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COURT OF APPEALS

STATE OF NEW YORK

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HIMMELSTEIN, MCCONNELL, GRIBBEN,  
DONOGHUE & JOSEPH, LLP, ET AL.,

Appellants,

-against-

NO. 39

MATTHEW BENDER & COMPANY, INC.,

Respondent.

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20 Eagle Street  
Albany, New York  
May 5, 2021

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Karen Schiffmiller  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 39, Himmelstein,  
2 McConnell, Gribben, Donoghue & Joseph v. Matthew Bender &  
3 Company.

4 Counsel?

5 MR. FISHMAN: Thank you, Judge. And good  
6 afternoon, may it please the court, my name is James  
7 Fishman on behalf of the appellants. We're here today to  
8 ask this court to reverse the First Department's dismissal  
9 or decision that upheld the pre-answered dismissal of the  
10 complaint in this action. The case involves some  
11 significant issues concerning the ability of individual  
12 consumers, who are acting as "private attorneys general" to  
13 enforce the New York Deceptive Practices Act and to seek  
14 damages and injunctive relief against businesses that  
15 engage in deceptive business practices.

16 JUDGE STEIN: Counsel, can we jump to the end,  
17 first - - -

18 MR. FISHMAN: Sure.

19 JUDGE STEIN: - - - and talk about the injury  
20 alleged here.

21 MR. FISHMAN: Sure.

22 JUDGE STEIN: And are - - - are you - - - are you  
23 - - - are you alleging that there was a price premium on  
24 the Tanbook due to the purported misrepresentations, and  
25 I'll weave into that question also, how - - - how - - - how



1 do you apply Small here?

2 MR. FISHMAN: Absolutely, Judge, and I agree  
3 that's a very important issue here. It was an issue that  
4 was addressed by the First Department, not the motion  
5 court. I think that price premium is one way to address  
6 the injury; it's not the only way. Certainly, somebody  
7 who's looking to buy this collection or compilation would  
8 not pay what they paid for it, if he - - - if they knew it  
9 didn't have everything it was supposed to have or that it  
10 was told - - - that they were told it had. So yes, it did  
11 cost more. We think the value is zero. Ultimately, I  
12 think it's a jury question, to determine how much is this  
13 book worth, and it's not a summary dismissal issue.

14 On the other hand, the other way to look at it is  
15 that the plaintiffs were deprived of the benefit of the  
16 bargain. And there's a long history of cases under GBL 349  
17 that say, and we've cited them in our brief, referenced  
18 cases from, I think, thirty-five other states that have  
19 similar statutes.

20 JUDGE STEIN: But - - - but would we have to  
21 overrule Small to - - - to say that you had alleged a  
22 cognizable injury here?

23 MR. FISHMAN: No, Judge, we're not asking or - -  
24 - or believe that Small needs to be overturned. I do,  
25 however, believe that Small should be limited to its very



1 unique facts. In Small, it involved a representation that  
2 cigarettes were not addictive. The people who bought those  
3 cigarettes, still got cigarettes. Whether or not they were  
4 addictive or not didn't create an injury. They still got  
5 the cigarettes, presumably smoked them, and got the benefit  
6 of what they paid for.

7 So using Small here - - -

8 JUDGE RIVERA: But yeah, but didn't they argue  
9 that they never would have bought the cigarettes, if - - -  
10 if they had known about its addictive qualities and not  
11 been misled by the - - -

12 MR. FISHMAN: Well - - -

13 JUDGE RIVERA: In that place, it really was the  
14 tobacco industry - - -

15 MR. FISHMAN: Yeah.

16 JUDGE RIVERA: - - - that sued all of them - - -

17 MR. FISHMAN: I mean - - -

18 JUDGE RIVERA: - - - and isn't that similar to  
19 the argument here - - -

20 MR. FISHMAN: Not really, Judge.

21 JUDGE RIVERA: - - - where you're basically  
22 saying, this has zero value; it's worthless to us, which I  
23 had thought that means, and therefore I would not have  
24 bought it if I had known it's incomplete.

25 MR. FISHMAN: I think there's a world of



1 difference between the knowledge of addictiveness of  
2 cigarettes, which is well known - - - was well known at the  
3 time. It didn't require a cigarette maker to lie about it  
4 for people to know that cigarettes were addictive.

5 JUDGE RIVERA: Yeah, but then that goes to that  
6 you could not have possibly been deceived - - -

7 MR. FISHMAN: Well - - -

8 JUDGE RIVERA: - - - which is another issue - - -

9 MR. FISHMAN: On that case, yes.

10 JUDGE RIVERA: - - - you're going to get to in  
11 your - - - in your case - - -

12 MR. FISHMAN: Well - - -

13 JUDGE RIVERA: - - - and the court - - -

14 MR. FISHMAN: I'm sorry.

15 JUDGE RIVERA: - - - of course, in Small, says  
16 deception alone is not an injury, so the court must have  
17 thought that the argument was that they were deceived.

18 MR. FISHMAN: Well, I think that applying Small  
19 to these facts is - - - is incorrect, and it would, in  
20 fact, result in an evisceration of the statute because this  
21 is a bait-and-switch case or a benefit of the bargain. And  
22 as I said, we've cited in our briefs, there's a whole  
23 history of cases that say, that if you believe you're  
24 buying X, and you end up getting Y, you've been deceived,  
25 and that's bait-and-switch or you didn't get the benefit of

1 what you thought you were buying.

2 So, and - - - and - - - and the - - - the  
3 respondent relies heavily, and so did the First Department,  
4 on a Second Department case called Rice v. Penguin. In  
5 that case, the plaintiffs claim they were deceived because  
6 they didn't realize that this book that they were buying  
7 wasn't one hundred percent written by a famous author. But  
8 if you look at Rice, it says very clearly in the Second  
9 Department's decision that the fact that that author didn't  
10 fully write the book appeared on the copyright page of the  
11 book. So if you're standing in a book store, and you're  
12 flipping through the book, and you see that, there's no  
13 deception. They didn't hide it like they did here.

14 This is a hiding. They hid these errors and  
15 these omissions, and they hid their disclaimer. They put  
16 their disclaimer on the backside of a purchase order that  
17 you don't even get with the book, instead of putting it on  
18 the inside cover, where people would actually see it. And  
19 the purpose of that, and this goes to both deception and  
20 the conspicuousness of the warranty - - - of the dis - - -  
21 of the disclaimer, that you can't hide a disclaimer that  
22 goes to the very heart of the purchase. And that's a UCC  
23 principle that this court upheld in the Wilson case in 1968  
24 that's cited in our brief.

25 JUDGE FAHEY: The First Department has a string



1 of cases that address the GBL and seem to have a specific  
2 definition of consumer - - -

3 MR. FISHMAN: Yes.

4 JUDGE FAHEY: - - - as someone dealing with  
5 personal, household goods.

6 MR. FISHMAN: Right.

7 JUDGE FAHEY: How does your claim fit within that  
8 First Department definition?

9 MR. FISHMAN: Well, the First Department  
10 definition is wrong.

11 JUDGE FAHEY: So - - - so you're saying we should  
12 override - - - overturn that line of cases?

13 MR. FISHMAN: Absolutely.

14 JUDGE FAHEY: All right.

15 MR. FISHMAN: It has no place in New York  
16 jurisprudence.

17 JUDGE FAHEY: And - - - and why is that?

18 MR. FISHMAN: Well, first you have to look at the  
19 le - - - at the statute.

20 JUDGE FAHEY: I'm sorry?

21 MR. FISHMAN: You have to look at the statute  
22 first of all. The text does - - - says nothing about  
23 personal, family, or household, like other sections of the  
24 GBL.

25 JUDGE FAHEY: The text, it - - - it doesn't - - -



1 doesn't use the word consumer, does it?

2 MR. FISHMAN: It uses the word person.

3 JUDGE FAHEY: I see.

4 MR. FISHMAN: It says - - -

5 JUDGE FAHEY: So it does not - - -

6 MR. FISHMAN: - - - any person - - -

7 JUDGE FAHEY: So - - - so to be clear, it does  
8 not use the word consumer.

9 MR. FISHMAN: Exactly.

10 JUDGE FAHEY: All right.

11 MR. FISHMAN: I mean, I me - - - I believe the -  
12 - -

13 JUDGE FAHEY: How about the leg - - - how about  
14 the legislative history?

15 MR. FISHMAN: The legislative history is also in  
16 line with that, as you - - - as the Attorney General's  
17 amicus brief points out. In fact, I can say, from  
18 firsthand knowledge, in 1980, I was a newly minted Deputy  
19 Assistant Attorney General in the Consumer Fraud Bureau.  
20 And I helped write the memo that ended up in the private  
21 right of action being adopted for the Attorney General. So  
22 I know that the point of the memo was to give all persons  
23 the right to bring this as a private attorney general, and  
24 not limit it to, simply, personal, family, or household.

25 We know how to put personal, family, or





1 household, or the legislature did, in other statutes, when  
2 they wanted to. But clearly, they had two chances to do it  
3 and they didn't. They could have done it in 1970 when they  
4 first enacted the statute, or in 1980, when they amended it  
5 to add the private right of action.

6 JUDGE FAHEY: When you say we - - -

7 JUDGE RIVERA: Given our recent decision in  
8 Plavin - - -

9 MR. FISHMAN: Yes.

10 JUDGE RIVERA: - - - how at all does that affect  
11 your view of this particular element of the claim?

12 MR. FISHMAN: Well, I think Plavin supports our  
13 consumer-oriented claim. Plavin involved 600,000 New York  
14 City employees, who were - - -

15 JUDGE RIVERA: But we did say they're repeating -  
16 - -

17 MR. FISHMAN: I'm sorry?

18 JUDGE RIVERA: Well, we did say they are  
19 repeating from other cases that you got to show that it's  
20 consumer-oriented, correct?

21 MR. FISHMAN: Well, no, you still have to show  
22 it's consumer-oriented, no question.

23 JUDGE RIVERA: Okay. So consumer-oriented is  
24 still in play.

25 MR. FISHMAN: Absolutely.



1 JUDGE RIVERA: I understand you're arguing for a  
2 different definition.

3 MR. FISHMAN: Yeah.

4 JUDGE RIVERA: So - - - so where would your  
5 definition have the limitations that Plavin and other  
6 decisions - - -

7 MR. FISHMAN: Well - - -

8 JUDGE RIVERA: - - - from this court have - - -

9 MR. FISHMAN: I - - -

10 JUDGE RIVERA: - - - set up?

11 MR. FISHMAN: I think all you have to do is  
12 eliminate the personal, family, or household layer that the  
13 First Department created out of thin air in the Cruz case.  
14 They - - - they analogized it to two other sections of the  
15 GBL that did use that definition. And had no legislative  
16 support, no legislative history support, no case law  
17 support. They just came up with it. And then it's been  
18 used repeatedly now in the First Department, both at the  
19 Appellate Division level, as well as in the lower courts in  
20 the First Department, to dismiss cases that otherwise meet,  
21 what this court has said, is consumer-oriented conduct.

22 It has to be, you know, effect the - - - the  
23 public at large. It can't be a one-shot transaction.  
24 Everybody agrees with that. And it has to involve  
25 something involving the public interest, so that when you



1 act as a private attorney general - - -

2 JUDGE RIVERA: Your light has gone off - - -

3 MR. FISHMAN: Oh.

4 JUDGE RIVERA: - - - if the Chief Judge will  
5 permit me, if you could quickly address - - - yes, Chief  
6 Judge?

7 CHIEF JUDGE DIFIORE: Certainly.

8 MR. FISHMAN: Do you want me to - - -

9 JUDGE RIVERA: The last element.

10 MR. FISHMAN: I'm sorry. I didn't hear - - -

11 JUDGE RIVERA: The last - - - if you could  
12 quickly address the last element of the claim.

13 MR. FISHMAN: The last element of - - -

14 JUDGE RIVERA: - - - of the claim under the 349.

15 MR. FISHMAN: Well, it's consumer-oriented - - -

16 JUDGE RIVERA: Yeah.

17 MR. FISHMAN: - - - that it's deceptive and it  
18 causes injury. Those are the elements and - - -

19 JUDGE RIVERA: Materially deceptive, okay. So  
20 how does that fit here?

21 MR. FISHMAN: Well, I don't think the deception  
22 part changes at all. In fact, the Appellate Division  
23 agreed in Cruz, that it met all the elements, except for  
24 pub - - - personal - - -

25 JUDGE RIVERA: Well, in this case, that element



1 has not been addressed by either court below, correct?

2 MR. FISHMAN: The deception element?

3 JUDGE RIVERA: The materiality, yeah.

4 MR. FISHMAN: Well, I don't think there's a  
5 dispute because it's a 3211 posture, so for the purposes of  
6 this proceeding, the respondent doesn't dispute that they  
7 didn't provide what the plaintiffs claim they thought that  
8 they were getting. So you know, I - - - I think that the -  
9 - - the deception claim hasn't been thrown out certainly.  
10 The Appellate Division didn't say we - - - we don't have a  
11 deception claim.

12 But overruling Cruz, I think is something that  
13 has been long - - - is something that's needed to be done a  
14 long time. As Your Honor addressed in the Collazo case  
15 last year, the same with the Ibiza case on - - - regarding  
16 landlord-tenant matters. The First Department has also  
17 restricted 349 in landlord-tenant cases, and Your Honor was  
18 very critical of that in your dissent in Collazo last year.

19 JUDGE FAHEY: All right. Judge, could - - -  
20 could I just - - -

21 CHIEF JUDGE DIFIIORE: Yes, Judge Fahey?

22 JUDGE FAHEY: I'm sorry, just if it's okay. Just  
23 one point.

24 One - - - one of the arguments of the defendant  
25 that - - - that I - - - that is one of their stronger



1 arguments, is the reliance and causation arguments that  
2 they make. And is - - - is - - - am I correct saying that  
3 - - - did you respond to that that causation is established  
4 by the annual updates, implying that the law is update-to-  
5 date in the - - - the Tanbook?

6 MR. FISHMAN: Are you say - - - I'm sorry. Are  
7 you asking - - -

8 JUDGE FAHEY: Well, one of the strongest points I  
9 thought of the defendant's argument, or - - - or let's say,  
10 it - - - I think it's an arguable point. There's - - - it  
11 clearly coincides to the reliance/causation arguments that  
12 they make, as to whether or not you've properly pled  
13 something is materially misleading. Am I correct in saying  
14 that your response to that is that the annual update in the  
15 - - - that's claimed to be done to the Tanbook is the basis  
16 of your causation argument, that the book isn't kept up-to-  
17 date in the law?

18 MR. FISHMAN: Well, they claim that it is.  
19 There is a page in the record, which is the table of  
20 contents, which says in the 2016 edition, "2015 updates".  
21 So they represent in the book itself that it's updated. We  
22 - - - we found - - - every one of these tabs shows an  
23 omission or an incorrect publication of a law that had been  
24 repealed. All of these items are listed in our complaint.  
25 The 2017 book, published five months after the suit, all of

1 those errors were corrected.

2 JUDGE STEIN: Well, you can't - - -

3 MR. FISHMAN: And some of these go back to '05.

4 JUDGE STEIN: Counselor, on the 2017, just to  
5 clarify. The plaintiffs purchased that book or paid for  
6 that book - - -

7 MR. FISHMAN: Yes.

8 JUDGE STEIN: - - - after they received it five  
9 months late or so, right?

10 MR. FISHMAN: Exactly.

11 JUDGE STEIN: Okay. So - - -

12 MR. FISHMAN: And - - -

13 JUDGE STEIN: Okay.

14 MR. FISHMAN: And they did so because it - - -  
15 it's inconceivable that after being sued for those thirty-  
16 seven errors, that they would then, five months later, turn  
17 around and publish the book without those errors corrected.  
18 I assume, and I think most purchasers would assume, that  
19 they went through the book with a fine-toothed comb to make  
20 sure that not only were those errors corrected, but the  
21 other 1,000 pages were error-free, as well, because imagine  
22 if, we then found other errors in a different portion of  
23 the book, after being sued for this section of the book.

24 So yes, I think it was perfectly reasonable to  
25 buy the book. It's just that they didn't get a full-year's



1 use of it. They got - - -

2 JUDGE STEIN: But what I'm saying is, is that  
3 they knew when they received it, that they weren't going to  
4 get a full-year's use of it.

5 MR. FISHMAN: That's true.

6 JUDGE STEIN: And - - - and they had - - -

7 MR. FISHMAN: That's true.

8 JUDGE STEIN: - - - the option then to either  
9 send it back - - -

10 MR. FISHMAN: Well - - -

11 JUDGE STEIN: - - - or not pay for it - - -

12 MR. FISHMAN: Well, because - - -

13 JUDGE STEIN: - - - or pay for it.

14 MR. FISHMAN: - - - the book serves a very  
15 important purpose, and our plaintiffs said that in their  
16 affidavits. This is a - - -

17 JUDGE STEIN: Well, wouldn't that indicate that  
18 then they - - - you found - - - the plaintiffs found that  
19 there was some value to it?

20 MR. FISHMAN: Well, if it - - - the - - - the '17  
21 book certainly had value if - - - because it's believed to  
22 be complete, and it's a one-volume, handy, soft-cover book,  
23 you can take with you to court; you can keep it, you know,  
24 at home, whatever. So yes, the '17 book had value, just  
25 not the twelve months of value that you had got - - - had



1           gotten every other year. So you only got seven months of  
2           value, but you know, at the same time, they continued to  
3           sell the '16 book. I bought it online in August of '17.

4                       And so, I mean, that just goes to the overall  
5           sense here of a company that really doesn't care that  
6           they're - - - what they're selling to the public. And I  
7           think that the state really has an interest in saying to  
8           businesses, that that's just not how we do business in New  
9           York.

10                      CHIEF JUDGE DIFIORE: Thank you, Counsel.

11                      MR. FISHMAN: Thank you, Judge. Oh - - -

12                      CHIEF JUDGE DIFIORE: Counsel?

13                      MR. DREYER: Good afternoon, Your Honors. For  
14           respondent Matthew Bender, Anthony Dreyer, joined with my  
15           colleague, Jordan Feirman.

16                      Your Honors, as Judge Stein put it, I will jump  
17           to the end very quickly, but there are two preliminary  
18           points I would like to make.

19                      The first is that Matthew Bender has never once  
20           disputed that the 2016 Tanbook, or at least part 3, was not  
21           current or accurate at the time. And it's not something we  
22           were happy about. It's not something we were proud of.  
23           But as every judge who's looked at this case, all four - -  
24           - five judges of the Appellate Division, and Justice Ramos  
25           has recognized, plaintiffs must plead more than a mistake.





1 They must plead each and every element, and facts to  
2 support each and every element of the claims that they  
3 brought. And that's particularly acute with the 349 claim,  
4 and that brings me to my second preliminary point.

5 Separate and apart from the injury issue, there  
6 are three other independent defects in the pleadings that  
7 warrant dismissal. The first is that the terms of service  
8 that they agree are binding - - - they try to bring a  
9 belated breach-of-contract claim under those same terms and  
10 conditions, expressly negate the alleged deceptive  
11 practice.

12 The second is that, respectfully, this is not a  
13 consumer-oriented good. As they acknowledge, this is a  
14 book of laws, a book of codes, marketed to lawyers and  
15 other legal professionals.

16 JUDGE STEIN: Well, you - - - you - - - you  
17 market it on Amazon, right, and - - - and your own website.  
18 And I mean, did - - - did you treat - - - do you - - - did  
19 you treat these plaintiffs differently from any other  
20 customers that might come across it and decide to buy it?

21 MR. DREYER: Well, I think, with respect to the  
22 marketing on Amazon question, Judge Stein, I think any  
23 bookseller these days has to market on Amazon. There are  
24 very few bookstores. I - - - I don't think that this court  
25 has ever held that the marketing channel, in and of itself,



1 is the test for whether something is consumer-oriented.  
2 There's - - - there's a - - - there's a question as to who  
3 the target audience is and what the practice is. And I  
4 think this is not consumer-oriented under either the First  
5 or Third Department's definition, which tried to ascribe  
6 words to consumer oriented, which is, of course, an  
7 unquestionable element of a 349 claim - - -

8 JUDGE STEIN: Well, have - - -

9 MR. DREYER: - - - or - - -

10 JUDGE STEIN: - - - have we ever said that - - -  
11 that - - - that somebody that uses something for business  
12 purposes, doesn't qualify as a consumer?

13 MR. DREYER: No, and we've not argued that, Judge  
14 Stein. There - - - there are instances where something  
15 that's marketed broadly to consumers and also used by  
16 businesses, could be consumer-oriented, a laptop, for  
17 example. We never disputed that that - - -

18 JUDGE STEIN: Well, I guess, my - - - my question  
19 is a little different. Isn't - - - isn't - - - can't a - -  
20 - a person who utilizes something in their business be  
21 considered a consumer - - -

22 MR. DREYER: Not - - -

23 JUDGE STEIN: - - - if - - - if - - - if as some  
24 argue, the statute was intended to be brought in that way?

25 MR. DREYER: Well, respectfully, Your Honor, I



1 think that's what the attorney general is arguing and  
2 that's what the legislature is considering, to broaden 349,  
3 to not just be focused on pure consumers. I think - - -

4 JUDGE STEIN: Well, the - - - the pending  
5 legislation doesn't - - - I - - - I don't think is really  
6 helpful, because it may be that they're seeing that - - -  
7 that there's this other case law going on and they don't  
8 agree with it, and they just want to clarify it, not that -  
9 - - that they didn't mean it to be that way in the first  
10 place.

11 MR. DREYER: I understand, Your Honor. But - - -  
12 but generally - - - the generally accepted definition of  
13 consumer is not someone who purchases for their business.  
14 It's a product that's marketed for - - - I - - - I do  
15 believe the First and Third Department tried to ascribe a  
16 rational meaning, a commonsense definition to what  
17 constitutes consumer, somebody who buys for themselves, their  
18 family, or for other personal use, their household, not - -  
19 - not for business, and so - - -

20 JUDGE RIVERA: Well, you do have one plaintiff  
21 who said that he bought it for his personal use, right - -  
22 -

23 MR. DREYER: Well - - -

24 JUDGE RIVERA: - - - as - - - as a tenant. I  
25 mean, it is hard to see this argument that you're making



1 that a book that, in part, has legal materials that  
2 tenants, as well as property owners, might have an interest  
3 in, isn't something broader than sort of a - - - a small  
4 group or bounded by a unique contract, which is what our  
5 case law has said that that's not consumer-oriented. It's  
6 hard to see that in this case.

7 MR. DREYER: Well, I - - - again, respectfully,  
8 Judge Rivera, I don't think the test is whether a consumer  
9 might buy it or a consumer might find it interesting, and  
10 this is not an ordinary consumer. This is somebody who's a  
11 tenant advocate. They have a TV show, advocating for  
12 tenants' purposes.

13 JUDGE FAHEY: Well, here - - - here's the problem  
14 with - - - with the argument on - - - on Judge Stein's  
15 point and Judge Rivera's point. I see the attorney  
16 general's amicus brief as having three main points. The  
17 first is that nothing in the text limits 349 to purchases  
18 of personal, family, or household goods. There's nothing  
19 in there that says that.

20 The second point, and it's indisputable in my  
21 mind - - - the second point is they never even use the word  
22 consumer in the text of the statute.

23 The third point is that the GBL statutes - - - or  
24 excuse me, other GBL statutes do expressly con - - - define  
25 consumer goods, and I - - - the way I understand that



1 argument is the legislature knew how to do that if they  
2 wanted to, and that's not what - - - what was being done  
3 here. It appears to have been an attempt to create a much  
4 broader right, and we - - - we would have to have some  
5 basis to define classes of consumers, and it's hard for me  
6 to find that in the text.

7 MR. DREYER: Well, Your Honor, I think the  
8 article that 349 is under, is unquestionably a consumer  
9 protection statute. We've set that forth in our papers,  
10 and this court has recognized - - -

11 JUDGE FAHEY: So then we come down to classes of  
12 consumers. Is that correct?

13 MR. DREYER: Forgive me, Your Honor.

14 JUDGE FAHEY: Classes, different classes of  
15 consumers. The - - - the way I understand your argument is  
16 that someone who's a class of consumer that's using a  
17 particular good for personal, household goods, or family  
18 purposes, that class of consumers is covered in the First  
19 Department, but the statute doesn't say that.

20 MR. DREYER: Well, I - - - I don't equate  
21 purchasers with consumers. I don't think all purchasers  
22 are consumers. That's the argument the plaintiffs make.

23 JUDGE FAHEY: Okay, let - - - let's stay with my  
24 question, though. My question is, is the class of  
25 consumers that was created by the First Department doesn't

1           seem to be in the statute.

2                   MR. DREYER:   Correct.   What the - - - what I  
3           believe the First and Third Department were doing, Your  
4           Honor, was to try to give a commonsense definition to the  
5           word consumer.

6                   JUDGE FAHEY:   I see.

7                   MR. DREYER:   Let me briefly touch on causation so  
8           I can come to the end, and it's taken me a bit longer to  
9           get there; I apologize.

10                  JUDGE FAHEY:   Oh, it's - - - trust me; no reason  
11           - - -

12                  MR. DREYER:   The - - - the second independent or  
13           third independent defect aside from injury, is that  
14           plaintiffs have not, as they must, plead facts to establish  
15           causation.   They have to - - -

16                  JUDGE FAHEY:   I'm sorry.   I'm having a little  
17           hard time hearing you.   Just because of the mask.

18                  MR. DREYER:   Forgive me, Your Honor.   Sure.

19                  JUDGE FAHEY:   Yeah.

20                  MR. DREYER:   They have not pled facts to  
21           establish a necessary element that the alleged deceptive  
22           practice caused an injury.   Recall the alleged injury - - -  
23           I'll come to price premium in a minute; I promise - - - the  
24           alleged injury is that they wouldn't have purchased the  
25           Tanbook at all, had they known, and that the alleged



1           deceptive statements were the website statements and the  
2           statements in the book.

3                       So they have to show a causal link between the  
4           two. Two of three plaintiffs never even reference that  
5           they saw the website or the book, and the third plaintiff,  
6           Mr. Himmelstein, does not draw a causal link at all. His  
7           main basis for his belief is his assumption, his  
8           understanding.

9                       JUDGE WILSON: Well, they don't have to plead - -  
10          -

11                      MR. DREYER: He pays - - -

12                      JUDGE WILSON: They don't have to plead reliance,  
13          right?

14                      MR. DREYER: Forget - - - that's correct, Your  
15          Honor. And I'm not saying reliance, but they do have to  
16          plead causation.

17                      JUDGE STEIN: Well, but you know, some - - - some  
18          of - - - some of what they're claiming are - - - are the  
19          misrepresentations are on the cover of the book or they're  
20          in the - - - it's in the table of contents, where some  
21          areas, for example, say selected provisions or port - - -  
22          you know, portions, and others don't. They - - - they - -  
23          - you know, the - - - the are - - - the some - - - the  
24          section at issue here. So can't we infer that they saw it  
25          even - - - I mean, I don't necessarily agree with you that



1 they didn't say that they saw it, but let's assume they  
2 didn't, and - - - and you know, can't we infer from - - -  
3 from those facts that they would have seen it if they  
4 looked at the book?

5 MR. DREYER: Well, I - - - I think the place that  
6 you're referencing is the - - - the overview page. And the  
7 alleged deceptive practice is - - - is solely the use of  
8 the work "the", where they used "selected" elsewhere.  
9 Let's assume for a moment that's a deceptive practice. We  
10 have addressed that in our brief. But I think they do have  
11 to allege some causal nexus, otherwise there's a  
12 misstatement in the book, they allege, and they bought the  
13 book. There's no causal nexus - - -

14 JUDGE FAHEY: So - - - so you're arguing then  
15 that the - - - the plaintiff wants to plead that they saw a  
16 misleading statement. Is that what you're saying?

17 MR. DREYER: If the injury is as alleged here  
18 that we bought the book - - -

19 JUDGE FAHEY: All right. Let me take a step  
20 back, just so I understand it.

21 MR. DREYER: Sure.

22 JUDGE FAHEY: And so if that's the case, to  
23 follow up on Judge Stein's point - - - which is a good one  
24 - - - well, then wouldn't it be sufficient to just simply  
25 say, I bought a book that I was told was annually updated,





1 and - - - and I find that it was not annually updated, and  
2 that should be sufficient. They don't need to go through  
3 and earmark, you know, the 700 different misleading  
4 statements.

5 MR. DREYER: Well, I think it's one thing, Judge  
6 Fahey, to say it's annually updated, and another to say, I  
7 believed, contrary to the terms of service, that it was  
8 current and error free.

9 JUDGE FAHEY: Well, let - - - let me put it  
10 another way. Do you dispute that there were misleading  
11 statements in the Tanbook?

12 MR. DREYER: We do. I think their whole basis  
13 for mis - - -

14 JUDGE FAHEY: You're saying there were no  
15 misleading statements?

16 MR. DREYER: Their whole basis for alleging there  
17 was a misleading statement was that the use of the word  
18 "the" in the first - - -

19 JUDGE FAHEY: No, that's not my question to you.  
20 Do you dispute factually that there were misleading  
21 statements in the Tanbook?

22 MR. DREYER: We have, Your Honor. We have, Your  
23 Honor.

24 JUDGE FAHEY: Okay. All right.

25 MR. DREYER: And - - - and so - - -



1                   JUDGE FAHEY: Well, then that - - - that's a - -  
 2                   - you're certainly - - - you have a right to do that, but -  
 3                   - - but the other side of that is, in terms of causation,  
 4                   you have to look at a reasonable consequence of a  
 5                   consumer's action. And if they're told that the book is  
 6                   updated, to comply with the law, it's a - - - kind of a  
 7                   question of fact, for someone other than summary judgment.

8                   MR. DREYER: Respectfully, Your Honor, that is  
 9                   not the pleadings. And I think there's been an issue  
 10                  throughout this case of the plaintiff's - - -

11                  JUDGE FAHEY: Uh-huh.

12                  MR. DREYER: - - - theory shifting like the  
 13                  sands, and I urge the court to go back to what was alleged.  
 14                  And that's particularly acute with injury, and I - - - I  
 15                  see - - -

16                  JUDGE FAHEY: Okay, I will.

17                  MR. DREYER: - - - I've run out of time. If I  
 18                  could just briefly address the injury issue.

19                  CHIEF JUDGE DIFIIORE: Please, sir.

20                  MR. DREYER: Thank you, Your Honor.

21                  There - - - there should be no doubt that  
 22                  Lorillard does apply to this case. The only injury they've  
 23                  ever alleged throughout this entire case, up until they got  
 24                  here on the reply brief, was that they wouldn't have  
 25                  purchased the book, had they known the true facts. That's



1 exactly what this court held in Lorillard, is not - - -

2 JUDGE STEIN: Well - - - well - - - well, but are  
3 you saying then that - - - that this - - - that this  
4 statute would never permit recovery for someone saying that  
5 they didn't get what they paid for?

6 MR. DREYER: No, but respectfully, Your Honor, I  
7 think they have to say more. This court and other courts  
8 have recognized that a plaintiff plead - - - plaintiffs  
9 plead facts - - -

10 JUDGE STEIN: Well, what more do they have to - -  
11 - what more do they have to show?

12 MR. DREYER: Well, they - - - first of all, they  
13 never pled that in this case. That's not the pleading.  
14 The alleged injury, all the way up until the reply brief,  
15 was not price premium. But that is the case in every 349  
16 case, Your Honor. In every single case - - -

17 JUDGE STEIN: Well, I mean - - -

18 MR. DREYER: - - - the plaintiff says, I didn't  
19 get the nonaddictive cigarettes, I thought I got. I didn't  
20 get the smart water that I thought I was going to get. I  
21 didn't get - - - I mean, that's always - - - that's  
22 deception; that's not injury. And that's what this court  
23 unanimously recognized in Lorillard.

24 JUDGE WILSON: The - - - the difficulty, I think,  
25 in - - - in that, in drawing a parallel, is that in



1 Lorillard, there's an - - - an odd procedural history,  
2 where there had been claims about addiction, and the class  
3 was not certified, because those were deemed to be more  
4 individual than - - - than class-wide issues, and the court  
5 then said, the addict - - - the nicotine addiction issues  
6 are out of the case. And the - - - the plaintiffs  
7 proceeded as individuals, not - - - and - - - and there was  
8 no addiction theory.

9 So there's a way to look at Lorillard, as not  
10 about injury, but about causation. That is, the - - -  
11 people buy cigarettes because they look cool; they buy them  
12 because they like the taste of them; they buy them for  
13 whatever reason they buy them. And if the addiction issue  
14 is out of the case, then there's a disconnect, because  
15 they're buying the - - - the thing - - - the cigarettes for  
16 a purpose - - - taste good, looks cool, whatever it is - -  
17 - and they got that.

18 Your case is different because they're buying the  
19 book for its contents and its contents is not what it's re  
20 - - - supposed to be.

21 MR. DREYER: Well, respectfully, Your Honor, I  
22 think this is why Lorillard was rightly decided and why it  
23 shows why this case lacks injury. All three plaintiffs  
24 used this book for well over a year. The Himmelstein law  
25 firm is not just one lawyer. It's ten lawyers. They used



1 it for one year without issue, without injury, without  
2 incident. And so this allegation that it was worthless is  
3 - - - is not only unsupported, it's belied by the facts  
4 that are in the record. And they continue to buy it,  
5 knowing that we're not representing that it's current or  
6 complete or accurate.

7 So respectfully, this allegation that it is worth  
8 nothing is undercut by the facts. And if all the plaintiff  
9 had to allege in a 349 case is consumer-oriented and I was  
10 deceived and I wouldn't have purchased it, then injury is  
11 out, and 349 effectively is a strict liability statute.

12 JUDGE WILSON: But - - - but let me just ask you  
13 about your answer then. So if they had not purchased the  
14 book, that is they discovered the errors and they stopped,  
15 does Lorillard have any application here?

16 MR. DREYER: I don't think it matters. It's just  
17 one additional fact, Judge Wilson, that shows why the - - -  
18 the - - - the evidence in this record belies their  
19 assertion that the book is worthless. They use it for one  
20 year without injury - - - without issue, without injury, or  
21 any incident. So that was the point.

22 And you know, respectfully, if Lorillard is done  
23 away with, because again, the injury in Lorillard was we  
24 would not have purchased the cigarettes had we known the  
25 true facts. Just like in Rice, we would not have purchased



1 this book, had we known the true facts. That is deception.  
2 That is the consumer saying, I wasn't entitled to make a  
3 free and informed purchase, and this court unanimously  
4 recognized in Lorillard that may satisfy the deception  
5 prong, but there has to be a separate injury. And there  
6 simply was not a separate injury here alleged.

7 Thank you, Your Honor.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 Counsel, do you care to have two minutes of  
10 rebuttal time?

11 MR. FISHMAN: Yes, I would.

12 CHIEF JUDGE DIFIORE: Um-hum.

13 MR. FISHMAN: Very briefly, Judge, first of all,  
14 counsel just said something that is completely outside of  
15 the record and in - - - inaccurate as well, when he said  
16 that Lorillard disclaimed - - - I'm sorry; that Bender  
17 disclaimed that the book was complete.

18 There is no disclaimer of completeness. They  
19 disclaimed currency, accuracy, and reliability.

20 JUDGE STEIN: Well - - - well, but wasn't that  
21 based on the lack of completeness in - - - in all fairness?

22 MR. FISHMAN: Well, they didn't say the book - -  
23 - we don't - - -

24 JUDGE STEIN: But that - - - that's what that - -  
25 - but that's what the claim is based on, right?



1 MR. FISHMAN: Well, but completeness is very  
2 important in this case, because - - -

3 JUDGE STEIN: Well, if it's not complete, it's  
4 not accurate, right?

5 MR. FISHMAN: Well, sure, but - - -

6 JUDGE STEIN: And - - -

7 MR. FISHMAN: - - - it - - - it could be - - -

8 JUDGE STEIN: And if it's not complete, it's not  
9 current.

10 MR. FISHMAN: Well, except they - - - they argued  
11 before the motion court and the Appellate Division that the  
12 book was - - - that they disclaimed - - - specifically  
13 disclaimed completeness, and specific disclaimers are  
14 different than general disclaimers. They never disclaimed  
15 completeness at all. And to not include amendments from  
16 the City Council from 2005 for eleven years, makes it  
17 hardly complete. And those are not just may - - - you  
18 know, minor amendments.

19 JUDGE RIVERA: Well, let me - - - let me ask you  
20 - - - let me ask you this. If what the disclaimer said  
21 was, we do not warrant that the book has everything - - -  
22 every word that is in the law.

23 MR. FISHMAN: Okay.

24 JUDGE RIVERA: Is that the equivalent of  
25 completeness?



1 MR. FISHMAN: Is that equivalent that - - -

2 JUDGE RIVERA: The equivalent of completeness?

3 MR. FISHMAN: I think that would be a de minimis  
4 claim. That would not be actionable, Judge. We're not  
5 here because - - -

6 JUDGE RIVERA: So then - - - so then the point of  
7 that question is, is it not possible to read the three  
8 words that they used as the functional equivalent of  
9 completeness?

10 MR. FISHMAN: Maybe that's a fact issue.

11 JUDGE RIVERA: They don't have to use that word  
12 specifically.

13 MR. FISHMAN: Maybe that's a fact issue, Judge.  
14 I'm not sure it's a legal issue, because certainly to say  
15 in the table of contents, we're only putting in selected  
16 portions of these laws, but this law, this section, it's  
17 the laws, that suggests completeness. And it clearly was  
18 not. And we wouldn't be here if we were - - - if - - - if  
19 they had missed a few semicolons or commas. I mean, they -  
20 - - they didn't publish the - - - the disabled rent  
21 increase exemption for eleven years. That affects every  
22 disabled, low-income New York, rent-regulated tenant, of  
23 which there are tens of thousands, and they just didn't  
24 publish it.

25 JUDGE RIVERA: Let me ask you this. Is he





1 correct in the way he has described your assertions in - -  
2 - in the complaint regarding the injury?

3 MR. FISHMAN: I think there's several - - - no, I  
4 don't think he's correct, and - - - and here's why.

5 JUDGE RIVERA: Okay.

6 MR. FISHMAN: First of all, this is a class  
7 action. So there are probably thousands of purported class  
8 members out there, who we allege in our complaint that  
9 these are common injuries - - - common damages. Now, we've  
10 asked in our - - -

11 JUDGE RIVERA: Yeah, but the class  
12 representatives have to - - -

13 MR. FISHMAN: Right.

14 JUDGE RIVERA: - - - have to meet all of the  
15 elements.

16 MR. FISHMAN: Right.

17 JUDGE RIVERA: Again - - -

18 MR. FISHMAN: Exactly.

19 JUDGE RIVERA: - - - I just want to be clear, if  
20 you disagree in the way he has characterized your assertion  
21 of the injury or do you want to address that?

22 MR. FISHMAN: What we've said in the complaint,  
23 what we've said throughout this litigation is that we're  
24 going to seek, if we get the opportunity to, we're going to  
25 seek to recover the purchase price. But ultimately, what



1 the book is worth, I believe, is a fact question. And - -  
2 - and a jury should decide, is it worth zero or is it  
3 worth, you know, fifty percent, or seventy-five, or  
4 whatever, but certainly we're going to ask for the purchase  
5 price to start. And - - -

6 JUDGE RIVERA: Okay. Can you - - - can you  
7 address his argument that none of the purported class mem -  
8 - - class representatives ever said that they actually did  
9 indeed read these alleged misstatements.

10 MR. FISHMAN: Well, it's actually not correct.  
11 Mr. Himmelstein said it. In fact, the Appellate Division  
12 recognized that he did, and Mr. McKee said it as well in  
13 his affidavit, but also, you know, he mentioned - - -

14 JUDGE RIVERA: Well, what did they say?

15 MR. FISHMAN: They said, we saw or we relied on  
16 the statement, selected provisions, versus the provision -  
17 - - the - - - the law. Mr. Himmelstein says - - -

18 JUDGE RIVERA: Well, did they merely describe it,  
19 or say, before I purchased it, I was aware of these  
20 representations?

21 MR. DREYER: Well, firstly, you have to - - -  
22 also in the context, they didn't just buy this book once.  
23 They bought it year after year.

24 JUDGE RIVERA: Okay.

25 MR. FISHMAN: And so, you know, do we have to



1 show that they saw it in year one, in year five, in year  
2 ten. They kept buying the book, because of that reliance,  
3 that belief that these things were accurate. Mr. McKee - -  
4 -

5 JUDGE RIVERA: Yeah, but what - - - what did they  
6 assert the basis for their understanding?

7 MR. FISHMAN: Yes.

8 JUDGE RIVERA: Okay.

9 MR. FISHMAN: Mr. McKee says at page 231, "In  
10 buying the book year after year, it's long been my  
11 understanding and reasonable assumption that the Tanbook is  
12 a useful source for the entire collection of the rent  
13 regulation laws." And then he says, "For many years it's  
14 been my understanding that the Tanbook contains the laws in  
15 their entirety, while only" - - - "while the book only  
16 contains 'selected sections' or 'excerpts'" - - -

17 JUDGE RIVERA: Yeah, but I guess the question is,  
18 is that because someone told him it's complete, or because  
19 he looked at these statements and relied on the rep - - -  
20 it alleged representations by - - -

21 MR. FISHMAN: They can certainly ask him that - -  
22 -

23 JUDGE RIVERA: - - - the defendant.

24 MR. FISHMAN: - - - in a deposition, Your Honor.  
25 But he says very clearly in his affidavit, I relied on what



1           it says in the book, and he had to have seen it to say  
2           that. So that certainly meets the standard.

3                       CHIEF JUDGE DIFIORE: Thank you, Counsel.

4                       MR. FISHMAN: Thank you, Judge.

5                       (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, et al. v. Matthew Bender & Company, Inc., No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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