To: New Jersey Law Revision Commission
From: Jordan Goldberg
Re: Project Related to the Consumer Fraud Act
Date: January 6, 2014

MEMORANDUM

The New Jersey Consumer Fraud Act ("CFA") was enacted in 1960 and is considered "one of the strongest and most 'consumer friendly' consumer protection laws in the United States." Lisa J. Trembly & Michael F. Bevacqua, *Back to the Future with the Consumer Fraud Act: New Jersey Sets the Standard for Consumer Protection*, 29 Seton Hall Legis. J. 193, 194 (2004). However, it is also one of the most complicated statutes in the state, with almost 200 subsections and dozens of discrete types of regulation and restrictions that have been added over fifty years. N.J.S. 56:8-1 to -195; *see, e.g.*, N.J.S. 56:8-2.4 (prohibiting the advertisement of unassembled merchandise as assembled in the picture, enacted in 1973); N.J.S. 56:8-2.27 (relating to the sale of expired food and baby food, enacted in 1998); N.J.S. 56:8-39 to -48 (regulating the operation of health clubs, enacted in 1987).

The New Jersey Supreme Court has analyzed the CFA in a number of cases and has found that it was intended to "greatly expand protections for New Jersey costumers" *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 555 (2009), and that its "original purpose was to combat sharp practices and dealing that victimized consumers by luring them into purchases through fraudulent or deceptive means." *D'Agostino v. Maldonado*, 216 N.J. 168, 183 (2013). Although its basic intention is simple, in its fifty year history, the CFA has been the subject of hundreds of cases in addition to the hundreds of amendments that have been added over the years. As a result, the CFA is now a one-hundred page collection of statutes (as well as many hundreds of pages of administrative regulations) that must be read along with a number of cases in order to be properly understood.

Because the CFA has been written over the course of so many years, with so many varied drafters and motivated by so many different concerns, great and small, specific and general, the actual statutory language contains many ambiguities and redundancies. For example, the Act contains more than two dozen separate "definitions" sections, each stating that it applies to "this act" and some that contain a differently worded definition of a term defined elsewhere, or that repetitively define a term defined elsewhere. To take one specific case, it seems that throughout the entire CFA, the word "director" is intended to refer to "the director of the Division of Consumer Affairs in the Department of Law and Public Safety." However, the term "Director," is defined 13 separate times in the CFA, 12 times as "the director of the Division of Consumer Affairs in the Department of Law and Public Safety" and once only as "the director of the Division of Consumer Affairs." *See, e.g.*, N.J.S. 56:8-39; 56:8-49. *Compare with* N.J.S. 56:8-175.

In its fifty year history, the CFA has changed radically and has engendered much discussion and criticism. In each of the last two legislative sessions alone, at least seven different bills were introduced to amend the CFA. *See, e.g.,* A1444 (proposal to eliminate award of attorneys' fees, filing fees and costs of suit for technical violations of the CFA); A1497 (proposal to require aggrieved person to request refund prior to commencing suit under the CFA under certain circumstances). There have also been dozens of Supreme Court cases addressing questions about the CFA, including three different cases in 2013 alone. *See D'Agostino v. Maldonado,* 216 N.J. 168 (2013); *Green v. Morgan Properties,* 215 N.J. 431 (2013); *Perez v. Professionally Green, LLC,* 215 N.J. 388 (2013).

Both the proposed legislation and the litigation have tended to focus on the more controversial components of the CFA, including the CFA's provision that permits victorious parties to collect treble damages as well as attorney's fees, apparently for even technical violations of the Act. *See* A1444 (2013). This part of the CFA has been the subject of much litigation, in part because even in a case with a clear technical violation of the CFA, the parties must still have identifiable damages (or an "ascertainable loss") than can be trebled in order to qualify for that relief. *See BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513, 518 (App. Div. 1996) (holding that the CFA "makes no distinction between 'technical' violations and more 'substantive' ones"); *but see also Hoffman v. Hampshire Labs, Inc*., 405 N.J. Super. 105, 113 (App. Div. 2009) (holding that in order to win a claim for treble damages, "a private litigant must allege specific facts that ... establish the following: (1) unlawful conduct by the defendant[ ]; (2) an ascertainable loss ...; and (3) a causal relationship between the defendant's unlawful conduct and the [ ] ascertainable loss").

New Jersey courts have apparently consistently held that a plaintiff may have a cause of action based on a technical violation of the CFA but still must prove an "ascertainable loss" in order to collect treble damages. *See, e.g. Cox v. Sears Roebuck & Co.,* 138 N.J. 2 (1994) (holding that violation of a regulation requiring permits to be obtained led to ascertainable loss connected to the fact that the poor workmanship would have been detected had the inspections related to those permits taken place; therefore, holding that plaintiff was entitled to treble damages based on the value of the replacement work on his home); *Roberts v. Cowgill,* 316 N.J. Super. 33 (1998) (holding that homeowners could receive treble damages for situation where contractor violated CFA regulation by issuing the final bill before a certificate of occupancy had been obtained, and where home could not meet standards to get certificate without extensive further corrective construction). Nonetheless, courts have struggled with the question of causation in situations where plaintiffs argue for treble damages by trying to show a connection between a technical or purely regulatory violation and some kind of damages. *See, e.g. Cox,* 138 N.J. at 21 (analyzing whether failure to apply for applicable permits had led to damages to plaintiffs' home); *Jonsantos Construction v. Bohrer,* 326 N.J. Super. 42, 46-7 (App. Div. 1999) (holding that contractor violated CFA by requesting that Certificate of Completion be signed prior to

completing installation of patio steps, which were later completed with flaws; holding that the flaws in steps were an "ascertainable loss" linked to the violation of the CFA and thus could be trebled as damages, but that other defects in the work that were later discovered were not linked to violation and therefore could not be included in damages). Furthermore, even the meaning of the phrase "ascertainable loss" has not been clear and was the primary legal question in the Court's most recent CFA case. *D'Agostino,* 216 N.J. at 190 (determining whether in a particular case there was an "ascertainable loss" and "if so, the remedy to be imposed," noting that "[n]otwithstanding the importance of [the term] ascertainable loss, we find sparse guidance in the statutory text.").

Another area of longstanding dispute is whether a plaintiff can recover attorneys' fees for a technical violation of the CFA that did not lead to an ascertainable loss. The Court initially held plaintiffs who can prove a technical violation of the CFA even without an ascertainable loss are still entitled to reasonable attorneys' fees and costs. *See Cox*, 138 N.J. at 24-25 (noting that "a consumer-fraud plaintiff can recover reasonable attorneys' fees, filing fees and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages"); *Branigan v. Level on the Level, Inc.*, 326 N.J. Super. 24 (App. Div. 1999) (holding that no ascertainable loss occurred in home improvement contract situation where the two major problems resulting from the project were of the homeowner's making, but also holding that because a minor technical violation of the CFA had occurred in that contractor had failed to specify start and end dates for the project, plaintiffs were entitled to at least some reasonable attorneys' fees, filing fees and costs). The Court later revised its approach, holding that the plaintiffs must at least bring a bona fide claim of ascertainable loss that can survive a summary judgment motion (although the factfinder may ultimately find that there was no such loss) in order to be entitled to attorneys' fees. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 253 (2002) ("We conclude that to have standing under the Act a private party must plead a claim of ascertainable loss that is capable of surviving a motion for summary judgment. In such a case, even if the factfinder ultimately determines that the loss has not been proven, a private plaintiff may obtain injunctive relief under the Act, along with attorneys' fees when unconscionable conduct is found to exist."). Most recently, Court further clarified its interpretation, holding that in any case where a plaintiffs' claim for ascertainable loss cannot survive a summary judgment-like standard, the plaintiff will not be entitled to attorneys' fees. *Perez*, 215 N.J. at 408 ("Although plaintiffs' claim for ascertainable loss was tested by a different motion from the summary judgment motion addressed in *Weinberg*, it fell short of a similar standard, and did not rise to the level of a bona fide claim within the meaning of N.J.S. 56:8–19. Thus, a reward of attorneys' fees in this procedural setting would directly contravene N.J.S. 56:8–19.").

Given the extensive nature of the CFA, the presence of redundancy and ambiguity in its terms and structure, and the ongoing interest in a robust consumer protection statute, Staff

proposes that the Commission approve a project to revise and restructure the CFA in order to ensure better clarity, to excise redundancy, and to attempt to address ambiguities that have been identified in case law and by scholars and legislators.