

NEW YORK COURT OF APPEALS ROUNDUP

SCOPE OF DECEPTION PROHIBITION AT ISSUE IN LEGAL PUBLISHING CASE

WILLIAM T. RUSSELL, JR. AND LINTON MANN III*
SIMPSON THACHER & BARTLETT LLP

June 15, 2021

The Court of Appeals will soon be back to full strength. Governor Andrew Cuomo nominated Administrative Judge of the New York City Civil Courts Anthony Cannataro and Nassau County District Attorney Madeline Singas to fill the vacancies on the Court of Appeals caused by Judge Paul G. Feinman's passing and Judge Leslie E. Stein's impending retirement. Their nominations were confirmed by the State Senate on June 8, 2021. Judge Cannataro was appointed to his current position by Chief Administrative Judge Lawrence K. Marks in 2018. Ms. Singas was first elected to the Nassau County District Attorney's Office in November 2015.

The Court of Appeals recently considered the scope of the General Business Law's prohibition of deceptive acts or practices in a case against legal publisher Matthew Bender & Company (Bender). In a majority opinion written by Judge Jenny Rivera and joined by Chief Judge Janet DiFiore and Judges Leslie Stein, Michael Garcia and Rowen Wilson, the court affirmed the Appellate Division, First Department's dismissal of the case but rejected the First Department's more narrow interpretation of the statute's scope.

In *Himmelstein v. Matthew Bender & Co.*, purchasers of certain annual editions of New York Landlord Tenant Law, a compilation of New York authority on landlord-tenant law (the Tanbook) sued Bender as the publisher of the Tanbook. Among other things, plaintiffs alleged that defendant materially misrepresented that Part III of the Tanbook contained "a complete and accurate compilation of the statutes and regulations applicable to rent-controlled and rent-stabilized apartments in New York City, when, in fact, key portions were omitted or inaccurately presented" in violation of General Business Law (GBL) §349.

Plaintiffs contrasted the description provided in the Tanbook's "Overview" section, which, in describing certain sections of the book, indicates that those sections contain "selected" laws and regulations or mere "excerpts" while Part III of the Tanbook purports to contain "*the* laws and regulations covering rent stabilization." (emphasis in original). Plaintiffs alleged that they would not have purchased the Tanbook but for defendant's alleged misrepresentations as to Part III's completeness.

Plaintiffs further pointed to the fact that, when defendant was made aware of the omissions and inaccuracies, it included the missing information in the next edition which was sold to plaintiffs at full price.

* **William T. Russell, Jr. and Linton Mann III** are partners at *Simpson Thacher & Bartlett LLP*.

Defendant moved to dismiss the complaint for failure to plead the necessary elements of GBL §349. While conceding that the Tanbook omissions were an unfortunate mistake, defendant asserted that plaintiffs cannot plausibly argue that a reasonable consumer would have been misled by the alleged misrepresentations given the nature of the misrepresentations and the product involved, and because the sales contracts expressly disclaim the accuracy, reliability, and currentness of the Tanbook.

In support, defendant submitted an affidavit of an Operations Director of one of defendant's affiliates. The affidavit provided a general overview of the contents of the Tanbook, described the standard practices and contractual terms governing the sale and purchase of the Tanbook, and described plaintiffs' respective purchases and the lack of complaints from them regarding the contents of the Tanbook.

The Supreme Court, New York County granted defendant's motion and dismissed the complaint. The First Department affirmed, in part, on different grounds. The Court of Appeals granted leave to appeal.

In her majority opinion, Judge Rivera noted, "GBL §349(a) declares unlawful all deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state. Section 349, on its face, applies to virtually all economic activity." Furthermore, "GBL §349 prohibits deceptive acts and practices that misrepresent the nature or quality of products and services.

Put simply, the statute seeks to secure an honest marketplace where trust, and not deception, prevails." To avoid dismissal, plaintiffs must adequately plead three elements: (1) the defendant's conduct was consumer-oriented, (2) the defendant's act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the deception.

With respect to the first element, the court unanimously held that plaintiffs adequately pleaded that defendant's conduct was consumer-oriented. The trial court had dismissed the complaint on this ground while relying on First Department precedent limiting the definition of "consumers" to be "those who purchase goods and services for personal, family or household use." *Himmelstein, et al. v. Matthew Bender & Co., Inc.*, No. 650932/2017, 2018 WL 984850, at *5, quoting *Med. Soc'y v Oxford Health Plans, Inc.*, 15 AD3d 206, 207 (1st Dept. 2005).

According to that First Department precedent, GBL §349 does not apply to a business's purchase of "a widely sold service that can only be used by businesses." *Id.*

The Court of Appeals rejected that interpretation of the statute because (1) "there is no textual support in GBL §349 for a limitation on the definition of 'consumer' based on use" and (2) "given the text and purpose of GBL §349, the court has explained that an act or practice is consumer-oriented when it has a broader impact on consumers at large. For example, the consumer-oriented element precludes a GBL §349 claim based on private contract disputes unique to the parties. Nor does the consumer-oriented element depend on the use to be made of the product, as what matters is whether the defendant's allegedly deceptive act or practice is directed to the consuming public and the marketplace."

Here, plaintiffs alleged that defendant advertised the Tanbook to the general public. The court rejected defendant's attempt nonetheless to limit the reach of GBL §349 by arguing that the Tanbook is oriented to

legal professionals. According to the court, the fact that legal professionals purchase the Tanbook “does not mean that the defendant’s conduct was not consumer oriented. Legal professionals are merely a subclass of consumers and, as we recently clarified, consumer oriented conduct need not be directed to all members of the public.”

With respect to the second element, the majority held that the complaint failed to adequately plead the materiality element of the cause of action. “A defendant’s actions are materially misleading when they are likely to mislead a reasonable consumer acting reasonably under the circumstances.

What is objectively reasonable depends on the facts and context of the alleged misrepresentations and may be determined as a matter of law or fact (as individual cases require).” Here, defendant’s statements about the completeness of Part III of the Tanbook could not materially mislead a consumer into believing that defendant guaranteed the accuracy or currentness of the publication where plaintiffs concede that the legal materials contained in Part III are subject to legislative amendment at any time and the disclaimer language in defendant’s form contract with its customers expressly disclosed that the information may not be current.

Because of the potential for updates after the Tanbook was published, the majority held that it is clear to consumers that the Tanbook is not “a completely accurate compilation of the law.” Indeed, the majority observed that the Tanbook was offered with a subscription service that would have provided updates to the current edition, if any, when they became available. With respect to the disclaimer, the language set forth in the form contract states, “WE DISCLAIM ALL WARRANTIES WITH RESPECT TO PUBLICATIONS, EXPRESS OR IMPLIED...WE DO NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS OF THE MATERIALS CONTAINED IN THE PUBLICATIONS.” The majority found that this language “addressed the precise deception alleged in plaintiff’s complaint, leav[ing] no possibility that a reasonable consumer would have been misled about the contents of the Tanbook.”

Having held, as a matter of law, that no reasonable consumer could have been materially misled to believe that the defendant guaranteed Part III of the Tanbook was complete and accurate at any given time, the majority affirmed the First Department’s order dismissing the complaint.

Judge Eugene Fahey dissented in part. While agreeing with the majority that plaintiffs adequately alleged consumer-oriented conduct, Fahey argued that plaintiffs also had sufficiently pled the remaining two elements. With respect to materiality, Fahey credited plaintiffs argument that “the fact that the Tanbook is updated and purchased by consumers annually would lead a reasonable consumer to believe that the Tanbook was updated on an annual basis with the changes to the law that were made the previous year, i.e., the consumers were not merely purchasing another copy of the same book each year.”

Fahey also found that a disclaimer is not a per se bar to a GBL §349 cause of action, even when it is specific, stating that “[t]his theory would allow routine disclaimers to render the consumer protections, codified by the statute, meaningless.” According to Fahey, a defendant’s disclaimer must be considered as part of the overall analysis in determining whether the alleged deceptive conduct was likely to mislead a reasonable consumer acting reasonably under the circumstances. “Plaintiffs have adequately pleaded that element, which is not amenable to resolution at the motion to dismiss stage. In concluding otherwise, the majority has treated defendant’s motion to dismiss as a motion for summary judgment.”

Although the majority opinion and Judge Fahey's dissent disagreed as to whether plaintiffs had stated a claim under GLB §349, the Court of Appeals has provided unanimous and clear guidance that the statute applies to all consumers and does not exclude goods or services sold to businesses or professionals.

This article is reprinted with permission from the June 15, 2021 issue of New York Law Journal. © 2021 ALM Media Properties, LLC. Further duplication without permission is prohibited. All rights reserved.