. Sears Holding Management Corporation, 59 AD3d 582 ("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"). But see: Dank v. Sears Holding Management Corp., 93 A.D. 3d 627 (2d Dept. 2012)(GBL 349, 350 and fraud claims dismissed; After the trial court dismissed the fraud and GBL 350 claims pre-trial the Appellate Division noted the trial court's error "when it dismissed the (fraud and GBL 350 claims) on the ground that the plaintiff had failed to establish the element of reliance. The plaintiff established that he relied on the representations of a Sears employee when he traveled to the third Sears store in an attempt to obtain a price match. However (fraud and GBL 350) require that the defendant acted deceptively or misleadingly...and the jury subsequently determined that Sears did not act in a deceptive or misleading way. Thus the plaintiff was not prejudiced by the (trial court's) error and reversal is not required"; See also: 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); Jay Norris, Inc., 91 F.T.C. 751 (1978) *modified* 598 F. 2d 1244 (2d Cir. 1979); Commodore Corp., 85 F.T.C. 472 (1975) (consent order).];

Professional Networking [BNI New York Ltd. v. DeSanto, 177

Misc2d 9 (enforcing an unconscionable membership fee promissory note)];

Propane Tanks; Underfilled [In Lazaroff v. Paraco Gas Corp.[51] the Court sustained a GBL 349 claim wherein customers alleged that defendant propane gas retailer claimed that its 20 lb propane tanks were "full" when filled but in fact they contained less propane gas. "Plaintiff alleges that the defendants have short weighted the containers by 25%, filling it with only 15 pounds of propane rather than 20 pounds, thereby supplying consumers with only partially filled cylinders, although the cap on the cylinder reads 'full'...Although defendants have both submitted evidence that their cylinders bore labeling (and/or place cards) which disclosed that they contained 15 pounds of propane, such proof does not dispose of (allegations) that the 15 pound disclosure was hidden by the mesh metal cages in which the cylinders were kept and, therefore, not conspicuous for the average consumer until after the propane had already been purchased...plaintiff had adequately alleged an injury (and asserts) that had he understood the true amount of the product, he would not have purchased it, and that he and the...class paid a higher price per gallon/pound of propane and failed to receive that was promised and/or the benefit of the bargain, i.e., a full 20 pound cylinder and the amount of propane he was promised"].

Privacy [Anonymous v. CVS Corp., New York Law Journal, January 8, 2004, p. 19, col. 1 (N .Y. Sup.)(sale of confidential patient information by pharmacy to a third party is "an actionable deceptive practice" under GBL 349); Smith v. Chase Manhattan Bank, 293 AD2d 598; Meyerson v. Prime Realty Services, LLC, 7 Misc2d 911 ("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")];

Pyramid Schemes [C.T.V., Inc. v. Curlen, New York Law Journal, Dec. 3, 1997, p. 35, col. 1 (Yks. Cty. Ct.)(selling bogus "Beat The System Program" certificates); Brown v. Hambric, 168 Misc2d 502 (selling misrepresented instant travel agent credentials and educational services)];

Real Estate Sales [Barkley v. Olympia Mortgage Co.[52] ("Plaintiffs, eight African-American first-time home buyers, commenced (actions) against (defendants) lenders, appraisers, lawyers and others, claiming that defendants conspired to sell them overvalued, defective homes, financed with predatory loans, and targeted them because they are minorities"; GBL 349 claim sustained); Gutterman v. Romano Real Estate, New York Law Journal, Oct. 28, 1998, p. 36, col. 3 (Yks. City Ct.)(misrepresenting that a house with a septic tank was connected to a city sewer system);

Board of Mgrs. Of Bayberry Greens Condominium v. Bayberry Greens Associates, 174 AD2d 595 (deceptive advertisement and sale of condominium units); B.S.L. One Owners Corp. v. Key Intl. Mfg. Inc., 225 AD2d 643 (deceptive sale of shares in a cooperative corporation); Breakwaters Townhouses Ass'n. V. Breakwaters of Buffalo, Inc., 207 AD2d 963 (condominium units); Latiuk v. Faber Const. Co., 269 AD2d 820 (deceptive design and construction of home); Polonetsky v. Better Homes Depot, Inc., 185 Misc2d 282, rev'd 279 AD2d 418, rev'd 97 NY2d 46 (N.Y.C. Administrative Code §§ 20-700 et seq (Consumer Protection Law) applies to business of buying foreclosed homes and refurbishing and reselling them as residential properties; misrepresentations that recommended attorneys were approved by Federal Housing Authority deceptive)];

Restocking Fees [In Smilewicz v. Sears Roebuck and Co., Index No. 17525/07, J. Pfau, Decision July 15, 2008 (Kings Sup. 2008), a class of consumers challenges defendant retailer's restocking fees. The court sustained a GBL § 349 claim and noted that "Based on the return policy... Plaintiff alleges that 'without proper or adequate notice to or consent by its customers, Sears unilaterally imposes this so-called Restocking Fee on select returned merchandise, including...Home Electronics...the Sears does not abide by the terms of its own return policy set forth on the back of the sales receipt... restocking fee is excessive because the 15% fee does not

correlate to the amount its costs Sears to restock these items...claims that defendant violated GBL § 349...unjustly enriched...and breached a contract...Here...plaintiff has alleged that Sears failed to adequately disclose the restocking fees before a consumer sale...Sears allegedly offers a money-back guarantee and allegedly does not adequately disclose its true return policy until after the sale". Later, however, the Court denied class certification (see Smilewicz v. Sears Roebuck Company, Index No. 17525/07, J. Pfau, Decision dated November 24, 2009 (Kings Sup. 2009), aff'd 82 A.D. 3d 744, 917 N.Y.S. 2d 904 (2d Dept. 2011)].

Securities [In Silvercorp Metals Inc. v. Anthion Mgt. LLC[53] the Court stated the general rule that GBL 349 is inapplicable to securities transactions and then noted that the instant action involved alleged misrepresentations made on the Internet regarding plaintiff's value, management and the quality of its ore/mines. "Silvercorp's GBL 349 claim, as alleged, does not arise out of a securities transaction. It is noted that courts have found GBL 349 inapplicable to claims arising from securities transaction, essentially for two reasons: (1) 'individuals do not generally purchase securities in the same manner as traditional consumer products such as vehicles, appliances or groceries since securities are purchased as investments not as good to be consumers' or used and (2) 'because the securities arena is one which is highly

regulated by the federal government...The clear weight of authority is that claims arising out of securities transactions are not the type of consumer transactions for which (GBL) 349 was intended to provide a remedy'"; Deer Consumer Products, Inc. v. Little Group[54] (plaintiff business not a consumer and has no standing to bring a GBL § 349 claim; "Here, plaintiff alleges that EOS Funds's misleading and deceptive statements were directed at and affected the readerships of their website and to invoke fear in plaintiff's shareholders... plaintiff cannot recover from the fact that these third parties were allegedly misled or deceived by EOS Funds"); Prickett v. New York Life Ins. Co.[55] ("Not all New York courts agree that securities-related transaction are exempted from (GBL 349). The Court of Appeals has not spoken on the issue. The Appellate Division for the Fourth Department has issued conflicting decisions (see Smith v. Triad Mfg. Group, Inc., 225 A.D. 2d 962 (4th Dept. 1998)(GBL 349 does not apply to securities); Scalp & Blade v. Advest, Inc., 281 A.D. 2d 882 (4th Dept. 2001)(GBL 349 applies to securities transactions). The Second Department has allowed a securities-related claim to proceed. BSL v. Key, 225 A.D. 2d 643 (2d Dept. 1996)...However, the First and Third Departments have consistently held that (GBL) 349 does not apply to securities-related transactions"; (see Gray v. Seaboard, 14 A.D. 3d 852 (3d Dept. 2005); Fesseba v. TD Waterhouse, 305 A.D. 2d 268 (1st Dept. 2003)].

Skin Treatment [Barbalios v. Skin Deep Center for Cosmetic Enhancement, LLC[56] (Plaintiff paid $3,520 for skin improvement treatment procedure "which had allegedly resulted in no discernable improvement"; the court found "that defendants had engaged in deceptive practices in order to mislead plaintiff"; GBL 349, 350 claims sustained; refund awarded)];

Sports Nutrition Products [Morelli v. Weider Nutrition Group, Inc., 275 AD2d 607 (manufacturer of Steel Bars, a high-protein nutrition bar, misrepresented the amount of fat, vitamins, minerals and sodium therein)];

Steering; Automobile Insurance Claims [M.V.B. Collision, Inc. V. Allstate Insurance Company[57] ("Mid Island is an auto-body shop. Mid Island and Allstate have had a long-running dispute over the appropriate rate for auto-body repairs. Mid Island alleges that, as a result of that dispute, Allstate agents engaged in deceptive practices designed to dissuade Allstate customers from having their cars repaired at Mid Island and to prevent Mid Island from repairing Allstate customers' cars"; GBL 349 claim sustained)];

Taxes; Improperly Charged [Chiste v. Hotels.Com LP[58] ("The crux of Plaintiffs' allegations stem from what is not disclosed on this

invoice (for the online purchase of hotel accommodations)...Second Plaintiffs' allege that defendants are charging consumers a higher tax based the Retail Rate consumers pay Defendants rather than the Wholesale Rate Defendants pay the hotels. Instead of remitting the full amount of taxes collected to the hotels, Defendants keep the difference between the tax collected and the amount remitted to the tax authorities...as a profit or fee without disclosing it"; GBL 349 claim sustained)];

Tax Advice [Mintz v. American Tax Relief, 16 Misc. 3d 517, 837 N.Y.S. 2d 841 (N.Y. Sup. 2007)("the second and fourth mailing 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 mailing...make explicit promises which...Cannot be described as 'puffery' and could...be found to be purposely misleading and deceptive")];

Termite Inspections [Anunziatta v. Orkin Exterminating Co., Inc., 180 F. Supp. 2d 353 (misrepresentations of full and complete inspections of house and that there were no inaccessible areas are misleading and deceptive)];

Three Quarter Housing [In David v. #1 Marketing Service, Inc.,

113 A.D. 3d 810 (2d Dept. 2014) the Court noted that defendants "are the operators of several three-quarter houses in Brooklyn and Queens (which is) a rapidly growing and highly profitable industry, which involves recruiting people, with disabilities and histories of substance abuse, as well as those living in shelters or re-entering the community after serving time in prison or jail, to join housing programs which purportedly offer supportive services...residents of three-quarrier houses commit their personal incomes or housing allowance to the operators of these three-quarter houses, only to find themselves living in abject and overcrowded conditions with no support services on site". In reversing the trial court, the Appellate Division sustained the GBL § 349 claim finding defendants' acts or practices were deceptive and misleading a material way when they recruited the plaintiffs to move into their houses"].

Timberpeg Homes [DeAngelis v. Timberpeg East, Inc., 51 AD3d 1175 ("the complaint alleges 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...plaintiffs have stated viable causes of action under GBL 349 and 350 against defendants")];

Travel Services [Meachum v. Outdoor World Corp., 235 AD2d 462 (misrepresenting availability and quality of vacation campgrounds); Vallery v. Bermuda Star Line, Inc., 141 Misc2d 395 (misrepresented cruise); Pellegrini v. Landmark Travel Group, 165 Misc2d 589 (refundability of tour operator tickets misrepresented)];

Trimboard [In Britsol Village, Inc. V. Louisiana-Pacific Corp.[59], the plaintiff assisted living facility alleged that defendants misrepresented the quality of TrimBoard, a construction material; "Plaintiff has sufficiently alleged that Defendant's conduct was consumer oriented (by asserting) that Defendant advertised TrimBoard as being more durable and easier to use than real wool and competing products, despite knowing that the product was unable to resist moisture as intended...misled consumers into believing that TrimBoard could be used in 'typical exterior application in which lumber would typically be used...Notably, Plaintiff is not required to identify specific individual consumers who were harmed by Defendant's actions in order to establish a violation of this section.

Tummy Tighteners [In Johnson v. Body Solutions of Commack, LLC, 19 Misc3d 1131, the plaintiff entered into a contract with defendant and paid $4,995 for a single "treatment to tighten her stomach area which lasted 30 minutes wherein the defendant allegedly applied

capacitive radio frequency generated heat to plaintiffs' stomach in order to tighten post childbirth wrinkled skin (and according to plaintiff) the service had no beneficial effect whatsoever upon her stomach". At issue were various representations the essence of which was (1) the 30 minute treatment "would improve the appearance of her stomach area", (2) "One using the websites, provided to him or her by the defendant, will thus be led to believe they are dealing with medical doctors when they go to Body Solutions...another page of this site, described 'The... Procedure ' as ' available only in the office of qualified physicians who specialize in cosmetic procedures'...the website provided to the plaintiff for reference promises that treatment will be provided exclusively in a physician's office...There is no...evidence that the plaintiff was treated in a physician's or doctor's office or by a doctor...The Court finds that the defendant has engaged in deceptive conduct under (GBL 349) by not treating her in a medical doctor's office under the proper supervision of a medical doctor and/or by representing...that she would receive noticeable beneficial results from a single 30 minute treatment and that the lack of proper medical involvement and supervision caused the lack of positive results")].

TV Repair Shops [Tarantola v. Becktronix, Ltd., Index No: SCR 1615/03, N.Y. Civ., Richmond Cty., March 31, 2004 (TV repair shop's

violation of " Rules of the City of New York (6 RCNY 2-261 et seq)...that certain procedures be followed when a licensed dealer receives an electronic or home appliance for repair...constitutes a deceptive practice under (GBL § 349)")];

Wedding Singers [Bridget Griffin-Amiel v. Frank Terris Orchestras, 178 Misc2d 71 (the bait and switch of a "40-something crooner" for the "20-something 'Paul Rich' who promised to deliver a lively mix of pop hits, rhythm-and-blues and disco classics"; violation of GBL 349)].

Wine; Counterfeit [Koch v. Greenberg, 2014 WL 1284492 (S.D.N.Y. 2014)(jury found that 24 bottles of wine had been misrepresented as to authenticity, finding fraud and violations of GBL 349, 350 and awarding "compensatory damages of $355,811-representing the purchase price for the 24 bottles-and additional $24,000 in statutory damages under GBL 349, which authorizes 'treble damages' up to $1000 per violation. On April 12, 2013, the jury awarded Koch $12 million in punitive damages"; Application for attorneys fees rejected by trial court).

[C] **Stating A Cognizable Claim**

Stating a cause of action for a violation of GBL 349 is fairly

straight forward and should identify the misconduct which is deceptive and materially misleading to a reasonable consumer[60] including a business[61] [see Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20; North State Autobahn, Inc. V. Progressive Insurance Group Co.[62] ("To successfully assert a claim under (GBL) § 349(h), 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice"); Ural v. Encompass Ins. Co. Of America[63] ("the complaint must allege that the defendant engaged in a deceptive act or practice, that the challenged act or practice was consumer-oriented and that the plaintiff suffered an injury as a result of the deceptive act or practice"); Midland Funding, LLC v. Giraldo[64] ("'Stating a cause of action to recover damages for a violation of (GBL) § 349 is fairly straight forward'...In order to properly plead a cause of action under GBL § 349, the party pleading the claim 'should identify consumer-oriented misconduct which is deceptive and materially misleading to a reasonable consumer, and which causes actual damages'"); Wilner v. Allstate Ins. Co.[65]; Andre Strishak & Assocs., P.C. v Hewlett Packard Co., 300 AD2d 608], which causes actual damages [see Small v. Lorillard Tobacco Co., 94 NY2d 43 ("To 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 causes actual, although not necessarily pecuniary harm' is required to impose compensatory damages"); Stutman v Chemical Bank, 95 NY2d 24, 29.

See also: Woods v. Maytag Co., 2010 WL 4314313 (E.D.N.Y. 2010), a putative class action involving exploding ovens and allegations that Maytag "intentionally withheld knowledge of the alleged defect and made express warranties and other misrepresentations regarding the safety of the oven in order to induce consumers to purchase the oven and spend money on repairs" the Court noted that "[t]he Act provides a cause of action to 'any person who has been injured by reason of any violation of this section' and provides for recovery of actual damages...'To make out a prima facie case under section 349, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result'...'[A]n action under (GBL) 349 is not subject to the pleading-with-particularity requirements of Rule 9(b), Fed. R. Civ. P., but need only meet the base-bones notice-pleading requirements of Rule 8(a)...Thus a Plaintiff failing to adequately plead a fraud claim does not necessarily also fail to plead a claim under GBL 349...'Deceptive conduct that does not rise to the level of

actionable fraud, may nevertheless form the basis of a claim under New York's Deceptive Practices Act, which was created to protect consumers from conduct that might not be fraudulent as a matter of law and also relaxes the heightened standards required for a fraud claim'").

See also: Derbaremdiker v. Applebee's International, Inc., 2012 WL 4482057 (E.D.N.Y. 2012)("To successfully assert a claim under Section 349, 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice'"); Barkley v. United Homes, LLC, 2012 WL 2357295 (E.D.N.Y. 2012)("In order to find a party liable under GBL § 349: '(1) the defendant's challenged acts or practices must have been directed at consumers, (2) the acts or practices must have been misleading in a material way, and (3) the plaintiff must have sustained injury as a result'"); Preira v. Bancorp Bank, 885 F. Supp. 2d 672 (S.D.N.Y. 2012)("To state a claim under Section 349 'a plaintiff must alleged (1) the [defendant's] act or practice was consumer-oriented, (2) the act or practice was misleading in a material respect, and (3) the plaintiff was injured as a result'").

The doctrine of unclean hands may apply to GBL § 349 as noted in Stephenson v. Terron-Carrera, 36 Misc. 3d 1202(A)(Suffolk Sup. 2012)("Thus, as plaintiff played a role in the duplicitous scheme about which he now complains, and come to this court with unclean

hands in connection with the purchase of the Property, he is barred from all equitable relief...as plaintiff played a role in the alleged fraud to obtain the mortgages he does not have a remedy under GBL 349...Plaintiff's GBL claim must (also) be dismissed...for lack of injury...Plaintiff admitted...That other than legal fees relative to the instant action, he has not sustained any damages as a result of the defendant's alleged deceptive practices").

[C.1] **Broad Impact On Consumers**

The subject misconduct must have "a broad impact on consumers at large" [Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.[66]); LLC v. Plaza Residential Owners LP[67] (GBL § 349 claim alleging "deceptive trade practices on the part of both the sponsor and the selling agent (does not have) 'a broad impact on consumers at large'"); Shebar v. Metropolitan Life Insurance Co., 23 AD3d 858 ("Plaintiff alleged a specific deceptive practice on the part of defendant, directed at members of the public generally who purchased its standard-form policy")][68], does not involve private disputes[69] and constitutes "consumer-oriented conduct"[70]. See also: M.V.B. Collision, Inc. V. Allstate Insurance Company[71] ("There is no 'magic number' of consumers who must be deceived before conduct can become 'consumer oriented'...'Instead the critical question is whether 'the acts or practices have a broad...impact on consumers at large'");

GBL 349 claim sustained); Nathanson v. Grand Estates Auction Co.[72] ("The gravamen of Plaintiff's Complaint is that the winning bidder (at real estate auction) was a shill (a fictitious bidder) acting on behalf of the Defendant, whose final bid of $5,000,000 was designed either to spur Plaintiff to increase his bid or to enable Defendant impermissibly to withdraw the Property from an auction billed as one without a reserve price...Here, Plaintiff's Complaint contains a single factual allegation that the Defendant's allegedly deceptive conduct was part of a larger pattern of deception which affects the public at large"; GBL 349, 350 claims dismissed).

[C.2] **Statute Of Limitations**

GBL § 349 claims are governed by a three-year period of limitations [see Corsello v. Verizon N.Y. Inc., 18 N.Y. 3d 777, 789 (2012)(3 year statute of limitations on GBL § 349 claims); Pike v. New York Life Insurance Company, 72 AD3d 1043; State v. Daicel Chemical Industries, Ltd., 42 AD3d 301; Beller v. William Penn Life Ins. Co. 8 AD3d 310); Kelly v. Legacy Benefits Corp., 34 Misc. 3d 1242(A)(N.Y. Sup. 2012)("Plaintiff alleges in his first cause of action that 'Legacy and MPC engaged in misleading and deceptive practices [that]...induc[ed investors] to invest significant sums in viatical settlements' by...'misrepresenting to Plaintiff through the use of false and/or contrived medical reports...the true life

expectancies of the viators'...'the three year period of limitations for statutory causes of action under CPLR 214(2) applies to the instant [GBL] 349 claims'...accrual of a section 349(h) private right of action first occurs when plaintiff has been injured by a deceptive act or practice violating section 349'"); Enzinna v. D'Youville College, 34 Misc. 3d 1223(A)(Erie Sup. 2010)(three year statute of limitations); People v. City Model and Talent Development, Inc., 29 Misc. 3d 1205(A) (N.Y. Sup. 2010)(three year statute of limitations); Boltin v. Lavrinovich, 28 Misc. 3d 1217(A) (N.Y. Sup. 2010)(GBL 349 claim time barred); Fathi v. Pfizer Inc., 24 Misc. 3d 1249 (N.Y. Sup. 2009)(" Here, Pfizer has not sustained its burden of proving that the statute of limitations has expired on Fathi's GBL § 349 cause of action ").

See also: Statler v. Dell, Inc., 2011 WL 1326009 (E.D.N.Y. 2011)("Actions brought pursuant to Section 349 must be commenced within three years of the date of accrual (which) occurs when plaintiff is injured by the deceptive act or practice that violated the statute...Such injury occurs when 'when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief' ...Accrual is not dependent upon any later date when discovery of the alleged deceptive practice is said to occur"); Woods v. Maytag Co., 2010 WL 4314313 (E.D.N.Y. 2010), a putative class action involving exploding ovens and allegations that Maytag "intentionally

withheld knowledge of the alleged defect and made express warranties and other misrepresentations regarding the safety of the oven in order to induce consumers to purchase the oven and spend money on repairs" the Court noted that "[t]he Act provides a cause of action to 'any person who has been injured by reason of any violation of this section' and provides for recovery of actual damages...'To make out a prima facie case under section 349, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result'...'[A]n action under (GBL) 349 is not subject to the pleading-with-particularity requirements of Rule 9(b), Fed. R. Civ. P., but need only meet the base-bones notice-pleading requirements of Rule 8(a)...Thus a Plaintiff failing to adequately plead a fraud claim does not necessarily also fail to plead a claim under GBL 349...'Deceptive conduct that does not rise to the level of actionable fraud, may nevertheless form the basis of a claim under New York's Deceptive Practices Act, which was created to protect consumers from conduct that might not be fraudulent as a matter of law and also relaxes the heightened standards required for a fraud claim'"; M&T Mortgage Corp. v. Miller, 2009 WL 3806691 (E.D.N.Y. 2009)(" the statute of limitations period for actions under GBL 349 is three years ")].

[C.3] **Stand Alone Claims**

A GBL 349 claim "does not need to be based on an independent private right of action" [Farino v. Jiffy Lube International, Inc., 298 AD2d 553]. See also: M.V.B. Collision, Inc. V. Allstate Insurance Company[73] ("As Allstate correctly points out, the Second Circuit has held that '[p]laintiffs cannot circumvent' the lack of a private right of action under a statute 'by claiming [that a violation of the statute is actionable under (GBL) 349'...Here... there is evidence of a 'free-standing claim of deceptiveness' that simply 'happens to overlap' with a claim under the Insurance Law...the deceptive practices at issue here extend beyond 'unfair claim settlement practices'...or steering...the deceptive practice at issue here is an alleged retaliatory scheme to dissuade Allstate insureds from going to Mid Island. The alleged scheme involved not only 'unfair settlement practices' and steering but also...alleged retaliatory totaling of vehicles, defamatory comments and threats that insureds would 'wind up in civil remedies if they took their car to Mid Island Collision'").

[C.4] **Misconduct Arising From Transactions In New York State**

GBL 349 does not apply to claims that do not arise from transactions in New York State [see Goshen v. Mutual Life Insurance Company, 98 N.Y. 2d 314, 746 N.Y.S. 2d 858 (2002) and Scott v. Bell Atlantic Corp., 98 N.Y. 2d 314, 746 N.Y.S. 2d 858 (2002)(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 held that GBL § 349 requires that "the transaction in which the consumer is deceived must occur in New York"); Ovitz v. Bloomberg L.P.[74] ("Plaintiff, a resident of Illinois was not deceived in New York State"); Morrissey v. Nextel Partners, Inc., 72 AD3d 209 (3d Dept. 2010)(" we conclude that plaintiff's motion for certification of a New York State class with respect to certification of a New York State class with respect to the (GBL § 349) claim of the ' Spending Limit Class ' should have been granted. However, we decline to certify a multistate class as to this claim...(GBL § 349) requires the deceptive transaction to have occurred in New York and, therefore, no viable claim under the statute would lie for potential class members from outside the state who were victimized by defendant's practices "); see also Kaufman v. Sirius XM Radio, Inc.[75] ("Plaintiffs have alleged many signals emanating from New York but have failed to plead the essential act that must have transpired within the boundaries of the state to maintain a viable suit under GBL 349; that the deception they allege having experienced occurred in New York"); Chiste v. Hotels.Com LP[76] ("The crux of Plaintiffs' allegations stem from what is not disclosed on this invoice (for the online purchase of hotel accommodations)...Second Plaintiffs' allege that defendants are

charging consumers a higher tax based the Retail Rate consumers pay Defendants rather than the Wholesale Rate Defendants pay the hotels. Instead of remitting the full amount of taxes collected to the hotels, Defendants keep the difference between the tax collected and the amount remitted to the tax authorities...as a profit or fee without disclosing it...Plaintiffs here made and paid for their hotel reservations on the Internet from their respective home states. The alleged deceptive practice...did not occur when Plaintiffs checked in to the hotels...except for (one plaintiff all others) made their hotel reservations outside of New York); GBL 349 claim sustained); Gunther v. Capital One, N.A., 2010 WL 1404122 (E.D.N.Y. 2010)(" Here, the plaintiff contends that he satisfies the standing requirements for Section 349 because some of his injuries took place in New York. However, the plaintiff does not describe in his complaint how he was injured in New York...the plaintiff may assert a claim under Section 349 for out-of-state deception, as long as it led him to take a related action in New York "); Gotlin v. Lederman, 616 F. Supp. 2d 376 (E.D.N.Y. 2009)(" the deception... occurred in Italy and...would be beyond the reach of New York's consumer fraud statute. The plaintiffs have not proffered evidence to suggest that the defendants engaged in promotional activities or advertising that deceived a consumer in New York and resulted in that consumer's injury "); Pentair Water Treatment (OH) Company v. Continental Insurance Company, 2009 WL

1119409 (S.D.N.Y. 2009)(" This case arises out of losses sustained by Plaintiffs in the wake of the outbreak of Legionnaires' disease aboard a cruise ship in the summer of 1994...Plaintiffs have not alleged that the transaction in which they were deceived occurred in New York and, therefore, have not stated a claim under GBL 349 ")].

[D] **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'[77]" (Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 344 quoting Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, at 25), the courts will uphold a suit pursuant to GBL 349. Thus in Gaidon the Court 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" (id. at 342)). Stated, simply, the conduct at issue must be "consumer oriented conduct"[78].

See e.g., Williams v. Citigroup, Inc.[79] ("alleging that defendants, who are underwriters of airline specialty facility (ASF) bonds which are used to finance the construction of municipal airports, boycotted a structure that plaintiffs, an experienced structured finance attorney, developed and patented for such bonds...plaintiff has standing to state an antitrust claim under the Donnelly Act...Plaintiff's attempt to assert (a GBL § 349 claim is unavailing) because that statute is limited to claims involving consumer oriented conduct"); Promatch, Inc. v. AFG Group, Inc.[80] ("Plaintiff alleges that defendant...wrongfully represented in advertising and in project proposals that construction management work done by plaintiff was defendant's work... plaintiff failed to plead that defendant's alleged misrepresentation had a broad impact on consumers at large"); Yellow Book Sales v. Hillside Van Lines, Inc.[81](advertizing contractual dispute; GBL § 349, 350 claims dismissed because 'private contractual disputes which are unique to the parties do not fall within the ambit of the statute"); Vescon Construction, Inc. V. Gorelli Ins. Agency, Inc.[82] (insurance coverage dispute; "Here, the conduct complained of is not consumer-oriented within the meaning of (GBL) § 349)...Rather, these allegations, liberally construed, at best show a private contract dispute over policy coverage and the processing of [Vescon's] claims, not conduct affecting the consuming public at large"); Gomez-Jimenez v. New York Law School[83]("a plaintiff 'must at the

threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices have a broad impact on consumers at large; 'private contract disputes unique to the parties...would not fall within the ambit of (GBL) § 349)...Here the challenged practice was consumer-oriented insofar as it was part and parcel of defendant's efforts to sell its services as a law school to prospective students"); Plaza PH 2001].

[E] **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" (Lonner v Simon Prop. Group, Inc., 57 AD3d 100, 110). 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" (Oswego Laborers' Local 214 Pension Fund, 85 NY2d at 25; Gomez-Jimenez v. New York Law School, 103 A.D. 3d 13, 956 N.Y.S. 2d 54 (1st Dept. 2012)("a plaintiff 'must at the threshold, charge conduct that is consumer oriented...Here the challenged practice was consumer-oriented insofar as it was part and parcel of defendant's efforts to sell its services as a law school to prospective students...Nevertheless, although there is no question that the type of employment

information published by defendant (and other law schools) during the relevant period likely left some consumers with an incomplete, if not false, impression of the school's job placement, Supreme Court correctly held that this statistical gamesmanship, which the ABA has since repudiated in its revised disclosure guidelines, does not give rise to a cognizable claim under (GBL) § 349. First, with respect to the employment data, defendant made no express representations as to whether the work was full-time or part-time. Second, with respect top the salary data, defendant disclosed that the representations were based on small samples of self-reporting graduates. While we are troubled by the unquestionably less than candid and incomplete nature of defendant's disclosures, a party does not violate (GBL) § 349 by simply publishing truthful information and allowing consumers to make their own assumptions about the nature of the information...we find that defendant's disclosures were not materially deceptive or misleading..."We are not unsympathetic to plaintiffs' concerns. We recognize that students may be susceptible to misrepresentations by law schools. As such 'this Court does not necessarily agree [with Supreme Court] that [all] college graduates are particularly sophisticated in making career or business decisions'...As a result, prospective students can make decisions to yoke themselves and their spouses and/or their children to a crushing burden of student loan debt, sometimes because the schools have made less than complete

representations giving the impression that a full-time job is easily obtainable, when, in fact, it is not. Given this reality, it is important to remember that the practice of law is a noble profession that takes price in its high ethical standards. Indeed, in order to join and continue to enjoy the privilege of being an active member of the legal profession, every prospective and active member of the profession is called upon to demonstrate candor and honesty in their practice...Defendant and its peers owe prospective students more than just barebones compliance with their legal obligations...In that vein, defendant and its peers have at least an ethical obligation of absolute candor to their prospective students"); Harmon v. Major Chrysler Jeep Dodge Inc., 101 A.D. 3d 679 (2d Dept. 2012)(defendant "failed to establish its prima facie entitlement to judgment as a matter of law by showing that it did not engage in an act or practice that was deceptive ore misleading in a material way when it failed to disclose that the vehicle had previously been repurchased by the manufacturer for failure to conform to its warranty prior to the plaintiff signing the contract agreeing to purchase the vehicle"); Patterson v. Somerset Invs. Corp., 96 A.D. 3d 817 (2d Dept. 2012)("Contrary to the plaintiff's contention, the loan instrument and other documents submitted by the defendant... demonstrated that the terms of the subject mortgage loan were fully set forth in the loan documents and that no deceptive act or practice occurred in this case...The plaintiff's claim that he did

not read the documents before executing them is unavailing, since a party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms"); Emigrant Mtge. Co. Inc. v. Fitzpatrick, 95 A.D. 3d 1169 (2d Dept. 2012)("the plaintiff's evidence established that Fitzpatrick was presented with clearly written documents describing the terms of the subject loan and alerting her to the fact the plaintiff would not independently verify her income...Firzpatrick failed to proffer any evidence...as to whether the plaintiff made any materially misleading statements"); Jones v. Bank of America, 97 A.D. 3d 639 (2d Dept. 2012)("the plaintiffs failed to allege that the appellants' alleged acts and practices misled them in a material way"); Lazaroff v. Paraco Gas Corp., 95 A.D. 3d 1080 (2d Dept. 2012) aff'g 38 Misc. 3d 1217(A)(Kings Sup. 2011)(consumers allege that defendant propane gas retailer claims that its 20 lb propane tanks are "full" when filled but in fact contain less propane gas; "Plaintiff alleges that the defendants have short weighted the containers by 25%, filling it with only 15 pounds of propane rather than 20 pounds, thereby supplying consumers with only partially filled cylinders, although the cap on the cylinder reads 'full'...Although defendants have both submitted evidence that their cylinders bore labeling (and/or place cards) which disclosed that they contained 15 pounds of propane, such proof does not dispose of (allegations) that the 15 pound disclosure was hidden by the mesh metal cages in which the cylinders

were kept and, therefore, not conspicuous for the average consumer until after the propane had already been purchased"); Austin v. Albany Law School, 38 Misc. 3d 988 (Albany Sup. 2013) (Albany Law School's "publication of aggregated 'employment rates' cannot be considered deceptive or misleading to a reasonable consumer acting reasonably"); Saxon Mortgage Services, Inc. v. Hamilton, 38 Misc. 3d 1201(A)(Queens Sup. 2012)("Hamiltons failed to proffer evidence sufficient to establish a meritorious defense as to whether the plaintiff made any materially misleading statements or committed any misconduct with respect to the subject loan"); JD & K Associates, LLC v. Selective Insurance Group, Inc., 2013 WL 1150207 (Onondaga Sup. 2013)(GBL 349 claim dismissed); Midland Funding, LLC v. Giraldo, 2013 WL 1189163 (N.Y. Dist. Ct. 2013)("Addressing the first element-'consumer oriented' conduct-defendant's GBL counterclaim is plainly sufficient...'the conduct complained of' at its heart involves the 'routine filing' of assigned debt lawsuits by plaintiff'despite a lack of crucial, legally admissible information' or 'sufficient inquiry' into whether the claims are meritorious. When considered together with defendant's allegation that plaintiff's deceptive acts and practices 'affect the consuming public at large' and are 'not limited to the defendant' the challenged conduct and practices clearly raise issues beyond any 'private contract disputes'"); Jones v. OTN Enter., Inc., 84 A.D. 3d 1027, 922 N.Y.S. 2d 810 (2d Dept. 2011)("complaint also does not

allege any deceptive or misleading conduct on the part of the (defendant) within the meaning of (GBL) § 349"); Maple House, Inc. v. Alfred F. Cypes & Co., 80 A.D. 3d 672, 914 N.Y.S. 2d 912 (2d Dept. 2011)(negligent procurement of insurance claims dismissed; GBL § 349 claim "properly dismissed because it was predicated upon an act or practice that was misleading in a material way...or an act or practice that was 'consumer oriented'").

In Dank v. Sears Holding Management Corp., 93 A.D. 3d 627, 940 N.Y.S. 2d 648 (2d Dept. 2012), a price matching class action, the Court sustained the fraud and GBL § 349 claims (59 A.D. 3d 582), denied class certification(59 A.D. 3d 584) and held a trial at which judgment was entered on behalf of the defendants dismissing the fraud and GBL §§ 349, 350 claims(2011 WL 3645516). The facts and the proceedings at trial are informative. "In February 2007, Sears published a policy promising, in pertinent part, to match the 'price on an identical branded item with the same features currently available for sale at another local retail store'. The plaintiff requested at three different stores that Sears sell him a flat-screen television at the same price at which it was being offered by two other retailers. His request was denied at the first two Sears stores on the basis that each store manager had the discretion to decide which retailers are considered local and therefore which prices to match. Eventually he purchased the television at the third Sears store at the price offered by one retailer, but was denied a

lower price offered by another". The plaintiff sued alleging fraud and violations of GBL §§ 349, 350 and after incorrectly dismissing the fraud and GBL § 350 claims on the grounds of no proof of reliance, submitted the case to jury which "subsequently determined that Sears did not act in a deceptive or misleading way. The Court also held that plaintiff's proof of misrepresentations made by employees were inadmissible hearsay since there was no proof that the employees "with whom he spoke when he visited the Sears stores had the authority to speak on behalf of Sears. Further, the Court providently exercised its discretion "in excluding from evidence later revisions in the price match policy on the ground that this evidence was irrelevant"); Moore v. Liberty Power Corp., LLC, 72 A.D. 3d 660, 897 N.Y.S. 2d 723 (2d Dept. 2010)("the parties entered into an agreement for the defendant to supply the plaintiff's residence with electricity at a rate of '0.1896' per kWh, which can only reasonably be interpreted to mean $0.1896 per kWh. The failure of the agreement to use a currency symbol was not 'deceptive or misleading in a material way'"); U.S. Bank National Association v. Pia, 73 A.D. 3d 752, 901 N.Y.S. 2d 104 (2d Dept. 2010)(failure to show that "allegedly deceptive acts were 'likely to mislead a reasonable consumer acting reasonably"); Koch v. Acker, Merrall & Condit Company, 2010 WL 2104250 (1st Dept. 2010)(purchaser of counterfeit wines claims that wine auctioneer violated GBL §§ 349, 350; " The ' Conditions of Sale/Purchase's Agreement ' included in

each of defendant's auction catalogues contains an ' as is ' provision alerting prospective purchasers that defendant ' makes no express or implied representation, warranty or guarantee regarding the origin, physical condition, quality, rarity, authenticity, value (of the wine)...A reasonable consumer, alerted by these disclaimers, would not have relied, and thus would not have been misled, by defendant's alleged misrepresentations concerning the vintage and provenance of the wine it sells...(GBL §§ 349, 350 claims) lack merit "); Morales v. AMS Mortgage Services, Inc., 2010 WL 114794 (2d Dept. 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 "); Wilner v. Allstate Ins. Co., 71 AD3d 155 (2d Dept. 2009)(" the plaintiffs are alleging that the defendant purposely failed to reach a decision on the merits of their insurance claim in order to force the 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 on 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; if the plaintiffs initiated the suit, the plaintiffs have to pay for it, whereas if the defendant initiates its own suit, the cost will fall upon the defendant...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 factfinder "); North State Autobahn, Inc. v. Progressive Ins. Group, 32 Misc. 3d 798, 928 N.Y.S. 2d 1999 (West. Sup. 2011)("As to Progressive's alleged misleading or deceptive behavior, plaintiff has submitted evidence that Progressive employees made disparaging, untrue statements to its insureds concerning plaintiff in connection with the DRP, that caused plaintiff to lose customers. The court finds that such evidence of misrepresentations, made in connection with its DRP, an established program involving billions of dollars and thousands of consumer-insureds, raises a question of fact that requires a trial as to what statements were made, their truth or falsity and/or whether deceptive and misleading, how far reaching and the extent to which plaintiff was damaged thereby"; motion to dismiss GBL § 349 claim denied); Nassau County Consolidated MTBE Products Liability Litigation, 29 Misc. 3d 1219(A) (N.Y. Sup. 2010)("The chemical MTBE...has been detected in the Long Island aquifer system, including within the water districts' production wells...allegations do not detail the materially misleading or deceptive acts of defendants"); Reit v. Yelp! Inc., 29 Misc. 3d 713, 907 N.Y.S. 2d 411 (N.Y. Sup. 2010)("Yelp's statement is not materially misleading to a reasonable consumer"); Held v. Macy's, Inc., 25 Misc. 3d 1219 (West. Sup. 2009)(" Plaintiff is essentially complaining that

having purchased three shirts at a discounted price and having returned one of them, she is entitled to make a profit on the deal by having the discount attributable to the returned shirt paid to her in the form of a credit on her credit card...Because Plaintiff has failed to show that a reasonable consumer acting reasonably under the circumstances would have been misled into believing that a $15 off $50 purchase coupon would allow the Macy's Cardholder upon his/her return of some or all of the merchandise purchased, to receive some or all of the value of the coupon refunded to his/her credit card account, Plaintiff's GBL §§ 349 and 350 (claims) are deficient as a matter of law "); People v. Nationwide Asset Services, Inc., 26 Misc. 3d 258 (Erie Sup. 2009)(court found that a debt reduction service repeatedly and persistently engaged in deceptive business practices and false advertising in violation of GBL §§ 349, 350 (1) " in representing that their services ' typically save 25% to 40% off ' a consumer's total indebtedness ", (2) " failed to take account of the various fees paid by the consumer in calculating the overall percentage of savings experienced by that consumer ", (3) " failing to honor their guarantee ", and (4) " failing to disclose all of their fees "); Board of Managers of Woodpoint v. Woodpoint Plaza LLC, 24 Misc. 3d 1233 (Kings Sup. 2009)(GBL §§ 349, 350 " dismissed for failure to allege an act or practice that was misleading in a material respect or allege that plaintiffs relied on false advertisements when

purchasing the condominium units ").

See also: Lane v. Fein, Such and Crane, LLP, 2011 WL 722372 (E.D.N.Y. 2011)(debtors challenge collection action; GBL § 349 claims dismissed because defendants "alleged acts are almost certainly no consumer-oriented as they affected the plaintiffs alone, and are not likely yo have a 'broader impact on consumers at large'...have alleged no facts-aside from their conclusion that they suffered emotional distress-that show that the alleged acts of the defendant caused any quantifiable damage...plaintiffs have not alleged any acts that materially misleading"); Verzani v. Costco Wholesale Corporation, 2010 WL 3911499 (S.D.N.Y. 2010)("a reasonable consumer would not read the label as promising that the package contained sixteen ounces of shrimp'. In fact the product's name alone, 'Shrimp Tray with Cocktail Sauce' suggests that a consumer (at a minimum) is purchasing shrimp and cocktail sauce"); Woods v. Maytag Co., 2010 WL 4314313 (E.D.N.Y. 2010)(gas range oven explodes; "Plaintiff alleges...Maytag ...expressly warranted to the general public and the Plaintiff, through the Internet, by advertisement literature and other means that consumers could safely use the product for the purpose of cooking...Plaintiff has simply not provided enough factual information to plausibly suggest that... Maytag...had knowledge of the defect or made misrepresentations to induce purchase of the ovens"; GBL 349 claim not stated); Barkley v. Olympia Mortgage Co.[84] ("Plaintiffs, eight African-American first-

time home buyers, commenced (actions) against (defendants) lenders, appraisers, lawyers and others, claiming that defendants conspired to sell them overvalued, defective homes, financed with predatory loans, and targeted them because they are minorities...UH Defendants advertised their services on billboards, in subways, in newspapers, on television, through a website and with flyers...despite... repeated representations that their homes would be renovated and repaired, each home was significantly in disrepair, in many cases with myriad defects masked by cosmetic repairs, which defects caused plaintiffs to incur substantial repair costs...One advertisement promised that homes would be 'Exquisitely Renovated (New Bathrooms, Kitchens, Appliances, Etc)' and 'Quality Craftsmanship Throughout the Whole House'...Thus, at a minimum there is a triable issue of fact as to whether (UH's) advertisements were objectively misleading"; GBL 349 claim sustained); Rodriquez v. It's Just Lunch Int'l, 2010 WL 685009 (S.D.N.Y. 2010)(misrepresented dating services; " Given the New York attorney general's own conclusion, that IJLI...violated (GBL 394-c(2)), the plaintiffs' allegation, the IJLI...overcharged clients in violation of state laws, satisfies the materially misleading element of (GBL 349)"); Kurschner v. Massachusetts Casualty Insurance Co., 2009 WL 537504 (E.D.N.Y. 2009)(" inappropriate delays in processing claims, denials of valid claims, and unfair settlement practices regarding pending claims have all been found under New York law to run afoul of § 349's

prohibition on deceptive practices...since plaintiff had pled that defendants delayed, denied and refused to pay disability income insurance policy claims and waiver of premium claims is a matter of conduct that amounted to unfair claim settlement practices that ultimately resulted in the termination of her benefits, the Court finds that she has successfully satisfied the pleading requirement of Section 349 as it related to deceptive and misleading practices and injuries incurred therefrom ")][85].

[F] **Injury**

The Plaintiffs must, of course, allege an injury as a result of the deceptive act or practice (see Stutman v Chemical Bank, 95 NY2d at 29). For example, in Ovitz v. Bloomberg L.P., 77 A.D. 3d 515, 909 N.Y.S. 2d 710 (1st Dept. 2010) the Court held that "Nor did plaintiff allege actual injury resulting from the alleged deceptive practices, since defendants did not commence enforcement proceedings against plaintiff and are not seeking to collect fees or payments from plaintiff in connection with the cancellation of his subscription"), aff'd 18 N.Y. 3d 753 (2012)("Plaintiff's (GBL) 349 claim must be dismissed for lack of injury. It is well settled that a prima facie showing requires allegations that a 'defendant is engaging in an act or practice that is deceptive or misleading in a material was and that plaintiff has been injured by reason thereof'").

In North State Autobahn, Inc. v, Progressive Ins. Group Co., 102 A.D. 3d 5 (2d Dept. 2012) the Court expanded the concept of injury to include a plaintiff business and its customers. "Here, the plaintiffs alleged that they were directly injured by the Progressive defendants' deceptive practices in that customers were misled into taking their vehicles from the plaintiffs to competing repair shops tat participated in the DRP (direct repair program). The allegedly deceptive conduct was specifically targeted at the plaintiffs and other independent (auto repair) shops in an effort to wrest away customers through false and misleading statements. The plaintiffs' alleged injury did not require a subsequent consumer transaction; rather, it was sustained when customers were unfairly induced into taking their vehicles from the plaintiffs' shop to a DRP shop regardless of whether the customers ultimately ever suffered pecuniary injury as a result of the Progressive defendants' deception. The plaintiffs adequately alleged that as a result of this misleading conduct, they suffered direct business loss of customers resulting in damages of over $5 million".

See also: Derbaremdiker v. Applebee's International, Inc., 2012 WL 4482057 (E.D.N.Y. 2012)("To successfully assert a claim under Section 349, 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice'...Plaintiff's alleged injury is not

legally cognizable under Section 349 because he 'sets forth deception as both act and injury'...Plaintiff claims that his injury is that he believed his odds of winning a prize in the Sweepstakes was higher than his actual odds. Plaintiff, however, must allege actual or pecuniary harm that is separate and apart from the alleged deception itself...Moreover...plaintiff received exactly what was represented to him on the receipt and the Website by entering the Sweepstakes-the chance to win $1,000 or an iPod (or an equivalent gift certificate)-and no specific odds of winning were ever represented to him"); Wade v. Rosenthal, Stein & Associates, LLC, 2012 WL 3764291 (E.D.N.Y. 2012)(the GBL 349 claim "rests on the allegation NCA's acts in attempting to collect the debts identified in their January 2011 letter were deceptive because NCA was seeking to collect a debt that it did not own and that was usurious. The plaintiff fails, however, to allege any injury that he suffered. He did not pay any of the debts in response to NCA's letters nor does he allege any monetary or other injury that he suffered"); Preira v. Bancorp Bank, 885 F. Supp. 2d 672 (S.D.N.Y. 2012)("Because Plaintiff has failed to allege, for example, that the cost of the gift card 'was inflated as a result of [Defendants'] deception' or that Plaintiff attempted, without success, to recoup the balance of the funds on her gift card, Plaintiff's claim 'sets forth deception as both act and injury' and, thus, 'contains no manifestation of either pecuniary or 'actual harm'...Further, all of the terms of the gift

card-including those concerning the limitations on split transactions and the ability to recoup funds on the card-were fully disclosed to Plaintiff before she engaged in her first transaction, although after the card had been activated"); Oscar v. BMW of North America, 2012 WL 2359964 (S.D.N.Y. 2012)(purchasers of BMW MINI vehicles allege deceptive business practices in failing to disclose the unreliability of special run flat tires (RFTs) and the replacement costs of RFTs; "Oscar has alleged that he was charged $350 for a replacement RFT by a MINI dealer but later replaced this tire with a non-RFT tire at a cost of $200...This (replacement cost) theory of injury is, however, flaws for several reasons...It assumes a conclusion, that every fully informed customer would have paid a lower purchase price for the MINI S (measured by the amount of the tire replacement costs) than he or she actually did, or would not have purchased the MINI S at all...(In addition) that theory of injury (has been rejected by the New York Court of Appeal) as 'legally flawed'...that 'consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices, have suffered an injury under (GBL) 349"); Himber v. Intuit, Inc., 2012 WL 4442796 (E.D.N.Y. 2012)("plaintiffs allege that the description of EZShields' products as products that afford 'insurance', 'protection' or 'coverage' is false advertising and deceptive (and should have been registered with New York State Insurance Department)...and had these products been regulated as

insurance, New York State would not have allowed a premium or charge of two cents per check...The injury alleged by plaintiff is that the product and services they purchased from defendants should be regulated by New York State as insurance and because of the absence of such regulations plaintiffs are paying more for the product and services and thus are being harmed. The injury alleged...is hypothetical and speculative...there is no standing where a finding of harm, is contingent on the discretionary decision of an independent actor-in this case, the New York State Insurance Department-whom the courts cannot control or predict”);

In Lazaroff v. Paraco Gas Corp., 95 A.D. 3d 1080 (2d Dept. 2012) customers alleged that defendant propane gas retailer claimed that its 20 lb propane tanks are “full” when filled but in fact contain less propane gas. “Plaintiff alleges that the defendants have short weighted the containers by 25%, filling it with only 15 pounds of propane rather than 20 pounds, thereby supplying consumers with only partially filled cylinders, although the cap on the cylinder reads ‘full’...Although defendants have both submitted evidence that their cylinders bore labeling (and/or place cards) which disclosed that they contained 15 pounds of propane, such proof does not dispose of (allegations) that the 15 pound disclosure was hidden by the mesh metal cages in which the cylinders were kept and, therefore, not conspicuous for the average consumer until after the propane had already been purchased...plaintiff had adequately

alleged an injury (and asserts) that had he understood the true amount of the product, he would not have purchased it, and that he and the...class paid a higher price per gallon/pound of propane and failed to receive that was promised and/or the benefit of the bargain, i.e., a full 20 pound cylinder and the amount of propane he was promised".

In Baron v. Pfizer, Inc., 42 AD3d 627, the GBL 349 claim was dismissed because of an absence of actual injury ["Without allegations that...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...failed even to allege...that Neurontin was ineffective to treat her neck pain and her claim that any off-label prescription was potential dangerous both asserts a harm that is merely speculative and is belied...by the fact that off-label use is a widespread and accepted medical practice"]).

In People v. Pharmacia Corp., 895 N.Y.S. 2d 682 (Albany Sup. 2010) the State alleged that defendant failed to use " average wholesale prices " and reported instead false and inflated...to the extent that Pharmacia intentionally inflated the reported prices of its drug prices over time to increase the ' spread ' between published (average wholesale prices (AWPs)) and actual acquisition costs following the Legislature's adoption of AWP as a basis from drug reimbursement, its conduct may run afoul of...(GBL 349). Pharmacia may also face liability for misrepresenting the

nature of the pricing data it provided to the third-party publishers under established principles of consumer protection law ".

In Ballas v. Virgin Media, Inc., 18 Misc3d 1106 aff'd 60 AD3d 712 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. 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., Index No: 2573/05, Sup. Ct. Westchester County, J. Rudolph, Decision September 23, 2005, aff'd 42 AD3d 497 (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, 50 A.D. 3d 1440 “ 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 “; no damages shown; no evidence “ that the allegedly false advertisements had a deceptive or misleading impact upon a ‘’ consumer acting reasonably under the circumstances ‘’ and no “ evidence...that such a consumer purchased a bat from defendants because they believed the bat was completely manufactured within the confines of Cooperstown “).

In Kassis Management, Inc. v. Verizon New York, Inc., 29 Misc. 3d 1209(A) (N.Y. Sup. 2010)("plaintiff must prove that it suffered an injury and that the injury is related to the deceptive conduct of defendants"; GBL 349 claim dismissed).

In Lane v. Fein, Such and Crane [86] debtors challenged defendant's collection practices but the GBL § 349 claims were dismissed because defendants "alleged acts are almost certainly no consumer-oriented as they affected the plaintiffs alone, and are not likely yo have a 'broader impact on consumers at large'...have alleged no facts-aside from their conclusion that they suffered emotional distress-that show that the alleged acts of the defendant caused any quantifiable damage...plaintiffs have not alleged any acts that materially misleading".

In Patchen v. GEICO [87] vehicle owners challenged GEICO's policy of using cheaper and allegedly inferior non original equipment manufacturer (non-OEM) parts in estimating the cost of repairs. "The crux of the plaintiff's claims is that the estimates by the GEICO claims adjusters were too low, and that the checks that GEICO issued did not fully compensate them for the damage to their vehicles...the claims adjuster prepared his estimate using prices for 'non-OEM crash parts' rather the 'OEM crash parts'". In addition, plaintiffs alleged that GEICO actively corralled claimants into 'captive' repair shops that would recommended substandard non-OEM replacement parts, while failing to inform

claimants that non-OEM parts were inferior". While such conduct was "arguably both consumer-oriented and materially misleading" it did not allege actual injury because plaintiffs failed to assert facts "to show that the non-OEM parts specified for their vehicles were deficient, but rather attempt to show that non-OEM parts are inferior without exception, The Court has found that their theory of universal inferiority is not plausible".

In Statler v. Dell, Inc. [88] the plaintiff business purchased five Dell computers which malfunctioned and allegedly Dell "covered up the fact that the problems experienced by Plaintiff were common to its Optiplex computers and were traceable to defective capacitors...Plaintiff nowhere alleges that he or any of his patients or staff suffered any injury in connection with such alleged hazards".

In Weiner v. Snapple Beverage Corp., 2011 WL 196930 (S.D.N.Y. 2011)("This case concerns whether defendant's labeling of its teas and juice drinks as 'All Natural', despite their inclusion of high fructose corn syrup (HFCS) was misleading to consumers...It is undisputed that Snapple disclosed the use of HFCS on its beverages' ingredient lists...Snapple represents that it 'no longer sells any products containing HFCS and labeled as 'All Natural'...plaintiffs have failed to present reliable evidence that they paid a premium for Snapple's 'All Natural' label (and hence have failed to prove they suffered a cognizable injury under GBL 349)").

In Rodriquez v. It's Just Lunch Int'l, 2010 WL 685009 (S.D.N.Y. 2010) the plaintiffs claimed, *inter alia*, that they were overcharged for misrepresented dating services; " to the extent Rodriquez also alleges she paid a higher price for the dating service, than she otherwise would have, absent deceptive acts, she has suffered an actual injury and has stated a claim (under GBL 349)); Sotheby's, Inc. v. Minor[89] the plaintiff claimed a GBL 349 violation because the auctioneer allegedly " failed to disclose its economic interest in (a painting) The Peaceable Kingdom and Carriage in Winter (relying upon) New York City Department of Consumer Affairs (DCA) regulations which require auctioneers to disclose any interest they have in items that are up for auction...There is no logical connection between Sotheby's failure to disclose a security interest and any actual or potential injury to either Minor or the public ".

[F.1] **Derivative Claims**

Derivative claims may not be asserted under GBL 349 [See City of New York v. Smokes-Spirits.Com, 12 N.Y. 3d 616 (2009)(" 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 “); North State Autobahn, Inc. V. Progressive Insurance Group, 102 A.D. 3d 5 (2d Dept. 2012)(“Here, the plaintiffs alleged that they were directly injured by the Progressive defendants’ deceptive practices in that customers were misled into taking their vehicles from the plaintiffs to competing repair shops tat participated in the DRP (direct repair program). The allegedly deceptive conduct was specifically targeted at the plaintiffs and other independent (auto repair) shops in an effort to wrest away customers through false and misleading statements. The plaintiffs’ alleged injury did not require a subsequent consumer transaction; rather, it was sustained when customers were unfairly induced into taking their vehicles from the plaintiffs’ shop to a DRP shop regardless of whether the customers ultimately ever suffered pecuniary injury as a result of the Progressive defendants’ deception. The plaintiffs adequately alleged that as a result of this misleading conduct, they suffered direct business loss of customers resulting in damages of over $5 million”); Silvercorp Metals Inc. v. Anthion Mgt. LLC, 36 Misc. 3d 1231(A) (N.Y. Sup. 2012)(“Silvercorp is a silver producer operating in China and Canada with stock that trades on the New York and the Toronto Stock Exchanges. Silvercorp alleges that (defendants) published defamatory letters and internet postings against it as part of a

scheme to drive Silvercorp's stock prices down...Silvercorp commenced this action for defamation, unjust enrichment, trade libel dn (violation of GBL § 349)...'a plaintiff may not recover damages under GBL 349 for purely indirect or derivative losses that were the result of third-parties being allegedly misled or deceived"); Lucker v. Bayside Cemetery, 33 Misc. 3d 69, 914 N.Y.S. 2d 367 (Nassau Sup. 2011)(the grandchildren of decedents who purchased perpetual care plots from a Cemetery did not have standing to sue for, inter alia, false advertising and deceptive business practices under GBL 349, 350. The plaintiffs alleged that the Cemetery failed to honor the perpetual care contracts sold to their grandparents obligating defendants to keep plots in presentable condition. Claims which are "clearly derivative" may not be brought under GBL 349, 350); Nassau County Consolidated MTBE Products Liability Litigation, 29 Misc. 3d 1219(A) (N.Y. Sup. 2010)("The chemical MTBE...has been detected in the Long Island aquifer system, including within the water districts' production wells...a plaintiff may not recover damages under GBL 349 for purely indirect or derivative losses that were the result of third-parties being allegedly misled or deceived")].

See also: M.V.B. Collision, Inc. V. Allstate Insurance Company[90] ("Here...there is evidence of a 'free-standing claim of deceptiveness' that simply 'happens to overlap' with a claim under the Insurance Law...the deceptive practices at issue here extend

beyond 'unfair claim settlement practices'...or steering...the deceptive practice at issue here is an alleged retaliatory scheme to dissuade Allstate insureds from going to Mid Island. The alleged scheme involved not only 'unfair settlement practices' and steering but also...alleged retaliatory totaling of vehicles, defamatory comments and threats that insureds would 'wind up in civil remedies if they took their car to Mid Island Collision'...In sum, given that Mid Island's alleged injuries occurred as a direct result of the alleged deceptive practices directed at consumers, its injuries were not 'solely as a result of injuries sustained by another party'...and are therefore not derivative").

[G] **Preemption**

GBL 349 may or may not be preempted by federal statutes [Giftcard class actions; Although this issue seemingly was resolved earlier in *Goldman*[91] two recent Nassau Supreme Court decisions have taken opposite positions on the issue of federal preemption. In L.S. v Simon Property Group, Inc.[92], a class action challenging, inter alia, a renewal fee of $15.00 imposed after a six months expiration period, raised the issue anew by holding that the claims stated therein were preempted by federal law. This decision was reversed, however, in Sharabani v. Simon Property, Inc., 96 A.D. 3d 24 (2d Dept. 2012)(GBL § 349 claim not preempted by Federal Home

Owner's Loan Act of 1933 and its implementing regulations promulgated by Office of Thrift Supervision (OTS)).

In Sheinken v Simon Property Group, Inc.[93], a class action challenging dormancy fees and account closing fees, held that "the National Bank Act and federal law do not regulate national banks exclusively such that *all* state laws that might affect a national bank's operations are preempted." Distinguishing SPGCC, LLC v Ayotte [94] and replying on *Lonner* and *Goldman* the Court denied the motion to dismiss on the grounds of federal preemption); Aretakis v. Federal Express Corp.[95](lost Fed Ex package; in breach of contract claim value limited to $100 under limitation in airbill; GBL 349 and negligence claims preempted by Airline Deregulation Act)

See e.g., Wurtz v. Rawlings Company LLC, 2013 WL 1248631 (E.D.N.Y. 2013)("plaintiffs' claims are completely preempted pursuant to Section 502 of ERISA"); Dickman v. Verizon Communications, Inc., 876 F. Supp. 2d 166 (E.D.N.Y. 2012)("Plaintiff asserts that defendant violated the GBL because 'despite receiving several disputes from Plaintiff (both verbally and in writing)', defendant 'repeatedly reported that Plaintiff owed a balance of $200 to multiple credit bureaus over at least two and a half years' even though this report was 'false and inaccurate'...the Court finds that plaintiff's GBL claim is preempted by FCRA (Fair Credit Reporting Act) and must be

dismissed"); People ex rel. Cuomo v. First American Corp., 18 N.Y. 3d 173, 960 N.E. 2d 927 (2011)("The primary issue we are called upon to determine is whether federal law preempts these claims alleging fraud and violations of real estate appraisal independence rules. We conclude that federal law does not preclude the Attorney General from pursuing these claims against defendants"), aff'g 76 A.D. 3d 68, 902 N.Y.S. 2d 521 (1st Dept. 2010)("The (AG) claims that defendants engaged in fraudulent, deceptive and illegal business practices by allegedly permitting eAppraisallT residential real estate appraisers to be influenced by nonparty Washington Mutual, Inc. (WaMu) to increase real estate property values on appraisal reports in order to inflate home prices...the (AG also) has standing to pursue his claims pursuant to (GBL) 349...defendants had implemented a system (allegedly) allowing WaMu's loan origination staff to select appraisers who would improperly inflate a property's market value to WaMu's desired target loan amount"); Ramirez v. National Cooperative Bank (NCB), __A.D. 3d__, __N.Y.S. 2d__(1st Dept. 2011)(a customer was induced to purchase three different cars by a car dealer who allegedly engaged in a scheme to entice customers to the dealership with false promises of a cash prize or a free cruise...the plaintiff, an uneducated Spanish-speaking Honduran immigrant on disability and food stamps, went to the dealership to collect (his prize)...rather than collecting any prize the plaintiff was induced by...' fraudulent and unfair sales

practices' to purchase three cars in seriatim, when he could afford none of them...These allegations ...state claims for fraud, fraud in the inducement, unconscionability and violation of (GBL 349)". In addition, the Court held that plaintiff's action was not preempted by 15 U.S.C. 1641(a)(TILA) because "the plaintiff does not state a 'paradigmatic TILA hidden finance charge claim' merely because he alleges that he was charged a grossly inflated price for the Escape. A hidden finance charge claim requires proof of a causal connection' between the higher base price of the vehicle and the purchaser's status as a credit customer'...there is no evidence supporting a connection between the inflated [price of the Escape and his status as a credit customer"); Merin v. Precinct Developers LLC, 74 A.D. 3d 688, 902 N.Y.S. 2d 821 (1st Dept. 2010)("To the extent the offering can be construed as directed at the public, the section 349 claim is preempted by the Martin Act").

See also: Aretakis v. Federal Express Corp., 2011 WL 1226278 (S.D.N.Y. 2011)(shipper tendered package to defendant and agreed to "Limitations On Our Liability And Liabilities Not Assumed. Our liability in connection with this shipment is limited to the lesser of your actual damages or $100 unless you declare a higher value, pay an additional charge and document your actual loss in a timely manner"; GBL 349 claim dismissed as preempted by the Airline Deregulation Act and recovery for loss limited to $100); Okocha v. HSBC Bank USA, N.A., 2010 WL 1244562 (S.D.N.Y. 2010)(" Plaintiff

alleges that defendants violated (GBL) 349 by (1) failing to maintain and follow reasonable procedures to ensure the accuracy of the information they reported...All of these allegations appear to fall squarely within the subject matter of Section 1681s-2 (of the Fair Credit Reporting Act)...and therefore are preempted "); McAnaney v. Astoria Financial Corp., 665 F. Supp. 2d 132 (E.D.N.Y. 2009)(consumers challenge the imposition of a variety of mortgage fees including closing fees, satisfaction fees, discharge fees, prepayment fees (or penalties) refinance fees (or penalties) and so forth; GBL 349 claims not preempted by Home Owners' Loan Act (HOLA) " because it is being asserted as a type of 'contract and commercial law' and its application in this case does not 'more than incidentally impact lending operations' pursuant to 12 C.F.R. § 560.2(c)(1) ")].

[H] **Recoverable Damages**

Under GBL 349 consumers may recover actual damages in any amount, treble damages under GBL 349(h) up to $1,000 [see Teller v. Bill Hayes, Ltd., 213 AD2d 141; Hart v. Moore (155 Misc2d 203); see also: Koch v. Greenberg, 2014 WL 1284492 (S.D.N.Y. 2014)(jury found that 24 bottles of wine had been misrepresented as to authenticity, finding fraud and violations of GBL 349, 350 and awarding "compensatory damages of $355,811-representing the

purchase price for the 24 bottles-and additional $24,000 in statutory damages under GBL 349, which authorizes 'treble damages' up to $1000 per violation. On April 12, 2013, the jury awarded Koch $12 million in punitive damages"; Application for attorneys fees rejected by trial court); Laino v. Rochella's Auto Service, Inc., 46 Misc. 3d 479 (N.Y. Civ. 2014)(dealer failed to disclose acting as a broker; failed to enter into written contract; failed to make requisite disclosures; compensatory damages of $5,000; punitive damages of $1,000); Nwagboli v. Teamworld Transportation Corp., 2009 WL 4797777 (S.D.N.Y. 2009)(" the court may, in its discretion increase a plaintiff's damages award to not more than $1,000, and award reasonable attorney's fees, ' if the court finds the defendant willfully or knowingly violated this section'")] and both treble damages and punitive damages [see e.g., Barkley v. United Homes, LLC, 2012 WL 2357295 (E.D.N.Y. 2012)("FN16. Even if the court decided defendants' motion on its merits, however, the court would uphold the jury's punitive damages award because GBL 349(h) restricts the court's award of treble damages, but does not govern the award of punitive damages, which plaintiffs may seek in addition to treble damages"); Volt Systems Development Corp. v. Raytheon Co., 155 AD2d 309; Bianchi v. Hood, 128 AD2d 1007; Wilner v. Allstate Ins. Co., 71 AD3d 155 (" Under (GBL 349(h)) consumers may recover...treble damages...up to $1,000...they allege that

the defendant intentionally did not reach a final decision on their claim, so as to force them to commence a suit against the Village. If that is true...such conduct may be considered to be "' so flagrant as to transcend mere carelessness '"...the plaintiffs' claim for punitive damages should not be dismissed "); Blend v. Castor, 25 Misc. 3d 1215 (Watertown City Ct. 2009)(" Ms. Castor (wrongfully withheld) Mr. Dase's security deposit and then (offered) a bogus claim for damages in her counterclaim...under GBL 349(h) (the Court) awards in addition to the $500 in damages an increase of the award by $500 resulting in a total judgment due of $1,000 together with costs of $15.00 "); Miller v. Boyanski, 25 Misc. 3d 1228 (Watertown City Ct. 2009)(failure to return security deposit; additional damages of $1,000.00 awarded pursuant to GBL § 349(h)) and legal fees and costs [see e.g., Serin v. Northern Leasing Systems, Inc., 2013 WL 1335662 (S.D.N.Y. 2013)(reasonable attorneys fees are recoverable and various factors must be considered including 'the time and skill required in litigating the case, the complexity of issues, the customary fee for the work, and the results achieved'. Additionally, the lawyer's experience, ability and reputation, the amount in dispute and the benefit to the client should also be considered. To determine a starting point a court may make a lodestar calculation. That figure should then be adjusted, taking the other relevant factors into account")].

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

Consumers who rely upon false advertising and purchase defective goods or services may claim a violation of G.B.L. § 350 [see e.g., Scott v. Bell Atlantic Corp.[96] (defective ' high speed ' Internet services falsely advertised)].

In Lazaroff v. Paraco Gas Corp., 95 A.D. 3d 1080 (2d Dept. 2012), aff'g 38 Misc. 3d 1217(A)(Kings Sup. 2011) customers alleged that defendant propane gas retailer claimed that its 20 lb propane tanks are "full" when filled but in fact contain less propane gas. "Plaintiff alleges that the defendants have short weighted the containers by 25%, filling it with only 15 pounds of propane rather than 20 pounds, thereby supplying consumers with only partially filled cylinders, although the cap on the cylinder reads 'full'...Although defendants have both submitted evidence that their cylinders bore labeling (and/or place cards) which disclosed that they contained 15 pounds of propane, such proof does not dispose of (allegations) that the 15 pound disclosure was hidden by the mesh metal cages in which the cylinders were kept and, therefore, not conspicuous for the average consumer until after the propane had already been purchased...plaintiff had adequately alleged an injury (and asserts) that had he understood the true amount of the product, he would not have

purchased it, and that he and the...class paid a higher price per gallon/pound of propane and failed to receive that was promised and/or the benefit of the bargain, i.e., a full 20 pound cylinder and the amount of propane he was promised...the plaintiff has (also) sufficiently alleged a false advertisement within the meaning of GBL 350...the statute includes representations that appear on a product's package, such as defendants' cylinder containers...the plaintiff has alleged that (defendants) placed caps on its cylinders which falsely represented that the partially filled cylinders were in fact 'full' of propane'").

See also: Card v. Chase Manhattan Bank[97] (bank misrepresented that its LifePlus Credit Insurance plan would pay off credit card balances were the user to become unemployed)]. G.B.L. § 350 prohibits false advertising which " means advertising, including labeling, of a commodity...if such advertising is misleading in a material respect...(covers)....representations made by statement, word, design, device, sound...but also... advertising (which) fails to reveal facts material "[98]. G.B.L. § 350 covers a broad spectrum of misconduct [Karlin v. IVF America[99] (" (this statute) on (its) face appl(ies) to virtually all economic activity and (its) application has been correspondingly broad ")].

Proof of a violation of G.B.L. 350 is straightforward, i.e., " the mere falsity of the advertising content is sufficient as a

basis for the false advertising charge " [People v. Lipsitz[100] (magazine salesman violated G.B.L. § 350; " (the) (defendant's) business practice is generally ' no magazine, no service, no refunds " although exactly the contrary is promised "); People v. McNair [101] (" 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 G.B.L. 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 '")].

4.1] **Reliance Need Not Be Proven**

On occasion, there may be a difference of opinion as to how and in what manner a particular statute should be interpreted. Such differences, if left unresolved, often lead to the under-utilization of salutary statutes. Such has been the case in the interpretation of CPLR 901-909[102] and General Business Law (hereinafter GBL) § 349 (deceptive and misleading business practices) and § 350 (false advertising). In a recent case, Koch v Acker, Merrall & Condit Co.,[103] the Court of Appeals has, inter alia, clarified that justifiable reliance is not an element of a

GBL § 350 claim. It was previously clear that there was no such requirement to state a GBL § 349 claim. The Court of Appeals' determination in this regard is in conformity with the language of both statutes, but appears to overrule a line of Appellate Division cases dating to 1986. In addition, the Koch decision finally makes GBL § 350 more readily available in consumer class actions.

4.2] **Debt Reduction Services**

In People v. Nationwide Asset Services, Inc.[104] the Court found that a debt reduction service repeatedly and persistently engaged in deceptive business practices and false advertising in violation of GBL §§ 349, 350 (1) " in representing that their services ' typically save 25% to 40% off ' a consumer's total indebtedness ", (2) " failed to take account of the various fees paid by the consumer in calculating the overall percentage of savings experienced by that consumer ", (3) " failing to honor their guarantee ", and (4) " failing to disclose all of their fees ")].

4.3] **Packaging; Excessive Slack Fill**

In Waldman v. New Chapter, Inc., 2010 WL 2076024 (E.D.N.Y. 2010) the Court found that plaintiffs stated claims for the violation of GBL §§ 349, 350 arising from defendant's use of excessive " slack fill " packaging. " In 2009, Plaintiff purchased a box of Berry Green, a ' Spoonable Whole-Food '...Berry Green comes in a box that is 6 5/8 inches tall...The box contains a jar that is 5 5/8 inches tall...And the jar itself is only half-filled with the product...(GBL 349 claim stated in that) Defendant's packaging is ' misleading ' for purposes of this motion... Plaintiff alleges that that packaging ' gives the false impression that the consumer is buying more than they are actually receiving ' and thus sufficiently pleads that the packaging was ' misleading in a material way ".

In addition, plaintiffs also state a claim for violation of GBL § 350. " As an initial matter (GBL 350) expressly defines ' advertisement ' to include ' labeling '. Thus the statute includes claims made on a product's package. In addition...excessive slack fill states a claim for false advertising (see Mennen Co. v. Gillette Co., 565 F. Supp. 648, 655 (S.D.N.Y. 1983).

4.4] **Bus Services**

In People v. Gagnon Bus Co., Inc., 30 Misc. 3d 1225(A)(N.Y. Sup. 2011) a bus company violated GBL 349, 350 by promising to

use new school buses and provide to students "safe, injury-free, reliable and affordable transportation for Queen's students" and failing to do so and failing to return fees collected for said services.

4.4] **Unlawful Use Of Name Of Nonprofit Organization**

G.B.L. § 397 provides that " no person...shall use for advertising purposes...the name...of any non-profit corporation ...without having first obtained the written consent of such non-profit corporation ". In Metropolitan Opera Association, Inc. v. Figaro Systems, Inc.[105] the Met charged a New Mexico company with unlawfully using its name in advertising promoting its " ' Simultext ' system which defendant claims can display a simultaneous translation of an opera as it occurs on a stage and that defendant represented that its system is installed at the Met ")].

4.5] **Modeling**

In People v. City Model and Talent Development, Inc.[106] The court found the "evidence sufficient to establish, prima facie, that the respondents violated (GBL 349) by luring at least one potential customer to their office with promises of future

employment as a model or actor and then, when the customer arrived at the office for an interview, convincing her, by subterfuge...to sign a contract for expensive photography services; that they violated (GBL) 350 by falsely holding CMT out as a modeling and talent agency")];

4.6] **Movers; Household Goods**

In Frey v. Bekins Van Lines, Inc.[107] The court held that "Broadly stated, Plaintiffs claim that Defendants are engaged in a pattern and practice of quoting lower shipping prices than those ultimately charged-a practice referred to as 'low-balling' estimates-with the intent of charging higher amounts. Defendants are also accused of overcharging their customers (for) a variety of add-on services, including fuel supplements and insurance premiums on policies that Defendants are alleged never to have obtained"; GBL 349 and 350 claims stated)].

5] **Cars, Cars, Cars**

There are a variety of consumer protection statutes available to purchasers and lessees of automobiles, new and used. A comprehensive review of five of these statutes [GBL § 198-b[108] (Used Car Lemon Law), express warranty[109], implied warranty of

merchantability[110] (U.C.C. §§ 2-314, 2-318), Vehicle and Traffic Law [V&T] § 417, strict products liability[111]] appears in Ritchie v. Empire Ford Sales, Inc.[112], a case involving a used 1990 Ford Escort which burned up 4 ½ years after being purchased because of a defective ignition switch. A comprehensive review of two other statutes [GBL § 198-a (New Car Lemon Law) and GBL § 396-p (New Car Contract Disclosure Rules)] appears in Borys v. Scarsdale Ford, Inc.[113], a case involving a new Ford Crown Victoria, the hood, trunk and both quarter panels of which had been negligently repainted prior to sale.

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

" The extended warranty and new parts warranty business generates extraordinary profits for the retailers of cars, trucks and automotive parts and for repair shops. It has been estimated that no more than 20% of the people who buy warranties ever use them... Of the 20% that actually try to use their warranties... (some) soon discover that the real costs can easily exceed the initial cost of the warranty certificate "[114]. In Giarratano v. Midas Muffler[115], Midas would not honor its brake shoe warranty unless the consumer agreed to pay for additional repairs found necessary after a required inspection of the brake system. G.B.L. § 617(2)(a) protects consumers who purchase new parts or new

parts' warranties from breakage or a failure to honor the terms and conditions of a warranty [" If a part does not conform to the warranty...the initial seller shall make repairs as are necessary to correct the nonconformity "[116]]. A violation of G.B.L. § 617(2)(a) is a per se violation of G.B.L. § 349 which provides for treble damages, attorneys fees and costs[117]. See also: Chun v. BMW of Manhattan, Inc.[118](misrepresented extended automobile warranty; G.B.L. § 349(h) statutory damages of $50 awarded).

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

Service stations should perform quality repairs. Quality repairs are those repairs held by those having knowledge and expertise in the automotive field to be necessary to bring a motor vehicle to its premalfunction or predamage condition [Welch v. Exxon Superior Service Center[119] (consumer sought to recover $821.75 from service station for failing to make proper repairs to vehicle; " While the defendant's repair shop was required by law to perform quality repairs, the fact that the claimant drove her vehicle without incident for over a year following the repairs indicates that the vehicle had been returned to its premalfunction condition following the repairs by the defendant, as required "); Shalit v. State of New York[120](conflict in findings in Small Claims Court in auto repair case with findings of Administrative Law

Judge under VTL § 398).

[C] **Implied Warranty Of Merchantability: U.C.C. §§ 2-314, 2-318; 2-A-212, 2-A-213; Delivery Of Non-Conforming Goods: U.C.C. § 2-608**

Both new and used cars carry with them an implied warranty of merchantability [U.C.C. §§ 2-314, 2-318][Denny v. Ford Motor Company[121]]. Although broader in scope than the Used Car Lemon Law the implied warranty of merchantability does have its limits, i.e., it is time barred four years after delivery[U.C.C. § 2-725; Hull v. Moore Mobile Homes Stebra, Inc[122].,(defective mobile home; claim time barred)] and the dealer may disclaim liability under such a warranty [U.C.C. § 2-316] if such a disclaimer is written and conspicuous [Natale v. Martin Volkswagen, Inc.[123] (disclaimer not conspicuous); Mollins v. Nissan Motor Co., Inc.[124](" documentary evidence conclusively establishes all express warranties, implied warranties of merchantability and implied warranties of fitness for a particular purpose were fully and properly disclaimed ")]. A knowing misrepresentation of the history of a used vehicle may state a claim under U.C.C. § 2-608 for the delivery of non-conforming goods [Urquhart v. Philbor Motors, Inc.[125]]

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

In Tarantino v. DaimlerChrysler Corp.[126], DiCinto v. Daimler Chrysler Corp.[127] and Carter-Wright v. DaimlerChrysler Corp.[128], it was held that the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq. applies to automobile lease transactions. However, in DiCintio v. DaimlerChrysler Corp.[129], the Court of Appeals held that the Magnuson-Moss Warranty Act does not apply to automobile leases.

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

In Borys v. Scarsdale Ford, Inc[130], a consumer demanded a refund or a new car after discovering that a new Ford Crown Victoria had several repainted sections. The Court discussed liability under G.B.L. § 198-a (New Car Lemon Law) and G.B.L. § 396-p(5) (Contract Disclosure Requirements) [" gives consumers statutory rescission rights ' in cases where dealers fail to provide the required notice of prior damage and repair(s)' (with a) ' retail value in excess of five percent of the lesser of manufacture's or distributor's suggested retail price '"]. In Borys the Court dismissed the complaint finding (1) that under G.B.L. § 198-a the consumer must give the dealer an opportunity to

cure the defect and (2) that under G.B.L. § 396-p(5) Small Claims Court would not have jurisdiction [money damages of $3,000] to force " defendant to give...a new Crown Victoria or a full refund, minus appropriate deductions for use ".

In Levitsky v. SG Hylan Motors, Inc[131] a car dealer overcharged a customer for a 2003 Honda Pilot and violated G.B.L. 396-p by failing to disclose the " estimated delivery date and place of delivery...on the contract of sale ". The Court found that the violation of G.B.L. § 396-p " and the failure to adequately disclose the costs of the passive alarm and extended warranty constitutes a deceptive act (in violation of G.B.L. § 349). Damages included " $2,251.50, the $2,301.50 which he overpaid, less the cost of the warranty of $50.00 " and punitive damages under G.B.L. § 349(h) bringing the award up to $3,000.00, the jurisdictional limit of Small Claims Court.

In Spielzinger v. S.G. Hylan Motors Corp.[132](failure to disclose the true cost of " Home Care Warranty " and " Passive Alarm ", failure to comply with provisions of G.B.L. § 396-p (confusing terms and conditions, failure to notify consumer of right to cancel) and G.B.L. § 396-q (dealer failed to sign sales contract); *per se* violations of G.B.L. § 349 with damages awarded of $734.00 (overcharge for warranty) and $1,000 statutory damages).

And in Thompson v. Foreign Car Center, Inc.[133] a car purchaser

charged a Volkswagen dealer with " misrepresentations and non-disclosures concerning price, after-market equipment, unauthorized modification and compromised manufacturer warranty protection ". The Court dismissed the claim under G.B.L. § 396-p (" While GBL § 396-p(1) and (2) state that a contract price cannot be increased after a contract has been entered into, the record reveals that defendants appear to have substantially complied with the alternative provisions of GBL § 396-p(3) by providing plaintiffs with the buyers' form indicating the desired options and informing them they had a right to a full refund of their deposit "). However, claims under G.B.L. § 396-q and P.P.L. § 302 were sustained because defendants had failed to sign the retail installment contract.

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

As stated by the Court of Appeals in Matter of DaimlerChrysler Corp., v. Spitzer[134] " In 1983, the Legislature enacted the New Car Lemon Law (G.B.L. § 198-a) ' to provide New York consumers greater protection that afforded by automobile manufacturers' express limited warranties or the Federal Magnuson-Moss Warranty Act '". New York State's New Car Lemon Law [G.B.L. § 198-a] provides that " If the same problem cannot be repaired after four or more attempts; Or if your car is out of service to

repair a problem for a total of thirty days during the warranty period; Or if the manufacturer or its agent refuses to repair a substantial defect within twenty days of receipt of notice sent by you...Then you are entitled to a comparable car or refund of the purchase price " [Borys v. Scarsdale Ford, Inc.[135]].

In Kandel v. Hyundai Motor America[136] (" The purpose of the Lemon Law is to protect purchasers of new vehicles. This law is remedial in nature and therefore should be liberally construed in favor of consumers...The plaintiff sufficiently established that the vehicle was out of service by reason of repair of one or more nonconformities, defects or conditions for a cumulative total of 30 or more calendar days within the first 18,000 miles or two years...that the defendant was unable to correct a problem that ' substantially impaired ' the value of the vehicle after a reasonable number of attempts...and the defendant failed to meet its burden of proving its affirmative defense that the stalling problem did not substantially impair the value of the vehicle to the plaintiff...plaintiff was entitled to a refund of the full purchase price of the vehicle ").

In General Motors Corp. V. Sheikh, 41 A.D. 3d 993, 838 N.Y.S. 2d 235 (2007)the Court held that a vehicle subject to " conversion " is not covered by GBL 198-a (" it is unrefuted that only evidence at the hearing regarding the cause of the leaky windshield was the expert testimony offered by petitioner's area

service manager, who examined the vehicle and its lengthy repair history and opined that the leak was caused by the extensive conversion of the vehicle by American Vans ".

The consumer has no claim under G.B.L. § 198-a if the dealer has " complied with this provision by accepting the vehicle, canceling the lease and refunding...all the payments made on account of the lease " [Mollins v. Nissan Motor Co., Inc.[137]] or if the " cause of the leaky windshield " was extensive alterations done after final assembly by the manufacturer [Matter of General Motors Corp. [Sheikh][138]].

Before commencing a lawsuit seeking to enforce the New Car Lemon Law the dealer must be given an opportunity to cure the defect [Chrysler Motors Corp. v. Schachner[139] (dealer must be afforded a reasonable number of attempts to cure defect)].

The consumer may utilize the statutory repair presumption after four unsuccessful repair attempts after which the defect is still present[140]. However, the defect need not be present at the time of arbitration hearing[141] [" The question of whether such language supports an interpretation that the defect exist at the time of the arbitration hearing or trial. We hold that it does not "[142]]. Civil Courts have jurisdiction to adjudicate Lemon Law refund remedy claims up to $25,000.[143]. In Alpha Leisure, Inc. v. Leaty[144]the Court approved an arbitrators award of $149,317 as the refund price of a motor home that " was out of service many times

for repair ".

Attorneys fees and costs may be awarded to the prevailing consumer [Kandel v. Hyundai Motor America[145] (" plaintiff was entitled to an award of a statutory attorney's fee "); Kucher v. DaimlerChrysler Corp.[146](" this court is mindful of the positive public policy considerations of the ' Lemon Law ' attorney fee provisions... Failure to provide a consumer such recourse would undermine the very purpose of the Lemon Law and foreclose the consumer's ability to seek redress as contemplated by the Lemon Law "); DaimlerChrysler Corp. v. Karman[147]($5,554.35 in attorneys fees and costs of $300.00 awarded)].

[F.1] **Used Cars**

In Matter of City Line Auto Mall, Inc. v. Mintz[148] a used car dealer was charged with failing to provide consumers with essential information regarding the used vehicles they purchased. The Court found that " Substantial evidence supports the findings that for more than two years petitioner engaged in deceptive trade practices and committed other violations of its used-car license by failing to provide consumers with essential information (Administrative Code 20-700, 20-701[a][2], namely the FTC Buyers Guide (16 CFR 455.2) containing such information as the vehicle's make, model, VIN, warranties and service contract;

offering vehicles for sale without the price being posted (Administrative Code 20-7-8), failing to have a ' Notice to Our Customers ' sign conspicuously posted within the business premises (6 RCNY 2-103[g][1][v]) and carrying on its business off of the licensed premises (Administrative Code 20-268[a])...We reject petitioner's argument that respondent's authority to license and regulate used-car dealers is preempted by State law. While Vehicle and Traffic Law 415 requires that used-car dealers be registered, the State has not assumed full regulatory responsibility for their licensing ".

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

In B & L Auto Group, Inc. v. Zilog[149] a used car dealer sued a customer to collect the $2,500.00 balance due on the sale of a used car. Because the dealer failed to have a Second Hand Automobile Dealer's license pursuant to New York City Department of Consumer Affairs when the car was sold the Court refused to enforce the sales contract pursuant to C.P.L.R. § 3015(e).

[H] **Extended Warranties**

In Collins v. Star Nissan[150] plaintiff purchased a 2009 Nissan GT-R and additional services including a seven year/100,000 mile

extended warranty. After taking delivery of the vehicle the dealer demanded an additional $10,000 for coverage under the extended warranty plan; breach of contract found); Goldsberry v. Mark Buick Pontiac GMC[151] the Court noted that plaintiff " bought a used automobile and a ' SmartChoice 2000 ' extended warranty, only later to claim that neither choice was very smart ". Distinguishing Barthley v. Autostar Funding LLC[152] [which offered " a tempting peg upon which the Court can hang its robe "] the Court found for plaintiff in the amount $1,119.00 [cost of the worthless extended warranty] plus 9% interest.

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

New York State's Used Car Lemon Law [G.B.L. § 198-b] provides limited warranty protection for used cars costing more than $1,500 depending upon the number of miles on the odometer [e.g., 18,000 miles to 36,000 miles a warranty " for at least 90 days or 4,000 miles ", 36,000 miles to 80,000 miles a warranty " for at least 60 days or 3,000 miles " and 80,000 miles to 100,000 miles a warranty " for 30 days or 3,000 miles "]. See Snider v. Russ's Auto Sales, Inc.[153](damages increased to cover not only $435 for transmission repairs but $93 for spark plugs and $817.16 for repairs to fuel pump module); Francis v. Atlantic Infiniti, Ltd., 64 AD3d 747 (2d Dept. 2009)(" the plaintiff made a prima facie

showing the Atlantic had a reasonable opportunity to correct defects to the Infiniti's engine...the Infiniti was out of service for 44 days during the warranty period as a result of repairs Atlantic made to the Infiniti's engine "; summary judgment for plaintiff on liability); Cintron v. Tony Royal Quality Used Cars, Inc.[154] (defective 1978 Chevy Malibu returned within thirty days and full refund awarded)].

Used car dealers must be given an opportunity to cure a defect before the consumer may commence a lawsuit enforcing his or her rights under the Used Car Lemon Law[Kassim v. East Hills Chevrolet[155](used car purchaser failed to give dealer an opportunity to cure alleged defects; complaint alleging violation of GBL 198-a dismissed); Milan v. Yonkers Avenue Dodge, Inc.[156] (dealer must have opportunity to cure defects in used 1992 Plymouth Sundance)].

1] **Preemption**

The Used Car Lemon Law does not preempt other consumer protection statutes [Armstrong v. Boyce[157]] including the UCC [Diaz v. Your Favorite Auto, 2012 WL 1957750 (N.Y. Civ. 2012)], does not apply to used cars with more than 100,000 miles when purchased[158] and has been applied to used vehicles with coolant leaks [Fortune v. Scott Ford, Inc.[159]], malfunctions in the

steering and front end mechanism [Jandreau v. LaVigne[160], Diaz v. Audi of America, Inc.[161]], stalling and engine knocking [Ireland v. JL's Auto Sales, Inc.[162]], vibrations [Williams v. Planet Motor Car, Inc.[163]], " vehicle would not start and the ' check engine ' light was on " [DiNapoli v. Peak Automotive, Inc.[164]] and malfunctioning " flashing data communications link light " [Felton v. World Class Cars[165]]. An arbitrator's award may be challenged in a special proceeding [C.P.L.R. 7502][Lipscomb v. Manfredi Motors[166]] and " does not necessarily preclude a consumer from commencing a subsequent action provided that the same relief is not sought in the litigation [Felton v. World Class Cars[167]]. In Hurley v. Suzuki, New York Law Journal, February 3, 2009, p. 27, col. 1 (Suffolk District Court 2009) the Court held arbitration was not a precondition to a used car Lemon Law lawsuit [" Unlike the Lemon law situation with ' new cars ' which sets up mandatory arbitration and creates liability for the manufacturers; used cars are sold by a much more diverse universe of entities. The corner " used car lot " may or may not have the resources or wherewithal to implement an arbitration system which comports with the requirements of Federal and New York State Law "].

2] **Damages**

Recoverable damages include the return of the purchase price

and repair and diagnostic costs [Nelson v. Good Ground Motors, 2013 WL 518679 (N.Y.A.T. 2013)(damages awarded to cover costs of window repairs of $446.42 to be reduced by $100 deductible in warranty); Williams v. Planet Motor Car, Inc.[168], Snider v. Russ's Auto Sales, Inc., 30 Misc. 3d 133(A)(N.Y.A.T. 2010)("one week after he has purchased the used vehicle...he began experiencing problems with the transmission and fuel pump module....that to make the necessary repairs to the vehicle, he had paid $435 for the transmission repairs, $93 for new spark plugs and $897.16 to repair the fuel pump module...damages of $93 and $897.16 allowed); Sabeno v. Mitsubishi Motors Credit of America, 20 A.D. 3d 466, 799 N.Y.S. 2d 527 (2005)(consumer obtained judgment in Civil Court for full purchase price of $20,679.60 " with associated costs, interest on the loan and prejudgment interest " which defendant refused to pay [and also refused to accept return of vehicle]; instead of enforcing the judgment in Civil Court the consumer commenced a new action, two claims of which [violation of U.C.C. § 2-717 and G.B.L. § 349] were dismissed)] and attorneys' fees [Francis v. Atlantic Infiniti, 34 Misc. 3d 1221(A) (N.Y. Sup. 2012)(attorneys fees of $27,824.50 awarded); Diaz v. Audi of America, 50 A.D. 3d 728 (2d Dept. 2008)(after non jury trial defendant liable on breach of warranty and violation of GBL 198-b and plaintiff awarded damages of $16,528.38 and $25,000 in attorneys fees; on appeal attorneys increased to $7,500 for

initial attorney and $22,500 for trial attorney)].

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

Used car buyers are also protected by Vehicle and Traffic Law § 417 [" VTL § 417 "] which requires used car dealers to inspect vehicles and deliver a certificate to buyers stating that the vehicle is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery. V&T § 417 is a non-waiveable, nondisclaimable, indefinite, warranty of serviceability which has been liberally construed [Barilla v. Gunn Buick Cadillac-GNC, Inc.[169]; Ritchie v. Empire Ford Sales, Inc.[170] (dealer liable for Ford Escort that burns up 4 ½ years after purchase); People v. Condor Pontiac[171] (used car dealer violated G.B.L. § 349 and V.T.L. § 417 in failing to disclose that used car was " previously used principally as a rental vehicle "; " In addition (dealer violated) 15 NYCRR §§ 78.10(d), 78.11(12), (13)...fraudulently and/or illegally forged the signature of one customer, altered the purchase agreements of four customers after providing copies to them, and transferred retail certificates of sale to twelve (12) purchasers which did not contain odometer readings...(Also) violated 15 NYCRR § 78.13(a) by failing to give the purchaser a copy of the purchase agreement in 70 instances (all of these are deceptive acts) "];

recoverable damages include the return of the purchase price and repair and diagnostic costs [Williams v. Planet Motor Car, Inc.[172]].

[K] **Repossession & Sale Of Vehicle: U.C.C. § 9-611(b)**

In Coxall v. Clover Commercials Corp.[173], the consumer purchased a " 1991 model Lexus automobile, executing a Security Agreement/Retail Installment Contract. The ' cash price ' on the Contract was $8,100.00 against which the Coxalls made a ' cash downpayment ' of $3,798.25 ". After the consumers stopped making payments because of the vehicle experienced mechanical difficulties the Lexus was repossessed and sold. In doing so, however, the secured party failed to comply with U.C.C. § 9-611(b) which requires " ' a reasonable authenticated notification of disposition ' to the debtor " and U.C.C § 9-610(b) (" the sale must be ' commercially reasonable ' "). Statutory damages awarded offset by defendant's breach of contract damages.

[L] **Wrecked Cars**

In Jung v. The Major Automotive Companies, Inc.[174] a class of 40,000 car purchasers charged the defendant with fraud " in purchas(ing) automobiles that were ' wrecked ' or ' totaled ' in

prior accidents, had them repaired and sold them to unsuspecting consumers...purposely hid the prior accidents from consumers in an attempt to sell the repaired automobiles at a higher price for a profit ". The parties jointly moved for preliminary approval of a proposed settlement featuring (1) a $250 credit towards the purchase of any new or used car, (2) a 10% discount for the purchase of repairs, parts or services, (3) for the next three years each customer who purchases a used car shall receive a free CarFax report and a description of a repair, if any and (4) training of sales representatives " to explain a car's maintenance history ", (5) projected settlement value of $4 million, (6) class representative incentive award of $10,000, and (7) $480,000 for attorneys fees, costs and expenses. The Court preliminarily certified the settlement class, approved the proposed settlement and set a date for a fairness hearing.

[M] **Inspection Stations**

In Stiver v. Good & Fair Carting & Moving, Inc.[175] the plaintiff was involved in an automobile accident and sued an automobile inspection station for negligent inspection of one of the vehicles in the accident. In finding no liability the Court held " as a matter of public policy we are unwilling to force inspection stations to insure against ricks ' the amount of which

they may not know and cannot control, and as to which contractual limitations of liability [might] be ineffective '...If New York State motor vehicle inspection stations become subject to liability for failure to detect safety-related problems in inspected cars, they would be turned into insurers. This transformation would increase their liability insurance premiums and the modest cost of a State-mandated safety and emission inspection ($12 at the time of the inspection in this case) would inevitably increase ").

[N] **Failure To Deliver Purchased Options**

[O] **Federal Odometer Act**

In Vasilas v. Subaru of America, Inc.[176] (Pre-assembly tampering to understate mileage covered by federal Odometer Act..."Congress recognized that the odometer plays a key role in the selection of an automobile...consumers 'rely heavily on the odometer reading as an index of the condition and value of a vehicle'...The Act is a consumer protection statute which is remedial in nature and it should therefore...be liberally construed to effectuate its purpose").

[5.1] **Charities**

See Strom, To Help Donors Choose, Web Site Alters How It Sizes Up Charities, NYTimes Online November 26, 2010 ("Charity Navigator, perhaps the largest online source for evaluating nonprofit groups, recently embarked on an overhaul to offer a wider, more nuanced array of information to donors who are deciding which organizations they might help").

[6] **Educational Services**

In Drew v. Sylvan Learning Center Corp.[177] parents enrolled their school age children in an educational services[178] program which promised " The Sylvan Guarantee. Your child will improve at least one full grade level equivalent in reading or math within 36 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, on 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 found (1) fraudulent misrepresentation noting that no evidence was introduced " regarding Sylvan's standards, whether those standards were aligned with the New York City Board of Education's standards, or whether Sylvan had any success with

students who attended New York City public schools ", (2) violation of GBL 349 citing Brown v. Hambric[179], Cambridge v. Telemarketing Concepts[180] and People v. McNair[181] 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 (3) 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 "]. See also: Andre v. Pace University[182] (failing to deliver computer programming course for beginners).

[7] **Food**

[A] **Coloric Information**

In New York State Restaurant Association v. New York City Board of Health[183] restaurant owners challenged constitutionality of New York City Health Code Section 81.50 (" Regulation 81.50 ") which " requires certain chain restaurants that sell standardized

meals to post coloric content information on 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 the New York City's interest in reducing obesity. " The City submitted evidence that...people tend to underestimate the calorie content of restaurant foods...that many consumers report looking at calorie 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 ' product-suggesting that consumer demand for such products is promoted by increased consumer awareness of the nutritional content of available food options ".

[B] **Nutritional Value**

See e.g., Pelman v. McDonald's Corp.[184](misrepresentation of nutritional value of food products); Pelman v. McDonald's Corp.[185](" In their (complaint) Plaintiffs list a number of specific advertisements which they allege to comprise the nutritional scheme that is the subject of this litigation. Plaintiffs contend that 'the cumulative effect' of these representations was to

constitute a marketing scheme that misleadingly 'conveyed, to the reasonable consumer...that Defendant's foods are nutritious, healthy and can be consumed easily every day without incurring any detrimental health effects'...As the court held in Pelman IV, an extensive marketing scheme is actionable under GBL 349"; class certification denied); See also Elliot & Jacobsen, Food Litigation: The New Frontier, New York Law Journal, July 8, 2010, p. 4 ("there has been a decided increase in litigation involving allegations of purportedly 'unsubstantiated health claims' in labeling and advertising").

[C] **Retail Packaging: Excessive Slack Fill**

In Waldman v. New Chapter, Inc., 2010 WL 2076024 (E.D.N.Y. 2010) the Court found that plaintiffs stated claims for the violation of GBL §§ 349, 350 arising from defendant's use of excessive " slack fill " packaging. " In 2009, Plaintiff purchased a box of Berry Green, a ' Spoonable Whole-Food '...Berry Green comes in a box that is 6 5/8 inches tall...The box contains a jar that is 5 5/8 inches tall...And the jar itself is only half-filled with the product...(GBL 349 claim stated in that) Defendant's packaging is ' misleading ' for purposes of this motion... Plaintiff alleges that that packaging ' gives the false impression that the consumer is buying more than they are actually receiving

‘ and thus sufficiently pleads that the packaging was ‘ misleading in a material way “. In addition, plaintiffs also state a claim for violation of GBL 350.

“ As an initial matter (GBL 350) expressly defines ‘ advertisement ‘ to include ‘ labeling ‘. Thus the statute includes claims made on a product’s package. In addition...excessive slack fill states a claim for false advertising (see Mennen Co. v. Gillette Co., 565 F. Supp. 648, 655 (S.D.N.Y. 1983).

[D] “ **All Natural** “

In Weiner v. Snapple Beverage Corp., 2011 WL 196930 (S.D.N.Y. 2011)(“This case concerns whether defendant’s labeling of its teas and juice drinks as ‘All Natural’, despite their inclusion of high fructose corn syrup (HFCS) was misleading to consumers...It is undisputed that Snapple disclosed the use of HFCS on its beverages’ ingredient lists...Snapple represents that it ‘no longer sells any products containing HFCS and labeled as ‘All Natural’...plaintiffs have failed to present reliable evidence that they paid a premium for Snapple’s ‘All Natural’ label (and hence have failed to prove they suffered a cognizable injury under GBL 349)”).

[8] **Franchising** [Emfore Corp. v. Blimpie Associates, Ltd., 51 A.D. 3d 434 (1st Dept. 2008)(franchisee stated claim of violation of GBL 683 and 687 (Franchise Act) asserting oral misrepresentations; " Indeed, by requesting franchisees to disclose whether a franchisor's representatives made statements concerning the financial prospects for the franchise during the sales process, franchisors can effectively root out dishonest sales personnel and avoid sales secured by fraud. However, defendant, in direct contravention of the laudatory goal it claims to be advancing, is asking this Court to construe the representations made by plaintiff is the questionnaire as a waiver of fraud claims Such waivers are barred by the Franchise Act. Accordingly, defendant's attempt to utilize the representations as a defense must ve rejected "; breach of contract and fraud claims dismissed)].

[9] **Homes, Apartments And Co-Ops**

[A] **Home Improvement Contracts & Frauds: G.B.L. §§ 771, 772**

G.B.L. § 771 requires that home improvement contracts be in writing and executed by both parties. The provisions of GBL 771

have been held to not apply "to the contract for engineering services" (see Velasquez v. Laskar[186]). A failure to sign a home improvement contract means it can not be enforced in a breach of contract action [Precision Foundations v. Ives[187]; Consigliere v. Grandolfo[188]("The statute's plain purpose is to protect homeowners from unscrupulous, venal home improvement contractors. It protects the consumer, by, among other things, requiring a written contract containing specific language and items to be included, including certain rights to the homeowner"; home improvement contract not enforced; no quantum meruit); cf: Kitchen & Bath Design Gallery v. Lombard[189]("while the failure to strictly comply with (GBL) 771 bars recovery under an oral home improvement contract, 'such failure does not preclude recovery for completed work under principals of quantum meruit'")]. However, a court may overlook the absence of a written contract to protect consumers. In Cristillo v. Custom Construction Services, Inc.[190] the Court stated " the question then becomes how the GBL applies in this case and whether the Builder can use its provisions as a sword rather than a shield...Article 36 of the (GBL) is at its heart a consumer protection law. Sanctions may be imposed on builders but not homeowners for non-compliance. Underlying GBL Section 771 is a legislative concern that the myriad problems which might arise in home construction or remodeling work need to be clearly spelled out in a written contract signed by the homeowner and

contractors...The court funds it would (mot) be in the interest of justice...to allow the defendant to benefit from his failure to comply with the requirements of the (GBL) by retaining the entire amount he has received ").

G.B.L. § 772 provides homeowners victimized by unscrupulous home improvement contractors [who make " false or fraudulent written statements "] with statutory damages of $500.00, reasonable attorneys fees and actual damages [Udezeh v. A+Plus Construction Co.[191] (statutory damages of $500.00, attorneys fees of $1,500.00 and actual damages of $3,500.00 awarded); Garan v. Don & Walt Sutton Builders, Inc.[192](construction of a new, custom home falls within the coverage of G.B.L. § 777(2) and not G.B.L. § 777-a(4))].

[1] **Solid Oak Wood Door**

See Ferraro v. Perry's Brick Company, New York Law Journal, February 15, 2011, p. 15 (N.Y. Civ. 2011)(what does the term oak wood door mean? It means a solid oak wood and not a veneer oak door. Defects in the door "diminished the value of the door by $2500")

[A.1] **Home Inspections**

In Carney v. Coull Building Inspections, Inc.[193] 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 $3,400.00 " 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 $395.00 fee paid [See e.g., Ricciardi v. Frank d/b/a/ InspectAmerica Enginerring,P.C.[194] (civil engineer liable for failing to discover wet basement)] and no private right of action existed under the Home Improvement Licensing Statute, Real Property Law 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 on the contract such as the " inspector's licensing information ".

In Mancuso v. Rubin[195] the plaintiffs retained the services of a home inspector prior to purchasing a house and relied on the inspector's report stating " no ' active termites or termite action was apparent '" but disclaimed by also stating that the " termite inspection certification " was "' not a warranty or a guaranty that there are no termites " and its liability, if any, would be " limited to the $200 fee paid for those services ". After the closing the plaintiffs claim they discovered " extensive

termite infestation and water damage which caused the home to uninhabitable and necessitated extensive repair ". The Court found no gross negligence or fraud and limited contractual damages to the $200 fee paid. As for the homeowners the complaint was dismissed as well since no misrepresentations were made and the house was sold " as is " [see Simone v. Homecheck Real Estate Services Inc.[196]]

[B] **Home Improvement Contractor Licensing: C.P.L.R. § 3015(e); G.B.L. Art. 36-A; RCNY § 2-221; N.Y.C. Administrative Code § 20-387, Nassau County Administrative Code § 21-11.2 Westchester County Code 863-319**

Homeowners often hire home improvement contractors to repair or improve their homes or property. Home improvement contractors must, at least, be licensed by the Department of Consumer Affairs of New York City, Westchester County, Suffolk County, Rockland County, Putnam County and Nassau County if they are to perform services in those Counties [C.P.L.R. § 3015(e)][see Marraccini v. Ryan[197](violation of Westchester County Code prohibiting contracting work in a name other than that to which a license was issued authorizes fines but does not bar "bringing a suit under a contract entered into under the wrong name"); see People v. Biegler[198](noting the differences between NYC Administrative Code

20-386 and Nassau County Administrative Code 21-11.1.7 (" there is no requirement under the Nassau County home improvement ordinance that the People plead or prove that the ' owner ' of the premises did actually reside at or intend to reside at the place where the home improvement was performed in order to maintain liability under the ordinance ")].

Should the home improvement contractor be unlicensed he will be unable to sue the homeowner for non-payment for services rendered [Flax v. Hommel[199] (" Since Hommel was not individually licensed pursuant to Nassau County Administrative Code § 21-11.2 at the time the contract was entered and the work performed, the alleged contract...was unenforceable "); CLE Associates, Inc. v. Greene,[200] (N.Y.C. Administrative Code § 20-387; " it is undisputed that CLE...did not possess a home improvement license at the time the contract allegedly was entered into or the subject work was performed...the contract at issue concerned ' home improvement '...the Court notes that the subject licensing statute, §20-387, must be strictly construed "); Goldman v. Fay[201] (" although claimant incurred expenses for repairs to the premises, none of the repairs were done by a licensed home improvement contractor...(G.B.L. art 36-A; 6 RCNY 2-221). It would violate public policy to permit claimant to be reimbursed for work done by an unlicensed contractor "); Tri-State General Remodeling Contractors, Inc v. Inderdai Baijnauth[202] [203](salesmen

do not have to have a separate license); Franklin Home Improvements Corp. V. 687 6th Avenue Corp.[204](home improvement contractor licensing does not apply to commercial businesses (" [t]he legislative purpose in enacting [CPLR 3015(e)] was not to strengthen contractor's rights but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor was licensed "); Altered Structure, Inc. v. Solkin[205](contractor unable to seek recovery for home improvement work " there being no showing that it was licensed "); Routier v. Waldeck[206] (" The Home Improvement Business provisions...were enacted to safeguard and protect consumers against fraudulent practices and inferior work by those who would hold themselves out as home improvement contractors "); Colorito v. Crown Heating & Cooling, Inc.[207],(" Without a showing of proper licensing, defendant (home improvement contractor) was not entitled to recover upon its counterclaim (to recover for work done) " Cudahy v. Cohen[208] (unlicenced home improvement contractor unable to sue homeowner in Small Claims Courts for unpaid bills); Moonstar Contractors, Inc. v. Katsir[209](license of sub-contractor can not be used by general contractor to meet licensing requirements)].

Obtaining a license during the performance of the contract may be sufficient [Mandioc Developers, Inc. v. Millstone[210]] while obtaining a license after performance of the contract is not

sufficient[B&F Bldg. Corp. V. Liebig[211] (" The legislative purpose...was not to strengthen contractor's rights, but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor is licensed "); CLE Associates, Inc. v. Greene,[212]].

Licenses to operate a home improvement business may be denied based upon misconduct [Naclerio v. Pradham[213] ("... testimony was not credible...lack of regard for a number of its suppliers and customers...Enterprises was charged with and pleaded guilty to violations of Rockland County law insofar as it demanded excessive down payments from its customers, ignored the three-day right-to-cancel notice contained in its contract and unlawfully conducted business under a name other than that pursuant to which it was licensed ")].

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

G.B.L. § 777 provides, among other things, for a statutory housing merchant warranty[214] for the sale of a new house which for (1) one year warrants " the home will be free from defects due to a failure to have been constructed in a skillful manner " and for (2) two years warrants that " the plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such

systems in a skillful manner " and for (3) six years warrants " the home will free from material defects " [See e.g., Etter v. Bloomingdale Village Corp.[215](breach of housing merchant implied warranty claim regarding defective tub sustained; remand on damages)].

In Farrell v. Lane Residential, Inc.[216], after a seven day trial, the Court found that the developer had violated G.B.L. § 777-a regarding " defects with regard to the heating plant; plumbing; improper construction placement and installation of fireplace; master bedroom; carpentry defects specifically in the kitchen area; problems with air conditioning unit; exterior defects and problems with the basement such that the home was not reasonably tight from water and seepage ". With respect to damages the Court found that the cost to cure the defects was $35,952.00. Although the plaintiffs sought damages for the " stigma (that) has attached to the property " [see Putnam v. State of New York[217]] the Court denied the request for a failure to present " any comparable market data ".

[C.1] **Exclusion Or Modification**

The statutory " Housing Merchant Implied Warranty may be excluded or modified by the builder of a new home if the buyer is offered a limited warranty that meets or exceeds statutory

standards " [Farrell v. Lane Residential, Inc.[218] (Limited Warranty not enforced because " several key sections including the name and address of builder, warranty date and builder's limit of total liability " were not completed)].

[C.2] **Custom Homes**

The statute may not apply to a " custom home " [Security Supply Corporation v. Ciocca[219] (" Supreme Court correctly declined to charge the jury with the statutory new home warranty provisions of (GBL) 777-a. Since the single-family home was to be constructed on property owned by the Devereauxs, it falls within the statutory definition of a ' custom home ' contained in (GBL) 777(7). Consequently, the provisions of (GBL) 777-a do not automatically apply to the parties' contract ")]. " While the housing merchant implied warranty under (G.B.L. § 777-a) is automatically applicable to the sale of a new home, it does not apply to a contract for the construction of a ' custom home ', this is, a single family residence to be constructed on the purchaser's own property " [Sharpe v. Mann[220]] and, hence, an arbitration agreement in a construction contract for a custom home may be enforced notwithstanding reference in contract to G.B.L. § 777-a [Sharpe v. Mann[221]].

[C.3] **"As Is" Clauses**

This Housing Merchant Implied Warranty can not be repudiated by " an ' as is ' clause with no warranties " [Zyburo v. Bristled Five Corporation Development Pinewood Manor[222] (" Defendant attempted to...Modify the Housing Merchant Implied Warranty by including an ' as is ' provision in the agreement. Under (G.B.L. § 777-b) the statutory Housing Merchant Implied Warranty may be excluded or modified by the builder of a new home only if the buyer is offered a limited warranty that meets or exceeds statutory standards [Latiuk v. Faber Construction Co., Inc.[223]; Fumarelli v. Marsam Development, Inc.[224]] .

[C.4] **Timely Notice**

The statute requires timely notice from aggrieved consumers [see Reis v. Cambridge Development & Construction Corp.[225](judgement of $2,250 for new homeowner claiming damage from water seepage affirmed; although plaintiff failed to give written notice within applicable period defendant admitted actual notice of the condition "and in fact dispatched staff to investigate plaintiff's complaints"); Finnegan v. Hill[226](" Although the notice provisions of the limited warranty were in derogation of the statutory warranty (see (G.B.L. § 777-b(4)(g)) the notices

of claim served by the plaintiff were nonetheless untimely "); Biancone v. Bossi[227](plaintiff's breach of warranty claim that defendant contractor failed " to paint the shingles used in the construction...(And) add sufficient topsoil to the property "; failure " to notify...of these defects pursuant to...(G.B.L. § 777-a(4)(a) "); Rosen v. Watermill Development Corp.[228] (notice adequately alleged in complaint); Taggart v. Martano[229](failure to allege compliance with notice requirements (G.B.L. § 777-a(4)(a)) fatal to claim for breach of implied warranty); Solomons v. Greens at Half Hollow, LLC, 26 Misc. 3d 83 (2d Dept. 2009)(" Pursuant to the provisions of the limited warranty, plaintiff could not maintain the instant action insofar as it was based on the limited warranty since he failed the defendant with notice of claim identifying the alleged defect, within the time required by said warranty "); Testa v. Liberatore[230] (" prior to bringing suit (plaintiff must) provide defendant with a written notice of a warranty claim for breach of the housing merchant implied warranty "); Randazzo v. Abram Zylberberg[231](defendant waived right " to receive written notice pursuant to (G.B.L. § 777-1(4)(a) ")].

[C.5] **Failure To Comply**

There appears to be a difference between the Second and

Fourth Departments as to the enforceability of contracts which fail to comply with G.B.L. § 771. In TR Const. v. Fischer, 26 Misc. 3d 1238 (Watertown City Ct. 2010) the Court refused to enforce an improvement contract which did not comply with G.B.L. § 777 noting that " The contract here lacks several provisions, including § 771(1)d)'s required warning that an unpaid contractor may have a mechanic's lien against the owner's property...Also missing are subsection (1)(e)'s notice that contractors must deposit pre-completion payments in accordance with New York's lien law or take other steps to protect the money prior to completion ". However, in Trificana v. Carrier[232] the Appellate Division Fourth Department held that compliance with the cure provisions of GBL 777-a(4)(a) is not a condition precedent to the assertion of a cause of action for breach of warranty.

Several Second Department cases including Wowaka & Sons, Inc. v. Pardell, 242 AD2d 1 (2d Dept. 1998) appear to allow partial compliance with GBL § 771. In Wowaka the Court held that while " 'illegal contracts are generally unenforceable' invalidating the contract at hand would amount to overkill because ' violation of a statutory provision will render a contract unenforceable only when the statute so provides...(GBL Article 36-A) 'does not expressly mandate that contracts which are not in strict compliance therewith are unenforceable' and that the § 771 provisions omitted were immaterial to the parties' dispute ". However, more recently,

some Courts in the Second Department have taken a different position. In Board of Managers of Woodpoint Plaza Condominium v. Woodpoint Plaza LLC, 24 Misc. 3d 1233 (Kings Sup. 2009) the Court held that " Upon review of the offering plan, the limited warranty set forth herein does not include either a claims procedure for the owner, an indication of what the warrantor will do when a defect arises, or a time period within which the warrantor will act. As the limited warranty included in the offering plan fails to meet the standards provided in GBL § 777-b(4)(f) and (h) the defendants may not rely on the exclusion of the statutory housing merchant implied warranty found in the offering plan ".

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

In Goretsky v. ½ Price Movers, Inc[233] claimant asserted that a mover hired to transport her household goods " did not start at time promised, did not pick-up the items in the order she wanted and when she objected (the mover) refused to remover her belongings unless they were paid in full ". The Court noted the absence of effective regulations of movers. " The biggest complaint is that movers refuse to unload the household goods unless they are paid...The current system is, in effect, extortion where customers sign documents that they are accepting delivery

without complaint solely to get their belongings back. This situation is unconscionable ". The Court found a violation of 17 N.Y.C.R.R. § 814.7 when the movers " refused to unload the entire shipment ", violations of G.B.L. § 349 in " that the failure to unload the household goods and hold them ' hostage ' is a deceptive practice " and a failure to disclose relevant information in the contract and awarded statutory damages of $50.00.

See also: Frey v. Bekins Van Lines, Inc.[234] ("Broadly stated, Plaintiffs claim that Defendants are engaged in a pattern and practice of quoting lower shipping prices than those ultimately charged-a practice referred to as 'low-balling' estimates-with the intent of charging higher amounts. Defendants are also accused of overcharging their customers (for) a variety of add-on services, including fuel supplements and insurance premiums on policies that Defendants are alleged never to have obtained"; GBL 349 and 350 claims stated; no breach of contract).

[E] **Real Estate Brokers' Licenses: R.P.L. § 441(b)**

In Olukotun v. Reiff[235]the plaintiff wanted to purchase a legal two family home but was directed to a one family with an illegal apartment. After refusing to purchase the misrepresented two family home she demanded reimbursement of the $400 cost of the

home inspection. Finding that the real estate broker violated the competency provisions of R.P.L. § 441(1)(b) (a real estate broker should have " competency to transact the business of real estate broker in such a manner as to safeguard the interests of the public "), the Court awarded damages of $400 with interest, costs and disbursements.

[F] **Arbitration Agreements: G.B.L. § 399-c**

In Baronoff v. Kean Development Co., Inc.[236] the petitioners entered into construction contracts with respondent to manage and direct renovation of two properties. The agreement contained an arbitration clause which respondent sought to enforce after petitioners terminated the agreement refusing to pay balance due. Relying upon Ragucci v. Professional Construction Services[237], the Court, in " a case of first impression ", found that G.B.L. § 399-c barred the mandatory arbitration clause and, further, that petitioners' claims were not preempted by the Federal Arbitration Act [While the (FAA) may in some cases preempt a state statute such as section 399-c, it may only do so in transactions ' affecting commerce ' "].

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

With some exceptions [Real Property Law § 463] Real Property Law § 462 [" RPL "] requires sellers of residential real property to file a disclosure statement detailing known defects. Sellers are not required to undertake an inspection but must answer 48 questions about the condition of the real property. A failure to file such a disclosure statement allows the buyer to receive a $500 credit against the agreed upon price at closing [RPL § 465] . A seller who files such a disclosure statement " shall be liable only for a willful failure to perform the requirements of this article. For such a wilfull failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory relief " [RPL 465(2)].

Notwithstanding New York's adherence to the doctrine of caveat emptor [unless fraud is alleged[238]] in the sale of real estate " and imposed no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment "[239] there have been two significant developments in protecting purchasers of real estate.

First, as stated by the Courts in Ayres v. Pressman[240] and Calvente v. Levy[241] any misrepresentations in the Property Condition Disclosure Statement mandated by RPL 462 provides a

separate cause of action for defrauded home buyers entitling plaintiff " to recover his actual damages arising out of the material misrepresentations set forth on the disclosure form notwithstanding the ' as is ' clause contained in the contract of sale "[242].

Second, the Court in Simone v. Homecheck Real Estate Services, Inc.[243], held that " when a seller makes a false representation in a Disclosure Statement, such a representation may be proof of active concealment...the alleged false representations by the sellers in the Disclosure Statement support a cause of action alleging fraudulent misrepresentation in that such false representations may be proof of active concealment ".

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

Tenants in Spatz v. Axelrod Management Co.[244] and coop owners in Seecharin v. Radford Court Apartment Corp.[245] brought actions for damages done to their apartments by the negligence of landlords, managing agents or others, i.e., water damage from external or internal sources. Such a claim may invoke Real Property Law § 235-b [" RPL § 235-b "] , a statutory warranty of habitability in every residential lease " that the premises...are fit for human habitation ". RPL § 235-b " has provided consumers with a powerful remedy to encourage landlords to maintain

apartments in a decent, livable condition "[246] and may be used affirmatively in a claim for property damage[247] or as a defense in a landlord's action for unpaid rent[248]. Recoverable damages may include apartment repairs, loss of personal property and discomfort and disruption[249].

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

In Goode v. Bay Towers Apartments Corp.[250] the tenant sought damages from his landlord arising from burst water pipes under Multiple Dwelling Law § 78 which provides that " Every multiple dwelling...shall be kept in good repair ". The Court applied the doctrine of *res ipsa loquitur* and awarded damages of $264.87 for damaged sneakers and clothing, $319.22 for bedding and $214.98 for a Playstation and joystick.

[J] **Roommate Law: RPL § 235-F**

See Decatrel v. Metro Loft Management, LLC, 30 Misc. 3d 1212(A) (N.Y. Sup. 2010)(violation of Roommate Law, RPL 235-f; Plaintiff alleges that defendant required her "to pay a $75 application fee and $250 administration fee in order to occupy a three-bedroom apartment...Plaintiff claims that her occupancy of the apartment with Ms. Pena (the roommate), the existing tenant of

the apartment was in accord with the existing lease and would have been legal under the Roommate Law. Plaintiff asserts that, consequently, the fees assessed were in improper restriction on occupancy in violation of that law and that she was damaged thereby”).

[K] **Lien Law article 3-A**

In Ippolito v TJC Development LLC[251], homeowners terminated a home improvement contract, were awarded $121,155.32 by an arbitrator and commenced a Lien Law article 3-A class action against the contractor TJC and its two principals. Plaintiff’s claim against TJC was dismissed on the grounds of res judicata based upon the arbitrator’s award. However, as a matter of first impression, the court held that the homeowners, “beneficiaries of the trust created by operation of Lien Law § 70" had standing to assert a Lien Law Article 3-A claim against TJC’s officers or agents alleging an improper diversion of trust pursuant to Lien Law § 72.

L] Tenant’s Attorney Fees

In Casamento v. Jyarequi[252] the Appellate Division Second Department held that a lease providing for payment of landlord’s

attorney fees in action against tenant triggered an implied covenant in tenant's favor to recover attorneys as prevailing party).

[10] **Insurance**

A] **Insurance Coverage And Rates** [Gaidon v. Guardian Life Insurance Co. & Goshen v. Mutual Life Insurance Co.[253] (misrepresentations that " out-of-pocket premium payments (for life insurance policies) would vanish within a stated period of time "); Tahir v. Progressive Casualty Insurance Co.[254](trial on whether " a no-fault health service provider's claim for compensation for charges for an electrical test identified as Current Perception Threshold Testing " is a compensable no-fault claim); Beller v. William Penn Life Ins. Co.[255](" 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 should be made "); Monter v. Massachusetts Mutual Life Ins. Co.[256](misrepresentations with respect to the terms " Flexible Premium Variable Life Insurance Policy "); Skibinsky v. State Farm Fire and Casualty Co.[257] (misrepresentation of the coverage of a " builder's risk " insurance policy); Brenkus v. Metropolitan Life

Ins. Co.[258](misrepresentations by insurance agent as to amount of life insurance coverage); Makastchian v. Oxford Health Plans, Inc.[259] (practice of terminating health insurance policies without providing 30 days notice violated terms of policy and was a deceptive business practice because subscribers may have believed they had health insurance when coverage had already been canceled); Whitfield v. State Farm Mutual Automobile Ins. Co.[260](automobile owner sues insurance company seeking payment for motor vehicle destroyed by fire; " Civil Court in general, and the Small Claims Part is particular, may entertain " insurance claims which involve disputes over coverage).

B] **Insurance Claims Procedures** [Shebar v. Metropolitan Life Insurance Co.[261](" Allegations that despite promises to the contrary in its standard-form policy sold to the public, defendants made 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 ', stated cause of action pursuant to (G.B.L.) § 349 "); Edelman v. O'Toole-Ewald Art Associates, Inc.[262](" action by an art collector against appraisers hire by his property insurer to evaluate damage to one of his paintings while on loan "; failure to demonstrate duty, reliance and actual or pecuniary

harm); Makuch v. New York Central Mutual Fire Ins. Co.[263] (" violation of (G.B.L. § 349 for disclaiming) coverage under a homeowner's policy for damage caused when a falling tree struck plaintiff's home "); Acquista v. New York Life Ins. Co.[264] (" allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability "" may be said to fall within the parameters of an unfair or deceptive practice "); Rubinoff v. U.S. Capitol Insurance Co.[265] (automobile insurance company fails to provide timely defense to insured)].

[C] **Provision Of Independent Counsel**: In Elacqua v. Physicians' Reciprocal Insurers[266] (" Elacqua I ") the Court held that " when the existence of covered and uncovered claims gives rise to a conflict of interest between and insurer and its insureds, the insured is entitled to independent counsel of his or her choosing at the expense of the insurer ". Subsequently, in Elacqua II[267] the Court, allowing plaintiff to amend her complaint asserting a violation of GBL 349, noted that " the partial disclaimer letter sent by defendant to its insureds...failed to inform them that they had the right to select independent counsel at defendants expense, instead misadvising that plaintiffs could retain counsel to protect their uninsured interests ' at [their] own expense '. Equally disturbing is the fact that defendant

continued to send similar letters to its insureds, failing to inform them of their rights, even after this Court's pronouncement in Elacqua I ". The Court held that "This threat of divided loyalty and conflict of interest between the insurer and the insured is the precise evil sought to be remedied...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".

[D] **No Fault Reimbursement Rates**: In Globe Surgical Supply v. GEICO[268] a class of durable medical equipment [DME] providers alleged that GEICO " violated the regulations promulgated by the New York State Insurance Department...pursuant to the no-fault provisions of the Insurance Law, by systematically reducing its reimbursement for medical equipment and supplies...based on what it deemed to be ' the prevailing rate in the geographic location of the provider ' or ' the reasonable and customary rate for the item billed '. In denying certification the Court found that Globe had met all of the class certification prerequisites except adequacy of representation since, *inter alia*, GEICO had asserted a counterclaim and as a result Globe may be " preoccupied with defenses unique to it ".

[E] **No Fault Peer Review Reports** [Consolidated Imaging PC v. Travelers Indemnity Co., 30 Misc. 3d 1222(A)(N.Y. Civ. 2011)("The court must reject the peer review report...as not being reliable...In addition, there are serious due process issues arising from the practice of carriers such as defendants operating through third party venders who select the peer reviewers and 'cherry-pick' what information is presented to the peer reviewer"; judgment for plaintiff with interest, costs, disbursements and attorneys' fees")].

[F] **Insurance Bid Rigging** [In People v. Liberty Mutual Insurance Company, 57 A.D. 3d 378 (1st Dept. 2008) the Attorney General asserted claims of bid rigging in violation of the Donnelly Act [GBL 340[2]] which the Court sustained on a motion to dismiss [" Here, the Attorney General sued to redress injury to its ' quasi-sovereign interest in securing an honest marketplace for all consumers '...free of bid rigging ".

[G] **Steering** [M.V.B. Collision, Inc. V. Allstate Insurance Company[269] ("Mid Island is an auto-body shop. Mid Island and Allstate have had a long-running dispute over the appropriate rate for auto-body repairs. Mid Island alleges that, as a result of that dispute, Allstate agents engaged in deceptive practices designed to dissuade Allstate customers from having their cars

repaired at Mid Island and to prevent Mid Island from repairing Allstate customers' cars"; GBL 349 claim sustained)].

[11] **Mortgages, Credit Cards And Loans**

Consumers may sue for a violation of several federal statutes which seek to protect borrowers, including the

[A] **Truth In Lending Act**, 15 U.S.C.A. §§ 1601-1665 [TILA[270]] [JP Morgan Chase Bank v. Tecl[271] (" The purpose of the TILA is to ensure a meaningful disclosure of the cost of credit to enable consumers to readily compare the various terms available to them, and the TILA disclosure statement will be examined in the context of the other documents involved "); Deutsche Bank National Trust v. West[272](" The Truth in Lending Act was enacted to ' assure a meaningful disclosure of credit terms so that [consumers] will be able to compare more readily the various credit terms available to [them] and avoid the uninformed use of credit '...if the creditor fails to deliver the material disclosures required or the notice of the right to rescind, the three day rescission period may be extended to three years after the date of consummation of the transaction or until the property is sold, whichever occurs first "); Jacobson v. Chase Bank[273] (refusal by bank to credit plaintiff's credit card after notified that plaintiff refused to

accept item purchased on Ebay; motion to dismiss claims brought pursuant to TILA and Fair Credit Billing Act and GBL Sections 701-707 denied); Community Mutual Savings Bank v. Gillen[274] (borrower counterclaims in Small Claims Court for violation of TILA and is awarded rescission of loan commitment with lender and damages of $400.00; " TILA (protects consumers) from the inequities in their negotiating position with respect to credit and loan institutions...(TILA) requir(es) lenders to provide standard information as to costs of credit including the annual percentage rate, fees and requirements of repayment...(TILA) is liberally construed in favor of the consumer...The borrower is entitled to rescind the transaction ' until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required ... together with a statement containing the material disclosures required... whichever is later...The consumer can opt to rescind for any reasons, or for no reason "); Rochester Home Equity, Inc. v. Upton[275] (mortgage lock-in fee agreements are covered by TILA and RESPA; " There is nothing in the New York regulations concerning lock-in agreements that sets out what disclosures are required and when they must be made...In keeping with the trend toward supplying consumers with more information than market forces alone would provide, TILA is meant to permit a more judicious use of credit by consumers through a ' meaningful disclosure of credit

terms '...It would clearly violate the purpose behind TILA and RESPA to allow fees to be levied before all disclosures were made...the court holds that contracts to pay fees such as the lock-in agreements must be preceded by all the disclosures that federal law requires ").

[B] **Fair Credit Billing Act**, 15 U.S.C. § 1606(a) [Jacobson v. Chase Bank[276] (refusal by bank to credit plaintiff's credit card after notified that plaintiff refused to accept item purchased on Ebay; motion to dismiss claims brought pursuant to TILA and Fair Credit Billing Act and GBL Sections 701-707 denied); Durso v. J.P. Morgan Chase & Co., 27 Misc. 3d 1212 (N.Y. Civ. 2010) (" It is well settled that a consumer can trigger a credit card company's responsibility under Fair Credit Billing Act to investigate and respond to alleged billing errors by sending a billing error notice to the creditor within 60 (sixty) days of the creditor's transmission of the statement reflecting the alleged error...there is no question that the plaintiff herein failed to assert the existence of the so-called billing errors until months after the 60 day period...Even if Nelson were proven to be a ' scam artist '...the liability for loss rests solely with Nelson and it is never incumbent on Chase as a credit card issuer, to be an indemnitor or arbiter for a credit card holder's knowing, voluntary yet ultimately poor choices ")].

[B.1] **Fair Credit Reporting Act**, 15 U.S.C. § 1681 [Dickman v. Verizon Communications, Inc., 876 F. Supp. 2d 166 (E.D.N.Y. 2012)(New York Fair Credit Reporting Act and GBL § 349 claim preempted by Fair Credit Reporting Act, 15 USC § 1681); Citibank (South Dakota) NA v. Beckerman[277] (" The billing error notices allegedly sent by defendant were untimely since more than 60 days elapsed from the date the first periodic statement reflecting the alleged errors was transmitted "); Ladino v. Bank of America[278](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 "); Tyk v. Equifax Credit Information Services, Inc.[279] (consumer who recovered damages under the Fair Credit Reporting Act denied an award of attorneys fees (" more must be shown than simply prevailing in litigation. It must be shown that the party who did not prevail acted in bad faith or for purposes of harassment ")].],

[C] **Real Estate Settlement Procedures Act**, 12 U.S.C. § 2601 [RESPA][see Kapsis v. American Home Mortgage Servicing Inc., 2013 WL 544010 (E.D.N.Y. 2013)("(Here) Plaintiff alleges that AHMSI violated (GBL) 349 by, inter alia, failing to properly credit

accounts...after payments were made, failing to timely respond to communications sent by debtors, issuing false or misleading monthly statement and escrow projection statements and refusing to provide detailed accountings to debtors for sums allegedly owed"; claim stated Fair Debt Collection Practices Act and Real Estate Settlement Procedures Act (RESPA) and GBL § 349); Iyare v. Litton Loan Servicing, LP[280] (borrower's " entitlement to damages pursuant to (RESPA) for alleged improper late charges (dismissed because) none of plaintiff's payments during the relevant period...was made in a timely fashion ")],

[D] **Home Ownership and Equity Protection Act**, 15 U.S.C. § 1639 [HOEPA][Bank of New York v. Walden[281] (counterclaiming borrowers allege violations of TILA, HOEPA and Regulation Z; " mortgages were placed on...defendants' properties without their knowledge or understanding. Not the slightest attempt at compliance with applicable regulations was made by the lenders. No Truth in Lending disclosures or copies of any of the loan documents signed at the closing were given to the defendants. Thus, plaintiffs did not comply with TILA and Regulation Z...It also appears that the lenders violated HOEPA and Regulation Z in that they extended credit to the defendant based on their collateral rather than considering their incomes...The lenders also violated Regulation Z which prohibits lenders from entering

into a balloon payment note with borrowers on high-interest, high fee loans ").

[D.1] **Reverse Mortgages**

Reverse mortgages are similar to equity home loans. In Richstone v. Everbank Reverse Mortgage, LLC, 27 Misc. 3d 1201 (N.Y. Sup. 2009) the Court defined a " A reverse mortgage is a type of mortgage loan in which a homeowner borrows money against the value of the home...Repayment of the mortgage loan is not required until the borrower dies or the home is sold. Through a reverse mortgage, older homeowners can convert part of the equity of their homes into income...' The reverse mortgage is aptly named because the payment stream is reversed '. Instead of making monthly payments to a lender, as with a regular mortgage, a lender makes payments to you '"; See also: Reverse Mortgages: Know the traps, Consumer Reports March 2011, 14).

[E] **Regulation Z**, 13 C.F.R. §§ 226.1 et seq. [Bank of New York v. Walden[282]].

[E.1] **Preemption of State Law Claims**

TILA has been held to preempt Personal Property Law

provisions governing retail instalment contracts and retail credit agreements [Albank, FSB v. Foland[283]], but not consumer fraud claims brought under G.B.L. §§ 349, 350 [In People v. Applied Card Systems, Inc.[284]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 tp ' 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 ". Both TILA and RESPA have been held to " preempt any inconsistent state law " [Rochester Home Equity, Inc. v. Upton[285]) and " *de minimis* violations with ' no potential for actual harm ' will not be found to violate TILA "[286]. See also: Witherwax v. Transcare[287] (negligence claim stated against debt collection agency)].

[E.2] **Choice Of Law Provisions; Statute Of Limitations**

In Portfolio Recovery Associates, LLC v. King, 14 NY3d 410 (Ct. App. 2010) the Court of Appeals held that a Delaware choice of law clause in a credit card agreement would not be enforced as to a statute of limitations which is procedural in nature but would be enforced under CPLR 202, the borrowing statute. " Therefore,

' [w]hen a non-resident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued '". See also Galacatos, Sheftel-Gomes and Martin, Borrowed Time: Applying Statute Of Limitations In Consumer Debt Cases, N.Y.L.J., March 3, 2010, p. 4.

[E.3] **Credit Card Accountability, Responsibility and Disclosures Act of 2009**

" Some of the key provisions of the Credit Card Act and the final rule are: (1) Prohibiting credit card issuers from increasing the interest rate that applies to an existing balance. Exceptions

...include variable rates, expiration of promotional rates or if the cardholder is over 60 days late; (2) Prohibiting credit card

issuers from raising the interest rates at all during the first year of an account, unless one of the above exceptions applies..." [Fed Issues Rules To Implement Credit Card Act, NCLC Reports, Vol. 28, January/February 2010 p. 15].

"On June 29, 2010, the Fed published a final rule implementing the reasonable and proportional fee requirements to take effect August 22, 2010. There is no private right of action for violations because the CARD Act...Practitioners may...be able to challenge penalty provisions...by using state laws that prohibit unfair and deceptive acts or practices...The final rule establishes several bright line prohibitions for penalty fees. First, a penalty fee cannot exceed the dollar amount associated with the violation or omission. In the case of a late payment, the dollar amount at issue would be required minimum payment...Second, the final rule bans fees for which there is no dollar amount associated withe the violation...Finally the rule prohibits issuers from imposing multiple penalty fees based on a single event or transaction".

[FRD Limits and Even Eliminates Credit Card Penalty Fees, NCLC Reports, Consumer Credit and Usury Edition, Vol. 28, May/June 2010, p. 21; Credit-card gotchas, Consumer Reports November 2010 at p. 13].

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

In Dougherty v. North Ford Bank[288] the Court found that the lender had violated R.P.L. § 274-a(2)(a) which prohibits the charging of fees for " for providing mortgage related documents " by charging the consumer a $5.00 " Facsimile Fee " and a $25.00 " Quote Fee ". In MacDonell v. PHM Mortgage Corp., __ A.D. 3d__, 846 N.Y.S. 2d 223 (2d Dept. 2007) a class of mortgagors challenged defendant's $40 fee " charged for faxing the payoff statements " [which plaintiffs paid] asserting 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 "] and common law causes of action alleging unjust enrichment, money had and received and conversion. The Court sustained the statutory claims finding that the voluntary payment rule does not apply [See Dowd v. Alliance Mortgage Co., 32 A.D. 3d 894, 822 N.Y.S. 2d 558 (2d Dept. 2006); Dougherty v. North Fork Bank, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2d Dept. 2003); Negrin v. Norwest Mortgage, 263 A.D. 2d 39, 700 N.Y.S. 2d 184 (2d Dept. 1999)] but does serve to bar the common law claims and noting that " To the extent that our decision in Dowd v. Alliance Mortgage Co., 32 A.D. 3d 894, 822 N.Y.S. 2d 558 (2d Dept. 2006)[See generally Dillon v. U-A Columbia Cablevision of Westchester, 100 N.Y. 2d 525, 760 N.Y.S. 2d 726, 790 N.E. 2d 1155 (2003)] holds to the contrary it

should not be followed ".

In Dowd v. Alliance Mortgage Company [289] a class of mortgages alleged that defendant violated Real Property Law [RPL] 274-a and GBL 349 by charging a "'priority handling fee' in the sum of $20, along with unspecified 'additional fees' for providing her with a mortgage note payoff statement". The Appellate Division, Second Department, granted class certification to the RPL 274-a and GBL 349 claims but denied certification as to the money had and received causes of action "since an affirmative defense based on the voluntary payment doctrine...necessitates individual inquiries of class members".

But in Fuchs v. Wachovia Mortgage Corp.[290], a class of mortgagees challenged the imposition of a $100 document preparation fee for services as constituting the unauthorized practice of law and violative of Judiciary Law 478, 484 and 495(3). Specifically, it was asserted that bank employees " completed certain blank lines contained in a standard ' Fannie Mae/Freddie Mac Uniform Instrument '...limited to the name and address of the borrower, the date of the loan and the terms of the loan, including the principal amount loaned, the interest rate and the monthly payment ". The plaintiffs, represented by counsel did not allege the receipt of any legal advice from the defendant at the closing. In dismissing the complaint that Court held that charging " a fee and the preparation of the documents ...did not

transform defendant's actions into the unauthorized practice of law ".

[F.1] **Electronic Fund Transfer Act: 15 U.S.C. § 1693f**

In Household Finance Realty Corp. v. Dunlap[291], a mortgage foreclosure proceeding arising from defendant's failure to make timely payments, the Court denied plaintiff's summary motion since it was undisputed " the funds were available in defendant's account to cover the preauthorized debit amount " noting that the Electronic Funds Transfer Act [EFTA] was enacted to ' provide a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund transfer systems '...Its purpose is to ' assure that mortgages, insurance policies and other important obligations are not declared in default due to late payment caused by a system breakdown '...As a consumer protect measure, section 1693j of the EFTA suspends the consumer's obligation to make payment ' [i]f a system malfunction prevents the effectuation of an electronic fund transfer initiated by [the] consumer to another person and such other person has agreed to accept payment by such means '".

In Hodes v. Vermeer Owners, Inc.[292] (landlord and tenant " contemplated the use of the credit authorization for the preauthorized payment of rent or maintenance on substantially

regular monthly intervals "; landlord's unauthorized withdrawal of $1,066 to pay legal fees without advanced notice " constituted an unauthorized transfer pursuant to 15 USC § 1693e ".

[F.2] **Predatory Lending Practices; High-Cost Home Loans**

In LaSalle Bank, N.A. v. Shearon[293] the plaintiff bank sought summary judgment in a foreclosure action [" financing was for the full $355,000 "] to which defendant homeowners [" joint tax return of $29,567 "] responded by proving that the original lender had engaged in predatory lending and violated New York State Banking Law 6-l(2). The court found three violations including (1) Banking Law 6-l(2)(k) [" which deals with the plaintiff's due diligence into the ability of the defendants to repay the loan. The plaintiff has not offered one scintilla of evidence of any inquiry into the defendant's ability to repay the loan "], (2) Banking Law 6-l(2)(l)(i) [" which requires lending institutions to provide a list of credit counselors licensed in New York State to any recipient of a high cost loan "] and (3) Banking Law 6-l(2)(m) [" which states that no more that 3% of the amount financed is eligible to pay the points and fees associated with closing the loans on the real property...The $19,145.69 in expenses equates to almost 5.4% of the high cost loan and is a clear violation of the statute "]. With respect to available

remedies the Court stated that defendants " may be entitled to receive: actual, consequential and incidental damages, as well as all of the interest, earned or unearned, points, fees, the closing costs charged for the loan and a refund of any amounts paid " [see discussion of this case in Scheiner, Federal Preemption of State Subprime Lending Laws, New York Law Journal, April 22, 2008, p. 4 and the case of Rose v. Chase Bank USA, N.A., 513 F. 3d 1032 (9th Cir. 2008)].

However, in Alliance Mortgage Banking Corp. v. Dobkin[294], also a foreclosure action wherein the defense of predatory lending was raised, the Court held that " She has claimed she was the victim of predatory lending, but has not demonstrated that there was any fraud on the part of the lender or even any failure to disclose fully the terms of the loan. She relies on only one statute, Banking Law 6-l. However, she has not been able to provide any proof that she falls under its provisions, nor under a related Federal statute. See Home Ownership and Equity Protection Act of 1994 [' HOEPA '](15 USC 1639). Neither of these statutes allow mortgagors to escape their legal obligations simply because they borrowed too much ".

[F.3] **Mortgage Brokers: Licensing** [Dell'Olio v. Law Office of Charles S. Spinardi PC, New York Law Journal, Feb. 16, 2011, p. 25, col. 1 (N.Y. Civ.)("Defendant was performing non-legal

services in regard to the modification of claimant's mortgage, it was not incidental to the rendering of legal services, it was the principal function for which he was retained. As such, he was required to be licensed by the Banking Department as a mortgage banker or mortgage broker. The failure to be properly licensed requires the defendant to refund the fees the claimant paid to him")].

[F.4] **Foreclosures: Notice And Standing**

The good news is that the five largest mortgage servicers (Bank of America, JP Morgan Chase, Wells Fargo, Citigroup and Ally Financial) have agreed to pay some two million borrowers some $26 Billion dollars (see Schwartz & Dewan, States Negotiate @26 Billion Agreement for Homeowners, 222.nytimes.com (2/10/2012)("It is part of a broad national settlement aimed at halting the housing market's downward slide and holding the banks accountable for foreclosure abuses"); Caher, A.G. Touts Benefits to New Yorkers of Global Foreclosure Settlement, New York Law Journal, 2/10/2012).

Even better news are two first impression mortgage foreclosure cases in which the Appellate Division, Second Department clarified the notice requirements of RPAPL § 1304 and the standing of Mortgage Electronic Registration Systems, Inc.

(MERS). MERS was created in 1993 to "'streamline the mortgage process by using electronic commerce to eliminate paper', [and facilitate] the transfer of loans into pools of other loans which were then sold to investors as securities [and which avoids] the payment of fees which local governments require to record mortgages'.[295] In Bank of New York v Silverberg,[296] the court, noting the Court of Appeals' decision in *Matters of* MERSCORP, Inc. v Romaine,[297] ("whether MERS has standing to prosecute a foreclosure action remained for another day") and that MERS "purportedly holds approximately 60 million mortgage loans and is involved in the origination of approximately 60% of all mortgage loans in the United States", distinguishing Mortgage Elec. Recording Sys. Inc. v Coakley [298] and being mindful of the possible impact its decision "may have on the mortgage industry in New York and perhaps the nation", held that MERS as "nominee and mortgagee for purposes of recording [is unable] to assign the right to foreclose upon a mortgage...absent MERS's right to, or possession of the actual underlying promissory note."

And in Aurora Loan Services, LLC v Weisblum, [299] the court not only held that the plaintiff lacked standing to foreclose on the mortgage ("there is nothing in the [mortgage] document to establish the authority of MERS to assign the first note [or] that MERS initially physically possessed the note") but equally important found that plaintiff had failed to comply with the

notice requirements of RPAPL § 1304 and provide defaulting mortagees with "'a list of at least five housing counseling agencies' with their 'last known addresses and telephone numbers.'" Rejecting the concept of constructive notice in the absence of shown prejudice, the court held that "proper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of a foreclosure action."

[G] **Credit Cards: Misrepresentations** [People v. Applied Card Systems, Inc.[300] (misrepresenting the availability of certain pre-approved credit limits; " 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 "), mod'd In People v. Applied Card Systems, Inc.[301] (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 tp ' 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 "); People v. Telehublink[302] (" telemarketers told prospective customers that they were pre-approved for a credit card and they could receive a low-interest credit card for an advance fee of approximately $220. Instead of a credit card, however, consumers who paid the fee received credit card applications, discount coupons, a merchandise catalog and a credit repaid manual "); Sims v. First Consumers National Bank[303], (" The gist of plaintiffs' deceptive practices claim is that the typeface and location of the fee disclosures, combined with high-pressure advertising, amounted to consumer conduct that was deceptive or misleading "); Broder v. MBNA Corporation[304] (credit card company misrepresented the application of its low introductory annual percentage rate to cash advances)].

H] **Identity Theft: G.B.L. §§ 380-s, 380-l**

In Kudelko v. Dalessio[305] the Court declined to apply retroactively to an identity theft scheme, G.B.L. §§ 380-s and

380-l which provide a statutory cause of action for damages [actual and punitive] for identity theft [" Identity theft has become a prevalent and growing problem in our society with individuals having their credit ratings damaged or destroyed and causing untold financial burdens on these innocent victims. As stated above the New York State Legislature, recognizing this special category if fraudulent conduct, gave individuals certain civil remedies when they suffered this harm "] but did find that a claim for fraud was stated and the jury could decide liability, actual and punitive damages, if appropriate.

In Lesser v. Karenkooper.com[306] the plaintiff " an E-Bay on-line store selling pre-owned luxury handbags and accessories, claims that defendant Karenkooper.com, a website selling luxury goods...sought to destroy her business (i) by making false allegations about her and her business on the internet (and alleges, inter alia) statutory identity theft pursuant to (GBL) 380-s ". In dismissing the 380-s claim the Court noted that " The claim asserted by plaintiff...does not involve credit reporting in any way and thus does not appear to fall within the intended scope of GBL 380-s ".

I] **Debt Collection Practices: G.B.L. Article 29-H**

See FTC Report, Repairing A Broken System, Protecting

Consumers in Debt Collection Litigation and Arbitration, at www.ftc.gov/os/2010/07/debtcollectionreport.pdf

In American Express Centurion Bank v. Greenfield[307] the Court held that there is no private right of action for consumers under G.B.L. §§ 601, 602 [Debt Collection Practices]; See also Varela v. Investors Insurance Holding Corp[308]. In People v. Boyajian Law Offices[309] the Court noted that NYFDCPA (GBL 600(1)) " is a remedial statute and, as such, should be liberally construed... This is particularly true since the statute involves consumer protection...It is clear that the NYFDCPA was intended to protect consumers from improper collection practices...the Court will not read the statute as to preclude applying these protections to debtors whose checks were dishonored "); People v. Applied Card Systems, Inc.[310](" considering the allegation that ACS engaged in improper debt collection practices (G.B.L. Article 29-H) the record reflects that despite an initial training emphasizing the parameters of the Debt Collection Procedures Act, the practice changed once actual collection practices commenced. ACS employees were encouraged to use aggressive and illegal practices and evidence demonstrated that the salary of both the collector and the supervisor were determined by their success...ACS collectors used rude and obscene language with consumers, repeatedly called them even when requested not to do so, misrepresented their identities to gain access and made unauthorized debits to consumer

accounts "), mod'd In People v. Applied Card Systems, Inc.[311]).

In Centurion Capital Corp. v. Druce[312] (plaintiff, a purchaser of credit card debt, was held to be a debt collector as defined in Administrative Code of City of New York § 20-489 and because it was not licensed its claims against defendant must be dismissed. In addition, defendant's counterclaim asserting that plaintiff violated G.B.L. § 349 by " bringing two actions for the same claim...is sufficient to state a (G.B.L. § 349) cause of action "]. In MRC Receivables Corp. v. Pedro Morales[313](" In this action to collect on a credit card debt, Civil Court properly " found that plaintiff debt collector need not be licensed pursuant to New York City Administrative Code Section 20-489 because of insufficient evidence that plaintiff's "' principal purpose...is to regularly collect or attempt to collect debts owed or due or asserted to be owed or due to another "); In Asokwah v. Burt[314] the Court addressed " the issue of whether the defendant improperly collected funds in excess of the outstanding judgment. The plaintiff asks this Court to determine whether the defendant improperly served additional restraining... even though the defendant had already restrained sufficient funds in plaintiff's Citibank account "

[J] **Fair Debt Collective Practices Act: 15 U.S.C. § 1692e, 1692k** [Kapsis v. American Home Mortgage Servicing Inc.,

2013 WL 544010 (E.D.N.Y. 2013)("(Here) Plaintiff alleges that AHMSI violated (GBL) 349 by, inter alia, failing to properly credit accounts...after payments were made, failing to timely respond to communications sent by debtors, issuing false or misleading monthly statement and escrow projection statements and refusing to provide detailed accountings to debtors for sums allegedly owed"; claim stated Fair Debt Collection Practices Act and Real Estate Settlement Procedures Act (RESPA) and GBL § 349); Jacobson v. Healthcare Financial Services, Inc., 516 F. 3d 85 (2d Cir. 2008)(we " hold that the recipient of a debt collection letter covered by the FDCPA validly invokes the right to have the debt verified whenever she mails a notice if dispute within thirty days of receiving a communication from the debt collector "); Wade v. Rosenthal, Stein & Associates, LLC, 2012 WL 3764291 (E.D.N.Y. 2012)(motion to amend complaint denied since claims to be asserted futile); Catillo v. Balsamo Rosenblatt & Cohen, P.C.[315](in non-payment proceeding tenant seeks unspecified damages for alleged violations of Fair Debt Collection Practices Act; summary judgment motions denied); Sykes v. Mel Harris and Associates, LLC[316] ("Plaintiffs allege that (defendants) entered into joint ventures to purchase debt portfolios, pursued debt collection litigation en masse against alleged debtors and sought to collect millions of dollars in fraudulently obtained default judgments...In 2006, 207 and 2008 they filed a total of 104,341 debt collection actions in New York City Civil Court...Sewer

service was integral to this scheme"; GBL 349 claim sustained as to one plaintiff); Larsen v. LBC Legal Group, P.C.[317](lawfirm qualified as debt collector under FDCPA and violated various provisions thereof including threatening legal action that could not be taken, attempts to collect unlawful amounts, failing to convey true amount owed); People v. Boyajian Law Offices[318] (lawfirm violated FDCPA by threatening litigation without an intent to file suit, sought to collect time-barred debts and threatened legal action thereon and use of accusatory language); Barry v. Board of Managers of Elmwood Park Condominium[319] (FDCPA does not apply to the collection of condominium common charges because " common charges run with the unit and are not a debt incurred by the unit owner "); American Credit Card Processing Corp. V. Fairchild[320] (FDCPA does not apply to business or commercial debts; " The FDCPA provides a remedy for consumers who are subjected to abusive, deceptive and unfair debt collection practices by debt collectors. The term ' debt ' as used in that act is construed broadly to include any obligation to pay monies arising out of a consumer transaction...and the type of consumer transaction giving rise to a debt has been described as one involving the offer or extension of credit to a consumer or personal, family and household expenses ")].

[K] **Standing: Foreclosures** [Wells Fargo Bank v. Reyes[321]

(" With Wells Fargo's failure to have ever owned the Reyes' mortgage, the Court must not only deny the instant motion, but also dismiss the complaint and cancel the notice of pendency filed by Wells Fargo...This Court will examine the conduct of plaintiff's counsel in a hearing pursuant to 22 NYCRR Section 130-1.1 to determine if plaintiff's counsel engaged in frivolous conduct ")].

[L] **Lawsuit Loans** [See Applebaum, Lawsuit Loans Add New Risk for the Injured, NYTimes Online January 16, 2011 ("The business of lending to plaintiffs arose over the last decade, part of a trend in which banks, hedge funds and private investors are putting money into other people's lawsuits. But the industry, which now lends plaintiffs more than $100 million a year, remains unregulated in most states, free to ignore laws that protect people who borrow from most other kinds of lenders. Unrestrained by laws that cap interest rates, the rates charged by lawsuit lenders often exceed 100 percent a year...Furthermore, companies are not required to provide clear and complete pricing information-and the details they do give are often misleading"); Walder, Former Client Blames Firm for 'Usurious' Funding of Suit, New York Law Journal, March 14, 2010, p. 1 ("Waiting for a personal injury lawsuit to settle in 2004, Juan Rodriquez was short of cash when he says his former attorney at Jacoby & Meyers

suggested he take out a $30,000 advance with a litigation funding company. Seven years later, Mr. Rodriquez, will owe Whitehaven Financial Group as much as $800,000 if he settles his suit, is accusing Jacoby & Meyers of encouraging him and other clients who are down on their luck to seek litigation loans with 'usurious' rates")].

[M] **Securities** [See Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc.[322] (Martin Act does not preclude a non-fraud cause of action; Martin Act does not preempt guarantor's common law breach of fiduciary duty and gross negligence claims); Berenger v. 261 W. LLC[323]("There is no private right of action where the fraud and misrepresentation relies entirely on alleged omissions in filings required by the Martin Act...the Attorney General enforces its provisions and implementing regulations"); Merin v. Precinct Developers LLC, 74 A.D. 3d 688, 902 N.Y.S. 2d 821 (1st Dept. 2010)("To the extent the offering can be construed as directed at the public, the section 349 claim is preempted by the Martin Act"); Assured Guaranty (UK) Ltd. v. J.P. Morgan, 80 A.D. 3d 293, 915 N.Y.S. 2d 7 (1st Dept. 2010)("In fact, New York State courts seem to be moving in the opposite direction from their federal brethren on the issue of preemption...there is nothing in the plain language of the Martin Act...that supports defendant's argument that the Act preempts

otherwise validly pleaded common-law causes of action")].

[N] **Subprime Residential Loan and Foreclosure Laws** [See Keshner, Conferences Prevent Foreclosures But Strain Courts, OCA Reports, New York Law Journal, November 29, 2010, p. 1("the courts held 89,093 foreclosure conferences from Jan. 1 (2010) through Oct. 20 (2010)...At the same time the number of pending foreclosure cases has grown to 77,815 from 54,591 last year. Foreclosure cases now represent 28.6 percent of all pending civil cases statewide"); Dillon, The Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, but not Legislatively Perfect, 30 Pace L. Rev. 855 (2009-2010)("This article examines the newly-enacted CPLR 3408 as it pertains to foreclosure actions filed in the State of New York. As will be shown below, CPLR 3408 fulfills a worthwhile purpose of requiring early settlement conferences with the trial courts, in the hope of preserving family home ownership, particularly for minorities and the poor, who are, statistically most affected by the crisis in subprime mortgages")].

[O] **Dodd-Frank Wall Street Reform and Consumer Protection Act** [See Impressive New Reach of State AG Enforcement Authority, NCLC Reports, Deceptive Practices Edition, Jan/Feb 2011, p. 18 ("The Dodd-Frank Act appears to provide attorneys general, effective July 21, 2001, the authority to enforce most federal consumer credit

legislation...This result is consistent with the intent of the Dodd-Frank Act to 'put more cops on the beat' by empowering state attorneys general to police the market")].

[P] **Mortgage Assistance Relief Services** [See FTC Rule on Mortgage Assistance Relief Services (MARS) Goes Into Effect, NCLC Reports, Deceptive Practices Edition, Vol. 29, Sept/Oct 2010, p. 9 (" targeting rampant abuses by loan modification and foreclosure rescue companies (www.ftc.gov/opa/2010/11/mars.shtm). The advance fee takes effect January 29, 2011...The rule creates significant limitations on MARS scams, prohibiting various forms of misconduct and banning advance payment for MARS work. Rule violations should be enforceable privately as a state UDAP (GBL 349) violation")].

[Q] **Debt Buyers** [See More Courts Dismissing Debt Buyer Suits for Lack of Evidence, NCLC Reports, Debt Collection Edition, Nov/Dec 2010, p. 11 ("Debt buyers pay pennies on the dollar for the right to collect credit card and other consumer debts, but often do not pay the creditor for most of the information, records and contracts involved with the debts. Debt buyers file millions of suits in assembly line fashion obtaining billions of dollars of default judgments, often with virtually no evidence that the person sued actually owed the debt. It is not unusual for the wrong person to be forced to pay a judgment or a person forced to pay the same

debt twice"); See also: "Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers " at www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf].

[R] **Credit Card Defaults & Mortgage Foreclosures**

Credit card default and mortgage foreclosure cases have increased dramatically in New York State and have generated an extraordinary response on the part of our Civil Courts[324]. A recent study[325] by the Urban Justice Center discussed " the explosion of consumer debt cases in the New York City Civil Court in recent years. Approximately, 320,000 consumer debt cases were filed in 2006, leading to almost $800 million in judgments. The report notes that this is more filings than all the civil and criminal cases in U.S. District Courts...findings of the report include (1) The defendant failed to appear in 93.3% of the cases, (2) 80% of cases result in default judgments, (3) Even when defendants appear, they were virtually never represented by counsel, (4) Almost 90% of cases are brought by debt buyers "[326]. " In the second quarter of 2009, nearly 240,000 New Yorkers were past due on their mortgages. Over the coming four years, estimates show an equal number of homes will be lost to foreclosure in that one state alone "[327].

Home foreclosures have increased dramatically leading New York

State Court of Appeals Chief Justice Kaye to note that " Since January 2005, foreclosure filings have increased 150 percent statewide and filing are expected to ruse at least an additional 40 percent in 2008 " and to announce a residential foreclosure program to " help ensure that homeowners are aware of available legal service providers and mortgage counselors who can help them avoid unnecessary foreclosures and reach-of-court resolutions "[328].

In addition, the Courts have responded vigorously as well [see Recent Standing Decisions from New York, NCLC Reports, Bankruptcy and Foreclosures Edition, Vol. 26, March/April 2008, p. 19 (" In a series of recent decisions several New York courts[329] either denied summary judgment or refused to grant motions for default to plaintiffs who provided the courts with clearly inadequate proof of their standing to foreclose ") including the application of New York State's predatory lending and " high-cost home loan " statute as an affirmative defense in foreclosure proceedings[330].

[R.1] **Adjudicating Credit Card Defaults and Foreclosures**

Several Courts have sought to establish appropriate standards for adjudicating credit card default claims brought by lenders. See e.g. Midland Funding LLV v. Loreto[331](summary judgment by credit

card issuer denied for failure to produce original application or credit agreement; inquiry as to whether plaintiff's documents may be "robo" documents); American Express Bank v. Tancreto(credit card payment default action dismissed; "Here, Ms. Salas' testimony could only be termed 'robo-testimony' because like 'robo[332]-signing' it was identical to the foundational testimony in other trials which mirrored the statutory language of CPLR 4518(a) regardless of the underlyibng documents"), American Express Bank, FSB v. Dalbis, New York Law Journal, March 22, 2011, p. 25 (N.Y. Civ. 2011)("The utter failure of large numbers of consumer credit plaintiffs to prove their cases has created substantial problems requiring the courts to take steps to insure that the due process rights of the unrepresented debtors and even defaulting defendants are protected"); Raiolo v. B.A.C. Home Loans, 29 Misc. 3d 1227(A) (N.Y. Civ. 2010)("Part of the problem created by the current mortgage foreclosure crisis could be resolved by two relatively simple pieces of legislation. One would make all mortgage brokers fiduciaries of the borrower so that they would use their best efforts for the benefit of the client and not be motivated by 'kickback' euphemistically described as a 'yield-spread' in the transaction...The second borrower protection legislation would be to require the lender to issue a disclosure advising the borrower to consult with or obtain independent counsel...and then having any borrower who proceeds without counsel to sign a waiver form").

In Citibank (South Dakota), NA v. Martin[333] the Court, after

noting that " With greater frequency, courts are presented with summary judgment motions by credit card issuers seeking a balance due from credit card holders which motions fail to meet essential standards of proof and form in one or more particulars ", set forth much needed standards of proof regarding, *inter alia*, assigned claims, account stated claims, tendering of original agreements, requests for legal fees and applicable interest rates.

In MBNA America Bank, NA v. Straub,[334] the Court set forth appropriate procedures for the confirmation of credit card arbitration awards. " After credit card issuers and credit card debt holders turn to arbitration to address delinquent credit card accounts, as they do increasingly, courts are presented with post-arbitration petitions to confirm arbitration awards and enter money judgments (CPLR 7510). This decision sets out the statutory and constitutional framework for review of a petition to confirm a credit card debt arbitration award, utilizing legal precepts relating to confirming arbitration awards and credit cards, a novel approach most suited to this type of award. Briefly put, to grant a petition to confirm an arbitration award on a credit card debt, a court must require the following: (1) submission of the written contract containing the provision authorizing arbitration; (2) proof that the cardholder agreed to arbitration in writing or by conduct, and (3) a demonstration of proper service of the notice of arbitration hearing and of the award. In addition, the court must

consider any supplementary information advanced by either party regarding the history of the parties' actions. Judicial review of the petition should commence under the New York provisions governing confirmation of an arbitration award but- if the written contract and cardholder agreement are established by the petition- the manner of service of the notice and award and treatment of supplementary information should be considered under the Federal Arbitration Act provisions (9 U.S.C. § 1, et seq., ' FAA') ".

In MBNA America Bank, NA v. Nelson[335]the Court stated that " Over the past several years this Court has received a plethora of confirmation of arbitration award petitions. These special proceedings commenced by a variety of creditors...seek judgment validating previously issued arbitration awards against parties who allegedly defaulted on credit card debt payments. In most of these cases the respondents have failed to answer...the judiciary continues to provide an important role in safeguarding consumer rights and in overseeing the fairness of the debt collection process. As such this Court does not consider its function to merely rubber stamp confirmation of arbitration petitions...Specifically, ' an arbitration award may be confirmed upon nonappearance of the respondent only when the petitioner makes a prima facie showing with admissible evidence that the award is entitled to confirmation '... Petition dismissed without prejudice (for failure of proof)". The Court also created " two checklist short form order decisions to help provide guidance and a sense of

unity among the judges of the Civil Court of New York. One provides grounds for dismissal without prejudice...The other lists grounds for dismissal with prejudice ".

In American Express Travel Related Services Company v. Titus Assih, 26 Misc. 3d 1016 (N.Y. Civ. 2009) the Court dismissed plaintiff credit card issuer's action collect credit card charges from defendants. In " the Land of Credit Cards permits consumers to be bound by agreements they never sign-agreements that may have never received-subject to change without notice and the laws of a state other than those existing where they reside...Plaintiff's cause of action is dismissed...there is no proof of an assignment of the claim to plaintiff. There is no proof that the agreement presented by plaintiff is the one which was in effect during the period of the transaction. The cause of action is also dismissed on the ground that the interest rate is usurious under New York law making the underlying contract void ".

In MBNA America Bank NA v. Pacheco[336] the Court denied a motion to confirm an arbitration award for lack of proper service. In LVNV Funding Corp v. Delgado[337] and Palisades Collection, LLC v. Diaz[338] the Court was " unwilling to grant extensions of time to properly serve a defendant...absent proof of a meritorious claim "). In Chase Bank USA N.A. v. Cardello[339] (" Allowing the assignee to give notice would enable dishonest debt collectors to search the court records, obtain the names of judgment debtors and send the debtor a letter stating they have purchased the debt from credit card

issuers such as Chase and should make all payments to the third party. Requiring the assignor-credit card issuer to serve the notice would reduce the incidents of fraud in this regard "). In Emigrant Mortgage Co., Inc. v. Corcione[340] the Court found a loan modification agreement " unconscionable, shocking or egregious (and)forever barred and prohibited (the plaintiff) from collecting any of the claimed interest accrued on the loan...recovering any claimed legal fees and expenses as well as any and all claimed advances to date (and imposed) exemplary damages in the sum of $100,000 "). In DNS Equity Group, Inc. v. Lavallee, 26 Misc. 3d 1228 (Nassau Dist. Ct. 2010) denied a summary judgment motion brought by an alleged assignee of a credit card debt for a failure to follow " the applicable rules ". In Citibank (SD) N.A. v. Hansen, 2010 WL 1641151 (Nassau Dist. Ct. 2010) the Court addressed the " What proof does a national bank need to submit in order to justify an award that includes interest charges far in excess of New York's usury limits? In Erin Services Co. LLC v. Bohnet, 26 Misc. 3d 1230 (Nassau Dist. Ct. 2010) the Court noted that " This matter, regrettably, involves a veritable ' perfect storm ' of mistakes, errors, misdeeds and improper litigation practices by plaintiff's counsel (which) are being sanctioned [$14,800.00] for multiple acts of frivolous conduct throughout the course of this matter ").

[R.2] **Unconscionable & Deceptive**

In Emigrant Mortgage Co., Inc. v. Fitzpatrick, 29 Misc. 3d 746, 906 N.Y.S. 2d 874 (N.Y. Sup. 2010), a foreclosure action involving subprime or high cost home loans, the Court stated that "Such submissions raise an issue of fact as to whether the mere extension of an asset-based secured loan, a type of loan used almost exclusively in commercial business lending to provide working capital, to defendant Fitzpatrick as a residential home loan was grossly unreasonable or unconscionable...defendant Fitzpatrick's allegation that the loan agreement was unreasonably favorable to the plaintiff because the plaintiff knew or should have known that she could not afford the terms of the agreement sufficiently states a claim for substantive unconscionability").

[12] **Overcoats Lost At Restaurants: G.B.L. § 201**

" For over 100 years consumers have been eating out at restaurants, paying for their meals and on occasion leaving without their simple cloth overcoats...mink coats...mink jackets...racoon coats...Russian sable fur coats...leather coats and, of course, cashmere coats..."[341]. In DiMarzo v. Terrace View[342], restaurant personnel encouraged a patron to remove his overcoat and then refused to respond to a claim after the overcoat disappeared from

their coatroom. In response to a consumer claim arising from a lost overcoat the restaurant may seek to limit its liability to $200.00 as provided for in General Business Law § 201 [" GBL § 201 "]. However, a failure to comply with the strict requirements of GBL § 201 ["' as to property deposited by...patrons in the...checkroom of any...restaurant, the delivery of which is evidenced by a check or receipt therefor and for which no fee or charge is exacted...'"[343]] allows the consumer to recover actual damages upon proof of a bailment and/or negligence[344]. The enforceability of liability limiting clauses for lost clothing will often depend upon adequacy of notice [Tannenbaum v. New York Dry Cleaning, Inc.[345] (clause on dry cleaning claim ticket limiting liability for lost or damaged clothing to $20.00 void for lack of adequate notice); White v. Burlington Coat Factory[346]($100 liability limitation in storage receipt enforced for $1,000 ripped and damaged beaver coat)].

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

"' (a pyramid scheme) is one in which a participant pays money...and in return receives (1) the right to sell products, and (2) the right to earn rewards for recruiting other participants into the scheme '"[347]. Pyramid schemes are sham money making schemes which prey upon consumers eager for quick riches. General Business

Law § 359-fff [" GBL § 359-fff "] prohibits " chain distributor schemes " or pyramid schemes voiding the contracts upon which they are based. Pyramid schemes were used in Brown v. Hambric[348] 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[349], 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[350], other Courts have found that GBL 359-fff gives consumers a private right of action[351], a violation of which also constitutes a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs[352].

[14] **Retail Sales And Leases**

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

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

locker[353], car rental agreements[354], home improvement contracts[355], giftcards [see below], equipment leases [see below], insurance policies[356], dry cleaning contracts[357] and financial brokerage agreements[358]. However, this consumer protection statute is not available if the consumer also relies upon the same size type[359] and does not apply to cruise passenger contracts which are, typically, in smaller type size and are governed by maritime law [see e.g., Lerner v. Karageorgis Lines, Inc.[360] (maritime law preempts state consumer protection statute regarding type size; cruise passenger contracts may be in 4 point type) and may not apply if it conflicts with federal Regulation Z [Sims v. First Consumers National Bank[361](" Regulation Z does not preempt state consumer protection laws completely but requires that consumer disclosures be ' clearly and conspicuously in writing ' (12 CFR 226.5(a)(1)) and, considering type size and placement, this is often a question of fact "). In Goldman v. Simon Property Group, Inc.[362], 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. In an earlier decision the Court found that these claims were not preempted by federal law[363].

The controversy between gift card issuers [a multi-billion

dollar business] and cooperating banks and consumers over the legality of excessive fees including expiration or dormancy fees persists with gift card issuers trying to morph themselves into entities protected from state consumer protection statutes by federal preemption. In three New York State class actions purchasers of gift cards challenged, *inter alia*, the imposition of dormancy fees by gift card issuers[364] (See Lonner v Simon Property Group, Inc.[365], Llanos v Shell Oil Company[366] and Goldman v Simon Property Group, Inc.[367]). The most recent battle is over whether or not actions (which rely upon the common law and violations of consumer protection statutes such as GBL §§ 349, 396-I and CPLR § 4544) brought by New York residents against gift card issuers and cooperating banks are preempted by federal law[368].

Although this issue seemingly was resolved earlier in *Goldman*[369] two recent Nassau Supreme Court decisions have taken opposite positions on the issue of federal preemption. In L.S. v Simon Property Group, Inc.[370], a class action challenging, inter alia, a renewal fee of $15.00 imposed after a six months expiration period, raised the issue anew by holding that the claims stated therein were preempted by federal law. However, most recently the Court in Sheinken v Simon Property Group, Inc.[371], a class action challenging dormancy fees and account closing fees, held that "the National Bank Act and federal law do not regulate national banks exclusively such that *all* state laws that might affect a national

bank's operations are preempted." Distinguishing *SPGCC, LLC v Ayotte*[372] and replying on *Lonner* and *Goldman* the Court denied the motion to dismiss on the grounds of federal preemption.

[A.1] **Dating Services: G.B.L. § 394-c**

G.B.L. § 394-c applies to a social referral service which charges a " fee for providing matching of members of the opposite sex, by use of computer or any other means, for the purpose of dating and general social contact " and provides for disclosures, a three day cancellation requirement, a Dating Service Consumer Bill of Rights, a private right of action for individuals seeking actual damages or $50.00 which ever is greater and licensing in cities of 1 million residents [See e.g., Doe v. Great Expectations[373] (" Two claimants sue to recover (monies) paid under a contract for defendant's services, which offer to expand a client's social horizons primarily through posting a client's video and profile on an Internet site on which other clients can review them and, therefore, as desired, approach a selected client for actual social interaction "; defendant violated G.B.L. § 394-c(3) by implementing a " massive overcharge " [" Where, as here, the dating service does not assure that it will furnish a client with a specified number of social referrals per month, the service may charge no more than $25 "] and § 394-c(7)(e) by failing to provide claimants

with the required " Dating Service Consumer Bill of Rights "; full refund awarded as restitutionary damages); Robinson v. Together Member Service[374] (consumer recovers $2,000 fee paid to dating service; " The agreement entered into between the parties does not comply (with the statute). Specifically...plaintiff paid a membership fee in excess of the allowable amount...for services to be provided to her were open-ended as opposed to having a two-year period. While plaintiff was told she would get five referrals, the number of referrals was not to be provided to her on a monthly basis, as required...since Together did not provide a specified number of referrals monthly, the maximum allowable charge was $25. Clearly, plaintiff was grossly overcharged "); Grossman v. MatchNet[375] (plaintiff failed to allege that " she sustained any ' actual harm ' from defendant's failure to include provisions mandated by the Dating Services Law. Plaintiff has not alleged that she ever sought to cancel or suspend her subscription (or that any rights were denied her) "); See also: Baker, Court: Dating firm cheated, The Journal News, July 21, 2010, p. 1 ("A Westchester County-based dating service that promised upscale singles a chance at love deceived and defrauded its clients by overcharging and undeserving them for years")].

[A.2] **Unfair Rebate Promotion [G.B.L. § 391-p]**

The Legislature recently enacted G.B.L. § 391-p to protect consumers from unfair rebate promotions [Edward, The Rebate 'Rip-Off': New York's Legislative Responses to Common Consumer Rebate Complaints, Pace L.R., Vo. 29, p. 471 (2009)(discussion of rebate problems to include rebate form unavailability, not enough time to redeem rebates, late payment of rebate awards, price confusion, ' junk mail ' rebate reward checks, fine print, privacy concerns, original documentation requirements and behavioral exploitation)].

[A.3] **Backdating**

In Argento v. Wal-Mart Stores, Inc.,[376] the court granted certification to a class of customers who alleged that defendant violated GBL § 349 by routinely backdating renewal memberships at Sam's Club stores. " [A]s a result of the backdating policy, members who renew after the date upon which their one-year membership terms expire are nevertheless required to pay the full annual fee for less than a full year of membership". Defendant admitted that Sam's Club had received $940 million in membership fees in 2006[377].

[A.4] Court Reporter Fees

In Elisa Dreier Reporting Corp. v. Global NAPs Networks, Inc.[378] the Appellate Division Second Department held that a court reporter service may seek recovery of court reporting fees from the client as well as from the attorney(s) who engaged it. See GBL 399-cc.

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

Buying dogs and cats are pets has always been problematic, particularly, as to origin [see Humane Society: Pet shops buy at 'worst' puppy mills, www.lohud.com (11/14/2011)("The Humane Society...is charging that 10 pet stores in Rockland and Westchester counties are selling puppies from inhumane breeders. The agency found that some local pet dealers are 'pushing dogs from hugh Midwest puppy mills with some of the worst federal Animal Welfare Act violations imaginable'"). Indeed, the qualities of cat litter may be less than advertised (see Church & Dwight Co. v. The Clorox Company, 11 Civ. 1985 (JSR)(Decision 1/3/2012)(plaintiff seeks to enjoin defendant from airing TV commercials which misrepresents the merits of each party's cat litter; "Those varieties include Arm & Hammer Double Duty Clumping Litter...and Arm & Hammer Super Scoop Clumping Litter...Clorox manufactures 'Fresh Step' cat litter products which utilize carbon instead of baking soda as an odor fighting ingredient").

Disputes involving pet animals are quite common [see e.g., In People v. Imported Quality Guard Dogs, Inc., 88 A.D. 3d 800, 930 N.Y.S. 2d 906 (2d Dept. 2011) the Court granted a permanent injunction sought pursuant to, inter alia, GBL §§ 349, 350 preventing defendant from "selling, breeding or training dogs, or advertising or soliciting the sale, breeding or training of dog" based upon allegedly "'repeated or illegal acts...persistent fraud'"); Rotunda v. Haynes, 33 Misc. 3d 68, 933 N.Y.S. 2d 803 (N.Y.A.T. 2011)(plaintiff alleged that defendant "dog breeder had sold a dog with a severe genetic heart defect to a nonparty purchaser, who had then given the dog to plaintiff as a gift. After a nonjury trial (action dismissed because plaintiff) failed to comply with (GBL) § 753 (by not providing) a valid veterinary certification detailing the extent and nature of the dog's condition"); Juliano v. S.I. Vet Care[379](dog owner claims her dog was released too early from emergency veterinary clinic without sufficient paid medication; to prove a veterinarian malpractice claim plaintiff must have an expert witness to establish a deviation from accepted veterinary standards); People v. Romano, 29 Misc. 3d 9, 908 N.Y.S. 2d 520 (N.Y.A.T. 2010)("Defendant was charged with animal cruelty under Agricultural and Markets Law § 353...the People prosecuted the animal cruelty charge on the theory that defendant 'unjustifiably injured' her dog by failing to groom it for a prolonged period of time and by failing to seek medical care for the dog after it was or should have been clear to

defendant that the animal required such care"); Rizzo v. Puppy Boutique, 27 Misc. 3d 117 (N.Y. Civ. 2010)(defective puppy sold to consumer; " Judgment for claimant Caruso...in the amount of $4,989.10 (which includes $1,723.00 the cost of the dog; $2,266.10 for reasonable veterinary expenses and consequential damages under the UCC and $1,000.00 punitive damages under GBL § 349) together with interest...costs and disbursements "); Miuccio v. Puppy City, Inc.[380](claimant " purchased a Shitzu-Maltese puppy...at a cost of $937.54. Within a week the dog was lethargic, had diarrhea and blood in his stool...a local veterinarian...concluded that the dog had parasites and kennel cough...veterinarian issued a letter stating that the dog was ' unfit for purchase ' "); Woods v. Kittykind[381](owner of lost cat claims that " Kittykind (a not-for-profit animal shelter inside a PetCo store) improperly allowed defendant Jane Doe to adopt the cat after failing to take the legally-required steps to locate the cat's rightful owner "); O'Rourke v. American Kennels[382](Maltese misrepresented as " teacup dog "; " (Little Miss) Muffet now weighs eight pounds. Though not exactly the Kristie Alley of the dog world, she is well above the five pounds that is considered the weight limit for a ' teacup ' Maltese "; damages $1,000 awarded); Mongelli v. Cabral[383] (" The plaintiffs ...and the defendants...are exotic bird lovers. It is their passion for exotic birds, particularly, for Peaches, a five year old white Cockatoo, which is at the heart of this controversy"); Smith v. A World of Pups, Inc., 27 Misc. 3d 1236(A) (N.Y. Civ.

2010)(7 month old Yorkie misrepresented as normal when in fact neutered; plaintiff retains possession of dog ("her children have bonded with the dog and would be devastated if the dog were to be removed from her home") and awarded expenses of $302.00 for vaccinations and punitive damages of $250.00); Dempsey v. American Kennels, 121 Misc. 2d 612 (N.Y. Civ. 1983)("' Mr. Dunphy ' a pedigreed white poodle held to be defective and nonmerchantable (U.C.C. § 2-608) because he had an undescended testicle "); Mathew v. Klinger[384] (" Cookie was a much loved Pekinese who swallowed a chicken bone and died seven days later. Could Cookie's life have been saved had the defendant Veterinarians discovered the presence of the chicken bone sooner? "); O'Brien v. Exotic Pet Warehouse, Inc.[385] (pet store negligently clipped the wings of Bogey, an African Grey Parrot, who flew away); Nardi v. Gonzalez[386] (" Bianca and Pepe are diminutive, curly coated Bichon Frises (who were viciously attacked by) Ace...a large 5 year old German Shepherd weighing 110 pounds "); Mercurio v. Weber[387] (two dogs burned with hair dryer by dog groomer, one dies and one survives, damages discussed); Lewis v. Al DiDonna[388](pet dog dies from overdose of prescription drug, Feldene, mislabeled " 1 pill twice daily ' when should have been " one pill every other day "); Roberts v. Melendez[389] (eleven week old dachshund puppy purchased for $1,200 from Le Petit Puppy in New York City becomes ill and is euthanized in California; costs of sick puppy split between buyer and seller); Anzalone v. Kragness[390](pet cat killed by another

animal at animal hospital; damages may include " actual value of the owner " where no fair market value exists)].

Pet Lemon Laws

Some 20 States have "lemon laws that provide legal recourse to people who purchase animals from pet dealers, later found to have a disease or defect")(see Pet Lemon Laws at www.avma.org/advocacy/state/issues/pet_lemon_laws.asp.

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

Several Courts have applied GBL §§ 752 et seq in Small Claims Courts [see e.g., Rizzo v. Puppy Boutique, 27 Misc. 3d 117 (N.Y. Civ. 2010)(defective puppy sold to consumer; judgment for consumer; " This waiver is in direct contradiction to the language and protections of the statute (GBL § 753) clearly gives the consumer the right to have an animal veterinarian of the consumer's choosing...The seller cannot require the consumer to use only a veterinarian selected or recommended by the pet store...The failure to properly advise the claimant as to her rights under the law is an additional ' deceptive ' business practice pursuant to GBL § 349); Budd v. Quinlin[391](consumer purchased puppy not in good heal and taken to veterinarian who charged $2,383.00 which is recoverable not under GBL 753(1) [damages limited to price for dog or cat here $400.00] but under UCC Section 2-105 [breach of the implied warranty of merchantability); Miuccio v. Puppy City, Inc.[392](claimant " purchased a Shitzu-Maltese puppy "; violation of GBL 349, no actual damages, $50.00 awarded); O'Rourke v. American Kennels[393] (statutory one year guarantee which " provides that if the dog is found to have a ' serious congenital condition ' within one year period, then the purchaser can exchange the dog for ' another of up to equal value '" does not apply to toy Maltese with a luxating patella); Fuentes v. United Pet Supply, Inc.[394] (miniature pinscher puppy diagnosed with a luxating patella in left rear leg; claims under GBL § 753 must be filed within fourteen days; claim valid under UCC § 2-324); Saxton v. Pets Warehouse,

Inc.[395] (consumer's claims for unhealthy dog are not limited to GBL § 753(1) but include breach of implied warranty of merchantability under UCC § 2-714); Smith v. Tate[396] (five cases involving sick German Shepherds); Sacco v. Tate[397] (buyers of sick dog could not recover under GBL § 753 because they failed to have dog examined by licensed veterinarian); Roberts v. Melendez[398] (claim against Le Petit Puppy arising from death of dachshund puppy; contract " clearly outlines the remedies available ", does not violate GBL § 753 and buyer failed to comply with available remedies; purchase price of $1,303.50 split between buyer and seller]. Pets have also been the subject of aggravated cruelty pursuant to Agriculture and Markets Law § 353-a [People v. Garcia[399] (" Earlier on that day, defendant had picked up a 10-gallon fish tank containing three pet goldfish belonging to Ms. Martinez's three children and hurled it into a 47-inch television screen, smashing the television screen and the fish tank...Defendant then called nine-year old Juan into the room and said ' Hey, Juan, want to something cool? ' Defendant then proceeded to crush under the heel of his shoe one of the three goldfish writhing on the floor ") and protected by Environmental Conservation Laws [People v. Douglas Deelecave[400](D & J Reptiles not guilty of violations of Environmental Conservation Law for exhibiting alligator at night and selling a Dwarfed Calman)].

[B.1] **Implied Warranty Of Merchantability [U.C.C. 2-105]**

In addition to the consumer's rights under G.B.L. Article 35-D [above] a claim for a defective dog or cat may be asserted under an implied warranty of merchantability which allows recovery of veterinarian costs [Hardenbergh v. Schudder, 2009 WL 4639722 (N.Y.A.T. 2009)(" Since the puppy came within the definition of 'goods' as set forth in UCC 2-105 and since the defendant was a 'merchant' within the meaning of UCC 2-104(1), plaintiff was entitled to recover damages under a theory of breach of the implied warranty of merchantability...and was not limited to pursuing his remedies under article 35-D of the (GBL) governing the sale of dogs and cats "); Rossi v. Puppy Boutique, 20 Misc. 3d 132 (N.Y.A.T. 2008)].

As for damages Texas recently allowed recovery of damages for the sentimental value of a pet [Medlen v. Strickland, 353 S.W. 3d 576 (Tex. App. 2011) and New Jersey refused to expend the concept of emotional distress damages to the loss of pets [McDougall v. Lamm, 2012 WL 3079207 (N.J. Sup. 2012)].

[B.2] **Pet Cemeteries: G.B.L. 750**

In Man-Hung Lee v. Hartsdale Canine Cemetery, Inc., 899 N.Y.S. 2d 823 (White Plains City Ct. 2010) the plaintiff " sought to recover damages resulting from the alleged wrongful exhumation and cremation of Dodo, a mixed breed dog who emigrated with plaintiff

from China...Defendant has counterclaimed for damages resulting from plaintiff's alleged breach of an agreement to pay annual fees for the maintenance of Dodo's burial plot...Pivotal to the outcome of this matter is whether defendant complied with the statutory requirement that plaintiff be clearly informed of the option to choose either perpetual care or annual care for Dodo's plot and whether plaintiff was specifically advised of the attendant costs/benefits each form of care offers (GBL §§ 750-q[2] and 750-v)...Plaintiff received all the protections afforded (and) breached her agreement to pay an annual fee each year for the care and upkeep of Dodo's resting place ".

[B.3] **Animal Cruelty: Duty To Groom And Seek Medical Treatment**

In People v. Romano, 29 Misc. 3d 9, 908 N.Y.S. 2d 520 (N.Y.A.T. 2010) the "Defendant was charged with animal cruelty under Agricultural and Markets Law § 353...the People prosecuted the animal cruelty charge on the theory that defendant 'unjustifiably injured' her dog by failing to groom it for a prolonged period of time and by failing to seek medical care for the dog after it was or should have been clear to defendant that the animal required such care".

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

" Some manufacturers...favor door-to-door sales (because) ...the selling price may be several times greater than...in a more competitive environment (and)...consumers are less defensive...in their own homes and...are, especially, susceptible to high pressure sales tactics "[401]. Personal Property Law [" PPL "] §§ 425-431 "' afford(s) consumers a ' cooling-off' period to cancel contracts which are entered into as a result of high pressure door-to-door sales tactics'"[402]. PPL § 428 provides consumers with rescission rights should a salesman fail to complete a Notice Of Cancellation form on the back of the contract. PPL § 428 has been used by consumers in New York Environmental Resources v. Franklin[403] (misrepresented and grossly overpriced water purification system), Rossi v. 21st Century Concepts, Inc.[404] [misrepresented pots and pans costing $200.00 each], Kozlowski v. Sears[405] [vinyl windows hard to open, did not lock properly and leaked] and in Filpo v. Credit Express Furniture Inc[406]. [unauthorized design and fabric color changes and defects in overpriced furniture]. Rescission is also appropriate if the Notice of Cancellation form is not in Spanish for Spanish speaking consumers[407]. A failure to " comply with the disclosure requirements of PPL 428 regarding cancellation and refund rights " is a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs[408]. In addition PPL 429(3) provides for an award of attorneys fees. In Certified Inspections, Inc. v. Garfinkel[409] the Court found that the subject contract was covered by PPL 426(1) (" 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 ").

[C.1] **Equipment Leases**

For an excellent " exploration of the (U.C.C.) and consumer law provisions governing the private parties to (equipment lease agreements) " see Sterling National Bank v. Kings Manor Estates[410] (" The 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...(G.B.L. § 349) ")].

In Pludeman v. Northern Leasing Systems, Inc.[411] a class of small business owners who had entered into lease agreements 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 be a one-page contract on a clip 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 attorneys' fees and New York as the chosen forum ", all of which were in " small print " or " microprint ". In sustaining the fraud cause of action against the individually named corporate officers 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 ".

[C.2] **Furniture Extended Warranties**

" The extended warranty and new parts warranty business generates extraordinary profits for the retailers... 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 "[412]. In Dvoskin v. Levitz Furniture Co., Inc.[413], the consumer purchased furniture from Levitz Furniture Company with " defects (that) occurred within six to nine months of delivery ". Levitz's attempt to disavow liability under both a one year warranty and a five year extended warranty was rejected by the Court for lack of notice ("

The purported limited warranty language which the defendant attempts to rely on appears on the reverse side of this one page ' sale order '. The defendant has not demonstrated and the Court does not conclude that the plaintiff was aware of or intended to be bound by the terms which appear on the reverse side of the sale order...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 "); See also: Giarratano v. Midas Muffler[414] (extended warranty for automobile brake pads); Kim v. BMW of Manhattan, Inc.[415](misrepresented automobile extended warranty); Petrello v. Winks Furniture[416] (misrepresenting a sofa as being covered in Ultrasuede HP and protected by a 5 year warranty).

[C.3] **Giftcards**

In three class actions purchasers of gift cards challenged the imposition of dormancy fees by gift card issuers[417]. Gift cards, a multi-billion business[418], 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 "[419]. In addition,

gift cards may not be given any special consideration in a bankruptcy proceeding[420].

In Lonner v. Simon Property Group, Inc.[421] 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 General Business Law 349 ("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. In Llanos v. Shell Oil Company[422], a class of consumers challenged the imposition of gift card dormancy fees of $1.75 per month setting forth four causes of action seeking damages for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and violation of GBL 349. Within the context of defendant's motion to dismiss the Complaint as preempted by GBL 396-I and for failure to state a cause of action, the Court found that the claims of the Llanos plaintiffs were not preempted by GBL 396-I and remitted the matter for consideration of the merits of each cause of action. And in Goldman v. Simon Property Group, Inc.[423], 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. In an earlier decision the Court found that these claims were not preempted by federal law[424].

The struggle between gift card issuers [a multi-billion dollar business] and cooperating banks and consumers over the legality of excessive fees including expiration or dormancy fees goes on with gift card issuers trying to morph themselves into entities protected from state consumer protection statutes by federal preemption. The most recent battle is over whether or not actions [which rely upon the common law and violations of salutary consumer protection statutes such as GBL §§ 349, 396-I and CPLR § 4544] brought by New York residents against gift card issuers and cooperating banks are preempted by federal law[425]. Although this issue seemingly was resolved earlier in *Goldman*[426], very recently, the Court *Sharabani v. Simon Property Group, Inc.*[427], a consumer class action challenging, *inter alia*, a renewal fee of $15.00 imposed after a six months expiration period, raised the issue anew by holding that the claims stated therein were preempted by federal law. This decision was reversed on appeal[428]. In addition this may be an area for legislative efforts to limit, if not otherwise prohibit, expiration dates and service fees of any kind as enacted by other States[429].

See also: Clifford, Gift Cards With Bells and Whistles, NYTimes Online, Dec. 10, 2010 ("retailers are devising new ways to make the cards more appealing because gift cards increase shopping traffic and encourage higher spending once people visit to redeem them. The cards also essentially act as an interest-free loan, where the retailer takes money now and does not have to give anything in return for a while"); Consumers can exchange gift cards for cash, The Journal News, December 25, 2010, p. 15A ("Sites charge fees, sellers only receive 50 to 90% of value (see www.swapagift.com, www.monstergiftcard.com, www.cardpool.com, www.plasticjungle.com)".

[C.4.2] **Releases**

In Layden v. Plante, 101 A.D. 3d 1540 (3d Dept. 2012) a health club customer was injured lifting weights. The Court refused to enforce a release. "An agreement that seeks to release a defendant from the consequences of his or her own negligence must 'plainly and precisely' state that it extends this far...The release at issue here makes no unequivocal reference to any negligence or fault of the fitness center employees or agents but merely enumerates activities on plaintiff's part that will not lead to liability ...This release does not bar plaintiff's claim").

[C.5] **Toning Shoes**

See Martin, Reebok to Pay Settlement Over Health Claims, www.nytimes.com (9/29/2011)("More dashed hopes for those seeking a perfect derriere-and the once highflying industry of toning shoes and clothing that promotes such ambitions. Those fancy Reebok sneakers that promise better legs and a better behind 'with every step' may be just like every other sneaker, federal regulators said Wednesday, and Reebok International is liable for $25 million in customer refunds for making false claims about its EasyTone line. 'Consumers expected to get a workout, nit to get worked over'").

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

In Andin International Inc. v. Matrix Funding Corp.[430] the Court held that the automatic renewal provision in a computer lease was ineffective under G.O.L. § 5-901 because the lessor failed to notify lessee of lessee's obligation to provide notice of intention not to renew. In addition, the provision may be unconscionable (under terms of lease unless lessee " is willing to meet the price unilaterally set for the purchase of the equipment, (lessee) will be bound for a successive 12-month period to renting the equipment. This clause, which, in essence, creates a perpetual obligation, is sufficiently one-sided and imbalanced so that it might be found to

be unconscionable (under Utah law) ")].

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

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

[1] **Home Improvement Contractors** [Tri-State General Remodeling Contractors, Inc v. Inderdai Baijnauth[431] (salesmen do not have to have a separate license); Routier v. Waldeck[432] (" The Home Improvement Business provisions...were enacted to safeguard and protect consumers against fraudulent practices and inferior work by those who would hold themselves out as home improvement contractors "); Power Cooling, Inc. v. Wassong[433], (N.Y.C. Administrative Code § 20-386[2] requiring the licensing of home improvement contractors does not apply to the installation of room air-conditioners); Colorito v. Crown Heating & Cooling, Inc.[434],(" Without a showing of proper licensing, defendant (home improvement contractor) was not entitled to recover upon its

counterclaim (to recover for work done) "); Falconieri v. Wolf[435](home improvement statute, County Law § 863.313 applies to barn renovations); Cudahy v. Cohen[436] (unlicenced home improvement contractor unable to sue homeowner in Small Claims Courts for unpaid bills); Moonstar Contractors, Inc. v. Katsir[437](license of sub-contractor can not be used by general contractor to meet licensing requirements). Obtaining a license during the performance of the contract may be sufficient (Mandioc Developers, Inc. v. Millstone[438]) while obtaining a license after performance of the contract is not sufficient (B&F Bldg. Corp. V. Liebig[439] (" The legislative purpose...was not to strengthen contractor's rights, but to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor is licensed ")];

[2] **Used Car Dealers** [B & L Auto Group, Inc. v. Zilog[440] (used car dealer's claim against consumer for balance of payment for used car of $2,500.00 dismissed for a failure to have a Second Hand Automobile Dealer's license pursuant to New York City Department of Consumer Affairs Regulation when the car was sold)];

[3] **Debt Collectors** [In Centurion Capital Corp. v. Druce[441] (plaintiff, a purchaser of credit card debt, was held to be a debt collector as defined in Administrative Code of City of

New York § 20-489 and because it was not licensed its claims against defendant must be dismissed "];

[4] **Pet Shops** [Rizzo v. Puppy Boutique, 27 Misc. 3d 117 (N.Y. Civ. 2010)(defective puppy sold to consumer; " None of the documents issued by the defendants...indicate that the defendants are properly licensed by the City of New York. This, when coupled with the fact that there is no such entity as the defendant business registered with the Department of State constitutes a deceptive business practice (under GBL § 349)").

[5] **Employment Agencies**

In Rhodes v. Herz, 27 Misc. 3d 722, 897 N.Y.S. 2d 839 (N.Y. Sup. 2010) "At issue is whether article 11 of the (GBL) which governs all employment agencies in New York provides for a private civil right of action for individuals to sue for civil remedies based on violations of the statute (finding that it does not). It is clear that (GBL) 189 provides a comprehensive enforcement mechanism for the regulation of licensed employment agencies"; Compare: Shelton v. Elite Model Management, Inc., 11 Misc. 3d 345 (N.Y. Sup. 2005)(private right of action) and Masters v. Wilhelmina Model Agency, Inc., 2003 WL 145556 (S.D.N.Y. 2003)(no private right of action).

[6] **Other Licensed Businesses** [B & L Auto Group, Inc. v. Ziloq[442] (" The legal consequences of failing to maintain a required license are well known. It is well settled that not being licensed to practice in a given field which requires a license precludes recovery for the services performed " either pursuant to contract or in quantum merit...This bar against recovery applies to...architects and engineers, car services, plumbers, sidewalk vendors and all other businesses...that are required by law to be licensed ")].

[E.1] **Massage Therapy: Education Law § 6512(1)**

" To the extent that the small claims action is founded upon allegations that defendant unlawfully practiced ' manipulation ' or massage therapy in violation of Education Law § 6512(1), no private right of action is available under the statue "[443].

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

" In order to induce a sale furniture and appliance store salesman often misrepresent the quality, origin, price, terms of payment and delivery date of ordered merchandise "[444]. In Walker v. Winks Furniture[445], a salesman promised delivery of new furniture within one week and then refused to return the consumer's purchase

price when she canceled two weeks later unless she paid a 20% cancellation penalty. GBL § 396-u protects consumers from unscrupulous salesmen who promise that merchandise will be delivered by specific date when, in fact, it is not. A violation of GBL § 396-u [failing to disclose an estimated delivery date in writing when the order is taken [GBL § 396-u(2)], failing to advise of a new delivery date and giving the consumer the opportunity to cancel [GBL § 396-u(2)(b)], failing to honor the consumer's election to cancel without imposing a cancellation penalty [GBL § 396-u(s)©)], failing to make a full refund within two weeks of a demand without imposing a cancellation penalty [GBL § 396-u(2)(d)]] allows the consumer to rescind the purchase contract without incurring a cancellation penalty[446]. A violation of GBL 396-u is a per se violation of GBL 349 which provides for treble damages, attorneys fees and costs[447]. In addition, GBL 396-u(7) provides for a trebling of damages upon a showing of a wilful violation of the statute[448].

In Dweyer v. Montalbano's Pool & Patio Center, Inc[449] a furniture store failed to timely deliver two of six purchased chairs. The Court found that the delayed furniture was not " custom-made " and that the store violated G.B.L. § 396-u(2) in failing to fill in an " ' estimated delivery date ' on the form as required by statute ", failing to give notice of the delay and advising the customer of her right to cancel under G.B.L. § 396-u(2)(b). The Court awarded G.B.L. § 396-u damages of $287.12 for

the two replacement chairs, trebled to $861.36 under G.B.L. 396-u(7). In addition the Court granted rescission under U.C.C. § 2-601 [" if the goods or tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole..."] awarding the customer the contract price of $2,868.63 upon return of the furniture.

In Julio v. Villency[450] 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 ".

[F.1] **Merchandise Layaway Plans: G.B.L. § 396-t**

G.B.L. § 396-t " governs merchandise sold according to a layaway plan. A layaway plan is defined as a purchase over the amount of $50.00 where the consumer agrees to pay for the purchase of merchandise in four or more installments and the merchandise is delivered in the future " [Amiekumo v. Vanbro Motors, Inc.[451](failure to deliver vehicle purchased and comply with statutory disclosure requirements)]. While G.B.L. § 396-t does not provide a private right of action for consumers it is has been held that a violation of G.B.L. § 396-t is a *per se* violation of G.B.L. § 349

thus entitling the recovery of actual damages or $50 whichever is greater, attorneys and costs
[Amiekumo v. Vanbro Motors, Inc., supra].

[F.2] **Price Gouging**

G.B.L. § 396-r prohibits price gouging during emergency situations. In People v. My Service Center, Inc.[452] the Court addressed the charge that a " gas station (had inflated) the retail price of its gasoline " after the "' abnormal market disruption '" caused by Hurricane Katrina in the summer of 2005. " this Court finds that respondent's pricing patently violated GBL § 396-r...given such excessive increases and the fact that such increases did not bear any relation to the supplier's costs...Regardless of respondent's desire to anticipate market fluctuations to remain competitive, notwithstanding the price at which it purchased that supply, is precisely the manipulation and unfair advantage GBL § 396-r is designed to forestall ". See also: People v. Two Wheel Corp.[453]; People v. Beach Boys Equipment Co., Inc.[454]; People v. Wever Petroleum Inc.[455] (disparity in gasoline prices following Hurricane Katrina warranting injunction); People v. Chazy Hardware, Inc.[456](generators sold following ice storm at unconscionable prices).

[F.3] **Price Matching**

In Dank v. Sears Holding Management Corporation[457]the court addressed the concept of deceptive "price matching"[458]. 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".

[F.4] Retail Price Restraints

In People v. Tempur-Pedic International, Inc.[459] the Attorney General alleged that defendant mattress manufacturer violated GBL 369-a through its retail pricing policy which even though they are

unenforceable and not actionable are not illegal.

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

Some stores refuse to refund the consumer's purchase price in cash upon the return of a product [" Merchandise, in New Condition, May be Exchanged Within 7 Days of Purchase for Store Credit...No Cash Refunds or Charge Credits "[460]]. In Baker v. Burlington Coat Factory Warehouse[461], a clothing retailer refused to refund the consumer's cash payment when she returned a shedding and defective fake fur two days after purchase. General Business Law § 218-a [" GBL § 218-a "] permits retailers to enforce a no cash refund policy if there are a sufficient number of signs notifying consumers of " its refund policy including whether it is ' in cash, or as credit or store credit only '"[462]. In McCord v. Norm's Music[463]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 ". In Evergreen Bank, NA v. Zerteck[464](" defendant had violated (G.B.L. § 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)"); In Perel v. Eagletronics[465] 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 G.B.L. § 218-a(1). In addition, the air conditioner was defective and breached the implied warranty of merchantability under U.C.C. § 2-314.

If, however, the product is defective and there has been a breach of the implied warranty of merchantability [U.C.C. § 2-314] then consumers may recover all appropriate damages including the purchase price in cash [U.C.C. § 2-714][466]. In essence, U.C.C. § 2-314 preempts[467] GBL § 218-a [Baker v. Burlington Coat Factory Warehouse[468] (defective shedding fake fur); Dudzik v. Klein's All Sports[469] (defective baseball bat)]. It has been held that a " failure to inform consumers of their statutory right to a cash or credit card charge refund when clothing is defective and unwearable " is a violation of GBL 349 which provides for treble damages, attorneys fees and costs[470].

[G.1] **Retail Sales Installment Agreements: P.P.L. § 401**

New York's Retail Installment Sales Act is codified in P.P.L. § 401 et seq. In Johnson v. Chase Manhattan Bank USA[471] a credit

card holder challenged the enforceability of a mandatory arbitration agreement on, amongst other grounds, that it violated P.P.L. § 413(10(f) which " voids a provision in a retail installment credit agreement by which the retail buyer waives any right to a trial by jury in any proceeding arising out of the agreement ". Nonetheless the Johnson Court found the arbitration agreement enforceable because the Federal Arbitration Act " preempts state law to the extent that it conflicts with the FAA ".

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

Personal Property Law §§ 500 et seq [" PPL §§ 500 et seq] provides consumers who enter into rental purchase agreements with certain reinstatement rights should they fall behind in making timely payments or otherwise terminate the contract [PPL § 501]. In Davis v. Rent-A-Center of America, Inc[472] the Court awarded the consumer damages of $675.73 because the renter had failed to provide substitute furniture of a comparable nature after consumer reinstated rental purchase agreement after skipping payment. In Sagiede v. Rent-A-Center[473] the Court awarded the consumers damages of $2,124.04 after their TV was repossessed (" this Court finds that, in keeping with the intent of Personal Property Law which attempts to protect the consumer while

simultaneously allowing for a competitive business atmosphere in the rental-purchase arena, that the contract at bar fails to reasonably assess the consumer of his rights concerning repossession ").

[H.1] **Renewal Provisions**

In Ovitz v. Bloomberg L.P., 77 A.D. 3d 515, 909 N.Y.S. 2d 710 (1st Dept. 2010) the Court held that "the automatic renewal provision of the agreement...was both 'inoperative' (GOL § 5-901) and 'unenforceable' (§ 5-901) since defendants to provide the requisite notice to plaintiff that the two-year subscription term was to be automatically renewed...Nor did plaintiff allege actual injury resulting from the alleged deceptive practices, since defendants did not commence enforcement proceedings against plaintiff and are not seeking to collect fees or payments from plaintiff in connection with the cancellation of his subscription".

[H.2] **Tiny Print**

In Pludeman v Northern Leasing Systems, Inc.,[474] a class of small business owners who had entered into lease agreements for POS [Point Of Sale] 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 be a one-page contract on a clip 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 attorneys' fees and New York as the chosen forum"; all of which were in "small print" or "microprint". The Appellate Division, First Department certified the class[475] noting that, "liability could turn on a single issue.
Central to the breach of contract claim is whether it is possible to construe the first page of the lease as a complete contract... Resolution of this issue does not require individualized proof." Subsequently, the trial court awarded the plaintiff class partial summary judgment on liability on the breach of contract/ overcharge claims[476].

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

U.C.C. § 2-314 provides consumers with an implied warranty of merchantability for products and has arisen in consumer lawsuits involving air conditioners [Bimini Boat Sales, Inc. v. Luhrs Corp.[477](defective fishing boat; " the dealer agreement between the parties failed to effectively disclaim the implied warranty of fitness for a particular purpose since the purported disclaimer was

not conspicuous "); Perel v. Eagletronics[478] (defective air conditioner; breach of the implied warranty of merchantability); alarm and monitoring systems [Cirillo v. Slomin's Inc.[479] (contract clause disclaiming express or implied warranties enforced), kitchen cabinet doors [Malul v. Capital Cabinets, Inc.[480] (kitchen cabinets that melted in close proximity to stove constitutes a breach of implied warranty of merchantability; purchase price proper measure of damages), fake furs [Baker v. Burlington Coat Factory Warehouse[481] (U.C.C. § 2-314 preempts[482] GBL § 218-a], baseball bats [Dudzik v. Klein's All Sports[483]] and dentures [Shaw-Crummel v. American Dental Plan[484] (" Therefore implicated in the contract ...was the warranty that the dentures would be fit for chewing and speaking. The two sets of dentures...were clearly not fit for these purposes ")].

[15] **Telemarketing**

It is quite common for consumers and businesses to receive unsolicited phone calls, faxes and text messages[485] at their homes, places of business or on their cellular telephones from mortgage lenders, credit card companies and the like. Many of these phone calls, faxes or text messages originate from automated telephone equipment or automatic dialing-announcing devices, the use of which is regulated by Federal and New York State consumer protection

statutes.

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

[486]

On the Federal level the Telephone Consumer Protection Act[487] [TCPA] prohibits " *inter alia*, the ' use [of] any telephone, facsimile machine, computer or other device to send, to a telephone facsimile machine, an unsolicited advertisement...47 U.S.C. § 227(b)(1)© "[488]. A violation of the TCPA may occur when the " offending calls (are) made before 8 a.m. or after 9 p.m. " or " the calling entity (has) failed to implement do-not-call procedures " [Weiss v. 4 Hour Wireless, Inc.[489]]. See also: Holster v. Cohen, 80 A.D. 3d 565, 914 N.Y.S. 2d 650 (2d Dept. 2011) ("The TCPA prohibits the use of 'any telephone facsimile machine...to send...an unsolicited advertisement'...Here the plaintiff sufficiently alleged that he received unsolicited advertisements from the defendant via facsimile in violation of the TCPA"); Kovel v. Lerner, Cumbo & Associates, Inc., 32 Misc. 3d 24 (N.Y.A.T. 2011)(summary judgment against defendant for violating TCPA; remand for assessment of damages).

The purpose of the TCPA is to provide " a remedy to consumers who are subjected to telemarketing abuses and ' to encourage consumers to sue and obtain monetary awards based on a violation of the statute ' "[490] The TCPA may be used by consumers in New York State Courts including Small Claims Court [Kaplan v. Democrat &

Chronicle[491]; Shulman v. Chase Manhattan Bank,[492] (TCPA provides a private right of action which may be asserted in New York State Courts)]. See Pollock v. Island Arbitration & Mediation, Inc., 22 Misc. 3d 463, 869 N.Y.S. 2d 740 (2008)(" The statute preserves the ' right to be let alone ' famously classified by United States Supreme Court Justice Louis Brandeis as ' the most comprehensive of rights and the right most valued by civilized men '").

The use of cellphone text messaging features to send advertisements may constitute a violation of TCPA [Joffe v. Acacia Mortgage Corp.[493]]. However, the Court in Pollock v. Island Arbitration & Mediation, Inc., 22 Misc. 3d 463, 869 N.Y.S. 2d 740 (2008) has held that attempting to place over 100 faxes to a cell phone by means other than " using a random or sequential number generator " does not constitute a violation of TCPA.

In Stern v. Bluestone[494] the Court of Appeals held that monthly faxes from an attorney concerning attorney malpractice were informational only and did not violate applicable statutes.

1] **Exclusive Jurisdiction**

Some Federal Courts have held that the states have exclusive jurisdiction over private causes of action brought under the TCPA[495] while others have not[496]. The U.S. Supreme may resolve this issue shortly (see Supreme Court Grants Review of Telephone

Consumer Protection Act Case, NCLC Reports Vol. 30 (July/August 2011)(Mims v. Arrow Financial Services, LLC, 2011 WL 1212225 (June 27, 2011) "The Second, Third, Fourth, Fifth, Ninth and Eleventh Circuits have held that federal courts lack federal-question jurisdiction over private TCPA actions...The Sixth and Seventh Circuits find federal question jurisdiction exists over TCPA claims"). Some State Courts have held that the Federal TCPA does not preempt State law analogues which may be stricter[497]. Some scholars have complained that " Congress intended for private enforcement actions to be brought by *pro se* plaintiffs in small claims court and practically limited enforcement to such tribunals "[498]. Under the TCPA consumers may recover their actual monetary loss for each violation or up to $500.00 in damages, whichever is greater [Kaplan v. Life Fitness Center[499] (" that plaintiff is entitled to damages of $500 for the TCPA violation (and) an additional award of damages of $500 for violation of the federal regulation "; treble damages may be awarded upon a showing that " defendant willfully and knowingly violated "[500] the Act); Antollino v. Hispanic Media Group, USA, Inc[501]. (plaintiff who received 33 unsolicited fax transmissions awarded " statutory damages of $16,500 or $500 for each violation ")]. In 2001 a Virginia state court class action against Hooters resulted in a jury award of $12 million on behalf of 1,321 persons who had received 6 unsolicited faxes[502]. Recently, the Court in Rudgayzer & Gratt v. Enine, Inc.[503]

held that the TPCA, to the extent it restricts unsolicited fax advertisements, is unconstitutional as violative of freedom of speech. This decision was reversed[504], however, by the Appellate Term (" A civil liberties organization and a personal injury attorney might conceivably send identical communications that the recipient has legal rights that the communicating entity wishes to uphold; the former is entitled to the full ambit of First Amendment protection...while the latter may be regulated as commercial speech "). In Bonime v. Management Training International[505]the Court declined to pass on the constitutionality of TPCA for a lack of jurisdiction.

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

On the State level, General Business Law § 399-p [" GBL § 399-p "] " also places restrictions on the use of automatic dialing-announcing devices and placement of consumer calls in telemarketing "[506] such as requiring the disclosure of the nature of the call and the name of the person on whose behalf the call is being made. A violation of GBL § 399-p allows recovery of actual damages or $50.00, whichever is greater, including trebling upon a showing of a wilful violation.

Consumers aggrieved by telemarketing abuses may sue in Small Claims Court and recover damages under both the TCPA and GBL § 399-

p [Kaplan v. First City Mortgage[507] (consumer sues telemarketer in Small Claims Court and recovers $500.00 for a violation of TCPA and $50.00 for a violation of GBL § 399-p); Kaplan v. Life Fitness Center[508] (consumer recovers $1,000.00 for violations of TCPA and $50.00 for a violation of GBL § 399-p)].

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

Under General Business Law § 399-z [" GBL § 399-z "], known as the " Do Not Call " rule, consumers may prevent telemarketers from making unsolicited telephone calls by filing their names and phone numbers with a statewide registry. " No telemarketer...may make...any unsolicited sales calls to any customer more than thirty days after the customer's name and telephone number(s)...appear on the then current quarterly no telemarketing sales calls registry ". Violations of this rule may subject the telemarketer to a maximum fine of $2,000.00. In March of 2002 thirteen telemarketers accepted fines totaling $217,000
for making calls to persons who joined the Do Not Call Registry.[509] In addition " [n]othing (in this rule) shall be construed to restrict any right which any person may have under any other statute or at common law ".

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

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

[E] **Unsolicited Telefacsimile Advertising: G.B.L. § 396-aa**

This statute makes it unlawful to " initiate the unsolicited transmission of fax messages promoting goods or services for purchase by the recipient of such messages " and provides an private right of action for individuals to seek " actual damages or one hundred dollars, whichever is greater ". In Rudgayser & Gratt

v. Enine, Inc.[510], the Appellate Term refused to consider " whether the TCPA has preempted (G.B.L.) § 396-aa in whole or in part ". However, in Weber v. U.S. Sterling Securities, Inc.[511] The Connecticut Supreme Court held that the TCPA " prohibits all unsolicited fax advertisements, and the plaintiff therefore has alleged facts in his complaint sufficient to state a cause of action under the act. Furthermore...(GBL § 396-aa) cannot preempt the plaintiff's federal cause of action ". And in Gottlieb v. Carnival Corp.[512] the Court of Appeals vacated a District court decision which held that a G.B.L. § 396-aa claim was not stated where there was no allegation that faxes had been sent in intrastate commerce.

Proper pleading was addressed by the Connecticut Supreme Court in Weber v. U.S. Sterling Securities, Inc.[513] which noted the GBL 396-aa " provides an exception from liability for certain transmissions: ' This section shall not apply...to transmissions not exceeding five pages received between the hours of 9:00P.M. and 6:00 A.M. local time '". The Connecticut Supreme Court affirmed that trial court's conclusion " that § 393-aa precludes the plaintiff's individual claim because the fax underlying the plaintiff's complaint fell within the exception contained in that statute. That is, because the plaintiff failed to allege that he had received an unsolicited fax advertisement between the hours of 6 a.m. and 9 p.m., or that he had received and unsolicited fax

advertisement in excess of five pages between the hours of 6 a.m. and 9. P.m., the fax at issue is not actionable under § 396-aa ". Nonetheless, the plaintiff did state a claim under the federal TCPA as noted above.

[16] **Weddings**

Weddings are unique experiences and may be cancelled or profoundly effected by a broken engagement [see Calautti v. Grados[514](prospective groom recovers $8,500 value of engagement which prospective bride refused to return); DeFina v. Scott[515] (" The parties, once engaged, sue and countersue on issues which arise from the termination of their engagement. The disputes concern the wedding preparation expenses, the engagement ring, third-party gifts and the premarital transfer of a one-half interest in the real property which as to be the marital abode ")], failure to deliver a contracted for wedding hall [see Barry v. Dandy, LLC[516] (" Defendant's breach of contract left Plaintiff without a suitable wedding hall for her wedding a mere two months before the scheduled date for her wedding. Monetary damages would adequately compensate Plaintiff for he loss. A bride's wedding day should be one of the happiest occasions in her life. It is a time filled with love and happiness, hopes and dreams...(She) secured the perfect wedding hall for her wedding, namely Sky Studios (which) is a unique,

high-end event location with spectacular views of New York City...As Plaintiff is from Iowa, this will negatively interfere with the traveling plans of numerous out-of-town guests... Defendant is obligated to make its space available for Plaintiff's September 15th wedding pursuant to the terms of its agreement ") or " ideal wedding site "[Murphy v. Lord Thompson Manor, Inc.[517] (unhappy bride recovers $17,000 in economic and non-economic damages plus costs arising from defendant, Lord Thompson Manor's " failure to perform a contract for wedding related services and accommodations ")], failure to deliver a promised wedding singer [see Bridget Griffin-Amiel v. Frank Terris Orchestras[518] (", the bait and switch[519] of a " 40-something crooner " for the " 20-something " Paul Rich " who promised to deliver a lively mix of pop hits, rhythm-and-blues and disco classics ")], failure to deliver proper photographs of the wedding [see Andreani v. Romeo Photographers & Video Productions[520] (" The Plaintiff asserts that the quality of the pictures were unacceptable as to color, lighting, positioning and events...The majority of the photos depict dark and grey backgrounds and very poor lighting. The colors were clearly distorted, for example, there were picture taken outdoors where the sky appeared to be purple instead of blue or gray; pictures where the grass and trees appeared to be brown instead of green and pictures where the lake appeared to be blue in some shots and brown in other shots. The majority of the indoor pictures were dark, blurry and unfocused ")].

ENDNOTES

1. See Bonior v. Citibank, N.A., 14 Misc. 3d 771, 828 N.Y.S. 2d 765 (N.Y. Civ. 2006)(" Since this is a Small Claims action, the claimants' complaint is merely a general statement of why relief is being sought and not a formalistic assertion of legal principals. This requires the Court to analyze the facts of each case as presented rather than pleaded so as to grant the ' substantial justice ' mandated by the statute "); Dvoskin v. Levitz Furniture Co., Inc., 9 Misc. 3d 1125 (N.Y. Dist. Ct. 2005)(" The informal nature of the layman facilitated small claims process dispenses with written answers as well as the need for plaintiffs to articulate all requisite elements of causes of action and instead places the responsibility upon the tribunal to ascertain from the proof what legal issues have been joined for disposition ").

3. Bartolomeo v. Runco 162 Misc2d 485 (landlord can not recover unpaid rent for illegal apartment)(overruled on other grounds by Corbin v. Briley, 192 Misc. 2d 503, 747 N.Y.S. 2d 134 (2d Dept. 2002).

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

5. *People v. First American Corp.*, 76 A.D. 3d 68, 902 N.Y.S. 2d 521 (1st Dept. 2010), aff'd 18 N.Y. 3d 173 (Ct. App. 2011).

6. *Flandera v AFA America, Inc.*, 78 A.D. 3d 1639, 913 N.Y.S. 2d 441 (4th Dept. 2010).

7. Aponte v. Raychuk, 160 A.D. 2d 636, 559 N.Y.S. 2d 255 (1st Dept. 1990).

8. Argento v. Wal-Mart Stores, Inc., 2009 WL 3489222 (2d Dept. 2009).

9 See also Dupler v. Costco Whoelsale Corporation, 249 F.R.D. 29 (E.D.N.Y. 2008). In Dupler the court granted certification to a class of customers that alleged that defendant failed to properly disclose its backdating policy, wherein " certain customers who decide to purchase a new annual membership after expiration of the old membership are provided with a term of membership less than 12 months ". The Court held that GBL § 349 covers claims based on omissions as well as actual misrepresentations.

10 In Cuomo v. Dell, Inc., 21 Misc. 3d 1110(A), 873 N.Y.S. 2d 236 (Albany Sup. 2008).

11. Pavlov v. Debt Resolvers USA, Inc., 28 Misc. 3d 1061, 907 N.Y.S. 2d 798 (N.Y. Civ. 2010).

12. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), revg. 53 N.Y. 2d 124 (1981), aff'g 73 A.D. 2d 849 (1st Dept. 1979).

13. Corsello v. Verizon New York, Inc., 77 A.D. 3d 344, 908 N.Y.S. 2d 57 (2d Dept. 2010), mod'd 18 N.Y. 3d 777 (2012)..

14. Morrissey v. Nextel Partners, Inc., 72 A.D. 3d 209, 895 N.Y.S. 2d 580 (3d Dept. 2010).

15. Goldman v. Simon Properties Group, Inc., 58 A.D. 3d 208, 869 N.Y.S. 2d 125 (2d Dept. 2008) and Lonner v. Simon Properties Group, Inc., 57 A.D. 3d 100, 866 N.Y.S. 2d 239 (2d Dept. 2008).

16. Sims v. First Consumers National Bank, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (1st Dept. 2003).

17. Ballas v. Virgin Media, Inc., 18 Misc3d 1106, 856 N.Y.S. 2d 22 aff'd 60 A.D. 3d 712, 875 N.Y.S. 2d 523 (2d Dept. 2009).

18. Centurion Capital Corp. v. Guarino, 35 Misc. 3d 1219(A)(N.Y. Civ. 2012).

19. Midland Funding, LLC v. Giraldo, 2013 WL 1189163 (N.Y. Dist. Ct. 2013).

20. Sykes v. Mel Harris and Associates, LLC, 2010 WL 5395712 (S.D.N.Y. 2010).

21. Apple v. Atlantic Yards Development Co., LLC, 2012 WL 2309028 (E.D.N.Y. 2012).

22. Gomez-Jimenez v. New York Law School, 36 Misc. 3d 230 (N.Y. Sup. 2012), aff'd 103 A.D. 3d 13, 956 N.Y.S. 2d 54 (1st Dept. 2012).

23. Austin v. Albany Law School, 38 Misc. 3d 988 (Albany Sup. 2013).

24. [Pelman v. McDonald's Corp., 396 F. 3d 508 (2d Cir. 2005).

25. Pelman v. McDonald's Corp., 272 F.R.D. 82 (S.D.N.Y. 2010).

26 See *Lonner v Simon Property Group, Inc.*, 57 A.D. 3d 100, 866 N.Y.S. 2d 239, 241, fn. 1 (2d Dept. 2008)(Virtually all gift cards have expiration dates and are subject to a variety of fees, including maintenance fees or dormancy fees (see Gift Cards 2007: Best and Worst Retail Cards: A Deeper View of Bank Cards Doesn't Improve Their Look, Office of Consumer Protection, Montgomery County, Maryland at www.montgomerycountymd.gov.).

27 *Lonner v Simon Property Group, Inc.*, 57 A.D. 3d 100 (2d Dept. 2008). See also: *Sims v First Consumers Nat'l Bank*, 303 AD2d 288, 289, 750 N.Y.S. 2d 284 (1st Dept. 2003).

28 *Llanos v Shell Oil Company,* 55 A.D. 3d 796 (2d Dept. 2008).

29 *Goldman v Simon Property Group, Inc.*, 58 A.D. 3d 208 (2d Dept. 2008).

30 See e.g., *SPGGC, LLC v Ayotte*, 488 F. 3d 525 (1st Cir. 2007); McAnaney v. Astoria Financial Corp., 665 F. Supp. 2d 132 (E.D.N.Y. 2009).

31_*Goldman v Simon Property Group, Inc.*, 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).

32.
L.S. v Simon Property Group, Inc., New York Law Journal, July 21, 2010, at 26, col. 5 (N.Y. Sup.), rev'd 96 A.D. 3d 24 (2d Dept. 2012)(claims not preempted by Federal Hone Owners' Loan Act of 1933 and its implementing regulations promulgated by the Office of Thrift Supervision (OTS) of the United States Department of the Treasury).

33 *Sheinken v Simon Property Group, Inc.*, 33 Misc. 3d 287 (N.Y. Sup. 2011).

34 *SPGCC, LLC v Ayotte*, 488 F. 3d 525 (1st Cir. 2007).

35. Preira v. Bancorp Bank, 885 F. Supp. 2d 672 (S.D.N.Y. 2012).

36. Partells v. Fidelity National Title Insurance Services, 2012 WL 5288754 (W.D.N.Y. 2012).

37. Ural v. Encompass Ins. Co. Of America, 97 A.D. 3d 562 (2d Dept. 2012).

38. Nick's Garage, Inc. v. Progressive Casualty Ins. Co., 2013 WL 718457 (N.D.N.Y. 2013).

39. Casey v. Citibank, N.A., 2013 WL 11901 (N.D.N.Y. 2013).

40. North State Autobahn, Inc. V. Progressive Ins. Group, 32 Misc. 3d 798 (N.Y. Sup. 2011), aff'd 102 A.D. 3d 5 (2d Dept. 2012).

41. M.V.B. Collision, Inc. V. Allstate Insurance Company, 728 F. Supp. 2d 205 (E.D.N.Y. 2010).

42 *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y. 3d 486 (2008)(In sustaining the fraud cause of action against the individually named corporate defendants the Court of Appeals 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").

43 *Pludeman v. Northern Leasing Systems, Inc.*,74 A.D. 3d 420 (1st Dept. 2010).

44 *Pludeman v. Northern Leasing Systems, Inc.*, 27 Misc. 3d 1203(A) (N.Y. Sup. 2010), *reargument denied* 2010 WL 3462147 (N.Y. Sup. 2010).

45. Frey v. Bekins Van Lines, Inc., 2010 WL 4358373 (E.D.N.Y. 2010)

46. Gotlin v. Lederman, M.D., 2012 WL 1506024 (2d Cir. 2012).

47. People v. City Model and Talent Development, Inc., 29 Misc. 3d 1205(A) (N.Y. Sup. 2010).

48. Emigrant Mortgage Co., Inc. v. Fitzpatrick, 29 Misc. 3d 746, 906 N.Y.S. 2d 874 (N.Y. Sup. 2010).

49 Dowd v. Alliance Mortgage Company, 74 A.D. 3d 867 (2d Dept. 2010).

50. Frey v. Bekins Van Lines, Inc., 2010 WL 4358373 (E.D.N.Y. 2010)

51. Lazaroff v. Paraco Gas Corp., 38 Misc. 3d 1217(A)(Kings Sup. 2011), affd 95 A.D. 3d 1080 (2d Dept. 2012).

52. Barkley v. Olympia Mortgage Co., 2010 WL 3709278 (E.D.N.Y. 2010).

53. Silvercorp Metals Inc. v. Anthion Mgt. LLC, 36 Misc. 3d 1231(A)(N.Y. Sup. 2012).

54. Deer Consumer Products, Inc. V. Little Group, 37 Misc. 3d 1224(A)(N.Y. Sup. 2012).

55. Prickett v. New York Life Ins. Co., 2012 WL 4053810 (S.D.N.Y. 2012).

56. Barbalios v. Skin Deep Center for Cosmetic Enhancement, LLC, 29 Misc. 3d 140(A)(N.Y.A.T. 2010).

57. M.V.B. Collision, Inc. V. Allstate Insurance Company, 728 F. Supp. 2d 205 (E.D.N.Y. 2010).

58. Chiste v. Hotels.Com LP, 2010 WL 4630317 (S.D.N.Y. 2010).

59. Britsol Village, Inc. v. Louisiana-Pacific Corp., 2013 WL 55698 (W.D.N.Y. 2013).

60. See Gomez-Jimenez v. New York Law School, 36 Misc. 3d 230 (N.Y. Sup. 2012)(attorneys alleged law school misrepresented post-graduation employment statistics; law students not reasonable consumers; "By anyone's definition, reasonable consumers-college graduates-seriously considering law schools are a sophisticated subset of education consumers, capable of sifting through data and weighing alternatives before making a decision regarding their post-college options, such as applying for professional school. These reasonable consumers have available to them any number of sources of information to review when making their decisions"), aff'd 103 A.D. 3d 12 (1st Dept. 2012)("We are not unsympathetic to plaintiffs' concerns. We recognize that students may be susceptible to misrepresentations by law schools. As such 'this Court does not necessarily agree [with Supreme Court] that [all] college graduates are particularly sophisticated in making career or business decisions'...As a result, prospective students can make decisions to yoke themselves and their spouses and/or their children to a crushing burden of student loan debt, sometimes because the schools have made less than complete representations giving the impression that a full-time job is easily obtainable, when, in fact, it is not. Given this reality, it is important to remember that the practice of law is a noble profession that takes price in its high ethical standards. Indeed, in order to join and continue to enjoy the privilege of being an active member of the legal profession, every prospective and active member of the profession is called upon to demonstrate candor and honesty in their practice...Defendant and its peers owe prospective students more than just barebones compliance with their legal obligations...In that vein, defendant and its peers have at least an ethical obligation of absolute candor to their prospective students").

61. See e.g., North State Autobahn, Inc. v. Progressive Ins. Group, 32 Misc. 3d 798, 928 N.Y.S. 2d 199 (West. Sup. 2011)(auto body shop alleged that the defendant Progressive Insurance Group steered insureds away from its auto body shop to others controlled by Progressive; business may assert a claim under GBL 349), aff'd 102 A.D. 3d 5 (2d Dept. 2012)("by conferring on an injured business competitor standing to challenge deceptive conduct practiced on the consumers in its marker, the integrity of the market may be maintained by an entity which may have more funds, broader information and more at stake in the market than any single individual consumer. Such private enforcement of this consumer protection statute is consistent with the purpose of the 1980 amendments inasmuch as it tends to ease the burden placed on the Attorney General by providing for alternative means of enforcing the substantive measures of consumer protection. So long as the allegedly deceptive conduct is sufficiently consumer-oriented, a business competitor protecting its own interest will ultimately serve to protect the interests of the consuming public ...we note that the right to bring a private action was not limited to those acting in a consumer role, but rather, it was provided to 'any person who has been injured by reason of any violation of this section (GBL § 349[h])...we hold that the allegation that the {Progressive defendants' deceptive practices diverted the plaintiffs' customers to competing businesses resulting in over $5 million in lost business sales constituted an allegation of a direct injury sufficient to confer standing upon the plaintiffs under (GBL) § 349(h)").

62. North State Autobahn, Inc. V. Progressive Insurance Group Co., 102 A.D. 3d 5 (2d Dept. 2012).

63. Ural v. Encompass Ins. Co. Of America, 97 A.D. 3d 562 (2d Dept. 2012).

64. Midland Funding, LLC v. Giraldo, 2013 WL 1189163 (N.Y. Dist. Ct. 2013).

65. Wilner v. Allstate Ins. Co., 71 AD3d 155.

66. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20.

67. Plaza PH 2001 LLC v. Plaza Residential Owners LP, 98 A.D. 3d 89 (1st Dept. 2012).

68 See also: **Moustakis v. Christie's, Inc.**, 68 A.D. 3d 637 (1st Dept. 2009)(auction; private contract dispute not consumer oriented); **Brooks v. Key Trust Company National Ass'n**, 26 A.D. 3d 628, 809 N.Y.S. 2d 270 (2006)(" plaintiff's complaint...

that defendants induced him to transfer his investment account to them for active management, that defendants thereafter failed to abide by promises and representations regarding the management and goals...(does) not amount to conduct affecting the consuming public at large "); **People v. Wilco Energy Corp.**, 284 A.D. 2d 469, 728 N.Y.S. 2d 471 (2d Dept. 2001)(" 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 "); **Walts v. Melon Mortgage Corporation**, 259 A.D. 2d 322, 686 N.Y.S. 2d 428 (1999)(" Plaintiffs have adequately alleged a materially deceptive practice aimed at consumers "), appeal dismissed 94 N.Y. 2d 795, 700 N.Y.S. 2d 424, 722 N.E. 2d 504 (1999); **Carr v. Pinnacle Group**, 27 Misc. 3d 1222 (N.Y. Sup. 2010)(private contract dispute not consumer oriented); **Richards v. Cesare**, 25 Misc. 3d 1217 (N.Y. Sup. 2009)(private contract dispute between attorney and client not consumer oriented); **Tate v. Fuccillo Ford, Inc.**, 15 Misc. 3d 453 (Watertown Cty. Ct. 2007)(" defendant's policy of fixing its times to do a given job on a customer's vehicle based on a national time standard rather than being based upon the actual time it took to do the task without so advising each customer of their method of assessing labor costs is ' a deceptive act or practice directed towards consumers and that such...practice resulted in actual injury to a plaintiff '"); **Chun v. BMW of Manhattan, Inc.**, 11 Misc. 3d 1078 (N.Y. Sup. 2005)(misrepresented extended warranty; " Plaintiffs' inability to cancel the Extension was not a merely private one-shot transaction "); **Meyerson v. Prime Realty Services, LLC**, 7 Misc. 2d 911(N.Y. Sup. 2005)(" defendants own and manage a substantial number of rent-regulated apartments, and use its challenged forms for all lease renewals, so that the dispute is not simply a private contract dispute and generally claims involving residential rental units are a type of claim recognized under (G.B.L. § 349)); **Dunn v. Northgate Ford, Inc.**, 1 Misc. 3d 911(A)(N.Y. Sup. 2004)(" there is evidence from other affiants that similar omissions and/or misstatements of fact, known to the dealer to be false or misleading...occurred in other sales at the same dealership...such practices are not isolated instances and would have a ' broader impact on consumers at large ' "); **McKinnon v. International Fidelity Insurance Co.**, 182 Misc. 2d 517, 522 (N.Y. Sup. 1999)(" the conduct must be consumer-oriented and have a broad impact on consumers at large "); see also **Sotheby's, Inc. v. Minor**, 2009 WL 3444887 (S.D.N.Y. 2009) (" Sotheby's is, however, correct in its contention that Minor

has failed to identify any other basis for injury to the public at large as a result of the allegedly deceptive practices ").

69. See e.g., Emergency Enclosures, Inc. V. National Fire Adjustment Co., Inc., 60 A.D. 3d 1658 (4th Dept. 2009)(" The gravamen of the complaint is not consumer injury or harm to the public interest, but rather, harm to plaintiff's business "); Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 A.D. 3d 473, 873 N.Y.S. 2d 679 (2d Dept. 2009)(private contractual dispute between two groups of anesthesiologists at Northern Westchester Hospital Center; GBL 349 claim dismissed); Flax v. Lincoln National Life Insurance Company, 54 A.D. 3d 992 (2d Dept. 2008)(" private contract disputes which are unique to the parties do not fall within the ambit of the statute. Here, the plaintiffs do not allege that the defendants engaged in deceptive business practices directed at members of the public generally who purchased flexible premium life insurance policies "); Mandelkow v. Child and Family Services of Erie County, 49 A.D. 3d 1316, 859 N.Y.S. 2d 321 (4th Dept. 2008)(first counterclaim " arises from ' a private contract dispute '"); Berrocal v. Abrams, 2010 NY Slip Op 50737(U)(" The gravamen of plaintiffs' complaint is that defendants fraudulently induced them to purchase the property and finance it with a loan from defendant Premium. Such claim does not amount to conduct which affects the consuming public at large "); Hurst v. Horse Power Auto Sales, Inc., 24 Misc. 3d 138 (N.Y.A.T. 2009)(private matter not consumer oriented); Purmil v. Chuk Dey India Too, Inc., 2008 NY Slip Op 51766(U)(Nassau District Court 2008)(" The matter is a private contract dispute over a specific commercial transaction between business entities ").

70. See Shaw v. Club Managers Association of America, 84 A.D. 3d 928 (2d Dept. 2011)(antitrust action (GBL 340) does not involve consumer oriented conduct).

71. M.V.B. Collision, Inc. V. Allstate Insurance Company, 728 F. Supp. 2d 205 (E.D.N.Y. 2010).

72. Nathanson v. Grand Estates Auction Co., 2010 WL 4916982 (E.D.N.Y. 2010).

73. M.V.B. Collision, Inc. V. Allstate Insurance Company, 728 F. Supp. 2d 205 (E.D.N.Y. 2010).

74. Ovitz v. Bloomberg L.P., 77 A.D. 3d 515, 909 N.Y.S. 2d 710 (1st Dept. 2010), aff'd 18 N.Y. 3d 753 (2012).

75. Kaufman v. Sirius XM Radio, Inc., 2010 WL 4674829 (S.D.N.Y. 2010).

76. Chiste v. Hotels.Com LP, 2010 WL 4630317 (S.D.N.Y. 2010).

77 See also: **Wellsburg Truck & Auto Sales, Inc. v. People State Bank,** 80 A.D. 3d 942, 915 N.Y.S. 2d 690 (3d Dept. 2011)(failure of bank to make promised loans; not consumer oriented); **Maple House, Inc. v. Alfred F. Cypes & Co.**, 80 A.D. 3d 672, 914 N.Y.S. 2d 912 (2d Dept. 2011)(not consumer oriented); **State of New York Workers' Compensation Board v. 26-28 Maple Avenue, Inc.**, 80 A.D. 3d 1135, 915 N.Y.S. 2d 744 (3d Dept. 2011)(not consumer oriented); **Western Bldg. Restoration Co., Inc. v. Lovell Safety Management Co., LLC**, 61 A.D. 3d 1095, 876 N.Y.S. 2d 733 (3d Dept. 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 AD3d 1137 (2d Dept. 2009)(failure to allege that misconduct had a broad impact on consumers at large); **Paltre v. General Motors Corp**., 26 A.D. 3d 481, 810 N.Y.S. 2d 496 (2006)(failure to state G.B.L. § 349 claim " because the alleged misrepresentations 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 (2005)(defective synthetic stucco; " To establish prima facie violation of (G.B.L. § 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 (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 Casualty Co. v. Nationwide Indemnity Co.**, 16 A.D. 2d 353, 792 N.Y.S. 2d 434 (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 (2005)(denial of insurance claim not materially deceptive nor consumer oriented practice); **Medical Society of New York v. Oxford Health Plans, Inc**., 15 A.D. 3d 206, 790 N.Y.S. 2d 79 (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 (2003)(claim against insurance agent for misrepresentations not consumer oriented); **Martin v. Group Health, Inc.**, 2 A.D. 3d 414, 767 N.Y.S. 2d 803 (2003)(dispute over insurance coverage for dental implants not consumer oriented); **Goldblatt v. MetLife, Inc.**, 306 A.D. 2d 217, 760 N.Y.S. 2d 850 (2003)(claim against insurance company not " consumer oriented "); **Plaza Penthouse LLLP v. CPS 1 Realty LP**, 24 Misc. 3d 1238 (N.Y. Sup. 2009) (private dispute not consumer oriented); **Solomons v. Greens at Half Hollow, LLC**, 26 Misc. 3d 83 (N.Y.A.T., 2d Dept. 2009)(" In our view, plaintiff's cause of action was based on a private contract that was unique to the parties, rather than conduct that affects consumers at large "); **Decatrel v. Metro Loft Management, LLC**, 30 Misc. 3d 1212(A) (N.Y. Sup. 2010)(violation of Roommate Law, RPL 235-f; GBL 349 claim not stated because not consumer oriented conduct); **Lincoln Life and Annuity Co. v. Bernstein**, 24 Misc. 3d 1211 (Onondaga Sup. 2009)(" Defendants set forth in their (counterclaim) that the policy issued by Lincoln Life was a standard-form policy sold by Lincoln Life to many consumers "); **Richstone v. Everbank Reverse Mortgage, LLC**, 27 Misc. 3d 1201 (N.Y. Sup. 2009)(" the conduct must be consumer-oriented and have a broad impact on consumers at large...Nothing more than a failure to abide by a private agreement is alleged here "); **Freefall Express, Inc. v. Hudson River Park Trust**, 16 Misc. 3d 1135 (N.Y. Sup. 2007)(" Where the alleged deceptive practices occur between relatively sophisticated entities with equal bargaining power such does not give rise to liability under GBL 349...large business are not the small-time individual consumers GBL 349 was intended to protect "); **Feinberg v. Federated Department Stores, Inc.**, 15 Misc. 3d 299, 832 N.Y.S. 2d 760 (N.Y. Sup. 2007)(private contract dispute over charge-backs between apparel manufacturer and distributor and retail store); **Huang v. Utica National Ins. Co.**, 15 Misc. 3d 127 (N.Y.A.T. 2007)(" private contract dispute "); **Rosenberg v. Chicago Ins. Co.**, 2003 WL 21665680 (N.Y. Sup. 2003)(conduct not consumer oriented; " Although the complaint includes allegations that the insurer's alleged bad acts had an impact on the public (plaintiff) is a large law firm, which commenced this action to protect its interests under a specific insurance policy "); **Canario v. Prudential Long Island Realty**, 300 A.D. 2d 332, 751 N.Y.S. 2d 310 (2002)(.78 acre property advertised as 1.5 acres is size; " the misrepresentation had the potential to affect only a single real estate transaction involving a single unique piece of property...There was no impact on consumers or the public at large "); **Cruz v. NYNEX Information Resources**, 263 A.D. 2d 285, 290, 703 N.Y.S. 2d 103

(1st Dept. 2000).

78. See e.g., Golden Eagle Capital Corp. v. Paramount Mgt. Corp., 88 A.D. 3d 646, 931 N.Y.S. 2d 632 (2d Dept. 2011)(action to foreclose a mortgage homeowner asserts counterclaims alleging fraud, equitable estoppel, doctrine of unclean hands and violation of GBL § 349; GBL § 349 claim dismissed "as the conduct alleged...does not have a 'broad impact on consumers at large' and therefore fails to state a cause of action"); Golub v. Tannenbaum-Harber Co., Inc., 88 A.D. 3d 622, 931 N.Y.S. 2d 308 (1st Dept. 2011)("Plaintiff's claims for fraudulent inducement are based on defendant's alleged failure to provide plaintiff with certain information relating to the insurance policies it was offering...As for plaintiff's claim under GBL § 349 he failed to allege...the type of conduct that would have a broad impact on consumers at large...and his conclusory allegations about defendant's practices with other clients are insufficient to save the claim"); Weinstein v. Natalie Weinstein Design Assoc. Inc., 86 A.D. 3d 641, 928 N.Y.S. 2d 305 (2d Dept. 2011)(homeowners enter into contract for the provision of "certain interior design and decorating services at their home in exchange for their payment of a stated fee"; GBL § 349 claims against individuals dismissed because "plaintiff failed to allege any deceptive acts committed by those defendants broadly impacting consumers at large"; GBL §§ 349, 350 claims against corporation sustained because "plaintiffs alleged the type of misleading consumer-oriented conduct sufficient to state claims for deceptive business practices and false advertising"); Crown Associates, Inc. V. Zot, LLC, 83 A.D. 3d 765, 921 N.Y.S. 2d 268 (2d Dept. 2011)(tenants allege that "'defendants orchestrated a scheme to purchase the subject property with the intention of harassing the existing tenants who paid low rents, thereby forcing them out of the building and enabling defendants to profit by re-renting the spaces thus cleared to new tenants who would pay higher rents'... Complaint failed to allege that the defendants were engaged in a 'consumer-oriented' practice"); Merin v. Precinct Developers LLC, 74 A.D. 3d 688, 902 N.Y.S. 2d 821 (1st Dept. 2010)(GBL 349 dismissed "since it stemmed from a private contractual dispute between the parties without ramifications for the public at large"); Cooper v. New York Central Mutual Fire Insurance Co., 72 A.D. 3d 1556, 900 N.Y.S. 2d 545 (4th Dept. 2010)("this is a private contractual dispute, 'unique to the parties'"); Aguaiza v. Vantage Properties, LLC, 69 A.D. 3d 422, 893 N.Y.S. 2d 19 (1st Dept. 2010)("private disputes between landlords and tenants, not consumer-oriented conduct aimed at the public at large"); Beller v William Penn Life Ins. Co., 8 AD3d 310, 314 [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; Elacqua v Physicians' Reciprocal Insurers, 52 AD3d 886, 888 [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"); Dennenberg v. Rosen, 71 AD3d 187 (" This case involves professional services surrounding the design and implementation of as tax-driven, sophisticated, individual private pension plan costing millions of dollars...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 consumer public at large "); North State Autobahn, Inc. v. Progressive Ins. Group, 32 Misc. 3d 798, 928 N.Y.S. 2d 1999 (West. Sup. 2011)("The gravamen of the
claims is that Progressive through its employees...steered its insureds to (Progressive's Direct Repair Program (DRP)) DRP (auto body) shops and away from plaintiff by means of deceptive, misleading and untrue statements which disparaged plaintiff"; motion to dismiss GBL § 349 claims denied; "practices by insurance companies involving routine, widespread marketing and communication with insureds, impacting the public at large, may support a cause of action under section 349...This court agrees ...that an insurer's misrepresentations to its insureds as part of a broad DRP may be sufficiently consumer-oriented to state a cause of action under section 349, that the alleged loss of business resulting therefrom is direct injury and that plaintiff's cause of action is not merely a disguised claim for steering in violation of Insurance Law § 2610"); Jagger v. Katz, 33 Misc. 3d 139(A)(N.Y.A.T. 2011)("The action seeks damages against defendants, the owner and managing agent of plaintiff's former residential apartment building, for injuries to her person and property resulting from extensive water penetration and/or mold contamination in her apartment unit...plaintiff's allegations of deceptive acts and practices 'presented only [a] private dispute [] between landlords and tenants and not consumer-oriented conduct aimed at the public at large'");

See also: Lane v. Fein, Such and Crane, LLP, 2011 WL 722372 (E.D.N.Y. 2011)(debtors challenge collection action; GBL § 349 claims dismissed because defendants "alleged acts are almost certainly no consumer-oriented as they affected the plaintiffs alone, and are not likely yo have a 'broader impact on consumers at large'...have alleged no facts-aside from their conclusion that they suffered emotional distress-that show that the alleged acts of the defendant caused any quantifiable damage...plaintiffs have not alleged any acts that materially misleading"); Barkley v. Olympia Mortgage Co. ("Plaintiffs, eight African-American

first-time home buyers, commenced (actions) against (defendants) lenders, appraisers, lawyers and others, claiming that defendants conspired to sell them overvalued, defective homes, financed with predatory loans, and targeted them because they are minorities...UH Defendants advertised their services on billboards, in subways, in newspapers, on television, through a website and with flyers"; GBL 349 claim sustained); Rodriquez v. It's Just Lunch Int'l, 2010 WL 685009 (S.D.N.Y. 2010)(misrepresented dating services; " IJLI's Web site and its magazine advertisements were clearly intended to reach the public at large in order to increase franchise membership. Similarly, insofar as the complaint alleges the oral misrepresentations made by franchise staff members were ' routine ' and made ' according to the mandatory IJLI script ' all staff members were ' required to follow ', the statements made...cannot be considered ' unique to these two parties... or ' single shot transactions... Furthermore, with respect to the overcharging allegation, the New York attorney general's determination to conduct his own investigation into this charge, itself, signals the conduct was consumer-oriented "); Corazzini v. Litton Loan Servicing, LLP, 2010 WL 1132683 (N.D.N.Y. 2010)(" The only factual allegations in her Complaint pertain to a dispute over late fees between the parties...Plaintiff only describes a private contractual dispute "); Kurschner v. Massachusetts Casualty Insurance Co., 2009 WL 537504 (E.D.N.Y. 2009)(" Where as here a defendant allegedly enters into ' contractual relationship[s] with customers nationwide ' via a standard form contract and has allegedly committed the challenged actions in its dealings with multiple insureds, such behavior plausibly affects the public generally...plaintiff has sufficiently pled the requirement of ' consumer-oriented ' conduct ")].

79. Williams v. Citigroup, Inc., 2013 WL 1110646 (1st Dept. 2013).

80. Promatch, Inc. v. AFG Group, Inc., 95 A.D. 3d 450 (1st Dept. 2012).

81. Yellow Book Sales v. Hillside Van Lines, Inc., 98 A.D. 3d 663 (2d Dept. 2012).

82. Vescon Construction, Inc. V. Gorelli Ins. Agency, Inc., 97 A.D. 3d 658 (2d Dept. 2012).

83. Gomez-Jimenez v. New York Law School, 103 A.D. 3d 13, 956 N.Y.S. 2d 54 (1st Dept. 2012).

84. Barkley v. Olympia Mortgage Co., 2010 WL 3709278 (E.D.N.Y. 2010).

85. See also: **Lincoln Life and Annuity Co. v. Bernstein**, 24 Misc. 3d 1211 (Onondaga Sup. 2009)(" Defendants set forth in their (counterclaim) that Lincoln's representations in the policy, were misleading in a material way in that (they) were led to believe that the Trust's claim for payment under the policy would be investigated and processed in good faith and in a timely manner and that the benefits would be paid in accordance with the terms of the policy ").

86. Lane v. Fein, Such and Crane, LLP, 2011 WL 722372 (E.D.N.Y. 2011).

87. Patchen v. GEICO, 2011 WL 49579 (E.D.N.Y. 2011).

88. Statler v. Dell, Inc., 2011 WL 1326009 (E.D.N.Y. 2011).

89. Sotheby's, Inc. v. Minor, 2009 WL 3444887 (S.D.N.Y. 2009).

90. M.V.B. Collision, Inc. V. Allstate Insurance Company, 728 F. Supp. 2d 205 (E.D.N.Y. 2010).

91 *Goldman v Simon Property Group, Inc.*, 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).

92 *L.S. v Simon Property Group, Inc.*, New York Law Journal, July 21, 2010, at 26, col. 5 (N.Y. Sup.), mod'd __A.D. 3d__, 942 N.Y.S. 2d 551 (2d Dept. 2012).

93 *Sheinken v Simon Property Group, Inc.*, 33 Misc. 3d 287 (N.Y. Sup. 2011).

94 *SPGCC, LLC v Ayotte*, 488 F. 3d 525 (1st Cir. 2007).

95. Aretakis v. Federal Express Corp., 2011 WL 1226278 (S.D.N.Y. 2011).

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

97. **Card v. Chase Manhattan Bank**, 175 Misc. 2d 389, 669 N.Y.S. 2d 117 (1996).

98. **Card v. Chase Manhattan Bank**, 175 Misc. 2d 389, 669 N.Y.S. 2d 117, 121 (1996)

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

100. **People v. Lipsitz**, 174 Misc. 2d 571, 663 N.Y.S. 2d 468, 475 (1997).

101. **People v. McNair**, 9 Misc. 2d 1121(a) (N.Y. Sup. 2005).

102 See Dickerson, New York State Class Actions: Make It Work Fulfill The Promise, 74.2 Albany L.R. 711-729 (2010-2011).

103 Koch v Acker, Merrall & Condit Co., _____ NY3d _____, 2012 NY Slip Op 02254 (Mar 27, 2012).

104. People v. Nationwide Asset Services, Inc., 26 Misc. 3d 258 (Erie Sup. 2009).

105. **Metropolitan Opera Association, Inc. v. Figaro Systems, Inc.**, 7 Misc. 3d 503 (N.Y. App. Div. 2005).

106. People v. City Model and Talent Development, Inc., 29 Misc. 3d 1205(A) (N.Y. Sup. 2010).

107. Frey v. Bekins Van Lines, Inc., 2010 WL 4358373 (E.D.N.Y. 2010)

108. **Millan v. Yonkers Avenue Dodge, Inc.,** New York Law Journal, Sept. 17, 1996, p. 26, col. 5 (Yks. Cty. Ct.).

109. Automobile manufacturers or dealers may sell consumers new and used car warranties which, typically, are contingent upon an opportunity to cure. **Borys v. Scarsdale Ford Inc.,** New York Law Journal, June 15, 1998, p. 34, col. 4 (Yks. Cty. Ct.).

110. **Denny v. Ford Motor Company**, 87 N.Y. 2d 248, 639 N.Y.S. 2d 250, 253-259, 662 N.E. 2d 730 (1995)(comparison of causes of action based upon strict products liability and breach of warranty of merchantability).

111. Strict products liability theory applies to new and used car dealers. **Nutting v. Ford Motor Company**, 180 A.D. 2d 122, 584 N.Y.S. 2d 653 (1992).

112. **Ritchie v. Empire Ford Sales Inc.**, New York Law Journal, Nov. 7, 1996, p. 30, col. 3 (Yks. Cty. Ct.).

113. **Borys v. Scarsdale Ford, Inc.,** New York Law Journal, June 15, 1998, p. 34, col. 4 (Yks. Cty. Ct.).

114. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 659 (1995).

115. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 660 (1995).

116. New York General Business Law § 617(2)(a).

117. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 661 (1995).

118. **Kim v. BMW of Manhattan, Inc.**, 11 Misc. 3d 1078 (N.Y. Sup. 2005).

119. **Welch v. Exxon Superior Service Center**, New York Law Journal, May 8, 2003, p. 25, col. 2 (City Ct. 2003).

120. **Shalit v. State of New York**, 153 Misc. 2d 241, 580 N.Y.S. 2d 836 (1992)

121. **Denny v. Ford Motor Company**, 87 N.Y. 2d 248, 638 N.Y.S. 2d 250, 253-259 (1995).

122. **Hull v. Moore Mobile Home Stebra, Inc.**, 214 A.D. 2d 923, 625 N.Y.S. 2d 710, 711 (1995).

123. **Natale v. Martin Volkswagen, Inc.**, 92 Misc. 2d 1046, 402 N.Y.S. 2d 156, 158-159 (1978).

124. **Mollins v. Nissan Motor Co., Inc.**, 14 Misc. 3d 1226 (Nassau Sup. 2007).

125. **Urquhart v. Philbor Motors, Inc.**, 9 A.D. 3d 458, 780 N.Y.S. 2d 176 (2d Dept. 2004).

126. **Tarantino v. DaimlerChrysler Corp.**, New York Law Journal, October 30, 2000, p. 34, col. 5 (West. Sup.).

127. **DiCinto v. DaimlerChrysler Corp**., New York Law Journal, August 30, 2000, p. 24, col. 5 (N.Y. Sup.).

128. **Carter-Wright v. DaimlerChrysler Corp.**, New York Law Journal, August 30, 2000, p. 26.

129. **DiCintio v. DaimlerChrysler Corp.**, 2002 WL 257017 (N.Y. Ct. App. Feb. 13, 2002).

130. **Borys v. Scarsdale Ford, Inc.,** New York Law Journal, June 15, 1998, p. 34, col. 4 (Yks. Cty. Ct.).

131. **Levitsky v. SG Hylan Motors, Inc.**, New York Law Journal, July 3, 2003, p. 27, col. 5 (N.Y. Civ. 2003).

132. **Spielzinger v. S.G. Hylan Motors Corp**., New York Law Journal, September 10, 2004, p. 19, col. 3 (Richmond Civ. 2004).

133. **Thompson v. Foreign Car Center, Inc**., New York Law Journal, March 10, 2006, p. 19, col. 3 (N.Y. Sup.).

134. **Matter of DaimlerChrysler Corp., v. Spitzer**, 7 N.Y. 3d 653, 860 N.E. 2d 705, 827 N.Y.S. 2d 88 (2006).

135. **Borys v. Scarsdale Ford, Inc.,** New York Law Journal, June 15, 1998, p. 34, col. 4 (Yks. Cty. Ct.).

136. Kandel v. Hyundai Motor America, __A.D. 3d__, 858 N.Y.S. 2d 298 (2008).

137. **Mollins v. Nissan Motor Co., Inc.**, 14 Misc. 3d 1226 (Nassau Sup. 2007).

138. **Matter of General Motors Corp. [Sheikh**], 2007 WL 4577944 (3d Dept. 2007).

139. **Chrysler Motors Corp. v. Schachner,** 166 A.D. 2d 683, 561 N.Y.S. 2d 595, 596-597 (1990).

140. **Matter of General Motors Corp. v. Warner**, 5 Misc. 3d 968, 784 N.Y.S. 2d 360 (Albany Sup. 2004).

141. **Matter of DaimlerChrysler Corp. v. Spitzer**, 6 Misc. 3d 228, 782 N.Y.S. 2d 610 (Albany Sup. 2004), *aff'd* 26 A.D. 3d 88, 804 N.Y.S. 2d 506 (2005), *aff'd* 7 N.Y. 3d 653, 860 N.E. 2d 705, 827 N.Y.S. 2d 88 (2006). See also: **Matter of Arbitration between General Motors Corp. v. Brenda Gurau**, 33 A.D. 3d 1149, 824 N.Y.S. 2d 180 (3d Dept. 2006)(" Lemon Law does not require a consumer to prove that a defect exists at the time of an arbitration hearing in order to recover under the statute ").

142. **Kucher v. DaimlerChrysler Corp**., 9 Misc. 3d 45, 802 N.Y.S. 2d 298 (N.Y. App. Term 2005).

143. **Kucher v. DaimlerChrysler Corp**., 9 Misc. 3d 45, 802 N.Y.S. 2d 298 (N.Y. App. Term 2005).

144. **Alpha Leisure, Inc. v. Leaty**, 14 Misc. 3d 1235 (Monroe Sup. 2007).

145. Kandel v. Hyundai Motor America, 858 N.Y.S. 2d 298 (2008).

146. **Kucher v. DaimlerChrysler Corp.**, New York Law Journal, May 15, 2006, p. 20, col. 3 (N.Y. Civ.), mod'd 20 Misc. 3d 64 (N.Y.A.T. 2008).

147. **DaimlerChrysler Corp. v. Karman**, 5 Misc. 3d 567, 782 N.Y.S. 2d 343 (Albany Sup. 2004).

148. Matter of City Line Auto Mall, Inc. v. Mintz, 42 A.D. 3d 407, 840 N.Y.S. 2d 783 (2007).

149. **B & L Auto Group, Inc. v. Zilog**, New York Law Journal, July 6, 2001, p. 21, col. 2 (N.Y. Civ. 2001).

150. Collins v. Star Nissan, New York Law Journal, September 2, 2010, p. 25 (N.Y. Sup. 2010).

151. **Goldsberry v. Mark Buick Pontiac GMC**, New York Law Journal, December 14, 2006, p. 25, col. 1 (Yks Cty Ct.).

152. **Barthley v. Autostar Funding LLC**, Index No: SC 3618-03, Yonkers Small Claims Court, December 31, 2003, J. Borrelli (In Barthley the consumer purchased a 1993 Lexus with over 110,000 miles and an extended warranty on the vehicle. After the vehicle experienced engine problems and a worn cam shaft was replaced at a cost of $1,733.66 the consumer made a claim under the extended warranty. The claim was rejected by the warranty company " on the basis that a worn camshaft was a pre-existing condition ". The Court found this rejection unconscionable and awarded damages to cover the cost of the new camshaft. " In effect, the warranty company has chosen to warranty a ten year old car with over 110,000 miles on the odometer and then rejects a timely claim on the warranty on the basis that the car engine's internal parts are old and worn ", rev'd N.Y.L.J., April 26, 2005, p. 25, col. 3 (N.Y.A.T.)(" defendant was not a party to the warranty agreement ").

153. Snider v. Russ's Auto Sales, Inc., 30 Misc. 3d 133(A)(N.Y.A.T. 2010).

154. **Cintron v. Tony Royal Quality Used Cars, Inc.**, 132 Misc. 2d 75, 503 N.Y.S. 2d 230 (1986).

155. Kassim v. East Hills Chevrolet, 34 Misc. 3d 158(A)(N.Y.A.T. 2012).

156. **Millan v. Yonkers Avenue Dodge, Inc.**, New York Law Journal, Sept. 17, 1996, p. 26, col. 5 (Yks. Cty. Ct.).

157. **Armstrong v. Boyce**, 135 Misc. 2d 148, 513 N.Y.S. 2d 613, 617 (1987).

158. **Shortt v. High-Q Auto, Inc.**, New York Law Journal, December 14, 2004, p. 20, col. 3 (N.Y. Civ. 2004).

159. **Fortune v. Scott Ford, Inc**., 175 A.D. 2d 303, 572 N.Y.S. 2d 382 (1991).

160. **Jandreau v. LaVigne**, 170 A.D. 2d 861, 566 N.Y.S. 2d 683 (1991).

161. **Diaz v. Audi of America, Inc.,** 19 A.D. 3d 357, 796 N.Y.S. 2d 419 (2005).

162. **Ireland v. J.L.'s Auto Sales, Inc.**, 151 Misc. 2d 1019, 574 N.Y.S. 2d 262 (1991), rev'd 153 Misc. 2d 721, 582 N.Y.S. 2d 603 (1992).

163. **Williams v. Planet Motor Car, Inc**., New York Law Journal, January 3, 2002, p. 19 (Kings Civ. Ct.).

164. **DiNapoli v. Peak Automotive, Inc.**, 34 A.D. 3d 674, 824 N.Y.S. 2d 424 (2d Dept. 2006).

165. **Felton v. World Class Cars**, 12 Misc. 3d 64, __N.Y.S. 2d__ (N.Y.A.T. 2006).

166. **Lipscomb v. Manfredi Motors**, New York Law Journal, April 2, 2002, p. 21 (Richmond Civ. Ct.)

167. **Felton v. World Class Cars**, 12 Misc. 3d 64, __N.Y.S. 2d__ (N.Y.A.T. 2006). See also: **Williams v. Planet Motor Car**, 190 Misc. 2d 33 (2001).

168. **Williams v. Planet Motor Car, Inc**., New York Law Journal, January 3, 2002, p. 19 (Kings Civ. Ct.).

169
. **Barilla v. Gunn Buick Cadillac-GMC, Inc.**, 139 Misc. 2d 496, 528 N.Y.S. 2d 273 (1988).

170. **Ritchie v. Empire Ford Sales Inc.,** New York Law Journal, Nov. 7, 1996, p. 30, col. 3 (Yks. Cty. Ct.).

171. **People v. Condor Pontiac**, 2002 WL 21649689 (N.Y. Sup. 2003).

172. **Williams v. Planet Motor Car, Inc**., New York Law Journal, January 3, 2002, p. 19 (Kings Civ. Ct.).

173. **Coxall v. Clover Commercials Corp.**, New York Law Journal, June 17, 2004, p. 19, col. 1 (N.Y. Civ. 2004).

174 Jung v. The Major Automotive Companies, Inc., 17 Misc. 3d 1124 (Bronx Sup. 2007).

175. Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y. 3d 253,___N.Y.S. 2d___ (2007).

176. Vasilas v. Subaru of America, Inc., New York Law Journal, August 27, 2009, p. 30, col. 3 (S.D.N.Y.).

177. Drew v. Sylvan Learning Center, 16 Misc. 3d 838 (N.Y. Civ. 2007).

178. See e.g., Andre v. Pace University, 161 Misc. 2d 613, 618 N.Y.S. 2d 975 (1994), rev'd on other grounds 170 Misc. 2d 893, 655 N.Y.S. 2d 777 (1996)(failing to give basic computer course for beginners). See also: Cullen v. Whitman Medical Corp., 197 F.R.D. 136 (E.D. Pa. 2000)(settlement of class action involving education misrepresentations).

179. Brown v. Hambric, 168 Misc. 2d 502 (Yonkers City Ct. 1995).

180. Cambridge v. Telemarketing Concepts, 171 Misc. 2d 796 (Yonkers City Ct. 1997).

181. People v. McNair, 9 Misc. 3d 1121 (N.Y. 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 G.B.L. 350-d of $500 for each deceptive act or $38,500.00 and costs of $2,000.00 pursuant to CPLR § 8303(a)(6)").

182. **Andre v. Pace University**, 161 Misc. 2d 613, 618 N.Y.S. 2d 975 (1994), rev'd on other grounds 170 Misc. 2d 893, 655 N.Y.S. 2d 777 (1996). See also: **Cullen v. Whitman Medical Corp**., 197 F.R.D. 136 (E.D. Pa. 2000)(settlement of class action involving education misrepresentations).

183 New York State Restaurant Association v. New York City Board of Health, 2008 WL 1752455 (S.D.N.Y. 2008), aff'd 556 F. 3d 114 (2d Cir. 2009).

184. [Pelman v. McDonald's Corp., 396 F. 3d 508 (2d Cir. 2005).

185. Pelman v. McDonald's Corp., 272 F.R.D. 82 (S.D.N.Y. 2010).

186. Velasquez v. Laskar, 34 Misc. 3d 158(A)(N.Y.A.T. 2012).

187. **Precision Foundations v. Ives**, 4 A.D. 3d 589, 772 N.Y.S. 2d 116 (3d Dept. 2004).

188. Consigliere v. Grandolfo, 30 Misc. 3d 1207(A) (Rye Cty Ct 2011).

189. Kitchen & Bath Design Gallery v. Lombard, 35 Misc. 3d 1205(A).

190. Cristillo v. Custom Construction Services, Inc., 19 Misc. 3d 1140(A) (Rochester City Ct. 2008).

191. **Udezeh v. A+Plus Construction Co.**, New York Law Journal, October 10, 2002, p. 22 (N.Y. Civ. 2002).

192. **Garan v. Don & Walt Sutton Builders, Inc**., 5 A.D. 3d 349, 773 N.Y.S. 2d 416 (2d Dept. 2004).

193. Carney v. Coull Building Inspections, Inc., 16 Misc. 3d 1114 (N.Y. Civ. 2007).

194. Ricciardi v. Frank d/b/a InspectAmerica Engineering, P.C., 163 Misc. 2d 337, 620 N.Y.S. 2d 918 (1994), mod'd 170 Misc. 2d 777, 655 N.Y.S. 2d 242 (N.Y.A.T. 1996).

195. Mancuso v. Rubin,52 A.D. 3d 580, 861 N.Y.S. 2d 79 (2d Dept. 2008).

196. Simone v. Homecheck Real Estate Services Inc., 42 A.D. 3d 518 (N.Y.A.D. 2007).

197. Marraccini v. Ryan, 17 N.Y. 3d 83 (2011). Marraccini v. Ryan, 17 N.Y. 3d 83 (2011)

198. People v. Biegler, 17 Misc. 3d 1139 (N.Y. Dist. Ct. 2007).

199. **Flax v. Hommel**, 40 A.D. 3d 809, 835 N.Y.S. 2d 735 (2d Dept. 2007).

200. **CLE Associates, Inc. v. Greene**, New York Law Journal, Nov. 22, p. 27, col. 3 (N.Y. Sup.).

201. **Goldman v. Fay**, 8 Misc. 3d 959, 797 N.Y.S. 2d 731 (Richmond Civ. 2005).

202. **Tri-State General Remodeling Contractors, Inc. v. Inderdai Bailnauth**, 194 Misc. 2d 135, 753 N.Y.S. 2d 327 (2002).

203. **Goldman v. Fay**, 8 Misc. 3d 959, 797 N.Y.S. 2d 731 (2005).

204. Franklin Home Improvements Corp. V. 687 6th Avenue Corp., 19 Misc. 3d 1107 (N.Y. Sup. 2008).

205. **Altered Structure, Inc. v. Solkin**, 7 Misc. 3d 139(A) (N.Y. App. Div. 2005).

206. **Routier v. Waldeck**, 184 Misc. 2d 487, 708 N.Y.S. 2d 270 (2000).

207. **Colorito v. Crown Heating & Cooling, Inc**., 2005 WL 263751 (N.Y. App. Term 2005).

208. **Cudahy v. Cohen**, 171 Misc. 2d 469, 661 N.Y.S. 2d 171 (1997).

209. **Moonstar Contractors, Inc. v. Katsir**, New York Law Journal, October 4, 2001, p. 19, col. 6 (N.Y. Civ.)

210. **Mandioc Developers, Inc. v. Millstone**, 164 Misc. 2d 71, 623 N.Y.S. 2d 704 (1995).

211. **B&F Bldg. Corp. v. Liebig**, 76 N.Y. 2d 689, 563 N.Y.S. 2d 40, 564 N.E. 2d 650 (1990).

212. **CLE Associates, Inc. v. Greene**, New York Law Journal, Nov. 22, p. 27, col. 3 (N.Y. Sup.).

213. Naclerio v. Pradham, 45 A.D. 3d 585, 845 N.Y.S. 2d 409 (2007).

214. For a discussion of this statute see Bailey & Desiderio, **New Home Warranty, An Open Question Seeking an Answer**, Real Estate Update, New York Law Journal, November 10, 2004, p. 5.

215. **Etter v. Bloomingdale Village Corp**., 6 Misc. 3d 135(A) (N.Y. App. Term. 2005.)

216. **Farrell v. Lane Residential, Inc.**, 13 Misc. 3d 1239 (Broome Sup. 2006).

217. **Putnam v. State of New York**, 233 A.D. 2d 872 (2d Dept. 1996).

218. **Farrell v. Lane Residential, Inc.**, 13 Misc. 3d 1239 (Broome Sup. 2006).

219. Security Supply Corporation v. Ciocca, 49 A.D. 3d 1136, 854 N.Y.S. 2d 570 (2008).

220. **Sharpe v. Mann**, 34 A.D. 3d 959, 823 N.Y.S. 2d 623 (3d Dept. 2006).

221. **Sharpe v. Mann**, 34 A.D. 3d 959, 823 N.Y.S. 2d 623 (3d Dept. 2006).

222. **Zyburo v. Bristled Five Corporation Development Pinewood Manor**, 12 Misc. 3d 1177 (Nassau Dist. Ct. 2006).

223. **Latiuk v. Faber Construction Co., Inc.**, 269 A.D. 2d 820, 703 N.Y.S. 2d 645 (2000)(builder could not reply upon contractual shortened warranty period because of a failure to comply with statutory requirements).

224. **Fumarelli v. Marsam Development, Inc**., 238 A.D. 2d 470, 657 N.Y.S. 2d 61 (1997), aff'd 92 N.Y. 2d 298, 680 N.Y.S. 2d 440, 703 N.E. 2d 251 (1998)(purchase agreement's limited warranty must be in accordance with the provisions of (G.B.L. § 777-b)).

225. Reis v. Cambridge Development & Construction Corp., 30 Misc. 3d 142(A)(N.Y.A.T. 2011).

226. **Finnegan v. Hill**, 38 A.D. 3d 491, 833 N.Y.S. 2d 107 (2d Dept. 2007).

227. **Biancone v. Bossi**, 24 A.D. 3d 582, 806 N.Y.S. 2d 694 (2005).

228. **Rosen v. Watermill Development Corp**., 1 A.D. 3d 424, 768 N.Y.S. 2d 474 (2003).

229. **Taggart v. Martano**, 282 A.D. 2d 521 (N.Y. App. Div. 2001).

230. **Testa v. Liberatore**, 6 Misc. 3d 126(A)(N.Y. App. Term. 2004).

231. **Randazzo v. Abram Zylberberg**, 4 Misc. 3d 109 (N.Y. App. Term. 2004).

232. Trificana v. Carrier, 81 A.D. 3d 1339 (4th Dept. 2011).

233. **Goretsky v. ½ Price Movers, Inc.**, New York Law Journal, March 12, 2004, p. 19, col. 3 (N.Y. Civ. 2004).

234. Frey v. Bekins Van Lines, Inc., 2010 WL 4358373 (E.D.N.Y. 2010)

235. **Olukotun v. Reiff**, Index No: S.C.R. 232/04, Richmond Cty Civ Ct. July 29, 2004, J. Straniere.

236. Baronoff v. Kean Development Co., Inc., 12 Misc. 3d 627 (Nassau Sup. 2006).

237. **Ragucci v. Professional Construction Services**, 25 A.D. 3d 43, 803 N.Y.S. 2d 139 (2005).

238. See Camisa v. Papaleo, 2012 WL 718030 (2d Dept. 2012)("we conclude that the complaint sufficiently states a cause of action ro recover damages for fraud on the theory that the defendants actively concealed that alterations to the premises had been made illegally...(thwarting) plaintiffs' efforts to fulfill their responsibilities under the doctrine of caveat emptor").

239. Simone v. Homecheck Real Estate Services, Inc., 42 A.D. 2d 518, 840 N.Y.S. 2d 398, 400 (2d Dept. 2007).

240. Ayres v. Pressman, 14 Misc. 3d 145 (N.Y.A.T. 2007).

241. Calvente v. Levy, 12 Misc. 3d 38 (N.Y.A.T. 2006).

242. Ayers, supra, at 14 Misc. 3d 145.

243. Simone v. Homecheck Real Estate Services, Inc., 42 A.D. 2d 518, 840 N.Y.S. 2d 398, 400 (2d Dept. 2007). See also: McMullen v. Propester, 13 Misc. 3d 1232 (N.Y. Sup. 2006).

244. **Spatz v. Axelrod Management Co.**, 165 Misc. 2d 759, 630 N.Y.S. 2d 461 (1995).

245. **Seecharin v. Radford Court Apartment Corp.**, Index No. SC 3194-95, Yks. Cty. Ct. (TAD), Decision dated June 15, 1995.

246. **Spatz v. Axelrod Management Co.**, 165 Misc. 2d 759, 764, 630 N.Y.S. 2d 461 (1995).

247. **Spatz v. Axelrod Management Co.,** 165 Misc. 2d 759, 630 N.Y.S. 2d 461 (1995); **Seecharin v. Radford Court Apartment Corp**., supra.

300. **Kachian v. Aronson**, 123 Misc. 2d 743 (1984)(15% rent abatement).

249. **Spatz v. Axelrod Management Co.**, 165 Misc. 2d 759, 630 N.Y.S. 2d 461 (1995).

250. **Goode v. Bay Towers Apartments Corp**., 1 Misc. 3d 381, 764 N.Y.S. 2d 583 (2003).

251 *Ippolito v TJC Development LLC*, 83 A.D. 3d 57 (2d Dept, 2011). See also: *Stern v DiMarzo*, Inc., 77 A.D. 3d 730, 909 N.Y.S. 2d 480 (2d Dept. 2010).

252. Casamento v. Jyarequi, 88 A.D. 3d 345 (2d Dept. 2011).

253. **Gaidon v. Guardian Life Insurance Co.**, 94 N.Y. 2d 330, 338, 704 N.Y.S. 2d 177, 725 N.E. 2d 598 (1999).

254. **Tahir v. Progressive Casualty Insurance Co.**, 2006 WL 1023934 (N.Y. Civ. 2006).

255. **Beller v. William Penn Life Ins. Co.**, 8 A.D. 3d 310, 778 N.Y.S. 2d 82 (2d Dept. 2004).

256. **Monter v. Massachusetts Mutual Life Ins. Co.**, 12 A.D. 3d 651, 784 N.Y.S. 2d 898 (2d Dept. 2004).

257. **Skibinsky v. State Farm Fire and Casualty Co.**, 6 A.D. 3d 976, 775 N.Y.S. 2d 200 (3d Dept. 2004).

258. **Brenkus v. Metropolitan Life Ins. Co.**, 309 A.D. 2d 1260, 765 N.Y.S. 2d 80 (2003).

259. **Makastchian v. Oxford Health Plans, Inc.**, 270 A.D. 2d 25, 704 N.Y.S. 2d 44 (2000).

260. **Whitfield v. State Farm Mutual Automobile Ins. Co.**, New York Law Journal, March 29, 2006, p. 20, col. 3 (N.Y. Civ.).

261 **Shebar v. Metropolitan Life Insurance Co.**, 23 A.D. 3d 858, 807 N.Y.S. 2d 448 (2006).

262. **Edelman v. O'Toole-Ewald Art Associates, Inc.**, 28 A.D. 3d 250, 814 N.Y.S. 2d 98 (1st Dept. 2006).

263. **Makuch v. New York Central Mutual Fire Ins. Co.**, 12 A.D. 3d 1110, 785 N.Y.S. 2d 236 (4th Dept. 2004).

264. **Acquista v. New York Life Ins. Co.**, 285 A.D. 2d 73, 730 N.Y.S. 2d 272 (2001).

265. **Rubinoff v. U.S. Capitol Insurance Co.**, New York Law Journal, May 10, 1996, p. 31, col. 3 (Yks. Cty. Ct.).

266 Elacqua v. Physicians' Reciprocal Insurers, 21 A.D. 3d 702 (3d Dept. 2005).

267 Elacqua v. Physicians Reciprocal Insurers 52 AD3d 886 (3d Dept. 2008).

268 Globe Surgical Supply v. GEICO, __A.D. 3d__, 2008 WL 5413643 (2d Dept. 2009).

269. M.V.B. Collision, Inc. V. Allstate Insurance Company, 728 F. Supp. 2d 205 (E.D.N.Y. 2010).

270. See **NCLC Reports**, Consumer Credit and Usury Edition, Vol. 23, Dec. 2004, p. 10 (" TILA provides that a credit card issuer is subject to all claims (except tort claims) and defenses of a consumer against a merchant when the consumer uses a credit card as a method of payment, if certain conditions are met. This right is essentially the credit card equivalent of the Federal Trade Commission's Holder Rule (16 C.F.R. § 433)...A consumer invokes her right as at assert claims or defenses against a card issuer by withholding payment or as a defense in a collection action. The claims or defenses asserted can include claims that also might be raised as a billing error. More importantly, a consumer can use this right to raise a dispute as to the quality of the merchandise or services paid for by the credit card. Note, there is significant confusion about the existence of this right, especially in the context of disputes over the quality of goods or services ").

271. **JP Morgan Chase Bank v. Tecl**, 24 A.D. 3d 1001 (3d Dept. 2005).

272. Deutsche Bank National Trust v. West, 2009 NY Slip Op 50405(U)(Kings Sup. 2009).

273. Jacobson v. Chase Bank, 34 Misc. 3d 38 (N.Y.A.T. 2011).

274. **Community Mutual Savings Bank v. Gillen**, 171 Misc. 2d 535, 655 N.Y.S. 2d 271 (1997).

275. **Rochester Home Equity, Inc. v. Upton**, 1 Misc. 3d 412, 767 N.Y.S. 2d 201 (2003).

276. Jacobson v. Chase Bank, 34 Misc. 3d 38 (N.Y.A.T. 2011).

277. Citibank (South Dakota) NA v. Beckerman, 18 Misc. 3d 133 (N.Y.A.T. 2008).

278. Ladino v. Bank of America, 52 A.D. 3d 571, 861 N.Y.S. 2d 683 (2d Dept. 2008).

279. **Tyk v. Equifax Credit Information Services, Inc**., 195 Misc. 2d 566, 758 N.Y.S. 2d 761 (2003).

280. **Iyare v. Litton Loan Servicing, LP**, 12 Misc. 3d 123, __N.Y.S. 2d__ (N.Y.A.T. 2006).

281. **Bank of New York v. Walden**, 194 Misc. 2d 461, 751 N.Y.S. 2d 341 (2002).

282. **Bank of New York v. Walden**, 194 Misc. 2d 461, 751 N.Y.S. 2d 341 (2002).

283. **Albank, FSB v. Foland**, 177 Misc. 2d 569, 676 N.Y.S. 2d 461 (1998).

284 People v. Applied Card Systems, Inc., 11 N.Y. 3d 105, 894 N.E. 2d 1 (2008).

285. **Rochester Home Equity, Inc. v. Upton**, 1 Misc. 3d 412, 767 N.Y.S. 2d 201 (2003).

286. **JP Morgan Chase Bank v. Tecl**, 24 A.D. 3d 1001 (3d Dept. 2005).

287. **Witherwax v. Transcare**, New York Law Journal, May 5, 2005, p. 19 (N.Y. Sup. 2005).

288. **Dougherty v. North Fork Bank**, 301 A.D. 2d 491, 753 N.Y.S. 2d 130 (2003).

289 Dowd v. Alliance Mortgage Company, 74 A.D. 3d 867 (2d Dept. 2010).

290 Fuchs v. Wachovia Mortgage Corp., 41 A.D. 3d 424, 838 N.Y.S. 2d 148 (2d Dept. 2007).

291. **Household Finance Realty Corp. V. Dunlap**, 15 Misc. 3d 659, 834 N.Y.S. 2d 438 (2007).

292. **Hodes v. Vermeer Owners, Inc.**, 14 Misc. 3d 366, 824 N.Y.S. 2d 872 (N.Y. Civ. 2006).

293. LaSalle Bank, N.A. v. Shearon, 19 Misc. 3d 433, 850 N.Y.S. 2d 871 (2008).

294. Alliance Mortgage Banking Corp. v. Dobkin, 19 Misc. 3d 1121, 2008 WL 1758864 (2008).

295. *Bank of New York v Silverberg,* 86 A.D. 3d 274 (2d Dept. 2011).

296
. *Bank of New York v Silverberg,* 86 A.D. 3d 274 (2d Dept. 2011).

297
. *Matter of MERSCORP, Inc. v Romaine,* 8 N.Y. 3d 90 (Ct. App. 2006).

298. *Mortgage Elec. Recording Sys. Inc. v Coakley*, 41 A.D. 3d 674, (2d Dept. 2010).

299. *Aurora Loan Services, Inc. v. Weisblum,* 85 A.D. 3d 95 (2d Dept. 2011). See also Wise, Lenders Must 'Strictly Comply' With Foreclosure Notice Rules, N.Y.L.J., May, 24, 2011, p. 1..

300. **People v. Applied Card Systems, Inc.**, 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (2005).

301 People v. Applied Card Systems, Inc., 11 N.Y. 3d 105, 894 N.E. 2d 1 (2008).

302. **People v. Telehublink**, 301 A.D. 2d 1006, 756 N.Y.S. 2d 285 (2003).

303. **Sims v. First Consumers National Bank,** 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (2003).

304. **Broder v. MBNA Corporation**, New York Law Journal, March 2, 2000, p. 29, col. 4 (N.Y. Sup.), aff'd 281 A.D. 2d 369, 722 N.Y.S. 2d 524 (2001).

305. **Kudelko v. Dalessio**, 14 Misc. 3d 650, 829 N.Y.S. 2d 839 (N.Y. Civ. 2006).

306. Lesser v. Karenkooper.com, 18 Misc. 2d 1119 (N.Y. Sup. 2008).

307. **American Express Centurion Bank v. Greenfield**, 11 Misc. 3d 129(A) (N.Y. App. Term. 2006).

308. **Varela v. Investors Insurance Holding Corp**., 81 N.Y. 2d 958, 598 N.Y.S. 2d 761 (1993).

309. People v. Boyajian Law Offices, 17 Misc. 3d 1119 (N.Y. Sup. 2007).

310. **People v. Applied Card Systems, Inc.**, 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (2005), *lv dismissed* 7 N.Y. 3d 741 (2006). See also: **People v. Applied Card Systems, Inc.**, __A.D. 3d __, __N.Y.S. 2d __, 2007 WL 1016885 (3d Dept. 2007)(" petitioner successfully established his claims pursuant to (G.B.L. § 349 and 350)...Having met the initial burden of establishing liability, Supreme Court was left to determine what measure of the injury ' is attributable to respondents' deception...We find no error in its exercise of such discretion, despite the lack of a hearing...(as to damages decision modified " by reversing so much thereof as awarded restitution to consumers who enrolled in the Credit Account Protection program and whose accounts were re-aged ").

311 People v. Applied Card Systems, Inc., 11 N.Y. 3d 105, 894 N.E. 2d 1 (2008).

312. **Centurion Capital Corp. v. Druce**, 14 Misc. 3d 564, 828 N.Y.S. 2d 851 (N.Y. Civ. 2006).

313. MRC Receivables Corp. v. Pedro Morales, 2008 NY Slip Op 52158(U)(N.Y.A.T. 2008).

314. **Asokwah v. Burt**, New York Law Journal, June 19, 2006, p. 25, col. 3 (Yks. City Ct.).

315. Catillo v. Balsamo Rosenblatt & Cohen, P.C., 33 Misc. 3d 700 (N.Y. Civ. 2011).

316. Sykes v. Mel Harris and Associates, LLC, 2010 WL 5395712 (S.D.N.Y. 2010).

317. Larsen v. LBC Legal Group, P.C., 533 F. Supp. 2d 290 (E.D.N.Y. 2008).

318. People v. Boyajian Law Offices, 17 Misc. 3d 1119 (N.Y. Sup. 2007).

319. Barry v. Board of Managers of Elmwood Park Condominium, 18 Misc. 3d 559 (N.Y. Civ. 2007).

320. **American Credit Card Processing Corp. V. Fairchild**, 11 Misc. 3d 972, 810 N.Y.S. 2d 874 (Suffolk Sup. 2006).

321. Wells Fargo Bank v. Reyss, 20 Misc. 3d 1104, 867 N.Y.S. 2d 21 (Kings Sup. 2008).

322. Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc., 18 N.Y. 3d 341 (2011).

323. Berenger v. 261 W. LLC, 93 A.D. 3d 175 (1st Dept. 2012).

324. There was a much needed effort by some Courts to analyze the process by which consumer agreements are entered into and the appropriate standards of proof regarding the disposition of disputes that arise therefrom such as summary judgment motions made by credit card issuers [see Citibank [South Dakota], NA v. Martin, 11 Misc. 3d 219 (N.Y. Civ. 2005)], confirmation of arbitration awards [MBNA America Bank, N.A. v. Nelson, 15 Misc. 3d 1148 (N.Y. Civ. 2007); MBNA America Bank, NA v. Straub, ____Misc. 3d_____, 2006 NYSlipOp 26209 (N.Y. Civ.)], deceptive practices used by lenders in home equity loan mortgage closings [see Bonior v. Citibank, N.A., 14 Misc. 3d 771, 828 N.Y.S. 2d 765 (N.Y. Civ. Ct. 2006), changing the price in the middle of the term of a fixed-price contract [see Emilio v. Robinson Oil Corp., 28 A.D. 3d 418, 813 N.Y.S. 2d 465 (2d Dept. 2006); People v. Wilco Energy Corp., 284 A.D. 2d 469 (2d Dept. 2001)] and improper debt collection methods [see People v. Applied Card Systems, Inc., 27 A.D. 3d 104, 805 N.Y.S. 2d 175 (3d Dept. 2005)].

325. Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor available at www.urbanjustice.org./cdp

326. New Report on New York City's Consumer Credit Crisis, NCLC Reports, Debt Collection and Repossessions Edition, Vo. 26, November/December 2007, p. 11.

327. Carlisle, Limits On New York Foreclosures, Verdict, Vol. 16, No. 2 (April 2010), p. 4.

328. New York State Unified Court System Press Release June 18, 2008, Chief Judge Kaye Announces Residential Foreclosure Program available at www.nycourts.gov/press/pr2008_4.shtml

329. See e.g., 5-Star Management, Inc. v. Rogers, 940 F. Supp. 512 (E.D.N.Y. 1996); FNMA v. Youkelstone, 755 N.Y.S. 2d 730 (App. Div. 2003); Guyerzeller Bank A.G. v. Chascona, NV, 841

N.Y.S. 22 (App. Div. 2007); Wells Fargo Bank Minnesota, National Association v. Mastropaolo, 837 N.Y.S. 2d 247 (App. Div. 2007); U.S. National Bank Association v. Kosak, 2007 WL 2480127 (N.Y. Civ. Ct. 2007); Wells, Fargo Bank, NA v. Farmer, 2008 WL 307454 (N.Y. Sup. 2008); Deutsche Bank National Trust Co. V. Castellanos, 2008 WL 123798 (N.Y. Sup. 2008); Countrywide Home Loans, Inc. V. Taylor, 843 N.Y.S. 2d 495 (N.Y. Sup. 2007);
Deutsche Bank National Trust Co. v. Clouden, 2007 WL 2709996 (N.Y. Sup. 2007); U.S. National Association v. Merino, 836 N.Y.S. 2d 853 (N.Y. Sup. 2007); U.S. Bank National Association v. Bernard, 2008 WL 383814 (N.Y. Sup. 2008); Wells Fargo Bank, N.A. v. Davilmar, 2007 WL 2481898 (N.Y. Sup. 2007).

330. LaSalle Bank, N.A. v. Shearon, 19 Misc. 3d 433, 850 N.Y.S. 2d 871 (2008); Alliance Mortgage Banking Corp. v. Dobkin, 19 Misc. 3d 1121, 2008 WL 1758864 (2008).

331. Midland Funding LLV v. Loreto, 34 Misc. 3d 1232(A)(N.Y. Civ. 2012).

332. American Express Bank v. Tancreto, CV-24043-11/KI (N.Y. Civ. J. Dear) Decision April 27, 2012.

333. **Citibank (South Dakota), NA v. Martin**, 11 Misc. 3d 219, 807 N.Y.S. 2d 284 (2005).

334. **MBNA America Bank, NA v. Straub**, 2006 NY Slip Op 26209(N.Y. Civ.).

335. MBNA America Bank, NA v. Nelson, 15 Misc. 3d 1148 (N.Y. Civ. 2007).

336. MBNA America Bank NA v. Pacheco, 12 Misc. 3d 1194 (Mt. Vernon Cty Ct 2006).

337. LVNV Funding Corp v. Delgado, 2009 NY Slip Op 51677 (Nassau Dist. Ct. 2009).

338. Palisades Collection, LLC v. Diaz, 25 Misc. 3d 1221 (Nassau Dist. Ct. 2009).

339. Chase Bank USA N.A. v. Cardello, 27 Misc. 3d 791 (N.Y. Civ. 2010).

340. Emigrant Mortgage Co., Inc. v. Corcione, 900 N.Y.S. 2d 608 (Suffolk Sup. 2010).

341. **DiMarzo v. Terrace View**, New York Law Journal, June 9, 1997, p. 34, col. 3 (Yks. Cty. Ct.), remanded on damages only, N.Y.A.T, Decision dated Oct. 27, 1998.

342. **DiMarzo v. Terrace View**, New York Law Journal, June 9, 1997, p. 34, col. 3 (Yks. Cty. Ct.), remanded on damages only, N.Y.A.T, Decision dated Oct. 27, 1998.

343. New York General Business Law § 201(1).

344. **DiMarzo v. Terrace View**, New York Law Journal, June 9, 1997, p. 34, col. 3 (Yks. Cty. Ct.), remanded on damages only, N.Y.A.T, Decision dated Oct. 27, 1998.

345. **Tannenbaum v. New York Dry Cleaning, Inc.**, New York Law Journal, July 26, 2001, p. 19, col. 1 (N.Y. Civ. Ct.).

346. **White v. Burlington Coat Factory**, 3 Misc. 3d 1106(A) (Mt. Vernon Cty Ct 2004).

347. **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995).

348. **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995).

349. **C.T.V., Inc. v. Curlen**, New York Law Journal, Dec. 3, 1997, p. 35, col. 1 (Yks. Cty. Ct.).

350. **Pacurib v. Villacruz**, 183 Misc. 2d 850, 705 N.Y.S. 2d 819 (1999).

351. See e.g., **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995); **C.T.V., Inc. v. Curlen**, New York Law Journal, Dec. 3, 1997, p. 35, col. 1 (Yks. Cty. Ct.).

352. **Brown v. Hambric**, 168 Misc. 2d 502, 638 N.Y.S. 2d 873 (1995). Web Page, supra.

353. **Welch v. New York Sports Club Corp.**, New York Law Journal, March 21, 2001, p. 19 (N.Y. Civ.).

354. **Hamilton v. Khalife,** 289 A.D. 2d 444 (2d Dept. 2001); **Morris v. Snappy Car Rental**, 189 A.D. 2d 115 (4th Dept. 1993).

355. **Bauman v. Eagle Chase Association**, 226 A.D. 2d 488 (2d Dept. 1996); **Filippazzo v. Garden State Brickface Co.**, 120 A.D. 2d 663 (2d Dept. 1986).

356. **Gulf Ins. Co. v. Kanen**, 13 A.D. 3d 579, 788 N.Y.S. 2d 132 (2d Dept. 2004)(

357. **Tannenbaum v. N.Y. Dry Cleaning**, New York Law Journal, July 26, 2001, at p. 19 (N.Y. Civ.).

358. **Hacker v. Smith Barney, Harris Upham & Co.**, 131 Misc. 2d 757 (N.Y. Civ. 1986).

359. **Tsadilas v. Providian National Bank**, 2004 WL 2903518 (1st Dept. 2004)(" Plaintiff may not invoke the type-size requirements of CPLR 4544 because her own claims against defendant depend on paragraph 4 of each credit card agreement, which appears to be in the same size type as the rest of the agreement ")

360. **Lerner v. Karageorgis Lines, Inc.**, 66 N.Y. 2d 479, 497 N.Y.S. 2d 894, 488 N.E. 2d 824 (1985).

361. **Sims v. First Consumers National Bank**, 303 A.D. 2d 288, 758 N.Y.S. 2d 284 (2003).

362 Goldman v. Simon Property Group, Inc., __A.D. 3d__, 2008 WL_ 5006453 (2d Dept. 2008).

363 Goldman v. Simon Property Group, Inc., 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).

364 See *Lonner v Simon Property Group, Inc.*, 57 A.D. 3d 100, 866 N.Y.S. 2d 239, 241, fn. 1 (2d Dept. 2008)(Virtually all gift cards have expiration dates and are subject to a variety of fees, including maintenance fees or dormancy fees (see Gift Cards 2007: Best and Worst Retail Cards: A Deeper View of Bank Cards Doesn't Improve Their Look, Office of Consumer Protection, Montgomery County, Maryland at www.montgomerycountymd.gov.).

365 *Lonner v Simon Property Group, Inc.*, 57 A.D. 3d 100 (2d Dept. 2008). See also: *Sims v First Consumers Nat'l Bank*, 303 AD2d 288, 289, 750 N.Y.S. 2d 284 (1st Dept. 2003).

366 *Llanos v Shell Oil Company*, 55 A.D. 3d 796 (2d Dept. 2008).

367 *Goldman v Simon Property Group, Inc.*, 58 A.D. 3d 208 (2d Dept. 2008).

368 See e.g., *SPGGC, LLC v Ayotte*, 488 F. 3d 525 (1st Cir. 2007); McAnaney v. Astoria Financial Corp., 665 F. Supp. 2d 132 (E.D.N.Y. 2009).

369_*Goldman v Simon Property Group, Inc.*, 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).

370.
Sharabani v Simon Property Group, Inc., New York Law Journal, July 21, 2010, at 26, col. 5 (N.Y. Sup.), mod'd __A.D. 3d__, 942 N.Y.S. 2d 551 (2d Dept. 2012).

371 *Sheinken v Simon Property Group, Inc.*, 33 Misc. 3d 287 (N.Y. Sup. 2011).

372 *SPGCC, LLC v Ayotte*, 488 F. 3d 525 (1st Cir. 2007).

373. **Doe v. Great Expectations**, 10 Misc. 3d 618 (N.Y. Civ. 2005).

374. Robinson v. Together Member Service, 25 Misc. 3d 230 (N.Y. Civ. 2009).

375. **Grossman v. MatchNet**, 10 A.D. 3d 577, 782 N.Y.S. 2d 246 (1st Dept. 2004).

376. Argento v. Wal-Mart Stores, Inc., 2009 WL 3489222 (2d Dept. 2009).

377 See also Dupler v. Costco Whoelsale Corporation, 249 F.R.D. 29 (E.D.N.Y. 2008). In Dupler the court granted certification to a class of customers that alleged that defendant failed to properly disclose its backdating policy, wherein " certain customers who decide to purchase a new annual membership after expiration of the old membership are provided with a term of membership less than 12 months ". The Court held that GBL § 349 covers claims based on omissions as well as actual misrepresentations.

378. Elisa Dreier Reporting Corp. v. Global NAPs Networks, Inc., 84 A.D. 3d 122, 921 N.Y.S. 2d 329 (2d Dept. 2011).

379. Juliano v. S.I. Vet Care, 34 Misc. 3d 147(A)(N.Y.A.T. 2012).

380. Miuccio v. Puppy City, Inc., 2009 NY Slip Op 50404(U) (N.Y. Civ. 2009).

381. **Woods v. Kittykind**, 8 Misc. 3d 1003, 801 N.Y.S. 2d 782 (2005).

382. **O'Rourke v. American Kennels**, N.Y.L.J., May 9, 2005, p. 18 (N.Y. Civ. 2005).

383. **Mongelli v. Cabral**, 166 Misc. 2d 240, 632 N.Y.S. 2d 927 (1995).

384. **Mathew v. Klinger**, New York Law Journal, October 7, 1997, p. 29, col. 1 (Yks. City. Ct.), mod'd 179 Misc. 2d 609, 686 N.Y.S. 2d 549 (1998).

385. **O'Brien v. Exotic Pet Warehouse, Inc.**, New York Law Journal, October 5, 1999, p. 35, col. 2 (Yks. City Ct.).

386. **Nardi v. Gonzalez**, 165 Misc. 2d 336, 630 N.Y.S. 2d 215 (1995).

387. **Mercurio v. Weber**, New York Law Journal, June 30, 2003, p. 33, col. 5 (N.Y. Civ. 2003).

388. **Lewis v. Al DiDonna**, 294 A.D. 2d 799, 743 N.Y.S. 2d 186 (3d Dept. 2002).

389. **Roberts v. Melendez**, N.Y.L.J., February 3, 2005, p. 19, col. 1 (N.Y. Civ. 2005)

390. **Anzalone v. Kragness**, 826 N.E. 2d 472 (Ill. App. Ct. 2005).

391. Budd v. Quinlin, 19 Misc. 3d 66 (N.Y.A.T. 2008).

392. Miuccio v. Puppy City, Inc., 2009 NY Slip Op 50404(U) (N.Y. Civ. 2009).

393. **O'Rourke v. American Kennels**, N.Y.L.J., May 9, 2005, p. 18 (N.Y. Civ. 2005).

394. **Fuentes v. United Pet Supply, Inc.**, New York Law Journal, September 12, 2000, p. 24, col. 3 ((N.Y. Civ. Ct.).

395. **Saxton v. Pets Warehouse, Inc.**, 180 Misc. 2d 377, 691 N.Y.S. 2d 872 (1999).

396. **Smith v. Tate**, New York Law Journal, January 29, 1999, p. 35, col. 5 (N.Y. Civ.).

397. **Sacco v. Tate**, 175 Misc. 2d 901, 672 N.Y.S. 2d 618 (1998).

398. **Roberts v. Melendez**, New York Law Journal, February 3, 2005, p. 19, col. 1 (N.Y. Civ. 2005).

399. **People v. Garcia**, 3 Misc. 3d 699 (N.Y. Sup. 2004).

400. **People v. Douglas Deelecave**, New York Law Journal, May 10, 2005, p. 19 (N.Y. Dist Ct. 2005).

401. **Rossi v. 21st Century Concepts, Inc.**, 162 Misc. 2d 932, 618 N.Y.S. 2d 182, 185 (1994).

402. **Rossi v. 21st Century Concepts, Inc.**, 162 Misc. 2d 932, 618 N.Y.S. 2d 182, 185 (1994). **Compare: Millan v. Yonkers Avenue Dodge, Inc**., New York Law Journal, Sept. 17, 1996, p. 26, col. 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)).

403. **New York Environmental Resources v. Franklin**, New York Law Journal, March 4, 2003, p. 27 (N.Y. Sup.)

404. **Rossi v. 21st Century Concepts, Inc.,** 162 Misc. 2d 932, 618 N.Y.S. 2d 182 (1994); **New York Environmental Resources v. Franklin**, New York Law Journal, March 4, 2003, p. 27 (N.Y. Sup.).

405. **Kozlowski v. Sears**, New York Law Journal, Nov. 6, 1997, p. 27, col. 3 (Yks. Cty. Ct.).

406. **Filpo v. Credit Express Furniture Inc.**, New York Law Journal, Aug. 26, 1997, p. 26, col. 4 (Yks. Cty. Ct.). Web Page, supra.

407. **Filpo v. Credit Express Furniture Inc.**, New York Law Journal, Aug. 26, 1997, p. 26, col. 4 (Yks. Cty. Ct.). Web Page, supra.

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

409. Certified Inspections, Inc. v. Garfinkel, 19 Misc. 3d 134 (N.Y.A.T. 2008).

410. **Sterling National Bank v. Kings Manor Estates**, 9 Misc. 3d 1116(A)(N.Y. Civ. 2005).

411 Pludeman v. Northern Leasing Systems, Inc., 10 N.Y. 3d 486, 890 N.E. 2d 184 (2008).

412. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 659 (1995).

413. **Dvoskin v. Levitz Furniture Co.**, Inc., 9 Misc. 3d 1125(A) (Suffolk Dist. Ct. 2005). See e.g., **Giarratano v. Midas Muffler**, 166 Misc. 2d 390, 393, 630 N.Y.S. 2d 656 (1995).

414. **Giarrantano v. Midas Muffler**, 166 Misc. 2d 390, 630 N.Y.S. 2d 656, 660 (1995).

415. **Kim v. BMW of Manhattan, Inc.**, 11 Misc. 3d 1078 (N.Y. Sup. 2005).

416. **Petrello v. Winks Furniture**, New York Law Journal, May 21, 1998, p. 32, col. 3 (Yks. Cty. Ct.).

417 See Lonner v. Simon Property Group, Inc., __A.D. 3d__, 866 N.Y.S. 2d 239, 241, fn. 1 (2d Dept. 2008)(" Virtually all gift cards have expiration dates and are subject to a variety of fees, including maintenance fees or dormancy fees (see Gift Cards 2007: Best and Worst Retail Cards: A Deeper View of Bank Cards Doesn't Improve Their Look, Office of Consumer Protection, Montgomery County, Maryland at www.montgomerycountymd.gov. ").

418 See Alterio, Store closings deal blow to holiday gift-card sales, The Journal News, November 27, 2008, p. 1 (" The National Retail Federation estimates that gift-card sales will dip 5% this holiday season to $24.9 billion, down from $26.3 billion last year ").

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

420 See Alterio, Store closings deal blow to holiday gift-card sales, The Journal News, November 27, 2008, p. 1, 23A (" ' We've never been very enthusiastic about gift cards around here ' Consumer Reports Executive Editor Greg Daugherty said. ' All the retailer and restaurant and bank and airline troubles are one more reason to think twice or three times before you get a gift card. It's conceivable a company will go into bankruptcy, and you will be just one more creditor waiting to get your money back ").

421 Lonner v. Simon Property Group, Inc.,__A.D. 3d__, 866 N.Y.S. 2d 239 (2d Dept. 2008). See also: Sims v First Consumers Nat'l Bank, 303 AD2d 288, 289, 750 N.Y.S. 2d 284 (1st Dept. 2003).

422 Llanos v. Shell Oil Company, __A.D. 3d__, 866 N.Y.S. 2d 309 (2d Dept. 2008).

423 Goldman v. Simon Property Group, Inc., __A.D. 3d__, 2008 WL_ 5006453 (2d Dept. 2008).

424 Goldman v. Simon Property Group, Inc., 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).

425 See e.g., SPGGC, LLC v. Ayotte, 488 F. 3d 525 (1st Cir. 2007); McAnaney v. Astoria Financial Corp., 665 F. Supp. 2d 132 (E.D.N.Y. 2009).

426 Goldman v. Simon Property Group, Inc., 31 A.D. 3d 382, 383, 818 N.Y.S. 2d 245 (2d Dept. 2006).

427 L.S. v. Simon Property Group, Inc., New York Law Journal, July 21, 2010, p. 26, col. 5 (N.Y. Sup.).

428. *Sharabani v. Simon Property Group, Inc.*, __A.D. 3d__ (2d Dept. 2012).

429 See Conn. Gen. Stat, 42-460 (prohibits expiration dates), Conn. Gen. Stat. 3-65c (prohibits service fees); Ill. Rev. Stat. Ch. 815, 505/2SS(b)(minimum expiration period 5 years, all post-purchase fees prohibited, face value of gift card may not be reduced in value and the holder may not be penalized in any way for non-use or untimely redemption); Mont. Code Ann. 30-14-108(1)(expiration date prohibited; all service fees including dormancy fees prohibited).

430. **Andin International Inc. v. Matrix Funding Corp.**, 194 Misc. 2d 719 (N.Y. Sup. 2003)(legislative history provides that " This bill seeks to protect all businessmen from fast talking sales organizations armed with booby traps which they plant in business contracts involving equipment rentals ").

431. **Tri-State General Remodeling Contractors, Inc. v. Inderdai Bailnauth**, 194 Misc. 2d 135, 753 N.Y.S. 2d 327 (2002).

432. **Routier v. Waldeck**, 184 Misc. 2d 487, 708 N.Y.S. 2d 270 (2000).

433. **Power Cooling, Inc. v. Wassong**, 5 Misc. 3d 22, 783 N.Y.S. 2d 741 (N.Y. App. Term. 2004).

434. **Colorito v. Crown Heating & Cooling, Inc**., 2005 WL 263751 (N.Y. App. Term 2005).

435. **Falconieri v. Wolf**, New York Law Journal, January 13, 2004, p. 20, col. 1 (West. Justice Court 2004).

436. **Cudahy v. Cohen**, 171 Misc. 2d 469, 661 N.Y.S. 2d 171 (1997).

437. **Moonstar Contractors, Inc. v. Katsir**, New York Law Journal, October 4, 2001, p. 19, col. 6 (N.Y. Civ.)

438. **Mindich Developers, Inc. v. Milstein**, 164 Misc. 2d 71, 623 N.Y.S. 2d 704 (1995).

439. **B&F Bldg. Corp. v. Liebig**, 76 N.Y. 2d 689, 563 N.Y.S. 2d 40, 564 N.E. 2d 650 (1990).

440. **B & L Auto Group, Inc. v. Zelig**, New York Law Journal, July 6, 2001, p. 21, col. 2 (N.Y. Civ. 2001).

441. **Centurion Capital Corp. v. Druce**, 14 Misc. 3d 564, 828 N.Y.S. 2d 851 (N.Y. Civ. 2006).

442. **B & L Auto Group, Inc. v. Zelig**, New York Law Journal, July 6, 2001, p. 21, col. 2 (N.Y. Civ. 2001).

443. **Vashovsky v. Blooming Nails**, 11 Misc. 3d 127(A)(N.Y. Sup. 2006).

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

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

446. **Walker v. Winks Furniture**, 168 Misc. 2d 265, 640 N.Y.S. 2d 428, 430 (1996). But see **Dweyer v. Montalbano's Pool & Patio Center, Inc**., New York Law Journal, March 16, 2004, p. 18, col. 3 (N.Y. Civ. 2004) (" There is nothing in the statute that permits the consumer to rescind the contract; damages are the only remedy under the statute ").

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

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

449. **Dweyer v. Montalbano's Pool & Patio Center, Inc**., New York Law Journal, March 16, 2004, p. 18, col. 3 (N.Y. Civ. 2004).

450. Julio v. Villency, 15 Misc. 3d 913, 832 N.Y.S. 2d 788 (2007).

451. **Amiekumo v. Vanbro Motors, Inc.**, 3 Misc. 3d 1101(A) (Richmond Civ. 2004).

452. **People v. My Service Center, Inc.**, 14 Misc. 3d 1217, 836 N.Y.S. 2d 487 (West. Sup. 2007).

453. **People v. Two Wheel Corp.**, 71 N.Y. 2d 693, ___N.Y.S. 2d__, __N.E. 2d__ (1988).

454. **People v. Beach Boys Equipment Co., Inc.**, 273 A.D. 2d 850 (__Dept. 2000).

455. **People v. Wever Petroleum Inc.**, __Misc. 2d__, 2006 N.Y. Slip Op 26414 (Albany Sup. 2006).

456. **People v. Chazy Hardware, Inc.**, 176 Misc. 2d 960 (Clinton Sup. 1998).

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

458. See 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); Jay Norris, Inc., 91 F.T.C. 751 (1978) modified 598 F. 2d 1244 (2d Cir. 1979); Commodore Corp., 85 F.T.C. 472 (1975) (consent order).

459. People v. Tempur-Pedic International, Inc., 30 Misc. 3d 986 (N.Y. Sup. 2011).

460. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281, 282 (1998).

461. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281, 282 (1998).

462. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281, 283 (1998).

463. In McCord v. Norm's Music, 2008 NY Sip Op 52181(U) (N.Y.A.T. 2008).

464. **Evergreen Bank, NA v. Zerteck**, 28 A.D. 3d 925, 813 N.Y.S. 2d 796 (3d Dept. 2006).

465. **Perel v. Eagletronics**, New York Law Journal, April 14, 2006, p. 20, col. 1 (N.Y. Civ.).

231. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281, 283 (1998).

467. On the issue of preemption see **Eina Realty v. Calixte**, 178 Misc. 2d 80, 679 N.Y.S. 2d 796 (1998)(RPAPL § 711 which permits commencement of litigation by landlord within three days of service of rent demand notice is preempted by Fair Debt Collection Practice Act (15 U.S.C.A. § 1692)).

468. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281 (1998).

469. **Dudzik v. Klein's All Sports**, 158 Misc. 2d 72, 600 N.Y.S. 2d 1013 (1993).

470. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 956-957, 673 N.Y.S. 2d 281 (1998).

471. **Johnson v. Chase Manhattan Bank USA, N.A.**, 2 Misc. 3d 1003(A), 784 N.Y.S. 2d 921 (N.Y. Sup. 2004).

472. **Davis v. Rent-A-Center of America, Inc.**, 150 Misc. 2d 403, 568 N.Y.S. 2D 529 (1991).

473. **Sagiede v. Rent-A-Center**, New York Law Journal, December 2, 2003, p. 19, col. 3 (N.Y. Civ. 2003).

474 *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y. 3d 486 (2008)(In sustaining the fraud cause of action against the individually named corporate defendants the Court of Appeals 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").

475 *Pludeman v. Northern Leasing Systems, Inc.*,74 A.D. 3d 420 (1st Dept. 2010).

476 *Pludeman v. Northern Leasing Systems, Inc.*, 27 Misc. 3d 1203(A) (N.Y. Sup. 2010), *reargument denied* 2010 WL 3462147 (N.Y. Sup. 2010).

477. **Bimini Boat Sales, Inc. v. Luhrs Corp.**, 60 AD3d 782 (2d Dept. 2010).

478. **Perel v. Eagletronics**, New York Law Journal, April 14, 2006, p. 20, col. 1 (N.Y. Civ.).

479. **Cirillo v. Slomin's Inc.**, 196 Misc. 2d 922 (N.Y. Sup. 2003).

480. **Malul v. Capital Cabinets, Inc.**, 191 Misc. 2d 399, 740 N.Y.S. 2d 828 (2002)

481. **Baker v. Burlington Coat Factory Warehouse**, 175 Misc. 2d 951, 673 N.Y.S. 2d 281 (1998).

482. On the issue of preemption see **Eina Realty v. Calixte**, 178 Misc. 2d 80, 679 N.Y.S. 2d 796 (1998)(RPAPL § 711 which permits commencement of litigation by landlord within three days of service of rent demand notice is preempted by Fair Debt Collection Practice Act (15 U.S.C.A. § 1692)).

483. **Dudzik v. Klein's All Sports**, 158 Misc. 2d 72, 600 N.Y.S. 2d 1013 (1993).

484. **Shaw-Crummel v. American Dental Plan**, New York Law Journal, March 31, 2003, p. 34, col. 6 (Nassau Dist. Ct.)

485. **Joffe v. Acacia Mortgage Corp.**, 121 P. 3d 831 (Ariz. Ct. App. 2005)(unsolicited advertizing sent to cellular telephone user in the form of text messaging violates Telephone Consumer Protection Act).

486. Kovel v. Lerner, Cumbo & Associates, Inc., 32 Misc. 3d 24 (N.Y.A.T. 2011).

487. Telephone Consumer Protection Act of 1991, 47 USC § 227.

488. **Gottlieb v. Carnival Corp**., 436 F. 3d 335 (2d Cir. 2006).

489. **Weiss v. 4 Hour Wireless, Inc.**, New York Law Journal, September 7, 2004, p. 18, col. 1 (N.Y. App. Term 2004).

490. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 28, 701 N.Y.S. 2d 859 (1999).

491. **Kaplan v. Democrat & Chronicle**, 266 A.D. 2d 848, 698 N.Y.S. 2d 799 (3rd Dept. 1998).

492. **Schulman v. Chase Manhattan Bank**, 268 A.D. 2d 174, 710 N.Y.S. 2d 368 (2000). Compare: **Charvat v. ATW**, Inc., 27 Ohio App. 3d 288, 712 N.E. 2d 805 (1998)(consumer in small claims court has no private right of action under TPCA unless and until telemarketer telephones a person more than once in any 12-month period after the person has informed the telemarketer that he or she does not want to be called).

493. **Joffe v. Acacia Mortgage Corp.**, 211 Ariz. 325, 121 P. 3d 831 (2005).

494. Stern v. Bluestone, 12 NY3d 873 (Ct. App. 2009).

495. See e.g., **Foxhall Realty Law Offices, Ltd. v. Telecommunications Premium Services, Ltd.**, 156 F. 3d 432 (2d Cir. 1998)(Congress intended to divest federal courts of federal question jurisdiction over private TCPA claims); **International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.**, 106 F. 3d 1146 (4th Cir. 1997); **Murphey v. Lanier**, 204 F. 3d 911 (9th Cir. 2000); **United Artists Theater Circuit, Inc. v. F.C.C.**, 2000 WL 33350942 (D. Ariz. 2000).

496. **Gottlieb v. Carnival Corp**., 436 F. 3d 335 (2d Cir. 2006) (" we conclude that Congress did not intend to divest the federal courts of diversity jurisdiction over private causes of action under the TCPA....We also vacate the (trial court's judgment) dismissing (the) claim under New York (G.B.L.) § 396-aa for lack of supplemental jurisdiction in light of our holding that the district court has diversity jurisdiction over his TCPA claim ").

497. **Utah Division of Consumer Protection v. Flagship Capital**, 125 P. 3d 894 (Utah Sup. 2005)(" Close examination of the Utah laws showed that they are not in conflict with the TCPA, not do they stand as an obstacle to the accomplishments and full objective of federal law...The telemarketing standards set by our legislature are stricter than, but do not directly conflict with the federal standards. A telemarketers who complies with the Utah standards will have little difficulty complying with the federal standards ").

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

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

500. 47 USC § 227[b][3].

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

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

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

504. **Rutgayser & Gratt v. Enine, Inc.**, 4 Misc. 3d 4 (N.Y. App. Term 2004).

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

506. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 701 N.Y.S. 2d 859 (1999).

507. **Kaplan v. First City Mortgage**, 183 Misc. 2d 24, 701 N.Y.S. 2d 859 (1999).

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

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

510. **Rudgayser & Gratt v. Enine, Inc.**, 4 Misc. 3d 4 (N.Y. App. Term 2004).

511. **Weber v. U.S. Sterling Securities, Inc.**, 2007 WL 1703469 (Conn. Sup. 2007).

512. **Gottlieb v. Carnival Corp**., 436 F. 3d 335 (2d Cir. 2006) (" We also vacate the (trial court's judgment) dismissing

(the) claim under New York (G.B.L.) § 396-aa for lack of supplemental jurisdiction in light of our holding that the district court has diversity jurisdiction over his TCPA claim ").

513. **Weber v. U.S. Sterling Securities, Inc.**, 2007 WL 1703469 (Conn. Sup. 2007).

514. Calautti v. Grados, 32 Misc. 3d 1205(A)(West. Sup. 2011).

515. **DeFina v. Scott,** New York Law Journal, February 24, 2003, p. 21, (N.Y. Sup.).

516. Barry v. Dandy, LLC, 17 Misc. 3d 1109, 851 N.Y.S. 2d 62 (2007).

517. Murphy v. Lord Thompson Manor, Inc., 105 Conn. App. 546, 938 A. 2d 1269 (2008)

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

519. Jacobs, **Bride Wins Lawsuit Over a Switch in Wedding Singers**, New York Times Metro Section, Sept. 10, 1998, p. 1.

520. Andreani v. Romeo Photographers & Video Productions, 17 Misc. 3d 1124, 851 N.Y.S. 2d 67 (2007).