1998 New York Consumer Fraud Decisions

by Seth R. Lesser*

In 1998, New York's consumer fraud statute, General Business Law Article 22-A, § 349 *et seq.*, was the subject of over thirty New York and federal court decisions in a wide variety of contexts. In each of these rulings, plaintiffs used Article 22-A in conjunction with other federal or state statutes and/or common law causes of action as the basis for their consumer fraud claims.[1]

While last year's Article 22-A decisions broke little new ground, the courts were called upon to apply consumer fraud doctrine to many different fact patterns. Perennial issues continue to be litigated, such as whether the activity at issue was harmful to the consuming public at large or involved a dispute unique to the litigating parties. Other issues included the elements of an Article 22-A cause of action, the beneficiaries and non-beneficiaries of Article 22-A's provisions, and the filed rate doctrine applicable to regulated public utilities.

Reliance Requirement

The question of whether GBL § 349 contains a requirement that the plaintiff specifically relied on the allegedly deceptive conduct came up in several cases. In its leading Section 349 decision, *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*[2] the Court of Appeals held in 1995 that reliance was not a necessary element of a 349 cause of action, a view supported by commentators.[3] Three 1998 city

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court opinions by Judge Dickerson followed *Oswego*, stating categorically that a plaintiff suing for a violation of GBL § 349 does not "have to prove reliance upon defendant's deceptive practices.[4]

On the other hand, in two decisions the First Department made off-hand statements suggesting that a reliance requirement exists. In *Odingo v. Allstate Ins Co.*,[5] it affirmed, without discussion, the dismissal of a cause of action for violation of GBL § 349 by stating, without analysis, that the cause of action was "deficient for failure to allege materially deceptive conduct upon which plaintiffs relied to their detriment."[6]

Similarly, in *Polzer v. TRW, Inc.*, the court wrote that GBL § 349 claims were properly dismissed because they "failed to make the requisite showing that the claimed of conduct was deceptive or misleading to them" and, in addition, that plaintiffs "have failed to demonstrate any damages or actual loss."[7]

What lies behind the First Department's apparent disagreement with the Court of Appeals is its apparent overlooking of the distinction between reliance and causation. While Section 349 does not include an explicit reliance element, the plaintiff must nonetheless prove causation -- i.e., that the deceptive conduct caused actual injury. In many cases, causation and reliance will be the same because the causative link will be the proof (or lack thereof) of the plaintiffs' reliance. Were the First Department's holdings rephrased as a failure to prove proximate cause by virtue of a failure to show actual reliance, they could be reconciled with *Oswego*.

Intent

The issue of intent was also raised by several decisions. Again, *Oswego* was either

followed or ignored. *Oswego* explicitly held that "it is unnecessary under the statute that a plaintiff establish the defendant's intent to defraud."[8] The three city court decisions already discussed followed *Oswego*, holding that there "is no requirement under GBL § 349 that plaintiff prove that defendant's practices or acts were intentional, fraudulent or even reckless."[9]

However, in *Samara Bros. Inc. v. Wal-Mart Stores, Inc*,[10] the Second Circuit found an intent requirement in upholding a plaintiff's cause of action. There, it rejected a contention that the federal Copyright Act preempted both GBL § 349 and the New York common law of unfair competition by holding that Section 349, unlike the federal act, required "a finding of 'intentional deception' of consumers."[11]

Public Impact

In 1998, as in prior years, a perennial controversy was whether the complained-of acts harmed the public at large or just presented a dispute unique to the litigants. In the absence of an effect on the public at large, a claim cannot be founded on Section 349.[12]

In *Aetna Casualty & Surety Co. v. ITT Hartford Ins.*,[13] an insured's judgment creditor sued the insured's liability insurer to satisfy its judgment. The First Department affirmed the complaint's dismissal by ruling the insurer properly disclaimed coverage and the plaintiff had failed to plead or prove a recurring failure by defendants constituting a deceptive business practice, citing as authority *United Knitwear Co. v. North Sea Ins. Co.*[14] In *United Knitwear*, the Second Department stated that "even assuming that North Sea's disclosures could be deemed a 'deceptive act,' the plaintiffs have wholly failed to demonstrate that the .... that the act was of a recurring nature and harmful to the public at

large,"[15] and therefore "plaintiffs' cause of action amounts to nothing more than a private contract dispute between the parties" beyond the ambit of Section 349.[16]

A number of similar rulings issued. *Ivy Mar. Co. v. C.R. Seasons Ltd.*[17] involved an importer of goods suing a competitor alleging Lanham Act and state causes of action, including Section 349. The court granted defendants' summary judgment motion with respect to the GBL claim, pointing out that even though such a claim can be brought by business competitors as an additional means to enforce the statute, an essential element of such a claim is evidence of harm to the public. The court dismissed the Section 349 claim because "the undisputed facts fail to identify the requisite harm to consumers or the public interest."[18]

The same result was reached in *International Sport Divers Assoc. v. Marine Midland Bank*,[19] and *New York Automobile Ins. Plan v. All Purpose Agency & Brokerage, Inc*.[20] In the first, the court held that GBL § 349 has been "construed ... as a consumer protection law that is inapplicable to 'business-versus-business disputes ... where the party asserting the claim is not acting in a consumer role,"[21] and, in the second, the court emphasized that the conduct in question "was not directed at consumers but at the insurance companies who provide coverage to consumers. In essence, the plaintiffs seek the protection of a statute that was not intended to protect them but to police them. This assertion of claims under the Statute is misplaced."[22]

On the other hand, three decisions expressly held that where defendants' alleged conduct had a broad impact on the consuming public at large, plaintiffs set forth viable causes of action under GBL § 349: *City of New York v. Coast Oil New York, Inc.*,[23] *Bauer*

v. Mellon Mortgage Co.,[24] and *BNI New York Ltd. v. De Santo.*[25]

The *City of New York* complaint alleged misleading prices in a publication widely used by fuel oil purchasers and the court ruled that the GBL § 349 claim was "not based solely on a private dispute" but "had a broad impact on the consuming public at large and on plaintiffs in particular."[26]

The *Bauer* plaintiffs contended that a bank's practice of continuing to bill and collect mortgage insurance premiums when unpaid principal loan amounts represented less than 75% of appraised value constituted unfair and deceptive commercial acts in violation of GBL § 349. The court ruled that the bank's conduct was sufficiently consumer oriented to state a GBL § 349 cause of action requiring an answer to plaintiffs' allegations. In *BNI New York*, the New York City Court found a business and professional networking organization's "misleading and deceptive practices in marketing its services to the general public 'have a broad impact on consumers at large.'"[27]

Non-Actionable Representations

The limitations of Sections 349 and 350 were captured by *CYTYC Corp. v. Neuromedical Systems Inc.*[28], an action brought by a drug manufacturer against a competitor. Various state and federal claims and counterclaims were filed. Defendant identified statements in plaintiff's advertisements which it alleged were false and misleading. The court found two types of statements not to be actionable under Section 349. One were statements of opinion, or "puffing," and the other type were "representations ... that comport substantively with statements approved as accurate by" the federal FDA. The court observed that under New York law, three factors are used "to

distinguish fact from opinion: 1) whether the challenged statements have a precise and readily understood meaning; 2) whether the statements are susceptible of being proven false; and 3) whether the context signals to the reader that the statements are more likely to be expressions of opinion rather than fact."[29]

Beneficiaries of Article 22-A

Various beneficiaries used Article 22-A in 1998. *Ansari v. New York University,*[30] was brought by a foreign dentist on a temporary visa in the United States who paid $30,000 to enroll in a program sponsored by NYU's College of Dentistry. Plaintiff alleged that students had been promised the "most sophisticated, state-of-the-art clinical facilities of any dental school in the country" and seven hours of daily instruction, whereas, in fact, the program was held in a poorly equipped unsanitary "urban warehouse" without the promised instruction. In denying a motion for class certification, the court indicated that plaintiff and others like him might well be able to prove a claim for approximately $90,000 in damages under Section 349, consisting of $30,000 in tuition costs and a $60,000 "lost opportunity" cost.[31]

Sokolski v. Trans Union Corp.,[32] granted plaintiff debtor's motion to add a class action allegation against a bank and a collection agency. Plaintiff alleged that defendants had violated both the federal Fair Debt Collection Practices Act ("FDCPA") and Section 349 by sending him a "dunning" letter on the stationery of a collection agency when the letter was in fact sent by the creditor bank and not the collection agency but with the latter's permission. In permitting the adding of class claims, the court's opinion, without deciding the issue, indicated strongly that it believed plaintiff had alleged valid causes of action

under both the federal act and Section 349.

Rejected Beneficiaries of Article 22-A

1998 saw a large number of litigants unsuccessfully attempt to invoke Article 22-A's consumer protection benefits. In these cases, the courts ruled that the defendants' actions had no impact on the consuming public and raised issues unique to the litigants.

Karp v. Siegel[33] was brought against an in-house attorney for American Express Travel Related Services alleging that he had violated both the FDCPA and GBL § 349. The court held the federal statute had no application to the case since the attorney was acting on behalf of his employer and that § 349 had no application since the case presented "a fact-specific incident between these parties."[34]

In *Smith v. Triad Manufacturing Group*, preferred stock owners of a defunct corporation sued the corporation's officers, directors and attorney, alleging causes of action under the federal Securities Act of 1933 and GBL § 349.[35] In reversing a decision dismissing the federal claim, the Fourth Department affirmed the dismissal of the Section 349 claims because the alleged conduct did "not fall within the consumer-oriented ambit of GBL § 349" since "securities are purchased as investments, not goods to be 'consumed or used.'"[36]

Other rejected would-be beneficiaries of Article 22-A included purchasers of life insurance policies in *Gaidon v. Guardian Life Ins. Co.*[37] The purchasers claimed the company's agents had promised "vanishing premiums." The First Department used the parol evidence rule to affirm the dismissal of contract and fraud claims and held that "in light of the express terms of the policies clearly indicating the duration of the required

premium payments, plaintiffs' claimed reliance on the alleged misrepresentations ... was unreasonable." Accordingly, "in the absence of any deceptive or misleading practice," plaintiffs' Section 349 cause of action also was dismissed.

Individuals whose credit information was stolen and used by an imposter saw Section 349 claims against a credit card issuer and credit agency dismissed in *Polzer*, *supra*, on the ground that the acts or omissions that allegedly violated Section 349 were "protected by the qualified immunity granted pursuant to the Federal Fair Credit Reporting Act ... since General Business Law § 349[d] provides that it is a complete defense if the alleged act or practice complies with the rules and regulations of, and the statutes administered by, *inter alia*, the Federal Trade Commission...."[38]

In *Lucido v. Vitolo*,[39] the Second Department followed its 1997 precedent in *Karlin v. IVF America*,[40] holding that recipients of medical services cannot invoke Section 349. In doing so, the Second Department again ignored the contrary First Department holding in *Sterling v. Ackerman*.[41]

The Filed Rate Doctrine

The best known non-beneficiaries of Article 22-A's protections are customers and users of public utilities whose rates and charges are governmentally-regulated. Two federal court decisions made this abundantly clear in 1998.

Marcus v. AT&T Corp.[42] involved a challenge to AT&T's alleged failure to disclose that residential calls were rounded up to the next full minute.. Many causes of action were asserted, including GBL §§ 349-350 claims. These claims were denied under the filed rate doctrine, described by the Second Circuit as forbidding "a regulated entity to charge rates

for its services other than those properly filed with the appropriate federal regulatory authorities."[43]

While the Second Circuit was sympathetic to plaintiffs' contention that the filed rate doctrine should not be applicable in a class action-- since discriminatory concerns are substantially alleviated in such a case -- it felt bound by the Supreme Court's ruling to the contrary in *Square D. Co. v. Niagara Frontier Tariff Bureau*.[44] It also rejected the argument that the doctrine "is no longer necessary to avoid price discrimination in light of the increasing competition between long-distance carriers" by quoting from Supreme Court opinions stating that "such considerations address themselves to Congress, not to the courts."[45]

Katz v. MCI Telecommunications Corp.[46] followed *Marcus* and dismissed a complaint alleging that MCI's telemarketer had misrepresented features of MCI's residential program, causing her to switch from another carrier. Despite a concern that "the filed rate doctrine is a trap for today's residential telephone customers in the face of the aggressive and wide-ranging sales tactics that are symptomatic of the current highly competitive telecommunications marketplace," the court had to dismiss the case.[47] It pointed out that ratepayers could file complaints with regulatory agencies such as the FCC or the New York State Attorney General's office.[48]

1. Article 22-A has two primary subsections for which there are private rights of action, § 349, which generally prohibits deceptive acts and practices and § 350-a which outlaws false advertising.

2. 85 N.Y.2d 20, 26, 647 N.E.2d 741, 745, 623 N.Y.S.2d 529, 533 (1995).

3. *See, e.g.,* Richard A. Given's Practice Commentaries in *McKinney's Consolidated Laws of New York Annotated*, Book 19 (GBL §§ 1 to 351), 1999 Cumulative Pocket Part, at 217-219.

4. *Baker v. Burlington Coat Factory Warehouse*, 175 Misc. 2d 951, 673 N.Y.S.2d 281 (City Ct. Yonkers 1998); *Griffin-Amiel v. Frank Terris Orchestras*, 178 Misc. 2d 71, 677 N.Y.S.2d 908 (City Ct. Yonkers 1998); *BNI New York Ltd. v. De Santo*, 177 Misc. 2d 9, 675 N.Y.S.2d 752 (City Ct. Yonkers 1998). *Baker* upheld a § 349 cause of action for the sale of a defective fake fur coat; *Griffen-Amiel*, upheld a similar cause of failure to provide the designated singer for a wedding reception; and *BNI New York* held that a business and professional networking organization violated GBL § 349 by misrepresenting to an applicant that he would be accepted by the organization.

5. 251 A.D.2d 81, 672 N.Y.S.2d 727 (1st Dept. 1998).

6. *Id.* For this proposition, the First Department relied on *Gershon v. Hertz Corp.*, 215 A.D.2d 202, 202-03, 626 N.Y.S.2d 80, 81 (1st Dept. 1995), where, however, it found a reliance requirement in a Section 350 (false advertising) case, not a Section 349 (general deceptive practices) situation. Similarly, in *Berrios v. Sprint Corp.*,1998 WL 199842 at *4 (E.D.N.Y. March 16, 1998), a federal district court categorically stated that "Section 349 mandates a showing that plaintiff's injury be a result of reliance on a materially deceptive act or practice."

7. __ A.D.2d __, 682 N.Y.S.2d 194, 195 (1st Dept. 1998).

8. 85 N.Y.2d at 26, 647 N.E.2d at 745, 623 N.Y.S.2d at 533.

9. *See, e.g., Baker, supra*, 175 Misc. at 956.

10. 165 F.3d 120 (2d Cir. 1998).

11. *Id.* at 131. The Second Circuit failed to acknowledge *Oswego* in its decision.

12. 85 N.Y.2d at 24-25, 647 N.E.2d at 744, 623 N.Y.S.2d at 532.

13. 249 A.D.2d 241, 672 N.Y.S.2d 310 (1st Dept. 1998).

14. 203 A.D.2d 358, 612 N.Y.S.2d 596 (2d Dept. 1994).

15. 203 A.D.2d at 359.

16. *Id.* at 360.

17. 1998 WL 704112 (E.D.N.Y. Oct. 7, 1998).

18. *Id.* at *7. To the same effect, see *Dove v. L'Agence, Inc.*, __ A.D.2d __, 671 N.Y.S.2d 661 (1st Dept. 1998); *Karp v. Siegel*, 1998 WL 314769, at *4 (S.D.N.Y. June 12, 1998) (debt collection case discussed *supra*); *Page One Auto Sales v. Commercial Union Ins. Companies*, 176 N.Y. Misc. 2d 820, 823-824, 674 N.Y.S.2d 577, 579 (Sup. Ct. Monroe Co. 1998) (insurance claim).

19. 25 F. Supp. 2d 101 (E.D.N.Y. 1998).

20. 1998 WL 695869 (S.D.N.Y. Oct. 6, 1998).

21. 25 F. Supp. 2d at 114 (quotation omitted).

22. 1998 WL 695869 at *6.

23. 1998 WL 82927 (S.D.N.Y. Feb. 25, 1998).

24. 178 Misc. 2d 234, 680 N.Y.S.2d 397 (Sup. Ct. N.Y. Co.).

25. *BNI, supra* note 4.

26. 1998 WL 82927 at *7.

27. 177 Misc. 2d at 15, 675 N.Y.S.2d at 756. 177 Misc. 2d at 15, 675 N.Y.S.2d at 756.

28. 12 F. Supp. 2d 296 (S.D.N.Y. 1998).

29. *Id.* at 302.

30. 179 F.R.D. 112 (S.D.N.Y. 1998).

31. *Id.* at 115.

32. 178 F.R.D. 393 (E.D.N.Y. 1998).

33. *Karp, supra* note 18.

34. *Id.*, 1998 WL 314769 at *5.

35. __ A.D.2d __, 681 N.Y.S.2d 710 (4th Dept. 1998).

36. *Id.*, 681 N.Y.S.2d at 712.

37. __ A.D.2d __, 679 N.Y.S.2d 611 (1st Dept. 1998).

38. 682 N.Y.S.2d at 196.

39. 251 A.D.2d 383, 672 N.Y.S.2d 818 (2d Dept. 1998).

40. 239 A.D.2d 560, 658 N.Y.S.2d 73 (2d Dept. 1997).

41. 244 A.D.2d 170, 663 N.Y.S.2d 842 (1st Dept. 1997).

42. 138 F.3d 46 (2d Cir. 1998).

43. 138 F.3d at 58.

44. 476 U.S. 409, 423 (1986).

45. 138 F.3d at 62.

46. 14 F. Supp. 2d 271 (E.D.N.Y. 1998).

47. *Id.* at 277.

48. *Id.*