

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 18-2490

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STEVEN PLAVIN,

Appellant

v.

GROUP HEALTH INCORPORATED

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On Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(D. C. No. 3-17-cv-01462)  
District Judge: Honorable Robert D. Mariani

Before: MCKEE, ROTH and FUENTES, *Circuit Judges*

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PETITION FOR CERTIFICATION OF QUESTIONS OF LAW

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To the Honorable Judges of the New York Court of Appeals:

Plaintiff Steven Plavin brought this action in the Middle District of Pennsylvania on behalf of New York City (City) employees and retirees alleging that Group Health Insurance (GHI), a health insurance company, made materially misleading statements regarding the scope of out-of-network coverage and other benefits under its Comprehensive Benefits Plan (Plan). We must determine whether Plavin has stated a claim under Sections 349 and 350 of the New York General Business Law (GBL).

“[A]s a threshold matter, plaintiffs claiming the benefit” of the GBL “must charge conduct of the defendant that is consumer-oriented.”<sup>1</sup> The District Court dismissed Plavin’s GBL claim in part because it held that Plavin had failed to show that GHI had engaged in consumer-oriented conduct when it allegedly made materially misleading statements in its summary documents. A panel of the United States Court of Appeals for the Third Circuit (McKee, Roth, Fuentes, JJ.) voted unanimously to transmit this Petition for Certification to the New York Court of Appeals pursuant to Local Appellate Rule (LAR) Misc. 110.1 of the United States Court of Appeals for the Third Circuit,<sup>2</sup> and in accordance with the procedures set forth in N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27.<sup>3</sup> Because we believe that the question presented here meets the requirements of Section 500.27, we respectfully request that the New York Court of Appeals accept this certification petition.

We represent as follows:<sup>4</sup>

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<sup>1</sup> *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995).

<sup>2</sup> LAR, Misc. 110.1, Certification of Questions of State Law, provides:

When the procedures of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the procedures of that court, and will stay the case in this court to await the state court’s decision whether to accept the question certified. The certification will be made after the briefs are filed in this court. A motion for certification must be included in the moving party’s brief.

<sup>3</sup> The pertinent text of Section 500.27 is set forth *infra* pg. 6.

<sup>4</sup> On review of a 12(b)(6) dismissal, we take all well-pled allegations of the complaint as true, and we draw all inferences in favor of Plavin. *See McTernan v. City of York, Pa.*, 577 F.3d 521, 526 (3d Cir. 2009).

1. The City entered into a contract with GHI to provide health insurance benefits to its employees, retirees, and their dependents. Pursuant to this contract, GHI offered the Plan at issue in this case. The Plan was one of eleven health insurance plans the City made available to its employees and retirees. Under New York City law, City employees and retirees have a fixed dollar amount for their health insurance each year; when they selected the Plan for their health insurance coverage, they directed the City to pay that amount to GHI on their behalf.

2. Through collective bargaining agreements, the City and the Municipal Unions cooperated in choosing the eleven plans and designing the benefits for those plans. It does not appear that the Unions were parties to the contract of insurance between GHI and the City.

3. GHI created two documents that summarized the Plan's benefits and coverage—the Summary Program Description (SPD) and the Summary of Benefits & Coverage (SBC) (together, summary documents). GHI drafted the SPD and sent it to the City. The City then compiled the SPDs for all eleven plans and distributed them to City employees and retirees. Plavin does not allege that the City reviewed or edited the SPDs prior to distribution. GHI also drafted the SBC, which was available on GHI's website. Plavin alleges that these were the only documents regarding the Plan available to City employees and retirees and that they were not provided with the certificate of insurance or the schedule of reimbursement rates.

4. Plavin initiated a lawsuit against GHI for, *inter alia*, violations of the GBL.<sup>5</sup> He alleges that, in an attempt to enroll as many City employees and retirees as possible into the Plan, GHI made a number of misrepresentations in the summary documents about the Plan's out-of-network reimbursement rates and other Plan benefits. Specifically, he claims that the summary documents contained materially misleading statements and omissions regarding reimbursement rates for out-of-network services, the schedule of reimbursements rates, the Plan's Optional Rider, and the Plan's Catastrophic Coverage.

5. GHI moved to dismiss Plavin's complaint under Fed. R. Civ. P. 12(b)(6), and the District Court granted the motion in its entirety. As to the GBL claim, the District Court held that GHI had not engaged in "consumer-oriented conduct"<sup>6</sup> because the challenged conduct arose out of a private contract of insurance negotiated by sophisticated parties, namely the City and GHI. The court's holding relied on the New York Court of Appeals decision in *N.Y. Univ. v. Cont'l Ins. Co.* ("NYU").<sup>7</sup> In this case, NYU negotiated and entered into a commercial crime insurance policy with Continental Insurance.<sup>8</sup> Two years later, NYU discovered that one of its employees had stolen merchandise from its bookstore and submitted a claim under the policy.<sup>9</sup> Continental investigated the claim

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<sup>5</sup> Plavin also brought claims for violations of Section 4226 of New York Insurance Law and unjust enrichment.

<sup>6</sup> A plaintiff asserting a claim under the GBL "must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 953 N.Y.S.2d 96, 101 (N.Y. App. Div. 2012).

<sup>7</sup> 87 N.Y.2d 308 (1995).

<sup>8</sup> *Id.* at 314.

<sup>9</sup> *Id.* at 313-14.

and denied coverage for the claim.<sup>10</sup> Continental also refused to renew the policy for “underwriting reasons.”<sup>11</sup> NYU subsequently brought a number of claims against Continental, including a violation of the GBL.<sup>12</sup> The court affirmed the grant of Continental’s motion to dismiss the GBL claim, reasoning that Continental’s “acts in selling this policy and handling the claim under it do not constitute consumer-oriented activity.”<sup>13</sup> The court explained that this was “essentially a ‘private’ contract dispute over policy coverage and the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large.”<sup>14</sup> The sophistication of the parties, large premiums, and the tailoring of the policy to NYU’s specific needs also factored into the court’s decision.<sup>15</sup>

6. Plavin argues that *NYU* is inapplicable because the dispute in *NYU* involved a single-shot transaction about the scope of coverage under the terms of the policy and the insurance company’s handling of a claim. GHI’s conduct, according to Plavin, meets the standard for being “consumer-oriented,” as articulated in *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*.<sup>16</sup> *Oswego* provides that conduct is consumer-oriented under the GBL if it “potentially affect[s] similarly-situated consumers.”<sup>17</sup> In

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<sup>10</sup> *Id.* at 314.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 315. The other claims included breach of contract, bad faith, and unlawful and fraudulent conduct. *Id.*

<sup>13</sup> *Id.* at 321.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 85 N.Y.2d 20 (1995).

<sup>17</sup> *Id.* at 27.

support of his argument, Plavin primarily relies on the New York Court of Appeals decision in *Gaidon v. Guardian Life Insurance Company*.<sup>18</sup> In *Gaidon*, insureds sued their life insurance company under the GBL, alleging that the insurer's marketing materials had falsely represented that insureds would have to pay premiums only for the first eight years of the policy.<sup>19</sup> The court held that they adequately pled consumer-orientated conduct because this was not a claim about "a private contract dispute as to policy coverage" like in *NYU*, but rather about misrepresentations the insurer made in marketing materials, to all of an insurer's policy holders, about the terms of the policy.<sup>20</sup>

7. We refrain from certifying questions of law if we can confidently predict how the highest state court will decide the issue.<sup>21</sup> In this case, however, it appears that neither *Gaidon*, *NYU*, nor any other New York Court of Appeals case dictates the outcome. We therefore transmit this Petition for Certification to you in accordance with the procedures set forth in N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27. In pertinent part, Section 500.27 provides that any United States Court of Appeals may certify "dispositive questions of law to the Court of Appeals" where "no controlling precedent of the Court of Appeals exists."<sup>22</sup> We believe the question presented here meets these requirements. "No controlling [New York] precedent" exists on the question of whether an insurer's conduct is consumer-oriented for purposes of the GBL where hundreds of thousands of

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<sup>18</sup> 94 N.Y.2d 330 (1999).

<sup>19</sup> *Id.* at 338-40.

<sup>20</sup> *Id.* at 343-44.

<sup>21</sup> *See, e.g., Travelers Indem. Co. of Ill. v. DiBartolo*, 171 F.3d 168, 169 n.1 (3d Cir. 1999).

<sup>22</sup> N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a).

City employees and retirees, who are third-party beneficiaries of an insurance contract negotiated by sophisticated parties, have been materially misled by the insurer's summary plan documents. Additionally, this question is dispositive as to the GBL claim. 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 or practice—has been adequately pled.<sup>23</sup>

NOW, THEREFORE, the following questions of law are certified to the New York Court of Appeals according to the rules of that Court:

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

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<sup>23</sup> See Appellee Br. at 6-7 (stating that Plavin alleged that his wife was injured when she received out-of-network services, and GHI did not provide the amount of reimbursement anticipated).

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?

We shall retain jurisdiction of the appeal pending resolution of this certification.

By the Court,

s/ Jane R. Roth  
Circuit Judge



A True Copy:

*Patricia A. Dodszeit*

Patricia S. Dodszeit, Clerk