New York
Official Reports

96 N.Y.2d 201, 750 N.E.2d 1078, 727
N.Y.S.2d 30, 2001 N.Y. Slip Op. 04138

Frank J. Gaidon et al., Respondents,
v.
Guardian Life Insurance
Company of America, Appellant.
Marie E. Russo, Appellant,
v.
Massachusetts Mutual Life
Insurance Company, Respondent.

Court of Appeals of New York
52, 53
Argued March 20, 2001;

Decided May 8, 2001

CITE TITLE AS: Gaidon v
Guardian Life Ins. Co. of Am.

**SUMMARY**

Appeal, in the first above-entitled action, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered May 2, 2000, which, upon remittitur from the Court of Appeals (*see,* 94 NY2d 330), modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (Charles E. Ramos, J.), entered in New York County, granting a motion by defendant to dismiss the complaint. The modification consisted of reinstating the cause of action alleging a violation of General Business Law § 349 arising out of defendant's sale of a "vanishing premium" life insurance policy. The following question was certified by the Appellate Division: "Was the order of this Court, which modified the order of Supreme Court, properly made?"

Appeal, in the second above-entitled action, by permission of the Court of Appeals, from so much of an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 27, 2000, as affirmed (1) an order of the Supreme Court (Walter J. Relihan, Jr., J.), entered in Tompkins County, partially granting a motion by defendant to dismiss causes of action seeking equitable relief arising from an alleged breach of fiduciary duty, and damages for negligence, negligent misrepresentation and violating General Business Law § 349, arising out of defendant's sale of a "vanishing premium" life insurance policy, and (2) a subsequent order of said court granting a motion by defendant for summary judgment dismissing the remaining causes of action.

Gaidon v Guardian Life Ins. Co., 272 AD2d 60, affirmed.

Russo v Massachusetts Mut. Life Ins. Co., 274 AD2d 878, reversed.

**HEADNOTES**

Limitation of Actions
What Statute Governs
Liability Created by Statute--Sale of "Vanishing Premium" Life Insurance Policies

(1) The three-year period of limitations for statutory causes of action under CPLR 214 (2) applies to claims alleging violations of General Business Law ***202** § 349 arising out of the sale of "vanishing premium" life insurance policies. CPLR 214 (2) does not automatically apply to all causes of action in which a statutory remedy is sought, but only where the liability "would not exist but for a statute." Section 349 does not merely codify and afford new remedies for what in essence is a common-law fraud claim. While it may cover conduct "akin" to common-law fraud, it encompasses a far greater range of claims that were never legally cognizable before its enactment. Although defendant's misrepresentations did not rise to the level necessary to establish a common-law fraud claim, its disclaimers were not sufficient to dispel the deceptiveness of its sales practices for purposes of alleging a violation of section 349. It is not merely the absence of scienter that distinguishes a violation of section 349 from common-law fraud.

Limitation of Actions
When Cause of Action Accrues
Sale of "Vanishing Premium" Life Insurance Policies--Demand for Additional Premium Payments after "Vanishing" Date

  

(2) Causes of action under General Business Law § 349 arising out of the sale of "vanishing premium" life insurance policies accrued when the demand for additional premium payments was made after the date when the insureds had been led to believe the policy dividends would be sufficient to cover all premium costs. Accrual of a private right of action under section 349 first occurs when a plaintiff has been injured by a deceptive act or practice. Because the gravamen of the section 349 violations was not false guarantees of policy terms, but deceptive practices inducing unrealistic expectations of continuing interest/dividend rate performance to fully offset premiums at the projected date, plaintiffs suffered no measurable damage until the point in time when those expectations were actually not met, and they were then called upon either to pay additional premiums or lose coverage and forfeit the premiums they previously paid. Thus, the date when those additional premiums were demanded triggered the Statute of Limitations, and the present actions, commenced within three years of those dates, were timely commenced.

## TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Consumer and Borrower Protection, §§ 289, 299, 302, 305; Limitation of Actions, §§ 127, 147, 148.

Carmody-Wait 2d, Limitation of Actions §§ 13:167, 13:168, 13:210, 13:211, 13:219.

McKinney's, CPLR 214 (2); General Business Law § 349.

NY Jur 2d, Consumer and Borrower Protection, §§ 5-8; Insurance, §§ 931, 971; Limitations and Laches, §§ 56, 191, 192.

## ANNOTATION REFERENCES

See ALR Index under Consumer Protection; Insurance and Insurance Companies; Limitation of Actions.

## POINTS OF COUNSEL

*Skadden, Arps, Slate, Meagher & Flom, L. L. P.,* New York City (*Thomas J. Dougherty* and *James R. Carroll* of counsel), ***203** for appellant in the first above-entitled action.

I. Plaintiff's section 349 claim accrued upon receipt of the policy contradicting his illustration allegations. (*Small v Lorillard Tobacco Co.,* 94 NY2d 43; *Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169; *Russo v Massachusetts Mut. Life Ins. Co.,* 274 AD2d 878; *Cole v Equitable Life Assur. Socy.,* 271 AD2d 271.) II. New York courts do not judicially imply accrual notice requirements for statutes not containing them. (*Rizk v Cohen,* 73 NY2d 98; *Matter of New York County DES Litig.,* 89 NY2d 506; *Thorton v Roosevelt Hosp.,* 47 NY2d 780; *Flanagan v Mount Eden Gen. Hosp.,* 24 NY2d 427; *National Life Ins. Co. v Hall & Co.,* 67 NY2d 1021; *Ackerman v Price Waterhouse,* 84 NY2d 535; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.,* 66 NY2d 38; *Suffolk County Water Auth. v J.D. Posillico, Inc.,* 267 AD2d 301; *Agristor Leasing v Meuli,* 634 F Supp 1208.) III. There are good reasons why section 349 (h) has no requirement of notice of injury for accrual of such a claim. (*Klehr v Smith Corp.,* 875 F Supp 1342; *Matter of Chemical Specialties Mfrs. Assn. v Jorling,* 85 NY2d 382; *Matter of Motor Vehicle Acc. Indem. Corp. v Aetna Cas. & Sur. Co.,* 89 NY2d 214; *Safeco Ins. Co. v Jamaica Water Supply Co.,* 83 AD2d 427; *Rizk v Cohen,* 73 NY2d 98; *Jackson v L. P. Transp.,* 134 AD2d 661; *Kitonyi v Albany County,* 128 AD2d 1018.) IV. Even if it were proper for a court to imply judicially a notice accrual rule (and it is not), plaintiff's section 349 claim is time-barred. (*In re Northwestern Mut. Life Ins. Co. Sales Practices Litig.,* 70 F Supp 2d 466; *Thelen v Massachusetts Mut. Life Ins. Co.,* 111 F Supp 2d 688.)

*Milberg Weiss Bershad Hynes & Lerach, L. L. P.,* New York City (*Barry A. Weprin, Melvyn I. Weiss* and *Mark T. Millkey* of counsel), *Arnzen, Parry & Wentz, P.S.C.,* Covington, Kentucky, *Bonnett, Fairbourn, Friedman & Balint, P. C.,* Phoenix, Arizona, *Hubbard & Biederman, L. L. P.,* Dallas, Texas, and *James, Hoyer, Newcomer, Forizs & Smiljanich, P.A.,* Tampa, Florida, for respondents in the first above-entitled action.

I. Respondents' General Business Law § 349 claim accrued when Guardian injured them by demanding additional premiums. (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *Small v Lorillard Tobacco Co.,* 94 NY2d 43; *Underwood v Life Ins. Co.,* 14 F Supp 2d 1266; *All Terrain Props. v Hoy,* 265 AD2d 87; *Ford Motor Credit Co. v Colonial Funding Corp.,* 215 AD2d 435; *Simcuski v Saeli,* 44 NY2d 442; *Rodriguez v Morales,* 200 AD2d 406; *General Stencils v Chiappa,* 18 NY2d 125; *Tinlee Enters. v Aetna Cas. & Sur. Co.,* 834 F Supp 605.) II. The six-year Statute of Limitations for ***204** fraud should be applied to General Business Law § 349. (*Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169; *Orr v Kinderhill Corp.,* 991 F2d 31; *State of New York v Cortelle Corp.,* 38 NY2d 83; *State of New York v Bronxville Glen I Assocs.,* 181 AD2d 516; *Strategic Risk Mgt. v Federal Express Corp.,* 253 AD2d 167;

*Weil v Long Is. Sav. Bank,* 77 F Supp 2d 313; *Dornberger v Metropolitan Life Ins. Co.,* 961 F Supp 506; *Avdon Capitol Corp. v Nationwide Mut. Fire Ins. Co.,* 240 AD2d 353; *Gordon & Breach Science Publs. v American Inst. of Physics,* 859 F Supp 1521; *Unibell Anesthesia v Guardian Life Ins. Co.,* 239 AD2d 248.)

*Eric Lane,* Hempstead, for Life Insurance Council of New York, Inc., *amicus curiae* in the first above-entitled action.

Plaintiff's General Business Law § 349 (h) claim is barred by the Statute of Limitations. (*Small v Lorillard Tobacco Co.,* 94 NY2d 43; *Russo v Massachusetts Mut. Life Ins. Co.,* 274 AD2d 878; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *State of New York v Bronxville Glen I Assocs.,* 181 AD2d 516; *Gordon & Breach Science Publs. v American Inst. of Physics,* 859 F Supp 1521; *Unibell Anesthesia v Guardian Life Ins. Co.,* 239 AD2d 248; *Conopco, Inc. v Campbell Soup Co.,* 95 F3d 187; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.,* 66 NY2d 38; *Schwartz v Heyden Newport Chem. Corp.,* 12 NY2d 212; *Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169.)

*Milberg Weiss Bershad Hynes & Lerach, L. L. P.,* New York City (*Barry A. Weprin, Melvyn I. Weiss, Regina L. LaPolla* and *Mark T. Millkey* of counsel), *Bonnett, Fairbourn, Friedman & Balint, P. C.,* Phoenix, Arizona (*Andrew S. Friedman* and *Wendy Harrison* of counsel), *Arnzen, Parry & Wentz, P.S.C.,* Covington, Kentucky (*Ronald R. Parry* of counsel), *Specter Specter Evans & Manogue, P. C.,* Pittsburgh, Pennsylvania (*Joseph N. Kravec, Jr.,* of counsel), *Lite, DePalma, Greenberg & Rivas, L. L. C.,* Newark, New Jersey (*Bruce D. Greenberg* of counsel), *Hubbard & Biederman, L. L. P.,* Dallas, Texas (*Stephen L. Hubbard* of counsel), and *James, Hoyer, Newcomer, Forizs & Smiljanich, P.A.,* Tampa, Florida (*W. Christian Hoyer* of counsel), for appellant in the second above-entitled action.

I. The six-year Statute of Limitations applies to General Business Law § 349. (*Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169; *State of New York v Cortelle Corp.,* 38 NY2d 83; *State of New York v Bronxville Glen I Assocs.,* 181 AD2d 516; *Bryden v Wilson Mem. Hosp.,* 136 AD2d 843; *State of New York v* ***205** *Danny's Franchise Sys.,* 131 AD2d 746; *Orr v Kinderhill Corp.,* 991 F2d 31; *Hartnett v New York City Tr. Auth.,* 86 NY2d 438; *Loengard v Santa Fe Indus.,* 573 F Supp 1355; *Dornberger v Metropolitan Life Ins. Co.,* 961 F Supp 506; *Gordon & Breach Science Publs. v American Inst. of Physics,* 859 F Supp 1521.) II. Plaintiff's General Business Law § 349 claim accrued when Massachusetts Mutual injured her by demanding additional premiums. (*Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169; *Matter of Motor Vehicle Acc. Indem. Corp. v Aetna Cas. & Sur. Co.,* 89 NY2d 214; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *Varela v Investors Ins. Holding Corp.,* 81 NY2d 958; *Underwood v Life Ins. Co.,* 14 F Supp 2d 1266.) III. Massachusetts Mutual is equitably estopped from asserting the Statute of Limitations because it concealed its misconduct. (*Roscigno v Town of Mount Kisco,* 210 AD2d 573; *Knaysi v A. H. Robbins Co.,* 679 F2d 1366; *Robinson v City of New York,* 24 AD2d 260; *Niagara Mohawk Power Corp. v Freed,* 265 AD2d 938.)

*Skadden, Arps, Slate, Meagher & Flom, L. L. P.,* New York City (*Vaughn C. Williams* and *Stanley Chinitz* of counsel), and *Gregory D. Woodworth,* Springfield, Massachusetts, for respondent in the second above-entitled action.

I. Plaintiff's section 349 claim accrued when she purchased her policy in 1989. (*Cole v Equitable Life Assur. Socy.,* 271 AD2d 271; *In re Northwestern Mut. Life Ins. Co. Sales Practices Litig.,* 70 F Supp 2d 466; *Bassile v Covenant House,* 191 AD2d 188; *Thelen v Massachusetts Mut. Life Ins. Co.,* 111 F Supp 2d 688; *Goldberg v Manufacturers Life Ins. Co.,* 242 AD2d 175, 92 NY2d 1000; *Kelly v City of Rochester,* 98 Misc 2d 435; *Small v Lorillard Tobacco Co.,* 94 NY2d 43; *Underwood v Life Ins. Co.,* 14 F Supp 2d 1266; *Kitonyi v Albany County,* 128 AD2d 1018; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.,* 66 NY2d 38.) II. Section 214 (2) applies to plaintiff's section 349 claim. (*Matter of Motor Vehicle Acc. Indem. Corp. v Aetna Cas. & Sur. Co.,* 89 NY2d 214; *Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169; *Gaidon v Guardian Life Ins. Co.,* 94 NY2d 330; *Small v Lorillard Tobacco Co.,* 94 NY2d 43; *Goldberg v Mallinckrodt, Inc.,* 792 F2d 305; *Brod v Central School Dist. No. 1,* 53 AD2d 1002; *Rabouin v Metropolitan Life Ins. Co.,* 182 Misc 2d 632; *Wender v Gilberg Agency,* 276 AD2d 311; *Cole v Equitable Life Assur. Socy.,* 271 AD2d 271; *Avdon Capitol Corp. v Nationwide Mut. Fire Ins. Co.,* 240 AD2d 353.) III. Plaintiff's section 349 claim is also barred by the six-year limitations statute. (*Fandy Corp. v Lung-Fong Chen,* 262 AD2d 352; ***206** *Curry v Chollette,* 57 AD2d 604.) IV. Massachusetts Mutual is not equitably estopped from asserting the Statute of Limitations. (*Contento v Cortland Mem. Hosp.,* 237 AD2d 725; *Julian v Carroll,* 270 AD2d 457.)

*Eliot Spitzer, Attorney General,* New York City (*Jane M. Azia, Preeta D. Bansal, Caitlin J. Halligan, Daniel Smirlock, Thomas G. Conway* and *Melissa Saren* of counsel), *amicus curiae* in the first and second above-entitled actions.

I. The six-year Statute of Limitations for fraud should apply to actions under General Business Law § 349. (*State of New York v Bronxville Glen I Assocs.,* 181 AD2d 516; *Matter of State of New York v Colorado State Christian Coll. of Church of Inner Power,* 76 Misc 2d 50; *People v Federated Radio Corp.,* 244

NY 33; *State of New York v Cortelle Corp.,* 38 NY2d 83; *State of New York v Princess Prestige Co.,* 42 NY2d 104; *Matter of State of New York v Interstate Tractor Trailer Training,* 66 Misc 2d 678; *State of New York v 7040 Colonial Rd. Assocs. Co.,* 176 Misc 2d 367; *State of New York v Danny's Franchise Sys.,* 131 AD2d 746; *Orr v Kinderhill Corp.,* 991 F2d 31; *Dornberger v Metropolitan Life Ins. Co.,* 961 F Supp 506.) II. A cause of action under General Business Law § 349 does not accrue until injury occurs for which relief can be afforded. (*LaBello v Albany Med. Ctr. Hosp.,* 85 NY2d 701; *Kronos, Inc. v AVX Corp.,* 81 NY2d 90; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *State of New York v Management Transition Resources,* 115 Misc 2d 489; *Small v Lorillard Tobacco Co.,* 252 AD2d 1, 94 NY2d 43; *Matter of State of New York v Colorado State Christian Coll. of Church of Inner Power,* 76 Misc 2d 50.)

**OPINION OF THE COURT**

Levine, J.

In *Gaidon v Guardian Life Ins. Co.* (94 NY2d 330) (*Gaidon I*), this Court ruled that plaintiffs had pleaded a legally sufficient cause of action against defendant Guardian Life Insurance Company under General Business Law § 349 (h). The complaint alleged that Guardian Life engaged in deceptive marketing and sales practices in promoting sales of its "vanishing premium" policies through agents' representations and personalized graphic illustrations showing that, after a specified period, "the policy's dividends would thereafter cover the premium costs" (*id.,* at 339). The *Gaidon* case is now again before us and, along with the appeal in *Russo v Massachusetts Mut. Life Ins. Co.,* presents two issues: (1) whether the three-year ***207** Statute of Limitations provided by CPLR 214 (2) for statutory causes of action, rather than the six-year limitations period provided by CPLR 213 (8) for fraud, applies to a cause of action brought under General Business Law § 349, and (2) whether plaintiffs' actions accrued when they purchased and received their policies, or when defendant life insurers demanded additional premium payments beyond the dates by which they led plaintiffs to believe that premium payments would "vanish."

In the *Gaidon* case, the policies at issue were purchased in 1987. Some eight years later, premiums were demanded after the purported date they were to be entirely offset by dividends. Plaintiffs commenced this action on October 8, 1996, asserting claims for breach of contract and common-law fraudulent inducement, as well as their cause of action under General Business Law § 349. Supreme Court granted Guardian Life's motion to dismiss the complaint in its entirety, and the Appellate Division, First Department, affirmed. We modified by reinstating only plaintiffs' section 349 cause of action, and remitted to the Appellate Division to consider the other issues raised but not decided on the appeal to that court.

Upon remittal (272 AD2d 60), the Appellate Division affirmed dismissal for lack of standing with respect to several plaintiffs, by reason of their prior execution of general releases to Guardian Life, and as against plaintiff Frank Gaidon, because the policies insuring his life were not purchased or owned by him, but by plaintiff trustees, who did have standing. As to the trustees' claims under General Business Law § 349, the court reversed Supreme Court's dismissal of their General Business Law § 349 cause of action, rejecting Guardian Life's challenge that the action was time-barred. The court held that the three-year period of limitation for statutory causes of action (CPLR 214 [2]) applied, but concluded that the latter claim was timely interposed because the cause of action did not accrue until plaintiffs were required to pay premiums beyond the projected date by which they were assured that the premiums would be fully covered by policy dividends. The Appellate Division granted Guardian Life leave to appeal on the certified question, was its order properly made?

In *Russo v Massachusetts Mut. Life Ins. Co.,* plaintiff, a purchaser of defendant's vanishing premium "N-PAY" Life Insurance policy in 1989, commenced a proposed class action on April 12, 1996. The complaint contained causes of action sounding in, among other things, breach of contract, fraud, violations ***208** of Insurance Law §§ 2123 and 4226 (prohibiting misrepresentations by insurers and insurance agents) and a violation of General Business Law § 349. Supreme Court granted Mass Mutual's motion to dismiss the General Business Law § 349 cause of action, as superseded by their claims under Insurance Law §§ 2123 and 4226; thereafter it denied plaintiff's motion for class certification and, after joinder of issue and discovery, granted Mass Mutual's motion for summary judgment dismissing all of the remaining causes of action.

On plaintiff's appeals, the Appellate Division, Third Department, affirmed all three of Supreme Court's orders (274 AD2d 878). Affirmance of the dismissal of plaintiff's General Business Law § 349 claim was on a different ground-- that it was time-barred. Like the First Department in *Gaidon,* the court ruled that the applicable Statute of Limitations was the three-year period for statutory causes of action under CPLR

  

214 (2). The court concluded, however, that plaintiff's section 349 claim accrued when she purchased her policy in 1989 and, hence, was not timely commenced. We granted plaintiff leave to appeal. Only the section 349 claim is before us.

**The Applicable Statute of Limitations**

The courts below agreed that the plaintiffs' claims under General Business Law § 349 (h) are "to recover upon a liability ... created or imposed by statute" (CPLR 214 [2]) and, therefore, are governed by the three-year Statute of Limitations provided in that section. CPLR 214 (2) does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability "would not exist but for a statute" (*Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169, 174). Thus, CPLR 214 (2) "does not apply to liabilities existing at common law which have been recognized or implemented by statute" (*id.*). When this is the case, the Statute of Limitations for the statutory claim is that for the common-law cause of action which the statute codified or implemented (*see, State of New York v Cortelle Corp.,* 38 NY2d 83, 86-87).

(1) Plaintiffs and the Attorney General, appearing as *amicus curiae,* contend that, at its core, General Business Law § 349 (h) merely codifies and affords new remedies for what in essence is a common-law fraud claim. They characterize the only substantive deviation from common-law fraud as being the elimination of the scienter requirement in a claim under section 349. Otherwise, they maintain, the proof of one establishes the other. We disagree. ***209**

As described in *Matter of Motor Vehicle Acc. Indem. Corp. v Aetna Cas. & Sur. Co.* (89 NY2d 214, 220-221), our case law construing CPLR 214 (2) contrasts:

"(1) claims which, although provided for in a statute, merely codify or implement an existing common-law liability, which are not governed by CPLR 214 (2) but by the Statute of Limitations applicable to their common-law sources; with (2) claims which, *although akin* to common-law causes, *would not exist but for the statute* ... in which case CPLR 214 (2) applies" (emphasis supplied).

General Business Law § 349, as invoked in this case, falls in the latter category. While General Business Law § 349 may cover conduct "akin" to common-law fraud, it encompasses a far greater range of claims that were never legally cognizable before its enactment. We made this clear in *Gaidon I,* where we said (in comparing common-law fraud to the conduct proscribed by section 349):

"Although a person's actions may at once implicate both, General Business Law § 349 contemplates actionable *conduct that does not necessarily rise to the level of fraud. In contrast to common-law fraud,* General Business Law § 349 is a creature of statute based on broad consumer-protection concerns .... Although General Business Law § 349 claims have been aptly characterized as similar to fraud claims ... *they are critically different* in ways illustrated by the cases at bar" (94 NY2d, at 343 [emphasis supplied]).

The substantive differences between the claims under General Business Law § 349 here and common-law fraud were most pointedly demonstrated by our disposition of those respective causes of action in *Gaidon I.* There, we held that, because of the disclaimers in the promotional illustrations Guardian Life used in selling its vanishing premium policies, the *misrepresentations* in those materials and by sales agents did not rise to the level necessary to establish a common-law fraud claim. Yet we also held that the disclaimers were not sufficient to dispel the deceptiveness of Guardian Life's sales practices with respect to the same illustrations for purposes of alleging violation of General Business Law § 349. Thus, despite plaintiffs' and the Attorney General's contentions to the contrary, it is not merely the absence of scienter that distinguishesa ***210** violation of section 349 from common-law fraud; section 349 encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law. For these reasons, we hold that the three-year period of limitations for statutory causes of action under CPLR 214 (2) applies to the instant General Business Law § 349 claims.

**Accrual of Plaintiffs' Causes of Action Under General Business Law § 349**

In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief (*see, Britt v Legal Aid Socy.,* 95 NY2d 443, 446; *Matter of Motor Vehicle Acc. Indem. Corp. v Aetna Cas. & Sur. Co., supra,* 89 NY2d, at 221). In an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim which must exist before the action accrues (*see, Matter of Motor Vehicle Acc. Indem. Corp., supra,* at 221).

  

Here, the statute prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" (General Business Law § 349 [a]), and affords a right of action to "any person who has been injured by reason of any violation of this section" (General Business Law § 349 [h]). Thus, accrual of a section 349 (h) private right of action first occurs when plaintiff has been injured by a deceptive act or practice violating section 349 (*see, Small v Lorillard Tobacco Co.,* 94 NY2d 43, 55). In *Gaidon I,* we held that plaintiffs sufficiently alleged Guardian Life's deceptive behavior, in violation of section 349, regarding the marketing of its vanishing premium policies. The sufficiency of plaintiff Russo's pleading of Mass Mutual's deceptive practices is not at issue on her appeal. Thus, accrual of plaintiffs' section 349 causes of action here turns upon when their respective injuries occurred as a result of the alleged statutory violations.

Guardian Life and Mass Mutual contend that each plaintiff's injury occurred at the time of purchase and delivery of each life insurance policy, which was unambiguous in stating that: (1) premiums were payable over the lifetime of the insured; (2) dividends (which the policyholder might apply to premium payments) were *not* guaranteed; and (3) the policy provisions contained *all* of the insurer's obligations, and all earlier representations were merged into the policy contract. Both ***211** defendants argue that those terms demonstrated that plaintiffs had actually received policies that were less valuable than the vanishing premium policies they were promised or represented to have purchased. Thus, their argument goes, each plaintiff's injury occurred when the inferior policy was delivered, triggering accrual of the statutory cause of action and the three-year period of limitations at that moment in time.

(2) We, however, agree with plaintiffs that their injuries occurred when they were first called upon to pay additional premiums beyond the date by which they were led to believe that policy dividends would be sufficient to cover all premium costs. Defendants' contention that injury occurred when each plaintiff received a policy that failed to contain terms reflecting the vanishing premium illustrations is based upon a misconception of the gravamen of plaintiffs' General Business Law § 349 causes of action. As *Gaidon I* explains, the basis of the alleged section 349 violation was not a false guarantee that the policies themselves would expressly provide for premiums to vanish, or even that the illustrations expressly guaranteed that result. Indeed, we held that the disclaimers in the illustrations and in the policy provisions were sufficient to negate the existence of any such guarantees. We concluded in *Gaidon I,* however, that the absence of any such guarantee was beside the point with respect to plaintiffs' section 349 claim. "Although [the insurers] did not guarantee that interest [and thus dividend] rates would remain constant, they failed to reveal that the illustrated vanishing dates were wholly unrealistic" (*supra,* 94 NY2d, at 350).

We held in *Gaidon I* that the operative allegations of the violation of General Business Law § 349 were that, through "an extensive marketing scheme ... defendants lured them into purchasing policies by using illustrations that created *unrealistic expectations as to the prospects of premium disappearance* upon a strategically chosen 'vanishing date.' This vanishing date, plaintiffs allege, was *misleading,* as based on the premise that interest rates would continue at a high unprecedented rate for, in some cases, 20 or more years--a premise that defendants allegedly knew to be unlikely" (*id.,* at 344 [emphasis supplied]).

Because the gravamen of the complaints of General Business Law § 349 violations was not false guarantees of policy terms, but deceptive practices inducing unrealistic expectations of continuing interest/dividend rate performance to fully offset premiums at the projected date, plaintiffs suffered no measurable ***212** damage until the point in time when those expectations were actually not met, and they were then called upon either to pay additional premiums or lose coverage and forfeit the premiums they previously paid. Thus, we conclude, the date when those additional premiums were demanded triggered the Statute of Limitations, and these actions, commenced within three years of those dates, were timely commenced.

Accordingly, in *Gaidon v Guardian Life Ins. Co.,* the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative. In *Russo v Massachusetts Mut. Life Ins. Co.,* the order of the Appellate Division, insofar as appealed from, should be reversed, with costs, and plaintiff's cause of action under General Business Law § 349 reinstated.

Chief Judge Kaye and Judges Smith, Ciparick, Wesley, Rosenblatt and Graffeo concur.
In *Gaidon v Guardian Life Ins. Co.:* Order affirmed, etc.

In *Russo v Massachusetts Mut. Life Ins. Co.:* Order, insofar as appealed from, reversed, etc. ***213**

  

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