



2014 LEGISLATIVE AGENDA

New Jersey's businesses face a stagnant economy coupled with high business costs, but our members know that New Jersey's economy is taking another serious hit – from excessive litigation. During the 2014 legislative session the New Jersey Civil Justice Institute will advocate for legislation that ensures that New Jersey's civil justice system treats all parties fairly and discourages lawsuit abuse.

EMPHASIZE THE DIFFERENCES BETWEEN REGULATION AND LITIGATION

The judicial system is well suited for settling disputes between parties; it is not well suited to establishing and enforcing standards for businesses. As a means of regulating the state's businesses, it is not only a blunt instrument, it is also an extraordinarily unpredictable and expensive instrument. Nevertheless, in New Jersey, litigation has come to operate as the enforcement mechanism for a number of substantive laws, and as a sort of super-regulatory system for a number of industries already regulated by state and federal government.

Amend the Consumer Fraud Act: The New Jersey Consumer Fraud Act (CFA) was enacted in 1960 to protect New Jersey citizens against deceptive business practices. As one of the first consumer protections laws in the country, it was heralded as a great success and served as the model for similar legislation in many other states.

Over the years, the law has been amended by the legislature and expanded by the courts into an enormous and unwieldy piece of legislation. Compliance is difficult, especially for New Jersey's small businesses. It is prone to abuse, incentivizes unnecessary litigation, and makes even technical violations extraordinarily costly to resolve. It is now a significant national outlier in the burdens it places on businesses and the court system.

One of NJCJI's top priorities this session is adopting some basic, technical changes that will make the NJCFA workable again while still providing strong protections to consumers:

- Limit the CFA to transactions occurring in New Jersey or to transactions with New Jersey residents.
- Require plaintiffs to prove that they relied on the misrepresentation when they purchased the product or service.
- Require consumers to ask for their money back or for the alleged fraud to be fixed prior to bringing suit.
- Limit the award of attorney's fees and costs to those fees reasonably attributable to the CFA claim.
- Allow the court discretion in awarding treble damages, as is common in other states.
- Limit the CFA's applicability against industries that are already subject to the Federal Trade Commission and other regulator structures.

Eliminate One-Sided Fee-Shifting: Numerous statutory fee shifting provisions drive a significant portion of regulation via litigation. Fee shifting provisions encourage frivolous litigation, discourage settlement, and increase costs to litigants. Because of this, cases are brought that literally cannot be defended for the cost of the case, and businesses that settle simply become targets for more litigation. Striking these fee-shifting

provisions and replacing them with a structure of civil fines would relieve the courts of the burden of regulation and allow them to focus on their actual role of resolving disputes between parties.

Preemption: Currently everything from pharmaceutical products and medical devices to the labels on prepared foods are subject to regulation at the federal level, under the FDA. But they are also effectively subject to an ad hoc regulation at the state level via litigation. We should leave the regulation to the regulators, and provide that where the federal regulatory process has approved a given product or label, that approval preempts state litigation.

RESTORE FAIRNESS IN LITIGATION

NJCJI and its members believe that a fair civil justice system resolves disputes expeditiously, without bias and based solely upon application of the law to the facts of each case. Such a system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services while ensuring that truly injured people are compensated fairly for their losses.

Standards for Expert Testimony: New Jersey is one of a handful of states that have not yet adopted some form of the federal *Daubert* standard for expert testimony. As a result, the New Jersey courts are an attractive forum for litigation based on “junk science” and the state is a less attractive forum for investment by pharmaceutical companies and other medical technology businesses. New Jersey should join the majority of other states that have adopted the *Daubert* standard via legislation or court rule.

Settlement Trust Transparency: The “easy money” that flows out of settlement trusts tend to attract unscrupulous players, and the lack of transparency in the process makes the cheating and double-dipping difficult to catch. Several other states have passed, or are currently considering, legislation that would increase transparency and discourage fraud so that settlement dollars are available to legitimately injured parties.

Cap Appeal Bonds for all Defendants: Capping the bond that must be posted in order to appeal an adverse decision would reduce dead weight litigation costs and ensure that erroneous decisions can be appealed in a cost-effective fashion. Reforming the existing system would send the message that New Jersey is open for business, and give courts the opportunity to review appeals from a broader scope of industries.

Class Action Reform: Currently the right to appeal a class certification comes only at final judgment, meaning the vast majority of class action cases settle after a trial court certification decision. Allowing an immediate appeal of a class certification decision as of right would enhance fairness and predictability by allowing the opportunity to correct errors prior to a lengthy trial. Appeals would also develop the case law on certification standards.

Foreign Judgment Recognition Act: When courts outside of the United States hear disputes involving US citizens, those foreign judgments can be brought back to the US for enforcement against US assets. The law on the recognition and enforcement of foreign judgments is a matter of state law, so there is an incentive to forum-shop for the most lenient court system. New Jersey’s law makes it very difficult for a US defendant to challenge the fairness of the foreign process. State law should be updated to strike an appropriate balance between enforcing legitimate judgments and challenging abusive foreign judgments.

Medical Liability Reform: Ten years ago, New Jersey enacted meaningful medical liability reform. Since then, court decisions have gutted key statutes and insurance premiums have skyrocketed. We are now on the brink of a severe doctor shortage while states that have enacted liability reform attract new physicians. It is time for the legislature to once again address this issue.

If you have questions about any of these policy initiatives, please contact Marcus Rayner or Alida Kass.