

Billion-Dollar Breakfast Bars: Statutory Damages and Unconstitutional Settlement Pressure Under New York's General Business Laws

How do you turn the purchase of a \$3 breakfast cookie into a billion-dollar claim? You bring a putative class action under New York's General Business Law §§349 and 350 and then ask for statutory damages, that's how.

In recent years, some courts have shown a willingness to certify damages classes in labeling cases under §§349 and 350 where the damages claimed would entitle plaintiffs' attorneys and the class to recover \$550 for every single New York purchase of a low-priced consumer good like cereal, breakfast bars, or even grass seed. When cases are certified under this "model," it exposes defendants to billions of dollars in potential liability that dwarfs the aggregate revenue of the underlying products' sales nationwide. And when that happens, defendants are nearly invariably forced to settle. As ridiculous as this scenario may seem, it reflects an increasingly troubling trend in class action litigation, and one that is crying out for a constitutional correction.

Sections 349 and 350 prohibit materially misleading acts or practices in conduct directed at consumers and, as such, are the statutes of choice for plaintiffs bringing consumer protection claims—including false advertising claims—under New York law. They also provide for significant statutory damages. Section 349 allows a plaintiff to recover "actual damages or fifty dollars, whichever is greater." N.Y. Gen. Bus. L. §349(h). Section 350 allows a plaintiff to recover "actual damages or five hundred dollars, whichever is greater." *Id.* §350-e. So, a successful plaintiff suing under these statutes may be entitled to up to \$550 in statutory damages per violation.

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