

To: New Jersey Law Revision Commission
From: Susan Thatch
Re: Consumer Fraud Act
Date: March 9, 2015

MEMORANDUM

In January 2014, the Commission authorized a project focusing on New Jersey's Consumer Fraud Act (N.J.S. 56:8-1 – 195) (the "CFA"). The Commission acknowledged the ongoing interest in a robust consumer protection statute but also recognized that the presence of statutory redundancy and ambiguity is potentially problematic and could thwart the appropriate application of the Act's protections.

Background

The Federal Trade Commission Act ("FTC Act") prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."¹ Under the FTC Act, The Federal Trade Commission is the sole enforcer of this provision; the FTC Act does not create a private cause of action for consumers.²

Over time, states' have seen fit to augment the FTC Act's protections by promulgating their own state-level legislation.³ Typically, states have either copied Section 5 of the FTC Act⁴ or adopted all or part of either the Uniform Deceptive Trade Practices Act or the Model Unfair Trade Practices and Consumer Protection Law.⁵

New Jersey was one of the first states to enact consumer fraud protections. In enacting the CFA in 1960, the Legislature sought "to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer."⁶ In 1971, the Legislature expanded the CFA to permit a private cause of action for violations of the Act.⁷ This private cause of action is considered "an efficient mechanism to: (1) compensate the victim for his or her actual loss; (2) punish the wrongdoer through the award of treble damages; and (3) attract

¹ 15 U.S.C. 45 (a)(1).

² Joanna M. Shepherd-Bailey, *Consumer Protection Acts or Consumer Litigation Acts? A Historical and Empirical Evaluation of State CPAs*, AM. TORT REFORM ASS'N, undated, at 9-10.

³ Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 173 (2011).

⁴ Approximately twenty-eight states specifically reference the FTC Act in their state consumer fraud laws. Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 173 (2011).

⁵ Shepherd-Bailey, *supra* note 2, at 13-14.

⁶ *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 14 (1994) quoting Senate Committee, Statement to Senate Bill No. 199 (1960).

⁷ N.J.S. 56:8-19 (1971).

competent counsel to counteract the ‘community scourge’ of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual.”⁸

Over time, the CFA has become one of the state’s most complicated statutes. It has been amended dozens of times, expanding to almost 200 subsections and extensive accompanying regulations. Every year, New Jersey’s judiciary confronts a substantial number of claims arising from the CFA’s broad and sometimes unclear provisions.⁹ Given its history of patchwork legislation and interpretive case law, New Jersey’s CFA would benefit from revisions promoting simplicity consistent with legislative intent.

Analysis

A significant amount of New Jersey’s CFA case law grapples with broad concepts derived from the language of N.J.S. 56:8-19; most are interpretations born of necessity in the absence of legislative clarity. At the same time, the Legislature regularly introduces bills expanding or restricting the CFA. The current legislative session is no different. Bills currently pending in the Legislature seek to address some of the courts’ most challenging issues:

- Mandatory treble damages for violation of the CFA – The language of N.J.S. 56:8-19 stipulates that a court “shall . . . award threefold the damage sustained by any person in interest” for a violation of the CFA. New Jersey’s courts’ have noted and faithfully executed the Legislature’s mandatory imposition of treble damages.¹⁰ Pending bill A 3497/S.2293 would make an award of up to treble damages discretionary.
- Attorney fees for technical violations of the CFA – An “unlawful act” proscribed by the CFA may present through affirmative acts, knowing omissions or regulatory violations.¹¹ Failure to comply with applicable regulations constitutes a violation of the CFA regardless of “intent or moral culpability.”¹² The New Jersey Supreme Court has held that a defendant remains liable for attorneys’ fees and costs if plaintiff proves an unlawful practice but is unable to show the requisite “ascertainable loss” required to collect treble damages.¹³ Notably, the courts’ have clarified that a plaintiff’s claim of an ascertainable loss must be “bona fide” and capable of surviving either a Rule 4:46-2 motion for

⁸ *D’Agostino v. Maldonado*, 216 N.J. 168 (2013), citing *Weinberg v. Spring Corp.*, 173 N.J. 233, 249 (2002).

⁹ See generally, Joanna Shepherd, *The Expansion of New Jersey’s Consumer Fraud Act: Causes and Consequences*, AM. TORT REFORM ASS’N (2013).

¹⁰ *Cox, supra*, 138 N.J. at 24 (“[A]n award of treble damages and attorneys’ fees are mandatory under N.J.S.A. 56:8-19 if a consumer-fraud plaintiff proves both an unlawful practice under the Act and an ascertainable loss.”); *D’Agostino*, 216 N.J. at 184.

¹¹ *Cox, supra*, 138 N.J. at 24.

¹² *Cox, supra*, 138 N.J. at 19.

¹³ *Cox, supra*, 138 N.J. at 23, citing *Performance Leasing Corp. v. Irwin Lincoln-Mercury*, 262 N.J. Super. 23, 31 (App. Div.), *certif. denied*, 133 N.J. 443 (1993).

summary judgment¹⁴ or a Rule 4:37-2(b) motion for involuntary dismissal¹⁵ to collect attorney fees. Proposed bill A207 and A3497/S2293 would eliminate attorney fees for technical violations of the CFA.

- Out-of-state litigants utilizing New Jersey’s CFA – State consumer fraud laws vary widely.¹⁶ Nine jurisdictions specifically prohibit class action suits based upon their consumer fraud statutes.¹⁷ The CFA’s broad protections, procedures, and remedies may incentivize litigants residing in other jurisdictions to file class action lawsuits in New Jersey.¹⁸ The New Jersey Supreme Court noted that “the certification of a nationwide class is rare and application of the law of a single state to all members of such a class is even more rare.”¹⁹ Indeed, research indicates that plaintiffs seeking nationwide class action certification based upon the CFA have difficulty surviving the analysis required by Rule 4:32-1.²⁰ Pending bills A809 and A3497/S2293 would limit the private cause of action to New Jersey residents or to transactions that take place within New Jersey.
- Reliance as a component of a CFA claim – As part of its “watchdog” authority, the Attorney General is not required to prove that consumers were in fact damaged by a particular unlawful practice.²¹ In the context of civil actions, New Jersey courts have also held that a practice can “be unlawful even if no person was in fact misled or deceived thereby.”²² Pending bill A3497/S2293 would require a plaintiff pursuing a CFA claim to prove that he relied to his detriment on defendant’s act or omission.

The modifications envisioned by this pending legislation have drawn both praise and opposition.²³ If enacted, these legislative efforts would redirect this area of jurisprudence through

¹⁴ *Weinberg, supra*, 173 N.J. at 253 (requiring “a bona fide claim of ascertainable loss that raises a genuine issue of fact requiring resolution by the factfinder”).

¹⁵ *Perez v. Professionally Green, L.L.C.*, 215 N.J. 388 (2013) (extending the holding of *Weinberg* to motions for involuntary dismissal); *see also Pron v. Carlton Pools, Inc.*, 373 N.J. Super. 103 (App. Div. 2004).

¹⁶ *Fink v. Ricoh Corp.*, 365 N.J. Super 520, 570 (App. Div. 2003) (“A review of the consumer fraud statutes of the various states, and the cases decided thereunder demonstrates the existence of numerous actual conflicts on various issues between provisions of the NJCFA and those of the statutes enacted by other states.”)

¹⁷ Carolyn L. Carter, *Consumer Protection in the States*, NATIONAL CONSUMER LAW CENTER INC. (Feb. 2009). (identifying Alabama, Georgia, Iowa, Louisiana, Mississippi, Montana, South Carolina, Tennessee and Virginia as states prohibiting class action consumer fraud claims).

¹⁸ *See generally* Shepherd, *supra* note 9.

¹⁹ *Int’l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co.*, 192 N.J. 372, 394 n.3 (2007).

²⁰ *See Int’l Union of Operating Engineers*, 192 N.J. at 382; *Fink*, 365 N.J. Super. at 520; *Beegal v. Park West Gallery*, 394 N.J. Super 98 (App. Div. 2007); *Hannan v. Weichert South Jersey*, 2007 WL 1468643 (App. Div. 2007); *cf. Lee v. Carter-Reed Co. L.L.C.*, 203 N.J. 496 (2010) (permitting class certification of a group of New Jersey based residents).

²¹ *Meshinky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 473 (1988)

²² *Cox, supra*, 138 N.J. at 462, *quoting D’Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J. Super. 11, 22; *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607-608 (1997).

²³ *See* Press Release, New Jersey Civil Justice Institute, Let’s fight fraud, not business. Reform New Jersey’s Consumer Fraud Act Now! (December 18, 2014), available at <http://www.civiljusticenj.org/lets-fight-fraud-not-business-reform-new-jerseys-consumer-fraud-act-now>; *cf.* Press Release, Consumers League of New Jersey,

clear legislative mandate. Staff has not proposed revisions involving these particular policy concerns, but requests the Commission's guidance as to whether they would like additional analysis in these areas.

The CFA's current organization is infirm. As the initial focus of the project, Staff has conducted a review and reorganization of the CFA's provisions with the goal of constructing a more logical and coherent statutory framework. The proposed reorganization would aggregate sections of general applicability and then categorize more specific provisions by subject area.

In connection with the reorganization, Staff proposes streamlining the CFA's definition section. Also, it may be useful to propose additional definitions that capture key interpretive language. For example, much case law has addressed what constitutes an "ascertainable loss" for the CFA's purposes. The Court has repeatedly noted, "there is little that illuminates the precise meaning that the Legislature intended in respect of the term ascertainable loss."²⁴ In the absence of legislative directive, the Court has determined that an ascertainable loss must be "quantifiable or measurable" not "hypothetical or illusory."²⁵ Staff anticipates a more thorough analysis concerning the concept of "ascertainable loss", including both New Jersey court interpretations and those of other jurisdictions.

With the Commission's authorization, Staff will begin outreach with the Division of Consumer Affairs, the AOC, and other interested stakeholders to determine whether the CFA's reorganization is feasible. Outreach will also focus on the CFA's definitions to determine whether they can be consolidated appropriately.

Assembly Bill A. 3333 Rewards the Perpetrators of Consumer Fraud, available at <http://www.cnj.org/a3333%20-%20cnj%20-%20opposition-%20robert-russo.pdf>.

²⁴ *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 11 (2004); *D'Agostino*, supra, 216 N.J. at 13 (holding that transfer of equity in home constitutes an ascertainable loss);

²⁵ *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 248 (2005).

Proposed reorganized structure:

1. Generally applicable provisions

- a. Definitions (N.J.S. 56: 8-1; N.J.S. 56: 8-2.15; N.J.S. 56: 8-2.29; N.J.S. 56: 8-14.2; N.J.S. 56: 8-22; N.J.S. 56: 8-26; N.J.S. 56: 8-39; N.J.S. 56: 8-49; N.J.S. 56: 8-53.1; N.J.S. 56: 8-55; N.J.S. 56: 8-62; N.J.S. 56: 8-67; N.J.S. 56: 8-83; N.J.S. 56: 8-86; N.J.S. 56: 8-93; N.J.S. 56: 8-99; N.J.S. 56: 8-104; N.J.S. 56: 8-108; N.J.S. 56: 8-115; N.J.S. 56: 8-120; N.J.S. 56: 8-137; N.J.S. 56: 8-153; N.J.S. 56: 8-157; N.J.S. 56: 8-161; N.J.S. 56: 8-170; N.J.S. 56: 8-175; N.J.S. 56: 8-185).
- b. General fraud (N.J.S. 56:8-2)
- c. Remedies and construction of act (N.J.S. 56:8-2.13).
- d. Attorney General’s authority, enforcement powers, and penalties (N.J.S. 56:8-3 to -14.1) (N.J.S. 56:8-15 to -18).
- e. Civil Cause of Action and penalties (N.J.S. 56:8-15, -19, -20).
- f. Promulgation of regulations – (56:8-14.7) Authorizes the Director of the Division of Consumer Affairs to promulgate regulations to effectuate the provisions of the act. Note that this authority appears in 19 subsections and is sometimes permissive (may promulgate) and sometimes mandated (shall promulgate).
- g. Severability (N.J.S. 56:8-12).
- h. Educational programs relating to the CFA (N.J.S. 56:8-14.5 and -.6)

2. Merchandise

- a. Advertisement of Unassembled Merchandise as Assembled in Picture or Illustration; Prohibition (N.J.S. 56:8-2.4).
- b. Sale, Attempt to Sell or Offer for Sale of Merchandise Without Tag or Label with Selling Price (N.J.S. 56:8-2.5 and -.6).
- c. Copy of transaction or contract; provision to customer (N.J.S. 56:8-2.22).
- d. “Going Out of Business Sale”; Time Limits (N.J.S. 56:8-2.8).
- e. Refund Policy Disclosure Act (N.J.S. 56:8-2.14 to -.21)
- f. Solicitation of Used Goods or Wares by Profit-Making Enterprise; Disclosures (N.J.S. 56:8-2.23).
- g. Misrepresentation of Geographic Origin or Location of Merchandise (N.J.S. 56:8-2.25).
- h. Raincheck Policy Disclosure Act (N.J.S. 56:8-2.28 to -.32).
- i. Unit Price Disclosure Act (N.J.S. 56:8-21 to -25).
- j. Resale of Tickets (N.J.S. 56:8-26 to -38).
- k. Health Clubs (N.J.S. 56:8-39 to -48).
- l. Child Product Safety (N.J.S. 56:8-49 to -53.5)
- m. Information Services (N.J.S. 56:8-54 to -60).
- n. Change in Telecommunications Services Providers (N.J.S. 56:8-86 to -91).
- o. Pet Purchase Protection Act (N.J.S. 56:8-92 to -97).
- p. Unlawful Selling of Certain Merchandise at Excessive Price During a State of Emergency (N.J.S. 56:8-107 to -109)
- q. Gift Certificate or Card; Value; Expiration; Dormancy Fee; Balance Under Five

Dollars; Penalty; Definitions (N.J.S. 56:8-110 to -112).

r. Prepaid Calling Cards and Services (N.J.S. 56:8-175 to -181).

3. Food and Drugs

- a. Sale of Non-Prescription Drugs, Infant Formula and Baby Food Beyond Expiration Date (N.J.S. 56:8-2.27).
- b. Halal Food Consumer Protection Act (N.J.S. 56:8-98 to -103).
- c. Kosher Food Consumer Protection Act (N.J.S. 56:8-61 to -66).
- d. Misrepresentation of Identity of Food in Menus or Advertisements of Eating Establishments (N.J.S. 56:8-2.9 to -.12).
- e. Unsolicited Credit Cards and Checks (N.J.S. 56:8-153 to -156).

4. Cars

- a. Sale of Used Cars (N.J.S. 56:8- 67 to -80) (this includes a consumer education program, but limited to 120 days following enactment so is unclear re: currently applicability. There is also an authorized administrative fee for this purpose, charged to the consumer.)
- b. Motor Vehicle Window Tinting (N.J.S. 56:8-117 and -118)
- c. Sale of Vehicle Protection Product Warranties (N.J.S. 56:8-167)

5. Construction

- a. Contractors' Registration Act (N.J.S. 56:8-136 to -152) (there's a public education campaign in this section)
- b. Contractors' Contracts; Required Terms and Conditions

6. Employment and Conditions of

- a. Temporary Help Services -- (N.J.S. 56:8-1.1 to -.2),
- b. International Labor Matching (N.J.S. 56:8-185 to -195) (there's a public education campaign section in this part).
- c. Industrial Hygienist Truth in Advertising Act (N.J.S. 56:8-81 to -85).
- d. Exemption from Consumer Fraud Law, Certain Real Estate Licensees (N.J.S. 56:8-19.1).

7. Fraudulent and Unlawful Practices

- a. Operation Simulating Governmental Agency as Unlawful Practice (N.J.S. 56:8-2.1).
- b. Scheme to Not Sell Item or Service Advertised (N.J.S. 56:8-2.2).
- c. Notification to Person that He Has Won Prize and Requiring Him to Perform Act (N.J.S. 56:8.2.3).
- d. Solicitation of Funds or Contributions, or Sale or Offer for Sale of Goods or Services Under False Representation of Solicitation for Charitable or Nonprofit Organization or of Benefit for Handicapped Persons (N.J.S. 56:8-2.7).
- e. Senior Citizens; Home Solicitation for Certain Loans Prohibited (N.J.S. 56:8-104 to -106).
- f. Safety Professional Truth in Advertising Act (N.J.S. 56:8-113 to -116).
- g. Telemarketing Calls (N.J.S. 56:8-119 to -135).

- h. Unsolicited Advertisements Over Telephone Lines (N.J.S. 56:8-157 to -160).
- i. Security of Personal Information (N.J.S. 56:8-161 to -166).
- j. Internet Dating Safety Act (N.J.S. 56:8-168 to -174).