



NJCFA: Will This Finally Be The Year For Change?

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New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, et seq. ("NJCF"), is among our country's most aggressive. *Cooper v. Samsung*, 374 Fed. Appx. 250, 256 (3d Cir. 2010). Indeed, our legislature intended it 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)), and our Supreme Court has

directed that the CFA must be construed liberally in favor of consumers (*Allen v. V and A Bros, Inc.*, 414 N.J. Super. 152, 156 (App. Div. 2010)). Some of its key provisions make New Jersey fertile ground for consumer protection class actions: i.e., its definition of "consumer" includes both individuals and businesses; and treble damages and attorneys' fees for successful plaintiffs are mandatory (N.J.S.A. 56:8-1(d) and 56:8-19).

Over the years though, various attempts have been made to temper the NJCFA's bite. Where do those efforts stand today? Well, not exactly where your business clients may have hoped.

Attorneys' fees & costs exclusion for "technical violations": First introduced on 10/15/04, A2598 (now A207 in 2014-2015's legislative session) eliminates the award of attorneys' fees, filing fees and costs of suit for NJCFA "technical violations," now defined in the current draft as "any violation that: (1) did not impact the quality, quantity, cost, or value of any product or service provided; (2) did not involve any unconscionable commercial practice... ; and (3) as a matter of law, did not result in an ascertainable loss to the consumer." A207's fee exclusion is inapplicable to: (a) Attorney General actions; (b) actions by governmental offices of consumer affairs; and (c) subsequent technical violations of the same or similar nature, provided defendant was notified of the original violation and given reasonable opportunity to rectify. A207 is pending technical review by legislative counsel. (Companion legislation S2293 and S1127 are pending before the Senate's Commerce Committee.)

Individuals must have detrimentally relied as to transactions within the Garden State and have made pre-suit demand for relief, with damages being discretionary and capped: Under the NJCFA now on the books, a court is mandatorily required to award treble damages -- whether plaintiff is a business or an individual. Could that change this year though?

First introduced on 09/27/12, A3264 (now A809 in 2014-2015's session) proposes to specifically exclude big business from the term "consumer," which A809 defines as "an individual who purchases, leases or rents merchandise, for personal, family, or household purposes, or a business with annual revenue of less than \$10,000,000."

But wait...there's more... A809 also makes the NJCFA applicable only to "New Jersey residents, and transactions that take place in the State." Talk about NJCFA shockwaves! This is not the NJCFA environment to which we've become accustomed, where "[f]or 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). If passed, A809 (pending in the Assembly's Consumer Affairs Committee) would take effect immediately and apply to lawsuits filed on or after the effective date

A809's implications take on even more significance for paring down the NJCFA's bite when read in conjunction with A3497 (originally A3333 when introduced on 10/07/10) and with S2293 (introduced 06/30/14 and referred to Senate's Commerce Committee), which require that a plaintiff-individual "must have relied to his detriment" on a defendant's unlawful commercial practice and have first served a written demand for relief upon a seller before being entitled to sue under the NJCFA (no matter the dollar amount at issue -- which jettisons the \$250 ascertainable loss prerequisite of prior version A3929 (introduced 05/11/09) that was necessary to trigger plaintiffs' obligation to make pre-suit written demand for refund). Together, A809 and A3497 set up new burdens for plaintiffs (and tort reform for would-be class action targets).

Currently pending before the Assembly's Consumer Affairs Committee, A3497 also gives courts discretion in awarding damages, which cannot exceed threefold the consumer's actual damages. Although costs and attorney fees are still mandatory upon a finding of NJCFA violation, awards are limited to only those amounts "reasonably attributable to the prosecution of the claim that results in the judgment" -- with a cap of "the greater of \$150,000 or one-third of the judgment." A3497 also makes the NJCFA inapplicable to transactions otherwise permitted or regulated by the Federal Trade Commission or by another federal or state regulatory agency. (Cue the preemption-based arguments.)

What do payday loans, flowers, vehicles & consultants have in common?: Pending legislative amendments also propose to tackle some more discrete issues under the NJCFA.

A1977 (introduced 01/16/14; referred to Assembly's Consumer Affairs Committee) makes it unlawful to extend deferred deposit or "payday loans" to consumers in New Jersey; it applies to payday loans made by lenders, wherever located, and made by any means, including in-person contact, Internet, mail, telephone, print, radio, or television.

A2793 (introduced 03/10/14; referred to Assembly's Consumer Affairs Committee) makes it unlawful for sellers of flowers or "ornamental products" to misrepresent the geographic location of their business by either: (1) listing a local telephone number in an advertisement, unless it also provides the seller's true physical address; or (2) listing a fictitious or assumed business name if the name misrepresents the location of the business, unless it identifies the seller's true physical address.

Under current NJCFA regulations, an automotive repair dealer must provide a customer with a written estimated price to complete the repair. S1098 (introduced 01/30/14; referred to Senate's Transportation Committee) proposes to exempt from this requirement "person[s] who restor[e] antique or classic motor vehicles," defined as "any motor vehicle which is at least 25 years old and which is owned as a collector's item and used solely for exhibition and educational purposes by the owner."

S2671 (introduced 12/22/14; referred to Senate's Commerce Committee) would make the NJCFA applicable to consultants, including small business consultants and consulting firms.

Whether or not these proposals find a permanent home in the statute books in the coming year, their ramifications portend significant enough implications for businesses in our State that companies' counsel should discuss these possibilities with clients and prepare for potential consumer protection landscape changes.

Since it's Fall sports season, do I hear any wagers on this being the Year of CFA Change?