To Be Argued By:
JOHN GLEESON
Time Requested: 15 Minutes

CTQ-2019-00002
U.S. Court of Appeals, Third Circuit Docket No. 18-2490

Court of Appeals

STATE OF NEW YORK

STEVEN PLAVIN,

Plaintiff-Appellant,

—against—

GROUP HEALTH INCORPORATED,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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September 16, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to New York Court of Appeals Rule of Practice 500.1(f), Defendant-Respondent Group Health Incorporated states that it is a not-for-profit corporation whose direct parent is Health Insurance Plan of Greater New York, Incorporated, which is a direct subsidiary of EmblemHealth, Incorporated.

Dated: New York, New York
September 16, 2019

Respectfully submitted,

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STATEMENT OF RELATED LITIGATION

There are no related cases other than the appeal pending before the United States Court of Appeals for the Third Circuit (No. 18-2490). This case has not previously been before this Court.

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PRELIMINARY STATEMENT

This Court's decision in *New York University v. Continental Insurance Co.* ("*NYU*"), 87 N.Y.2d 308 (1995), provides the legal basis to answer in the negative the certified questions from the Third Circuit – whether an insurance company engages in consumer oriented conduct under the General Business Law (the "GBL") when it provides allegedly misleading summary information about a City-sponsored health insurance plan that was negotiated by sophisticated parties (here, the City of New York (the "City"), the municipal unions that represent City employees and retirees, and the insurance company).

This case centers on a health insurance plan sponsored by the City (the "GHI Plan") and administered by Defendant-Respondent Group Health Incorporated ("GHI"). The GHI Plan was negotiated through a collective bargaining process (as one of 11 health plans offered by the City to its employees and retirees) that resulted in a health plan tailored for, and made exclusively available to, those employees and retirees. Plaintiff claimed that GHI violated Sections 349 and 350 of the GBL by allegedly misrepresenting the terms of the GHI Plan in summary descriptions that were distributed by the City, and also on GHI's website.

The District Court for the Middle District of Pennsylvania applied *NYU*, held that Plaintiff failed to allege that the GHI Plan implicated consumer oriented conduct (as required by the GBL), and dismissed the Complaint with prejudice.

The District Court explained that, because the GHI Plan was not offered to the general public and it was negotiated between "two sophisticated institutions" with similar bargaining power, the alleged conduct was not consumer oriented. As this Court made clear in *NYU* and *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20 (1995), the predicate of a GBL claim is disparate bargaining positions among the parties, and the GBL does not extend to disputes grounded in contracts that are privately negotiated by sophisticated parties, like the one in this case. The District Court's holding, and this Court's decision in *NYU*, are entirely consistent with the central purpose of the GBL, which is to protect members of the general public, who lack bargaining power, when engaging in consumer transactions. It is for this reason that the GBL typically applies to modest consumer transactions, not multi-million dollar contracts of insurance like the GHI Plan.

Ignoring the purpose of the GBL (rectifying the imbalance in bargaining power in consumer transactions) and the core principle underlying this Court's precedents (private transactions negotiated by sophisticated bargainers never implicate the expansive protections the GBL affords consumers), Plaintiff urges the Court to focus simply on the number of plan members affected by the alleged conduct. But no matter how numerous they may be, members of privately negotiated health plans who enjoy the protections of unions in the negotiation and

administration of their plans do not need the expansive protection of the GBL, and extending that protection to them will have multiple adverse consequences. Accordingly, the certified questions should be answered in the negative.

COUNTER-STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

GHI is a not-for-profit corporation organized under New York law, and is authorized to operate as an indemnity insurer. *See* Compl. ¶ 14 (A58-59). The City of New York ("City") offers 11 health insurance plans to its employees and retirees and their dependents as part of their compensation and retirement packages. *Id.* ¶ 2, 19 (A55, 60). Among the plans (and at issue here) is GHI's Comprehensive Benefits Plan (the "GHI Plan"), a preferred provider organization (PPO) plan, which provides in-network coverage and partial reimbursement for out-of-network services. *Id.* ¶¶ 1-2 (A54-55).

The GHI Plan is provided exclusively to City employees and retirees pursuant to a contract between the City and GHI. The City sponsors and pays entirely for the GHI Plan. *Id.* ¶¶ 19-20 (A60). The contract between the City and GHI was negotiated with the municipal unions that represent the City's employees and retirees. The City's Office of Labor Relations ("OLR") administers the 11 health plans, and explains:

> Through collective bargaining agreements, the City of New York and the Municipal Unions have cooperated in choosing health plans and designing the benefits for the City's Health Benefits Program. These benefits are intended to provide you with the fullest possible protection that can be purchased with available funding.

A327; *see* Compl. ¶ 22 (A60-61). Accordingly, City employees and retirees are third-party beneficiaries of the underlying contract of insurance for the GHI Plan. *See* Certification Order ¶ 7 (A548-49). The full coverage and benefits under the GHI Plan are set forth in a Certificate of Insurance. *See* Certificate of Insurance (A191, 196) ("The City of New York has entered into a Group Contract with Group Health Incorporated (GHI) to provide health insurance benefits. Under this Group Contract, GHI will provide the benefits described in this booklet to persons enrolled in the New York City Employee Benefits Program. . . . This booklet is your Certificate of Insurance. It is evidence of your coverage under the Group Contract between GHI and the City of New York.").[1]

The reimbursement rates for out-of-network services under the GHI Plan are approved by the City. *See* A200 ("Allowed Charges are the various scheduled amounts which GHI will reimburse for covered services rendered by non-participating providers. . . . Allowed Charges are based upon data collected by

[1] The Certificate of Insurance is publicly available on the website of GHI's parent company, EmblemHealth. *See* A191, available at https://www.emblemhealth.com/~/media/Files/PDF/NYC%20Certificate%20of%20Insurance.pdf.

GHI and agreed to by the City of New York."). Additionally, the City and unions continuously work to improve the GHI Plan for City employees, and, over the years, have negotiated with GHI for "program enhancements" and "benefit changes." *See* A303 (July 1999 letter); A305 (February 2001 letter); A306 (March 1999 letter); A308 (August 2000 letter); A309 (March 2004 letter). These changes constituted "significant improvements" to the GHI Plan that were obtained "[t]hrough the joint efforts of the [OLR] and the City's unions." A303, A306. Among other features, the parties negotiated for "higher out-of-network reimbursements" for members, like Plaintiff, who enrolled in an optional coverage rider. A306. The parties also agreed to cut in half the deductible for catastrophic coverage for out-of-network services. A304; *see also* A309 (March 2004 announcement identifying "benefit changes" that were the "result of negotiations between the [OLR] and the Unions.").

Every year, prior to the open enrollment period during which City employees can select from among the 11 health plans offered, OLR provides City employees and retirees with a Summary Program Description ("SPD"). Compl. ¶¶ 21-22 (A60-61). The SPD contains "a summary of [employees'] benefits under the New York City Health Benefits Program" (*i.e.*, a summary of the different benefits provided under each of the 11 health plans that the City has negotiated on behalf of its employees and retirees). A327. This includes a

summary of the benefits under the GHI Plan. A348. GHI also provides on its website a Summary of Benefits and Coverage of the GHI Plan ("SBC"). A85.

II. PROCEDURAL HISTORY

A. Proceedings Before the District Court

In August 2017, Plaintiff sued GHI in federal district court in the Middle District of Pennsylvania on behalf of himself and a putative class of "[a]ll persons who were members of [the GHI Plan] from 2011 to 2015." Compl. ¶ 42 (A68). Plaintiff is a retired City police officer who resides in Pennsylvania. *Id.* ¶ 13 (A58). He has been a member of, and covered by, the GHI Plan since he first enrolled in 1984, and his coverage has extended to his family members. *Id*. Plaintiff asserted claims pursuant to (i) GBL § 349; (ii) GBL § 350, and (iii) New York Insurance Law § 4226, as well as (iv) for unjust enrichment. *Id.* ¶ 1 (A54).

Each claim was based on the same alleged conduct – that the SPD (which was distributed by the City) and SBC "convey[ed] the impression that employees faced little risk of incurring large reimbursement deficits" (*id.* ¶ 6 (A56)) and did not disclose that the reimbursement rates for out-of-network medical services under the GHI Plan "would be a fraction of the actual cost of that service." *Id.* ¶ 5 (A55-56). Plaintiff claims that he was injured when his wife, who was covered by the GHI Plan, received out-of-network services in 2013 and 2014 for which GHI did not provide reimbursement in the amounts Plaintiff anticipated. *Id.* ¶ 41 (A67).

Plaintiff, however, had previously been reimbursed for over 400 out-of-network claims under the GHI Plan since 2004, when he moved to Pennsylvania, and thus was fully aware of the complained-of reimbursement rates for out-of-network services for more than a decade. Manalansan Decl. ¶ 6 (A163-64).

GHI moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Complaint for failure to state a claim upon which relief could be granted. *See* A102-44. In June 2018, in a 41-page opinion, the District Court granted GHI's motion in its entirety, and dismissed each claim with prejudice. *See* Dist. Ct. Op. at 41-42 (A41-42).

With respect to the issue presently before this Court, the District Court dismissed the GBL claims because, among other reasons, the Complaint failed to allege consumer oriented conduct, as required to state a claim under GBL §§ 349 and 350. The District Court held that Plaintiff had not alleged such conduct because "the alleged deception arises out of a private contract negotiated between [GHI], a health insurance company, and the City of New York, [Plaintiff's] former employer." *Id.* at 18 (A18).

Relying on this Court's decisions in *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.* ("*Oswego*"), 85 N.Y.2d 20, 24 (1995) and *N.Y. Univ. v. Cont'l Ins. Co.* ("*NYU*"), 87 N.Y.2d 308 (1995), the District Court held that, because the GHI Plan was negotiated between "two sophisticated

institutions," Plaintiff was "not a mere consumer of the public," and therefore the alleged deceptive conduct was not consumer oriented. Dist. Ct. Op. at 19 (A19). The District Court explained that the GBL did not apply because Plaintiff "was only able to receive the benefits of [GHI]'s plan by virtue of being an employee of the City of the New York, which bargained with [GHI] on behalf of its employees—and only its employees—on the terms of employee benefit plans." *Id.* The mere fact that other City employees received the summary documents did not "automatically transform the [GHI P]lan into something that has 'a broader impact on consumers at large.'" *Id*. (quoting *Oswego*, 85 N.Y.2d at 25).

The District Court also dismissed the GBL claims because Plaintiff failed to allege any materially misleading statements. *Id.* at 25 (A25). After reviewing the SPD, SBC, and the Complaint, the court specifically rejected Plaintiff's "twisted reading" (*id.* at 28 (A28)) and "farfetched interpretations" of the summary documents (*id.* at 32 (A32)), as well as Plaintiff's "unreasonable assumption[s]." *Id.* at 26 (A26). Given that Plaintiff had been enrolled in the GHI Plan since 1984, and had received reimbursement for hundreds of out-of-network services since moving to Pennsylvania in 2004, the District Court found that Plaintiff's complaints about the rates of reimbursement for such providers rang especially hollow: "Tellingly, the Complaint never alleges what Plavin *personally expected* the reimbursement rates to be, but only laments that the plan covered 'a fraction of

factual costs of services.'" *Id.* (emphasis in original). The District Court went on to say that the implicit allegation that a plan for which Plaintiff "paid zero dollars in out-of-pocket premiums" since 1984 would "cover a substantial (if not all) of out-of-network expenses" was "unreasonable." *Id.*

B. Proceedings Before The U.S. Court of Appeals For The Third Circuit

Plaintiff appealed the dismissal of the Complaint to the U.S. Court of Appeals for the Third Circuit. A43. At oral argument, Circuit Judge Theodore McKee expressed skepticism about whether the dissemination of the SPD and SBC constituted consumer oriented conduct. A475, 479. Judge McKee observed that this case presents a situation that is "very different" from claims typically brought pursuant to the GBL because "the contract at issue was arranged" between the City and unions "on one side and the insurer on the other." A479. Rejecting the argument that the GBL automatically applies simply because its language does not expressly exempt employer-sponsored benefit plans from its scope, A483-84, Judge McKee noted that this Court applies a context-specific inquiry to determine if the GBL should apply, taking into account the size of the transaction, "whether the entity being protected in a particular suit fits within the class of consumers," and "whether or not something is offered to the general public." A484; *see also* A481.

Following oral argument, the Third Circuit certified to this Court the question of whether the conduct alleged in the Complaint is consumer oriented under GBL §§ 349 and 350. A543. Specifically, the Certification Order asks whether the dissemination of the SBD and SBC, as alleged in the Complaint, implicated consumer oriented conduct "[w]here a contract of insurance is negotiated by sophisticated parties such as the City of New York and [the] insurance company, and where hundreds of thousands of City employees and retirees are third-party beneficiaries of that contract, and where the insurance company's policy created pursuant to the contract is one of several health insurance policies from which employees and retirees can select." A549.

Contrary to Plaintiff's assertion, the Third Circuit did not "reverse[]" the District Court in any respect. Pl. Br. 16. Nor did the Third Circuit resolve, or even address (in the Certification Order or otherwise), GHI's argument that Plaintiff's claims were time barred. That issue is fully briefed before the Third Circuit, and provides an alternative ground for affirming the District Court's dismissal of the Complaint. *See* GHI 3d Cir. Br. at 44-47.

By order dated May 2, 2019, this Court accepted the Third Circuit's certified questions. A560.

ARGUMENT

The GBL is a consumer protection statute that seeks to level the playing field between members of the public and superiorly situated businesses when engaging in consumer transactions. Accordingly, a plaintiff alleging a GBL violation must demonstrate that the complained-of conduct is consumer oriented. The factual premise underlying both certified questions requires that the questions be answered in the negative: Where the complained-of conduct relates to a contract of insurance negotiated by sophisticated parties – namely, the City and the municipal unions that represent the employees who are third-party beneficiaries of the insurance – and that insurance plan is available only to the parties on whose behalf the contract is negotiated, the conduct is not consumer oriented.

That result is supported by the underlying purpose of the consumer protection statutes and the principles underlying this Court's precedents interpreting those statutes. Plaintiff's focus on the number of members to whom the materials were disseminated misses the point of the GBL. The GHI Plan is a private contract of insurance negotiated between sophisticated parties with equal bargaining power, and does not implicate consumer oriented conduct.

I. THE GBL DOES NOT GOVERN PRIVATE CONTRACTS NEGOTIATED BETWEEN SOPHISTICATED PARTIES WITH EQUAL BARGAINING POWER.

Sections 349 and 350 of the GBL prohibit "[d]eceptive acts and practices" and "[f]alse advertising," respectively, "in the conduct of any business, trade or

commerce or in the furnishing of any service in this state." The statutes, however, "do[] not grant a private remedy for every improper or illegal business practice." *Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 309 (2017) (internal quotation marks omitted). Rather, these laws govern only wrongs directed "against the consuming public." *Oswego*, 85 N.Y.2d at 24. "Thus, as a threshold matter, plaintiffs claiming the benefit of section 349 [and section 350] – whether individuals or entities . . . – must charge conduct of the defendant that is consumer oriented." *Id.* at 25.

The "consumer oriented conduct" requirement reflects the statutes' purpose, that is, to protect members of the general public, who lack bargaining power, when engaging in consumer transactions. "The structure of the law, with the Attorney-General initially wielding sole enforcement power in the name of the State, speaks to its public focus." *Id.* As the Governor's Memorandum approving GBL § 349 explained, the statute's purpose was to provide "an honest market place where trust prevails between buyer and seller," and to stop frauds "whose principal victims are the poor." Mem. of Governor Rockefeller, 1970 N.Y. Legis. Ann. at 472, 73. Section 350 shares this intent. *See Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 148 (2nd Dep't 1995) ("The goals of GBL §§ 349-350 were major assaults upon fraud against consumers*, particularly the disadvantaged*.") (emphasis added) (internal quotation marks omitted). Courts, too, have long recognized that these laws "were

enacted to safeguard the vast multitude." *People by Lefkowitz v. Volkswagen of Am., Inc.*, 47 A.D.2d 868, 868 (1st Dep't 1975) (internal quotation marks omitted), *abrogated in part by Oswego*, 85 N.Y.2d at 26.

For these reasons, and as noted above, a plaintiff asserting a GBL claim must establish that the conduct complained of is consumer oriented. To this end,

> [c]ourts have traditionally applied [GBL] § 349 in the context of consumer sales transactions. The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising. And, the New York cases where plaintiffs have recovered under section 349(h) further reflect its consumer orientation since they uniformly involve transactions where the amount in controversy is small.

Teller, 213 A.D.2d at 146 (internal citations and quotation marks omitted).

In contrast, and at the other end of the spectrum, "[p]rivate contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." *Oswego*, 85 N.Y.2d at 25. This principle is exemplified by this Court's decision in *NYU*. In that case, the plaintiff university alleged that its insurer had conducted a sham investigation of a claim, vindictively refused to renew the university's policy, and engaged in "bad-faith practices with respect to policyholders nationwide." 87 N.Y.2d at 314. The plaintiff also claimed that the insurer "fraudulently induced the [u]niversity (and others) to purchase insurance, and to maintain such insurance, by falsely representing that it would evaluate claims in good faith," among other

things. *Id.* at 316-17. This Court held that the plaintiff failed to allege consumer oriented conduct, and therefore could not state a GBL claim:

> The policy was not a standard policy, although it contained standard provisions, but was tailored to meet the purchaser's wishes and requirements. The premiums were in excess of $55,000 and the policy provided coverage for losses up to $10 million against various acts of employee dishonesty. The sale was handled by one of the largest brokerages in the Nation, Johnson & Higgins, which managed, through negotiation, to obtain several enhancements to the policy for plaintiff's benefit . . . .

Id. at 321.

The Court contrasted the university's allegations with the facts in *Oswego* where, just 10 months earlier, this Court held that the plaintiff had alleged consumer oriented conduct. The plaintiffs in *Oswego* claimed that a bank violated the GBL when it provided them with allegedly deceptive signature cards to open savings accounts. 85 N.Y.2d at 23-24. In holding that the conduct was consumer oriented, this Court explained:

> defendant Bank dealt with plaintiffs' representative as any customer entering the bank to open a savings account, furnishing the [plaintiffs] with standard documents presented to customers upon the opening of accounts. The account openings were not unique to these two parties, nor were they private in nature . . . .

Id. at 26. In contrast, this Court in *NYU* stated:

> [m]anifestly, th[e] transaction [in *NYU*] is wholly unlike that in *Oswego*, which involved a bank customer receiving the standard forms and advice supplied to the

> *consuming public at large*, and in which the parties occupied *disparate bargaining positions*.

87 N.Y.2d at 321 (emphasis added). Unlike in *Oswego*, *NYU* involved

> complex insurance coverage and proof of loss in which *each side was knowledgeable and received expert representation and advice*. Although relief under the statute is not necessarily foreclosed by the fact that the transaction involved an insurance policy, this was not the "modest" type of transaction the statute was primarily intended to reach. It is essentially a "private" contract dispute over policy coverage and the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large.

Id. (internal citations omitted) (emphasis added).

Oswego and *NYU* together establish that whether conduct is consumer oriented is a context-specific inquiry that examines (1) "the relative bargaining power and sophistication of the parties," (2) "the nature of the agreement," and (3) "the amount of money involved in the agreement." *Interested Underwriters at Lloyd's of London Subscribing to Policy No. 991361018 v. Church Loans & Inv. Tr.*, 432 F. Supp. 2d 330, 332 (S.D.N.Y. 2006) (citing *NYU*, 87 N.Y.2d 308); *see also Berck v. Principal Life Ins. Co.*, 975 N.Y.S.2d 707, 2013 WL 3455767, at *3 (N.Y. Sup. Ct. 2013) (Kapnick, J.) (collecting cases); *Fleisher v. Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290, 304 (S.D.N.Y. 2012). This context-specific inquiry strikes the balance of enabling the GBL to govern "the numerous, ever-changing types of false and deceptive business practices," on the one hand, *Karlin v. IVF*

Am., Inc., 93 N.Y.2d 282, 291 (1999), without extending it to where its "protections" are not "need[ed]" or are improperly "supplant[ing]" causes of actions that historically regulate "an arm's length contract." *Teller*, 213 A.D.2d at 148 (finding no consumer oriented conduct, in part, because of the lack of "disparity of bargaining power" between the parties).

This analysis also ensures that the GBL is applied according to its intent: "to empower consumers [and] to even the playing field in their disputes with better funded and superiorly situated fraudulent businesses." *Graham v. Eagle Distrib. Co.*, 224 A.D.2d 921, 922 (4th Dep't 1996) (quoting *Teller*, 213 A.D.2d at 148). A plaintiff who is represented by a sophisticated entity, or is a beneficiary of a contract tailored for her benefit, is not akin to "the vast multitude which the statutes were enacted to safeguard." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273 (1977).

II. THE GHI PLAN DOES NOT IMPLICATE CONSUMER ORIENTED CONDUCT BECAUSE IT IS A PRIVATE CONTRACT OF INSURANCE NEGOTIATED BY SOPHISTICATED PARTIES.

A. The District Court Correctly Held That Plaintiff Failed To Allege Consumer Oriented Conduct.

This Court's precedent in *NYU* resolves the certified questions, as the District Court recognized when it dismissed Plaintiff's GBL claims for failing to allege consumer oriented conduct. The GHI Plan, like the policy in *NYU*, was negotiated by highly sophisticated institutional parties: GHI, the City of New York

Office of Labor Relations, and the group of municipal unions that represent City employees and retirees. *See* Dist. Ct. Op. at 18-19 (A18-19). The opening paragraph of the SPD – which was provided to City employees and retirees by OLR, and not GHI – expressly advised City employees and retirees as follows:

> Through collective bargaining agreements, the City of New York and the Municipal Unions have cooperated in choosing health plans and designing the benefits for the City's Health Benefits Program. These benefits are intended to provide you with the fullest possible protection that can be purchased with the available funding.

A327.

The contract of insurance underlying the GHI Plan, like the policy in *NYU*, was negotiated for, and made exclusively available to, a closed set of insureds (City employees and retirees and their families), and not "the consuming public at large." 87 N.Y.2d at 321. Indeed, a member of the "consuming public at large" could not enroll in the GHI Plan. The sophisticated parties representing the interests of City employees and retirees worked with GHI to "design[ ] the benefits" of the GHI Plan and tailor it to the needs of City workers, retirees, and their dependents. A327. The City and the municipal unions also obtained "significant improvements" for members over the years. A303, A306. This includes, for example, increasing the "out-of-network reimbursements" for optional riders and halving the deductible for catastrophic coverage, two aspects of

the GHI Plan that Plaintiff alleges were inadequate. A306. To borrow from this Court's opinion in *NYU*, an insurer's "acts in selling [the insurance] policy" are not consumer oriented conduct where that sale was handled by a sophisticated entity "which managed, through negotiation, to obtain several enhancements to the policy for plaintiff's benefit." 87 N.Y.2d at 321; *see also Denenberg v. Rosen*, 71 A.D.3d 187, 194-95 (1st Dep't 2010) (finding no consumer oriented conduct for individual private pension plan where "[t]he parties had various professionals in the form of accountants and lawyers representing them"). Indeed, parties with equal bargaining power reached a private contract of insurance, and Plaintiff's claim regarding the amount of reimbursement he received under the plan is a "dispute over policy coverage . . . which is unique to these parties, not conduct which affects the consuming public at large." *NYU*, 87 N.Y.2d at 321.

The premiums that the City paid to GHI on behalf of GHI Plan members and the extensive in-network and out-of-network coverage the GHI Plan provided to those members further distinguishes this case from the "modest" consumer transactions that are subject to GBL claims. *Id.* As the Complaint alleged, the City paid GHI "total premiums in excess of $2 billion" and GHI earned over $172 million for administering the GHI Plan in 2013 alone. Compl. ¶ 12 (A58).

Plaintiff's assertion that the total premiums are "irrelevant" because Plaintiff's claims are not based "on GHI's contract with the City" makes little

sense. Pl. Br. 39. The gravamen of Plaintiff's claim is that GHI misrepresented the terms of the contract of insurance to which he was a third-party beneficiary. Certification Order ¶¶ 4, 7 (A546, 548-49). Specifically, Plaintiff asserts that GHI misrepresented the reimbursement rates for out-of-network services, yet these rates were "agreed to" by the City and owed to Plaintiff pursuant to the contract of insurance. A200. The purported "ill-gotten premiums" the City paid to GHI (Pl. Br. 39) were likewise owed pursuant to that contract. Plaintiff's GBL claims are rooted in, and inseparable from, his dissatisfaction with the contract of insurance, and do not implicate consumer oriented conduct.

B. Members of the GHI Plan Do Not Need The Protection Of The GBL.

That the conduct complained of does not implicate consumer oriented conduct is underscored by the fact that Plaintiff simply does "not need the protection of [GBL] § 349." *Teller*, 213 A.D.2d at 147; *cf. Exxonmobil Inter-Am., Inc. v. Advanced Info. Eng'g Servs., Inc.*, 328 F. Supp. 2d 443, 450 (S.D.N.Y. 2004) ("Even if [the defendant's] actions had the potential to deceive and defraud thousands of possible customers like [plaintiff], this does not change the fact that [the plaintiff], one of the world's largest corporations, is not the kind of consumer § 349 was intended to protect.").

Members of the GHI Plan received "expert representation" by the City and municipal unions that negotiated the GHI Plan on their behalf. *NYU*, 87 N.Y.2d at

321. The City and municipal unions possess the sophistication, experience, and leverage to maximize the health benefits for City employees and retirees. As the District Court explained, "the fact that the City had a large number of employees only suggests that the City would have been a powerful party in negotiations with insurance companies such as [GHI]." Dist. Ct. Op. at 19 (A19).

The safeguards provided by the unions to Plaintiff and his fellow City employees and retirees are particularly significant here. The unions are statutorily empowered to "be the exclusive representative . . . of all the employees in the appropriate negotiating unit," N.Y. Civ. Serv. Law § 204(2), and the unions owe their members a "duty of fair representation . . . predicated on their role as exclusive bargaining representatives." *Civil Serv. Bar Ass'n, Local 237, Int'l Bhd. of Teamsters v. City of New York*, 64 N.Y.2d 188, 196 (1984). The benefits that the unions negotiated under the GHI Plan are the product of collective bargaining (A327), a process that is uniquely protective and empowering of workers, and strongly favored in New York. *See City of Watertown v. State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 78 (2000) ("As we have time and again underscored, the public policy of this State in favor of collective bargaining is strong and sweeping.") (internal quotation marks omitted).

Moreover, as the District Court noted,

> according to the NYC Administrative Code, public employers of New York City *must* negotiate the terms of

> their employees' wages and benefits with employees' unions. This provision would obligate the City to bargain in good faith to attempt to reach an agreement with employees' unions on wages and health benefits, which occurred here, as manifested by the City's making available 11 different health plans for selection by its employees and retirees."

Dist. Ct. Op. at 20-21 (A20-21) (emphasis in original) (citing NYC Code § 12-307(a)).

The significance of equal bargaining power in the context of a GBL claim cannot be overstated. In *Teller*, for example, the Second Department held that an individual had failed to allege consumer oriented conduct against a general contractor for allegedly "deceiv[ing her] regarding the costs of the renovation of her home." 213 A.D.2d at 145. Among other factors, the court emphasized that "there was not the disparity of bargaining power present in this case that is a signature of the more run-of-the-mill consumer fraud case." *Id.* at 149. That is true here, as well, where the City and the unions wield significant bargaining power.

If members of the GHI Plan are dissatisfied with the benefits under the plan, or with the way in which the plan is described in the SPD or SBC, they can raise their concerns with their union representatives, or with the City, which is involved in preparing and disseminating the SPD. These entities in turn can remedy any issues with GHI through their contractual relationship, or at the bargaining table in

future negotiations. Members of the GHI Plan simply bear no meaningful resemblance to the unrepresented consumer – *i.e.*, the "vast multitude" – that "the statutes were enacted to safeguard." *Guggenheimer*, 43 N.Y.2d at 273.

C. Plaintiff Misconstrues The Scope Of The GBL.

Plaintiff's argument fails to account for the fact that sophisticated parties negotiated the GHI Plan on behalf of Plaintiff. That the GHI Plan was offered only to a closed universe of City employees and retirees simply was one factor that the District Court considered in holding that GHI did not engage in consumer oriented conduct. The fact that the GHI Plan was a multi-million dollar contract of insurance, negotiated by sophisticated parties, including two that represented Plaintiff's interests, weighed heavily in the District Court's analysis. As the District Court explained:

> [T]he fact that a large class of members is affected does not automatically transform the plan into something that has 'a broader impact on consumers at large.' [Plaintiff] was only able to receive the benefits of [GHI]'s plan by virtue of being an employee of the City of New York, *which bargained with [GHI] on behalf of its employees* – and *only* its employees – on the terms of employee benefit plans. Indeed, the fact that the City had a large number of employees only suggests that the City would have been a powerful party in negotiations with insurance companies such as [GHI].

Dist. Ct. Op. at 18-19 (A18-19) (citation omitted) (first emphasis added, second emphasis in original).

The cases Plaintiff cites to support his argument all are distinguishable. Pl. Br. 25-31. None involves circumstances in which the alleged conduct – as in this case – relates to and arises from a multi-million-dollar insurance contract negotiated by highly sophisticated parties who represented the plaintiff's interests. For example, in *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 8-10, 13 (2d Dep't 2012), an auto insurer was found to have engaged in consumer oriented conduct where it provided information to consumers about a repair program by which the insurer contracted directly with vehicle repair shops regarding rates and terms of repairs for claimants. No sophisticated party acted on behalf of the plaintiffs to negotiate the rates. Similarly, in *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 887 (3rd Dep't 2008), physicians claimed that their medical malpractice insurance company failed to inform them, as it was legally required to do, that the physicians had a right to select independent counsel of their choosing at the insurer's expense. The court found that the insurance company had engaged in consumer oriented conduct, but the case did not involve a contract that was negotiated by a sophisticated party on behalf of the physicians. *Id.* at 888.

Plaintiff's argument based on *Koch v. Greenberg*, 626 F. App'x 335, 340 (2d Cir. 2015), *i.e.*, that "the presence of an intermediary cannot defeat a GBL claim," similarly is misplaced. Pl. Br. 38. That case involved a purchaser of wine

(a consumer product) at an auction, who alleged that the defendant misrepresented the wine's authenticity. *See* 626 F. App'x at 340; *Koch v. Greenberg*, 14 F. Supp. 3d 247, 261-62 (S.D.N.Y. 2014) (providing the underlying facts). The defendant argued in response that the GBL did not apply because the auctioneer served as an "expert intermediary" between the buyer and seller. 626 F. App'x at 340. The court rejected that argument because the auctioneer simply facilitated the transaction; it was not the plaintiff's representative, as the City and unions were here. *See* A327.

The parade of horribles that Plaintiff claims will ensue if the certified questions are answered in the negative has no basis, and indeed, serious adverse effects will occur if they are not answered in the negative. First, answering the certified questions in the negative does not, as Plaintiff suggests, foreclose an entire category of clams. Pl. Br. at 43. As this Court recognized in *NYU*, "relief under the statute is not necessarily foreclosed by the fact that the transaction involved an insurance policy." 87 N.Y.2d at 321. The only GBL claims that will be foreclosed if the certified questions are answered in the negative are those brought by plaintiffs who were represented by sophisticated entities with relatively equal bargaining power.

Moreover, members of employer-sponsored insurance plans are not without other remedies. As discussed above (at 21-22, *supra*), City employees and retirees

can seek redress through their unions. The employer-sponsored benefits of most other New Yorkers are governed by federal law – the Employee Retirement Income Act of 1974 ("ERISA") – which pre-empts state law claims (including under the GBL) that "directly implicate issues concerning benefits due under the Plan[ ]." *Ciampa v. Oxford Health Ins., Inc.*, No. 15-CV-6451, 2016 WL 7392014, at *3 (E.D.N.Y. Dec. 21, 2016) (holding that ERISA pre-empts GBL claim based on alleged deceptive practices in sale of health insurance plan and collecting cases); *see generally* ERISA, 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq. Indeed, "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).[2]

Plaintiff also ignores the fact that the GBL was not designed to supplant or replace existing causes of action under New York's common law or civil and criminal statutes. *See, e.g.*, GBL § 349(g); GBL § 350-e(1). Although untenable here, members of employer-sponsored health plans have recourse to various common law claims, including fraud or breach of contract, or a claim under the

[2] To the extent an employee belongs to an employer-sponsored plan not covered by ERISA (*e.g.*, governmental plans, church plans, plans maintained solely to comply with workers compensation or disability laws), 29 U.S.C.A. § 1003(b), a court would able to assess – as the District Court did here – whether the alleged conduct is consumer oriented based on the facts of the case and this Court's precedent. Where an employee is represented by his employer and union, both of which can provide "expert representation," the GBL will not, and need not, apply.

New York Insurance Law. *See, e.g.*, *Lynch v. McQueen*, 309 A.D.2d 790, 792 (2nd Dep't 2003) (holding that plaintiff had stated a claim for fraud in the inducement and negligent misrepresentation, but not for violation of GBL § 349 where the alleged conduct was not "part of a pattern directed at the public generally").

If Plaintiff could prove that GHI's conduct was fraudulent, as he alleges (Compl. ¶ 10 (A57, A64)), he could have and would have alleged fraud. If Plaintiff could prove that he did not receive the benefits of the contract of insurance negotiated by the unions for his benefit, he could have and would have alleged breach of contract. What is at stake here is not whether Plaintiff lacks recourse for the conduct he alleges, but only whether he is *also* entitled to the generous cause of action under the GBL, which was specifically enacted to protect members of the consuming public with disparate bargaining power when engaging directly with more sophisticated entities. The GBL, for example, does not require that an alleged deceptive practice involve a fraudulent statement or omission. *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000). Nor does it require reliance by the plaintiff, or that the plaintiff suffered pecuniary harm. *Id.* The GBL, as this Court has stated, is a "critically different" avenue of relief. *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 209 (2001). If every union member has resort to the expansive cause of action under the GBL whenever he or she alleges non-

fraudulent, non-contract-breaching deceptive conduct with respect to their union-negotiated health care plans, this Court can expect precisely the sort of "tidal wave of litigation" it held was not intended when the legislature created the private right of action under the GBL in 1980. *Oswego*, 85 N.Y.2d at 26.

Putting other available remedies aside, Plaintiff's hypothetical scenarios involving members of "big-box stores like Costco" (Pl. Br. at 44) or consumers "targeted via some overarching business-to-business transaction involving their employer, their bank, [or] their internet service provider" (*id.* at 47) bear no resemblance to the facts of this case. Whether the GBL applies in a given situation does not turn simply on whether some business-to-business transaction is involved, but requires a careful examination of the nature of the transaction, including whether the plaintiff has disparate bargaining power as compared to the defendant, is represented by a sophisticated entity, and whether the allegations are rooted in, and inseparable from, the contract negotiated on the plaintiff's behalf by such an entity.

A holding that GHI did not engage in consumer oriented conduct also would not "preclude the Attorney General . . . from seeking any redress for an array of deceptive practices," as Plaintiff argues. *Id.* at 46. A 2014 Assurance of Discontinuance ("AOD"), on which Plaintiff heavily relied below, makes clear that the Attorney General ("NYAG") conducted its investigation, in part, pursuant to

Executive Law § 63(12), which covers a far broader range of conduct than the GBL. A166. Under the Executive Law, the NYAG is charged with protecting not just the reasonable consumer, "but also the ignorant, the unthinking, and the credulous," and thus the NYAG regulates to a fundamentally different standard than is applicable to a private cause of action under the GBL. *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 106 (3d Dep't 2005) (quoting *People ex rel. Spitzer v. Gen. Elec. Co.*, 302 A.D.2d 314 (1st Dep't 2003)); *see also Guggenheimer*, 43 N.Y. 2d at 273. The Executive Law also does not require allegedly deceptive conduct to be consumer oriented. *Applied Card Sys., Inc.*, 27 A.D.3d at 106. Thus, any decision regarding the scope of consumer oriented conduct under the GBL would have no impact on the NYAG's ability to commence an investigation pursuant to the Executive Law, or other applicable statutes, as the case may be.[3]

Finally, the Court should be aware of the regulatory consequences of the expansion of the GBL advanced by Plaintiff. The AOD (which explicitly stated that GHI did not admit any of the NYAG's allegations (A174)), reflects GHI's good faith effort to work constructively with the NYAG's Health Care Bureau to *improve* disclosures, not to correct materially misleading ones. Allowing Plaintiff

[3] Nearly every court to address whether the Executive Law § 63(12) provides a free-standing cause of action has held that it does. *Matter of People by Schneiderman v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417 (1st Dep't 2016) (collecting cases).

– the only one of hundreds of thousands of members of the GHI Plan to bring this action – to bootstrap an AOD that results from that kind of cooperation into a putative class action will seriously undermine the incentive of health care companies to work with the NYAG to improve communications with plan participants.

CONCLUSION

For the foregoing reasons, GHI respectfully requests that this Court hold that the conduct alleged by Plaintiff does not constitute consumer oriented conduct under GBL §§ 349 and 350 and therefore answer the certified questions in the negative.

Dated: New York, New York
September 16, 2019

Respectfully submitted,

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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 6,829 words.

Dated: New York, New York
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