Chapter 1

General Description, History and General Purpose of the CFA

1-1 WHAT IS THE CONSUMER FRAUD ACT?

The Consumer Fraud Act ("CFA") is a consumer protection law focusing on regulating the conduct of persons and businesses involved in the sale of goods or services for profit (merchants). The CFA appears in Chapter 8 of Title 56 of the codified New Jersey Statutes, a chapter titled "Trade Names, Trade-Marks and Unfair Trade Practices." The CFA begins at N.J.S.A. 56:8-1 and its subparts keeps increasing as the Legislature adds new subjects to its boundaries. Chapter 8—the CFA subchapter—is titled "Fraud, Etc., In Connection with Sale or Advertisements of Merchandise or Real Estate as Unlawful Practice."

The CFA offers more than simply another cause of action sounding in fraud, which existed in some form for hundreds of years.[1] Common law legal and equitable fraud[2] are causes of action that failed to sufficiently combat marketplace fraud, leading the Legislature to adopt the CFA.[3] The CFA differs from common law legal fraud by offering claimants: (1) less rigorous burdens of proof;[4] and (2) expanded remedies, such as awards of

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1. *See Grow Farms Corp. v. Nat'l State Bank, Elizabeth*, 167 N.J. Super. 102, 107 (Law Div. 1979).

2. *Liebling v. Garden State Indem.*, 337 N.J. Super. 447 (App. Div. 2001) (discussing the distinction between the two causes of action).

3. *See Kugler v. Romain*, 58 N.J. 522 (1971) (discussing the CFA's purpose).

4. *Compare* Model Civil Jury Charge 4:43 *with* Model Civil Jury Charge 3.30E.

statutory treble damages, litigation expenses and costs.[5] However, with its "consumer transaction" bent, the CFA also does not cover ground covered by common law fraud. While the CFA uses the term "consumer" sparingly and does so without providing any definition,[6] the common law holds that the CFA excludes the sale of merchandise bought by a reseller of the merchandise.[7]

The CFA allows the Attorney General ("AG"), a department of the AG called the Division of Consumer Affairs and individuals and businesses victimized by unlawful practices to bring claims against merchants violating the CFA.[8] There are three possible unlawful practices imposing CFA liability:

- Affirmative acts under N.J.S.A. 56:8-2.[9]
- Knowing omissions under N.J.S.A. 56:8-2.[10]
- Per se violations[11] derived from:
  - CFA statutory subsections.[12]
  - Statutory subsections outside the CFA.[13]
  - Regulations adopted by the Division of Consumer Affairs.[14]

The CFA imposes penalties against merchants committing unlawful practices, such as:

- Treble damages.
- Attorney's fees.

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5. *See* N.J.S.A. 56:8-19.

6. *Hundred E. Credit Corp. v. Eric Schuster Corp.*, 212 N.J. Super. 350, 355 (App. Div. 1986) (the court noted the term "consumer" is generally recognized as meaning the user of economic goods whose use either diminishes or destroys the utility of the goods), *certif. denied*, 198 N.J. 474 (2009); N.J.S.A. 56:8-1; *see also Zorba Contractors, Inc. v. Hous. Auth. of the City of Newark*, 282 N.J. Super. 430, 434 (App. Div. 1995).

7. *Stockroom, Inc. v. Dydacomp Dev. Corp.*, 941 F. Supp. 2d 537 (D.N.J. 2013); *Papergraphics Int'l, Inc. v. Correa*, 389 N.J. Super. 8 (App. Div. 2006).

8. *See* N.J.S.A. 56:8-2; *Cox v. Sears Roebuck & Co*., 138 N.J. 2 (1994).

9. *See* N.J.S.A. 56:8-2; *Cox v. Sears Roebuck & Co*., 138 N.J. 2 (1994).

10. *See* N.J.S.A. 56:8-2; *Cox v. Sears Roebuck & Co*., 138 N.J. 2 (1994).

11. *See Cox v. Sears Roebuck & Co*., 138 N.J. 2 (1994).

12. *See, e.g.*, Home improvement contractors' violations of the Contractors' Registration Act, N.J.S.A. 56:8-136, et seq.; prize notification violations under N.J.S.A. 56:8-2.3; food misrepresentation violations under N.J.S.A. 56:8-2.9.

13. *See, e.g.*, The Consumer Protection Leasing Act, N.J.S.A. 56:12-70.

14. N.J.A.C. 13:45A-1.1, et seq. *See, e.g.*, Home improvement contractors' violations of the Home Improvement Practices regulations under N.J.A.C. 13:45-16.

What started as a dozen subsections[15] of a subchapter of Title 56 of New Jersey Statues now totals over 200 subsections,[16] 36 subchapters of administrative regulations[17] and over 2,000 cases.

1-2 HISTORICAL BACKGROUND

1-2:1 CFA as Originally Adopted

In 1960, the Legislature enacted the Consumer Fraud Act ("CFA").[18] The CFA started as a dozen subsections[19] of a subchapter of Title 56 of New Jersey Statues. These subsections included definitions (Section 1) and the declaration of the first kinds of unlawful practices imposing CFA liability: five categories of affirmative acts and one category of acts of omission.[20] The first CFA subsections also provided the AG with specific enforcement powers.[21]

The CFA's original purpose was to enable the AG to investigate and fight the commission of fraud against the public.[22] Therefore, the CFA in its original form emphasized public remedies over private ones, favoring government intervention to curb consumer fraud.[23] The Legislature believed that a consumer protection statute giving private parties individual rights and remedies would fail to provide sufficient protections to the public.[24] Instead, initially the AG was the sole entity entrusted with enforcing the CFA.[25] To aid the AG in this task, the CFA provided the AG

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15. N.J.S.A. 56:8 through 12 initially without any of their present subparts.

16. N.J.S.A. 56:8-1, et seq.

17. N.J.A.C. 13:45A-1.1, et seq.

18. *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 270 (1978).

19. N.J.S.A. 56:8 through 12 initially without any of their present subparts.

20. N.J.S.A. 56:8-1 through 2, exclusive of their subsequent subparts.

21. N.J.S.A. 56:8-3 through 12, exclusive of their subsequent subparts.

22. *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572, 577 (Ch. Div. 1972); *Kugler v. Romain*, 58 N.J. 522, 545 (1971). The CFA's legislative history is quite sparse. Bevacqua & Trembly, *Back to the Future with the Consumer Fraud Act: New Jersey Sets the Standard for Consumer Protection*, 29 Seton Hall Legis. J. 193 (2004).

23. *Kugler v. Romain*, 58 N.J. 522, 537 (1971).

24. *Kugler v. Romain*, 58 N.J. 522, 537 (1971).

25. *Zorba Contrs., Inc. v. Hous. Auth., City of Newark*, 362 N.J. Super. 124, 134 (App. Div. 2003); *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 472-73 (1988).

with broad powers of investigation and enforcement.[26] The CFA regulates the sale of both merchandise and services because while the CFA speaks of regulating the sale of merchandise, that term includes the sale of services.[27]

1-2:2 Amendments to CFA

In 1968, the CFA was amended to include violations for falsely implying association with a governmental agency.[28] More amendments followed in 1966, 1967, 1969, 1971, 1973, 1975, 1979, 1982, etc., all the way up to the present.[29]

The most significant amendments came in 1971, when the Legislature intended to make the CFA one of the country's strongest consumer protection laws.[30] The 1971 amendments:

- expanded the definition of "unlawful practice" to include "unconscionable commercial practices";[31]
- broadened the AG's enforcement powers; and[32]
- provided for private causes of action.[33]

To meet the CFA's objectives, the Legislature permitted private class actions raising CFA claims.[34] The Legislature hoped the amendment would provide consumers with easier access to the courts, encourage attorneys to take consumer actions and reduce the burdens of the Division of Consumer Affairs (DCA).[35] The 1971 amendment specified the remedies available to the private consumer (i.e., treble damages, reasonable attorneys' fees and costs of suit).[36] If a private party is injured by an unlawful practice, the AG may

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26. *Zorba Contrs., Inc. v. Hous. Auth., City of Newark*, 362 N.J. Super. 124, 134 (App. Div. 2003); N.J.S.A. 56:8-3; N.J.S.A. 56:8-5; N.J.S.A. 56:8-8.

27. *D'Agostino v. Maldonado*, 216 N.J. 168 (2013).

28. N.J.S.A. 56:8-2.1.

29. N.J.S.A. 56:8-2.2 to 226.

30. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994).

31. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994).

32. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994).

33. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994); *see also D'Agostino v. Maldonado*, 216 N.J. 168 (2013).

34. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 248 (2002) (citing *Riley v. New Rapids Carpet Ctr.*, 61 N.J. 218, 226 (1972)).

35. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 248-49 (2002).

36. *Zorba Contrs., Inc. v. Hous. Auth., City of Newark*, 362 N.J. Super. 124, 137 (App. Div. 2003); N.J.S.A. 56:8-19.

still take an interest in the case and direct that the private party be restored their money or property.[37] However, the AG might not wish to pursue the case and the private party might not wish to ask for the AG's intervention, in which event the private party could proceed with their claim in any court of competent jurisdiction.[38] The CFA mandates recovery of treble damages and attorneys' fees in certain private actions.[39]

In 1975, the Legislature passed another landmark CFA amendment by including unlawful practices in the sale or advertisement of real estate.[40] Referred to as the Truth in Real Estate Advertising Act, the amendment corrected the previous omission of real estate from the CFA's scope.

In 1999, the Legislature amended the CFA to provide no right of recovery for punitive damages or attorney fees against a real estate broker, broker-salesperson or salesperson licensed under N.J.S.A. 45:15-1, et seq., for the communication of any false, misleading or deceptive information provided to the real estate broker, broker-salesperson or salesperson, by or on behalf of the seller of real estate located in New Jersey, if the real estate broker, broker-salesperson or salesperson demonstrates that he:

- Had no actual knowledge of the false, misleading or deceptive character of the information; and
- Made a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading or deceptive character.[41]

This amendment became effective on March 30, 1999. On July 10, 2004, the Legislature further amended N.J.S.A. 56:8-19.1 to include language about unlicensed home inspectors. For purposes of this section of the CFA, communications by a real estate broker, broker-salesperson or salesperson, which shall be deemed to satisfy the requirements of a "reasonable and diligent inquiry"

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37. *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 470 (App. Div. 1982).

38. *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 470 (App. Div. 1982).

39. *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 470 (App. Div. 1982).

40. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 604 (1997) (citing *Strawn v. Canuso*, 140 N.J. 43, 60 (1995)) (citing, in turn, *Arroyo v. Arnold-Baker & Assocs., Inc.*, 206 N.J. Super. 294, 297 (Law Div. 1985)); *see also* Chapter 13 regarding CFA's application to advertisements.

41. N.J.S.A. 56:8-19.1.

include, but shall not be limited to, communications that disclose information:

- provided in a report or upon a representation by a person, licensed or certified by the State of New Jersey, including, but not limited to, an appraiser, home inspector, plumber or electrical contractor or an unlicensed home inspector until December 30, 2005, of a particular physical condition pertaining to the real estate derived from inspection of the real estate by that person;[42]
- provided in a report or upon a representation by any governmental official or employee, if the particular information of a physical condition is likely to be within the knowledge of that governmental official or employee; [43] or
- that the real estate broker, broker-salesperson or salesperson obtained from the seller in a property condition disclosure statement, which form shall comply with regulations promulgated by the director in consultation with the New Jersey Real Estate Commission, provided that the real estate broker, broker-salesperson or salesperson informed the buyer that the seller is the source of the information and that, prior to making that communication to the buyer, the real estate broker, broker-salesperson or salesperson visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller.[44]

42. N.J.S.A. 56:8-19.1.
43. N.J.S.A. 56:8-19.1.
44. N.J.S.A. 56:8-19.1.

1-3 PURPOSE

1-3:1 Promotion of Truth and Fair Dealing in Marketplace

The CFA focuses on eradicating commercial deception.[45] The Legislature believed that, as commercial transactions expanded, the public faced rampant fraud committed by unscrupulous merchants.[46] Accordingly, the CFA addresses complaints about selling practices that victimize customers by increasing their limited leverage.[47]

The CFA seeks to:

- Halt unlawful sales and advertising practices designed to induce customers to purchase merchandise or real estate, whether such practices involve acts of commission or omission.[48]
- Promote the disclosure of relevant information to enable consumers to make intelligent decisions when selecting products and services.[49]
- Via its treble damage provision, prevent unconscionable commercial practices in connection with the sale or advertisement of any merchandise or real estate.[50]
- Compel merchants to develop practices that minimize consumer fraud, such as by requiring the use of written agreements.[51] Regulate companies doing business in New Jersey.[52]

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45. *Delaney v. Garden State Auto Park*, 318 N.J. Super. 15, 19 (App. Div. 1999).

46. *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572, 577 (Ch. Div. 1972).

47. *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 69 (1985); *Kugler v. Romain*, 58 N.J. 522, 535 (1971).

48. *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 270 (1978); *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 69 (1985).

49. *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 471 (App. Div. 2001); *Division of Consumer Affairs v. G.E. Co.*, 244 N.J. Super. 349, 353 (App. Div. 1990).

50. *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 469-70 (App. Div. 1982).

51. *Marascio v. Campanella*, 298 N.J. Super. 491, 501 (App. Div. 1997).

52. *Dreier Co., Inc. v. Unitronix Corp.*, 218 N.J. Super. 260 (App. Div. 1986); *see also Coastal Group, Inc. v. Dryvit*, 147 N.J. 574 (1997) (holding that CFA and U.C.C. claims were both able to be maintained).

1-3:2 Compensation of Victim for Actual Loss

In authorizing private CFA actions, the Legislature sought to provide consumer fraud victims' legal relief for their ascertainable losses of money and property.[53] The CFA is designed to make victims of fraud whole.[54] A variety of remedies under the CFA seek to achieve that purpose, including a return of money and property that was lost through a merchant's fraud, monetary compensation to replace what was lost, cancellation of fraudulent debts and obligations, and reformation of contracts to mirror the CFA's requirements.

1-3:3 Punishment of Wrongdoer

The CFA attempts to punish merchants committing consumer fraud and thereby deter future commercial misconduct.[55] But a private party must prove ascertainable loss to survive summary judgment and therefore, to recover treble damages and attorney's fees.[56] In private actions, merchants committing CFA violations, such as by failing to comply with the requirements of statutory or administrative subsections, without causing parties to sustain ascertainable losses of money or property, frequently escape liability.[57]

1-3:4 Attraction of Competent Counsel for Private Enforcement

The CFA's fee-shifting provision seeks to ensure that claimants with legitimate claims are able to find counsel.[58] "The poor and powerless benefit from the guiding hand of counsel offered

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53. *Zorba Contrs., Inc. v. Hous. Auth., City of Newark*, 362 N.J. Super. 124, 138 (App. Div. 2003).

54. *Furst v. Einstein Moomjy, Inc*., 182 N.J. 1, 13-14 (2004).

55. *Miller v. Am. Family Publishers*, 284 N.J. Super. 67, 92 n.11 (Ch. Div. 1995); *Belmont Condo. Ass'n, Inc. v. Geibel*, No. A-2584-10T3, 2013 N.J. Super. LEXIS 105 (N.J. Super. App. Div. July 9, 2013) (citing *Furst v. Einstein Moomjy, Inc*., 182 N.J. 1, 12 (2004) (additional citations omitted)).

56. *See, e.g., Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002); *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234 (2005).

57. *Branigan v. Level on the Level, Inc.*, 326 N.J. Super. 24 (App. Div. 1999) (private party cannot recover treble damages against a home repair contractor pursuant to the CFA unless the home repair contractor's misconduct causes its customer to suffer an ascertainable loss of money or property causally related to the misconduct).

58. *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590, 610 (App. Div. 1990), *aff'd o.b.*, 124 N.J. 520 (1991) (citing *Coleman v. Fiore Bros., Inc.*, 113 N.J. 594, 598 (1989)).

through the CFA."[59] If a CFA claimant was to have access to the courts, they would need the resources to file suit.[60] Moreover, the Legislature wanted to assure that the claimant's cost to bring a CFA action was minimized and the compensation was maximized.[61] The Legislature thereby hoped to avoid private CFA claimants having to pay attorneys' fees and incur potentially considerable expense for a small recovery.[62] However, because a private party must prove ascertainable loss to survive summary judgment and therefore, to recover treble damages and attorney's fees,[63] attorneys often charge private CFA litigants fees and costs in lieu of pure contingent fee arrangements. Therefore, if citizens bring private CFA actions, they may still pay attorneys' fees and costs and thereby incur potentially considerable expense for a small recovery or no recovery at all.

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59. *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 585 (2011).

60. *Furst v. Einstein Moomjy, Inc*., 182 N.J. 1, 21 (2004).

61. *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 471 (App. Div. 1982).

62. *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 470 (App. Div. 1982).

63. *See, e.g., Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002); *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234 (2005).