New York Court of Appeals Limits Remedies Under NY General Business Law Sections

Responding to certified questions from the United States Court of Appeals for the Second Circuit, on May 30, 2013, the New York Court of Appeals held in *Schlessinger v. Valspar Corporation,*[1] that "[New York] General Business Law § 395-a does not make contract clauses that contradict its terms null and void,"[2] and that a violation of § 395-a alone is not necessarily "deception" giving rise to a remedy for fraud under General Business Law § 349.[3]

I. Background

Plaintiffs Brenda Pianko and Lori Schlessinger purchased furniture from the Fortunoff Department Store ("Fortunoff") together with a Guardsman Elite 5 Year Furniture Protection Plan (the "Plan"). The Plan was provided by Valspar Corporation ("Valspar") and offered a variety of services in the event that the furniture became stained or damaged during the five year period after purchase. The Plan also contained a "store closure provision," which stipulated that "if the particular store location where you had originally purchased your furniture . . . has closed . . . [Valspar] will give you a refund of the original purchase price of this protection plan."[4]

Subsequent to Plaintiffs' purchases, Fortunoff filed for bankruptcy, and the store at which Plaintiffs had purchased their furniture closed. Pianko, but not Schlessinger, made a claim pursuant to the Plan for which Valspar gave her a full refund ($100) for what she had paid for the Plan.

Plaintiffs then brought suit against Valspar in the United States District Court for the Eastern District of New York, asserting two causes of action: (1) breach of contract under GBL § 395-a,[5] and (2) damages under GBL § 349.[6] Plaintiffs claimed that the store closure provision violated GBL § 395-a(2). Plaintiffs also brought suit on behalf of two putative classes of New York residents—those who had previously purchased or will purchase a service contract, and those whose claims were resolved by payment of a full Plan refund between June 1, 2004 and judgment in this case.[7]

The District Court dismissed the complaint and Plaintiffs appealed to the Second Circuit, which certified the following questions to the New York Court of Appeals:

---

[1] 2013 WL 2338425, 2013 N.Y. Slip op. No. 03870 (N.Y. May 30, 2013).

[2] Opinion at 2.

[3] Opinion at 8.

[4] Opinion at 2.

[5] With exceptions not relevant here, New York General Business Law ("GBL") § 395-a(2) states that "[n]o maintenance agreement covering parts and/or service shall be terminated at the election of the party providing such parts and/or service during the term of the agreement." Enforcement of GBL §395 is assigned exclusively to government officials. There is no express or implied private right of action to enforce GBL §395. *See* GBL §395-a(4).

[6] GBL §349(a) 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." A private right of action for violation of GBL §349 is set out in GBL §349(h).

[7] Opinion at 3.

(1) "May parties seek to have contractual provisions that run contrary to General Business Law § 395-a declared void as against public policy?"

(2) "May plaintiffs bring suit pursuant to § 349 on the theory that defendants deceived them by including a contractual provision that violates § 395-a and later enforcing th[e] agreement [in question]?"[8]

The New York Court of Appeals accepted the certified questions and, assuming that the store closure provision did violate GBL § 395-a(2), answered both in the negative.

II. GBL § 395-a Claim

Since Valspar acted in conformity with its contractual obligations by issuing Pianko a full refund for the purchase price of the Plan, Pianko could only succeed on her breach of contract claim if GBL § 395-a rendered the store closure provision null and void, thereby removing the refund as a contractual option under the Plan and casting Valspar into breach of contract.[9]

The Court of Appeals noted that GBL § 395-a has no express or implied private right of action. Furthermore, the Court noted that the statutory provision includes no specific language invalidating inconsistent contract provisions.[10] The Court was therefore unwilling to undermine the deliberate decision of the legislature to leave out such enforcement mechanisms, and thereby refused to find a right of private action under § 395-a.

Since accepting Painko's claim as valid would provide a backdoor to a private cause of action,[11] the Court held that § 395-a does not make a contract clause that contradicts its terms null and void.[12]

III. GBL § 349 Claim

The second certified question before the Court stemmed from Plaintiffs' second cause of action, asserting a private right of action for damages under GBL § 349. Plaintiffs claimed that Valspar's violation of § 395-a—the insertion of the unlawful store closure provision into the Plan—constituted a deceptive act or practice because Valspar impliedly represented that this provision was valid. The Court found this theory to be "too attenuated to be plausible,"[13] and extending far beyond the reach of the statutory language.

The Court held that GBL § 349 applied only to conduct that tends to deceive consumers, and does not grant a private right of action for *every* improper or illegal business practice. In its discussion, the Court made a distinction between acts that are "unlawful" and acts that are "deceptive." The Court stated that § 349 "cannot fairly be understood to mean that everyone who acts unlawfully, and does not admit the transgression, is being deceptive."[14] Such an interpretation would ultimately cover *all* misconduct by businesses, which is far beyond the reach of the statutory provision.

---

[8] Opinion at 4-5.

[9] Opinion at 5.

[10] Opinion at 6.

[11] *Id.*

[12] Opinion at 2.

[13] Opinion at 8.

[14] *Id.*

In their argument, the Plaintiffs relied on three gift card cases to support their claim. In those cases, printing contract clauses in small type was found to deceive consumers. However, the Court distinguished these cases from the case at hand by finding that the inclusion of a termination provision in the contract clause does not reach that same level of tending to deceive consumers as does small print on a gift card. Thus, the Court held that the violation of a section of a statute (here, § 395-a) without more, does not give rise to a cause of action under § 349. Significantly, this holding rejected an attempt to expand § 349 to include "unlawful" conduct as a "deceptive act."

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.