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The Rebate “Rip-Off”: New York’s Legislative Responses to Common Consumer Rebate Complaints

Matthew A. Edwards*

I. The New York Rebate Law: General Business Law, Section 391-p

Consumer rebate offers and redemptions have “exploded during the past two decades.”¹ Nevertheless, numerous press accounts suggest that consumers hate rebates—that they view rebates as a reprehensible rip-off or a scurrilous scam.² Although there is no federal law that deals directly with rebates,³ consumers and attorneys should know that the New York legislature recently enacted a statute that protects consumers against certain allegedly unfair rebate promotion practices: General Business Law, Section 391-p.⁴ This essay will survey

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1. Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 353 (2008) [hereinafter Edwards, *New Paternalism*]. See also Matthew A. Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 STAN. J.L. BUS. & FIN. 362, 362-63 (2007) [hereinafter Edwards, *Consumer Rebates*].

2. Edwards, *Consumer Rebates*, *supra* note 1, at 363 (“The difficulties of meeting rebate redemption requirements have become a staple of consumer affairs and business columns, and frustrated consumers frequently write in to newspapers to complain about rebates gone astray.”) (footnotes omitted); Edwards, *New Paternalism*, *supra* note 1, at 353-54 (“[R]ebates are despised by U.S. consumers, who view them as a massive scam. . . . Some aggrieved consumers claim that rebate offerors delay or fail to pay legitimately earned rebate rewards and impose unnecessarily complicated rebate redemption requirements to discourage consumers from completing the rebate redemption process.”).

3. An unfair or deceptive rebate offering arguably would be covered by Section 5 of the Federal Trade Commission Act. See Edwards, *Consumer Rebates*, *supra* note 1, at 399-400.

4. N.Y. GEN. BUS. LAW § 391-p (McKinney Supp. 2009). See also *infra* note 31 and accompanying text (noting existence of a second N.Y. GEN. BUS. LAW § 391-p). The text of the rebate statute is as follows:

1. [T]he term “rebate” shall mean an offer to provide cash, credit, or credit towards future purchases, that is offered to consumers who acquire or

briefly the ways in which this and other New York laws address the most common complaints regarding mail-in and online consumer rebates.⁵

purchase a specified product or service and that is conditioned upon the customer submitting a request for redemption after satisfying the terms and conditions of the offer. The term shall not include any discount from the purchase price that is taken at the time of purchase, any discount, cash, credit, or credit towards a future purchase that is automatically provided to a consumer without the need to submit a request for redemption, or any refund that may be given to a consumer in accordance with a company's return, guarantee, adjustment, or warranty policies, or any company's frequent shopper customer reward program.

2. (a) Any . . . entity offering a consumer rebate shall provide the rebate redemption form directly with the product or at the same location and at the same time that the consumer purchases the product, or at the time a contractual agreement for service is signed by the consumer.

(b) Any . . . entity that does not provide rebate redemption forms directly with its product may comply with this section by supplying the retailer with either of the following: (1) a sufficient quantity of rebate redemption forms based on reasonably anticipated sales; or (2) the means to create a rebate redemption form prior to or at the time and place of sale.

(c) For purposes of internet sales, a generally accessible . . . entity internet site that clearly and conspicuously displays the rebate redemption form as a printable document on the internet page on which the product is purchased or on an internet page accessible by a hyperlink from the page on which the product is purchased shall comply with this section. For purposes of telephone sales, directing consumers to a generally accessible individual . . . or entity internet site that clearly and conspicuously displays the rebate redemption form as a printable document on the internet page on which the product is purchased or on an internet page accessible by a hyperlink from the page on which the product is purchased and, upon request, sending the rebate redemption form via the consumer's choice of regular or electronic mail or telefacsimile shall comply with this section.

3. Any . . . entity that offers a consumer rebate shall allow a minimum of fourteen days from the date the consumer purchases the product, or becomes eligible for the rebate upon satisfying the terms and conditions of the offer for the submission of a request for redemption by the consumer.

4. Upon receipt of a request for redemption meeting the terms and conditions of the rebate offer, an . . . entity shall mail the rebate check or transmit the rebate funds to the consumer within sixty days.

5. Any person, firm, corporation or association offering a rebate who violates this section shall be subject to a civil penalty of not less than one hundred dollars nor more than one thousand dollars for each such violation.

N.Y. GEN. BUS. LAW § 391-p. The statute was first enacted in 2005. *See Act of Aug. 23, 2005, ch. 574, 2005 N.Y. Laws 574.* It was then amended in 2006. *See Act of June 7, 2006, ch. 81, sec. 1, § 391-p(2), 2006 N.Y. Laws 81.*

5. The New York statute makes clear that that only delayed incentives count as rebates. Incentives with immediate redemption are not rebates under this provision. N.Y. GEN. BUS. LAW § 391-p(1).

II. Four Problems that New York’s Rebate Laws Address

1. *Rebate Form Unavailability.* You cannot redeem a rebate if you do not have a rebate redemption form, and some consumers complain that retailers do not have sufficient rebate forms on hand.⁶ New York law now requires rebate offerors to “provide the rebate redemption form directly with the product or at the same location and at the same time that the consumer purchases the product, or at the time a contractual agreement for service is signed by the consumer.”⁷ For rebate offerors that do not provide forms directly with the product, New York allows for statutory compliance by supplying either “(1) a sufficient quantity of rebate redemption forms based on reasonably anticipated sales; or (2) the means to create a rebate redemption form prior to or at the time and place of sale.”⁸ In addition, for internet and telephone sales, firms can comply by providing rebate forms online.⁹

2. *Not Enough Time to Redeem Rebates.* A common complaint is that consumers do not have enough time to redeem their rebates because of unreasonably short redemption deadlines.¹⁰ Very short deadlines are also problematic if a purchaser wants to try out the product and does not wish to submit her original receipt or bar code to the rebate offeror, as doing so might complicate product returns.¹¹ New York’s rebate law requires rebate offerors to give consumers at least fourteen days to redeem their rebates, measured from either the date of the product purchase or the date when the consumer becomes eligible for the rebate.¹² This provision, while well-intentioned, may not increase rebate redemptions for two reasons. First, it is not clear that many rebate offers had redemption deadlines that were shorter than two weeks in duration. Second, the statute does not set any maximum time period—rebate offerors can

6. See Edwards, *Consumer Rebates*, *supra* note 1, at 413-14.

7. N.Y. GEN. BUS. LAW § 391-p(2)(a).

8. *Id.* § 391-p(2)(b).

9. See *id.* § 391-p(2)(c). For telephone sales, the firm must, upon request, send the rebate redemption form via the consumer’s choice of regular or electronic mail or telefacsimile. *Id.* See also Assemb. 9454, 229th Sess. (N.Y. 2006) (providing background on this provision); S. 6355, 229th Sess., 2006 N.Y. Laws 81 (same).

10. See Edwards, *Consumer Rebates*, *supra* note 1, at 415-16.

11. See *infra* note 25 and accompanying text.

12. See N.Y. GEN. BUS. LAW § 391-p(3).

give consumers as much time to redeem as they wish. This is of interest because some scholarship suggests that longer deadlines can lead to *fewer* rebate redemptions due to increased chances for consumer procrastination and forgetfulness.¹³

3. *Late Payment of Rebate Rewards.* Some consumers believe that rebate offerors unnecessarily delay paying rebate rewards.¹⁴ New York's rebate law addresses this issue by requiring rebate offerors to mail rebate checks or transmit rebate funds within sixty days of receiving a redemption request that meets the conditions of the rebate offer.¹⁵

4. *Price Confusion.* Consumer advocates have argued that the manner in which rebates are promoted or advertised confuses consumers about the actual cost of a good or service that is offered with a rebate, thus inhibiting comparison shopping.¹⁶ This problem is addressed in a separate provision of the General Business Law, which states that it is "false advertising to display . . . the price of an item after deduction of a rebate unless the actual selling price is displayed or announced, and clear and conspicuous notice is given in the advertisement that a mail-in rebate is required to achieve the lower net price."¹⁷

III. Six Problems that New York's Rebate Laws Do Not Address (Yet)

1. *"Junk Mail" Rebate Reward Check.* It has been claimed that rebate reward checks often appear to be junk mail and thus may be accidentally discarded by consumers.¹⁸ New York does not presently require any particular form for rebate re-

13. See Edwards, *Consumer Rebates*, *supra* note 1, at 415-16.

14. *Id.* at 376.

15. See N.Y. GEN. BUS. LAW § 391-p(4). Although consumers might also claim that rebate offerors altogether fail to pay legitimately earned rebate rewards, New York's rebate statute does not have a specific provision on this point, perhaps because a failure to pay in such cases obviously would amount to a breach of contract, deceptive trade practice or false advertising. See *id.* § 349(a) ("Deceptive acts . . . in the conduct of any business . . . are hereby declared unlawful."); *id.* § 350 ("False advertising in the conduct of any business . . . is hereby declared unlawful."); *id.* § 350-a (defining false advertising). See also Thomas A. Dickerson, *New York Consumers Enjoy Statutory Protections under Both State and Federal Statutes*, N.Y. ST. B. ASS'N J., Sept. 2004, at 10.

16. Edwards, *New Paternalism*, *supra* note 1, at 357-58.

17. See N.Y. GEN. BUS. LAW § 350-a(3).

18. See Edwards, *Consumer Rebates*, *supra* note 1, at 418 n.303.

ward checks. A proposed amendment to New York’s rebate law would have required all rebates to “prominently and in the English language state, on the rebate, the name of the product purchased for which such rebate has been issued and that this is a rebate.”¹⁹

2. *The Redemption Black Hole.* Some rebate offerors do not provide a mechanism for checking up on one’s rebate submissions.²⁰ At the present time, New York does not require rebate offerors to provide a mechanism for obtaining status updates on their rebate requests.

3. *Fine Print.* A consumer’s difficulty in reading the fine print on a rebate form can lead to a failure to follow the rebate offerors’ instructions, which can lead to a rejected rebate redemption request. New York law does not appear to set specific readability standards for rebate forms, though the Civil Practice Law and Rules (CPLR) does forbid the introduction of certain fine or small print consumer contracts as evidence at trial.²¹

4. *Privacy Concerns.* Some consumers are made uneasy by the personal information required by rebate offerors on rebate redemption forms.²² Despite alleged privacy concerns, New

19. See Assemb. 2512, 230th Leg. Sess. (N.Y. 2007). Presumably, the term “rebate” here means the rebate reward, not the rebate offer itself.

20. See Edwards, *Consumer Rebates*, *supra* note 1, at 416 n.289.

21. See N.Y. C.P.L.R. 4544 (McKinney 2007). Section 4544 provides in pertinent part:

The portion of any printed contract or agreement involving a consumer transaction . . . where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement As used in the immediately preceding sentence, the term “consumer transaction” means a transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes. No provisions of any contract or agreement waiving the provisions of this section shall be effective.

Id. See also *Mickle v. Christies, Inc.*, 214 F. Supp. 2d 430, 432 (S.D.N.Y. 2002) (“As a procedural rule of evidence rather than a substantive requirement, CPLR § 4544 is not applicable as binding law in a federal court sitting in diversity.”); *Jocar Realty Co. v. Galas*, 673 N.Y.S.2d 836, 839 (Civ. Ct. 1998) (“CPLR 4544 is a statutory rule of evidence, deliberately included in article 45, the CPLR’s evidence article. It does not declare small-type consumer contracts or residential leases absolutely void or unenforceable.”).

22. See Edwards, *Consumers Rebates*, *supra* note 1, at 418 n.302.

York does not limit the type of information that consumers must provide to obtain their rebates.

5. *Original Documentation Requirements.* Many rebate offers require consumers to submit original receipts and UPC codes from product packaging.²³ This can cause difficulties if a single product bears multiple rebate offers, each of which requires an original receipt or UPC bar code. In addition, some consumers wish to save their original receipts for possible returns of gifts or defective items.²⁴ A proposed amendment to New York's rebate law would have entitled all consumers to a duplicate rebate receipt at the time of purchase and prohibited requiring the same original documentation for more than one rebate offered on the same item.²⁵

6. *Behavioral Exploitation.* One of the most powerful, persistent complaints is that rebates are a form of behavioral exploitation—that rebate offerors are taking unfair advantage of the fact that consumers will procrastinate or forget to redeem their rebates.²⁶ In a sense, this complaint is unique because it even applies to honestly and efficiently administered rebate promotions.²⁷ Claims of behavioral exploitation have led consumer advocates to suggest that all rebates ought to be paid immediately at the time of purchase.²⁸ In 2007, New York legislators introduced bills that would have required payment for rebates “at the time and place of retail purchase of the good or service to which the rebate applies.”²⁹ The sponsors' memoranda made their intentions clear:

Consumers often buy goods which have a rebate. Usually they have to fill out forms and mail them in to the manufacturer and then wait for a reply. This is not

23. *Id.* at 380.

24. *See id.* at 418.

25. *See* Assemb. 2512, 230th Sess. (N.Y. 2007).

26. *See* Edwards, *Consumer Rebates*, *supra* note 1, at 381-95; Edwards, *New Paternalism*, *supra* note 1, at 354-55; Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM & MARY L. REV. 1635 (2006). This argument is closely related to the claim that the rebate process is made unnecessarily complex to reduce rebate redemption. *See* Edwards, *Consumer Rebates*, *supra* note 1, at 377 n.67, 378 n.73.

27. *See* Edwards, *New Paternalism*, *supra* note 1, at 354-55.

28. *See* Edwards, *Consumer Rebates*, *supra* note 1, at 396 & n.161.

29. *See* Assemb. 4922, 230th Sess. (N.Y. 2007); S. 2716, 230th Sess. (N.Y. 2007).

only an inconvenience but requires an additional outlay of time and money. *Since the purpose of a rebate is to reduce the cost of the product, it should be awarded at the point of purchase.*³⁰

Such a statute, of course, effectively would be a ban on conventional mail-in rebates. This brief essay is not the place to debate whether such vigorous intervention into the marketplace is warranted, but it would be a dramatic change to current legal regulation of consumer rebates and thus requires close legislative study.

IV. Conclusion: Two Modest Suggestions

Assuming that the legislature decides not to ban rebates, but rather continues with its current program of addressing the most egregious rebate practices, this essay will conclude with two minor suggestions. First, there currently are two New York General Business Law sections numbered “391-p”—the rebate provision discussed in this essay and a second statute covering the rental of previously worn clothes.³¹ It would be simple for the legislature to fix this minor error before it decides on further rebate regulation.

Second, Section 391-p provides for “a civil penalty of not less than one hundred dollars nor more than one thousand dollars” for each violation.³² The statute neither provides for a private right of action nor makes a violation of Section 391-p a *per se* violation of the general consumer protection statute, General Business Law Section 349, which explicitly provides for a private right of action.³³ Thus, the legislature may want to con-

30. WILLIAM F. BOYLAND, N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. 4922, 230th Sess. (2007) (emphasis added); WILLIAM T. STACHOWSKI, N.Y. STATE S., INTRODUCER’S MEMORANDUM IN SUPPORT, S. 2716, 230th Sess. (2007) (stating same).

31. See N.Y. GEN. BUS. LAW § 391-p(1) (McKinney Supp. 2009) (“No person shall rent articles of clothing which have been previously worn unless such articles of clothing are cleaned prior to such rental.”).

32. N.Y. GEN. BUS. LAW § 391-p(5) (McKinney Supp. 2009).

33. See *id.* § 349(h) (providing for a private right of action with statutory damages that can be trebled in cases of knowing violations, up to a maximum of one thousand dollars, in addition to attorney’s fees for prevailing plaintiffs). One piece of Section 391-p’s legislative history contends that “[a]lthough the bill is silent on enforcement, a failure to comply would constitute a deceptive act or practice under General Business Law § 349, which authorizes Attorney General Enforcement.”

sider whether the remedies under the rebate statute are sufficient to deter wrongdoing by rebate offerors and to clarify the rights of private citizens, if any, to enforce these provisions.³⁴

KATHY BENNETT, OFFICE OF THE ATTORNEY GEN., MEMORANDUM, S. 4888, 228th Sess. (N.Y. 2005). The memorandum does not, however, mention private enforcement of Section 391-p under General Business Law Section 349(h).

34. A recent proposal would have “expand[ed] consumer protection regarding the application and redemption of consumer rebates and create[d] an avenue for consumers to receive compensation if their rebates are wrongly denied or not received.” SAM HOYT, N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. 2512, 230th Sess. (2007). But enforcement under the provision still would appear to remain in the hands of the Attorney General. *Id.*