



NEW YORK  
CITY BAR

**REPORT ON LEGISLATION BY THE ANIMAL LAW COMMITTEE,  
CIVIL COURT COMMITTEE,  
CONSUMER AFFAIRS COMMITTEE AND THE LEGAL PROBLEMS OF THE  
AGING COMMITTEE**

**A.7138  
S.795**

**M. of A. Weinstein  
Sen. Comrie**

AN ACT to amend the general business law, the financial services law and the insurance law, in relation to enacting the “Consumer and Small Business Protection Act.”

**THIS LEGISLATION IS APPROVED**

**I. SUMMARY OF THE PROPOSED LEGISLATION**

The proposed legislation,<sup>1</sup> titled the Consumer and Small Business Protection Act (“CSPA”), would amend New York General Business Law § 349 (“GBL § 349”), which currently prohibits deceptive business acts and practices, to:

1. expand conduct prohibited by the statute to include unfair and abusive business acts and practices (§§ (a)(1)-(3));<sup>2</sup>
2. eliminate the judicially imposed requirement of consumer-oriented conduct (§ (h)(1));
3. make reasonable attorney’s fees to a prevailing plaintiff mandatory, not discretionary, and include costs (§ (h)(1));
4. define “person” broadly and codify current New York organizational and third-party standing (§§ (h)(1)(i)&(ii));
5. permit class actions for actual, statutory and punitive damages (§ (h)(2)); and

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<sup>1</sup> A.7138, Assemb. Reg. Sess. 2023-2024 (N.Y. 2023), <https://assembly.state.ny.us/leg/?bn=a7138>; S.795, Sen. Reg. Sess. 2023-2024 (N.Y. 2023), <https://www.nysenate.gov/legislation/bills/2023/s795>. (All websites last visited May 12, 2023).

<sup>2</sup> The definitions of “unfair,” “deceptive,” and “abusive” are also set forth in these subsections.

**About the Association**

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6. recognize standing for organizations that test products and services for compliance with GBL § 349 (§ (h)(3)).

## II. BACKGROUND

Section 349 of New York’s General Business Law prohibits a wide range of deceptive business practices but lacks several key provisions that are found in similar statutes in other states. Most critically, GBL § 349 does not prohibit *unfair* and/or *abusive* business acts and practices.<sup>3</sup> This omission leaves New York consumers and small business owners vulnerable to unscrupulous business practices that may be unfair or abusive, but not deceptive. It also leaves New Yorkers dependent on financially constrained government agencies to protect consumers and animals from mistreatment.

The scope of GBL § 349 has been further limited by judicial interpretations that added a “consumer-oriented conduct” requirement to the statute and thereby restricted its purview to business practices directed toward the public at large.<sup>4</sup> The statute itself does not contain this limitation. Rather, the plain language of the statute covers “acts,” which need not consist of conduct toward consumers in general but can include individual acts directed toward even one individual, in addition to “practices,” which may include repeated and widespread misconduct. However, due to the imposition of a judicially created “consumer-oriented” standard, consumers must now not only demonstrate that they were cheated, but they must also convince courts that the complained-of practices also affect the greater public.

In practice, this interpretation has created a burdensome pleading requirement for many GBL § 349 violations. Individual consumers have been effectively required to expend the resources of an Attorney General’s office to investigate whether a business’s conduct impacts, or could impact, the public at large, and to prematurely develop this otherwise discoverable evidence before filing suit.

GBL § 349 is lacking in other respects. For instance, GBL § 349 does not explicitly codify standing for non-profit organizations with relevant missions to represent the interests of the general public. This effectively increases the burden on the government to address widespread deceptive business practices, given that consumers are typically unable to devote the resources necessary to investigate and prosecute such misconduct.

Furthermore, GBL § 349 does not explicitly recognize “tester standing” for plaintiffs who test or evaluate products and services for compliance with the law. By codifying tester standing,

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<sup>3</sup> See, e.g., Cal. Bus. & Prof. Code § 17200 (prohibiting “any unlawful, unfair or fraudulent business act or practice”); Ind. Code § 24-5-0.5-3 (banning any “unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction”); Md. Code Ann., Comm. Law §§ 13-301, 13-303 (prohibiting any “unfair, abusive, or deceptive trade practice”); cf. Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5536 (prohibiting “engag[ing] in any unfair, deceptive, or abusive act or practice”).

<sup>4</sup> See, e.g., *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 623 (2009) (“[S]ection 349 is directed at wrongs against the consuming public . . . .”); *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995) (“Plaintiff . . . must demonstrate that the acts or practices have a broader impact on consumers at large”).

the District of Columbia has provided a clear path that non-profits can rely upon to demonstrate standing. This basis for standing has been successfully invoked by organizations that evaluate food products and production practices.<sup>5</sup> Because New York does not provide plaintiffs with this concrete method for establishing standing, non-profit organizations have to accept the substantial risk that they may invest vast resources on investigations and litigation that *reveal and prove misconduct* but that ultimately fail to meet the current vague and discretionary standing requirement imposed by New York courts. Considering this risk, organizations are often deterred from investing the investigatory and legal resources required to expose deceptive business practices in the first place.

Finally, the increased statutory damages and lifting of the cap on damages for knowing and willful violations serve as important deterrents to unlawful conduct.

### III. JUSTIFICATION

The Committees support the CSPA because, time and again, lawyers practicing in this area see low-income individuals and small businesses sued for financial obligations resulting from unfair and abusive business conduct. By not broadly prohibiting unfair business practices, New York lags behind most states in protecting its consumers and small businesses. It is time for New York to have a proper “UDAP,” and to ban unfair and deceptive business acts and practices, as 39 other states and the District of Columbia do.<sup>6</sup>

Unfairness prohibitions in other states have been used to combat unfair terms in adhesion contracts,<sup>7</sup> high-pressure sales tactics,<sup>8</sup> charging unconscionable collection fees,<sup>9</sup> and taking advantage of homeowners with poor credit.<sup>10</sup> Prohibitions against abusive business practices, which arose after the 2008 mortgage crisis, buttress UDAP statutes by creating a more flexible, expansive standard than “unfair” or “deceptive.”<sup>11</sup> They have been used against a check casher who systematically hid its fees,<sup>12</sup> a bank that opened accounts without authorization,<sup>13</sup> a debt

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<sup>5</sup> See, e.g., *Organic Consumers Ass’n v. General Mills, Inc.*, 2017 D.C. Super. LEXIS 4, \*1 (finding that Organic Consumers Association established standing by testing “100% natural” granola products for residues of synthetic biocide).

<sup>6</sup> National Consumer Law Center, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws 14* (March 2018), <http://www.nclc.org/images/pdf/udap/udap-report.pdf>. “UDAP” refers to Unfair or Deceptive Acts or Practices.

<sup>7</sup> *State v. Kaiser*, 254 P.3d 850 (Wash. Ct. App. 2011).

<sup>8</sup> *Hill v. Wells Fargo Bank*, 946 F. Supp. 2d 817 (N.D. Ill. 2013).

<sup>9</sup> *King’s Choice Neckwear, Inc. v. FedEx Corp.*, 2007 WL 4554220 (D.N.J. Dec. 21, 2007).

<sup>10</sup> *United Companies Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192 (D. Mass. 1998).

<sup>11</sup> *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015).

<sup>12</sup> Complaint, *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, Case No. 3:16-cv-00356-WHB-JCG (S.D. Miss. May 11, 2016).

<sup>13</sup> Consent Order, *In re Wells Fargo Bank, N.A.*, CFPB No. 2016-CFPB-0015 (Sept. 8, 2016).

settlement company that signed up consumers who could not benefit from its services,<sup>14</sup> and a for-profit school that pushed students into high-risk loans that it knew were likely to default.<sup>15</sup>

The CSPA would protect small business owners, who, like consumers, are sometimes preyed upon by unscrupulous businesses. One prominent example of this is Northern Leasing Systems, a company that the New York Attorney General sued based on its sale of shoddy point-of-sale systems to small business owners at enormously overinflated prices and under deceptive and unfair terms. Despite the egregious nature of the conduct and that the impact was felt most acutely by low-income individuals, a New York court found that the protections of GBL § 349 did not apply to the victims of Northern Leasing's conduct.<sup>16</sup> Another example of small businesses left unprotected by the current law are taxi drivers who undertook large loan obligations under dubious terms, but are not able to avail themselves of protections offered to consumers despite similar misconduct in the provision of loans.<sup>17</sup> By defining "person" broadly under the statute, this law will help to ensure a fairer marketplace for businesses large and small.

The proposed legislation would also protect New York's most marginalized communities by removing the court-imposed "consumer-oriented" limitation on the existing statute, which has been used to bar relief to low-income New Yorkers deceived by businesses. For instance, despite the central importance of housing in the lives of most consumers, some courts have held that landlord-tenant transactions categorically are not consumer-oriented.<sup>18</sup> The consumer-oriented prong was also used to deny relief to patients of a hospital who could not access their medical records without a fee, even though this practice clearly had an impact on low-income New Yorkers' health care.<sup>19</sup> Expansion of individuals covered by the protections of GBL 349 and elimination of the "consumer oriented" requirement would enable those harmed by unfair conduct to challenge that conduct in court without an undue burden of proving that the unfair or deceptive conduct is part of a recurring pattern or larger business practice.

Providing more individuals with true access to justice in these cases should not raise concerns about a flood of groundless litigation. While New York's proposed law would allow individuals to pursue unfair and abusive conduct not addressed by existing law, states that have enacted similar statutes have not been overwhelmed with lawsuits.<sup>20</sup> And identical concerns of an explosion of "spurious litigation" were raised when a private right of action was added to GBL § 349 in 1980, and no such thing has come to pass. Nor does the proposed law limit a defendant's existing ability to oppose or dismiss baseless claims.

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<sup>14</sup> Complaint, *Consumer Fin. Prot. Bureau v. Freedom Debt Relief, L.L.C.*, Case No. 3:17-cv-06484 (N.D. Cal. Nov. 8, 2017).

<sup>15</sup> Complaint, *Consumer Fin. Prot. Bureau v. IIT Educ. Servs., Inc.*, Case No. 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014).

<sup>16</sup> See, e.g., *People v. N. Leasing Sys., Inc.*, 2021 N.Y. Slip Op. 914 (N.Y. App. Div. 2021).

<sup>17</sup> See, e.g., Brian Rosenthal, "They Were Conned": How Reckless Loans Devastated a Generation of Taxi Drivers," Dec. 23, 2019, available at <https://www.nytimes.com/2019/12/23/nyregion/nyc-taxi-suicides.html>.

<sup>18</sup> *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 423 (1st Dept. 2010).

<sup>19</sup> *Smalls v. St. John's Episcopal Hosp.*, 152 A.D.3d 629, 630, 58 N.Y.S.3d 536, 538–39 (App. Div. 2d Dept. 2017).

<sup>20</sup> Jeff Sovern, *Will New York Catch Up to Mississippi in Protecting Consumers?*, Consumer Law & Policy Blog (Jun. 7, 2019).

Awarding reasonable attorney's fees to a prevailing plaintiff is essential to advancing the purpose of any consumer protection statute. Fee-shifting provisions are the norm in federal consumer protection statutes, such as the Fair Debt Collection Practices Act,<sup>21</sup> Fair Credit Reporting Act,<sup>22</sup> Truth in Lending Act,<sup>23</sup> Equal Credit Opportunity Act,<sup>24</sup> and many others. The purpose of fee-shifting statutes is to make it possible for private attorneys to bring valid claims on behalf of consumers who otherwise could not afford to retain an attorney on their own, even if their dollar losses are relatively minor. Fee-shifting provisions, therefore, exist to attract lawyers to cases that advance the public interest in an honest marketplace, but which may not otherwise be economically feasible. GBL § 349 currently makes the award of attorney's fees merely discretionary, which makes it hard for consumers, and the public, to reap the benefits of a fee-shifting statute because attorneys are reluctant to take even the best cases due to the uncertainty that their investment in time and resources will be justly compensated. For this reason, New York should join New Jersey,<sup>25</sup> Massachusetts,<sup>26</sup> Maine,<sup>27</sup> Texas,<sup>28</sup> and other states in making reasonable attorney fees and costs to the prevailing plaintiff mandatory.

As an additional point of justification, the Animal Law Committee supports the CSPA because it will increase the ability of non-profit organizations to hold businesses accountable for making misleading marketing representations regarding animal welfare. A 2013 survey conducted by the American Humane Association found that 89% of consumers were very concerned about farm animal welfare, and 74% stated that they were willing to pay more for humanely raised meat products.<sup>29</sup> In line with these findings, a 2018 study published in the journal *Animals* found that the weighted average of consumers' marginal willingness to pay for products from humanely treated animals was \$0.96 for one pound of chicken breast (a 48% premium).<sup>30</sup> This growing concern for animal welfare has led to a proliferation of false and misleading animal welfare representations (e.g., "humane," "free-range," "naturally-raised" etc.) in the marketplace.<sup>31</sup> But,

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<sup>21</sup> 15 U.S.C. § 1692k.

<sup>22</sup> 15 U.S.C. §§ 1681n(a)(3), § 1681o(a)(2).

<sup>23</sup> 15 U.S.C. § 1640(a)(3).

<sup>24</sup> 15 U.S.C. § 1691e(d).

<sup>25</sup> N.J. Stat. § 56:8-19.

<sup>26</sup> Mass. Ann. Laws ch. 93A, § 9.

<sup>27</sup> Me. Rev. Stat. tit. 5, § 213.

<sup>28</sup> Tex. Bus. & Com. Code § 17.50(d).

<sup>29</sup> American Humane Association, *Humane Heartland Farm Animal Welfare Survey* (2013), available at <https://www.americanhumane.org/publication/humane-heartland-farm-animal-welfare-survey/>.

<sup>30</sup> C. Victor Spain et al., *Are They Buying It? United States Consumers' Changing Attitudes Toward More Humanely Raised Meat, Eggs, and Dairy*, 8 ANIMALS 128 (2018), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6116027/pdf/animals-08-00128.pdf>.

<sup>31</sup> See, e.g., Deena Shanker, *Fight Over Pilgrim's Pride Chicken Claims Expands to Seven States*, Bloomberg (Mar. 12, 2019), <https://www.bloomberg.com/news/articles/2019-03-12/fight-over-pilgrim-s-pride-chicken-claims-expands-to-seven-states>.

because of a lack of transparency regarding the industrial production of animal products,<sup>32</sup> it is extremely challenging for individual consumers to learn when companies fail to live up to their “humane” claims. Furthermore, because state law false advertising claims based on meat and poultry product *labels* (as opposed to non-label marketing) are preempted by federal law,<sup>33</sup> there is a greater challenge and a smaller incentive for private law firms to pursue consumer class actions in this context.

Non-profit organizations, especially animal protection organizations, are particularly well-placed to investigate and litigate these “humane washing” claims against businesses that falsely or misleadingly advertise their animal products with terms like “humane,” “natural,” and “pasture-raised.”<sup>34</sup> By codifying organizational standing and tester standing, and through removing the consumer-oriented conduct requirement in GBL § 349, the proposed legislation will enable non-profit plaintiffs — who have resources and expertise that individual consumers lack — to more successfully challenge “humane washing” in New York courts.

#### IV. CONCLUSION

For the reasons above, the Animal Law Committee, Civil Court Committee, Consumer Affairs and Legal Problems of the Aging Committee support the proposed legislation.

Animal Law Committee  
Robyn S. Hederman & Rebecca Seltzer, Co-Chairs

Civil Court Committee  
Sidney Cherubin, Chair

Consumer Affairs Committee  
Jolevete Mitchell, Chair

Legal Problems of the Aging Committee  
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<sup>32</sup> See, e.g., Kelsey Piper, “Ag-gag Laws” Hide the Cruelty of Factory Farms from the Public. Courts Are Striking Them Down, Vox (Jan. 11, 2019), <https://www.vox.com/future-perfect/2019/1/11/18176551/ag-gag-laws-factory-farms-explained>.

<sup>33</sup> See *Organic Consumers Ass’n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1014 (N.D. Cal. 2018).

<sup>34</sup> See, e.g., *Friends of the Earth v. Sanderson Farms, Inc.*, No. 17-cv-03592-RS, 2018 U.S. Dist. LEXIS 220547, at \*15 (N.D. Cal. Dec. 3, 2018) (“Plaintiffs have sufficiently plead that a reasonable consumer understands the use of ‘natural’ to mean a host of expectations, including the fair inference that the animal was allowed to move outdoors.”); *Organic Consumers Ass’n v. Ben & Jerry’s Homemade, Inc.*, 2019 D.C. Super. LEXIS 1, \*5 (“a reasonable consumer could plausibly interpret Ben & Jerry’s labeling and marketing as affirmatively (and inaccurately) communicating that the company’s ice cream products are sourced exclusively from Caring Dairies and/or other humane sources”).