The Expansion of New Jersey's Consumer Fraud Act: Causes and Consequences

by Joanna Shepherd

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TABLE OF CONTENTS

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*Professor Joanna Shepherd is a Professor of Law at Emory University where she teaches classes in Torts, Law and Economics, Analytical Methods for Lawyers, Statistics, and Health Policy. Before joining Emory, Professor Shepherd was an Assistant Professor of Economics at Clemson University. She holds a Ph.D. in Economics.

Professor Shepherd's research focuses on empirical analyses of legal changes and legal institutions. Her recent research has examined issues related to the healthcare industry, tort reform, employment law, corporate law, and judicial elections. She has published broadly in the top national law reviews, legal journals, health law journals, and peer-reviewed economics journals. Recent publications have appeared in the New York University Law Review, Vanderbilt Law Review, Southern California Law Review, Duke Law Journal, UCLA Law Review, Michigan Law Review, The Journal of Law and Economics, The Journal of Legal Studies, The American Law and Economics Review, The American Journal of Law and Medicine, and Health Matrix. In addition to publishing dozens of academic articles, Professor Shepherd is the author of two textbooks, The Economic Analysis of Law and The Economics of Industrial Organization. Her research has been discussed on CNN Sunday, National Fox News, and The O'Reilly Factor, as well as in The Wall Street Journal and The New York Times.

Professor Shepherd has been invited to testify before the U.S. House of Representatives Judiciary Committee and before the Committee on Law and Justice of the National Academy of Sciences. She has considerable experience as an economic and statistical expert, and has authored numerous expert reports, testified at deposition and trial, and provided public policy research and white papers for many clients. Professor Shepherd has also been invited to present her scholarly work by faculties at leading universities around the country including Stanford Law School, The University of Chicago Law School, NYU School of Law, The University of Michigan School of Law, Northwestern University School of Law, Duke Law School, Georgetown School of Law, and The University of Southern California School of Law. She also frequently teaches economics courses to law professors and federal and state judges.

I. INTRODUCTION

Consumer protection litigation developed to protect American consumers from fraudulent and deceptive business practices in commercial transactions. Initially, Congress, through the FTC Act, sought to effectively define and deter a new class of wrongs to consumers that the existing legal system largely failed to remedy. Subsequently, states localized and individualized these rights while maintaining a careful balance between protecting consumers and preventing the proliferation of lawsuits that harm both consumers and businesses.

But in recent decades, this tradition of thoughtful balancing has given way to surprising legislative and judicial overcorrections with a common theoretical mistake: the notion that additional consumer protection litigation necessarily protects consumers more. Basic economic theory, empirical scholarship, and common sense collectively affirm that the optimal amount of consumer protection litigation for consumers as a class is well shy of the theoretical maximum. Yet courts and legislatures have gradually abolished many of the procedural and remedial protections designed to ensure state consumer protection acts do not become all-purpose business litigation or business rent-seeking statutes.

New Jersey has been one of the worst offenders. Although the New Jersey Consumer Fraud Statute was enacted to combat "fly-by-night operators who travel from area to area perpetrating deceptive business practices,"[1] in recent years it has been applied in ways not originally contemplated by the Legislature. Indulgent amendments and lenient interpretations have encouraged enterprising litigants and lawyers to bring claims, resulting in a dramatic increase in consumer protection litigation. This increase inflicts costs on New Jersey consumers through higher product costs, lower employment, an overburdened justice system, and socially-harmful frivolous litigation.

Fortunately, enacting a few reforms will prevent abuse of the current statute. With these protections, New Jersey lawmakers can be confident that the Consumer Fraud Act will protect consumers instead of harm them.

This paper proceeds in four additional parts. Part II outlines a brief history of American consumer protection laws, beginning with the common law and FTC Act and proceeding to the introduction of traditional state consumer protection acts. Part III describes the origins of New Jersey's Consumer Fraud Act and subsequent expansions of various provisions in the Act. Part IV reviews and discusses the predictable litigation consequences of these expansions in the New Jersey Consumer Fraud Act, including harm to consumers themselves, litigants, and the judicial system. Part V concludes, recommending several salutary policy prescriptions for lawmakers considering amending the Consumer Fraud Act.

[1] Memorandum from Deputy Attorney Gen. David M. Satz to Deputy Attorney Gen. David C. Thompson (Feb. 5, 1960).

II. THE HISTORICAL DEVELOPMENT OF AMERICAN CONSUMER PROTECTION LAW

Under the common law, consumer purchases were largely governed by principles of caveat emptor—"let the buyer beware"—under the assumption that buyers and sellers had equal responsibility and ability to judge the quality of goods.[2] The law presumed that market pressures would give most merchants an incentive to maintain a reputation for honesty and fair dealing, and that consumers could negotiate additional contractual terms when necessary.[3] Contract and tort law provided some remedies for major breaches of the merchant-consumer relationship, with aggrieved consumers resorting to fraud claims for misrepresentations as to the nature or quality of purchased goods for single transactions.[4]

However, the requirements of common-law fraud claims—an intentional misstatement of fact delivered with the purpose of deceiving the victim, the victim's justified reliance, and demonstrable damages—presented significant hurdles for consumers in many suits.[5] Intent to deceive and justifiable reliance were notoriously difficult and expensive for consumers to prove,[6] and the typical damage award was so meager that it did not justify economically the expense of bringing a fraud claim.[7] Nevertheless, the requirements reflected common law assumptions about the symmetry of the consumer-merchant relationship. A consumer claiming fraud had to demonstrate that the merchant's misstatement was intentional, as opposed to accidental, as both the merchant and consumer were in approximately equal positions to ascertain the truth of the claim as of the time of the sale.[8] The consumer further had to show that his reliance was justified: that a reasonable person in his position, dealing with the merchant as a peer, evaluating the goods and transaction at the time, would have reasonably believed the false claim was true.[9] And the consumer had to prove some demonstrable, quantifiable harm in damages for the purported deception, under the assumption that both parties could

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[2] *See, e.g.,* Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort,* 53 AM. L. REG. 273, 337 (1905); Walton H. Hamilton, *The Ancient Maxim Caveat Emptor,* 40 YALE L.J. 1133 (1931).

[3] William A. Lovett, *State Deceptive Trade Practice Legislation,* 46 TUL. L. REV. 724, 725 (1971) (suggesting that while these roles were assumed, there was an ever increasing breakdown of these responsibilities and incentives, particularly on the side of the merchant); *see also* SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION (PRELIMINARY REPORT) 6 (2009) [hereinafter SEARLE STUDY], *available at* http://ssrn.com/abstract=1708175.

[4] Michael S. Greve, *Consumer Law, Class Actions and the Common Law,* 7 CHAP. L. REV. 155, 156 (2004).

[5] Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts,* 54 U. KAN. L. REV. 1, 7 (2005).

[6] DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 10:1 (2013); *see also* Jason M. Solomon, *Judging Plaintiffs,* 60 VAND. L. REV. 1749, 1766–67 (2007).

[7] Schwartz & Silverman, *supra* note 5, at 7.

[8] *Id.*

[9] *Id.*

ascertain cheaply and readily the value difference between his reasonable expectations and the defective goods he received.[10]

However, economic developments during the first part of the twentieth century undermined then-prevailing assumptions that consumers and merchants stood in equal positions to one another and in evaluating goods for sale. Buyers were no longer equally able to judge the quality and nature of products as these products became increasingly sophisticated and increasingly diverse. New credit and financing arrangements and unfamiliar warranty disclaimers further increased the complexity of transactions for consumers.[11] And as consumers grew increasingly ill-equipped to judge the nature of products and transactions, sellers became only more sophisticated. Merchants were no longer the "shopkeeper-neighbors" with knowledge and bargaining power equal to consumers. Instead, as industrialization and mass production expanded, merchants grew increasingly remote from consumers and large enough to deal with product disputes through internal specialization and economies of scale.[12] These changes led to the widespread belief that merchants managed to escape liability for practices that, if not vindicated in fraud claims, were essentially unfair. [13]

Appreciating the common law's growing inability to protect consumers, Congress sought to update consumer protection law with the FTC Act. Yet, it recognized that any new law must strike a balance between curbing consumer abuses through unfair commercial conduct while also preventing consumer abuses through unjustifiable litigation. Congress deliberated how to effectively define the class of impermissible acts in a way that neither invited constant evasion by merchants nor constant abuse by potentially mischievous litigants.[14] While a narrowly-defined list of prohibited practices would provide consumers clear protection from known undesirable practices, it would also invite sophisticated merchants to modify these practices slightly, requiring yet another new legal intervention to prevent them. In contrast, a broad prohibition against all undesirable business practices could lead to the professional "hunting up and working [of] such suits,"[15] deterring beneficial business dealings, and leading to strategic claims by competitors — chilling commerce through

[10] *Id.; see also* Lovett, *supra* note 3, at 726–31.

[11] Lovett, *supra* note 3, at 725.

[12] *See* George J. Stigler, *The Division of Labor Is Limited by the Extent of the Market,* 59 J. POL. ECON. 185, 188-89 (1951) (identifying that increased specialization must entail increased economies of scales).

[13] Brian J. Linn & Gretchen Newman, *Part III: Implementing the Washington Consumer Protection Act,* 10 GONZ. L. REV. 593, 597 (1975).

[14] *See, e.g.,* 51 CONG. REC. 11,084-109, 11,112-16 (1914).

[15] AMERICAN TORT REFORM FOUNDATION, STATE CONSUMER PROTECTION LAWS: UNHINGED 7 (2013), [hereinafter ATRA (2013)] (citing 51 CONG. REC. 13,113, AT 13,120 (1914) (statement of Sen. Stone)) *available at* http://atra.org/sites/default/files/documents/CPA%20White%20Paper.pdf.

regulatory uncertainty.[16] Ultimately, Congress recognized that consumers were often employers and merchants themselves, and that only a carefully balanced consumer protection statute would protect consumers as a whole.

The result of this careful balancing was the FTC Act. Instead of prohibiting specific business practices, the Act created a multi-member administrative body—the Federal Trade Commission—and empowered it to define and enforce the prohibition against "unfair or deceptive acts or practices in or affecting commerce."[17] Understanding the potential breadth of this "unfair or deceptive" language, Congress paired the broad prohibition ("unfair or deceptive") with a tightly cordoned enforcement power: Congress entrusted only the FTC to sue under this power, and injunctions would be these suits' primary goal.[18] Congress expected the Commission's members would possess substantial business and commercial backgrounds, enabling them to distinguish malevolent business practices harming consumers from disingenuous claims of "unfairness" prompted only by consumer litigation.[19] Finally, Congress required the Commission to consider the public interest, and not merely an individual consumer's interest, in bringing suit: Congress recognized that some practices might occasionally harm individual consumers, yet prove broadly beneficial to consumers and commerce as a whole, and entrusted the FTC with this calculus in its enforcement discretion.[20] In short, the FTC Act sought to deter consumer harm by issuing a firm and broad pro-consumer prohibition against unfair practices while strictly constraining the procedures, remedies, and conditions under which that prohibition could be enforced to prevent consumer abuses through frivolous litigation.[21]

Though the Commission was initially quite popular, within a few decades it came to be perceived as ineffective, politically captured, poorly managed, poorly directed, and fundamentally confused about its consumer protection mission.[22] The FTC's alleged failure to protect consumers inspired states to revisit the FTC Act compromise.[23] Moreover, state-level

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[16] Henry N. Butler & Jason S. Johnston, *Consumer Harm Acts? An Economic Analysis of Private Actions Under State Consumer Protection Acts 70* (Nw. Univ. Sch. of Law Faculty Working Papers, Paper No. 184, 2009), *available at* http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/18.

[17] *See* Federal Trade Commission Act, Pub. L. No. 62-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 51-58 (2000)) (establishing the FTC). In 1938, the consumer protection language was added. *Id.; see also* Wheeler-Lea Amendment of 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1) (2006)).

[18] 15 U.S.C. § 45; *see also* ATRA (2013), *supra* note 15, at 7.

[19] *See* Butler & Johnston, *supra* note 16, at 20.

[20] *See* Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Use of Federal Trade Commission Jurisprudence,* 48 Geo. Wash. L. Rev. 521, 554 (1980).

[21] *See* Schwartz & Silverman, *supra* note 5, at 9.

[22] Richard A. Posner, *The Federal Trade Commission,* 37 U. Chi. L. Rev. 47, 47 & n.1 (1969).

[23] Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?,* 63 Fla. L. Rev. 163, 167-168 (2011) (citing Edward F. Cox et al., 'The Nader Report' on the Federal Trade

officers could respond to local constituencies more effectively than the national Commission, and might understand the "public interest," in the words of the Commission's mandate, differently.[24]

Several states began to adopt their own consumer protection laws in the 1960s and early 1970s. New Jersey's "consumer fraud statute" enacted in 1960 was one of the earliest State Consumer Protection Acts ("CPAs"),[25] and became the model for subsequent laws in several states. New Jersey's original act prohibited "fraud," "deception," "false promise[s]," and similar misrepresentations or omissions,[26] and empowered the State Attorney General to investigate unlawful practices and seek injunctions and restitution for violations of the consumer fraud statute.[27] As such, New Jersey's original consumer fraud act tracked the FTC Act concerns both structurally and in spirit: it focused on preventing ongoing consumer fraud and providing restitution for victims, rather than on attorney's fees or punitive damages, and charged the State Attorney General with responsibility for enforcing the Act.[28] Several states passed similar acts modeled on New Jersey's consumer fraud statute.

Other early adopters of State CPAs that did not follow the New Jersey model generally had one of two responses. Some states modeled legislation directly on the FTC Act relying on broad, generalized prohibitory language, earning them the moniker "little FTC Acts."[29] Other states adopted the Uniform Deceptive Trade Practices Act (UDTPA) developed by the National Conference of Commissioners on Uniform State Laws which provided a "laundry list" model that enumerated twelve deceptive trade practices, such as false advertising and misleading trade identification, and included an open-ended prohibition against "any other conduct which similarly creates a likelihood of confusion or misunderstanding."[30]

Although the early State CPAs were by necessity more aggressive than the original FTC Act, they each sought to find a balance between the twin concerns underlying the FTC Act in light of the FTC's perceived failure.

COMMISSION 39 (1969)); ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 1 (1969); Posner, *supra* note 22, at 47.

[24] Butler & Johnston, *supra* note 16, at 8.

[25] Consumer Fraud Act, ch. 39, §§1-12, 1960 NJ Laws 137 (codified as amended at N.J. REV. STAT. §§ 56:8-1 to 56:8-148 (2010)).

[26] Alan S. Brown & Larry E. Hepler, *Comparison of Consumer Fraud Statutes Across the Fifty States*, 55 FED'N DEF. & CORP. COUNS. Q. 263, 266 (2005).

[27] *See* ch. 39, § 1–12, 1960 N.J. Laws 137.

[28] *See generally id.*

[29] 29 COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 142 (1969).

[30] COMM'RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 253, 262 (1964); *see* Butler & Wright, *supra* note 23, at 170; *see also* PRIDGEN & ALDERMAN, *supra* note 6, at § 2:10; *see also* Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent,* 73 TENN. L. REV. 131, 145 (2006).

All of these early laws contained significant restrictions to prevent consumer abuses through frivolous litigation as well. The earliest consumer fraud acts contemplated at least primary enforcement by the relevant State Attorney General; the little FTC Acts tracked known FTC jurisprudence and provided some measure of predictability; the UDTPA enumerated specific forbidden acts, did not originally contain a general damages remedy, and narrowed attorney's fees sharply to penalize only deliberate offenders.[31]

Though these state laws each reflected a compromise between protecting consumers and preventing excessive consumer litigation, they created a patchwork of wildly divergent laws. The FTC, chastened by its publicly poor reputation in the consumer protection sphere, sought to rehabilitate its position and standardize these state laws through the Model Unfair Trade Practices and Consumer Protection Law (UTPCPL).[32] "Less innovative than comprehensive," the UTPCPL synthesized many of the various state acts into one model Act. The UTPCPL provided three liability formulations against unlawful practices that closely tracked the developments in then-current state law.[33] Like the State CPAs, the UTPCPL also empowered State Attorneys General to enforce the consumer protection law through injunctions against prohibited acts, disgorgement of any property gained by defrauding consumers, restitution to victims of forbidden acts, and civil monetary penalties against knowing violators.[34]

But the UTPCPL drastically deviated from State CPAs in its treatment of private suits and private remedies.[35] Early State CPAs evinced some hesitation against consumer suits for money damages, either by limiting consumer suits altogether, entrusting the State Attorney General with enforcement discretion, or granting private rights of action without damages and with only equitable or injunctive remedies.[36] In contrast, the UTPCPL radically expanded potential vehicles for suit and available damages by authorizing class actions for consumer protection violations, granting an individual right of action for the greater of actual damages suffered or $200, and providing attorney's fees at the court's discretion

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[31] SEE COMM'RS ON UNIF. STATE LAWS, *supra* note 30, at 262; COMM'RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 299 (1966); *see also* PRIDGEN & ALDERMAN, *supra* note 6, at § 2:10.

[32] Butler & Wright, *supra* note 23, at 170. This model was developed by the FTC and adopted by the Committee on Suggested State Legislation of the Council of State Governments. *Id.* (citing NATIONAL ASSOCIATION OF ATTORNEYS GENERAL COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE ATTORNEY GENERAL 390 (1971) [HEREINAFTER ATTORNEY GENERAL REPORT]).

[33] 29 COUNCIL OF STATE GOV'TS, *supra* note 29, at 142, 146.

[34] PRIDGEN & ALDERMAN, *supra* note 6, at § 2:10; *see also* 29 COUNCIL OF STATE GOV'TS, *supra* note 29, at 145-152; Butler & Wright, *supra* note 23, at 172.

[35] 29 COUNCIL OF STATE GOV'TS, *supra* note 29, at 148–49.

[36] *Id.* (listing section 8(a) as allowing for such private rights of action for only equitable or injunctive remedies).

against any violator, not merely knowing violators.[37] Contrary to the FTC Act, the UTPCPL shifted balance away from restraint and towards much greater enforcement.

State responses to the UTPCPL recognized a need for restraint to prevent lawsuits that would harm consumers. The National Association of Attorneys General warned that private class actions would "provide too great an opportunity for frivolous suits," and many states proved slow to adopt the UTPCPL's class action provision.[38] Many states also continued to require proof of actual injury to recover under these acts, even while relaxing other requirements from the common-law fraud standard. These restraints meant that early State CPAs provided a robust, even aggressive medium for consumers, while still remaining conscious of the potential consumer and business harms from abusive or frivolous State CPA lawsuits.

The FTC similarly retains a variety of structural precautions: for example, the Commission may still only bring suits that it considers in the "public interest," and the FTC Act still limits the Commission to largely equitable relief, including injunctions, cease and desist orders, and disgorgement of profits from prohibited practices.[39] Further, the Commission's 1984 policy statement reintroduced restrictions on consumer protection claims, requiring proof of actual injury for both unfairness and deception, including a demonstration of materiality for deception (and substantiality for unfairness), and applying a "reasonableness" inquiry for both. The Commission recognized, as states did in the 1960s and 1970s—and Congress before them—that powerful, open-ended and less precise consumer protection laws required meaningful ties to actual consumer harms in order to protect against frivolous consumer litigation.[40]

Unfortunately, as federal consumer protection law grew more sophisticated and economical, state legislatures began to strip away many of the restraints that were meant to strike a balance between consumer protection and preventing excessive consumer litigation. This expansion has turned many state consumer protection statutes into consumer litigation statutes.

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[37] *Id.* at 149.

[38] ATTORNEY GENERAL REPORT, *supra* note 32, at 409.

[39] 15 U.S.C. § 45 (2006). Note that disgorgement is itself a traditionally equitable remedy. *See, e.g.*, SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991) ("The disgorgement remedy [the district court judge] approved in this case is, by its very nature, an equitable remedy . . . ."); *see also* Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1 (2013), http://www.hblr.org/?p=3528.

[40] *See generally* Butler & Johnston, *supra* note 16, at 2–3.

III. NEW JERSEY'S CONSUMER FRAUD ACT

Since its enactment in 1960, the New Jersey Consumer Fraud Act ("CFA") has been considered one of the most consumer-friendly State CPAs in the nation.[41] The act has grown increasingly complex as almost 200 subsections and dozens of discrete types of regulation and restrictions have been added over fifty years.[42]

The original New Jersey CFA vested authority with the Attorney General "to combat the increasingly widespread practice of defrauding the consumer."[43] The original Act gave the Attorney General the exclusive authority to investigate unlawful practices and to obtain injunctions against any persons engaging in or about to engage in unlawful practices and to seek restitution parens patriae for those individuals harmed by the unlawful acts.[44]

But in 1971, the act was amended to give "New Jersey one of the strongest consumer protection laws in the nation."[45] The amendment broadened the definition of consumer fraud, streamlined procedures, and increased penalties for violations.[46] The bill also created a new Division of Consumer Affairs to give New Jersey more power to "protect the consumer." Additionally, the definition of unlawful practices was expanded to include "unconscionable consumer practices."[47] The New Jersey Supreme Court subsequently explained "unconscionable commercial practices" as "an amorphous concept obviously designed to establish a broad business ethic"[48] but implying a lack of "good faith, honesty in fact and observance of fair dealing."[49] The court realized that because there was no clear definition of the business practices that would be deemed unconscionable, violations must be judged on a case-by-case basis.

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[41] Press Release, Govenor William T. Cahill, Assembly Bill No. 2402, at 1 (June 29, 1971). *See* Gennari v. Weichert Co Realtors, 148 N.J. 582, 604, 691 A.2d 350 (1997).

[42] Lisa J. Trembly and Michael F. Bevacqua, *Back to the Future with the Consumer Fraud Act: New Jersey Sets the Standard for Consumer Protection*, 29 Seton Hall Legislative J. 193, 194 (2004), *available at* http://www.civiljusticenj.org/wp-content/uploads/2014/01/BackToTheFutureWithTheConsumerFraudAct_NewJerseySetsStandardForConsumerProtection.pdf.

[43] Cox v. Sears Roebuck & Co., 138 N.J. 2, 14, 647 A.2d 454 (1994) (quoting Senate Committee, Statement to the Senate Bill No. 199 (1960)).

[44] *See* Consumer Fraud Act, ch. 39, §5, 1960 NJ Laws 137 (codified as amended at N.J. Rev. Stat. §§ 56:8-1 to 56:8-148 (2010)).

[45] Skeer v. EMK Motors, Inc., 187 N.J. Super. 465, 471, 455 A.2d 508 (App. Div. 1982) (quoting Press Release, *supra* note 41) (emphasis omitted).

[46] *Id.*

[47] *Id.* The practices to be covered "unconscionable consumer practices" include "exorbitant prices, unfair bargaining advantages and incomplete disclosures." *Id.*

[48] Kugler v. Romain, 58 N.J. 522, 543, 279 A.2d 640 (1971).

[49] *Id.* at 544.

But, the biggest change brought by the amendment was that it provided for a private right of action to consumers for violations of the CFA.[50] The private right of action also included provisions that allowed for entitlement to "triple damages, reasonable attorney's fees, and reasonable costs of suit."[51] In order to qualify for that relief, the consumer must have an "ascertainable loss" of money or property.[52] However, although a plaintiff must have an ascertainable loss, the CFA does not distinguish between "technical" violations of the law and more substantive ones; even minor violations that are not done in bad faith subject defendants to treble damages and attorney's fees.[53]

Many of the provisions in New Jersey's CFA—a private right of action, class actions, treble damages, attorney's fees, remedies for technical violations—represent significant deviations from the original State CPAs which recognized the need to strike a balance between protecting consumers and preventing excessive and meritless consumer litigation. For example, the CFA allows plaintiffs to recover attorney's fees if they can prove a technical violation of the CFA even if they are not able to prove they suffered an ascertainable loss. As long as they survive a summary judgement motion on the issue of ascertainable loss, plaintiffs can recover attorney's fees in cases where they cannot even recover compensatory damages.[54] Awarding attorney's fees for technical violations even in cases where plaintiffs cannot prove they suffered actual harm certainly encourages litigation initiated by financially-motivated attorneys. Even New Jersey courts have recognized the absurdity of fee-shifting for technical violations:

> Although we think the facts now before us demonstrate the lowest conceivable level of violation under the Consumer Fraud Act, and although we have difficulty seeing how the salutary goals of the Act are furthered by the award of fees, the statute nevertheless supports the reward. The Supreme Court has made it clear that the statute mandates an award of counsel fees and costs for any violation of the Act, even if that violation caused no harm to the consumer. Relief from this strict liability, if any, must be granted by the Legislature.[55]

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50 *Skeer,* 187 N.J. Super. at 471 (quoting Press Release, *supra* note 41).

51 *Id*. (emphasis omitted). The reason for this portion of the amendment was 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." Weinberg v. Sprint Corp. 173 N.J. 233, 249, 801 A.2d 281 (2002) (citing Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139, 741 A.2d 591 (1999)).

52 N.J. Stat. Ann §56:8-19 (West 2014) ("any person who suffers an ascertainable loss . . . may bring an action or assert a counterclaim").

53 *See* BJM Insulation & Constr., Inc. v. Evans, 287 N.J. Super. 513, 518, 671 A.2d 603 (App. Div. 1996) (holding that the CFA "makes no distinction between 'technical' violations and more 'substantive' ones").

54 Weinberg v. Sprint Corp., 173 N.J. 233, 253, 801 A.2d 281 (2002).

55 Branigan v. Level on the Level, 326 N.J. Super. 24, 31, 740 A.2d 643 (App. Div. 1999).

New Jersey stands alone in many expansions and judicial interpretations of its consumer protection statute. New Jersey is among a small handful of states that mandates the trebling of awards: "In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest."[56] In contrast, most states that allow for treble damages under their CPA statutes leave the decision to the court's discretion in most or all circumstances.[57] This gives the court the option of not trebling damages in situations where the defendant acted in good faith.

New Jersey is also unusual in the potential nationwide application of its consumer protection legislation. Many New Jersey courts have ruled that the CFA affords a claim to residents of other states, for transactions occurring in other states, simply because the defendant is headquartered in New Jersey.[58] This nationwide application has been used to justify nationwide class actions, where millions of consumers outside of New Jersey sue New Jersey-based businesses under the CFA. Thus, a statute originally enacted to protect New Jersey consumers instead often benefits out-of-state consumers and lawyers at the expense of New Jersey businesses and employees—a tradeoff certainly unanticipated when the law's original proponents weighed the consumer-protecting benefits against the commerce-restraining costs of the CFA. In contrast, most other states have expressly held that non-resident plaintiffs may not bring consumer protection claims under State CPAs for conduct occurring outside the state.[59]

Thus, while the New Jersey CFA was initially celebrated as empowering consumers, the expansion in the original legislation has tipped the balance from protecting consumers to encouraging excessive consumer litigation. As explained in the next section, lenient provisions and interpretation of the CFA—automatic treble damages, fee-shifting for technical violations, and the possibilities of extraterritorial application to nationwide class actions—has inspired abusive and socially harmful litigation. The indulgent New Jersey CFA has engendered professional consumer protection litigators: consumers and attorneys who aggressively seek out potential advertisements, labels, and products on which to bring an

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56 §56:8-19.

57 *See, e.g.,* Del. Code Ann. tit. 6 § 2583(b) (West 2014); Ind. Code Ann. § 24-5-0.5-4(a) (West 2014); Ohio Rev. Code Ann. § 1345.09(B) (West 2014).

58 *See Int'l Union,* 384 N.J. Super. at 305, *overruled on other grounds,* 192 N.J. 372 (2007); Elias v. Ungar's Food Prods., Inc., 252 F.R.D. 233 (D.N.J. 2008).

59 *See, e.g.,* Goshen v. Mut. Life Ins. Co., 774 N.E.2d 1190, 1195 (N.Y. 2002) (deception of consumer must occur in New York to be actionable); Avery v. State Farm Mut. Auto Ins. Co., 835 N.E.2d 801, 853 (Ill. 2005) (Illinois Consumer Fraud Act applies only to transactions in Illinois); Marshall v. Priceline.com Inc., No. 05C-02-195 WCC, 2006 Del. Super. LEXIS 447, at *5-6 (Del. Super. Ct. Oct. 31, 2006) (Delaware statute does not have extraterritorial effect).

action.[60] Where consumer advocates under the common-law system worried about the perils of caveat emptor and under-incentivized consumers unable to bring claims, the modern consumer protection landscape more resembles caveat venditor: "let the seller beware."

IV. THE CONSEQUENCES OF NEW JERSEY'S CFA EXPANSION

The expansion of New Jersey's CFA has harmed consumers and the civil justice system. The Act's devolution from a consumer protection act into a consumer litigation act has greatly increased the amount of CFA litigation in the state. Both data and theory prove that excessive increases in litigation lead directly to consumer harms, including higher product prices. As explained, the substantial increase in consumer protection litigation is a direct consequence of the perverse incentives this law now creates.

A. The Flood of Consumer Protection Litigation

The State CPAs' extension beyond their original purposes has driven a surge of consumer protection litigation. Though State CPA litigation has increased steadily since adoption of these acts in the 1960s to 1970s, this trend continues apace in the era of consumer litigation acts. A 2009 study by the Northwestern University Searle Civil Justice Institute (the "Searle Study") found that the number of reported CPA decisions increased by 119 percent from 2000 to 2007.[61] These increases in CPA litigation far exceed increases in either tort or general litigation over this same period.[62]

New Jersey's increase in consumer protection litigation has been especially pronounced. From 2000 to 2009, the number of reported decisions under the CFA increased by an astonishing 447 percent.[63]

Figure 1 compares New Jersey's published CFA decisions with the national trend. New Jersey has consistently experienced more consumer protection litigation than the national trend, and this difference has grown in the last decade. Moreover, because these data include only reported decisions, and not actions filed or filed and settled without generating a reported judicial decision, they necessarily underestimate the amount of consumer protection litigation. Nevertheless, the data reveal that New Jersey's CFA litigation has placed a significant burden on the state's civil justice system.

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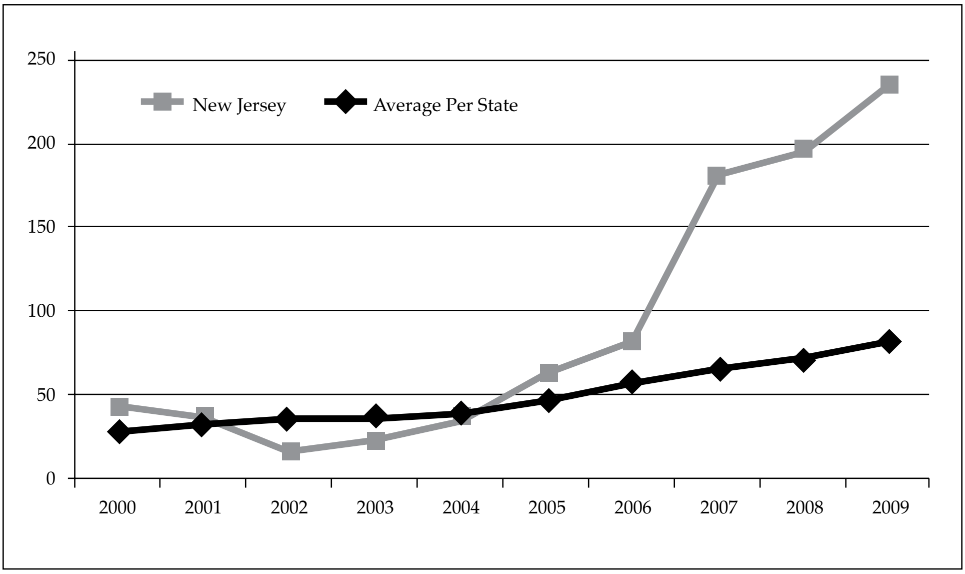
[60] Am. Tort Reform Ass'n, Private Consumer Protection Lawsuit Abuse: When Claims Are Driven by Profit-Driven Lawyers and Interest-Group Agendas, Not the Benefit of Consumers (2006) [hereinafter ATRA 2006].

[61] The Study uses reported decisions as a proxy for total litigation levels. Searle Study, *supra* note 3, at 19.

[62] Searle Study, *supra* note 3, at 19.

[63] New Jersey-specific data is from the original Searle Study updated to 2009.

Figure 1: Trends in Consumer Protection Litigation 2000-2009; New Jersey versus National Average



Data from the Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation (Preliminary Report)* 6 (2009), available at http://ssrn.com/abstract=1708175 [hereinafter Searle Study], updated to 2009.

The increase in New Jersey's consumer protection litigation is not surprising given the deviation of the CFA from the original purpose of consumer protection laws. The Searle Study finds that CPA statutes that provide for a greater expected value of recovery—through treble damages, attorney's fees, etc.—invite more CPA litigation.[64] Consumers respond rationally to litigation incentives, and states that invite additional consumer protection litigation through imprecise standards, low burdens of proof, and more generous awards ought not be surprised when enterprising lawyers initiate more litigation, whether meritless or not.

B. The Social Costs of Increasing Consumer Protection Litigation

Though initially celebrated as empowering consumers, the expansion of State CPAs like the New Jersey CFA has drawn criticism for inspiring abusive and socially harmful litigation.[65] This gradual but consistent devolution of consumer protection acts into consumer litigation acts carries serious social costs. Experience, the academic literature, and common sense demonstrate that this increase does not consist of downtrodden consumers finally vindicating economically-small but significant claims against uncaring businesses. Rather, sophisticated

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64 Searle Study, *supra* note 3, at xii.

65 Butler & Johnston, *supra* note 16, at 4, 7. *See also* ATRA 2006, *supra* note 61.

litigants predictably exploit low burdens of proof and generous remedial provisions to extract rents from businesses, raising prices, and ultimately harming local consumers.

Economic theory explains that an increase in CFA claims in New Jersey would, on balance, harm consumers. The additional consumer protection claims inflict certain costs—higher prices and an overburdened justice system—in exchange for speculative benefits. Indeed, modern experiences with New Jersey's CFA suggest that new cases brought under more expansive provisions are of dubious social value.

Both litigated and threatened consumer protection actions impose significant costs on businesses. Protracted adversarial litigation often results in expensive attorney's fees, or otherwise often induces a quick but expensive settlement. Though the New Jersey CFA offsets these attorney's fees for plaintiffs, businesses must foot the costs of defending against, settling, and paying these claims, whether meritorious or not. Even the possibility of a consumer protection action under an indulgent CFA law forces businesses to incur litigation expenses to determine the scope of the law and acceptable behavior. Moreover, litigation and the threat of litigation impose time costs that are not so easily shifted, and which all parties must bear.[66] Although these costs are initially borne by businesses, they are ultimately passed on to consumers through increased prices, fewer innovations, lower product quality, lower wages, and lower employment. Economic research confirms this theoretical understanding; a 2011 study, for example, confirms that State CPA statutes inflict substantial economic harm on consumers through increased prices, especially when State CPAs assign broad liability with indulgent damages provisions.[67]

Increased litigation under New Jersey's CFA also burdens the state's civil justice system. These cases generally slow state and federal dockets in all other cases as well, increasing the delay and cost of unrelated litigation.[68] These delays impose a cost-increasing, rent-seeking cycle: an increase in filings increases court dockets, which leads to lengthier times to disposition, which increases the value of the threat of a frivolous lawsuit, which encourages additional filing.[69] The additional value from

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66 *See generally* Butler & Johnston, *supra* note 16.

67 Searle Civil Justice Institute Task Force on State Consumer Protection Acts and Consumer Welfare, State Consumer Protection Acts and Costs to Consumers: The Impact of State Consumer Acts on Automobile Insurance Premiums (Preliminary Report) 4 (2011), *available at* http://www.masonlec.org/site/rte_uploads/files/CPA-Costs-Body-Sept-2011.pdf. In looking at automobile insurance cases and insurance premiums in general, the Task Force found that the expanding liability of State CPAs led to higher automobile insurance premiums.

68 *See, e.g.*, Judicial Council of Cal., *Statewide Caseload Trends 2002–2003 Through 2011–2012*, 2013 Ct. Stat. Rep. 40–42, *available at* www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf. In California State Superior Courts, as the general trend in filing of Civil Unlimited (driven mostly by civil complaints) and Civil Limited cases has been increasing from Fiscal Year 2003 ("FY03") to Fiscal Year 2012 ("FY12"), the percentage of cases disposed of within 24 months has been decreasing.

69 *Id.* at 41. Until Fiscal Year 2011 ("FY11"), the clearance of dispositions to filings was less than 100 percent, indicating that more cases were being filed than disposed of. At the end of FY12, the clearance rate was once again sliding towards a sub-100 percent value.

frivolous lawsuits encourages additional frivolous threats, and the cycle begins itself anew.

Moreover, we can infer that this pattern has encouraged frivolous consumer protection lawsuits. Although actual data on the number of frivolous cases is nonexistent, available data does compel several troubling conclusions. First, New Jersey CFA reported decisions are regularly increasing; from 2000 to 2009, the number of reported decisions increased by 447 percent. Yet over this period, bench and jury trials have steadily declined.[70] This suggests that not only are more New Jersey consumer protection claims being filed, but a greater proportion of those cases are settled without a reported decision. In other words, the 447 percent increase between 2000 and 2009 probably understates the growth of consumer protection litigation. Furthermore, if one expects that weak claims are likely to be overrepresented in settled claims, as opposed to actually litigated claims, even this extraordinary number probably understates the amount of frivolous litigation taking place under the guise of consumer protection legislation. This fact also understates the sweeping, in terrorem effect of class action lawsuits, which undoubtedly magnify the problem further.[71]

Although the costs of increasing CFA litigation—higher consumer prices, overburdened courts, and socially-harmful frivolous litigation—are established by data and economic theory, the potential benefits from this additional litigation are deeply speculative. There is no study establishing that New Jersey consumers reap any tangible benefits from the expansion of the CFA. Indeed, tangible benefits would not be expected if much of the increase in consumer litigation derives from socially-valueless cases. And there are ample examples of cases with seemingly little social value that are brought under the CFA. They include a class action brought by a California woman against New Jersey-based Benjamin Moore paint for "low-odor" paint still smelling like paint,[72] a class action brought against Subway because occasionally a "foot-long" sandwich falls short of 12 inches,[73] and a class action brought against the NFL alleging ticket distribution policies that drive up the price of Super Bowl tickets.[74] If these marginal cases offer little or no social benefits, but impose tangible social costs, then expansive consumer protection

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70 Nat'l Ctr. for State Courts, *Examining the Work of State Courts*, 11 CASELOAD HIGHLIGHTS 1, 3 (2012) (showing that while total dispositions increased by about 46 percent from 1984 through 2002, that the rate of jury or bench trial has been decreasing by about 49 percent across 22 states).

71 Butler & Johnston, *supra* note 16, at 66 (suggesting that the economic harms caused by class actions are even more magnified than those presented by private lawsuits, and that therefore there should be separate rules for consumer class actions under State CPAs to help mitigate these additional costs, such as removal of statutory damages, damage multipliers, and punitive damages).

72 Sway v. Benjamin Moore & Co., No. 2:11-cv-02343 (D.N.J. 2011). This case was eventually dismissed.

73 Farley v. Subway Sandwich Shops Inc., No. 000185-2013 (N.J. Super. Ct. 2013).

74 Finkelman v. NFL, No. 14-CV-00096 (PGS) (DEA) (D.N.J. 2014).

litigation harms consumers instead of helping them as intended.[75]

The filing of these seemingly socially-valueless cases is no surprise given the continued expansion of the New Jersey CFA. In standard civil cases, a private plaintiff weighs his costs of litigation against his prospective benefits when determining whether to file suit; typically, these costs are significant enough that they discourage plaintiffs from needlessly exposing the public to the negative externalities accompanying frivolous litigation.[76] However, regular attorney's fees awards under the CFA reduce plaintiffs' costs to bring suit, subsidizing additional, often frivolous, claims. Moreover, the CFA's automatic trebling of damages further increase the filing of marginal claims. In fact, threatening these asymmetrical costs against businesses is used as a force to extract concessions through excessive settlements.[77] But predictably, these costs must be paid somehow: one expects they are shared by both New Jersey consumers and the defendant, in part dependent on the defendant business's ability to pass on these litigation costs through increased prices and lower wages.[78]

These absurd results and adverse incentives hint at the true beneficiaries of expansive consumer protection legislation— professional consumer litigators. Many such suits come at the behest of professional trial lawyers pressuring or pursuing individual clients to file suits, especially with nationwide class actions available under the New Jersey CFA. These attorneys seek a large payday through court-ordered attorney's fees, settlements, or both.[79] These actors are merely rationally responding to perverse incentives; the true problem is not rent-seeking attorneys and plaintiffs of convenience, but the legal regime created by the CFA that encourages plaintiffs to create (or imagine) harmless misunderstandings in order to financially benefit from litigation.

Unfortunately, the problems attending the New Jersey CFA are so intransigent and so predictable precisely because of these perverse

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[75] *See* Butler & Johnston, *supra* note 16, at 65 (suggesting through an empirical analysis of case law brought under State CPAs that the State CPAs are actually harming consumers and decreasing consumer welfare).

[76] Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System,* 11 J. Legal Stud. 333, 333 (1982).

[77] *See* Butler & Johnston, *supra* note 16, at 36.

[78] Frank Furedi & Jennie Bristow, Ctr. for Policy Ctudies, The Social Cost of Litigation (2012), *available at* http://www.frankfuredi.com/images/uploads/120905122753-thesocialcostoflitigation.pdf. While this study specifically looks at the costs of medical services as a result of increasing litigation, the analyses drawn from increased litigation to increased costs in services carry over to other fields of consumer protection as well. *See also* Jeff Sovern, *Toward a New Model of Consumer Protection Statutes: The Problem of Increased Transaction Costs,* 47 Wm. & Mary L. Rev. 1635, 1705–09 (2006) (stating that State CPAs may increase transaction costs that firms may then pass onto consumers and arguing for regulation that would prevent such a result).

[79] Brian P. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards,* 7 J. Empirical L. Stud. 4 (2010) (stating that prior empirical studies have found that the average attorneys' fee award is between 25 and 30 percent for class action settlements, and that the percentage is often highly and inversely associated with the size of the settlement and the duration of the case).

incentives. Frivolous consumer litigation derives directly and sensibly from the costs and benefits to filing these cases; there are few risks and little costs to plaintiffs and their attorneys, but substantial costs to defendant businesses—and society at large.

V. CONCLUSIONS AND MOVING FORWARD

American consumer protection law had, at its foundation, an understanding of the need to balance consumer protection with preventing excessive consumer litigation. Unfortunately, ever-expanding state legislation, like the New Jersey CFA, invites potential abuses through socially valueless lawsuits and unnecessary consumer litigation. Fighting these potential abuses is key to ensuring that consumers at large, rather than merely specific litigants and enterprising litigators, benefit from consumer protection acts.

Empirical scholarship, economic theory, and common sense suggest that certain reforms could mitigate or reverse New Jersey CFA's devolution from consumer protection act to a consumer litigation act. These include the following:

- **Discretionary treble damages** allow courts to reserve such damages for defendants that acted in bad faith or with intent to do harm. Mandatory treble damages for even technical violations of the CFA are unduly harsh and conflict with the purpose and imposition of other exemplary damages. Courts have recognized this. Discretion in these awards will discourage enterprising attorneys from filing meritless claims in the hopes of extracting settlements from unknowing violators while still deterring bad faith business practices.

- **Reserving attorney's fees for knowing violations of state laws** will protect good-faith defendants and drive aggressive, litigation-conscious attorneys toward cases where punishing such a practice is more likely to be socially beneficial: those where businesses are clearly making active efforts to deceive customers.

- **Requiring detrimental reliance** for consumer protection act claims will ensure that compensation reaches those consumers that are actually misled by a questionable business practice. Consumers should be able to minimally demonstrate that they actually relied on the misrepresentation they challenge. By necessity, requiring reliance will discourage speculative claims by consumers and attorneys hoping to extract damages for a business practice unrelated to their commercial transaction.

- **Eliminating the possibility of extraterritorial application** will deter professional consumer litigators from drumming up nationwide class actions in hopes of taking advantage of New Jersey's indulgent CFA provisions. The legislative history of the CFA makes it clear that it was designed to protect consumers in New Jersey, not enable consumers outside of New Jersey to sue New Jersey-based businesses for transactions that occurred outside of the state. Clarifying that extraterritorial application is not allowed under the CFA will protect both New Jersey's businesses and the state economy.

The New Jersey CFA was enacted to protect consumer abuses from unfair and deceptive commercial conduct. But this law can also be used to harm consumers, employers, and businesses through excessive and socially unproductive lawsuits that enrich a few consumers and many lawyers at the expense of higher prices and slower judicial dockets. Fortunately, a solution is simple: restoring the original purpose of consumer protection acts is as easy as enacting a few reforms to prevent abuse of the CFA. With these protections, New Jersey lawmakers can be confident that the CFA will protect consumers instead of harm them.

AMERICAN TORT REFORM FOUNDATION
1101 Connecticut Avenue, NW Suite 400, Washington, DC 20036
Telephone: 202 682 1163 • Fax: 202 682 1022 • www.atra.org