

New York Law Journal

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Ruling on Reliance in GBL §350 Claims Serves as Game Changer

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New York Law Journal

04-19-2012

On occasion, there may be a difference of opinion as to how and in what manner a particular statute should be interpreted. Such differences often lead to the under-utilization of salutary statutes. Such has been the case in the interpretation of CPLR 901-909,¹ and General Business Law (GBL) §349 (deceptive and misleading business practices) and §350 (false advertising). In a recent case, [Koch v. Acker, Merrall & Condit](#),² the Court of Appeals has, inter alia, clarified that justifiable reliance is not an element of a GBL §350 false advertising claim. It was previously clear that there was no such requirement to state a GBL §349 claim for deceptive and misleading business practices. 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.

Alleged Misrepresentation

In *Koch*, the plaintiff alleged, among other things, that the defendant auction house offered certain wines for sale after having conducted a careful inspection of the wines to verify that they were genuine.³ The defendant allegedly described its wines as "extraordinary," "absolutely stunning," "superlative," "incredible," and among the "greatest wines...ever experienced." Tucked away in the defendant's extensive April 2005 and January 2006 catalogs was an "as is" disclaimer.⁴ The plaintiff alleged that certain of the wines purchased were counterfeit. In the action, the plaintiff asserted that the defendant misrepresented the authenticity of the wines, and that the defendant's inspection protocols were false or materially misleading.

The 'As Is' Disclaimer

The defendant sought dismissal pursuant to CPLR 3211(a)(1) and 3211(a)(7) on the grounds that the "as is" disclaimer barred the GBL §§349 and 350 claims.

The trial court rejected this argument finding that "liability may be found under GBL 349-350 despite the presence of an explicit disclaimer."

On appeal the Appellate Division, First Department, enforced the disclaimer, noting that "[a] reasonable consumer, alerted by [the] 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."⁵

The Court of Appeals reversed the First Department, noting that, to assert GBL §§349 and 350 claims, a consumer "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."⁶ The court found that the plaintiff sufficiently pled such causes of action, and that the disclaimers in the defendant's brochures "do not...bar [plaintiff's] claims for deceptive trade practices at this stage of the proceedings, as they do not establish a defense as a matter of law."⁷

The Reliance Requirement

The Court of Appeals further stated in *Koch*, "[t]o the extent that the Appellate Division order imposed a reliance requirement on General Business Law §§349 and 350 claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim."⁸

It is well established that reliance plays no part in asserting a GBL §349 claim.⁹ However, the Court of Appeals' ruling in *Koch* appears to overrule a line of Appellate Division case law dating to 1986 pertaining to General Business Law §350.¹⁰

This line of cases expressly states that, unlike a claim pursuant to GBL §349, GBL §350 claims require a showing of reliance. For example, in *Morrissey v. Nextel Partners*, in which a class of plaintiffs sued a cellular telephone company alleging deceptive and misleading practices, the Appellate Division, Third Department, expressly stated that the "plaintiffs' cause of action for false advertising under General Business Law §350, unlike their General Business Law §349 claim, requires proof of reliance."¹¹

In *Dank v. Sears Holding Mgt.*, a class of consumers challenged the defendant's price-matching policies, and the Appellate Division, Second Department, held that the "Supreme Court erred when it dismissed the plaintiff's causes of action alleging fraud and a violation of General Business Law §350 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."¹²

In *Klein v. Robert's Am. Gourmet Food*, in which a class of consumers alleged misrepresentations concerning the caloric content in the defendant's snack products, the Second Department held that a number of causes of action set forth in the complaint, including a cause of action premised on GBL §350, required proof of reliance.¹³ In *Gale v. International Bus. Machines*, the Second Department held that "Reliance is not an element of a claim under General Business Law §349."¹⁴ However, the court continued, "[d]ismissal of the plaintiff's claims under General Business Law §350 to recover damages for breach of express warranty, which do require proof of reliance, was also proper, since the plaintiff failed to allege that he relied on the statements or any advertisement at the time of his purchase."¹⁵

In *Andre Strishak & Assoc. v. Hewlett Packard*, Second Department held that the plaintiff's "General Business Law §350 cause of action...was properly dismissed since the plaintiffs failed to show that they relied upon or were aware of the allegedly false advertisement when purchasing the printers."¹⁶ In *Small v. Lorillard Tobacco*, the First Department stated, "[j]ust as individualized proof of addiction is essential to the General Business Law §349 cause of action, individualized proof of reliance is essential to the causes of action for false advertising under General Business Law §350."¹⁷

And in *McGill v. General Motors*, the First Department held that the plaintiffs' General Business Law §350 claim must be dismissed, as there was "no showing that any plaintiff relied upon or even knew about GM's allegedly false advertisements when the cars were purchased."¹⁸

Elements of a §350 Claim

In *Koch*, the Court of Appeals cited *Small v. Lorillard Tobacco* and *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank* for the proposition that neither GBL §349 claims nor GBL §350 claims require a showing of reliance.¹⁹ The court in *Small* stated, "[i]ntent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim."²⁰ However, in making this statement, the court was only considering a claim pursuant to GBL §349; the court expressly noted that the plaintiffs did not appeal from the dismissal of their claim pursuant to GBL §350.²¹ Thus, the language set forth in *Small*, stating that justifiable reliance is not an element of the statutory claim, addresses only a claim pursuant to GBL §349.

Furthermore, *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, the case relied upon by the court in *Small* for the proposition that justifiable reliance is not an element of the statutory claim, addressed only GBL §349 claims; the case does not so much as reference GBL §350.²²

It should be noted that the Court of Appeals previously has not expressly stated whether claims pursuant to GBL §350 include a reliance requirement. The court has stated, however, that "[t]he standard for recovery under General Business Law §350, while specific to false advertising, is otherwise identical to section 349."²³

Nonetheless, with *Koch*, the Court of Appeals has now made expressly clear that justifiable reliance is no more an element of a GBL §350 cause of action than it is an element of a GBL §349 claim.²⁴

Consumer Class Actions

In addition to making GBL §350 more accessible to injured consumers, the *Koch* decision is equally important for classes of consumers seeking to utilize not only GBL §349 but GBL §350.²⁵ While consumer class actions alleging violations of GBL §349 are generally certifiable,²⁶ the courts have generally declined to certify GBL §350 class actions, finding that reliance is not subject to class-wide proof.²⁷

Conclusion

With the clarification that reliance is not an element of GBL §350 claims, consumers should be more readily able to prosecute GBL §§349 and 350 claims together, either as individuals or as members of a consumer class.

Thomas A. Dickerson and Jeffrey A. Cohen are associate justices of the Appellate Division, Second Department. **Jonathan Glenn**, principal law clerk to Justice Dickerson, assisted in the research of this article. Justice Dickerson is author of "[Class Actions: The Law of 50 States](#)," (Law Journal Press 2012).

Endnotes:

1. See Dickerson, "[New York State Class Actions: Make It Work—Fulfill the Promise](#)," 74 Albany L. Rev. 711 (2010-2011).
2. *Koch v. Acker, Merrall & Condit*, NY3d, 2012 NY Slip Op 02254 (March 27, 2012).
3. ROA 63, 195-197, 208.
4. [Koch v. Acker, Merrall & Condit](#), 73 AD3d 661, 661 (1st Dept. 2010), rev'd *Koch v. Acker, Merrall & Condit*, NY3d, 2012 NY Slip Op 02254 (March 27, 2012) ("The 'Conditions of Sale/Purchaser'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 or estimated value of [the wine],' that any statements made by defendant were 'opinion only, and shall not be relied upon by any bidder,' and that '[p]rospective bidders must satisfy themselves by inspection or other means as to all considerations pertinent to any decision to place any bid'").
5. *Id.*
6. *Koch v. Acker, Merrall & Condit*, NY3d, 2012 NY Slip Op 02254 (March 27, 2012), quoting [City of New York v. Smokes-Spirits.Com](#), 12 NY3d 616, 621 (2009).
7. *Koch v. Acker, Merrall & Condit*, NY3d, 2012 NY Slip Op 02254 (March 27, 2012), quoting [Goshen v. Mutual Life Ins. of N.Y.](#), 98 NY2d 314, 324 (2002).
8. *Koch v. Acker, Merrall & Condit*, NY3d, 2012 NY Slip Op 02254 (March 27, 2012).
9. See *Small v. Lorillard Tobacco*, 94 NY2d 43, 55 (1999); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20, 26 (1995); see also Haig, *Commercial Litigation in New York State Courts* §98:4, at 582 (3d ed 2010).
10. See [Butler v. Caldwell & Cook](#), 122 A.D.2d 559, 505 N.Y.S.2d 288 (4th Dept. 1986) (GBL 349, 350 claims dismissed "because of the failure to state facts showing that plaintiffs relied to their detriment upon deceptive practices"); [Bello v. Cablevision Sys.](#), 185 A.D.2d 262, 587 N.Y.S.2d 1 (2d Dept. 1992) (GBL 349 and 350 claims dismissed "for failure to sufficiently demonstrate reliance"); [Gerson v. Hertz](#), 215 A.D.2d 202, 203 (1st Dept. 1995) ("cause of action under General Business Law §350 for false advertising is legally insufficient absent an allegation that he relied upon or even knew of defendant's advertising"). The error of requiring reliance in GBL 349 and 350 claims can be traced to [Burns v. Volkswagen of America](#), 118 Misc.2d 289, 292, 460 N.Y.S.2d 410 (Monroe Sup. 1982), aff'd [97 A.D.2d 977](#), 468 N.Y.S.2d 1017 (4th Dept. 1983) ("A necessary element of any action based upon deception is reliance" relying upon a common law fraud (not asserting GBL 349, 350 claims) class action in [Strauss v. Long Island Sports](#), 60 A.D. 2d 501, 506, 401 N.Y.S.2d 233 (2d Dept. 1978)).
11. *Morrissey v. Nextel Partners*, 72 A.D.3d 209, 217 (3d Dept. 2010).
12. *Dank v. Sears Holding Mgt.*, A.D.3d, 2012 NY Slip Op 01648 (2d Dept. March 6, 2012).
13. *Klein v. Robert's Am. Gourmet Food*, 28 A.D.3d 63, 72 (2d Dept. 2006).
14. *Gale v. International Bus. Machines*, 9 A.D.3d 446, 447 (2d Dept. 2004) (citations omitted).
15. *Id.* (citations omitted).
16. *Andre Strishak & Assoc. v. Hewlett Packard*, 300 AD2d 608, 610 (2d Dept. 2002) (citation omitted).
17. *Small v. Lorillard Tobacco*, 252 AD2d 1, 8 (1st Dept. 1998), aff'd 94 NY2d 43 (1999).
18. *McGill v. General Motors*, 231 AD2d 449, 450 (1st Dept. 1996) (citation omitted).
19. *Koch v. Acker, Merrall & Condit*, NY3d, 2012 NY Slip Op 02254 (March 27, 2012), citing *Small v. Lorillard Tobacco* 94 NY2d at 55, and *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d at 26.
20. *Small v. Lorillard Tobacco*, 94 NY2d at 55, citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d at 26.
21. *Small v. Lorillard Tobacco*, 94 NY2d at 51 n 3.
22. See *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20.

23. *Goshen v. Mutual Life Ins.*, 98 NY2d at 324 n 1.

24. *Koch v. Acker, Merrall & Condit*, NY3d, 2012 NY Slip Op 02254 (March 27, 2012).

25. See Dickerson, Article 9, Weinstein Korn Miller, New York Civil Practice: CPLR, Section 901.26(6)(c).

26. See *id.*

27. See *id.*; see also [Morrissey v. Nextel Partners](#), 22 Misc.3d 1124(A), 2009 NY Slip Op 50260(U), n. 8 (Sup. Ct. Albany County 2009), mod 72 AD3d 209 ("Not surprisingly, in light of the element of reliance attendant upon any GBL §350 claim, this court's research has failed to disclose a single reported New York case in which a class certification motion for such a cause of action was ultimately successful").

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