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Where (Literally) Is the Deception?

Analyzing the reach of New York's consumer protection statute in the digital age.

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THE NEW YORK General Business law 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." N.Y. Gen. Bus. §349 (McKinney 2012).

In *Goshen v. Mutual Life Insurance Company of New York*, the New York Court of Appeals held that the "territorial reach" of §349 is limited to deceptive acts or practices that occur in the state of New York. "[T]o qualify as a prohibited act under the statute, the deception of a consumer must occur in New York."[1]

Plaintiff Goshen was a Florida resident who purchased a "vanishing premium" policy from the defendant, Mutual Life Insurance Company of New York (MONY). The plaintiff alleged that the vanishing premium concept was conceived and orchestrated in New York prior to any dissemination to potential consumers and that the actionable deception occurred in New York although he "ultimately purchased a vanishing premium policy through a MONY representative in Florida." The court noted that MONY had "extensive ties to New York" and conducted business in New York.[2]

Despite MONY's "extensive ties" to New York, the Court of Appeals held that the origin of any advertising or promotional conduct was "irrelevant" since Goshen received MONY's information in Florida and purchased his policy there. "Plainly, for purposes of section 349, any deception took place in Florida, not New York." Accordingly, Goshen's complaint was dismissed.[3]

In *Goshen*, the allegedly deceptive statements were made in person in Florida by the defendant's representative. But in other cases, the allegedly deceptive statements may not be made in person—they may be on a website—which poses a question as to whether the deception has occurred in New York if the consumer is out-of-state and the defendant is in New York.

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BIGSTOCK

The New York Court of Appeals provided guidance on this question in *Scott v. Bell Atlantic*, the companion case decided along with *Goshen*. The *Scott* plaintiffs were consumers who subscribed to the defendants' digital subscriber line (DSL) Internet service. One of the defendants' principal places of business was New York. Three of the plaintiffs were residents of New York and the remainder were out-of-state residents. The defendants used their website, as well as print media, to advertise their DSL service. The plaintiffs challenged as deceptive the defendants' statements that their DSL service was "fast," "dedicated," and "simple," and that it "[w]orks on your existing phone line and our self-installation kit can be set up in minutes."[4]

The court held that the out-of-state plaintiffs in *Scott* "cannot allege that they were deceived in New York," and it dismissed the complaint as to these out-of-state consumers.[5]

The court held that both the text of the statute and its legislative history indicated that "the intent is to protect consumers in their transactions that take place in New York State," and that the statute was "not intended to police the out-of-state transactions of New York companies."[6] Accordingly, the fact that the defendants were operating from New York did not bring the alleged deception within the territorial reach of the General Business Law.

Two Lines of Cases

The application of the Court of Appeals holdings in *Goshen* and *Scott* has spawned two divergent lines of cases.

One line of cases asks whether the consumer has been deceived in New York, i.e., the focus is on the location of the consumer and where the deceptive action occurred, dismissing complaints where the deception has occurred outside New York, even if the defendant can be shown to have numerous ties to New York.

The other line of cases focuses on the "transaction" and asks whether "some part" of the transaction has occurred in New York, stating that complaints with respect to out-of-state plaintiffs will be upheld if "some part" of the transaction has occurred in New York.

Focus on the Deceptive Statement

The line of cases focusing on the location of the deceptive statement or action is exemplified by *Kaufman v. Sirius XM Radio*. In that case, the out-of-state plaintiff Kaufman alleged that the defendant Sirius engaged in deceptive conduct in connection with the contractual payment terms found in certain Sirius standard subscriber contracts. Sirius argued that Kaufman had received the invoice seeking the payment complained of in Nevada, where he resided, and that there was no deception alleged in New York.[7]

The court noted that the plaintiff had alleged a "laundry-list of connections to New York—none of which supports the inference that the deception occurred in New York." The list of connections included Sirius' having its principal place of business and corporate offices in New York, furnishing Internet or satellite radio service in New York, drafting the allegedly deceptive payment terms in New York, formulating and approving in New York the content of the allegedly offending invoices seeking payment, and collecting the payments in New York. The plaintiff also relied on the allegation that the "transaction" involving payment for services allegedly occurred in New York and that the accounting for the payments was performed in New York.[8]

The court in *Kaufman* held that:

> Plaintiffs have alleged many signals emanating from New York, but have failed to plead the essential act that must have transpired within the boundaries of the state to maintain a viable suit under GBL §349: that the deception they allege having experienced occurred in New York.[9]

There are numerous other cases in this line of authority focusing on whether the deception

itself occurs in New York. In *Drizin v. Sprint*, the Appellate Division, First Department, held that: "Section 349 requires the deceptive transaction to have occurred in New York."[10] *Chiste v. Hotels.com* held that the alleged deception occurred at the time that the out-of-state plaintiffs made and paid for their reservations on the Internet from their respective home states. It did not matter that the reservations were for stays in New York hotels.[11] In *People v. Direct Revenue*, the court dismissed the attorney general's petition, citing *Goshen*'s holding that "the deception of a consumer must occur in New York."[12]

'Some Part of the Transaction'

The second line of authority, focusing on the "transaction" and whether "some part" of it has occurred in New York, is exemplified by *People v. Telehublink Corp.*[13] The defendant Telehublink was a Delaware corporation with its principal offices in Massachusetts. It sold its "low interest" credit card product to consumers throughout the United States by deceptive claims and statements by telephone from call centers located in Montreal. The New York Attorney General sought relief based not only on New York consumers having received the deceptive telephone calls in New York, but also with respect to out-of-state consumers who received the calls in other states. The *Telehublink* court held that the out-of-state consumers were within the reach of GBL §349 based upon Telehublink having used "a New York address to send and receive correspondence related to the telemarketing scheme," including sending out the credit cards that it had mischaracterized in the telephone calls.[14]

In what is apparently dicta, the court in *Mountz v. Global Vision Products*, citing *Goshen*, stated that "some part of the underlying transaction" must occur in New York State[15]—although no such statement appears in *Goshen*.[16] The dicta in *Mountz* also refers to *Telehublink* and to "the receipt of Internet orders physically within New York" as "apparently" forming a "locus for a transaction covered by the New York consumer protection statutes."[17] Other cases also have focused on the "transaction," sometimes in dicta. In *People v. Direct Revenue*, cited above in the first line of cases, the court dismissed claims as to "unidentified consumers" because the petitioner attorney general had not stated "where the transaction occurred." Then citing the dicta in *Mountz*, the court went on to state that "at least some part of the underlying unlawful transaction affecting [plaintiffs] must be completed in this state."[18]

In *People v. H&R Block*, respondent H&R Block Services sold an individual retirement account (IRA) to consumers that allowed for only one investment option, a New York money market account, and the customers were advised that the New York business would be their "authorized agent."[19] Citing *Telehublink*, but not mentioning *Goshen*, the court held in a one-paragraph reference to §349's territorial limitation that the defendants' use of a "New York business to complete the deceptive transactions" was sufficient to avoid dismissal since it "threatened" New York's "interest in securing an honest marketplace in which to transact business."[20]

Party Tactics, Court Analyses

For plaintiffs and defendants, the tactical "take-away" here is obvious: Where territorial reach is an issue, plaintiffs should emphasize the line of cases that focuses on the broader standard that only "some part of the transaction" must occur in New York, and try to distinguish the cases that focus on whether the deception of the consumer itself occurred in New York. Defendants, of course, should do the reverse.

But what's a court to do? Well, for starters, courts should address straight-forwardly that there are two largely inconsistent lines of cases and explain why one is being followed and the other is not. In order to make that call, a court should also go back to the source, the *Goshen* and *Scott* decisions, and the rationale underlying that decision, in determining which of the lower court lines of cases is the more authoritative.

In the *Goshen* and *Scott* decisions, the Court of Appeals flatly held that "the deception of a consumer must occur in New York."[21] It did *not* hold that "some part of the transaction" must occur in New York. The cases that examine the connections of the "transaction" to New York, rather than whether the deception itself occurred in New York, are not consistent with the Court of Appeal's ruling, and seem instead to suffer from "analysis drift"—applying the type of analysis applicable in the personal jurisdiction arena, instead of that required by §349.

In **'Goshen,'** the New York Court of Appeals held that the **'territorial reach'** of §349 is limited to **deceptive acts or practices** that occur in the state of New York.

As the Court of Appeals pointed out, the legislative history of §349, as well as the constitutional limitations on a state extending its laws beyond its borders, led it to the conclusion that the alleged deception must occur in New York. At the time of the enactment of §349 in 1980, the New York attorney general's memorandum to the governor described the law as adding "significant new protection to consumers *in this state*."[22]

Accordingly, as the court of appeals held, if an out-of-state consumer comes to New York and is deceived in New York, then the action falls within the territorial reach of §349.[23] On the other hand, if, as in *Scott*, the deception is on a website and the consumer reads that deception in his home state of California, then the deception has not occurred in New York and §349 does not apply, the defendants' otherwise perhaps extensive contacts with New York state notwithstanding. The consumer in California is protected by California's laws.

The defendants in *Goshen* and *Scott*, as well as amicus briefs, also argued that an application of §349 beyond New York's borders would present constitutional questions. By requiring that the deception occur in New York, the Court of Appeals avoided these constitutional issues; it noted that other states have the right to regulate their own markets and to enforce their own consumer protection laws without interference from New York through a beyond-New York-borders application of §349.[24]

Decisions From Other States

Interestingly, courts in other jurisdictions that have applied §349 have seen the Court of Appeals' holdings in *Goshen* and *Scott* more clearly than some of the lower New York state courts.

For example, in *Broida v. Sirius XM Radio*, the court held that plaintiff, a Colorado resident, "is simply wrong to insist that it is the locus of the 'transaction' rather than the actual deception that matters."[25] In *Gavin v. AT&T*, the court dismissed the plaintiff's §349 claim, holding that "here, the deception (if any) occurred in Illinois where Plaintiff received the December 2000 Notice and relied on it…."[26] While plaintiff's claim did "not automatically fail because she is not a New York resident," it was not enough that [the defendants] maintained offices, contracted for post-merger services, and mailed and received letters (including the class members' certificates and fees) in New York.[27] There are numerous other decisions to the same effect from jurisdictions outside New York.

The teachings of *Goshen* would appear to be: If the deceptive website of a California corporation is viewed in New York by, say, a Nevada resident, then there is deception in New York and §349 applies; conversely, if the deceptive website of a New York corporation is viewed in California by a New York resident, then the deception has occurred in California and §349 does not apply.

In any event, clarification by the courts as to which line of cases interpreting the territorial reach of GBL §349 is the more authoritative would be useful, and the rationale for that choice should be based on the *Goshen* and *Scott* decision itself.

1. 98 N.Y.2d 314, 321, 325 (2002).
2. Id. at 321-22, 325-26.
3. Id. at 326, 322.
4. Id. at 322.
5. Id. at 326, 322-23.
6. Id. at 325.
7. 751 F. Supp. 2d 681, 686 (S.D.N.Y. 2010).
8. Id. at 687-88.
9. Id. at 688.
10. 785 N.Y.S.2d 428, 429 (1st Dept. 2004).
11. 756 F. Supp. 2d 382, 403 (S.D.N.Y. 2010).
12. 862 N.Y.S.2d 816, No. 401325/06, 2008 WL 1849855, at *7 (Sup. Ct. N.Y. Cty. March 12, 2008); see also *Bezuszka v. L.A. Models*, No. 04 Civ. 7703 (NLB), 2006 WL 770526, at *15 (S.D.N.Y. March 24, 2006) (complaint "does not allege that any deception occurred in New York, as required by the case law [citing *Goshen*]").
13. 756 N.Y.S.2d 285 (3d Dept. 2003).
14 Id. at 286-87, 289.
15 770 N.Y.S.2d 603, 608 (Sup. Ct. N.Y. Cty. 2003) (dicta because the court dismissed the complaint against out-of-state plaintiffs holding that, as to them, the complaint pled "no consumer contact occurring within New York State").
16. Id.
17. Id.
18. 2008 WL 1849855, at *6-7.
19. 870 N.Y.S.2d 315, 316 (1st Dept. 2009).
20. Id.; see also *People v. National Home Protection*, No. 400431/09, 2009 WL 4821492 (Sup. Ct. N.Y. Cty. Dec. 8, 2009) (allegedly false statements made in telephone calls from New York; gift card rebate forms at issue sent to New York; contract called for binding arbitration in New York; if "at least some part" of the deceptive acts take place in New York, territorial limitation satisfied).
21. 98 N.Y.2d at 321.
22. Id. at 325 (emphasis added).
23. Id.
24. Id.
25. No. 11cv1219, 2011 WL 6013588, at *2 (S.D. Cal. Dec. 1, 2011).
26. 543 F. Supp. 2d 885, 908 (N.D. Ill. 2008).
27. Id. at 907-08.