



MEMORANDUM

TO: Members of the Assembly Commerce and Economic Development Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: NJCJI's Opposition to Assembly Bill 2035
DATE: June 5, 2014

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose A-2035.**

We appreciate the improvements in the most recent draft of this bill. Whereas an earlier draft provided for mandatory treble damages, the bill now makes that multiplier discretionary. We also appreciate the addition of language requiring notice and an opportunity to cure a violation prior to filing litigation.

However, there remain three issues of concern: the availability of treble damages, the one-sided fee shifting, and the retroactive application of the act. These are long-standing issues of concern for our organization because of their potential to distort the structural incentives in the civil justice system, and as a result we continue to oppose the bill.

Treble Damages:

Treble damages are most commonly found in consumer-related legislation, with a rationale of encouraging consumer litigation and thereby fostering consumer policing of low-dollar violations. This is a rationale that we have opposed in the New Jersey Consumer Fraud Act, because regulating via litigation is inefficient and unpredictable, and over-incentivizes litigation. However, even that rationale does not apply here.

In the context of business litigation, multipliers on damages are typically linked to some sort of higher standard of wilful behavior. We would suggest that rather than simply make the award of a multiplier discretionary, there would be greater clarity and predictability in tying the treble damages to misconduct that is willful or wanton.

Fee Shifting:

We also have longstanding concerns over the proliferation of one-sided fee shifting provisions. The provisions are interpreted broadly by the courts for their remedial purposes, and significantly distort the incentive structures of the litigation system, often making it economically infeasible to defend against even meritless litigation. The language in this bill is both one-sided and actually

favors the plaintiff even further by awarding fees where the plaintiff prevails “in whole or in part” – a significant distortion in equities.

There is a range of alternatives that could provide for fee shifting in an even-handed way.

If the priority is to ensure that the prevailing party is made whole, a bilateral award of reasonable fees and costs for the party that “substantially prevails” would ensure that a dealer with a legitimate cause of action would be made whole as a result of challenging a breach, while also protecting the manufacturer’s interests in defending against litigation that ultimately proves to be unfounded:

Where the franchisee or franchisor substantially prevails the court or arbitration panel shall award attorney's fees and assess costs, including expert witness fees and other expenses incurred by the prevailing party in the litigation, so long as such fees and costs are reasonable, against the opposing party.

The fee-shifting could also be tied to the standard for treble damages and awarded only for wilful violations of the contract or Franchise Act:

If the misconduct is willful or wanton, treble damages may be awarded, in addition to the costs of the suit, including reasonable attorney’s fees.

Retroactive application

We also have long-standing concerns over retroactive application of laws to existing contracts. Where two parties have entered into a contract, we do not believe that it is appropriate for the legislature to rewrite the terms of that contract. Such provisions are destabilizing to the legal system and are of dubious constitutionality.

Although we do not have a position on the substantive policy choices entailed in this bill, as currently drafted the bill includes several liability provisions that would have a negative impact on the civil justice system, and as a result we continue to oppose the bill.

The New Jersey Civil Justice Institute respectfully requests that the committee hold the bill.