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The New Jersey Consumer Fraud Act Is there change in the air?



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New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.* ("NJCF"), is recognized as one of the strongest in the country. *Cooper v. Samsung Elec. Am., Inc.*, 374 Fed. Appx. 250, 256 (3d Cir. 2010). Our courts have noted that the State legislature intended the Act to "be one of the strongest consumer protection laws in the nation." *New Mea Constr. Corp. v. Harper*, 203 N.J. Super. 486, 501-502 (App. Div. 1985); *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994) (citing Governor's Press Release (Apr. 19, 1971)). Several of the NJCFA's key provisions make the Garden State fertile ground for would-be statutory consumer protection claim class action plaintiffs: *i.e.*, the Act's definition of "consumer" includes both individuals and businesses; and mandatory treble damages and attorneys' fees for successful plaintiffs (N.J.S.A. 56:8-1(d) and 56:8-19). This statutory breadth has been coupled with directive from our Supreme Court that the CFA, as remedial legislation, be construed liberally in favor of consumers. *Allen v. VandA Bros, Inc.*, 414 N.J. Super. 152, 156 (App. Div. 2010). As a result, the CFA's history has been one of "constant expansion of consumer protection." *Jefferson Loan Co., Inc. v. Session*, 397 N.J. Super. 520, 502, 533-34 (App. Div. 2008); *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 604 (1997).

New Jersey's courts have repeatedly held that this liberal interpretation of the NJCFA is particularly appropriate in allowing consumer fraud claim class actions. "For nearly thirty years, our highest court has instructed trial courts to liberally allow class actions involving allegations of consumer fraud." *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 332 N.J. Super. 31, 45 (App. Div. 2000).

However, some of the NJCFA's bite may be softened in the coming year. Bipartisan activity in the Senate and General Assembly in late 2010 signaled that the winds of change may be coming. For example:

(1) Assembly Bill A-3333 and Senate Bill S-2855 contain the most significant changes of all the proposed legislation: (a) *Only individuals may sue* — The Act's private cause of action would be available only to individuals and not to businesses; (b) *Plaintiffs must prove detrimental reliance on the unlawful commercial practice* — This sets up a new burden for NJCFA plaintiffs (and tort reform for would-be targets of NJCFA class actions); (c) *Discretionary, not mandatory, trebling and fees* — Courts would have discretion in awarding damages, which would not be permitted to exceed threefold the consumer's actual damages sustained. If the court found that an NJCFA violation occurred, award of attorneys' fees and costs is still required, but only for those costs

reasonably attributable to the prosecution of the NJCFA claim that results in judgment. These Bills further limit the award of attorneys' fees and costs to the greater of \$150,000 or one-third of the judgment; and (d) *New Jersey-only transactions* — The NJCFA would apply only to transactions that take place within the State.

As of August 29, 2011 (the date this article was submitted for print), the New Jersey Office of Legislative Services reported that Bills S-2855 and A-3333 have not yet been scheduled for a vote or other legislative action in the Assembly or Senate.

(2) Assembly Bill A-1401 requires that an NJCFA plaintiff with an ascertainable loss of \$250 or less must first request a refund in writing before commencing suit. No action could be filed until the 35th day following the mailing of the refund request. As of August 29, 2011, the New Jersey Office of Legislative Services reported that Bill A-1401 has not yet been scheduled for a vote or other legislative action in the Assembly.

(3) On May 20, 2010, the General Assembly (by a vote of 76 - 2) passed Bill No. A-1064, which eliminates the award of attorneys' fees, filing fees and costs of suit for technical violation of the NJCFA, meaning "any violation where the person held in violation made a good faith effort to comply with [the NJCFA] and the resulting violation did not: (a) impact the quality of the product or service provided; or (b) result in an ascertainable loss to the consumer." The caveat is that attorneys' fees, filing fees and costs of suit could still be awarded in an action brought by the Attorney General. Bill S-1790 awaits action by the Senate Commerce Committee.

These legislative developments are tempered by a July 7, 2011 precedent-setting decision of the New Jersey Supreme Court that officers, owners, managers and employees of businesses providing services to consumers can be sued individually (alongside the company) and can be held personally accountable for statutory violations, even though they were acting through a corporation at the relevant time. *Allen v. V & A Brothers, Inc.*, No. A-30-10, 2011 WL 2637270, at *1 (N.J. July 7, 2011). Nevertheless, because many NJCFA-class-action-targeted companies doing business in the Garden State or with its residents have accused the Act of being one of the most abused pieces of consumer protection legislation in the nation, they regard Bills A-3333/S-2855, A-1401 and A-1064/S-1790 as important first steps toward allowing honest businesses to serve consumers — free of the threat of frivolous lawsuits — while still protecting consumers from fraud where warranted.

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