

## **BACK TO THE FUTURE WITH THE CONSUMER FRAUD ACT:**

### **NEW JERSEY SETS THE STANDARD FOR CONSUMER PROTECTION**

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## ***I. Introduction***

New Jersey's Consumer Fraud Act<sup>1</sup> ("Act") is one of the strongest and most "consumer friendly" consumer protection laws in the United States.<sup>2</sup> New Jersey courts interpret the Act's provisions liberally, resulting in increased consumer protection.<sup>3</sup> This article will discuss the Act's legislative history, essential provisions, and recent trends in the expansion of consumer protection.

## ***II. Legislative History of the Consumer Fraud Act***

While New Jersey's Act is strong, its legislative history is sparse.<sup>4</sup> The only legislative history in the state library is a number of press releases from former Governor Cahill's Office regarding the 1971 amendment to the Act.<sup>5</sup> On June 29, 1971, Governor Cahill signed the bill that made the amendment law.<sup>6</sup> The Governor's message stated:

Governor William T. Cahill signed into law a bill giving New Jersey one of the strongest consumer protection laws in the nation . . . . Under Assembly Bill 2402, sponsored by Assemblyman Thomas Kean . . . the definition of consumer fraud is broadened, enforcement procedures are streamlined and penalties for violation are increased. The bill is part of the Administration's program to provide increased protection for consumers.

In signing the measure, Cahill expressed his appreciation to the members of the Legislature for their foresight and cooperation in passing the legislation. He added that this bill coupled with recent legislation which created a new Division of Consumer Affairs 'gives New Jersey the enforcement power it needs to protect the consumer. . . .'

The bill amends the Consumer Fraud Act to include 'unconscionable consumer practices' as part of a definition of unlawful practices to cover exorbitant prices, unfair bargaining advantages and incomplete disclosures . . . .

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<sup>1</sup> N.J. STAT. ANN. §§ 56:8-1 to -109 (West 2004).

<sup>2</sup> Press Release, Governor William T. Cahill, Assembly Bill No. 2402, at 1 (June 29, 1971). *See* Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1996).

<sup>3</sup> Weinberg v. Sprint Corp., 173 N.J. 233, 257 (2002) (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 15 (1994)).

<sup>4</sup> Skeer v. EMK Motors, Inc., 187 N.J. Super. 465, 471 (App. Div. 1982).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

In addition, the bill provides a private right of action for consumers against those who violate the Consumer Fraud Act. Under this provision the consumer will be entitled to treble damages, reasonable attorney's fees, and reasonable costs of suit . . . .

The Governor stated that this provision, in his opinion, will provide easier access to the courts for the consumer, will increase the attractiveness of consumer actions to attorneys and will also help reduce the burdens on the Division of Consumer Affairs.<sup>7</sup>

Governor Cahill saw the amendment "as an incentive for an attorney to take a case and as encouraging private parties to bring their own actions instead of turning to the Attorney General."<sup>8</sup>

The second press release states that "[a]nother amendment [to the Consumer Fraud Act] provides a private cause of action for injured persons and *requires the court to award triple damages, reasonable attorneys' fees and reasonable costs of the suit.*"<sup>9</sup>

In addition, the attorney general's appendix includes a letter written in 1971 by former Attorney General Kugler to senators voicing his support for the proposed amendment.<sup>10</sup> According to the letter, studies performed by the Center for Analysis of Public Issues and the Office of the Attorney General indicated a need for a new Division of Consumer Affairs.<sup>11</sup>

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<sup>7</sup> *Id.* at 471-72 (quoting press release) (emphasis omitted).

<sup>8</sup> *Id.* at 472.

<sup>9</sup> *Id.* (quoting press release) (emphasis added).

<sup>10</sup> *Skeer*, 187 N.J. Super. at 472.

<sup>11</sup> *Id.* at 472-73. Former Attorney General Kugler's letter states: perhaps one of the most substantial and necessary remedies provided by this legislation grants the consumer a private right of action against persons violating the Consumer Fraud Act. In addition the provision mandates treble damages, reasonable attorneys' fees and reasonable costs of suit in such an action. We found through our study that consumers are often without adequate remedy for redressing violations such as those contained in the Consumer Fraud Act. In addition, we found that consumers most often cannot afford the cost of pursuing what remedies they do have available and that attorneys are not attracted to individual consumer suits which involve a great amount of work and very little monetary award. Consequently, we included the above private right of action in order to provide a vehicle for private consumer redress, to make that vehicle economically and professionally attractive to the attorneys of this State.

*Id.* at 473 (quoting General Kugler's Letter to New Jersey Senators) (emphasis omitted).

### III. Overview of the Consumer Fraud Act

In 1960, the New Jersey Legislature first enacted the Act, vesting the attorney general with the authority “to combat the increasingly widespread practice of defrauding the consumer.”<sup>12</sup> The Legislature was concerned with “sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kind[s] of selling or advertising practices.”<sup>13</sup>

Originally, the Act was enforced exclusively by the Attorney General, “who was provided with broad powers to investigate,<sup>14</sup> subpoena records,<sup>15</sup> and seek injunctions prohibiting fraudulent conduct and orders of restitution to make whole any person damaged by conduct which violated the Act.”<sup>16</sup> Since 1967, the attorney general has exercised his enforcement powers and duties through the Office of Consumer Protection.<sup>17</sup>

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<sup>12</sup> *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 14 (1994) (quoting Senate Committee, Statement to the Senate Bill No. 199 (1960)). See also *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 264 (1997) (noting that “the Act grants Attorney General various powers to accomplish objectives.”).

<sup>13</sup> *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 271 (1978).

<sup>14</sup> N.J. STAT. ANN. § 56:8-3 (West 2004).

<sup>15</sup> *Weinberg v. Sprint Corp.*, 173 N.J. 233, 247-48 (quoting *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 472-73 (1988)). See also N.J. STAT. ANN. § 56:8-5 (West 2004).

<sup>16</sup> *Weinberg*, 173 N.J. at 247-48 (quoting *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 472-73 (1988)), which stated:

The Act also granted the Attorney General the power to investigate consumer fraud complaints, to set forth rules and regulations that have the force of law, N.J.S.A. 56:8-4, and to issue cease and desist orders and impose penalties for violations of such orders, N.J.S.A. 56:8-18. Other statutory provisions reinforce the Attorney General’s broad authority and further define his or her power under the Act. See N.J.S.A. 56:8-6 (setting forth Attorney General’s power under circumstances where person fails to file statement or obey subpoena in conjunction with any investigation or inquiry); N.J.S.A. 56:8-15 (authorizing restoration of moneys or property in addition to imposition of civil penalties); N.J.S.A. 56:8-16 (stating Attorney General may provide for remission of all or part of such penalty conditioned “upon prompt compliance with the requirements thereof and any order entered thereunder”); N.J.S.A. 56:8-17 (establishing that upon person’s failure to pay penalty or restore money or property, Attorney General may “issue certificate to Clerk of Superior Court that such person is indebted to the State for the payment of such penalty and moneys or property ordered restored” and that such entry has same force and effect as docketed judgment).

*Weinberg*, 173 N.J. at 247-48.

<sup>17</sup> N.J. STAT. ANN. § 52:17B-5.7 (West 2004); see also *Weinberg*, 173 N.J. at 248.

In 1971, the Act was amended to permit a private cause of action by individual consumers to recover monies and treble damages for consumer fraud violations.<sup>18</sup> This amendment promoted several important purposes.<sup>19</sup> The reasons for the Act were to: “compensate the victim for his or her actual loss; to punish the wrongdoer through the award of treble damages; and to attract 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.”<sup>20</sup> However, there is one caveat to this amendment. The standing requirement to bring a private action under the Act mandates that a consumer must meet the heightened standard of showing an “ascertainable loss” of money or property, as opposed to the lesser burden imposed in enforcement proceedings instituted by the attorney general.<sup>21</sup> Only the attorney general may bring a consumer fraud action purely for injunctive relief.<sup>22</sup>

The 1971 amendment also broadened the scope of the Act by defining “unlawful practices” to include “any unconscionable commercial practice,” but failed to define “unconscionable commercial practices.”<sup>23</sup> The New Jersey Supreme Court defined that phrase in *Kugler v. Romain*,<sup>24</sup> as “an amorphous concept obviously designed to establish a broad business ethic.”<sup>25</sup> The term “unconscionable” implies

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<sup>18</sup> N.J. STAT. ANN. §§ 56:8-2.11 to -2.12 (West 2004); N.J. STAT. ANN. § 56:8-19 (West 2004); *see also Weinberg*, 173 N.J. at 248 (citing *Lemelledo v. Beneficial Mgmt. Corp.* of Am., 150 N.J. 255, 264); *Riley v. New Rapids Carpet Ctr.*, 61 N.J. 218, 226 (1972) (holding that private class actions must be accepted if Act’s objectives were to be met).

<sup>19</sup> *Weinberg*, 173 N.J. at 249.

<sup>20</sup> *Id.* (citing *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139); *see also Scibek v. Longette*, 339 N.J. Super. 72, 77-78 (App. Div. 2001) (examining purposes of Act).

<sup>21</sup> *Weinberg*, 173 N.J. at 250 (citing *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 473 (1988)); *Cox v. Sears Roebuck & Co.* 138 N.J. 2, 21; *see also* N.J. STAT. ANN. § 56:8-19 (stating that “any person who suffers an ascertainable loss . . . may bring an action or assert a counterclaim”).

<sup>22</sup> *Id.*

<sup>23</sup> *D’Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J. Super. 11, 24 (App. Div. 1985). Importantly, a consumer is not required to prove that a perpetrator committed an “unconscionable commercial practice” to prevail under the Act. *Cox*, 138 N.J. at 19. Notably, the conduct that constitutes a violation of the Act is specified in the disjunctive, as “any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact.” *Id.* (quoting N.J. STAT. ANN. § 56:8-2) (emphasis added).

<sup>24</sup> 58 N.J. 522 (1971).

<sup>25</sup> *Id.* at 543.

a lack of "good faith, honesty in fact and observance of fair dealing."<sup>26</sup> Due to the absence of bright-line rules or standards, this category of violations must be judged on a case-by-case basis.

#### ***IV. Specific Provisions of the Act***

The Act provides:

[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . . .<sup>27</sup>

Essentially, the Act applies to all consumer transactions that involve the sale of consumer merchandise or services generally sold to the public at large. The definitional sections of the Act and its intended purpose are very broad.<sup>28</sup> "Merchandise" is defined as including "any objects, wares, goods, commodities, services, or anything offered, directly or indirectly to the public for sale."<sup>29</sup> "Sale" is defined as "any sale, rental or distribution, offer for sale, rental or distribution or attempt to directly or indirectly to sell, rent or distribute."<sup>30</sup> A "person" is defined as any natural person or any business entity such as partnerships, corporations, companies, associations, etcetera.<sup>31</sup>

The Act essentially prohibits fraud "which has been expansively interpreted by New Jersey's courts to include any misrepresentation or knowing omission of a material fact regarding the sale of merchandise with the intent that the consumer will rely upon the misrepresentation or omission."<sup>32</sup> However, the prohibitions of the Act do not stop at

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<sup>26</sup> *Id.* at 544.

<sup>27</sup> N.J. STAT. ANN. § 56:8-2 (West 2004).

<sup>28</sup> *New Mea Construction Corp. v. Harper*, 203 N.J. Super. 486, 499 (App. Div. 1985).

<sup>29</sup> N.J. STAT. ANN. § 56:8-1(c) (West 2004).

<sup>30</sup> N.J. STAT. ANN. § 56:8-1(e) (West 2004).

<sup>31</sup> N.J. STAT. ANN. § 56:8-1(d) (West 2004).

<sup>32</sup> Thomas V. Hildner & Lisa J. Trembly, *New Jersey's Consumer Fraud Act: A Powerful Weapon for Consumers and a Need to Know for Business Owners*, THE HILLSBOROUGH BEACON, July 23, 1998, at 12A; *see also Kavky v. Hertalife Int'l of Am.*, 359 N.J. Super. 497, 509 (App. Div. 2003) (citing *Gennari v. Weichert Co. Realtors*, 148



outright fraud.<sup>33</sup> The Act prohibits “unlawful practices” and “unconscionable commercial practices” “in connection with the sale or advertisement of *any* merchandise or real estate.”<sup>34</sup>

An “unlawful practice” under the Act may arise from: (1) an affirmative act; (2) a knowing omission; or (3) a violation of an administrative regulation.<sup>35</sup> The central element in all forms of consumer fraud is the *capacity* to mislead.<sup>36</sup> Since application of the Act only requires a *potential* to mislead, a practice may be deemed unlawful regardless of whether the seller actually deceived the consumer.<sup>37</sup> Good faith is not a defense to a violation of the Act.<sup>38</sup>

Notably, there is no scienter requirement when a perpetrator’s alleged unlawful practice consists of an affirmative act, and therefore, the consumer is merely required to prove that an unlawful practice was committed that caused an ascertainable loss.<sup>39</sup> Conversely, intent is an element of the offense when the alleged unlawful practice is an omission, and accordingly, the consumer must show that the perpetrator intended to commit the unlawful practice.<sup>40</sup>

Additionally, the Act imposes strict liability for any violation of the regulations promulgated by the attorney general.<sup>41</sup> Intent is not an element for these violations.<sup>42</sup> These violations are the most treacherous because all “parties subject to the regulations are assumed to be familiar with them, so that any violation of the regulations, regardless of intent or moral culpability, constitutes a violation of the Act.”<sup>43</sup>

The Act authorizes the attorney general to promulgate regulations that “shall have the force of law.”<sup>44</sup> Pursuant to the Act, the Division of Consumer Affairs has enacted extensive regulations to govern many of

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N.J. 582 (1996) (internal citation omitted)).

<sup>33</sup> Hildner & Trembly, *supra* note 32.

<sup>34</sup> *Id.* (quoting N.J. STAT. ANN. § 56:8-2).

<sup>35</sup> See *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 17 (1994); see also *Gennari v. Weichert Co. Realtors*, 148 N.J. at 582; N.J. STAT. ANN. §§ 56:8-2 to -4 (West 2004).

<sup>36</sup> *Cox*, 138 N.J. at 17 (emphasis added).

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> *Id.* at 16; see *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 470 (App. Div. 1982) (holding that good faith will not excuse non-compliance with regulations).

<sup>39</sup> *Cox*, 138 N.J. at 17-18.

<sup>40</sup> *Id.* at 18.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 18-19.

<sup>43</sup> *Id.*

<sup>44</sup> N.J. STAT. ANN. § 56:8-4 (West 2004).

the practices susceptible to consumer-fraud violations, such as home-improvement contracts.<sup>45</sup> Specific regulations adopted by the Division which govern the conduct of certain businesses include: Deceptive Mail Order Practices; Meat Sales; Banned Hazardous Products; the Delivery of Household Furniture and Furnishings; Merchandise Advertising; Servicing and Repairing of Home Appliances; the Sale of Animals; Unit Pricing of Consumer Commodities in Retail Establishments; Disclosure of Refund Policy in Retail Establishments; Home Improvement Practices; Resale of Entertainment Tickets; Sale of Food Represented as Kosher; Deceptive Practices Concerning Watercraft Repair; Toy and Bicycle Safety; Health Club Services; Motor Vehicle Advertising Practices; Automotive Sales Practices; and Automotive Repairs.<sup>46</sup>

#### ***V. Damages Available in a Successful Consumer Fraud Action***

As mentioned, the Act was intended to be both remedial and punitive in nature.<sup>47</sup> The remedial aspect of the Act compensates a victim's loss.<sup>48</sup> At the same time, the Act's provision of treble damages, attorneys' fees, filing fees and costs to a successful litigant is punitive because the threat of these severe sanctions deters wrongdoers.<sup>49</sup>

There are three levels of damages available under the Act.<sup>50</sup> Much of the appeal of the Act lies in the cumulative nature of these damages. Thus, a person can incur liability under any one level or all three levels of damages in the aggregate.

The first level of damages is the automatic imposition of treble damages when a plaintiff demonstrates ascertainable loss as a result of an unlawful practice under the Act.<sup>51</sup> This penalty is mandatory and the

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<sup>45</sup> See N.J. ADMIN. CODE tit. 13, § 45A-16 (2004).

<sup>46</sup> See The Division of Consumer Affairs Regulations (June 2003), at <http://www.state.nj.us/lps/ca/ocp/ocpreg.pdf>, for a full text of the regulations.

<sup>47</sup> Weinberg v. Sprint Corp., 173 N.J. 233, 249 (2002).

<sup>48</sup> Cox, 138 N.J. at 21.

<sup>49</sup> N.J. STAT. ANN. § 56:8-19 provides that a plaintiff who has been victimized by an unlawful practice under the Act is entitled to "threefold the damages sustained" by way of "any ascertainable loss of moneys or property, real or personal . . . ." See Cox, 138 N.J. at 21.

<sup>50</sup> For a discussion of the "three tier" damages scheme available under the Act, see Richard Malagiere, Esq. & Anthony M. Rainone, Esq., *The Consumer Fraud Act's Appetite for Residential Improvement Contractors Part II: Penalties for Violating the Consumer Fraud Act*, THE BERGEN RECORD, Dec. 15, 2003, at 18 [hereinafter Malagiere & Rainone II].

<sup>51</sup> See N.J. STAT. ANN. § 56:8-19 (West 2004); see also Cox, 138 N.J. at 21.



courts do not have any discretion when awarding these damages.<sup>52</sup> The key to a successful claim for treble damages is proof that the unlawful practice caused the plaintiff to suffer actual damages.<sup>53</sup> Importantly, even though an individual consumer must present a claim of ascertainable loss to have standing under the Act, that does not mean the claim must ultimately be successful.<sup>54</sup>

The second level of damages is the automatic award of attorneys' fees and costs to a litigant upon the mere showing that an individual or entity committed an unlawful practice under the Act.<sup>55</sup> These damages are noteworthy because the Act mandates the award of attorney's fees and costs only upon a showing of unlawful practice, even where a plaintiff cannot show ascertainable loss.<sup>56</sup> These damages embody the legislature's recognition of the numerous collateral reasons that may cause a claim brought in good faith and supported by underlying facts to ultimately fail.<sup>57</sup> Although a consumer must present a claim of ascertainable loss to bring a private cause of action for consumer fraud, he or she may still be awarded equitable relief and attorney's fees even if that claim ultimately fails.<sup>58</sup> Thus, in order to seek equitable relief and be entitled to attorney's fees, a consumer must simply present a good faith claim of ascertainable loss and prove the commission of an unlawful practice.<sup>59</sup> The fact that the consumer's claim for damages ultimately fails has no effect on the consumer's entitlement to the remedies available under this level.<sup>60</sup> The Act, as drafted, entices

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<sup>52</sup> N.J. STAT. ANN. § 56:8-19; *see also Cox*, 138 N.J. at 21.

<sup>53</sup> *See id.* at 23.

<sup>54</sup> *Weinberg v. Sprint Corp.*, 173 N.J. 233, 252 (2002)(emphasis added).

<sup>55</sup> N.J. STAT. ANN. § 56:8-17 (West 2004).

<sup>56</sup> *BJM Insulation v. Evans*, 287 N.J. Super. 513, 516 (App. Div. 1996) (citing *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 499 (App. Div. 1982)).

<sup>57</sup> *Weinberg*, 173 N.J. at 251.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 253.

<sup>60</sup> *Id.* A violation of the Act only entitles a plaintiff to attorneys' fees. *Id.* In order to obtain other damages, a plaintiff must show, an "ascertainable loss" resulting from the unlawful practice or consumer fraud. *See* N.J. STAT. ANN. § 56:8-19 (West 2004). Case law in New Jersey clearly requires causation between the violation and any damages suffered by plaintiffs. *See Weinberg*, 173 N.J. at 251. For example, in *Feinberg v. Red Bank Volvo*, the Appellate Division found that an automobile dealership violated the Act when it failed to disclose in its leasing advertisement that to qualify for the program a customer must pass a credit check. 331 N.J. Super. 506, 509 (App. Div. 2000). The ad also stated that no bank fees or money down would be required. *Id.* Plaintiff filled out the application for the lease, chose a particular car, filled out a credit application, and placed

attorneys to represent consumers with the smallest of claims.

The third level of damages under the Act authorizes the imposition of civil penalties up to \$10,000 for a first violation, and up to \$20,000 for each subsequent violation.<sup>61</sup> As mentioned, the penalty scheme under the Act is cumulative. Hence, civil penalties are imposed in conjunction with any compensatory or punitive damages awarded by the court.<sup>62</sup> Summary proceedings for the imposition of civil penalties may be instituted by either the attorney general or an individual.<sup>63</sup>

In the interests of increased consumer protection, "the Act prohibits and requires a broad scope of behaviors on the part of those subject to its provisions."<sup>64</sup> As noted, the Act's penalty scheme is quite severe. However, one's exposure to these penalties can be minimized by simply conforming business practices to the requirements and

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\$210 in motor vehicle and document fees on his credit card. *Id.* One day later, the defendant advised plaintiff that he did not qualify for the lease because his credit check disclosed several outstanding judgments. *Id.* Thereafter, plaintiff's own car broke down and he filed a consumer fraud action against the dealership seeking as damages the expenses he incurred resulting from his car breaking down and the \$210 in fees he charged on his credit card. *Id.*

The Appellate Division reversed a treble damages award in favor of the plaintiff holding that a plaintiff must prove a causal relationship between the ascertainable loss and the unlawful practice and that all damages must be proven with "reasonable certainty." *Id.* The court found that any expenses plaintiff incurred when his own car broke down were unrelated to the actions of the dealership. *Id.* Further, with respect to the \$210 charge, the court found that plaintiff's failure to request a refund of that amount prevented him from obtaining a judgment. *Id.*

Likewise, in another case, the court found that a contractor violated the Act by signing a certificate of completion before all the work was done. *Josantos Construction v. Bohrer*, 326 N.J. Super. 42 (App. Div. 1999). In that case, the contractor agreed to build a patio and walkway. *Id.* at 43. Before the steps were completed, the defendant signed a certificate of completion. *Id.* Defects were later found with the work. *Id.* The court found that only the defects in the steps had a sufficient nexus to the violation to warrant treble damages. *Id.* The court explained:

The only violation of the Consumer Fraud Act was the premature submission of the Certification of Completion to the defendants. It was premature because the steps had not been completed. We fail to see a causal connection between that technical violation of the Consumer Fraud Act and the subsequent discovery of additional defects in the work. The fortuitous occurrence that the signing of the Certificate of Completion preceded the discovery of the deficiencies does not supply the causal connection necessary to establish an 'ascertainable loss.'

*Id.*

<sup>61</sup> N.J. STAT. ANN. § 56:18-13 (West 2004) (emphasis added).

<sup>62</sup> *Id.*

<sup>63</sup> N.J. STAT. ANN. § 56:8-14 (West 2004).

<sup>64</sup> *Malagiere & Rainone II*, *supra* note 50, at 18.

restrictions outlined in the Act and the regulations promulgated thereunder. Accordingly, it is advisable that those subject to the Act become familiar with its provisions and the applicable regulations.

#### ***VI. The Importance of Knowing Whether A Consumer Has A Cause of Action***

Whether a consumer has a cause of action for a consumer fraud violation is important for several reasons. First, the applicable statute of limitations under the Act requires a consumer to bring such an action within six years from the date of the accrual of the consumer fraud claim.<sup>65</sup> Second, a litigant that fails to assert a viable consumer fraud claim in a lawsuit based on some other cause of action, such as negligence or breach of contract, may be precluded from later asserting the consumer fraud claim by New Jersey's "entire controversy doctrine."<sup>66</sup> Under that doctrine, a party must assert all claims against all parties in a single judicial proceeding if the claims or parties have a material interest in the same series of transactions.<sup>67</sup> Further, courts generally may not raise a consumer fraud claim *sua sponte*.<sup>68</sup> Therefore, if a viable consumer fraud claim is not asserted in a pending action, it may be forever barred.

Finally, it is important to remember that a consumer fraud violation can be used as a defense in an action. For example, if a seller files a lawsuit against a buyer for failing to pay for the product or services, the buyer may defend the action by pleading that the seller violated the Act.<sup>69</sup>

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<sup>65</sup> N.J. RULES OF CT. § 4:30A; *see* *Mirra v. Holland Am. Line*, 331 N.J. Super. 86, 90 (App. Div. 2000).

<sup>66</sup> N.J. RULES OF CT. § 4:30A; *see* *Prevratil v. Mohr*, 145 N.J. 180, 190 (1996).

<sup>67</sup> *K-Land Corp. No. 28 v. Sewerage Auth.*, 173 N.J. 59, 70 (2002).

<sup>68</sup> *See R. Wilson Plumbing & Heating, Inc. v. Wademen*, 246 N.J. Super. 615, 619 (App. Div. 1991) (raising consumer fraud issue *sua sponte* may violate party's right to notice and opportunity to defend).

<sup>69</sup> *See BJM Insulation v. Evans*, 287 N.J. Super. 513, 515-18 (App. Div. 1996) (Plaintiff contractor sued defendant homeowner alleging breach of contract. Defendant denied allegations of breach and asserted in defense that plaintiff violated the Act. The trial court found that plaintiff had violated the Act and granted summary judgment in favor of defendant. Yet, the court denied defendant's request for attorneys' fees and costs of suit. The Appellate Division reversed and held that plaintiff's violation of the Act coupled with the defendant's success on the merits entitled defendant to reasonable attorneys' fees and costs of suit).

## VII. Recent Developments

### A. Residential Improvement Practice Regulations

Noncompliance with the regulations governing Home Improvement Practices is an unlawful practice within the purview of the Consumer Fraud Act.<sup>70</sup> The New Jersey Administrative Code, specifically Title 13 section 45A-16.2, addresses home improvement practice regulations. The regulations are specified in thirteen categories of either prohibited or required behavior by the contractor. The thirteen categories pertain to model home representations; product and material representations; bait selling; identity of the seller; gift offers; price and financing; performance; competitors; sales representations; building permits; guarantees and warranties; home improvement contract requirements; and disclosures and obligations concerning preservation of buyers' claims and defenses.<sup>71</sup>

Pursuant to the home improvement regulations, a contractor must, among others: (i) ensure all applicable state and local permits have been issued before prosecuting the work;<sup>72</sup> (ii) provide the owner with a copy of an inspection certificate before final payment is due and prior to requesting the owner to sign a completion slip;<sup>73</sup> and (iii) ensure that all contracts for improvements in excess of \$200.00 be in writing as well as any changes in the terms and conditions of the contract.<sup>74</sup>

Additionally, the regulations require home improvement contracts in writing detailing the parties' obligations pursuant to the agreement.<sup>75</sup> The applicable regulations regarding contracts for residential home improvements must include, *inter alia*: (i) the legal name and business address of the contractor, including the name and address of the agent who solicited the work;<sup>76</sup> (ii) a description of the work to be done and

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<sup>70</sup> See *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 17 (1994).

<sup>71</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2; see Richard Malagiere, Esq. & Anthony M. Rainone, Esq., *The Consumer Fraud Act's Appetite for Residential Improvement Contractors Part I: Prohibited and Required Practices*, THE BERGEN RECORD, Nov. 15, 2003, at 18 (hereinafter Malagiere & Rainone I).

<sup>72</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(10)(i) (2004).

<sup>73</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(10)(ii) (2004).

<sup>74</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(12) (2004); see Malagiere & Rainone I, *supra* note 71, at 18.

<sup>75</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(12) (2004).

<sup>76</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(12)(i) (2004).

the principle products and materials to be used or installed in the performance of the contract;<sup>77</sup> (iii) the total contract price, including all finance charges and, where applicable, the hourly rate for labor;<sup>78</sup> (iv) the start date and completion date;<sup>79</sup> (v) a description of any mortgage or security interest to be taken in connection with the financing or sale of the improvement;<sup>80</sup> and (vi) a statement of any guarantee or warranty with respect to any products, materials, labor or services made by the seller.<sup>81</sup>

Regarding actions prohibited by the regulations, a contractor *cannot*: (i) request an owner to sign a certificate of completion form or make final payment prior to the completion of the work;<sup>82</sup> (ii) misrepresent that the home is in need of repair;<sup>83</sup> (iii) make any claim that an enforceable contract has been agreed upon when none exists;<sup>84</sup> or (iv) fail to give the homeowner timely written notice of the reasons beyond the contractor's control for any delay in performance and when the work will commence or be completed.<sup>85</sup>

Notably, the regulations also prohibit any misrepresentations by a contractor, "even by implication, that the materials utilized in the home improvements do not require any maintenance or that the materials are sufficient for the particular project."<sup>86</sup> Further, the regulations prohibit a contractor's failure to: (i) have a sufficient quantity of advertised goods to meet demands;<sup>87</sup> (ii) disclose extra delivery or installation charges;<sup>88</sup> (iii) include all permit fees in the contract price;<sup>89</sup> and (iv) begin and complete work at the dates set in the written contract.<sup>90</sup> Consumer fraud

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<sup>77</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(12)(ii) (2004).

<sup>78</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(12)(iii) (2004).

<sup>79</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(12)(iv) (2004).

<sup>80</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(12)(v) (2004).

<sup>81</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(12)(vi) (2004); *see* Malagiere & Rainone I, *supra* note 71, at 18.

<sup>82</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(6)(v) (2004).

<sup>83</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(9)(iii) (2004).

<sup>84</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(6)(v) (2004).

<sup>85</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(7)(iii) (2004); *see* Malagiere & Rainone I, *supra* note 71, at 18.

<sup>86</sup> Malagiere & Rainone I, *supra* note 71, at 18; *see* N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(2)(i) (2004).

<sup>87</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(3)(v) (2004).

<sup>88</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(6)(vi) (2004).

<sup>89</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(6)(viii) (2004).

<sup>90</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(7)(ii) (2004); *see* Malagiere & Rainone,

liability is immediately triggered upon a contractor's failure to comply with the home improvement regulations.<sup>91</sup>

The New Jersey Administration Code section entitled "Unlawful Practices" provides: "[w]ithout limiting any other practices which may be unlawful under the Consumer Fraud Act, utilization by a seller of the following acts and practices involving the sale, attempted sale, advertisement or performance of home improvements shall be unlawful."<sup>92</sup> The regulations provided for in the New Jersey Administrative Code are not meant to be exhaustive.<sup>93</sup> As such, practices not specified in the regulations may nevertheless constitute unlawful consumer fraud.<sup>94</sup>

#### B. *Discussion of a Surge in Home Improvement Contracts*

Due to record low interest rates, residual real estate sales have increased and homeowners are refinancing in increasing numbers to fund extensive renovations.<sup>95</sup> Yet, in an effort to seize this limited opportunity, unknowledgeable, hasty or even deceptive contractors may step into the pitfalls of the Act.

For some contractors, determining which business practices are "unlawful" under the Act is not so easy. Yet, while not every simple breach of a home improvement contract is a violation of the Act, every regulatory breach is.<sup>96</sup> By way of illustration, in *Cox v. Sears Roebuck & Co.*, plaintiff-homeowner contracted with Sears to renovate his kitchen, including the installation of cabinets, vinyl floor, sink, and electrical improvements.<sup>97</sup> Plaintiff was unhappy with the quality of the work and sued defendant Sears for breach of contract and violation of the Act in connection with the performance of a home improvement contract.<sup>98</sup> The jury found in favor of the plaintiff, but the trial court entered judgment for defendant notwithstanding the verdict.<sup>99</sup> The

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*supra* note 71, at 18.

<sup>91</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(7)(ii).

<sup>92</sup> *Id.*

<sup>93</sup> N.J. ADMIN. CODE tit. 13, § 45A-16.2(a) (2004).

<sup>94</sup> *Id.*

<sup>95</sup> See Alan J. Wax, *A Strong Market with Strong Concerns*, *NEWSDAY*, May 16, 2004, at A30.

<sup>96</sup> *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18-19 (1994).

<sup>97</sup> *Id.* at 7.

<sup>98</sup> *Id.* at 8.

<sup>99</sup> *Id.* at 7.



appellate court affirmed because it determined that the plaintiff had not proven a violation of the Act or any loss that entitled him to damages.<sup>100</sup> On appeal, the New Jersey Supreme Court reversed and held that the lower courts had erred in respect to both rulings because defendants' conduct was an unlawful practice under the Act, and plaintiff suffered a loss caused by defendants' violation of the Act when the defendant violated the permit regulation.<sup>101</sup>

First, the New Jersey Supreme Court determined that Sears had breached its contract by failing to rewire the kitchen properly.<sup>102</sup> The court opined that Sears' "poor performance created several concealed hazardous defects that could constitute a 'substantial aggravating circumstance' warranting a finding of an unconscionable commercial practice."<sup>103</sup> The court, however, did not find bad faith or lack of fair dealing by Sears, and thus, held that the breach of contract did not amount to an unconscionable commercial practice under the Act.<sup>104</sup> Significantly, the court ultimately found that Sears violated the Act by failing to secure the requisite permits.<sup>105</sup> The home improvement regulations required Sears to obtain "all applicable state and local building and construction permits . . . required under state law or local ordinances" before commencing work, which Sears failed to do.<sup>106</sup>

The court also held that Sears' violation of the applicable regulations caused the plaintiff to suffer an ascertainable loss.<sup>107</sup> The Cox court reasoned:

The purpose of the regulations is to protect the consumer from hazardous or shoddy work. Had all applicable permits been obtained before Sears began work, the issued permits would have triggered periodic inspections of the renovations. An inspector would have detected any substandard electrical wiring or cabinet work and would not have permitted the work to progress or have issued the required certificates until Sears corrected the deficiencies. Because the inspections did not occur, the wiring remained unsafe, the

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Cox, 138 N.J. at 7.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 21-22. See N.J. ADMIN. CODE tit. 13, § 45A-16.2(a)(10)(i) (2004).

<sup>106</sup> Cox, 138 N.J. at 17. This is an example of how a violation of any regulation constitutes a *per se* violation of the Act. *Id.*

<sup>107</sup> *Id.* at 22.

cabinets remained unattractive, and both resulted in a loss measured by the cost of repairing those conditions.<sup>108</sup>

In calculating plaintiff's damages, the court determined that the contract price was not the correct measure of damages under the Act, "because the consumer fraud occurred in the course of the performance, not in the actual contracting for the home-improvement work."<sup>109</sup> The court held that the proper measure of damages was the cost of repair with the required inspections, trebled to reflect a violation of the Act, plus attorney's fees, filing fees, and costs.<sup>110</sup>

Although the court in *Cox* did not find a violation of the Act based on the contractor's substandard performance, other courts have found that poor workmanship and the substitution of inferior quality materials constitutes an unconscionable commercial practice in violation of the Act.<sup>111</sup> For example, in *New Mea Construction Corp. v. Harper*, plaintiff builder brought an action against defendant homeowner for breach of contract and demanded damages for the outstanding balance of the contract price.<sup>112</sup> The homeowner defended and filed a counterclaim alleging consumer fraud violations.<sup>113</sup> In holding that the plaintiff had violated the Act, the appellate division opined that at "every turn of event the plaintiff attempted to shortchange the property owner by substituting cheaper materials, as opposed to the more expensive materials in defiance of the homeowner's request to have a house constructed of the best quality and of the best workmanlike manner."<sup>114</sup>

Recently, pressure from the Division of Consumer Affairs caused Home Depot to revise the form of its home improvement contracts to ensure compliance with the statute.<sup>115</sup> Various consumer complaints

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 23.

<sup>110</sup> *Id.* at 24.

<sup>111</sup> *New Mea Construction Corp. v. Harper*, 203 N.J. Super. 486, 501 (App. Div. 1985). The Appellate Division concluded that the Act was applicable to a custom builder who utilized substandard materials in the construction of a house. *Id.* In arriving at this conclusion, the court reasoned that the materials used in the house constituted "merchandise sold" to owners within contemplation of New Jersey Statute Annotated 56:8-1(c) and (e). *Id.*

<sup>112</sup> *New Mea Construction Corp.*, 203 N.J. Super. at 489.

<sup>113</sup> *Id.* This is an example of how a consumer fraud violation could be used to defend an action. *Id.*

<sup>114</sup> *Id.* at 501.

<sup>115</sup> Press Release, New Jersey Department of Law and Public Safety, Home Depot

were made against numerous Home Depots located in New Jersey alleging that Home Depot “failed to complete home improvement work or make deliveries in the time frame presented; and failed to provide refunds to dissatisfied consumers.”<sup>116</sup> Consequently, Home Depot agreed to pay the State \$510,000 as part of an agreement entitled Assurance of Voluntary Compliance (“AVC”).<sup>117</sup> The AVC requires Home Depot to ensure that its home improvement contracts in New Jersey pass muster under both the Act and the regulations promulgated by the attorney general.<sup>118</sup> Also, Home Depot is required to investigate consumer complaints received before the AVC was filed, and attempt to resolve them.<sup>119</sup>

*C. Doctors and Lawyers Cannot Be Sued Under New Jersey’s Consumer Fraud Act?*

Recently, in *Macedo v. Dello Russo*, the New Jersey Supreme Court held that doctors and lawyers cannot be sued under the Act.<sup>120</sup> In *Macedo*, two New Jersey patients sued their physician over false and misleading statements made in advertisements for LASIK surgery.<sup>121</sup> The patients claimed that they chose Dello Russo to perform their surgeries because his advertisements indicated that he would personally perform their surgeries and provide the necessary follow-up care.<sup>122</sup> The patients alleged that, contrary to the statements made in the advertisements, Dr. Kellogg, who was not fully licensed, provided their follow-up care.<sup>123</sup>

Curiously, the patients conceded that the care Dello Russo’s office provided was within the bounds of medical standards.<sup>124</sup> Furthermore, the patients did not assert that they suffered any physical injury because a physician who was not fully licensed provided their follow-up care.<sup>125</sup>

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Enters Into Agreement with New Jersey to Pay More than \$500,000 and Alter Business Practices (May 27, 2003).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 178 N.J. 340 (2004).

<sup>121</sup> *Id.* at 342.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

In other words, the patients did not make any allegations traditionally associated with a medical malpractice claim.<sup>126</sup> Essentially, the patients claimed that they had relied to their detriment on their physician's false advertisements.<sup>127</sup> Furthermore, the plaintiffs alleged that while their physician's actions were "medically acceptable," they nonetheless suffered "'mental anguish,' loss of enjoyment of life, medical bills and economic damages" for which they sought "compensatory damages, punitive damages, attorneys' fees, interest and costs of suit."<sup>128</sup>

The patients sued Dr. Dello Russo under the Act.<sup>129</sup> The trial court dismissed the patients' claim for consumer fraud violations because the underlying allegations implicated medical services, which fall outside of the scope of the Act.<sup>130</sup> Subsequently, the appellate division reversed.<sup>131</sup> On appeal, the New Jersey Supreme Court reinstated the trial court's ruling.<sup>132</sup>

In reversing the appellate division, the supreme court reasoned that "[i]n 1960, the Legislature adopted the precursor to the Act, creating liability in connection with fraud in advertising."<sup>133</sup> The Act obviously was not meant to encompass advertising by physicians because such advertising was not permitted for another two decades."<sup>134</sup> Citing an earlier ruling of the appellate division, the court stated that "no one would argue that a member of any of the learned professions is subject to the provisions of the Consumer Fraud Act despite the fact that he renders 'services' to the public. And although the literal language may be construed to include professional services, it would be ludicrous to construe the legislation with that broad sweep in view of the fact that the nature of the services does not fall into the category of consumerism."<sup>135</sup> The court noted that the Legislature amended the Act in 1976 to specifically include the sale of real estate in the definition of "merchandise," however, to date, the Act does not include physicians or

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<sup>126</sup> Tanya Albert, *New Jersey Squelches Lawsuit for Advertising Fraud*, AMENDNEWS.COM, at 1.

<sup>127</sup> *Macedo*, 178 N.J. at 342.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*; see also *Macedo v. Dello Russo*, 359 N.J. Super. 78 (2003).

<sup>132</sup> *Macedo*, 178 N.J. at 343.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 344 (quoting *Neveroski v. Blair*, 141 N.J. Super. 365, 379 (App. Div. 1976)).

other professionals.<sup>136</sup>

However, patients do have recourse. Physicians and other professionals must comply with the comprehensive regulations promulgated by their governing regulatory bodies,<sup>137</sup> and patients may pursue any applicable common-law remedies, such as a tort cause of action.<sup>138</sup> Significantly, the court in *Macedo* concluded by stating, “[I]f we are incorrect in our assumption, we would expect the legislature to take action to amend the statute.”<sup>139</sup>

Shortly after the *Macedo* decision, the New Jersey Legislature introduced a bill to amend the Act to hold physicians, lawyers, and other licensed professional accountable for false and misleading advertising. If passed, Bill No. A-2088 would nullify the *Macedo* court’s decision.

Notably, the bill is being opposed by the New Jersey State Bar Association (“NJSBA”). In response to the bill, Karol Corbin Walker, President of the NJSBA, expressed the NJSBA’s position that professionals should remain outside the scope of the Act.<sup>140</sup> In a letter dated March 15, 2004, to the General Assembly, Corbin stated that:

First, the Consumer Fraud Act (CFA) does not currently and should not apply to highly regulated professionals where a direct and unavoidable conflict exists between the application of another regulatory scheme which deals specifically, concretely, and pervasively with the activity at issue. Under the holding in *Lemelledo v. Beneficial Management Corp.*, 150 N.J. 255, 259-60 (1997), the Supreme Court held that ‘in order to overcome the presumption that the CFA applies to a covered activity, a court must be satisfied . . . that a direct and unavoidable conflict exists between the application of the other regulatory scheme or schemes. It must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject the parties to multiple regulations that, as applied, will work at cross purposes.’ *Id.* at 270. Thus, even if this legislation were enacted where another regulatory scheme ‘specifically, concretely and pervasively’ dealt with the

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<sup>136</sup> *Id.* at 346.

<sup>137</sup> *Id.* at 346.

<sup>138</sup> *Macedo*, 178 N.J. at 343.

<sup>139</sup> *Id.*

<sup>140</sup> Letter dated March 15, 2004, from Karol Corbin Walker to The General Assembly, available at [www.njsba.com/news](http://www.njsba.com/news) (on file with author).

advertising of a profession the CFA would still not apply. It would be inapplicable to attorneys under this test, because the Supreme Court of New Jersey, since July 1, 1987 has specifically regulated attorney advertising through its Committee on Attorney Advertising which closely monitors this subject matter and issues advisory opinions to offer guidance to attorneys in this area.

Second, as the decision in *Vort v. Hollander*, 257 N.J. Super 56, 57 (App. Div. 1992), highlights, even if other learned professionals are included in the legislation, the conduct of attorneys is highly regulated by the Supreme Court of New Jersey and should be exempted. Consistent with that opinion and its rationale, the position of the NJSBA is that subjecting attorneys to lawsuits under the Consumer Fraud Act would be inconsistent with the Supreme Court's authority to comprehensively regulate the profession as established by New Jersey's Constitution in Article VI, Section 2, Paragraph 3.<sup>141</sup>

Despite the stance of the NJSBA and many members of New Jersey's legal and medical communities, the bill passed in the General Assembly by a vote of 78-1 on March 15, 2004.<sup>142</sup> Thereafter, the Senate received the bill and passed it on to the Senate Commerce Committee.<sup>143</sup>

#### *D. The New Jersey Consumer Fraud Act Applies to a Franchise Relationship*

In 1971, New Jersey adopted the New Jersey Franchise Practices Act ("NJFPA"),<sup>144</sup> to remedy unfair franchise agreements resulting from the unequal bargaining power of parties.<sup>145</sup>

The NJFPA applies to any contract if five requirements are met. First, the franchise agreement must either contemplate or require "the franchisee to establish or maintain a place of business in New Jersey."<sup>146</sup> Second, the "gross sales of the products or services [must] exceed \$35,000.00 for the twelve months preceding the institution of the

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<sup>141</sup> *Id.*

<sup>142</sup> Valerie L. Brown, et al, *Special Edition: Bills to Watch*, N.J. STATE BAR ASS'N CAPITOL REPORT, Aug. 16, 2004, at 2.

<sup>143</sup> *Id.*

<sup>144</sup> N.J. STAT. ANN. § 56:10-1 (West 2004).

<sup>145</sup> *Westfield Centre Serv., Inc. v. Cities Serv. Oil Co.*, 86 N.J. 453, 461-64 (1981).

<sup>146</sup> N.J. STAT. ANN. § 56:10-4 (West 2004).



suit.”<sup>147</sup> Third, “more than 20% of the franchisee’s gross sales are intended to be or are derived from the franchise.”<sup>148</sup> Fourth, the franchisor must grant the franchisee “a license to use a trade mark, trade name or related characteristics.”<sup>149</sup> Lastly, the franchisee and franchisor must share some “community of interest in the marketing of the goods or services.”<sup>150</sup>

The NJFPA specifically prohibits certain practices.<sup>151</sup> New Jersey Statute section 56:10-5 deals with the termination of a franchise, and provides that a manufacturer can only terminate a distribution agreement for “good cause” and upon 60 days written notice.<sup>152</sup> The NJFPA presumes that once the parties execute the franchise agreement they are essentially “aware of the rules of the game.”<sup>153</sup> Accordingly,

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> N.J. STAT. ANN. § 56:10-3(a) (West 2004).

<sup>150</sup> *Id.*

<sup>151</sup> See N.J. STAT. ANN. § 56:10-7 (West 2004). This section provides:

It shall be a violation of this act for any franchisor, directly or indirectly, through any officer, agent or employee, to engage in any of the following practices:

(a) To require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this act.

(b) To prohibit directly or indirectly the right of free association among franchisees for any lawful purpose.

(c) To require or prohibit any change in management of any franchise unless such requirement or prohibition of change shall be for good cause, which shall be stated in writing by the franchisor.

(d) To restrict the sale of any equity or debenture issue or the transfer of any securities of a franchise or in any way prevent or attempt to prevent the transfer, sale or issuance of equity securities or debentures to employees, personnel of the franchisee, or spouse, child or heir of an owner, as long as the basic financial requirements of the franchisor are complied with, and provided any such sale, transfer or issuance does not have the effect of accomplishing the sale or transfer of control, including, but not limited to, change in the persons holding the majority voting power of the franchise. Nothing contained in this subsection shall excuse a franchisee’s obligation to provide prior written notice of any change of ownership to the franchisor if that notice is required by the franchise.

(e) To impose unreasonable standards of performance upon a franchisee.

(f) To provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates this act.

*Id.*

<sup>152</sup> N.J. STAT. ANN. § 56:10-5 (West 2004).

<sup>153</sup> *Dunkin’ Donuts of America v. Middletown Donut Corp.*, 100 N.J. 166, 185 (1985).

“good cause” is limited to those circumstances where the franchisee fails to “substantially comply with those requirements imposed upon him by the franchise.”<sup>154</sup> Hence, “all that a franchisee must do is comply substantially with the terms of the agreement, in return for which he receives the benefit of an ‘infinite’ franchise - he cannot be terminated or refused renewal.”<sup>155</sup> Quite simply, the express provisions of the franchise agreement effectively put a franchisee on notice of exactly what he can and cannot do with regard to the franchise.<sup>156</sup>

Because the NJFPA protects all franchisees except those who intentionally violate their franchise agreement, “good cause” does not include bona fide business reasons.<sup>157</sup> Therefore, if a franchisor terminates an agreement, even if in good faith and for a bona fide business reason, the franchisor has violated the Act.<sup>158</sup>

The NJFPA regulates the franchises specified in its provisions, and accordingly, it would be superfluous if the Consumer Fraud Act were applied to those franchises. However, the Consumer Fraud Act may be applied to franchises beyond the scope of the NJFPA, that is, those franchises that are smaller in gross sales or otherwise do not meet the requirements.<sup>159</sup>

Over thirty years ago, in *Kugler v. Koscot*, the Act was applied to “business opportunity ventures” offered to the general public.<sup>160</sup> In that case, the attorney general prosecuted a pyramid sales scheme under the Act.<sup>161</sup> Thirteen years later, in *Morgan v. Air Brook Limousine, Inc.*, the *Kugler* court’s holding was expanded to cover small franchises falling outside the scope of the NJFPA.<sup>162</sup> The *Morgan* court reasoned that such business opportunities are “merchandise” within the intent of the Act.<sup>163</sup>

However, in the mid-1990’s, the Court of Appeals for the Third Circuit “cast doubt on the validity of *Kugler’s* application of the Act

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<sup>154</sup> N.J. STAT. ANN. § 56:10-5.

<sup>155</sup> *Dunkin’ Donuts of America*, 100 N.J. at 185; N.J. STAT. ANN. § 56:10-5.

<sup>156</sup> *Dunkin’ Donuts of America*, 100 N.J. at 185.

<sup>157</sup> *Westfield Centre Serv., Inc. v. Cities Serv. Oil Co.*, 86 N.J. 453, 461-64 (1981).

<sup>158</sup> *Id.*

<sup>159</sup> See N.J. STAT. ANN. § 56:10-3(a) (West 2004).

<sup>160</sup> 120 N.J. Super. 216 (Law Div. 1972).

<sup>161</sup> *Kavky v. Herbalife International of America*, 359 N.J. Super. 457, 500 (App. Div. 2003).

<sup>162</sup> *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84, 99 (Law Div. 1986).

<sup>163</sup> *Id.*

and the reasoning of *Morgan*.<sup>164</sup> In *J&R Ice Cream Corp. v. California Smoothie Licensing Corp.*, the court held that franchise relationships are beyond the scope of the Consumer Fraud Act because those transactions concern the acquisition of a business.<sup>165</sup>

Recently, in *Kavky v. Herbalife Int'l of America*, the New Jersey Appellate Division opposed the position of the Third Circuit and held that the Consumer Fraud Act covers franchises that are not covered by the NJFPA.<sup>166</sup> The *Kavky* court refused to endorse the Third Circuit's reasoning in *J&R*, arguing that that ruling would deprive aspiring business owners of protection from many types of mass public frauds simply because their businesses are not substantial enough to fall under the NJFPA.<sup>167</sup>

In *Kavky*, the defendant company used online advertisements directed to the general public to solicit distributors for its products by stating that in return for a fee it would provide "Pre-Paid Retail Internet Customers."<sup>168</sup> Based on the defendant's advertisements, the plaintiff paid the required fee and became a distributor.<sup>169</sup> However, the defendant failed to provide the promised customers.<sup>170</sup>

Since the distributorship was not substantial enough to come within the NJFPA, plaintiff sued for common law fraud and consumer fraud violations.<sup>171</sup> The trial court held that the Act did not apply to plaintiff's investment.<sup>172</sup> On appeal, the appellate division found that while the franchise investment was not regulated by the NJFPA, it was merchandise offered for sale to the general public, and thus, fell within the purview of the Act.<sup>173</sup>

The Act's failure to define "consumer" is the root of the confusion surrounding the issue of whether a franchise is protected by the Act.<sup>174</sup> The *Kavky* court opined that while other courts have "occasionally

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<sup>164</sup> *Kavky*, 359 N.J. Super. at 500.

<sup>165</sup> *Id.* (citing *J&R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259, 1270-74 (3rd Cir. 1994)).

<sup>166</sup> 359 N.J. Super. 497 (App. Div. 2003).

<sup>167</sup> *Kavky*, 359 N.J. Super. at 499.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Kavky*, 359 N.J. Super. at 501, 508.

<sup>174</sup> *Id.* at 501.

referred to the dictionary definition of consumer as ‘one who uses [economic] goods, and so diminishes or destroys their utilities,’ some consumer goods may not be diminished or destroyed through use.”<sup>175</sup> Ultimately, the court decided to apply a broad definition of “consumer” that included a franchise. The court reasoned that “when the Legislature has wanted the term ‘consumer’ to have a restricted meaning, it expressly imposed a restrictive meaning through a definition within the Act, as in the Unit Price Disclosure Act.”<sup>176</sup> By contrast, in the Act, the legislature did not use a restricted definition.

The *Kavky* court also addressed the issue of whether the “business opportunity venture” purchased by a franchisee was “merchandise” under the Act. The Act defines “merchandise” as including “any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale.”<sup>177</sup> The court, relying largely on the decision in *Morgan*, held that the Act applies to a franchise relationship because a franchise or business opportunity venture is “merchandise” within the intent of the Act.<sup>178</sup> The court held that a franchise is subsumed within the term “consumer commodity,”<sup>179</sup> and thus is “merchandise.”<sup>180</sup> The court opined that “investment in a franchise is not really the acquisition of a business even though the franchise is purchased ‘for the present value of the cash flow [it is] expected to produce in the future . . . .’”<sup>181</sup> The court further reasoned that since this type of franchise is not “a going concern,” such an investment more accurately “involves the acquisition of both goods and services.”<sup>182</sup>

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<sup>175</sup> *Id.* at 504-05; see also *J&R Ice Cream Corp.*, 31 F.3d at 1272.

<sup>176</sup> *Id.* at 505 (citing *Morgan*, 211 N.J. Super. at 92-93).

<sup>177</sup> *Id.* at 501 (citing N.J. STAT. ANN. § 56:8-1(c) (West 2004)).

<sup>178</sup> *Id.* at 506-07.

<sup>179</sup> N.J. STAT. ANN. § 56:8-22 (West 2004). The statute states:

As used in this act: “Consumer commodity” means any merchandise, wares, article, product, comestible or commodity of any kind or any class produced, distributed or offered for retail sale for consumption by individuals other than at the retail establishment, or for use by individuals for purposes of personal care or in the performance of services rendered within the household, and which is consumed or expended in the course of such use.

*Id.*

<sup>180</sup> *Kavky*, 359 N.J. Super. at 505-06 (citing *Morgan*, 211 N.J. Super. at 98).

<sup>181</sup> *Id.* at 507 (quoting *J.R. Ice Cream Corp. v. California Smoothie Lic. Corp.*, 31 F.3d 1259, 1274 (1994)).

<sup>182</sup> *Id.*; see also *Wheeler v. Box*, 671 S.W.2d 75, 77-78 (Tex. Ct. App. 1984).

The court instructed that the threshold issue in determining whether certain property constitutes “merchandise” under the Act “is not the specific nature of the property, but rather whether the property is generally made available to the public.”<sup>183</sup> Relying on *Morgan*, the *Kavky* court concluded that a franchise, like other merchandise, is offered for sale to the general public because a franchisee is not required to possess any greater qualifications or experience than the general public.<sup>184</sup> Franchisees must only possess the funds necessary to pay the required fees.<sup>185</sup> The court cautioned that in the interest of public welfare, when dealing with mass-marketed offers to the general public, “restrictive definitions of what is being marketed are inappropriate.”<sup>186</sup> The *Kavky* court’s decision that franchises too small for the NJFPA are regulated by the Act, demonstrates that New Jersey state courts will not penalize aspiring business owners whose businesses are not substantial enough for coverage under the NJFPA.

#### E. Nutritional Supplements

Another recent development is the Act’s applicability to nutritional supplements. New Jersey has decided to adopt a strong stance against nutritional supplement companies that prey on those people desperate to lose weight and reap the benefits of this nation’s “fatness epidemic.”<sup>187</sup> In two recent instances, the attorney general declined to wait for the Federal Drug Administration to take action and filed suit alleging consumer fraud violations against nutritional supplement companies that used “false and misleading advertisements that exaggerated the benefits and downplayed the risks of their pills.”<sup>188</sup>

First, the State filed suit against Cytodyne Technologies (“Cytodyne”),<sup>189</sup> the manufacturer of Xenadrine, alleging multiple

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<sup>183</sup> *Kavky*, 359 N.J. Super. at 505-06.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 505 (citing *Morgan*, 211 N.J. Super. at 100).

<sup>186</sup> *Id.* at 506.

<sup>187</sup> Gene Koretz, *Those Heavy Americans*, BUSINESS WEEK, Nov. 10, 2003. Some 65% of adult Americans are overweight, and nearly a third are medically obese. *Id.* By contrast, obesity in other nations is far lower, averaging 10% to 12% in Continental Europe. *Id.*

<sup>188</sup> Susan Todd, *N.J. Agencies to Sue Diet Pill Maker*, THE STAR LEDGER (N.J.), July 14, 2003, available at <http://www.yourlawyer.com/practice/news.htm?storyid=6272&topic=Ephedra> (last visited Apr. 2005).

<sup>189</sup> New Jersey Department of Law and Public Safety Press Release, New Jersey Sues Monmouth County Manufacturer of Xenadrines (July 14, 2003) available at

violations of the Act related to its marketing and sale of the product.<sup>190</sup> Attorney General Peter C. Harvey and Division of Consumer Affairs Director Reni Erdos announced that the suit alleges that Cytodyne “misrepresented the efficacy of that dietary supplement and deliberately withheld material information about potentially life-threatening side effects of the product.”<sup>191</sup>

Furthermore, the State’s complaint alleges that Cytodyne failed to reveal the results of clinical studies indicating that the use of the product could cause cardiovascular problems.<sup>192</sup> In addition, Xenadrine was marketed as ephedra-free.<sup>193</sup> Cytodyne, however, allegedly neglected to disclose that other ingredients contained in the product have the same adverse effects as those associated with the use of ephedra.<sup>194</sup>

On October 16, 2003, the State filed a complaint against a second nutritional supplement company, Geon Technologies, the maker and distributor of the dietary supplement “TrimSpa”; Nutramerica; Geon Seminars Institute, Inc.; Alex Szynalski, founder of Geon Seminars Institute, Inc.; and Albert Fleischner, Ph.D., Chief Science Officer of the Geon Group and Chief Operating Officer of TrimSpa Corp. (“Geon”).<sup>195</sup>

The complaint alleges, *inter alia*, that Geon utilized “a bait-and-switch advertising scheme” focusing on the use of hypnosis as a drug-free mechanism to lose weight, but once consumers arrived at the Geon seminars they were bombarded with sales gimmicks and the focal point of the program became Geon supplements.<sup>196</sup> In addition, to increase sales, Geon representatives made unsubstantiated claims regarding the

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<http://www.state.nj.us/oag/ca/press/xena.htm>. In recent years, Cytodyne Technologies has been sued numerous times, including a wrongful death suit involving Baltimore Orioles pitcher Steve Bechler. *Id.* Bechler, who was using Xenadrine as a supplement to enhance his performance, died during spring training. *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* The suit also names Robert Chinery, Cytodyne’s owner, and Kelly Conklin, a Cytodyne representative who “bought” the medical endorsement of Xenadrine from five New Jersey-licensed physicians. *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Press Release, New Jersey Department of Law and Public Safety, New Jersey Sues Founder of Geon Seminars (Oct. 16, 2003), available at <http://www.state.nj.us/oag/ca/press/xena.htm>

<sup>196</sup> *Id.*



efficacy of Geon products.<sup>197</sup> For example, one product was deceptively referred to as “liposuction in a bottle.”<sup>198</sup>

Furthermore, the complaint alleges that warnings pertaining to the dangers of using TrimSpa, which is ephedra-based, as well as notice that consumers should not use the product before consulting a physician, were absent from Geon advertisements for that product.<sup>199</sup> The complaint also contends that the 110-percent, money-back guarantee, offered by Geon was regularly refused when requested.<sup>200</sup> “The State [sought] civil penalties and restitution for affected consumers, as well as an order that would permanently bar [Geon] from making unsubstantiated claims about their supplements and that would require them to disclose the risks associated with the use of ephedra.”<sup>201</sup>

The attorney general has stated that people attempting to lose weight are just the type of consumer the Act was designed to protect. Attorney General Harvey stated:

Millions of Americans struggle to lose weight . . . They join gyms, follow special diets, consume diet shakes, diet bars, diet pills and herbal supplements in their attempts to lose weight. It’s no wonder that when a company . . . offers what seems to be a magic pill, promising dramatic weight loss with little or no effort, desperate dieters jump at the chance to take it too.<sup>202</sup>

These suits are yet another example of New Jersey’s willingness to expand the reach of the Act to protect consumers, and furthermore, “could mark the start of a more aggressive monitoring of New Jersey’s dietary supplement industry.”<sup>203</sup>

### VIII. Conclusion

New Jersey has one of the strongest consumer protection laws in the nation. New Jersey’s laws regulate nearly every aspect of the sale

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* (“Ephedra is a stimulant derived from the Chinese herb ma huang that has been proven to cause headaches, irritability and heart palpitations, and has been associated with strokes, seizures, high blood pressure and heart attacks.”).

<sup>201</sup> New Jersey Department of Law and Public Safety Press Release, *supra* note 195.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* Earlier this year, a California court ordered Cytodyne to pay \$12.5 million to consumers who had purchased the weight-loss supplement because of false before-and-after testimonials. *Id.*

of goods and services to consumers—from the regulation of health clubs, mattress sales, home improvement contracts and watercraft sales and service. Businesses, individuals, and other entities that offer goods or services to the public, as well as consumers, are encouraged to become familiar with the terms of the Act and the regulations promulgated by it.

Recent changes in the economy, technology, and current affairs, have led to new scams that in turn have lead to an increase in the number of investigations by the New Jersey Division of Consumer Affairs. Just this year, the New Jersey Division of Consumer Affairs issued a press release warning investors of the top ten scams for 2004.<sup>204</sup> Additionally, lawsuits have been instituted and decisions rendered which often refine and clarify the scope of the Act. Some recent decisions, such as the *Dello Russo* decision, have even prompted proposed legislation. As we look forward to future development and refinement of today's issues, practitioners and the public need to keep apprised of the most recent laws and regulations delineating the parameters of the Act and its enforcement.

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<sup>204</sup> See Press Release, New Jersey Division of Consumer Affairs, Attorney General Warns Investors of Top Ten Scams for 2005 (Mar. 24, 2004) available at <http://www.state.nj.us/lps/ca/canews.htm>.

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