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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 PLAINTIFF-APPELLANT

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STATEMENT OF RELATED LITIGATION

There are no related cases other than the appeal pending in the United States Court of Appeals for the Third Circuit.

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PRELIMINARY STATEMENT

This case presents a quintessential deceptive practice that falls within the broad scope of New York's General Business Law Sections 349 and 350. *See* GBL §§ 349, 350. Plaintiff Steven Plavin—a former NYPD police officer—brought this lawsuit on behalf of hundreds of thousands of public employees and retirees of the City of New York ("City"). He alleges that Group Health Incorporated ("GHI") misled City employees about critical aspects of out-of-network coverage under GHI's "Comprehensive Benefits Plan" ("GHI Plan" or "Plan"), by misrepresenting the out-of-network reimbursements available to City employees who chose that plan over ten others available in the marketplace. Through materials describing the Plan that GHI prepared for distribution to City employees, as well as other GHI-created materials available on GHI's website, GHI falsely depicted the GHI Plan as a true preferred provider organization ("PPO") plan that gave members the "freedom to choose any provider worldwide" with extensive out-of-network coverage. Critically, GHI failed to disclose that on average it reimbursed out-of-network services at a rate of just 23% (with reimbursements as low as 9% for some procedures). GHI also concealed that the reimbursements were based on a schedule, unavailable to the public, that had been virtually untouched since 1983 and covered only a fraction of out-of-network charges. And in its advertisement and sale of the optional "enhanced" out-of-network Rider for which employees paid an additional

fee, GHI failed to disclose that the Rider enhanced reimbursements for inpatient services only and provided absolutely nothing for out-patient services—which accounted for 65% of out-of-network costs.

A plaintiff bringing a claim under New York's broad consumer protection statutes must show that the defendant engaged in a deceptive practice that was materially misleading, consumer-oriented, and resulted in injury to the plaintiff. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25–26 (1995). In the federal district court where the Complaint was filed, GHI did not contest that its alleged conduct harmed Plavin. On appeal from the district court's dismissal of the Complaint, the U.S. Court of Appeals for the Third Circuit held that Plavin plausibly alleged that GHI's statements were materially misleading. The Third Circuit certified to this Court the question of whether GHI's conduct was "consumer-oriented," as required by GBL §§ 349 and 350.

The answer is plainly yes. GBL § 349 broadly provides that "[d]eceptive acts or practices in the conduct of *any* business, trade or commerce or in the furnishing of *any* service in this state are hereby declared unlawful." GBL § 349 (emphasis added). Although specific to false advertising, GBL § 350 identically provides that "[f]alse advertising in the conduct of *any* business, trade or commerce or in the furnishing of *any* service in this state is hereby declared unlawful." GBL § 350

(emphasis added). In a seminal case laying out the broad reach of New York's consumer protection law, this Court held that § 349 applies to any conduct that even "potentially affect[s] similarly situated consumers," *Oswego*, 85 N.Y.2d at 27, and the same is true for GBL§ 350, *see Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 n.1 (2002). As this Court has explained, these laws "on their face apply to virtually all economic activity, and their application has been correspondingly broad," with no exception for the business practices of insurance companies. *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 290 (1999) (discussing both §§ 349 and 350). Not only are GBL §§ 349 and 350 broadly drafted, this Court has emphasized they must be liberally construed to accommodate the "ever-changing" ways in which businesses deceive consumers. *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 343–44 (1999) (internal quotation marks omitted) (§ 349); *Karlin*, 93 N.Y.2d at 291 (same, with respect to §§ 349 and 350).

GHI's conduct falls squarely within GBL §§ 349 and 350. GHI drafted and prepared summaries directed to individual consumers in an attempt to persuade them to spend their benefits and additional out-of-pocket dollars on GHI's insurance plan and supplemental riders instead of choosing competitor plans. In doing so, GHI misrepresented the terms of its out-of-network coverage and its supplemental rider, and concealed from those consumers its antiquated reimbursement schedule, leaving consumers saddled with substantial bills for medical services that they expected

would be covered by GHI. This alleged conduct—which is separate and apart from any contract negotiations that may have occurred between the City of New York and GHI—more than satisfies the broad test for "consumer-oriented" conduct laid down by this Court in *Oswego*: that the conduct "potentially affect similarly situated consumers."

GHI asked the federal district court and the Third Circuit to exempt its deceptive conduct from New York's consumer protection laws because it targeted hundreds of thousands of City workers, not every member of the public, and because GHI had access to this market under a contract with the City. The misrepresentations at issue were made *by* GHI *to* consumers—via materials that GHI itself prepared for dissemination to public employees, and via GHI's own website. Just as with any other consumer-oriented transaction, employees read those statements about the terms of GHI's plan, evaluated their options in the market, and chose where to spend their healthcare dollars.

If this Court were to adopt GHI's reading of GBL §§ 349 and 350, it would upset decades of settled precedent broadly construing these statutes. There would be no available recourse for members of employer-sponsored insurance plans, no matter how blatantly their insurers might misrepresent to them the scope of coverage available under their plans—in this case, chosen by consumer employees from among numerous other health insurance plans in the marketplace. And broader

ripple effects in industries far and wide, wherever some ostensible linkage to a contract between "sophisticated" parties could be claimed, would result.

As this Court held in *Oswego*, "[c]onsumers have the right to an honest market place where trust prevails between buyer and seller." 85 N.Y.2d at 25 (quoting Mem. of Governor Rockefeller, 1970 N.Y. Legis. Ann., at 472). Instead of "provid[ing] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State," *Karlin*, 93 N.Y.2d at 291, a decision in GHI's favor would carve out a particular type of deceptive practice from the GBL's scope with no legitimate justification. For these reasons, and those discussed below, this Court should hold that the Complaint in this case has properly alleged that GHI engaged in "consumer-oriented" conduct.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the certified questions pursuant to 22 N.Y.C.R.R. § 500.27(a).

QUESTIONS PRESENTED

> 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. Factual Background

The City of New York offers its employees a choice of health insurance plans as part of their compensation and retirement packages. A60 (Compl. ¶ 19). City employees choose, on an annual or biennial basis, which health insurance plan to enroll in based on each plan's description of the benefits it offers and employees' individual needs. A60–61 (*Id.* ¶¶ 19–22). Prior to the open enrollment period, City employees receive a Summary Program Description, which is assembled by the NYC Office of Labor Relations and includes the summaries of each health plan offered to City employees. Those summaries are prepared by each respective insurer—as relevant here, by GHI. A60–61 (*Id.* ¶ 22); A2–3 (Dist. Ct. Op. 2-3). Once a City employee elects a plan, the City pays a set amount of money to the chosen insurer for that employee's insurance.[1] The insurers thus compete in this marketplace for insurance premiums from hundreds of thousands of employees.

During the relevant time period, the GHI plan at issue was one of eleven health insurance plans made available to over 600,000 City employees. A54–55 (Compl. ¶¶ 1, 2). GHI's Comprehensive Benefit Plan (the "GHI Plan") was one of only two

[1] As part of their compensation and retirement packages, City employees are entitled to their choice of City-sponsored health insurance plans. The City pays to a given employee's health plan either the entire premium or a large portion thereof depending on the plan the employee/retiree chooses. *See* A60 (Compl. ¶ 19). The amount the City contributes to each insurance policy is set by NYC Administrative Code § 12-126.

preferred provider organization ("PPO") plans that purported to provide "comprehensive coverage" for out-of-network medical services. A55 (*Id.* ¶ 2). Costs being equal, PPO plans are generally preferred by consumers because they provide coverage for services rendered by almost any provider, whether in-network or out-of-network. HMO plans, by contrast, typically provide coverage for only in-network services. A60 (*Id.*¶ 20).

GHI communicated information about the terms of its Plan to City employees prior to each year's enrollment period by distributing, or causing to be distributed, two documents. A55–56, A60 (*Id.* ¶¶ 5, 21). First, GHI prepared the summary of its Plan that was included in the Summary Program Description distributed to City employees. A61 (*Id*. ¶ 22). GHI also created an online Summary of Benefits & Coverage ("SBC") that was made available on GHI's website. A61 (*Id.* ¶ 23). These documents were the only sources of information about the details of GHI's Plan available to City employees when deciding where to direct their insurance dollars. A61 (*Id.* ¶ 24).

In these documents, GHI falsely depicted its Plan as a true PPO plan that gave members the "freedom to choose any provider worldwide" with extensive out-of-network coverage, while alluding only to the mere possibility that reimbursements might be less than the actual fee charged by out-of-network providers. A55 (*Id.* ¶ 4); *see* A80–83 (Summary Program Description); A84–99 (Summary of Benefits).

In reality, on average, GHI reimbursed out-of-network services at a rate of just 23% (with reimbursements as low as 9% for some procedures), which left plan members on the hook for hundreds or even thousands of dollars. A62 (Compl. ¶ 29).

GHI never told a single current or prospective Plan Member that reimbursement rates for virtually every out-of-network service would be *just a fraction* of the actual cost of that service. A55–58, A63–64 (*Id.* ¶¶ 5–11, 31–32). GHI also represented that out-of-network reimbursements would be based on a "schedule" that was "periodically updated," but in fact the reimbursement schedule had been virtually untouched for decades—since 1983. A55–57, A62–64 (*Id.* ¶¶ 5, 7–8, 27–29, 31–32). GHI also promoted "additional" "Catastrophic Coverage," pursuant to which GHI promised to pay "100% of the Catastrophic Allowed Charge as determined by GHI" if a member's out-of-network expenses exceeded $1,500. A56–57, A64–65 (*Id.* ¶¶ 6, 10, 33–35). Although GHI represented this coverage as an additional benefit and highlighted it as one of six key benefits in the Plan Summary, GHI set the "Catastrophic Allowed Charge" at the same rate as the ordinary Allowed Charge that GHI paid in all cases, which was only a small fraction of the reasonable and customary costs of medical services. *Id.* Thus, in reality, GHI provided Plan Members the same amount that GHI had already agreed to pay regardless of the $1,500 threshold, and gave Plan Members no additional benefit at all. *Id.*

GHI also sold, at an additional cost to employees, an optional rider (the "Rider") that provided an "enhanced schedule for certain services [that] increases the reimbursement of the basic program's [out-of-network] fee schedule, on average, by 75%." A56 (*Id.* ¶ 6). GHI failed to disclose in its marketing materials provided in the Plan Description and on GHI's website that the Rider enhanced reimbursements for inpatient services only, and provided nothing for out-patient services. A58 (*Id.* ¶ 11) (noting out-patient services accounted for 65% of out-of-network charges during the Class Period); A65–66 (*Id.* ¶¶ 36–38).

Once Plan members were enrolled, GHI never delivered a policy, Certificate of Insurance, or reimbursement "schedule" to Plan members at any point. A61–62 (*Id*. ¶¶ 24, 27). In fact, GHI concealed the reimbursement schedule from insureds and denied access to the schedule when requested via email and phone. A56, A62 (*Id.* ¶¶ 7, 27).

GHI's unlawful scheme was exceedingly lucrative. A58, A61–62, A66 (*Id.* ¶¶ 12, 25, 38). GHI had the highest enrollment of any health plan offered to City employees; as of 2012, 311,880 employees and non-Medicare retirees were enrolled, and membership totaled approximately 994,500, inclusive of family members. A61–62 (*Id.* ¶ 25). From 2011 to 2015, GHI earned an average of $172 million per year for administering the GHI Plan and $3 million per year on the optional Rider. A58, A61–62, A66 (*Id.* ¶¶ 12, 25, 38).

GHI's deceptive conduct caught the attention of state authorities. The New York Attorney General ("NYAG") investigated and found that GHI's conduct—including its extraordinarily low rates of reimbursement for the out-of-network claims of the hundreds of thousands of City employees enrolled in the GHI Plan—"constitute[d] repeated violations of . . . General Business Law §§ 349 and 350." A174 (Assurance of Discontinuance ("AOD") ¶ 26). The NYAG identified several "problems" with GHI's "disclosures to consumers and [GHI Plan] members." A168 (AOD ¶ 7). Specifically, the NYAG concluded that GHI: (1) failed to "sufficiently describe the limitations of GHI Plan's reimbursement of out-of-network providers and the resulting financial consequences to members and prospective members"; (2) failed to "sufficiently make the [Reimbursement] Schedule available to GHI Plan members and prospective members"; (3) failed to "sufficiently describe the circumstances by which members may unknowingly encounter out-of-network providers"; and (4) "misrepresent[ed] the frequency with which the [Reimbursement] Schedule is updated." A163–83 (AOD ¶¶ 7–17, 21–22). The NYAG determined that GHI's conduct harmed consumers—specifically, City employees—and interfered with their ability to "make well-informed decisions in selecting the appropriate health plan" and deciding "whether or not to seek services from out-of-network providers." A166–74 (AOD ¶¶ 7, 13, 17, 19, 20, 22, 26).

As a result of the investigation, GHI entered into an Assurance of Discontinuance, in which it agreed to "modify all GHI Plan consumer-facing materials," including "the GHI Plan Certificate of Insurance, GHI Plan marketing materials, and communications to NYC employees and retirees regarding its out-of-network coverage, so as to ensure that NYC employees and retirees are presented with clear information."[2] A174 (AOD ¶ 27). GHI agreed to pay the NYAG $300,000 "in penalties" and $3.5 million to the City "for the establishment of a Consumer Assistance Fund ('The Fund') to assist current and former NYC employees, retirees, and their dependents with medical expenses or debt stemming from having accessed out-of-network services." A177–78 (AOD ¶¶ 34, 35, 37). Additionally, GHI agreed to "designate a specific GHI employee" to assist with administration of The Fund, including "helping to verify (i) consumer enrollment in the GHI Plan, and (ii) that claims submitted were for covered services." A177 (AOD ¶ 34). This AOD was only one of four settlements GHI entered with the NYAG relating to its administration of the GHI Plan in a four-year period. A55 (Compl. ¶ 3). The NYAG's investigation and resulting AOD covered some, but not all of the deceptive practices that are the subject of this lawsuit; for example, the AOD did not

[2] GHI neither admitted nor denied the NYAG's findings. A174 (AOD ¶ 26).

address the consequences of the illusory Catastrophic Coverage and worthless Rider. *See* A64–66 (*Id*. ¶¶ 33–39).

Plaintiff Steven Plavin is a retired New York City police officer who has enrolled and re-enrolled in the GHI Plan since 1984, paying for the Rider each time. A58 (*Id.* ¶ 13). Plavin, his wife, and his children are all covered by the GHI plan. *Id.* In 2014, Plavin's wife received numerous medical services that GHI deemed out-of-network and paid just a fraction of the expenses for, leaving Plavin with significant financial responsibility. A67 (*Id.* ¶ 41). GHI saddled Plavin with out-of-network costs at various points through 2014 and 2015. *Id.*

B. Statutory Background[3]

The New York legislature enacted Sections 349 and 350 of the General Business Law in 1970 and 1963, respectively. Section 349 broadly prohibits "[d]eceptive acts or practices in the conduct of *any* business, trade or commerce or in the furnishing of *any* service in this state." 1970 McKinney's N.Y. Sess. Laws, ch. 43 (193rd Legis. Sess., vol. 1) (emphasis added). The "equally broad" Section 350, *Karlin*, 93 N.Y.2d at 290, prohibits "[f]alse advertising in the conduct of *any* business, trade or commerce or in the furnishing of *any* service in this state." 1963 McKinney's N.Y. Sess. Laws, ch. 813 (186th Legis. Sess., vol. 2) (emphasis added). As was emphasized during their enactment, these consumer protection laws

[3] For reference, key statutory provisions have been reprinted in an addendum to this brief.

"provide[] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State." *Karlin*, 93 N.Y.2d at 291 (quoting N.Y. Dep't of Law, Mem. to Governor, 1963 N.Y. Legis. Ann., at 105).

As originally enacted, GBL §§ 349 and 350 did not include a private cause of action. Instead, they authorized only the Attorney General to bring suit. *Id.* "It soon became clear . . . that the 'broad scope of section 349, combined with the limited resources of the Attorney General, [made] it virtually impossible for the Attorney General to provide more than minimal enforcement.'" *Id.* (quoting Mem. of Assemblyman Strelzin, L. 1980, ch. 346, § 1, 1980 N.Y. Legis. Ann., at 146). To augment the Attorney General's limited resources, the legislature amended GBL §§ 349 and 350 in 1980 to create a private right of action. *Id.*; *see* 1980 McKinney's N.Y. Sess. Laws, chs. 345, 346 (203rd Legis. Sess., vol. 1); GBL § 349(h); GBL § 350-e(3) (formerly § 350(d); renumbered 1989). As this Court has repeatedly explained, this amendment was "a significant step to expand the statute's enforcement scheme." *Gaidon*, 94 N.Y.2d at 344; *see also Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 205 (2004) ("The amendment was intended to afford additional protection for consumers, allowing them to bring suit on their own behalf without relying on the Attorney General for enforcement.").

C. Procedural History

Plavin filed his Complaint in a Pennsylvania federal court on August 16, 2017, alleging that GHI misled consumers about the out-of-network reimbursements under the health insurance plan it offered to City employees, resulting in violations of: (1) GBL § 349; (2) GBL § 350; (3) New York Insurance Law § 4226; and giving rise to a claim of (4) unjust enrichment. A54–75. Plavin was enrolled in GHI's Plan and purchased the optional Rider. A58 (Compl. ¶ 13). Between 2013 and 2014, Plavin's wife received several medical services that GHI deemed out-of-network and consequently paid just a fraction of the actual cost for the care, leaving Plavin with the responsibility of paying the difference, which amounted to thousands of dollars. A67 (*Id.* ¶ 41).

Plavin alleges that GHI's summary documents contained materially misleading statements and omissions regarding reimbursement rates for out-of-network services, the schedule of reimbursement rates, the Plan's optional Rider, and the Plan's Catastrophic Coverage. Specifically, Plavin asserts that "GHI's materials do not accurately set forth the potentially wide gap between the out-of-network reimbursement and out-of-network charges, and potentially substantial out-of-pocket amounts for which GHI Plan members will be responsible," and that it was deceptive for GHI to "merely suggest that it is only a possibility that members will be required to pay for out of network services" for a significant portion of an

out-of-network claim. A57 (*Id.* ¶ 9). As a result of GHI's deception, Plavin and members of the class became personally responsible for amounts due to out-of-network medical providers, contrary to GHI's representations. A71 (*Id.* ¶ 59.)

GHI moved to dismiss under Fed. R. Civ. P. 12(b)(6). A102–44. On June 22, 2018, the district court dismissed all claims. A1–42. As relevant here, with respect to Plavin's GBL §§ 349 and 350 claims, the court concluded that GHI's conduct was not "consumer-oriented" because the insurance was offered to hundreds of thousands of City employees rather than to every member of the general public, and was purportedly based on a private contract between GHI and the City. A17–23. The Court further concluded that the statements were not materially misleading, weighing GHI's misrepresentations against purported disclaimers in the marketing materials. A23-33.

Plavin timely appealed to the Third Circuit. The Third Circuit reversed the district court on whether the Complaint alleged material misrepresentations, and determined that the application of the consumer-oriented conduct requirement to the facts of this case implicated a novel issue of New York law. The Third Circuit explained that certification was appropriate because no controlling New York appellate precedent "exists on the question of whether an insurer's conduct is consumer-oriented for purposes of the GBL where hundreds of thousands of City employees, who are third-party beneficiaries of an insurance contract negotiated by

sophisticated parties, have been materially misled by the insurer's summary plan documents." A548–49. The answer to this question, the Third Circuit noted, would be dispositive of Plavin's GBL claims: "If the alleged conduct is not consumer-oriented, and thus not covered by the GBL, the dismissal of the claim will be affirmed. If the alleged conduct is covered by the GBL, the dismissal will not be affirmed because GHI's statements and omissions, as alleged, are materially misleading, and GHI does not contest that the third element of Plavin's GBL claim—that he suffered injury as a result of the allegedly deceptive act of practice—has been adequately pled." A549.

Accordingly, the Third Circuit certified the above-cited questions to this Court, retaining jurisdiction of the appeal pending this Court's resolution of the certified questions. By order dated May 2, 2019, this Court accepted the certified questions, over GHI's objections. A560; *see* A552–57 (GHI Letter to New York Court of Appeals).

ARGUMENT

A plaintiff asserting a claim under GBL §§ 349 or 350 "must allege that a defendant has engaged in (1) consumer-oriented conduct[,] that is (2) materially misleading[,] and that (3) the plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (2012) (internal quotation marks omitted); *Goshen*, 98 N.Y.2d at 324 n.1

(confirming that the standard under § 350, "while specific to false advertising, is otherwise identical to section 349"). Defendant GHI did not contest that Plavin adequately pleaded injury, and the Third Circuit held that GHI's statements and omissions, as alleged, are materially misleading. Thus, the Third Circuit certified only one question to this Court: whether GHI's conduct was "consumer-oriented" within the meaning of the GBL.

The Legislature's objectives in enacting GBL §§ 349 and 350, as well as the precedents of New York's appellate courts, confirm that the answer is unequivocally "yes." The scope of these statutes is exceedingly broad: Sections 349 and 350 "apply to virtually all economic activity." *Karlin,* 93 N.Y.2d at 290; *see Blue Cross*, 3 N.Y.3d at 207 ("[W]e recognize that section 349 is a broad, remedial statute and that the provision creating a private right of action employs expansive language."). As the legislative history of GBL § 349 makes clear, the Legislature enacted these essential safeguards to protect against "all deceptive and fraudulent practices affecting consumers" because "[c]onsumers have the right to an honest market place where trust prevails between buyer and seller." Mem. of Governor Rockefeller, 1970 N.Y. Legis. Ann. at 472. New York's consumer protection laws prohibit "those acts or practices which undermine a consumer's ability to evaluate his or her market options and to make a free and intelligent choice. In this sense, the deception itself is the harm that the statute seeks to remedy . . . ." *N. State Autobahn, Inc. v.*

Progressive Ins. Grp. Co., 102 A.D.3d 5, 13 (2d Dep't 2012). In aid of this goal, GBL §§ 349 and 350 apply to all cases "where the deception pertains to an issue that may bear on a consumer's decision to participate in a particular transaction." *Id.*

In line with the broad remedial goals of these laws, this Court has held that "the language and history of sections 349 and 350" preclude creation of a "blanket exemption" for any particular category of business transactions. *Karlin*, 93 N.Y.2d at 291–92. That principle applies to insurance companies in equal measure. *See Riordan v. Nationwide Mut. Fire Ins. Co.*, 756 F. Supp. 732, 739–40 (S.D.N.Y. 1990) ("[T]here is nothing in [the legislative history or case law] or in the statute itself which indicates a legislative intent to exclude the insurance industry from the statute's remedial scope. To the contrary, there is every indication that the legislature intended the statute to apply to any business so as to effect its broad remedial purpose . . . ."), *aff'd in part*, 977 F.2d 47 (2d Cir. 1992).

GHI nonetheless seeks to impose novel—and unwarranted—restrictions on what constitutes "consumer-oriented" conduct for purposes of GBL §§ 349 and 350. Before the federal district court and the Third Circuit, GHI offered two grounds for curtailing the scope of the statutes in this manner. First, GHI claimed that deceptive acts must be aimed at the general public in its entirety to count as "consumer-oriented." But this Court has held that GBL §§ 349 and 350 reach all conduct that "potentially affect[s] similarly-situated consumers," *Oswego*, 85 N.Y.2d at 27, and

the information that GHI provided to hundreds of thousands of City employees certainly qualifies. Second, GHI claimed that its contract with the City that allows it access to the market for City employee health insurance insulates it from the consumer protection laws. But that, too, is wrong. GHI drafted information about its plan and "enhanced" Rider for distribution to consumers, both through the Summary Plan Descriptions and GHI's own website. Consumers like Plavin and countless other City employees selected their insurer based on that information, and GHI must be held to account for its misrepresentations, just as would any other business in the marketplace. GHI's cramped reading of GBL §§ 349 and 350 has no basis in the text of the laws or decades of case law interpreting these provisions, and this Court should reject it.

A. GBL §§ 349 and 350 Reach All Deceptive Practices That Impede Consumers' Ability to Evaluate Market Options

Precedent from this Court and the Appellate Divisions distinguishes between conduct that is consumer-oriented and conduct that is not. If the deceptive conduct is limited to a private dispute between two parties, it is not consumer-oriented. If, however, the conduct is directed toward or affects a similarly situated group of consumers, it falls under the purview of GBL §§ 349 and 350.

Since the misrepresentations and omissions that GHI made in describing its coverage falls squarely within the scope of these laws, GHI has resorted to arguing that its conduct was not consumer-oriented. GHI first attempts to transform this

inquiry into a requirement that the deceptive conduct reach the *entire* public. But GHI provides no support whatsoever for such a limitation, and numerous state and federal courts applying GBL §§ 349 and 350 have found that conduct is consumer-oriented when it targets consumers in discrete, pre-existing groups. Second, GHI attempts to analogize its conduct—misrepresentations that GHI made to hundreds of thousands of consumers—to a private contract dispute between two parties. That the City had a contract with GHI has nothing to do with the claims brought by consumers who were injured by materials that GHI distributed, or caused to be distributed, to them. Just as with any other consumer-oriented transaction, consumers read the disseminated materials and decided whether to transact with GHI, and GHI's conduct is accordingly subject to the protections set forth in GBL §§ 349 and 350.

1. GBL §§ 349 and 350 Are Not Limited To Deceptive Conduct Directed Toward The Entire General Public.

GHI's efforts to evade the reach of GBL §§ 349 and 350 are fundamentally inconsistent with the statutes' text and objectives, as well as numerous precedents from New York appellate courts that set forth the parameters of the state's consumer protection laws. The text of GBL §§ 349 and 350 confirms their breadth: they prohibit deceptive acts and practices in conducting "*any* business, trade or commerce" or furnishing "*any* service." As this Court has explained, the Legislature made this drafting choice to "provide[] needed authority to cope with the numerous,

ever-changing types of false and deceptive business practices which plague consumers in our State." *Karlin*, 93 N.Y.2d at 291 (quoting N.Y. Dep't of Law, Mem' to Governor, 1963 N.Y. Legis. Ann. at 105).

The GBL "is intended to protect consumers, that is, those who purchase goods and services for personal, family or household use." *Sheth v. N.Y. Life Ins. Co.*, 273 A.D.2d 72, 73 (1st Dep't 2000). The New York State Bar Association's Antitrust Law Section, which drafted the bill enacted as GBL § 349, explained in a letter to the Governor that "[t]he bill represents an attempt to secure for New York more effective legislation in the area of consumer protection. . . . [E]xisting state laws are not adequate to *fully protect* the consumer. Unquestionably needed is a law which will prohibit all deceptive acts and practices in the conduct of any business or furnishing of any service in the State of New York . . . . " N.Y. State Bar Ass'n, Antitrust Law Section, Letter to Governor Rockefeller dated Feb. 10, 1970 (emphasis added). Accordingly, the statute "is meant to include all economic activity concerning consumer protection." William F. Mulroney, *Deceptive Practices in the Marketplace: Consumer Protection by New York Government Agencies*, 3 Fordham Urban L.J. 491, 507 n.89 (1975) (discussing § 349 and citing N.Y. State Bar Ass'n Antitrust Law Symposium at 121 (1968)).

In the face of the GBL's sweeping language and clear legislative intent, GHI claimed that New York's consumer protection laws apply only to conduct aimed at

the general public as a whole. The Pennsylvania district court accepted this argument, concluding that GHI's conduct was not consumer-oriented (and outside the scope of GBL §§ 349 and 350) because the insurance that GHI offered to City employees "was aimed to benefit only a circumscribed class of individuals," and "a member of the public cannot approach [GHI] and gain membership in the same plan that Plavin received." A20. That narrow reading has no support in the statutes themselves, or the decades of New York precedent applying them.

While GHI pointed to this Court's decision in *Oswego* as supporting its radical curtailment of GBL §§ 349 and 350, GHI 3d Cir. Br. at 17 (quoting *Oswego*, 85 N.Y. 2d at 24), GHI completely misreads that case—as the Third Circuit's decision to certify this issue rather than accept the district court's interpretation suggests. In *Oswego*, this Court held that the "threshold test" in determining the GBL's applicability is whether "the acts [plaintiffs] complain of are consumer-oriented in the sense that they potentially affect similarly situated consumers." *Oswego*, 85 N.Y.2d at 27. In other words, alleged conduct must "have a broader impact on consumers at large." *Id.* at 25. *Oswego* involved several union funds that sued a bank for failing to disclose that it would not pay interest on savings accounts in excess of $100,000, and for opening commercial, rather than non-profit, accounts on behalf of the funds. When setting up the accounts, the bank interacted with the funds just as it would with any other customer opening an account, and furnished standard

documents that were presented to other customers opening accounts. *Id.* at 26. Because these transactions were standard, and not unique to the parties or a "single shot transaction," the Court held that the acts "potentially affect similarly situated consumers"—that is, "consumers at large." *Id.*

Nothing in *Oswego* suggests that "consumers at large" means *every* member of the public. Rather, conduct is consumer-oriented if it potentially affects consumers other than the plaintiff bringing the GBL lawsuit. *Id.*; *see Karlin*, 93 N.Y.2d at 294 (GBL §§ 349 and 350 claims not viable for "victims of deception in a single transaction in which the only parties truly affected by the alleged misrepresentations were plaintiffs and defendants"); *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 145 (2d Dep't 1995) ("In other words, the deceptive act or practice may not be limited to just the parties.").[4] This requirement is "construed liberally," as expected for statutes that "on their face apply to virtually all economic activity," and whose "application has been correspondingly broad." *Karlin*, 93 N.Y.2d at 290.

GHI nonetheless argued to the district court that because *Oswego* described the GBL as addressing "wrongs directed 'against the consuming public,'" a GBL plaintiff must show that a challenged product or service was made available to every member of the general public. A125. But *Oswego* cannot support this reading. It

[4] *See Donnenfeld v. Petro, Inc.*, 333 F. Supp. 3d 208, 222 (E.D.N.Y. 2018) ("Conduct is 'consumer oriented' under the GBL if it 'has a broader impact on consumers at large' as opposed to on just the plaintiff.").

explained that a GBL plaintiff must "demonstrate that the acts or practices have a broader impact on consumers at large," as distinct from "private contract disputes, unique to the parties." *Oswego*, 85 N.Y.2d at 25. As a representative example of private, one-off disputes that are distinct from average consumers paying modest sums for a good or service, *Oswego* cited a case involving a concert promoter's rental of Shea Stadium from the New York City Department of Parks and Recreation. *Id.* (citing *Genesco Entm't v. Koch*, 593 F. Supp. 743, 752 (S.D.N.Y. 1984) (stadium rental dispute involved "single shot transaction" rather than "ordinary or recurring consumer transaction")).

Consistent with *Oswego*, New York courts have repeatedly held that the relevant inquiry under the GBL is whether the conduct "potentially affect[ed] similarly situated consumers." Accordingly, they have repeatedly rejected arguments that GBL claims are cognizable only when the conduct is directed at the general public. Indeed, New York courts routinely find a defendant's conduct to be consumer-oriented under GBL §§ 349 and 350 when it targets consumers in a discrete, pre-existing group. GHI's bid to narrow GBL §§ 349 and 350 would be at odds with all of these rulings.

For example, in *North State Autobahn, Inc. v. Progressive Insurance Group Company*, the Second Department applied GBL § 349 to a small, defined group: policyholders insured by Progressive who needed car repairs. 102 A.D.3d at 8.

There, an auto repair shop brought a GBL § 349 claim alleging that Progressive steered policyholders away from having their cars repaired at that shop by making material misrepresentations about the shop's services, and by misleading "customers of the plaintiffs and other independent shops into believing that they must have their vehicles repaired at repair shops that were members of [Progressive's auto repair program]." *Id.* at 8–9, 13. The Second Department held that Progressive's conduct was consumer-oriented, even though the consumer group was limited to Progressive insureds. It concluded that "[t]he complaint further alleges that this conduct was part of an institutionalized program and that it constituted a standard practice that was routinely applied to all claimants who sought to have their vehicles repaired by the plaintiffs or by any other independent repair shop. Accordingly, the complaint adequately alleges conduct that is consumer-oriented inasmuch as it alleges conduct that has a 'broad[] impact on consumers at large.'" *Id.* at 13 (quoting *Oswego*, 85 N.Y.2d at 25); *see also Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 565 (2d Dep't 2012) (complaint adequately alleged consumer-oriented conduct where complained-of conduct—the insurer's "general practice of inordinately delaying the settlement of insurance claims against policyholders"—was directed toward existing policyholders).

As the Second Department explained, "[t]o require a showing of specific quantifiable harm to the *public at large* goes beyond the Court of Appeals' statement

that *a plaintiff need only show an 'impact' on consumers*." *Autobahn*, 102 A.D.3d at 13–14 (quoting *Oswego*, 85 N.Y.2d at 25) (emphasis added). "Such a requirement would be inconsistent with past cases which hold that the threshold requirement of consumer-oriented conduct may be satisfied where the allegedly deceptive acts are standardized such that 'they *potentially* affect similarly situated consumers.'" *Id.* (emphasis in original) (quoting *Oswego* at 85 N.Y.2d at 27; and citing *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 888 (3d Dep't 2008)); *see also M.V.B. Collision, Inc. v. Allstate Ins. Co.*, 728 F. Supp. 2d 205, 213–14, 221 (E.D.N.Y. 2010) (denying Allstate's motion for summary judgment on a similar GBL § 349 claim after concluding that "a rational trier of fact could find . . . that this practice had a broad impact on consumers at large, *i.e.*, any Allstate customer who brought his car to [the body shop]").

The Third Department is in accord. In *Accredited Aides Plus, Inc. v. Program Risk Management, Inc.*, a group of employers alleged that the administrators of a group self-insured trust which provided workers' compensation coverage for businesses violated GBL §§ 349 and 350 by distributing materially misleading information about the trust to employers. 147 A.D.3d 122, 134 (3d Dep't 2017). Because the trust administrators' misleading information—provided through "advertisements, marketing materials, and its website"—affected the "workers' compensation benefits of New York employers and their employees," the Court held

that the trust's actions were consumer-oriented conduct and thus fell under the protection of the GBL. *Id.* (observing that the trust administrators' public website "target[ed] employers seeking workers' compensation coverage," the only parties eligible to purchase the advertised coverage).

So too with *Elacqua v. Physicians' Reciprocal Insurers*. 52 A.D.3d 886 (3d Dep't 2008). There, a group of physicians sued their medical malpractice insurer under GBL § 349 for failing to inform them of their right to select independent counsel at the insurer's expense in malpractice lawsuits. *Id.* at 888. The Third Department reversed the dismissal of the physicians' claims following a bifurcated trial on liability, finding that the insurer's practice of misrepresenting the contours of the insurance plan—including through letters sent directly to insureds—was consumer-oriented, "inasmuch as its failure to inform plaintiffs of their right to select independent counsel was not an isolated incident, but a routine practice that affected many similarly situated *insureds*." *Id.* at 888 (emphasis added) (remanding for trial on damages). And the First and Fourth Departments have reached the same conclusion. *See, e.g.*, *Acquista v. N.Y. Life Ins. Co.*, 285 A.D.2d 73, 82–83 (1st Dep't 2001) (affirming denial of motion to dismiss GBL § 349 claim where complained-of conduct—the insurer's practice of delaying and denying disability claims involved a "standard issue-policy" and "has been aimed at other policyholders besides [plaintiff]"); *Makuch v. N.Y. Cent. Mut. Fire Ins. Co.*, 12 A.D.3d 1110, 1110

(4th Dep't 2004) (affirming denial of motion to dismiss homeowners' GBL § 349 claim based on insurer's partial disclaimer of coverage where "the allegations that the forms making up plaintiffs' [homeowners] insurance policy are standard and regularly used by the defendant are sufficient to support the allegation that defendant's actions are consumer-oriented") (citing *Acquista*, 285 A.D.2d at 82–83).

Similarly, federal courts have considered and rejected the argument that New York's consumer protection laws are limited to conduct reaching the entire "general public." In *Millennium Health, LLC v. EmblemHealth, Inc.*,[5] a New York federal district court rejected the argument that "the statute covers only 'deceptive acts directed to the public at large.'" 240 F. Supp. 3d 276, 285–86 (S.D.N.Y. 2017). "New York courts have consistently held that harm to insureds may form the basis of a § 349 claim," the court held, particularly where "the unlawful conduct alleged 'was not an isolated incident, but a routine practice that affected many similarly situated insureds.'" *Id.* (quoting *Elacqua*, 52 A.D.3d at 888). Applying these standards, the court concluded that the plaintiff, a clinical drug testing services provider, satisfied the GBL's consumer-oriented conduct element (despite not even being a consumer itself) by alleging that the defendant insurer misrepresented to insureds that it would cover the costs of drug testing, but then refused to pay over

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[5] Group Health Incorporated, the Respondent here, is a subsidiary of EmblemHealth, Inc. *See* Dist. Ct. Dkt. 30 (GHI disclosure statement).

27,000 claims for urine drug testing. *Id.* at 281, 285–86. The court determined that allegations of "harm to numerous insureds," and not to the "public at large," suffice under New York law. *Id.* at 286*; see also Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 643–44 (S.D.N.Y. 2016) (rejecting "elevated requirements that some district courts have apparently engrafted onto the 'consumer-oriented' element of § 349 claims [that] lack a basis in governing New York law," including the requirement that GBL complaints must "plead significant ramifications for the public at large"; and explaining that in *Oswego*, "the Court's focus was not on the magnitude of the public interest at stake or the identity of the claimant, but rather on whether the complained-of acts represented a one-off, 'single shot transaction,' on the one hand, or a way of doing business, on the other").

The Second Circuit has also weighed in on the broad scope of consumer-oriented conduct, rejecting a wine seller's claims that his actions were not consumer-oriented because "the wine was a high-end collectible because it sold at immodest prices, precluding the involvement of the general public." *Koch v. Greenberg*, 626 F. App'x 335, 340 (2d Cir. 2015). Relying on *Oswego*, the Second Circuit explained that consumer-oriented conduct requires merely that the conduct at issue "have a broader impact on consumers at large," and can "potentially affect similarly situated consumers." *Id*. This showing was made, the court held, where the seller provided

wine to be sold at an auction to consumers who were similarly situated to the plaintiff (i.e., other auction-goers). *Id.*

Moreover, as the Second Department explained in *Autobahn*, conduct directed at discrete groups of similarly-situated consumers may well have an impact on the broader public: "[t]he Legislature determined . . . that consumer deceptions of this sort inherently hurt the public—including both consumers themselves and legitimate business." 102 A.D.3d at 14. (quoting McKinney's Cons. Laws of N.Y., Book 19, GBL § 349, at 569 (1988 ed.)). That dynamic is certainly at play here. Families of insureds who were deceived by GHI's misrepresentations have been saddled with substantial additional medical bills, with "financially ruinous" consequences in some instances. *See, e.g.*, A58 (Compl. ¶ 12); A62–63 (*Id.* ¶ 29); A67 (*Id.* ¶ 41); A71 (*Id.* ¶ 59). So even if a GBL plaintiff were required to show impact on the public at large, such a requirement would, in any event, be satisfied.

In sum, GHI's contention that consumer-oriented conduct must be directed at every member of the general public and not based on membership in a pre-existing group is not only inconsistent with cases from state and federal courts in New York, it has been repeatedly rejected by those courts. Under the GBL, conduct is consumer-oriented if it is directed toward or affects a similarly situated group of consumers. The good or service offered by the wrongdoer does not need to be available to the entire public at large: the malpractice insurance in *Elacqua* was

available only to doctors, and the workers' compensation insurance offered in *Accredited Aides* was available only to employers. The consumers subjected to or affected by the deceptive conduct may likewise be a discrete group rather than the general public: the consumers affected by the misrepresentations in *Autobahn* and *M.V.B. Collision* were part of a discrete class of auto insurance policy holders. Instead, what matters is that the conduct is "standardized such that [it] '*potentially* affect[ed] similarly situated consumers.'" *Autobahn*, 102 A.D.3d at 14 (emphasis in original) (quoting *Oswego*, 85 N.Y.2d at 25).

The facts of this case underscore why this Court should reject GHI's narrow reading of New York's consumer protection laws. The Complaint alleges that GHI drafted a summary of its Plan benefits, which was distributed to City employees by the NYC Office of Labor Relations alongside the descriptions of the multiple other health plans available in the marketplace. GHI also made available on its website a summary of benefits and coverage. Both the summary plan and website information were directed toward and available to hundreds of thousands of City employees, who are consumers similarly situated to the plaintiff in this lawsuit. These materials were standardized and contained the only information about the GHI Plan available to City employees prior to their individual choices to select the GHI Plan over other plans. These materials were also the only information available to City employees

prior to the choice that many of them made to pay additional money out of pocket for the "enhanced" Rider offered by GHI.

As the Complaint alleges, the information in the summary and on GHI's website contained materially misleading representations and omissions about the plan, including misrepresentations about the out-of-network reimbursements available under the GHI Plan and "enhanced" Rider. Those misrepresentations had a broad impact on consumers similarly situated to Plavin, *i.e.*, other City employees who chose the "comprehensive" out-of-network GHI Plan, as well as those who paid extra for the Rider. In return, GHI received each employee's insurance premiums, paid by the City as part of employee compensation packages, and in many cases collected additional premiums for the optional Rider.

There can be no question that when City employees such as Plavin received marketing materials, selected a health insurance plan, and paid additional premiums for GHI's optional Rider, they were acting as consumers purchasing services for personal or family use. The deception alleged here—the misleading marketing of a PPO plan with "comprehensive" out-of-network coverage—"pertains to an issue that may bear on a consumer's decision to participate in a particular transaction." *Autobahn*, 102 A.D.3d at 13. Plavin alleges that GHI's deceptive conduct affected City consumers' choice among numerous health insurance plans available to them in the marketplace. Both the GHI Plan and "enhanced" optional Rider were offered

to Plavin and other consumers on a standardized basis with no opportunity for negotiation. With each City employee's election of the GHI Plan and purchase of the Rider, GHI received premiums and reaped the profits from those transactions.

GHI's transactions with individual City employees for standardized, non-negotiable insurance plans are precisely the types of "modest" consumer transactions the statute is intended to protect. *See Teller*, 213 A.D.2d at 146–47.[6] And the NYAG, who is tasked with enforcing the statute alongside private parties, agreed. It investigated GHI for some of the same misconduct alleged in Plavin's Complaint and found that GHI's conduct violated GBL §§ 349 and 350. *See supra* at 9–10. That determination was wholly unremarkable given the nature of GHI's actions, and there is no basis to conclude that GHI is shielded from the reach of these laws because it offered plans to hundreds of thousands of employees, rather than to every single member of the public.

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[6] To the extent the Third Circuit concluded that Plavin and other City employees are third-party beneficiaries of the City's contract with GHI, *see* A549, that has no effect on whether GHI's conduct is consumer-oriented. *See, e.g.*, *Accredited Aides*, 147 A.D.3d at 130 (allowing GBL §§ 349 and 350 claims brought against administrators of group self-insured trust by employer-members of trust who were third-party beneficiaries of contract between the trust and trust administrators to proceed); *Hart v. Moore*, 587 N.Y.S.2d 477, 478–80 (N.Y. Sup. 1992) (concluding that a "third party beneficiary to an insurance policy may sue the insurance company for deceptive acts and practices under [GBL §] 349").

2. The City's Contract with GHI To Provide Health Insurance to City Employees Who Choose the GHI Plan Does Not Transform This Case Into a Private Contract Dispute Unique to One Insured.

In addition to claiming that conduct must be directed at the entire general public to fall within the scope of GBL §§ 349 and 350, GHI told the federal district court and Third Circuit that this case presented nothing more than a "private contractual dispute" and thus was exempt from New York's consumer protection laws. GHI noted that it had access to Plavin and other City employees through the contract for health insurance between GHI and the City of New York. *See* GHI 3d Cir. Br. at 17–23. According to GHI—both before the Third Circuit and again in urging this Court to reject the certified questions—GBL §§ 349 and 350 are inapplicable to claims that "arise from a privately negotiated contract," under this Court's decision in *New York University v. Continental Insurance Company*, 87 N.Y.2d 308 (1995) ("*NYU*"). GHI 3d Cir. Br. at 19; *id.* at 17 (arguing the GBL does not apply "where the challenged practice arises out of a private contract of insurance negotiated by sophisticated parties"). Relatedly, GHI claimed that conduct cannot be consumer-oriented for purposes of GBL §§ 349 and 350 when "a sophisticated entity acts as plaintiff's intermediary." *Id.* at 20. Neither of these points has any merit.

GHI completely misapprehends *NYU*. *NYU* involved a customized commercial crime liability insurance policy that covered a *sole* insured—NYU—

from losses due to employee dishonesty. *NYU*, 87 N.Y.2d at 314. In no respect could the policy affect any consumers or entities other than NYU, let alone "the consuming public at large." The policy was not a standard policy—through detailed negotiations between NYU and the insurer, it was tailored to meet NYU's idiosyncratic coverage needs. When NYU filed a claim under the policy to recover losses after uncovering a $1.6 million fraudulent scheme by its bookstore employees and the insurer denied NYU's coverage claim, the university sued under the GBL, claiming that the policy itself contained misrepresentations that led to the claim denial. The Court held that this was a "'private' contract dispute over policy coverage and the processing of a claim which is unique to these parties," and "not conduct which affects the consuming public at large." *Id.* at 321. Because this was a unique, "single shot" transaction bearing solely on the coverage terms of the specific insurance policy between NYU and the insurer, the insurer's conduct was not consumer-oriented. *See id.*

By contrast, Plavin's claims are based on the misleading marketing of a form insurance plan and Rider to hundreds of thousands of City employees who were in the market for health insurance, not on a coverage dispute unique to Plavin. Plavin is not a sophisticated party with a unique insurance policy; the policy terms are not tailored to him; the City is not the insured or the party claiming it was deceived; and Plavin's claims have nothing to do with the terms of the contract between the City

and GHI or the circumstances under which it was negotiated. Rather, Plavin's claims arise from the uniform—and deceptive—marketing materials that GHI disseminated to him and 311,880 other City employees, in order to entice them to elect the GHI Plan over numerous other options and to pay additional premiums for the worthless "enhanced" out-of-network Rider. A60–63 (Compl. ¶¶ 20–29). The terms of GHI's contract with the City, and the negotiations that led to its execution, are wholly irrelevant to Plavin's claims.

Nor is the City acting as an "intermediary" with respect to the deceptive practice at issue here: the misleading marketing of the GHI Plan to City employees. The City did not negotiate the GHI Plan as a sole option for City employees. Instead, City employees had multiple plans to choose from, and GHI only collected premiums for the GHI Plan if individual City employees chose to enroll in that plan over other options. Likewise, GHI only collected premiums for the "enhanced" Rider if City employees chose to pay extra for what they thought was additional coverage for themselves and their families. GHI's marketing was key to securing each consumer transaction; indeed, it what was allowed GHI to collect any money at all. That is why this case seeks redress for GHI's marketing misrepresentations, designed to foster enrollment in the GHI Plan and selection of the Rider for an additional fee, thereby putting as many dollars as possible into GHI's pocket—not the contours of the contract that GHI negotiated with the City.

The Second Circuit has confirmed that the presence of an intermediary cannot defeat a GBL claim, so long as the defendant engaged in deceptive conduct directed to consumers, *see Koch*, 626 F. App'x at 339–40 (rejecting defendant's argument that auctioneer's role as "intermediary" precluded a finding of consumer-oriented conduct), and the few Appellate Division cases we have identified that consider the issue are in accord. For example, the First Department dismissed a GBL claim brought against a manufacturer as a "private dispute between [a] plaintiff and a supplier over a defective product," where there was "no contact" between the plaintiff and the manufacturer, and thus the defendant could not have made any misrepresentation directed at the consumer. *St. Patrick's Home for Aged & Infirm v. Laticrete Int'l, Inc.*, 264 A.D.2d 652, 655 (1st Dep't 1999) (dismissing GBL claim against manufacturer of wall panel where it did not "direct[ly] solicit" and had "no contact" with plaintiff, and where "sophisticated business entities such as [the contractor, architect, and panel installer] acted in an intermediary role in the transaction, thereby reducing any potential that a customer in an inferior bargaining position would be deceived"). Likewise, the Second Department dismissed a GBL claim brought by a homeowner against a stucco manufacturer on similar grounds. *See Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095, 1097 (2d Dep't 2005) (dismissing GBL claim by plaintiff homeowners against stucco manufacturer where the manufacturer did not "direct[ly] solicit" and had "no contact" with the

homeowners, and intermediaries (architect and general contractor) hired the company that purchased and installed the stucco). GHI's interactions with Plavin—including transmission of materials aimed at soliciting employees to pick GHI as their insurance and the posting of information directly on GHI's website—are completely different from these arrangements.

Before the Third Circuit, GHI attempted to shift the focus of the case from the individual premium and Rider payments it received from City employees to the *aggregate* premiums it collected, arguing that the total amount involved makes this a sophisticated rather than consumer-oriented transaction. GHI 3d Cir. Br. at 22–23. But again, Plavin's GBL claims are based on GHI's transactions with him and other similarly situated City employees, not on GHI's contract with the City. A60 (Compl. ¶ 19) (alleging that premiums are based on the number of enrollees that GHI convinces to sign up, with the City contributing $5,312 annually for an individual policy and $13,791 annually for a family policy). There is nothing "sophisticated" or "custom" about those transactions. The fact that, by virtue of directing its conduct towards hundreds of thousands of City employees, GHI cumulatively collected hundreds of millions of dollars in ill-gotten premiums is irrelevant to the GBL analysis.

As this Court noted in *Gaidon*, GBL claims "are based on deceptive business *practices*, not on deceptive contracts." *Gaidon*, 94 N.Y.2d at 345. This case is no

different than countless others where consumers have sued based on uniform and deceptive marketing practices. In *Gaidon*, this Court held that GBL claims alleging an insurer provided deceptive insurance illustrations to prospective policyholders "involved an extensive marketing scheme that had a broader impact on consumers at large," and therefore was not a "private contract dispute as to policy coverage" in the mold of *NYU*. 94 N.Y.2d at 344 (internal quotation marks omitted). In *Acquista v. New York Life Insurance Company*, the First Department rejected the defendant insurer's attempt to compare the case to *NYU*, explaining that in *NYU* "the insured was a major university acting through its director of insurance, and the policy was not standard, but was tailored to meet the university's wishes and requirements, while the present case concerns a standard-issue policy provided to an individual consumer" and "this same alleged practice [of delaying and denying disability claims] has been aimed at other policyholders besides [plaintiff] so as to have a 'broader impact on consumers at large.'" 285 A.D.2d 73, 82–83 (1st Dep't 2001) (affirming denial of motion to dismiss GBL claim).[7] There is no reason for this Court to deviate from this reasoning now.

[7] *See also Autobahn*, 102 A.D.3d at 13 (rejecting insurer's argument that plaintiffs' claims were based on a "private contract dispute" or "single shot transaction" akin to *NYU* where defendant's standard practice was to "misle[a]d [insureds] . . . into believing that they must have their vehicles repaired at [authorized] repair shops" rather than independent shops of their choosing); *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 163–64 (2d Dep't 2010) (concluding that plaintiffs had adequately alleged consumer-oriented conduct by insurer who required insureds to litigate a claim

B. GHI's Representations In Its Summary Plan Information and On Its Website Are Consumer-Oriented Conduct For Purposes of GBL §§ 349 and 350

Because GHI engaged in consumer-oriented conduct by drafting misleading summary plan information distributed to City employees and publishing additional misleading materials on its website, this Court should answer the certified questions in the affirmative. Courts have routinely recognized potential GBL liability under both methods of communication at issue in this case. *First*, courts have determined that channeling communications to consumers through another entity does not preclude a finding of consumer-oriented conduct. *See Mayfield v. Asta Funding, Inc.*, 95 F. Supp. 3d 685, 700 (S.D.N.Y. 2015) (rejecting defendants' argument that their conduct was not "consumer-oriented" because their communications were "directed at the court and at Plaintiffs' employers [who garnished plaintiffs' wages following judgment in the fraudulent lawsuits], rather than at the consumers themselves," and explaining that "[p]assing fraudulent communications through the court en route to consumers does not cleanse Defendants of liability under § 349"); *see also Midland Funding, LLC v. Giraldo*, 961 N.Y.S.2d 743, 754 (Nassau Cty. Dist. Ct. 2013) (denying motion to dismiss similar allegations).

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on the insurer's behalf at the insureds' expense where the disputed provision "is not unique to the plaintiffs, but is contained in every [homeowners' policy issued by the defendant]").

Second, it is well established that disseminating deceptive information through a website, as GHI did here, is actionable. *See, e.g.*, *Accredited Aides*, 147 A.D.3d at 134 (reversing dismissal of GBL claims where plaintiffs alleged consumer-oriented conduct based on defendants' posting of misleading marketing information on their public website "target[ing] employers seeking workers' compensation coverage"); *Donnenfeld v. Petro, Inc.*, 333 F. Supp. 3d 208, 222–23 (E.D.N.Y. 2018) (finding, on motion to dismiss, that plaintiff alleged consumer-oriented conduct by pleading that home heating oil provider "represents on its website that customers who enter into ceiling plan contracts will benefit from decreases in market prices"); *Casper Sleep*, 204 F. Supp. 3d at 644 (concluding mattress seller adequately alleged consumer-oriented conduct against mattress reviewer whose "website, reviews and disclosures are plainly geared toward consumers" and "potentially affect similarly situated consumers because readers of the website browse the same site and are subject to the same allegedly deceptive conduct").

Here, that the City and GHI negotiated a contract does not change the fact that GHI disseminated—both directly on its website and by "passing" prepared materials through the City's benefits department—deceptive marketing materials to City employees in order to induce them to select the GHI Plan and pay more money for the Rider. It is those transactions, between GHI and individual City employees, that

are at issue. Accordingly, this case involves a straight-forward application of the *Oswego* test.

C. GHI's Cramped Reading of GBL §§ 349 and 350 Would Substantially Undermine The Goals Of New York's Consumer Protection Laws

If this Court answers the certified questions in the negative, its ruling would dramatically narrow laws that "on their face apply to virtually all economic activity," and whose "application has been correspondingly broad" during decades of interpretation. *Karlin*, 93 N.Y.2d at 290. Such a ruling would carve out a wide range of deceptive conduct from the GBL's reach and artificially divide consumers based on how they were exposed to a defendant's deceptive conduct (*e.g.*, through the workplace, a professional association, a membership plan, or a pre-existing contractual relationship). A determination that GHI's conduct is not consumer-oriented would mean barring any employee insured through an employer-sponsored plan from ever asserting a GBL claim. More broadly, it would also mean barring any individual who is subjected to deceptive conduct or marketing through his membership in a particular group from asserting a GBL claim—and it would also result in every GBL defendant arguing that its conduct is not directed toward the "public at large" and therefore is not "consumer-oriented."

GHI argued to the Third Circuit that "the only claims the District Court's decision will bar are ones brought by plaintiffs who were represented by sophisticated entities with relatively equal bargaining power." GHI 3d Cir. Br. at

23. Even if this interpretation was correct—and it is not, because it wrongly focuses on the transaction between GHI and the City rather than the transactions between GHI and City employees—GHI's position would still remove a broad swath of consumers from the GBL's protections. No participant in an employer health plan could ever bring a GBL claim against their insurer. And downstream consumers—say, members of big-box stores like Costco—could only bring GBL claims against upstream producers if they purchased goods directly from them, rather than if they purchased them from an intermediary who negotiated with the upstream producer to make those goods available for purchase.

That outcome—excluding consumers based on membership in a particular group or the source of their exposure to the deceptive conduct—would be fundamentally at odds with the Legislature's intent in enacting GBL §§ 349 and 350. As one commentator explained shortly after the Legislature added a private right of action to enforce these laws, these provisions—and in particular, the right of private parties like Plavin to hold businesses to account for their deceptive practices—"radically alter[] traditional market relationships, creating new substantive rights and remedies not limited by established common law doctrines and provide[] compensation for exposure to an unlimited variety of unlawful and harmful conduct." Note, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 Brook. L. Rev. 509, 584–85 (1982). "Effectively used,

the private remedy will afford the injured consumer or businessperson with a powerful mechanism for relief and will aid in deterring fraudulent practices in the marketplace. However, narrow judicial construction and a lack of public awareness could diminish its potency as a consumer weapon and render it nothing more than a paper tiger." *Id.*; *see also* N.Y. State Assembly, Comm. on Consumer Affairs and Protection, 1980 Annual Report, at 1 ("In 1980, the Committee achieved an important consumer victory by successfully orchestrating the enactment of private right of action legislation.").

No court has previously held that conduct is actionable under GBL §§ 349 and 350 only if it was targeted at the entire "general public." Indeed, if the District Court were right, the doctors in *Elacqua*, the employers in *Accredited Aides*, the auto insurance policyholders in *Autobahn* and *M.V.B. Collision*, and countless other groups of consumers would be left without recourse for violations of the GBL. The consequences would be particularly devastating in the field of insurance, where countless policies, including health, life, disability, and long-term care, are negotiated on a group basis through employers and other organizations and then directly marketed to consumers. Nor does GHI's agreement with the City make any difference. The representations that GHI made in the Summary Description Plans and on its website are no different than representations made by any business in trying to persuade consumers to select a particular product or service. There is

nothing bespoke about these interactions, or the insurance that Plavin and many other City employees obtain from GHI.

The Assurance of Discontinuance that GHI entered into with the NYAG underscores the importance of the questions presented here. In 2014, the NYAG found that in marketing its insurance plan to City employees, GHI had engaged in repeated violations of GBL §§ 349 and 350. A66. These findings were predicated on a determination that GHI's conduct was consumer-oriented—a necessary element of the GBL claims. *See People ex rel. Schneiderman v. Orbital Pub. Grp., Inc.*, 21 N.Y.S.3d 573, 585–86 (N.Y. Sup. 2015) ("In order to make a prima facie case under GBL § 349, the State must show that the respondents have engaged in a 'deceptive act or practice that is consumer oriented.'") (quoting *Gaidon*, 94 N.Y.2d at 344), *rev'd on other grounds*, *People by Schneiderman v. Orbital Pub. Grp., Inc.*, 169 A.D.3d 564 (1st Dep't 2019) (granting NYAG's request "for a summary determination that respondents violated [GBL] §§ 349 and 350" in distributing materially misleading solicitations for newspaper and magazine subscriptions to consumers).

GHI's position, if upheld, would exempt a wide range of conduct from the scope of the GBL, and would preclude the Attorney General, as well as private parties, from seeking any redress for an array of deceptive practices. Consumer-oriented deceptive conduct comes in many forms and reaches consumers in myriad

ways. The Second Department in *Autobahn* explained that allegations satisfy the consumer-oriented conduct standard in a variety of scenarios, including where the conduct "involved 'an extensive marketing scheme,' (*Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d at 344), where it involved the 'multi-media dissemination of information to the public' (*Karlin v. IVF Am.*, 93 N.Y.2d at 293), and where it constituted a standard or routine practice that was 'consumer-oriented in the sense that [it] potentially affect[ed] similarly situated consumers.' (*Oswego* [85 N.Y.2d at 27.])" *Autobahn*, 102 A.D.3d at 12; *see Elacqua*, 52 A.D.3d at 889 (insurer sent deceptive communications in letters to physician-insureds that "failed to inform them that they had the right to select independent counsel at defendant's expense, instead misadvising that plaintiffs could retain counsel to protect their uninsured interests 'at [their] own expense'").

Under GHI's reading, the exact same type of conduct at issue in *Gaidon*, *Oswego*, and other cases would be unactionable so long as the consumers were targeted via some overarching business-to-business transaction involving their employer, their bank, their internet service provider, or some other intermediary. Particularly in light of the increasing number of such arrangements, such a broad carve-out would functionally gut GBL §§ 349 and 350 and undermine the remedial purpose behind these laws. The legislature broadly drafted, and courts broadly apply, §§ 349 and 350 to "cope with the numerous, ever-changing types of false and

deceptive business practices which plague consumers in our State." *Karlin*, 93 N.Y.2d at 291 (internal quotation marks omitted). All that GBL §§ 349 and 350 require are allegations sufficient to show that a defendant's conduct had a broad impact on multiple insureds. With 994,500 members enrolled in the GHI Plan, this test is unquestionably met. Accordingly, this Court should answer the certified questions in the affirmative.

CONCLUSION

For these reasons, this Court should answer both questions presented by the Third Circuit Court of Appeals in the affirmative and hold that GHI's conduct was consumer-oriented.

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Respectfully submitted,

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Addendum – Relevant Statutory Provisions

General Business Law § 349(a)

Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

General Business Law § 349(h)

In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

General Business Law § 350

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

General Business Law § 350-e(3)

Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his or her own name to enjoin such unlawful act or practice, an action to recover his or her actual damages or five hundred dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages, up to ten thousand dollars, if the court finds that the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

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 11,371 words.

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