



OP-ED: NJ CAN PROTECT CONSUMERS WITHOUT PROMOTING LAWSUITS

MARCUS RAYNER | SEPTEMBER 30, 2014

A few simple, common-sense amendments to the current Consumer Fraud Act would punish deceptive business practices while curbing nuisance litigation against honest businesses



Marcus Rayner is president of the Trenton-based New Jersey Civil Justice Institute.

Remember last year's wave of lawsuits claiming that some of Subway Sandwich Shops' famous "footlong" subs weren't quite a foot long? Some of the first suits filed were orchestrated by lawyers here in New Jersey because the state's consumer protection law has been so badly distorted during the past few decades that it not only invites such preposterous litigation, but also often generously rewards it.

A new white paper from Emory University Law School professor Joanna Shepherd, "The Expansion of New Jersey's Consumer Fraud Act: Causes and Consequences," details just how we got to the point where we are suing over sandwiches. It begins by explaining that the Garden State's law was initially modeled after the Federal Trade Commission Act of 1914.

It was 100 years ago that Congress first sought to define and deter a new class of consumer harms that arose as the traditional merchant-consumer relationship evolved in response to myriad new products and services, new retail models, and new credit-based payment systems. The FTC Act prohibited "unfair and deceptive acts or practices in or affecting commerce."

But recognizing the potential for litigious mischief (such as lawsuits claiming sandwiches aren't quite long enough), Congress purposely limited enforcement of the law to its newly created Federal Trade Commission. It expressly prohibited private lawsuits so as Sen. William J. Stone (D-MO) warned prior to final passage, "a certain class of lawyers . . . will [not] arise to ply the vocation of hunting up and working of such suits," the number of which "no man can estimate."

This prohibition against private lawsuits recognized that consumers could be harmed not only by unfair and deceptive trade practices, but also by the over-prosecution of marginal or specious claims. Defendants' costs for litigating both legitimate and bogus claims are ultimately passed on to consumers in the form of higher prices, and some claims can effectively work to narrow consumers' choices.

Leery of these potential harms to consumers, nearly all 50 states and the District of Columbia initially preserved the prohibition against private lawsuits as they eventually adopted their own state-level consumer laws. In New Jersey, the attorney general was tasked with enforcement.

But since then, the state's consumer fraud act has undergone radical changes. More than 200 amendments have broadened original definitions of fraudulent or deceptive practices, and expanded defendants' potential liabilities far beyond consumers' out-of-pocket losses. Most significant of all was the 1971 amendment allowing private attorneys to "enforce" the law via litigation. The still rising tide of consumer lawsuits now flooding our court dockets was inevitable once the private litigation floodgates were opened and incentives like triple damages and attorneys' fees were adopted.

Shepherd's paper cites statistics from a 2009 study by Northwestern University's Searle Civil Justice Institute showing that reported decisions of consumer fraud claims in New Jersey between 2000 and 2009 rose nearly 450 percent (roughly three times higher than the national average), even as the state's population rose less than 4.5 percent. Much of this hundredfold discrepancy can be fairly attributed to the fact that well-intentioned legislators and judges have managed to turn the state's consumer law into one that encourages costly lawsuits.

NJCJI believes that New Jersey's consumer fraud act should be amended to protect consumers without promoting lawsuits. The state could make substantial progress by:

- Limiting the CFA to transactions occurring in the State of New Jersey or to transactions with New Jersey residents.
- Requiring plaintiffs to prove that they relied on the misrepresentation when they purchased the product or service.
- Requiring consumers to ask for their money back or for the alleged fraud to be fixed prior to bringing suit.
- Limiting the award of attorney's fees and costs to those fees reasonably attributable to the CFA claim.
- Allowing the court discretion in awarding treble damages, as is common in other states.
- Limiting the CFA's applicability against industries that are already subject to the Federal Trade Commission and other regulator structures.

These simple changes would ensure that the Consumer Fraud Act is used to punish deceptive business practices and protect consumers without enabling nuisance litigation against honest businesses.

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