

To: New Jersey Law Revision Commission
From: Samuel M. Silver
Re.: New Jersey Consumer Fraud Act
Date: February 5, 2018

EXECUTIVE SUMMARY

In 2014, the Commission authorized a project focusing on New Jersey's Consumer Fraud Act (N.J.S. 56:8-1 – 195) (“NJCFA” or “Act”). Subsequently, in 2015, Staff drafted a Memorandum proposing a statutory reorganization of the CFA and discussing legislative initiatives in this area

The Commission has acknowledged an ongoing interest in a robust consumer protection statute and has also recognized that the presence of statutory redundancy and ambiguity is potentially problematic and could thwart the appropriate application of the Act's protections.

As Staff renews work in this area of the law, it conducted research into the origin of the Consumer Fraud Act and recent legislative initiatives. Information regarding the legislative initiatives is set forth below in order to provide a background for Commission consideration, and to seek guidance from the Commission regarding the aspects of this law on which Staff should focus to conclude the Commission work in this area.

BACKGROUND

A. THE STRUCTURE OF THE ACT.

For a little over fifty years, the New Jersey Consumer Fraud Act has been amended by the Legislature in an attempt to protect consumers.

The Act now contains thirty separate and distinct definition sections that define 186 terms.¹ These new sections frequently duplicate terms already defined by the Act. The term “director,” pertaining to the Director of the Division of Consumer Affairs in the Department of Law and Public Safety, is defined 13 times in 13 separate statutes within the Act.² The presence of these duplicative definitions makes the Act cumbersome and difficult to navigate.

It may also be beneficial to reorganize the Act to clarify confusing provisions and excise redundancies. Duplicative definitions could be eliminated in an effort to streamline and simplify the Act.³ Sections of general applicability could be grouped together.⁴ Finally, rather than being

¹ See n. 165.

² See 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. 56:8-62; N.J.S. 56:8-67; N.J.S. 56:8-86; N.J.S. 56:8-93; N.J.S. 56:8-99; N.J.S. 56:8-120; N.J.S. 56:8-137; N.J.S. 56:8-170; N.J.S. 56:8-175; N.J.S. 56:8-185.

³ See Memorandum from Susan Thatch, to the New Jersey Law Rev. Comm. 4 (Mar. 09, 2015), available at <http://www.lawrev.state.nj.us/agenda/agen2015/agen030915.pdf>

⁴ *Id.*

set forth in a chronological order, the statutes should be organized by subject matter.⁵

An earlier review by Staff resulted in the consideration of revisions to the structure of the New Jersey Consumer Fraud Act as follows⁶:

1. Generally applicable provisions

- a. Definitions.⁷
- b. General Fraud.⁸
- c. Remedies and Construction of the Act⁹.
- d. Attorney General's Authority, Enforcement Powers, and Penalties.¹⁰
- e. Civil Cause of Action and Penalties.¹¹
- f. Promulgation of Regulations.¹²
- g. Severability.¹³
- h. Educational Programs related to the CFA¹⁴

2. Merchandise

- a. Advertisement of Unassembled Merchandise as Assembled in Picture or Illustration; Prohibition.¹⁵
- b. Sale, Attempt to Sell or Offer for Sale of Merchandise Without Tag or Label with Selling Price.¹⁶
- c. Copy of Transaction or Contract; Provision to Customer.¹⁷
- d. "Going Out of Business Sale"; Time Limits.¹⁸
- e. Refund Policy Disclosure Act.¹⁹

⁵ *Id.*

⁶ The proposed revisions represent the preliminary assessment of the statute performed by Susan Thatch. *See also n. 179 supra.*

⁷ *See 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. 56:8-39; 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. 56:8-110; N.J.S. 56:8-115; N.J.S. 56:8-120; N.J.S. 56:8-130; 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; and N.J.S. 56:8-196.*

⁸ *N.J.S. 56:8-2.*

⁹ *N.J.S. 56:8-2.13.*

¹⁰ *N.J.S. 56:8-3 to -14.4; N.J.S. 56:8-15 to -18.*

¹¹ *N.J.S. 56:8-15; N.J.S. 56:8-19; N.J.S. 56:8-20.*

¹² *N.J.S. 56:8-2.32; N.J.S. 56:8-14.7; N.J.S. 56:8-24; N.J.S. 56:8-25; N.J.S. 56:8-28; N.J.S. 56:8-31; N.J.S. 56:8-36; N.J.S. 56:8-48; N.J.S. 56:8-52(b); N.J.S. 56:8-53.5; N.J.S. 56:8-56(c); N.J.S. 56:8-59; N.J.S. 56:8-78; N.J.S. 56:8-89; N.J.S. 56:8-97; N.J.S. 56:8-111; N.J.S. 56:8-118; N.J.S. 56:8-134; N.J.S. 56:8-138.2; N.J.S. 56:8-142(7)(c); N.J.S. 56:8-152; N.J.S. 56:8-165; N.J.S. 56:8-174; N.J.S. 56:8-180; N.J.S. 56:8-195.*

¹³ *N.J.S. 56:8-12.*

¹⁴ *N.J.S. 56:8-14.5 and N.J.S. 56:8-14.6.*

¹⁵ *N.J.S. 56:8-2.4.*

¹⁶ *N.J.S. 56:8-2.5 and N.J.S. 56:8-2.6.*

¹⁷ *N.J.S. 56:8-2.22.*

¹⁸ *N.J.S. 56:8-2.8.*

¹⁹ *N.J.S. 56:8-2.14 to N.J.S. 56:8-2.21.*

- f. Solicitation of Used Goods or Wares by Profit-Making Enterprise; Disclosures.²⁰
- g. Misrepresentation of Geographic Origin or Location of Merchandise.²¹
- h. Raincheck Policy Disclosure Act.²²
- i. Unit Price Disclosure Act.²³
- j. Resale of Tickets.²⁴
- k. Health Clubs.²⁵
- l. Child Product Safety.²⁶
- m. Information Services.²⁷
- n. Change in Telecommunications Services Providers.²⁸
- o. Pet Purchase Protection Act.²⁹
- p. Unlawful Selling of Certain Merchandise at Excessive Price During a State of Emergency.³⁰
- q. Gift Certificate or Card; Value; Expiration; Dormancy Fee; Balance Under Five Dollars; Penalty.³¹
- r. Prepaid Calling Cards and Services.³²

3. **Food and Drugs**

- a. Sale of Non-Prescription Drugs, Infant Formula and Baby Food Beyond Expiration Date.³³
- b. Halal Food Consumer Protection Act.³⁴
- c. Kosher Food Consumer Protection Act.³⁵
- d. Misrepresentation of Identity of Food in Menus or Advertisements of Eating Establishments.³⁶
- e. Unsolicited Credit Cards and Checks.³⁷

4. **Cars**

²⁰ *N.J.S.* 56:8-2.23.

²¹ *N.J.S.* 56:8-2.25.

²² *N.J.S.* 56:8-2.28 to 56:8-2.32.

²³ *N.J.S.* 56:8-21 to *N.J.S.* 56:8-25.

²⁴ *N.J.S.* 56:8-26 to *N.J.S.* 56:8-38.

²⁵ *N.J.S.* 56:8-39 to *N.J.S.* 56:8-48.

²⁶ *N.J.S.* 56:8-49 to *N.J.S.* 56:8-53.5.

²⁷ *N.J.S.* 56:8-54 to *N.J.S.* 56:8-60.

²⁸ *N.J.S.* 56:8-86 to *N.J.S.* 56:8-91.

²⁹ *N.J.S.* 56:8-92 to *N.J.S.* 56:8-97.

³⁰ *N.J.S.* 56:8-107 to *N.J.S.* 56:8-109.

³¹ *N.J.S.* 56:8-110 to *N.J.S.* 56:8-112.

³² *N.J.S.* 56:8-175 to *N.J.S.* 56:8-181.

³³ *N.J.S.* 56:8-2.27.

³⁴ *N.J.S.* 56:8-98 to *N.J.S.* 56:8-103.

³⁵ *N.J.S.* 56:8-61 to *N.J.S.* 56:8-66.

³⁶ *N.J.S.* 56:8-2.9 to *N.J.S.* 56:8-2.12.

³⁷ *N.J.S.* 56:8-153 to *N.J.S.* 56:8-156.

- a. Sale of Used Cars³⁸
- b. Motor Vehicle Window Tinting.³⁹
- c. Sale of Vehicle Protection Product Warranties.⁴⁰

5. Construction

- a. Contractors' Registration Act.⁴¹
- b. Contractors' Contracts; Required Terms and Conditions.⁴²

6. Employment and Conditions of

- a. Temporary Help Services.⁴³
- b. International Labor Matching.⁴⁴
- c. Industrial Hygienist Truth in Advertising Act⁴⁵
- d. Exemption from Consumer Fraud Law, Certain Real Estate Licensees.⁴⁶

7. Fraudulent and Unlawful Practices

- a. Operation Simulating Governmental Agency as Unlawful Practice.⁴⁷
- b. Scheme to Not Sell Item or Service Advertised.⁴⁸
- c. Notification to Person that He Has Won Prize and Requiring Him to Perform Act.⁴⁹
- 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.⁵⁰
- e. Senior Citizens; Home Solicitation for Certain Loans Prohibited.⁵¹
- f. Safety Professional Truth in Advertising Act.⁵²
- g. Telemarketing Calls.⁵³

³⁸ *N.J.S.* 56:8- 67 to *N.J.S.* 56:8-80.

³⁹ *N.J.S.* 56:8-117 and *N.J.S.* 56:8-118.

⁴⁰ *N.J.S.* 56:8-167.

⁴¹ *N.J.S.* 56:8-136 to *N.J.S.* 56:8-152.

⁴² *Id.*

⁴³ *N.J.S.* 56:8-1.1 to - *N.J.S.* 56:8.2.

⁴⁴ *N.J.S.* 56:8-185 to *N.J.S.* 56:8-195.

⁴⁵ *N.J.S.* 56:8-81 to *N.J.S.* 56:8-85.

⁴⁶ *N.J.S.* 56:8-19.1.

⁴⁷ *N.J.S.* 56:8-2.1.

⁴⁸ *N.J.S.* 56:8-2.2.

⁴⁹ *N.J.S.* 56:8.2.3.

⁵⁰ *N.J.S.* 56:8-2.7.

⁵¹ *N.J.S.* 56:8-104 to *N.J.S.* 56:8-106.

⁵² *N.J.S.* 56:8-113 to *N.J.S.* 56:8-116.

⁵³ *N.J.S.* 56:8-119 to *N.J.S.* 56:8-135.

- h. Unsolicited Advertisements Over Telephone Lines.⁵⁴
- i. Security of Personal Information.⁵⁵
- j. Internet Dating Safety Act.⁵⁶

B. SUBSTANTIVE CHANGES TO THE ACT

In the absence of an extensive legislative history⁵⁷ the judiciary has been called upon to interpret significant aspects of the Act, including: pre-suit demand for a refund; the extraterritorial application of the Act to nationwide class actions; fee-shifting for technical violations⁵⁸; and mandatory treble damages.⁵⁹ Recently legislation has been introduced in an effort to amend or codify the aforementioned issues.⁶⁰

Over the past several years, bills regarding the Consumer Fraud Act have been introduced in the Legislature. The bills introduced in prior legislative sessions did not move through the legislative process nor have they been enacted. There are, however, bills that were introduced in the 2018-2019 legislative session. Although the Commission does not generally work in areas that are a current focus of the Legislature, the legislative proposals currently under consideration do not comprehensively address all the issues the NJLRC has reviewed.

C. PRE-SUIT DEMAND

In *Bosland v. Warnock Dodge, Inc.*⁶¹ a consumer purchased a vehicle from an automobile dealer. At the time of her purchase, the buyer was unaware that the seller had included undisclosed service fees in her registration paperwork.⁶² Rather than seek a refund of these fees, the buyer filed a complaint against the defendant and alleged a violation of the Consumer Fraud Act.⁶³ The trial court found that “she never complained about these charges... [and] these fees were Defendant[’s] profit...paid without objection.”⁶⁴ The Appellate Division disagreed with the dismissal of the plaintiff’s cause of action and explicitly rejected the premise that a pre-suit demand was required in order to sustain an action under the NJCFA.⁶⁵

In reviewing this matter, the New Jersey Supreme Court explicitly found that, “[t]he plain language of the CFA does not... impose upon any putative plaintiff the requirement that he or she first seek a remedy directly from the offending merchant.” Rather, “any person who suffers

⁵⁴ *N.J.S.* 56:8-157 to *N.J.S.* 56:8-160.

⁵⁵ *N.J.S.* 56:8-161 to *N.J.S.* 56:8-166.

⁵⁶ *N.J.S.* 56:8-168 to *N.J.S.* 56:8-174.

⁵⁷ *See n.* 135 *supra*.

⁵⁸ *B.J.M. Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513, 517 (App. Div. 1996).

⁵⁹ *N.J.S.* 56:8-19 (2016).

⁶⁰ A303, 2018 Leg., 218th Legislature (N.J. 2018); *see also* A1556, 2018 Leg., 218th Legislature (N.J. 2018), regarding the pre-suit demand requirement under certain circumstances.

⁶¹ *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543 (2009).

⁶² *Id.* at 548.

⁶³ *Id.*

⁶⁴ *Id.* at 549.

⁶⁵ *Id.* at 550.

an ascertainable loss... as a result of” defendant’s violation of the CFA may file an action.⁶⁶ The Court went on to find that reading a pre-suit demand requirement into the Act could conceivably “...permit practices that the statute was designed to deter... to continue unabated and unpunished.”⁶⁷

The Court acknowledged that it could imagine circumstances in which a pre-suit demand for relief might be appropriate.⁶⁸ The Supreme Court advised the defendants that the requirement of a pre-suit demand for a refund involved, “an examination and a weighing of public policy considerations that... are [reserved] for the Legislature.”⁶⁹ Such a consideration follows.

Assembly Bills A303⁷⁰ and A1556⁷¹ were pre-filed for introduction during the 2018-2019 legislative session. Both require an aggrieved consumer issue a pre-suit demand for a refund upon the seller. These bills seek to avoid the use of the NJCFA to punish merchants for accidental violations of the Act or honest mistakes made during the course of a consumer transaction.

D. CLASS ACTION IN NEW JERSEY

In *International Union of Operating Engineers Local No. 68 v. Merck & Co., Inc.*, the New Jersey Supreme Court found that the frequency of nationwide class certification is rare.⁷² The Court also noted that, “[the] application of the law of a single state to all members of such a class is even more rare.”⁷³ Under the right circumstances, however, the possibility remains that the size of a class could be expanded to include non-New Jersey residents whenever a New Jersey Corporation is the defendant.

Under the proposed legislation, the New Jersey Consumer Fraud Act would “apply only to New Jersey residents, or to transactions that take place in the State.”⁷⁴

E. TREBLE DAMAGES; FEE AWARDS FOR TECHNICAL VIOLATIONS.

Treble Damages

Since 1971, individual consumers have been permitted to bring private actions to recover refunds and treble damages for violations of the New Jersey Consumer Fraud Act.⁷⁵ To be eligible to collect treble damages, a plaintiff must prove that the defendant’s conduct was

⁶⁶ *Id.*

⁶⁷ *Id.* at 561.

⁶⁸ *Id.* at 562.

⁶⁹ *Id.*

⁷⁰ <http://www.njleg.state.nj.us/bills/BillView.asp> (Last visited January 30, 2018).

⁷¹ <http://www.njleg.state.nj.us/bills/BillView.asp> (Last visited January 30, 2018).

⁷² *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.* 192 N.J. 372, 394 n.3 (2007).

⁷³ *Id.*

⁷⁴ *Id.* at sec. 2(a).

⁷⁵ *Dugan v. TGI Fridays, Inc.*, 231 N.J. at 50-51.

unlawful and demonstrate an ascertainable loss.⁷⁶ In addition, the claimant must also establish “a causal relationship between the unlawful conduct and the ascertainable loss.”⁷⁷ For the purpose of imposing treble damages, the NJCFA does not discriminate between a nefarious merchant and one who was acting in good faith and with no intent to defraud a consumer.

Technical Violations

In New Jersey, if a consumer-fraud plaintiff is able to prove both an unlawful practice under the NJCFA and an ascertainable loss then an award of treble damages and attorneys’ fees is mandatory under N.J.S. 56:8-19.⁷⁸ The defendant in *BJM Insulation & Construction, Inc. v. Evans*⁷⁹, denied the allegations against it and interposed a defense that the plaintiff had violated the Consumer Fraud Act.⁸⁰ The trial court judge noted in the order of dismissal that the plaintiff had violated the provisions of the CFA.⁸¹ The trial court, however, denied the defendant’s request for attorneys’ fees and costs.⁸² The defendant appealed.⁸³

The Appellate Division held, “... the question of whether a trial judge has the discretion to deny counsel fees to a successful claimant of Consumer Fraud Act protection is no longer an open one.”⁸⁴ The Court made it clear that if a consumer-fraud plaintiff is able to prove both an unlawful practice under the NJCFA and an ascertainable loss then an award of attorneys’ fees is mandatory under N.J.S. 56:8-19.⁸⁵

Finally, the Court addressed the plaintiff’s argument that any transgression of the Act should be forgiven because it was merely a “technical” violation.⁸⁶ The Court stated “...the Consumer Fraud Act [would make] no distinction between “technical” violations and more “substantive” ones.”⁸⁷

Assembly Bill A303 would amend N.J.S. 56:8-19 to leave the imposition of treble damages against a vendor to the discretion of the trial court judge as follows:

In any action under this section, the court may, in addition to any other appropriate legal or equitable relief, award up to threefold the

⁷⁶ *Id.* at 52.

⁷⁷ *Id.*

⁷⁸ *BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513 (App. Div. 1996) (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994)).

⁷⁹ *BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513 (App. Div. 1996).

⁸⁰ *Id.* at 515.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994)).

⁸⁵ *BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513, 516.

⁸⁶ *Id.*

⁸⁷ *Id.* at 518.

actual damages sustained by any person in interest.⁸⁸

In addition, subsection c.1 of this bill provides,

Notwithstanding the provisions of subsection a. of this section, attorneys' fees, filing fees, and reasonable costs of suit shall not be awarded for a technical violation of P.L. 196, c.39 (C.56:8-1 et seq.).

In order to be exonerated for a "technical violation" of the Act, the merchant must have been acting in "good faith" and with "no intent to defraud the consumer."⁸⁹ In addition, the violation must neither impact the quality of the product nor service provided⁹⁰ nor result in an ascertainable loss to the person.⁹¹

CONCLUSION

Staff is seeking guidance from the Commission regarding the areas in which to focus and, with the Commission's authorization, will begin outreach with the Division of Consumer Affairs, the AOC, and other interested stakeholders to determine whether the CFA's reorganization is feasible.

⁸⁸ A303, sec. 2, 2018 Leg., 218th Legislature sec. 7 (a) (N.J. 2018). The underscored text represents the proposed changes to the statute.

⁸⁹ A303, sec. 7(c)(2), 2018 Leg., 218th Legislature (N.J. 2018).

⁹⁰ *Id.* at sec. 7(c)(2)(a).

⁹¹ *Id.* at sec. 7(c)(2)(b).