No. CTQ-2019-00002

To be argued by:
MARK S. GRUBE
10 minutes requested

State of New York
Court of Appeals

STEVEN PLAVIN,

Plaintiff-Appellant,

v.

GROUP HEALTH INCORPORATED,

Defendant-Respondent.

BRIEF FOR AMICUS CURIAE STATE OF NEW YORK

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INTEREST OF AMICUS CURIAE

The New York State Office of the Attorney General submits this amicus curiae brief to assist the Court in answering the question of state law certified to this Court by the United States Court of Appeals for the Third Circuit.

The legal question certified here is whether New York's consumer-protection statutes, General Business Law (GBL) § 349 and § 350, extend to allegedly deceptive communications about insurance coverage that (a) described a health plan offered to employees by a government employer, (b) would influence employees' selection from an array of offered plans or their choice of healthcare options within a plan, and (c) were authored solely by the private administrator of the plan. This Court's resolution of that question will directly affect the Attorney General's enforcement powers under those statutes.

Group Health Incorporated (GHI) administers a group healthcare insurance plan offered by New York City to its employees and retirees. The plaintiff here, a retired New York City police officer, brought GBL § 349 and § 350 claims against GHI, alleging

that GHI had provided deceptive communications for distribution to employees about the scope of out-of-network healthcare coverage, and further alleging that these communications were authored by GHI and neither reviewed nor revised by the City. GHI's principal defense has been that these communications are not "consumer-oriented conduct," and are thus not actionable under GBL § 349 and § 350, because they purportedly "relate[] to a contract of insurance negotiated by sophisticated parties"—namely, the City, GHI, and municipal unions. Br. for Defendant-Respondent (GHI Br.) at 11. The Third Circuit has asked this Court to advise whether GBL § 349 and § 350 extend to this conduct.

The Attorney General has a strong interest in explaining to this Court that these communications are indeed consumer-oriented within the meaning of GBL § 349 and § 350. The Attorney General has a general interest in the scope of these statutes, because the Attorney General enforces them and regularly seeks to protect the public from deceptive practices or false advertising under both GBL § 349 and § 350. *See, e.g.*, *Matter of People v. Orbital Publ. Group, Inc.*, 169 A.D.3d 564, 565-66 (1st Dep't 2019); *People v. Nationwide*

Asset Servs., Inc., 26 Misc. 3d 258, 270-78 (Sup. Ct. Erie County 2009). This Court's ruling on the certified question will thus directly implicate the Attorney General's enforcement powers.

The Attorney General also has a specific interest in the particular dispute here. The Office has a longstanding interest in the problem of private insurers providing misleading information to employees about the group health insurance plans offered to them by their employers. Indeed, in 2014 the Attorney General entered into an Assurance of Discontinuance (AOD) with GHI based on communications that GHI had made to city employees and retirees regarding, inter alia, out-of-network coverage that the Attorney General determined to be deceptive. Some of the alleged misconduct at issue in this lawsuit overlaps with the communications addressed by the AOD. Thus, the Attorney General has a strong interest in explaining that GBL § 349 and § 350 should be interpreted to encompass the alleged conduct at issue here: misleading representations made by an insurance company to employees about a group insurance plan offered to them by their employer, in a manner that would reasonably influence employees' decisions to

select one plan from among many available offerings, or to choose particular healthcare options within a plan.

QUESTION CERTIFIED TO THIS COURT

The Third Circuit certified the following question (Appendix (A.) 549-550):

> Where a contract of insurance is negotiated by sophisticated parties such as the City of New York and an 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, has the insurance company engaged in "consumer-oriented conduct" under the GBL when:
>
> (1) The insurance company drafts summary plan information that allegedly contains materially misleading misrepresentations and/or omissions about the coverage and benefits of the insurance policy and sends these summary materials to the City, and the City does not check or edit these materials before sending them on to the City employees and retirees; OR
>
> (2) The insurance company directs City employees and retirees to information on the insurance company's website that allegedly contains materially misleading misrepresentations and/or omissions about the coverage and benefits of the insurance policy?

STATEMENT OF THE CASE

A. Statutory Background

New York's consumer-protection laws prohibit (1) "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state," GBL § 349(a); and (2) "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service," *id.* § 350; *see id.* § 350-a. *See also Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 343 (1999). These laws authorize judicial relief for all acts and practices that are "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995). Both the Attorney General and private plaintiffs may seek relief under these statutes. *See* GBL §§ 349(b), (h), 350-d, 350-e(3).

B. Factual Background

1. The Group Health Incorporated (GHI) Comprehensive Benefit Plan

Like many employers, New York City offers subsidized group health insurance to its current and former employees. The GHI Comprehensive Benefit Plan (GHI Plan) is one of eleven health plans that the City offers to its employees and retirees. (A. 55, 167.) In 2014, the GHI Plan had approximately 994,500 members, the highest enrollment of any city-sponsored health plan. (A. 61-62, 167.)

This dispute concerns the GHI Plan's out-of-network coverage. As relevant here, GHI reimburses members for out-of-network services at rates set out on a reimbursement schedule; members pay out-of-pocket for any fees exceeding GHI's reimbursement payment. (A. 55, 167.)

GHI regularly prepares a description of the GHI Plan's benefits to include in the City's Summary Program Description, a document the City provides to city employees and retirees to help them select a health plan; however, the City does not review or edit GHI's summary before distributing it to employees and retirees. (A. 545.) GHI also maintains a description of the GHI Plan on its own

website; again, the City neither reviews nor edits that description. (A. 60-61.) Both the Summary Program Description and GHI's website contain various descriptions of the GHI Plan's out-of-network coverage, explained in more detail below.

2. GHI's Assurance of Discontinuance with the Attorney General

Before this lawsuit was filed, the Attorney General conducted an investigation into GHI's representations to city employees and retirees regarding the GHI Plan. In September 2014, GHI entered into an Assurance of Discontinuance (AOD) in which it agreed to halt or alter certain practices. (A. 165-183.) As relevant here, the AOD identified four categories of representations that the Attorney General deemed to "constitute repeated violations of Executive Law § 63(12) and General Business Law §§ 349 and 350." (A. 174; *see* A. 168-173.) The AOD specifically noted that several of these representations were found in the Summary Program Description that GHI prepared for inclusion in a document that the City distributes to its employees and retirees to help them select a

health plan. (A. 168-173.) GHI neither admitted nor denied these findings.

First, GHI did not make its reimbursement schedule for out-of-network procedures easily available to city employees or retirees who are either current or prospective members of the GHI Plan. Instead, to determine GHI's out-of-network reimbursement rate, and thus to calculate their own potential out-of-pocket expenses, members had to contact customer service representatives and provide a specific medical procedure code—information not easily accessible to lay consumers. (A. 168-169.)

Second, GHI did not sufficiently describe the limitations of the GHI Plan's reimbursements for out-of-network services and thus understated the likelihood that members would have to pay out-of-pocket for such services. GHI's marketing materials "merely suggest" a possibility that members will need to make payments not covered by the GHI Plan, but it is in fact "highly likely that GHI Plan members will be required to pay for out-of-network services." (A. 170.) GHI's promotional materials also did not accurately describe the "potentially wide gap between the out-of-network reimbursement

and out-of-network charges," leaving members in the dark about the "substantial out-of-pocket costs they may incur." (A. 170-171.)

Third, GHI did not explain the circumstances under which members may unknowingly encounter out-of-network providers, such as during an emergency hospitalization, thus resulting in steep unforeseen out-of-pocket costs. (A. 171-172.)

Fourth, GHI misrepresented the frequency of updates to the reimbursement schedule. Although GHI represented that some reimbursement amounts had "been increased periodically," GHI in fact had not updated "the vast majority of the reimbursement amounts" in three decades. (A. 173.)

To resolve the matter, GHI agreed to modify "all GHI Plan consumer-facing materials" to more fully and accurately disclose both out-of-network coverage and the likely out-of-pocket expenses of members (A. 174); established a $3,500,000 fund to assist city employees and retirees with medical expenses incurred by out-of-network services; and paid a $300,000 penalty (A. 177-178).

3. The allegations in this complaint

In August 2017, Steven Plavin, a retired New York City police officer residing in Pennsylvania, brought an action against GHI on behalf of a putative class of GHI Plan members, seeking relief based on GHI's alleged misrepresentations regarding out-of-network coverage, including some of the same categories of conduct addressed by the AOD. (A. 54-76.)

Plavin's claims focus on two communications that "GHI distributed and caused to be distributed to" city employees and retirees to help them select health plans: the Summary Program Description and the online summary of benefits and coverage. (A. 55; *see* A. 60-61.) Plavin alleges that those materials did not indicate "that reimbursement rates for virtually every out-of-network service would be a fraction of the actual cost of that service." (A. 56; *see* A. 63-64.) Indeed, GHI allegedly never provided the actual schedule of out-of-network reimbursement rates to current or prospective members. (A. 61, 545.)

Plavin also alleges that the GHI Plan offered "Catastrophic Coverage" and an optional rider to increase reimbursements for

out-of-network services, but that those purported benefits were nonexistent. (A. 56-58, 64-66.) This conduct was not part of the Attorney General's AOD with GHI.

Plavin asserted common-law claims for unjust enrichment, violations of New York Insurance Law § 4226, and, as relevant here, violations of GBL § 349 and § 350. (A. 70-73.)

C. Procedural History

In June 2018, the United States District Court for the Middle District of Pennsylvania (Mariani, J.) granted GHI's motion to dismiss the complaint, holding, among other grounds, that GHI had not engaged in "consumer-oriented conduct" that would be actionable under GBL § 349 and § 350. (A. 17-23.) On Plavin's appeal, the Third Circuit certified this question of New York law to this Court. (A. 543-550.)

ARGUMENT

GBL § 349 AND § 350 APPLY TO COMMUNICATIONS AUTHORED SOLELY BY INSURANCE COMPANIES, AND AIMED AT GOVERNMENT-EMPLOYEE CONSUMERS, ABOUT THE SCOPE OF THE COVERAGE OF GOVERNMENT-EMPLOYER-SPONSORED PLANS

This Court should reject GHI's contention that its allegedly deceptive communications to current and prospective members of the GHI Plan are outside the scope of GBL § 349 and § 350. This Court has squarely held that an insurer's misrepresentations to insureds about the scope and nature of their policies are "consumer oriented" conduct actionable under New York's consumer-protection statutes. *See Gaidon*, 94 N.Y.2d at 344-45. That principle applies with full force here.

Contrary to GHI's argument, it is immaterial that GHI's alleged misrepresentations occurred in the context of an employer-sponsored health plan where benefits were negotiated by GHI, New York City, and employee unions. Plaintiff here does not seek to change these benefits or otherwise alter the outcome of the negotiations of the sophisticated parties. Instead, he asks only that GHI be honest in describing the coverage of the GHI Plan in a

different transaction: employees' and retirees' selection of a health plan, or their choice of healthcare options within a plan. In the context of that distinct transaction, city employees and retirees were faced with a classic consumer choice: a free selection of multiple health plans or healthcare options that would ultimately be based on their own preferences, but that would reasonably be influenced by GHI's descriptions of the GHI Plan's coverage. The relevant transaction here thus involves precisely the type of consumer choice that the Legislature sought to protect from deceptive practices or false advertising.

The fact that the City is a governmental entity is also immaterial under plaintiff's allegations. According to the complaint, the sole author of the alleged misrepresentations was GHI, not the City (or the unions); there is no indication that the higher-level contractual negotiations between these parties contemplated, let alone mandated, these misrepresentations; and the plaintiff here does not seek to modify the terms that these other sophisticated parties negotiated. Put simply, the claims here involve different parties and different conduct from the contractual negotiations that

GHI attempts to invoke as a shield. GHI therefore cannot rely on those negotiations to avoid its obligation to honestly describe its insurance coverage to current and prospective members.

A. GHI's Authorship of Allegedly Deceptive Marketing Directed to City Employees and Retirees Regarding the Coverage of a Health Plan Constitutes "Consumer-Oriented Conduct."

The conduct alleged in Plavin's complaint is the type of "consumer-oriented conduct" that the Legislature sought to regulate in enacting GBL § 349 and § 350. GHI authored communications that were disseminated to a broad class of over 600,000 individuals. Those communications described the value and cost of a GHI product (specifically, the out-of-network coverage of the GHI Plan) in a manner that would reasonably influence individuals to select the GHI Plan over other available options, or that would affect GHI Plan members' selection of healthcare options within the GHI Plan. And although GHI made these communications in the context of a health plan sponsored by New York City for its employees and retirees, the complaint here alleges that GHI alone authored these communications, and that the City neither reviewed nor edited them.

GBL § 349 and § 350 apply to this type of conduct. The misrepresentations at issue here (allegedly deceptive descriptions of insurance coverage and insureds' likely out-of-pocket expenditures) concern the nature or quality of a good or service that individuals are deciding whether to purchase. They thus directly affect a classic consumer choice: whether an individual should make one purchase rather than others based on their understanding of the differences among the options available to them and the suitability of each of these options to their personal needs. GHI's alleged misrepresentations about the GHI Plan's out-of-network coverage were "likely to mislead a reasonable consumer acting reasonably under the circumstances" because "the business alone possesses material information that is relevant to the consumer and fails to provide this information." *Oswego*, 85 N.Y.2d at 26. Specifically, GHI's alleged misrepresentations "undermine[d] a consumer's ability to evaluate his or her market options and to make a free and intelligent choice," leading some consumers to join the GHI Plan or select healthcare options under the GHI Plan based on a misimpression of the out-of-network benefits they would receive. *See North State*

Autobahn, Inc. v. Progressive Ins. Group Co., 102 A.D.3d 5, 13 (2d Dep't 2012).

These types of representations—descriptions of a product or service that a reasonable individual would consider in making a free choice among many market options—are quintessential examples of consumer-oriented conduct. *See, e.g.*, *Accredited Aides Plus, Inc. v. Program Risk Mgt., Inc.*, 147 A.D.3d 122, 134 (3d Dep't 2017) (marketing that targeted employers seeking workers' compensation coverage was consumer-oriented); *Shebar v. Metropolitan Life Ins. Co.*, 25 A.D.3d 858, 859 (3d Dep't 2006) (insurer liable under GBL § 349 for "misrepresentation[s] of the nature of the coverage being provided"). And GHI's misrepresentations had "a broader impact on consumers at large," *Oswego*, 85 N.Y.2d at 25, because GHI allegedly made these misrepresentations as part of an "extensive marketing scheme," *Gaidon*, 94 N.Y.2d at 344, disseminating allegedly deceptive information about the GHI Plan's out-of-network coverage to hundreds of thousands of city employees and retirees. The breadth of this class and the nature of GHI's asserted misrepresentations thus distinguish the alleged conduct here from the types of one-off

transactions that would fall outside the scope of GBL § 349 and § 350. *See, e.g.*, *Genesco Entertainment v. Koch*, 593 F. Supp. 743 (S.D.N.Y. 1984) (New York consumer-protection laws do not apply to rental of Shea Stadium).

B. GHI's Contract with the City Does Not Exempt It from Liability Under New York's Consumer-Protection Laws for the Deceptive Practices Alleged Here.

GHI's various attempts to evade the application of GBL § 349 and § 350 here all revolve around an immaterial fact: the terms and benefits of the GHI Plan were determined by a contract negotiated between GHI, the City, and employee unions. That fact has no relevance to the viability of claims under GBL § 349 and § 350 for alleged misrepresentations when GHI was the sole author of those misrepresentations; the negotiated terms of the GHI Plan did not authorize, let alone mandate, these misrepresentations; and the plaintiff here seeks not to modify the terms and benefits of the plan, but only to require GHI to honestly describe them.

1. Plavin's claims about misrepresentations that GHI made to consumers are distinct from any dispute regarding the contract negotiated between GHI, the City, and employee unions.

GHI's principal error here is construing Plavin's complaint as raising a "dispute[] grounded in contracts that are privately negotiated by sophisticated parties"—namely, GHI, the City, and employee unions. *See* GHI Br. at 2. But the allegations here do not concern a dispute by either the City or the unions about the terms of the employer-negotiated contract that established the GHI Plan in the first instance. Instead, the complaint targets distinct conduct: GHI's misrepresentations to current and potential insureds (not to the City or the unions) in a manner that affected these individuals' choices about which plan to join. GHI is thus wrong to assert that Plavin's "GBL claims are rooted in, and inseparable from, his dissatisfaction with the contract of insurance" (*id.* at 19). Regardless of whether Plavin has an underlying grievance with the negotiated terms of the GHI Plan, his allegations here do not contest the adequacy of those terms, but instead focus on GHI's descriptions of them to current and prospective consumers.

These circumstances distinguish this case from *New York University v. Continental Insurance Co.*, 87 N.Y.2d 308 (1995), GHI's principal precedent. In that case, this Court held that GBL § 349 did not extend to NYU's complaint that its insurer had acted improperly and in bad faith in its performance of a policy that had been "tailored to meet [NYU's] wishes and requirements." *Id.* at 321. This Court reasoned that NYU's grievance was "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.*

NYU thus involved a complaint (a) by an actual party to an insurance policy individually tailored to that party (b) about the insurer's performance under that policy (c) in a manner that directly affected only the complaining party, not a broader population. Here, by contrast, neither the City nor the unions are plaintiffs here; Plavin's claims arise from communications authored solely by GHI that were not authorized or mandated by the underlying contract; and the potential harms of GHI's misrepresentations would fall directly on hundreds of thousands city employees and retirees, not

on the City or the unions themselves. As this Court squarely held in *Gaidon*, several years after *NYU*, such facts would identify "an extensive marketing scheme that had a broader impact on consumers at large" rather than the type of "private contract dispute as to policy coverage" at issue in *NYU*, and would accordingly be governed by GBL § 349 and § 350. *Gaidon*, 94 N.Y.2d at 344 (quotation marks omitted).

GHI's arguments about the City's and unions' bargaining power (at 14-16) are thus misplaced because they focus on the wrong parties and the wrong transaction. The City and the employee unions may have had power to bargain over the terms and benefits of the GHI Plan, and thus arguably could not qualify as ordinary "consumers" in a dispute with GHI over those negotiated terms. *Cf. United Teamster Fund v. MagnaCare Admin. Servs., LLC*, 39 F. Supp. 3d 461, 474-75 (S.D.N.Y. 2014) (dispute between plan administrator and health-benefit plan was not consumer oriented). But the allegations at issue here concern misrepresentations by GHI that were not part of these negotiations, and the individuals actually affected by GHI's misrepresentations (city employees and

retirees) did not have any bargaining power in the relevant transaction (their selection of health plans). Instead, they were faced with a set of take-it-or-leave-it options during each open enrollment period and were reliant on representations authored by GHI to make their selection. GBL § 349 and § 350 protect ordinary consumers in precisely such circumstances. *See Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 148 (2d Dep't 1995) (New York's consumer-protection statutes were "intended to empower consumers; to even the playing field in their disputes with better funded and superiorly situated fraudulent businesses.")

2. GHI cannot hide behind the City when, as alleged, the City did not review, edit, or endorse GHI's misrepresentations.

GBL § 349 and § 350 address commercial transactions: both statutes apply only to deceptive practices or false advertising "in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The statutes would thus typically not apply to a government entity's provision of health benefits to its employees, which is generally considered a governmental function rather than a commercial transaction. *Cf. Glassman v. Glassman*,

309 N.Y. 436, 440 (1956) (State's provision of retirement benefits is "an important governmental function"); *Vassenelli v. City of Syracuse*, 174 A.D.3d 1439, 1440 (4th Dep't 2019) (municipality providing healthcare benefits pursuant to General Municipal Law § 207-c is performing governmental function).

Here, however, the complaint has alleged that the misrepresentations here were authored solely by GHI and were not reviewed, edited, or endorsed by the City, even though the City distributed some of those communications to its employees and retirees. (A. 545.) (Other alleged misrepresentations were posted on GHI's website and were thus not distributed by the City.) The absence of *any* involvement by the City in authoring these alleged misrepresentations precludes GHI from raising defenses to liability under GBL § 349 and § 350 that might be available if the City had effectively made the communications at issue itself. *Cf. Parker v. Brown*, 317 U.S. 341, 350-52 (1943) (state governmental immunity from federal antitrust laws extends to conduct by private actors that is compelled by state regulatory regime).

Accordingly, this case should be governed by the century-old principle that contractors performing work for governmental entities generally cannot avoid liability to private individuals when they make decisions "for their own private benefit to do injury" to others. *Mairs v. Manhattan Real Estate Assn.*, 89 N.Y. 498, 506 (1882); *see Bates v. Holbrook*, 171 N.Y. 460, 471 (1902) (fact that contractors "are engaged in a public work" is no defense to nuisance claim). That well-established principle supports the application of GBL § 349 and § 350 to a private insurer's decision, on its own, to mischaracterize the terms of a government-sponsored health plan.

3. GBL § 349 and § 350 apply when a particular product or service is offered to a selected audience rather than the general public.

GHI also mistakenly argues that New York's consumer-protection statutes do not apply here because the GHI Plan is not offered to *every* member of the consuming public, but only to hundreds of thousands of city employees and retirees. *See* GHI Br. at 17, 22. New York courts have never held that the requirement that "consumer-oriented conduct" have a "broader impact on consumers at large," *Oswego*, 85 N.Y.2d at 25, means that the

conduct must be directed at absolutely everybody. Instead, the purpose of the "broader impact" requirement is to distinguish the conduct covered by GBL § 349 and § 350 from narrower disputes, arising from circumstances "unique to the[] parties," that do not affect other similarly situated individuals. *Id.*; *accord NYU*, 87 N.Y.2d at 321. GHI's "extensive marketing scheme" making the same alleged misrepresentations to hundreds of thousands of individuals, *Gaidon*, 94 N.Y.2d at 344, plainly removes its conduct here from the type of one-off transactions that would not be covered by New York's consumer-protection statutes.

Under similar circumstances, New York courts have routinely upheld conduct as "consumer-oriented" even when it affects only a limited class of consumers, rather than every member of the public. For example, the Second Department has held that a corporation that unilaterally changed the terms of 143 consumer contracts engaged in consumer-oriented conduct subject to GBL § 349. *See Matter of People v. Wilco Energy Corp.*, 284 A.D.2d 469, 470-71 (2d Dep't 2001). The Third Department has held that advertisements and marketing materials targeting a discrete class of employers

seeking workers'-compensation coverage were actionable under the GBL. *See Accredited Aides Plus*, 147 A.D.3d at 134-35. The First Department has sustained GBL claims against broadband service companies that necessarily targeted a discrete class of consumers whose residences are wired for service. *See Matter of People v. Charter Communications, Inc.*, 162 A.D.3d 553, 553-54 (1st Dep't 2018). And courts have allowed GBL claims asserted by students against their educational institutions, such as claims based on certain fees charged to students, when the alleged misrepresentations were directed only at students or prospective students. *See Alexson v. Hudson Valley Community Coll.*, 125 F. Supp. 2d 27, 30-31 (N.D.N.Y. 2000). This Court should thus reject GHI's argument that New York's consumer-protection laws apply only to misrepresentations that are made to every member of the public.

4. The availability of other remedies for consumers does not preclude application of GBL § 349 and § 350.

GHI asserts that "members of the GHI Plan do not need the protection of the GBL," because they have other remedies—including, in particular, possible action "by the City and municipal unions that negotiated the GHI Plan." GHI Br. at 19 (capitalization modified). But in enacting GBL § 349 and § 350, the Legislature specifically provided that these consumer protections would apply "whether or not [particular misconduct was] subject to any other law of this state," GBL § 349(g), and would "neither enlarge[] nor diminish[] the rights of parties in private litigation," *id.* § 350-e(1). *See also id.* § 349(g) (these statutes "shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry"). It is thus well settled that GBL § 349 and § 350 "may be invoked regardless of whether the allegedly deceptive activity is covered by other laws," *New York v. Feldman*, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002); and, conversely, that a GBL § 349 or § 350 claim "does not foreclose

additional claims" under other statutes or common-law principles, *Karlin v. IVF Am.*, 93 N.Y.2d 282, 293 (1999).[1]

The Legislature's express recognition that GBL § 349 and § 350 provide additional rather than substitute remedies reflects its considered judgment that consumers benefit from multiple regimes that work in tandem to prevent deceptive or fraudulent practices. Consumers often face considerable disadvantages in the marketplace: they are expected to make decisions on their own about which products or services to purchase, yet the information available to them to make such decisions often comes from the very businesses with the strongest incentives to close a sale by any means necessary. To address this imbalance of both power and information, the Legislature has imposed on businesses the obligation to "refrain from fraud, deception, and false advertising when communicating

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[1] GHI's claim that beneficiaries of plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) may have remedies under that statute (*see* GHI Br. at 25) admittedly provides no remedy to government employees, such as Plavin, because "governmental plan[s]" are not governed by ERISA. *See* 29 U.S.C. § 1003(b)(1) (exempting "governmental plans" from ERISA framework); *see also id.* § 1002(32) (defining "governmental plan" to include political subdivisions of a state, such as the City).

with New York consumers." *Matter of People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 115 (2008). And the Legislature has not only tolerated but in fact added to the panoply of mechanisms to enforce that obligation—including, as relevant here, by adding a private cause of action to GBL § 349(h)—to ensure that businesses act honestly and adhere to their fundamental "duty not to deceive," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992). Excusing GHI from complying with GBL § 349 and § 350 because of other avenues to correct their alleged misrepresentations would run counter to this legislative judgment.

5. Private remedies under GBL § 349 and § 350 complement rather than undermine the Attorney General's enforcement powers under these statutes.

GHI is also wrong in asserting (at 28) that a ruling in its favor here would not affect the Attorney General's ability to enforce GBL § 349 and § 350. While the Attorney General has distinct enforcement powers and remedies—including the ability to recover civil penalties, *see* GBL § 350-d—the underlying standard for "consumer-oriented

conduct" is the same under GBL § 349 and § 350 regardless of whether the Attorney General or a private individual asserts a claim.

It is unclear what GHI means by asserting that a ruling in Plavin's favor here would "seriously undermine the incentive of health care companies to work with the [Attorney General] to improve communications with plan participants." GHI Br. at 29. This Court's express recognition that GBL § 349 and § 350 extend to insurers' descriptions of the coverage of employer-sponsored health plans would enhance, rather than undermine, insurers' incentives to improve the honesty of such descriptions. And such a ruling would bolster the Attorney General's ability to enforce these statutes as well. By contrast, a ruling *exempting* such communications from the reach of GBL § 349 and § 350 would free private insurers like GHI to disregard the demands of both the Attorney General and its own insureds to refrain from deceptive practices or false advertising in marketing their insurance products.

CONCLUSION

In order to preserve the robust consumer protections that the Legislature intended to make available to both the Attorney General and private plaintiffs, this Court should answer "yes" to the certified question and confirm that GBL § 349 and § 350 extend to communications authored solely by private insurers for distribution to government employees and retirees in a manner that would reasonably influence their selection of employer-sponsored health plans or healthcare options within a plan.

Dated: New York, New York
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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Mark S. Grube, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,184 words, which complies with the limitations stated in § 500.13(c)(1).

Mark S. Grube