To Be Argued By:
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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.

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I. Introduction

GHI's brief misses the point. The material misrepresentations that lie at the core of the class complaint did not occur when GHI, New York City, and the employees' union agreed that GHI would have the opportunity to offer its insurance plan to City employees and retirees (negotiations that are, as GHI knows, detailed nowhere in the record). Instead, they occurred when GHI lied to Plavin and tens of thousands of similarly-situated consumers to induce them to choose GHI's plan over the others available to them. In the transaction that actually matters, GHI materially misrepresented the contours of the Plan they offered to Plavin and other City employees, and he was not represented or advised by anyone—the City or his union—in making that selection. Contrary to what GHI tells this Court, Plavin is exactly the type of consumer that needs the protection of the General Business Law ("GBL").

To shoehorn this case into *New York University v. Continental Insurance Company*, 87 N.Y.2d 308 (1995), a one-off, single-shot dispute concerning the terms of a heavily-negotiated policy between the plaintiff, NYU University, and Continental Insurance Company, GHI ignores the myriad ways that the claim at issue in this case is different. The plaintiff here is not a billion-dollar private university, but rather a putative class of over 600,000 individual consumers. The claim here does not focus on the terms of a bespoke insurance plan hammered out

by two sophisticated entities, but rather standardized and misleading marketing documents drafted by GHI for a broad class of employees and retirees to persuade them to select GHI as their insurer and then pay GHI even more for worthless riders. GHI unquestionably did this for profit, as consumers' selection of GHI's plan in the marketplace resulted in hundreds of millions of dollars flowing to GHI annually. And totally absent from GHI's brief is any discussion of the company's advertisement and sale directly to employees of an "enhanced" out-of-network rider--a solicitation in which GHI failed to disclose that the rider provided absolutely nothing for out-patient services, which accounted for the lions' share of out-of-network costs. The GBL's scope is broad, as this Court has emphasized time and again, *see, e.g., Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 290 (1999) (GBL provisions "on their face apply to virtually all economic activity, and their application has been correspondingly broad"); *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 343–44 (1999) (emphasizing broad scope of GBL § 349 to accommodate "ever-changing" ways in which businesses deceive consumers), and it easily encompasses GHI's conduct.

Beyond that, GHI makes a few remarkable assertions. It first claims that City employees and retirees picking a health care plan do not need the protection of the GBL because they are similarly situated to companies like ExxonMobil – in the words that GHI's own brief uses, "one of the world's largest corporations."

Opp. Br. at 19. It then tells this Court that City employees do not need the protection of the GBL because they can bring a fraud claim if the deceptive conduct is egregious enough, Opp. Br. at 25–26. That ignores the Legislature's plain intent to provide redress for deceptive conduct that does not rise to the level of common-law fraud. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 209 (2001) ("While General Business Law § 349 may cover conduct 'akin' to common-law fraud, it encompasses a far greater range of claims that were never legally cognizable before its enactment."). And it should go without saying that GHI's threat to cease making a "good faith effort to work constructively with the NYAG's Health Care Bureau" if this Court rejects its cramped construction of the GBL, Opp. Br. at 28–29, is no reason to accede. Exactly the opposite: it confirms the urgent need for the GBL's protection here.

II. Counter Statement of Facts

This case focuses on the terms of GHI's Summary Program Description, Summary of Benefits Coverage, and GHI's advertisement and sale to consumers of its "enhanced" rider, not the terms of or the negotiations surrounding the GHI Comprehensive Benefit Plan itself ("the Plan"). But in any event, GHI's characterizations of so-called "negotiations" among GHI, the City, and the municipal union concerning the Plan are wholly misleading. GHI cites boilerplate communications that it sent to GHI plan participants. Opp. Br. at 5 (citing letters

sent to plan participants in March 1999, July 1999, February 2001, and March 2004). These letters do nothing to correct the misrepresentations in the Summary Program Description and the Summary of Benefits and Coverage; they were sent years before the Class Period, and they reference only vaguely what the City and the union purportedly agreed to without providing detail as to the contours of those plan features.

GHI also recites language from the Certificate of Insurance and claims that the Certificate of Insurance is today available on GHI's parent's website. Opp. Br. at 4. What GHI fails to tell the Court is that the Complaint alleges that this Certificate of Insurance was never provided to Plavin or other City employees. A61 (Compl. ¶24) ("Prospective members were not provided with any certificate of insurance of schedule of reimbursement rates, and such documents were not available on GHI's (or its parent EmblemHealth's) website at any point during the Class Period."). Even if the affidavit that GHI used to interject the Certificate into the case, A163, could be considered on a motion to dismiss—which it cannot—neither it nor the Certificate itself establish that it was (i) in effect during the relevant time period or (ii) provided to Plavin or any putative class member.[1]

[1] Even if the Certificate of Insurance had been provided to Plavin and was in effect, the passages that GHI cites provide scant detail on the actual rate of reimbursement for out-of-network providers. *See* A200 (GHI Certificate of Insurance) ("Allowed Charges are based upon data collected by GHI and agreed to by the City of New York"); *see also id.* ("Allowed charges are basic benefits for covered services which are rendered by non-participating providers are based

GHI's characterization of the proceedings before the U.S. Court of Appeals for the Third Circuit is irrelevant in some parts and inaccurate in others. As to oral argument, *see* Opp. Br. at 9, snippets plucked from questions asked by the panel shed no light on the court's ruling. And if oral argument counts, GHI should have apprised this Court of the deep skepticism directed at GHI's own conduct in communicating with City employees. *See, e.g.*, A482 ("JUDGE ROTH: I tended in the beginning to think that *NYU* was applicable until my law clerk persuaded me that this is a case where although the contract was negotiated between the union, the City of New York, and the company, that because the insurance company as one of 11 companies offering insurance in New York City wanted to get the lion's share it was communicating directly to the employees to get them when they made their selection of what insurance to pick to select the defendant and that it was this direct communication between the 900,000 insureds and the insurance company that you are concerned about rather than the negotiations of the underlying contract between the city and the union and the insurance company.").

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upon 1983 procedure allowances. Some allowances have been increased from time to time"). And the Certificate of Insurance contains misrepresentations, just as do the Summary Program Description and the Summary of Benefits & Coverage. For example, it states that reimbursements for services rendered by non-participating providers "may be less than the fee charged by a non-participating provider," A200 (Certificate of Insurance), but in reality it was virtually certain that reimbursements would be dramatically less than the actual fees charged by out-of-network providers in all cases, A57 (Compl. ¶9). Finally, GHI does not contest that it—not the City and not the employees' union—wrote the Summary Program Description and Summary of Benefits & Coverage on its own. A60-61 (Compl. ¶¶22-23).

As for the panel's ruling, GHI is wrong in asserting that "the Third Circuit did not 'reverse' the District Court in any respect." Opp. Br. at 10. While the district court held that GHI's conduct was not materially misleading, *see* A23-33, or consumer-oriented, *see* A17-23, the Third Circuit certified only the latter question—whether GHI's conduct is consumer-oriented. "If the alleged conduct is covered by the GBL," the Third Circuit explained, "the dismissal will not be affirmed because GHI's statements and omissions, as alleged, are materially misleading, and GHI does not contest the third element of Plavin's GBL claim" (injury). A549. As this passage makes clear, the Third Circuit plainly reversed the district court on the question of whether GHI's conduct was materially misleading.

III. Argument

Contrary to GHI's brief, this case does not focus on the GHI plan, or on any negotiations among GHI, the City, or the union. The claim in this case is that GHI drafted and prepared misleading 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 violation of GBL §§ 349 and 350. This alleged conduct is separate and apart from any contract negotiations and, as Plavin explained in his opening brief, more than satisfies the broad test for "consumer-oriented" conduct set forth by this Court in *Oswego* and other cases. *See, e.g., Oswego Laborers'*

Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25–26 (1995) (holding that conduct is "consumer-oriented" under the GBL when it affects "similarly situated consumers"); *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5 (2d Dep't 2012); *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 887 (3rd Dep't 2008); *Accredit Aides Plus, Inc. v. Program Risk Management, Inc.*, 147 A.D.3d 122, 134 (3rd Dep't 2017).

GHI's brief does not engage with the conduct that is actually alleged in this case. Instead, GHI argues that because the backdrop of this case is employer-sponsored insurance, GHI is entirely exempt from the protection of GBL §§ 349 and 350. The radical curtailment of the GBL that GHI proposes has no basis in precedent and, if accepted, would extinguish GBL protection for a wide range of consumers in any number of industries. This Court should reject GHL's invitation to so drastically rewrite New York's consumer protection law.

A. GHI ignores the relevant transaction.

In its opening brief, Plavin explained that products or services need not be available to each and every member of the consuming public to give rise to a claim under the GBL. Pl. Br. at 21–34. GHI appears to agree with that proposition, as it does not challenge it before this Court.

GHI's remaining argument is that its deceptive conduct is exempt from the GBL's protective reach because the health insurance it provides to City employees

is a “private contract” “negotiated by sophisticated parties.” Opp. Br. at 16. That completely misunderstands the allegations here. Plavin’s claim is not that the GHI plan is inherently deficient or that the City did a poor job in negotiating its terms. His claim is that GHI materially misrepresented the terms of its Plan to him and other City employees in the hopes that the employees would pick GHI’s Plan from the eleven plans available to them. GHI’s focus on the parties who negotiated GHI’s inclusion on the list of insurers that City employees could select ignores the crux of Plavin’s complaint.

The process through which City employees selected a health insurance plan—the one that put premium dollars in GHI’s pocket—is the operative transaction in this case, not any purported negotiations between the City and GHI about the terms of the Plan. First, those negotiations are nowhere in the record. This appeal is from the dismissal of the complaint at the pleadings stage. The complaint includes no allegations concerning any such negotiations, and GHI does not even try to explain how these extra-record discussions could even be considered at this stage of the proceedings, let alone be dispositive of the certified questions. GHI’s singular focus on the purported negotiation should be seen for

what it is—an attempt to distract this Court from the questions presented by the Third Circuit.[2]

As those questions indicate, Plavin alleges that the marketing materials disseminated by GHI to plan participants from 2011 to 2015 were materially misleading, not that the terms of the contract between GHI and the City of New York were breached or should have been different. The contract between the City and GHI is not even part of the record,[3] and the Certificate of Insurance that GHI cites was not provided to plan participants like Plavin. A61 (Compl. ¶24). And the fact that the City and GHI negotiated a contract in the late 1990s, allowing GHI to offer its plan to City employees, clearly did not deter New York's Attorney General from investigating "GHI's disclosures to consumers and members," A168 (AOD at ¶7), finding "repeated violations of . . . General Business Law §§ 349 and

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[2] The Third Circuit's questions focus squarely on the interaction between GHI and City employees, not GHI and the City or the union: whether an insurance company engages in consumer-oriented conduct when it (1) "drafts summary plan information that allegedly contains materially misleading misrepresentations . . . 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. . . ." A550.

[3] Because the contract is not part of the record, GHI's contention that Plavin was a third-party beneficiary of that contract is irrelevant. Opp. Br. at 19. *See Dormitory Authority v. Samson Constr. Co.*, 30 N.Y.3d 704, 710 (2018) ("[W]e have generally required express contractual language stating that the contracting parties intended to benefit a third party . . . [i]n the absence of express language such third parties are generally considered mere incidental beneficiaries.") (internal quotations omitted).

350," A174 (AOD at ¶26), and requiring GHI to "modify all GHI Plan consumer-facing materials," A174 (AOD at ¶27), in 2014.

GHI does not dispute that the City played no role in the selection of specific insurance plans by individual employees, A60–61 (Compl. at ¶¶19–24), or that GHI alone controlled the representations it made to Plavin and other consumers about the Plan. *Id.* (Compl. at ¶22). GHI cannot point to anything in the record suggesting that the City negotiated what GHI could or could not say in its Summary Program Description, nor does it show that the City provided guidance to Plavin to help him interpret or understand what benefits the Plan actually provided based on GHI's misrepresentations. Despite GHI's misleading assertion that the City and Plavin's union were "involved in preparing and disseminating the [Summary Program Description]," Opp. Br. at 21, it was GHI alone—and not the City or the union—that wrote the section of the Summary Program Description describing the GHI Plan, A61 (Compl. ¶22), and it was GHI alone that wrote and disseminated the online Summary of Benefits & Coverage that was posted on GHI's own website. A61 (Compl. ¶23). The Third Circuit agrees, expressly stating in its certification order that "GHI created" both documents; it "drafted the SPD and sent it to the City," and "drafted the SBC, which was available on GHI's website." A545.

The sophistication of the City and Plavin's union are thus irrelevant, because neither the City nor the union guided GHI in preparing its descriptions of the Plan, or represented Plavin and other employees in the process of deciphering GHI's descriptions or selecting a plan. Because GHI focuses on the wrong transaction, the cases it cites for the proposition that Plavin and GHI had equal bargaining power are all inapposite. Not surprisingly, none of them stand for the proposition that City employees and a multi-billion-dollar insurance company have equal bargaining power.

In each of the cases cited by GHI for that proposition, Opp. Br. at 12–13, 16, the alleged sophisticated party was the plaintiff asserting a claim under the GBL, and the carefully negotiated transaction was itself the subject of the claim. Neither of those circumstances are present here. *See New York University v. Continental Insurance Company*, 87 N.Y.2d 308 (1995) (involving extensive negotiations between New York University and Continental Insurance Company over NYU's bespoke insurance policy that applied to NYU and no other party); *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 143, 148–49 (2d Dep't 1995) (involving a dispute over a $350,000 East Hampton home renovation following extensive negotiations between the homeowner and the building company); *People by Lefkowitz v. Volkswagen of America, Inc.*, 47 A.D.2d 868 (1st Dep't 1975) (not evaluating at all whether the relative bargaining power of the parties affects the GBL analysis);

Graham v. Eagle Distributing Co., Inc., 224 A.D.2d 291 (4th Dep't 1996) (not discussing the relative bargaining power of the parties at all, or how that affects whether a GBL claim can proceed).

Because GHI focuses on the wrong transaction, it incorrectly characterizes this case as a "private contractual dispute" in the style of *New York University v. Continental Insurance Co.* and *Denenberg v. Rosen*. 87 N.Y.2d 308; 71 A.D.3d 187 (1st Dep't 2010). Both of those cases focused on whether material misrepresentations in bespoke, individualized contracts between sophisticated entities fell under the ambit of the GBL. In *NYU*, the alleged misrepresentations took place during brokered negotiations between New York University and Continental Insurance Company over the University's private insurance plan for commercial crime liability. 87 N.Y.2d at 314. In *Denenberg*, the alleged misrepresentations took place during negotiations between the Plaintiff, a commodities trader on the New York Mercantile Exchange who operated his business as a sole proprietor and insisted in the litigation that he was a sophisticated entity, and the Defendant, the insurance company who issued the plan, over a private, individualized pension plan. 71 A.D.3d at 190, 195. These are worlds apart from this case, where the misrepresentations were included in GHI-authored standard marketing materials and were distributed to the entire pool of public employees in the City of New York.

GHI also proposes that this Court adopt a multi-factor test to determine whether conduct is consumer-oriented. Opp. Br. at 15. GHI points to *NYU*—which held, just as *Oswego* noted— that the GBL does not cover private, one-off, single-shot contractual disputes, *NYU*, 87 N.Y.2d at 314; *Oswego*, 85 N.Y.2d at 26—wrings from those cases an inquiry that focuses on the relative bargaining power and sophistication of the parties, the nature of the agreement, and the amount of money involved in the agreement; and concludes that Plavin's claim fails because of the "sophistication" of the City and the union in negotiating the contract that allowed GHI to offer its plan to City employees.

But neither *NYU* nor *Oswego* establish such a test. And GHI cites no case from any appellate division applying the test either. GHI appears to have pulled it from *Interested Underwriters at Lloyd's of London Subscribing to Policy No. 991361018 v. Church Loans & Inv. Trust*, which identifies both *NYU* and *Oswego* as relevant to whether conduct is consumer-oriented. 432 F. Supp. 2d 330, 332 (S.D.N.Y. 2006). It goes without saying that a case from a federal district court cannot yield a controlling interpretation of a New York law.

Even if such a test were the law, it would help Plavin, not GHI. With the right transaction in view, Plavin satisfies each prong: he and other City employees—acting without representation from the City or the union—relied on widely disseminated, standard marketing materials to select GHI's plan and direct

their individual premium dollars towards GHI. A60-A62 (Compl. ¶¶19–26). None of the three cases that GHI cites on this point, *see* Opp. Br. at 15, compels a different conclusion. *See Fleisher v. Phoenix Life Ins. Co.,* 858 F.Supp.2d 290, 304 (S.D.N.Y. 2012) (dismissing plaintiff's GBL claim for failing to state an injury without examining whether the at-issue conduct was consumer-oriented); *Berck v. Principal Life Ins. Co.*, 975 N.Y.S.2d 707, 2013 WL 3455767, at *4 (Sup. Ct. N.Y. 2013) (dismissing GBL claim arising from a dispute between an experienced insurance trust trustee and a life insurance company over a $5 million "sophisticated" insurance arrangement); *Lloyd's*, 423 F.Supp.2d at 332 (allowing a GBL claim to proceed when the "alleged deceptive practices may affect numerous other consumers of [ ] insurance," and the amount involved and relative bargaining power of the parties could not be fully determined at the motion to dismiss stage).

GHI is likewise mistaken in claiming that its conduct cannot be consumer-oriented because the aggregate of premiums it collected from City employees add up to a substantial sum. *See* Opp. Br. at 18. By the same token, material misrepresentations to consumers involving any good or service would not fall under the GBL's protection, as long as the aggregate revenue from all of the consumers that were misled equals a large number. No case stands for that proposition, and GHI does not cite one. That the City actually paid the premiums

matters little, because the City simply directed payments to the Plans that employees select. A60 (Compl. ¶19).

GHI's attempt to distinguish the GBL cases cited in Plavin's opening brief similarly fails. Even if representation by a sophisticated actor mattered, Plavin—like the Plaintiffs in those cases—was not represented or advised by anyone in the transaction that matters—the one where he picked an insurance plan. *See N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5 (2d Dep't 2012) (allowing holders of automobile insurance to bring a GBL claim against their insurer for misleading them into believing that their vehicles had to be repaired at certain repair shops); *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 887 (3rd Dep't 2008) (allowing holders of medical malpractice insurance to proceed where the insurer made misrepresentations about the contours of the plan directly to the insureds). And even if the City or Plavin's union had played some role in providing information about the Plan to Plavin—and they did not—GHI would still be liable under the GBL for its misrepresentations, because as Plavin explained in his opening brief the presence of an intermediary cannot defeat a GBL claim so long as GHI's misrepresentations were directed straight to consumers. *Koch v. Greenberg*, 626 Fed. Appx. 335 (2d Cir. 2015) (holding that a wine auctioneer's role as a "expert intermediary" in the sale of high-end wine did not

defeat a GBL claim, when the defendant seller made misrepresentations directly to the plaintiff buyer).

With the relevant transaction in focus, GHI cannot argue that the parties were sophisticated and equally situated. Quite the contrary: GHI members such as Plavin were required to select an insurance plan like millions of New York consumers do every day: based on insurer-drafted marketing materials that merely summarize the coverage that is purportedly being provided.

Finally, GHI does not even try to address the class's claim based on GHI's misrepresentations of the worthless Optional Rider. The Rider was not part of the Plan itself, but rather was sold to and purchased by Plan participants directly, as a supplement to the Plan. A65 (Compl ¶37). For that reason, GHI is flat-wrong in stating that the City "sponsors and pays entirely for the GHI Plan." Opp. Br. at 3. Any negotiation the City undertook on Plavin's behalf for the Plan, to the extent it could somehow be deemed relevant, would not cover the marketing, purchase, and sale of the Optional Rider.

B. Members of the GHI plan need the protection of the GBL.

Plavin and other similarly-situated City employees are exactly the members of the consuming public that require the protection of the GBL. GHI peddled its standard plan to hundreds of thousands of public employees—including current and retired police officers like Plaintiff—using descriptions that it alone authored,

and marketed that plan with misrepresentations to those employees. Plavin and other public employees are far from the kinds of Plaintiffs that GHI insists do "not need the protection of GBL § 349." *See ExxonMobil Inter-Am., Inc. v. Advanced Info. En'g Servs., Inc.*, 328 F. Supp.2d 443, 450 (S.D.N.Y. 2004) (declining—in a federal case examining New York law—to apply GBL liability to Exxon, "one of the world's largest corporations"); *see also Teller*, 213 A.D.2d at 147 (noting that large, private, single-shot contractual transactions involving "complex arrangements, knowledgeable and experienced parties and large sums of money" unlike the transactions at issue here do not "need the protection of [the GBL").

GHI's alternative solutions provide cold comfort to Plavin and the other City employees that were fleeced. GHI suggests that members of the GHI plan "can raise their concerns with their union representatives, or with the City . . . [and that] [t]hese entities in turn can remedy any issues with GHI through their contractual relationship, or . . . in future negotiations." Opp. Br. at 21. In other words, Plavin should have no remedy for any harm GHI committed in the past, and his only hope for the future is at the bargaining table. There is not a single case in GHI's brief that supports this far-out proposition.[4] And nowhere does the GBL require that no

[4] As GHI acknowledges, the Employment Retirement Income Act of 1974 ("ERISA") does not apply to this case because the plan at issue is not covered by the Act. Opp. Br. at 25. Even if ERISA did apply, it is not settled that preemption would bar consumers who were misled into selecting employer-sponsored plans from bringing a GBL claim, or that such consumers could bring an ERISA claim instead. *See, e.g. Venturino v. First Unum Life Ins. Co.*, 724 F.Supp.2d

other claim be available for a Plaintiff to receive its protection, as GHI argues. Opp. Br. at 25. GBL § 349(g) expressly states that "this section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state."

C. GHI's reading of the GBL would have far-reaching adverse consequences.

Despite GHI's hand-waving, its reading of the GBL would markedly curtail who could bring a claim under this critical statute. Given the dispositive importance that GHI places on the presence of a sophisticated negotiation that is in any conceivable way connected to the transaction at issue, any party whose interests were represented at any point in the commerce stream would be blocked from bringing a claim. That includes members of unions, who could never bring GBL claims for any misrepresentation in a downstream transaction with any connection to a union negotiation (including, as here, any GBL claim for any misrepresentation by an insurance company to an insured, if the union negotiated any part of the plan at issue). It also includes employees of companies who now negotiate through group contracts a wide array of products and services, ranging

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429, 432–34 (S.D.N.Y. 2010) (noting that "[n]one of the civil actions enumerated in [ERISA's] § 502(a) contemplates a consumer protection dispute such as that presented here seeking damages because of alleged deceptive practices in the marketing and issuance of insurance policies," and holding that ERISA does not preempt a GBL claim for "alleged deception in marketing and issuing a policy").

from life and disability insurance to gym memberships to hotel and car rental programs, even if the defendants, as in this case, make direct misrepresentations to the employees themselves. *See, e.g.*, https://www.forbes.com/sites/vickyvalet/2015/07/08/more-than-two-thirds-of-u-s-employers-currently-offer-wellness-programs-study-says/#5e78f70d231d. Taken to its extreme, GHI's argument would even foreclose GBL claims in any industry where an argument can be made that the plaintiff is "represented" in some capacity by an organization, agency, or representative body. Suffice it to say, this is the opposite of what the legislature intended, and there is not one case cited in GHI's brief that would support such an unraveling of New York's deceptive practices law.

To the extent consumers would be barred from bringing civil actions of this type, the Attorney General would be likewise barred from bringing actions like the one that led to the 2014 Assurance of Discontinuance that sits parallel to this case. Rather than preventing businesses like GHI from working constructively with the Attorney General to improve their disclosures, that would immunize businesses like GHI and shield them from any efforts to compel remediation of their misleading representations.[5]

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[5] Although GHI contends that the 2014 Assurance of Discontinuance rested on Executive Law § 62(12), Opp. Br. at 27, the Attorney General's investigation was authorized under Article 22-

IV. Conclusion

For the reasons stated above and in Plaintiff-Appellant's opening brief, the Certified Questions should respectfully be answered in the affirmative and this case returned to the Third Circuit for further proceedings.

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Respectfully submitted,

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A of the GBL, and the Assurance of Discontinuance made findings of its findings repeated violations of GBL §§ 349 and 350. *See* A174 (AOD ¶26).

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 4,858 words.

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Respectfully submitted,

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