

**CONSUMER PROTECTION IN AN EBAY MARKETPLACE:
AN ANALYSIS OF THE SUPREME COURT OF NEW JERSEY'S
RADIR WHEELS DECISION TO EXTEND LIABILITY UNDER
THE NEW JERSEY CONSUMER FRAUD ACT TO INDIVIDUAL
EBAY SELLERS**

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I. INTRODUCTION

The New Jersey Consumer Fraud Act (CFA)¹ is “one of the strongest consumer-protection laws in the nation.”² In pertinent part, the CFA’s general antifraud provision makes unlawful “[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 . . . in connection with the sale or advertisement of any merchandise or real estate.”³

Since the CFA’s adoption in 1960, the judiciary and legislature have been constantly expanding the CFA to provide broader and stronger consumer protection.⁴ But technological developments of the late twentieth and early twenty-first centuries, such as Internet-auction powerhouse eBay, present new questions about the protection that the CFA affords consumers.

An Internet auction occurs where an item—usually a good, but sometimes a service—is offered for sale via an Internet-auction Web site, through which potential buyers bid against one another to pur-

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¹ N.J. STAT. ANN. §§ 56:8-1 to -184 (West 2001 & Supp. 2009).

² Press Release, Governor William T. Cahill, Assembly Bill No. 2402, 1 (June 29, 1971) (on file with author).

³ § 56:8-2.

⁴ See *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 364–65 (N.J. 1997).

chase the item.⁵ Two forms of Internet-auction Web sites have been established: business-to-consumer Internet-auction Web sites and consumer-to-consumer Internet-auction Web sites.⁶ A business-to-consumer Internet-auction Web site exists where the Internet-auction Web site physically possesses, accepts payment for, and delivers the item after purchase.⁷ A consumer-to-consumer Internet-auction Web site exists where the seller, not the Internet-auction Web site, physically possesses the item, and once the auction ends, the seller and purchaser deal directly with one another regarding payment and delivery.⁸

In 1995, eBay became one of the pioneers of consumer-to-consumer Internet-auction Web sites, which have now become a staple form of e-commerce.⁹ Nearly fifteen years later, “[w]ith more than 88 million active users globally, eBay is the world’s largest online marketplace, where practically anyone can buy and sell practically anything.”¹⁰ Thus, “[w]ith a diverse and passionate community of individuals and small businesses, eBay offers an online platform where millions of items are traded each day.”¹¹ As eBay and similar e-commerce facilitators continue to grow in popularity, “courts are, not surprisingly, faced with the task of applying settled law to modern technological dilemmas.”¹²

Indeed, Internet-auction Web sites provide swindlers yet another means through which to perpetrate fraud.¹³ Because consumers make millions of Internet-auction purchases each day,¹⁴ “[s]cammers are attracted to eBay like moths to a flame,” and “unsuspecting bidders are the main prey of the crooks.”¹⁵ To be sure, Internet-auction

⁵ See INTERNET FRAUD COMPLAINT CTR., INTERNET AUCTION FRAUD 5 (2001), available at <http://permanent.access.gpo.gov/lps50672/AuctionFraudReport.pdf>.

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See *Sayeedi v. Walser*, 835 N.Y.S.2d 840, 842 (N.Y. Civ. Ct. 2007).

¹⁰ eBay, Inc., Who We Are, <http://www.ebayinc.com/who> (last visited Nov. 14, 2009).

¹¹ *Id.*

¹² *Sayeedi*, 835 N.Y.S.2d at 842.

¹³ See INTERNET FRAUD COMPLAINT CTR., *supra* note 5, at 5.

¹⁴ See eBay, Inc., Who We Are, *supra* note 10.

¹⁵ Frank Fortunato, *Fraud on eBay: Causes and Cures*, ECOMMERCE-GUIDE ESSENTIALS, Jan. 8, 2007, <http://www.ecommerce-guide.com/essentials/ebay/article.php/3652611>; see also eBay, What To Do When You Don't Receive Your Item or It's Not as Described, <http://pages.ebay.com/help/buy/item-not-received.html>

fraud, which accounted for nearly thirty-six percent of all Internet-crime complaints in 2007, constitutes by far the most reported Internet crime.¹⁶ Notably, eighty-four percent of Internet-auction fraud is committed by a seller who is not engaged in the trade or business of making sales of the type of which he made on eBay (an “individual seller” or “individual eBay seller”); only the remaining sixteen percent is committed by a seller who is engaged in the trade or business of making sales of the type of which he made on eBay (a “merchant seller” or “merchant eBay seller”).¹⁷

Scamming sellers perpetrate Internet-auction fraud in six main ways: (1) non-delivery, which occurs where the seller places up for bid an item that does not exist and, consequently, is never delivered to the purchaser after the purchaser pays for the item; (2) misrepresentation, which occurs where the seller purposefully deceives the buyer as to the item’s true value by, for example, listing false information or using false or altered photographs of the item; (3) triangulation, which occurs where the seller markets stolen merchandise to an unsuspecting buyer through an Internet-auction Web site; (4) fee stacking, which occurs where the seller, after the close of an auction, adds hidden charges, such as separate costs for postage, handling, or shipping, so that the buyer, consequently, pays more than he anticipated; (5) black-market-good sale, which occurs where the seller’s item actually is an unauthorized imitation or copy of the kind of good that the seller purports it to be; and (6) shill bidding, which is intentional phony bidding by either the seller or the seller’s accomplice to purposefully increase the price of the seller’s own item.¹⁸

No CFA specific antifraud provision or regulation promulgated under the CFA expressly relates to Internet-auction sales. Nonetheless, a merchant eBay seller who commits Internet-auction fraud would unquestionably be subject to liability under the CFA’s general antifraud provision.¹⁹ And the Supreme Court of New Jersey’s landmark holding in *Real v. Radir Wheels, Inc.*, made the CFA’s general antifraud provision the first consumer-protection law in the nation to

(last visited Nov. 11, 2009) (delineating procedures for buyers who may have been defrauded).

¹⁶ See INTERNET CRIME COMPLAINT CTR., 2007 INTERNET CRIME REPORT 5 (2008), available at http://www.ic3.gov/media/annualreport/2007_IC3Report.pdf.

¹⁷ See INTERNET FRAUD COMPLAINT CTR., *supra* note 5, at 10.

¹⁸ See *id.* at 6–7.

¹⁹ See *infra* note 124 and accompanying text.

explicitly extend liability to individual eBay sellers.²⁰ Specifically, the court articulated that “[t]here is no doubt that” an individual eBay seller “himself satisfies the statutory definition of ‘person’” such that he may be held liable under the CFA’s general antifraud provision.²¹

This Comment will analyze the court’s holding in *Radir Wheels* to assess whether the court was correct to extend to individual eBay sellers liability under the CFA’s general antifraud provision.²² Part II of

²⁰ See 969 A.2d 1069, 1071 n.1, 1078 (N.J. 2009).

²¹ *Id.* at 1079.

²² At the outset, noting the issues on which this Comment does not center is also important.

One issue that this Comment does not address is the question of what is the best means by which to regulate Internet-auction fraud. Governance of Internet-auction sellers and Web sites potentially may be best addressed through federal statutes and regulations enacted pursuant to the Commerce Clause. See generally Shawn T. Hynes, Comment, *Stopping Another Phantom Menace: Using the Commerce Clause to Force States to Police Online Auction Shill Bidding or Face Congressional Mandates*, 5 U. PA. J. CONST. L. 763 (2003). This Comment, however, is concerned only with whether the *Radir Wheels* court correctly concluded that the CFA should be one of the ways in which consumers are protected.

Another issue that this Comment does not address is New Jersey courts’ personal jurisdiction over individual eBay sellers. New Jersey courts clearly would have general jurisdiction over an individual eBay seller who violates the CFA while residing in New Jersey. See *Helicopteros Nacionales de Colom., S. A. v. Hall*, 466 U.S. 408, 414 & n.9 (1984). But whether New Jersey courts would have personal jurisdiction over an individual eBay seller who, while residing outside of New Jersey, violates the CFA in a sale to a New Jersey consumer is not so obvious. Assuming purposeful availment, specific jurisdiction would be warranted because a New Jersey consumer’s suit against an individual eBay seller would be “based on a contract which had substantial connection with th[e] State.” *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957). But an individual eBay seller’s purposeful availment of New Jersey’s laws and privileges may be difficult to prove. Unless evidence shows that before the sale the individual eBay seller knew that the consumer resided in New Jersey, the individual eBay seller’s purposeful availment “of the privilege of conducting activities within the forum State” may be lacking. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Despite this uncertainty, the personal jurisdiction issue is not the focal point of this Comment, which concentrates only on whether the court correctly held that the CFA substantively, not procedurally, applies to individual eBay sellers.

A final issue that this Comment does not address is choice-of-law complications that could arise where one of the parties resides outside of New Jersey and the other resides within the State. Assuming no choice-of-law agreement between the parties, the issue would then be whether the fraudulent transaction should be governed by the CFA or by the consumer-protection law of the state or country of the party who resides outside of New Jersey. Regardless of which of the two parties lives in New Jersey, New Jersey courts would likely apply the CFA in all cases in which a consumer brings a CFA claim. See *Smith v. Alza Corp.*, 948 A.2d 686, 694 (N.J. Super. Ct. App. Div. 2008) (stating that in assessing choice-of-law issues, two steps are involved: (1) absent an actual conflict between the interested states’ laws, New Jersey courts apply New Jersey substantive law; and (2) if such actual conflict exists, New Jersey courts

this Comment will discuss the CFA's history. Part III will articulate the current state of the CFA and how the CFA's provisions function to protect consumers. Part IV will detail the Supreme Court of New Jersey's decision in *Radir Wheels*. Finally, Part V will argue that the *Radir Wheels* decision was a necessary and proper extension of the CFA's general antifraud provision.

II. THE CFA'S HISTORY

In the 1950s, the New Jersey Legislature "recognized that the deception, misrepresentation, and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods frequently produce an adverse effect on large segments of disadvantaged and poorly educated people."²³ Thus, in 1960, the legislature enacted the CFA to battle against the increasing prevalence of consumer fraud.²⁴ The sponsor statement that accompanied the CFA articulated that the legislature, through the CFA, intended to confer on the attorney general the power "to investigate and prohibit fraudulent advertising and selling practices," which the legislature recognized had "caused extensive damage to the public."²⁵ Originally, the attorney general enforced the CFA exclusively through his broad powers under the CFA to investigate, subpoena, and seek both injunctions to terminate prohibited conduct and restitution orders to make whole any consumers harmed by conduct in violation of the CFA.²⁶ In 1967, the legislature created the Office of Consumer Protection to provide the means through which the attorney general carried out his duties under the CFA.²⁷

apply the substantive law of "the state with the greatest interest in governing the particular issue" (quoting *Veazey v. Doremus*, 510 A.2d 1187, 1187 (N.J. 1986)). Because the CFA is one of the nation's most protective consumer-fraud laws, *see* Press Release, *supra* note 2, at 1, New Jersey courts would likely apply the CFA even if a conflict exists because New Jersey would have the greater interest in the issue. Nonetheless, this Comment does not address choice-of-law considerations and is concerned only with the court's holding that where the CFA does apply, the CFA governs individual eBay sellers.

²³ *Kugler v. Romain*, 279 A.2d 640, 648 (N.J. 1971).

²⁴ *See Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 460 (N.J. 1994).

²⁵ Sharon Bossemeyer, *Re-examining New Jersey's Consumer Fraud Act: Loopholes for Professionals?*, 7 SETON HALL LEGIS. J. 45, 45 (1983) (citing N.J. STAT. ANN. §§ 56:8-1 to -25 (West 1964 & Supp. 1982)).

²⁶ *See Meshinsky v. Nichols Yacht Sales, Inc.*, 541 A.2d 1063, 1067 (N.J. 1988).

²⁷ *See Bossemeyer*, *supra* note 25, at 47 (stating that the Office of Consumer protection was created to "attempt to give substance to the legislative mandate that government be responsive to the needs of the public").

In 1970, however, only ten years after the legislature enacted the CFA, independent researchers determined that the CFA did not live up to its promised level of consumer protection.²⁸ The researchers specifically found that

New Jersey consumers have been short-changed by [New Jersey's] government. They have not been served well by the legislature, which has repeatedly rejected tough new measures designed to strengthen the position of the consumer in the marketplace. At the same time, it has denied the executive branch adequate funds to enforce the consumer laws now on the books. Likewise, the governors and attorneys general of both the past and present administrations have allowed the Office of Consumer Protection, for which they are responsible, to assemble an unskilled staff, to operate with chronic inefficiency, and to vitiate the laws against fraud through timid, weak enforcement.²⁹

Finding the CFA to be ineffective primarily because it was left to be enforced solely by the attorney general through the Office of Consumer Protection, the researchers recommended that the legislature create a private cause of action through which consumers themselves could enforce the CFA.³⁰ Additionally, the researchers asserted that the legislature should provide to consumers who bring a private cause of action under the CFA the right to collect from defendants in breach of the CFA treble damages, attorney's fees, and the costs for bringing suit.³¹ The researchers believed that doing so would "induc[e] the private bar to enter the fight against consumer fraud," and consequently, consumers "would no longer have to stand by helplessly while their claims of fraud languished in the Office of Consumer Protection."³²

In 1971, one year after the researchers published their report and recommendations, the legislature responded by enacting exactly the type of provision for which the researchers called—a private cause of action that required the courts to award to a consumer who brought a successful CFA claim treble damages, attorney's fees, and costs.³³ The legislature enacted the amendment to effectuate five

²⁸ See *id.* at 47–48.

²⁹ CTR. FOR ANALYSIS OF PUB. ISSUES, NEW JERSEY OFFICE OF CONSUMER PROTECTION: A PROMISE UNFULFILLED 55 (1970).

³⁰ See Bossemeyer, *supra* note 25, at 47–48.

³¹ See *id.*

³² CTR. FOR ANALYSIS OF PUB. ISSUES, *supra* note 29, at 67.

³³ See Bossemeyer, *supra* note 25, at 48. In the 1971 amendment to the CFA, the legislature also granted to the attorney general the "authority to seek restoration of

main purposes, all of which are substantially similar to the researchers' reasons for their recommendations: (1) to make the victim whole through compensatory damages;³⁴ (2) to punish CFA violators through treble damages;³⁵ (3) to induce competent private counsel to pursue CFA claims through the provision for attorney's fees;³⁶ (4) to make access to the courts easier for consumers, who thereafter could use the private cause of action; and (5) to reduce the Office of Consumer Protection's burden in ensuring compliance with the CFA by permitting consumers to privately pursue enforcement actions.³⁷ Because of both the CFA's current provisions and New Jersey courts' liberal construction of those provisions, the CFA is one of the strongest consumer-protection statutes in the United States.³⁸

III. THE CFA'S CURRENT FORM

A. *Unlawful Practices Under the CFA*

A person violates the CFA when that person commits an "unlawful practice" under the CFA.³⁹ The CFA enumerates four types of violations: "(1) affirmative acts; (2) knowing omissions; . . . (3) regulatory violations";⁴⁰ and (4) violations of specific antifraud provisions.⁴¹ The first two categories of unlawful practices, affirmative acts and knowing omissions, are derived from the CFA's general antifraud provision; the third category, regulatory violations, flows from violations of the regulations promulgated under the CFA.⁴² The fourth

money or property to a defrauded consumer." *Id.* Additionally, in that same year, the Office of Consumer Protection was replaced by the Division of Consumer Affairs in the Department of Law and Public Safety. *See id.* at 47 n.15.

³⁴ *See Lettenmaier v. Lube Connection, Inc.*, 741 A.2d 591, 593 (N.J. 1999); *see also* N.J. STAT. ANN. § 56:8-19 (West 2001) (providing for "reasonable attorneys' fees, filing fees and reasonable costs of suit").

³⁵ *See Lettenmaier*, 741 A.2d at 593; *see also* § 56:8-19 (stating that, under the CFA, "the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest").

³⁶ *See Lettenmaier*, 741 A.2d at 593.

³⁷ *See* Press Release, *supra* note 2, at 1-2.

³⁸ *See* Lisa J. Trembly & Michael F. Bevacqua, *Back to the Future with the Consumer Fraud Act: New Jersey Sets the Standard for Consumer Protection*, 29 SETON HALL LEGIS. J. 193, 194 (2004).

³⁹ *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 459 (N.J. 1994).

⁴⁰ *Thiedemann v. Mercedes-Benz USA, L.L.C.*, 872 A.2d 783, 790 (N.J. 2005).

⁴¹ *See infra* note 58.

⁴² *See Cox*, 647 A.2d at 462 (articulating that in regard to the first three categories of CFA violations, "[t]he first two are found in the language of [N.J. STAT. ANN. §

category, violations of specific antifraud provisions, is based on breach of any of the CFA's numerous specific antifraud provisions, which define practices in certain consumer-protection fields that constitute automatic violations of the CFA.⁴³ Notably, the CFA's general antifraud provision is not trumped by and applies alongside any specific antifraud provisions or regulations in regard to a particular area of consumer protection.⁴⁴ Moreover, the CFA's general antifraud provision, specific antifraud provisions, and regulations are not nullified by and apply simultaneously with any and all other statutes and regulations that relate to consumer protection unless either of the only two notable CFA exceptions applies.⁴⁵

1. The General Antifraud Provision

The CFA's general antifraud provision sets forth two types of unlawful practices: affirmative acts and knowing omissions.⁴⁶ To prove that an affirmative act violates the CFA's general antifraud provision, a plaintiff must demonstrate only that the defendant engaged in "unconscionable commercial practices, fraud, deception, false promise, false pretense, [or] misrepresentation."⁴⁷ Affirmative-act violations are strict-liability offenses, and thus, the plaintiff need not prove intent on the part of the perpetrator.⁴⁸

To establish that a knowing omission violates the CFA's general antifraud provision, a plaintiff must prove that the defendant engaged in a "knowing[] concealment, suppression, or omission of any

56:8-2 [(West 2001)], and the third is based on regulations enacted under [N.J. STAT. ANN. § 56:8-4] (West 2001)).

⁴³ See *infra* note 58.

⁴⁴ See *infra* notes 56, 57, 59 and accompanying text.

⁴⁵ See *Finderne Mgmt. Co. v. Barrett*, 955 A.2d 940, 952 (N.J. Super. Ct. App. Div. 2008) ("When analyzing whether a transaction is covered by the CFA, it should ordinarily be assumed that the CFA applies to the covered practice. The presumption . . . applies, even in the face of other existing sources of regulation, [to] preserve[] the Legislature's determination to effect a broad delegation of enforcement authority to combat consumer fraud.") (citations and internal quotation marks omitted); see also *infra* Part III.C.

⁴⁶ See *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 790 (N.J. 2005).

⁴⁷ N.J. STAT. ANN. § 56:8-2 (West 2001); see also *Cox v. Sears Roebuck & Co.*, 647 A.2d at 462 (stating that because the CFA disjunctively prohibits "any unconscionable commercial practice, deception, fraud, false pretense, false promise, [and] misrepresentation," a plaintiff need prove only one of the proscribed acts to demonstrate a CFA violation).

⁴⁸ See *Thiedemann*, 872 A.2d at 791 (stating that because intent need not be proven, "[a]n 'affirmative act' may be established by showing that a defendant's actions constituted one of the stated prohibited practices").

material fact.”⁴⁹ In contrast to violations under the affirmative-act prong, the perpetrator’s intent is essential for CFA violations premised on knowing omissions because the plaintiff must demonstrate that the defendant *knowingly* made the omission.⁵⁰

2. The Regulations

The CFA’s third category of unlawful practices is violation of the regulations promulgated pursuant to the CFA.⁵¹ The CFA provides the Director of the Division of Consumer Affairs with authority to enact regulations to effectuate both the CFA’s general antifraud provision and the CFA’s specific antifraud provisions.⁵² Accordingly, the Director of the Division of Consumer Affairs has enacted many such CFA regulations.⁵³ The regulations carry the legal weight of the CFA, and therefore, any regulatory violation constitutes a breach of the CFA.⁵⁴ Further, because any party subject to any regulation promulgated under the CFA is presumed to be familiar with the regulation, the CFA regulations are strict liability, and therefore, intent is not necessary to prove a violation.⁵⁵

The CFA regulations purport to more specifically effectuate the CFA’s general antifraud provision and specific antifraud provisions, even if a CFA regulation applies to the area of consumer protection in which the CFA violation is asserted.⁵⁶ Thus, the CFA regulations do

⁴⁹ § 56:8-2; *see also Cox*, 647 A.2d at 462.

⁵⁰ *See Cox*, 647 A.2d at 459.

⁵¹ *See id.* at 462; Administrative Rules of the Division of Consumer Affairs, N.J. ADMIN. CODE §§ 13:45A-1.1 to -29.1 (2008).

⁵² *See* N.J. STAT. ANN. § 56:8-2.32 (West Supp. 2009).

⁵³ *See Daaleman v. Elizabethtown Gas Co.*, 390 A.2d 566, 568 (N.J. 1978).

⁵⁴ *See Cox*, 647 A.2d at 459 (stating that the regulations promulgated under the CFA are backed by authority of law).

⁵⁵ *See id.* at 462.

⁵⁶ *See Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 696 A.2d 546, 551, 553–54 (N.J. 1997); *see, e.g.*, N.J. ADMIN. CODE § 13:45A-1.1(a) (2008) (“Without limiting any other practices which may be unlawful under the [CFA’s general and specific antifraud provisions], this rule makes unlawful thereunder some specific practices in the mail order or catalog business.”); *id.* § 13:45A-10.5 (“Without foreclosing the prosecution of any other practices which may be unlawful under the [CFA’s general and specific antifraud provisions], any violations of the provisions [regulating servicing and repairing of home appliances] shall be subject to the sanctions contained in [the CFA].”); *id.* § 13:45A-15.4 (providing specific remedies, which apply “[i]n addition to any other remedy provided by the [CFA’s general and specific antifraud provisions],” for violation of the regulations promulgated in regard to disclosure of refund policies in retail establishments); *id.* § 13:45A-23.2(a) (stating that “[w]ithout limiting the prosecution of any other practices which may be unlawful under the [CFA’s gen-

not limit the ability of the consumer to seek additional or alternative protection of the CFA's general antifraud provision or specific antifraud provisions or any other remedy at law that may be available.⁵⁷

3. The Specific Antifraud Provisions

Breach of one of the CFA's specific antifraud provisions constitutes the CFA's fourth category of violations.⁵⁸ The CFA's specific antifraud provisions consist of numerous "supplemental provisions" adopted by the legislature to "define very specific unlawful practices" under the CFA.⁵⁹ Because the CFA's specific antifraud provisions apply alongside the CFA's general antifraud provision and corresponding regulations, when a consumer pursues a claim that falls within an area in which the legislature has enacted a specific antifraud provision, the consumer nonetheless may invoke the protection of any and all other applicable CFA provisions—including the general antifraud provision, other specific antifraud provisions, and relevant regulations—as well as any other applicable legal remedy outside of the CFA.⁶⁰

B. Standing Requirements

The standing requirements to pursue a CFA claim differ depending on whether the attorney general or a consumer initiates the

eral and specific antifraud provisions], . . . the following acts or omissions shall be deceptive practices in the conduct of the business of a watercraft repair dealer").

⁵⁷ See *Lemelledo*, 696 A.2d at 551, 553–54.

⁵⁸ The specific antifraud provisions are sprinkled throughout the entirety of the CFA following the CFA's general antifraud provision. These specific antifraud provisions provide express articulations of what constitutes an "unlawful act" per se in their respective consumer-protection areas, but the specific antifraud provisions do so without limiting what may otherwise qualify as an "unlawful act" in those areas under the CFA's general antifraud provision, other specific antifraud provisions, or the regulations promulgated under both the general and specific antifraud provisions. See, e.g., Refund Policy Disclosure Act, N.J. STAT. ANN. §§ 56:8-2.14 to -2.21 (West 2001); Raincheck Policy Disclosure Act, N.J. STAT. ANN. §§ 56:8-2.28 to -2.31 (West 2001 & Supp. 2009); Unit Price Disclosure Act, N.J. STAT. ANN. §§ 56:8-21 to -25 (West 2001); Kosher Food Consumer Protection Act, *id.* §§ 56:8-61 to -66; Used Car Lemon Law, *id.* §§ 56:8-67 to -80; Industrial Hygienist Truth in Advertising Act, *id.* §§ 56:8-81 to -85; Pet Purchase Protection Act, *id.* §§ 56:8-92 to -97; Halal Food Consumer Protection Act, *id.* §§ 56:8-98 to -103; Safety Professional Truth in Advertising Act, N.J. STAT. ANN. §§ 56:8-113 to -116 (West Supp. 2009); Contractors' Registration Act, *id.* §§ 56:8-136 to -148.

⁵⁹ Bossemeyer, *supra* note 25, at 48–59.

⁶⁰ See *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 696 A.2d 546, 551, 553–54 (N.J. 1997).

action. For the attorney general to have standing under the CFA, the attorney general need only prove that the CFA has been violated; the attorney general is not required to prove that any consumer has actually been harmed by the unlawful act.⁶¹ But for a consumer to have standing to pursue a private cause of action under the CFA, the consumer must show not only that an unlawful act occurred but also that the unlawful conduct caused the consumer an “ascertainable loss.”⁶² New Jersey courts have held that to show an ascertainable loss, the consumer must set forth specific evidence from which the fact finder could reasonably determine that the consumer suffered actual loss.⁶³

Consequently, although the attorney general may bring actions seeking injunctions for purely prospective relief, an individual consumer may not do so.⁶⁴ Even if seeking an injunction in hopes of preventing future harm, the requirement that the consumer first demonstrate an ascertainable loss necessitates that the consumer also be seeking retroactive relief.⁶⁵

C. Exceptions

The CFA’s provisions are exceptionally broad. The general anti-fraud provision, the specific antifraud provisions, and the regulations generally apply “even in the face of other existing sources of regulation.”⁶⁶ But the CFA’s provisions’ far-reaching application is subject to two notable limitations.⁶⁷

1. The Regulatory-Conflict Exception

The first exception to the CFA is the regulatory-conflict exception. Under the regulatory-conflict exception, the CFA’s provisions do not govern a given commercial practice where “a ‘real possibility’

⁶¹ See *Meshinsky v. Nichols Yacht Sales, Inc.*, 541 A.2d 1063, 1067 (N.J. 1988).

⁶² *Thiedemann v. Mercedes-Benz USA, L.L.C.*, 872 A.2d 783, 791 (N.J. 2005) (internal quotation marks omitted).

⁶³ See *id.* at 792–93. Notably, the Supreme Court of New Jersey in *Thiedemann* described how New Jersey courts have consistently struggled to define the exact meaning of ascertainable loss. See *id.*

⁶⁴ See *id.* at 792.

⁶⁵ See *id.*

⁶⁶ *Finderne Mgmt. Co. v. Barrett*, 955 A.2d 940, 952 (N.J. Super. Ct. App. Div. 2008).

⁶⁷ These two exceptions are the only exceptions that are worth noting in detail. On other very rare occasions, however, New Jersey courts have found other minute CFA exceptions. See, e.g., *Daaleman v. Elizabethtown Gas Co.*, 390 A.2d 566, 569 (N.J. 1978) (holding that the CFA does not apply to a public-utility company).

of conflict would exist if the CFA were to apply to a particular practice, regardless of the number of agencies with regulatory jurisdiction over that practice.”⁶⁸ This regulatory-conflict exception is based on the “understanding that the Legislature does not intentionally subject regulated entities to clearly conflicting administrative regimes.”⁶⁹

Even where other regulation exists, courts must begin with the presumption that the CFA applies “because of the strong and sweeping legislative remedial purpose apparent in the CFA.”⁷⁰ Indeed, the CFA calls for such an assumption because it “explicitly states that the ‘rights, remedies and prohibitions’ that it creates are cumulative to those created by other sources of law.”⁷¹ To overcome the presumption that the CFA’s provisions apply, “a direct and unavoidable conflict” must exist between the CFA and the other regulatory scheme(s).⁷² Establishing “a direct and unavoidable conflict” requires proving “that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent *not* to subject parties to multiple regulations that, as applied, will work at cross-purposes.”⁷³ The CFA’s application is negated under the regulatory-conflict exception only by such a strong showing because if the CFA’s applicability could be “too easily overcome, the statute’s remedial measures may be rendered impotent as primary weapons in combatting [sic] clear forms of fraud simply because those fraudulent practices happen also to be covered by some other statute or regulation.”⁷⁴

2. The Learned-Professionals Exception

The second exception to the CFA is the learned-professionals exception. Under the learned-professionals exception, “learned professionals in respect of the rendering of professional services are insulated from the CFA.”⁷⁵ Learned professionals include, among others, “lawyers, physicians, dentists, accountants[,] engineers,”⁷⁶ and real-

⁶⁸ *Lemelledo v. Benefit Mgmt. Corp.*, 696 A.2d 546, 553 (N.J. 1997).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (quoting N.J. STAT. ANN. § 56:8-2.13 (West 2001)).

⁷² *Id.* at 554.

⁷³ *Id.* (emphasis added).

⁷⁴ *Lemelledo*, 696 A.2d at 554.

⁷⁵ *Macedo v. Dello Russo*, 840 A.2d 238, 242 (N.J. 2004).

⁷⁶ *Id.* at 241 (internal quotation marks omitted).

estate brokers.⁷⁷ The learned-professionals exception is deeply rooted in CFA jurisprudence; the legislature has taken no action to alter the path of this four-decade-old court-established exception.⁷⁸

The learned-professionals exception is based on the notion that although learned professionals clearly provide services to the public, those “services does [sic] not fall into the category of consumerism.”⁷⁹ Further, the CFA need not govern learned professionals because they are already subject to “comprehensive regulation by the relevant regulatory bodies” of their professions.⁸⁰

IV. *REAL V. RADIR WHEELS, INC.*⁸¹

In 2009, the protections offered by the CFA entered a new realm. In *Radir Wheels*, the Supreme Court of New Jersey faced the issue of whether the CFA’s general antifraud provision reaches so far as to regulate an eBay transaction between a consumer and an in-state individual eBay seller.⁸²

The plaintiff in *Radir Wheels*, Lyle Real, was a Missouri resident who, while contemplating purchasing a vintage car, came across the following Internet-auction advertisement on eBay:

1970 Corvette Convert[i]ble. Matching numbers, One owner Car, 350/300 HP 4 speed, Good Frame, New exh[au]st system, Power steering, Soft top is good. New Carpet. Runs Strong, Original rallys, Original radio/cassette. Title is original from 06/24 1970. If you have any Questions[,] please feel free to give us a call at [number removed]. Thanks and good luck!⁸³

The advertisement further described the vehicle’s condition as follows: “Needs door hinge pins, Radiator support, original interior is ok but seats are a little worn. Painted once now has a few chips. Windshield has small crack in the lower left corner.”⁸⁴ Additionally, the advertisement stated that a “10% deposit required within 5 days of

⁷⁷ See *Neveroski v. Blair*, 358 A.2d 473, 481 (N.J. Super. Ct. App. Div. 1976). Notably, the *Neveroski* court also held that the CFA’s general antifraud provision does not apply to an individual seller’s sale of his personal residence. See *id.*; see also *infra* Part V.B.2.

⁷⁸ See *Macedo*, 840 A.2d at 242.

⁷⁹ *Id.* at 241 (internal quotation marks omitted).

⁸⁰ *Id.* at 242.

⁸¹ 969 A.2d 1069 (N.J. 2009).

⁸² See *id.* at 1071.

⁸³ *Id.* at 1072 (alterations in original) (internal quotation marks omitted).

⁸⁴ *Id.* (internal quotation marks omitted).

auction close. Delivery options can be [discussed]. Payment in Full required within 10 days of auction close.”⁸⁵ Finally, the advertisement provided an e-mail address and a phone number that belonged to Radir Wheels, Inc., which Richard Conklin owned.⁸⁶

In response to the eBay advertisement, the plaintiff placed a bid on the 1970 Corvette in the amount of \$13,651.⁸⁷ Shortly after placing that bid but before the online auction closed, the plaintiff spoke to Conklin by calling the phone number listed on the advertisement.⁸⁸ Conklin verified all of the statements in the advertisement, confirmed that the vehicle “was in good condition,” and stated that the car “could be driven from New Jersey to Missouri.”⁸⁹ Subsequently, when the auction closed, the plaintiff’s bid won the Corvette.⁹⁰

Thereafter, the plaintiff contacted Conklin, but Conklin now told the plaintiff that “it might not be safe to drive the Corvette from New Jersey to Missouri” because “the automatic headlights did not work (although they could be raised manually), the windshield wipers did not work, and the car lacked a spare tire.”⁹¹ Conklin, however, never disclosed any of those problems in the advertisement or in the prior phone call between Conklin and the plaintiff.⁹² In light of those issues, the plaintiff chose to ship the Corvette to Missouri.⁹³ The plaintiff paid for the car “with a check made payable to Conklin,” and the plaintiff received the title to the car directly from Conklin (although the title arrived in a Radir Wheels envelope).⁹⁴

After the car arrived in Missouri, the plaintiff brought the Corvette for an examination at a specialty repair shop.⁹⁵ That examination revealed that

the car’s frame was rusted nearly in half, thereby disqualifying the Corvette from registration in Missouri; the convertible top was in poor condition; the seats were ripped in various places; the driver’s seat frame was broken; the radio/tape player was not original

⁸⁵ *Id.* (alteration in original) (internal quotation marks omitted).

⁸⁶ *See id.*

⁸⁷ *See Radir Wheels, Inc.*, 969 A.2d at 1072.

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See Radir Wheels, Inc.*, 969 A.2d at 1072.

⁹⁴ *Id.*

⁹⁵ *See id.*

equipment; the engine hesitated during acceleration; and the carburetor was out of tune.⁹⁶

Thus, Conklin's advertisement for the vehicle on eBay "was not even close" to reflective of the car's actual condition.⁹⁷ After the examination, the plaintiff e-mailed Conklin, and the plaintiff insisted that he would never have bought the Corvette had he known its true condition.⁹⁸

Claiming "breach of contract, common law fraud, negligent misrepresentation, violations of the [CFA], and fraudulent inducement," the plaintiff filed suit against both Conklin individually and Radir Wheels.⁹⁹ The defendants denied liability.¹⁰⁰ In his suit, the plaintiff asserted that Conklin's false eBay advertisement induced the plaintiff to pay over \$13,000 for a vehicle that was, at the time of the auction, worth between \$5,000 and \$8,000.¹⁰¹ To place the car in a safe and presentable condition, the plaintiff was forced to pay, in addition to the purchase price of \$13,651, over \$40,000 for professional repairs.¹⁰² And even after the professional work, the Corvette was still worth only \$25,000–\$30,000.¹⁰³

At trial, the court, sitting without a jury, initially dismissed all claims against Radir Wheels on the grounds that all of Conklin's actions in regard to the advertisement and sale of the Corvette were Conklin's alone and were not taken on behalf of Radir Wheels.¹⁰⁴ Thereafter, the court found that Conklin committed the affirmative act of misrepresentation, that Conklin qualified as a "dealer," and that his actions, therefore, violated the CFA.¹⁰⁵ Thus, after determining that the plaintiff's ascertainable loss under the CFA was \$8,651,

⁹⁶ *Id.*

⁹⁷ *Id.* at 1072–73 (internal quotation marks omitted).

⁹⁸ *See id.* at 1073.

⁹⁹ *Real v. Radir Wheels, Inc.*, No. A-6074-04T1, slip op. at 2 (N.J. Super. Ct. App. Div. July 6, 2007), available at <http://lawlibrary.rutgers.edu/courts/wordperfect/appellate/A6074-04.DOC>.

¹⁰⁰ *See id.*

¹⁰¹ *See Radir Wheels, Inc.*, 969 A.2d at 1073.

¹⁰² *See id.* at 1073 & n.2.

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* (internal quotation marks omitted).

the trial court awarded the plaintiff \$25,953 in treble damages, \$29,950 in attorney's fees, and \$6,544.81 in costs.¹⁰⁶

Conklin appealed and alleged two grounds for error.¹⁰⁷ Specifically, Conklin asserted that the trial court erred in (1) "conclud[ing] that, as a casual seller of used cars, Conklin nevertheless was subject to compliance with the CFA"; and (2) assuming that Conklin could not be liable under the CFA unless he was a dealer, denying, at the close of the plaintiff's case, Conklin's motion to dismiss premised on the assertion that the plaintiff failed to prove that Conklin was a dealer.¹⁰⁸ Agreeing with Conklin, the appellate division reversed and "rul[ed] that the commercial activities of a *casual seller* of used automobiles do not fall within the CFA's private civil cause of action"¹⁰⁹ and that Conklin's motion to dismiss the CFA claim therefore "should have been granted because there was no evidence that Conklin was a 'dealer' or 'merchant' under the CFA."¹¹⁰ The appellate division, however, held that the trial court implicitly found that Conklin committed common-law fraud.¹¹¹ Therefore, the appellate panel upheld but modified the judgment against Conklin to an award for the plaintiff of \$8,651, which is the amount of compensatory damages to which the plaintiff would be entitled under a cause of action pursuant to common-law fraud (rather than CFA).¹¹²

On certification to the Supreme Court of New Jersey, the court held that "giving full expression" to the CFA's general antifraud provision's "plain words" required the court to reverse the appellate division's opinion and reinstate the trial court's judgment.¹¹³ The court began by discussing the CFA's history and broad protective purpose.¹¹⁴ The court articulated that the CFA's general antifraud provision's "proscriptions [are] both wide and deep" and that the CFA was enacted to "address sharp practices and dealings in the marketing of

¹⁰⁶ *Id.* The \$8,651 amount "represent[s] the difference between the \$13,651 plaintiff paid for the Corvette and . . . \$5,000," which the trial court found to be the actual value at the time of the plaintiff's purchase. *Id.*

¹⁰⁷ See *Radir Wheels, Inc.*, 969 A.2d at 1074.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1071 (emphasis added).

¹¹⁰ *Id.* at 1074.

¹¹¹ See *id.*

¹¹² See *id.* at 1074. The appellate division also remanded the case to the trial court to determine whether Conklin should be liable for prejudgment interest on the appellate division's new award of damages based on common-law fraud. See *id.*

¹¹³ *Radir Wheels, Inc.*, 969 A.2d at 1072.

¹¹⁴ See *id.* at 1075.

merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kind of selling or advertising practices.”¹¹⁵ Next, the court demonstrated the CFA’s “wide breadth” by providing a “ cursory survey” of the contexts in which the CFA has been applied.¹¹⁶ And finally, because the plaintiff’s claim rested on a statutory-interpretation issue, before moving on to apply the CFA’s general antifraud provision to the plaintiff’s claim against Conklin, the court reviewed the basic rules of statutory construction.¹¹⁷ Applying those statutory-construction principles, the court held that the CFA’s general antifraud provision “prohibits certain acts performed by ‘any person,’ and the statutory definition of ‘person’ is sufficiently expansive to ensnare [the] defendant,” who was an individual eBay seller.¹¹⁸

Additionally, the court specifically held that, for purposes of assessing liability under the CFA’s general antifraud provision, “it is immaterial whether Conklin was a ‘dealer.’”¹¹⁹ The court explained that the parties had mistakenly been using the term “dealer,” which the parties derived from the Used Car Lemon Law (UCLL).¹²⁰ Because the UCLL specifically states that “[n]othing in this act shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law,”¹²¹ the UCLL, “by its own explicit terms, . . . never was intended to substitute for the CFA; on the con-

¹¹⁵ *Id.* (citation and internal quotation marks omitted).

¹¹⁶ *Id.* at 1076. Specifically, the court articulated that the CFA’s protections have been utilized in, among other contexts, all of the following examples: “undisclosed document fee charges on new-car purchases,” *id.* (citing *Bosland v. Warnock Dodge, Inc.*, 964 A.2d 741 (N.J. 2009)); “residential siding products,” *id.* (citing *Simmermon v. Dryvit Sys., Inc.*, 953 A.2d 478 (N.J. 2008)); “overcharges in summary dispossess complaints,” *id.* (citing *Hodges v. Sasil Corp.*, 915 A.2d 1 (N.J. 2007)); “overcharges on loan interest,” *id.* (citing *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006)); “arbitration of mortgage claims,” *id.* (citing *Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006)); “rent-to-own contracts,” *id.* (citing *Perez v. Rent-A-Center, Inc.*, 892 A.2d 1255 (N.J. 2006)); “car repairs,” *id.* (citing *Ryan v. American Honda Motor Co.*, 896 A.2d 454 (N.J. 2006)); “car warranty claims,” *id.* (citing *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783 (N.J. 2005)); “carpet sales,” *id.* (citing *Furst v. Einstein Moomjy, Inc.*, 860 A.2d 435 (N.J. 2004)); and “pre-paid phone cards,” *id.* (citing *Smith v. SBC Commc’ns, Inc.*, 839 A.2d 850 (N.J. 2004)).

¹¹⁷ *See id.* at 1077; *see also infra* Part V.

¹¹⁸ *Radir Wheels, Inc.*, 969 A.2d at 1078 (quoting N.J. STAT. ANN. §§ 56:8-1(d), -2 (West 2001)).

¹¹⁹ *Id.*

¹²⁰ *Id.* (citing N.J. STAT. ANN. §§ 56:8-67 to -80 (West 2001)).

¹²¹ *Id.* (quoting § 56:8-75).

trary, it is additive, intended to supplement the CFA's rights and remedies."¹²² Therefore, whether an individual eBay seller qualifies as a "dealer" under the UCLL (or any other CFA specific antifraud provision or regulation) is irrelevant to and in no way affects the individual eBay seller's potential liability under the CFA's general antifraud provision.¹²³

V. THE NECESSITY AND CORRECTNESS OF THE *RADIR WHEELS* DECISION

No one could reasonably argue that the CFA's general antifraud provision does not apply to merchant eBay sellers.¹²⁴ But the Supreme Court of New Jersey took a bold step in *Radir Wheels* by holding that individual sellers, who frequently transact on eBay, are subject to liability under the CFA's general antifraud provision.¹²⁵ No other state has ever explicitly provided (via statute or reported court holding) that its consumer-protection laws apply to individual sellers on eBay or other Internet-auction Web sites.¹²⁶ And notably, in the

¹²² *Id.* (internal quotation marks omitted).

¹²³ *Id.*

¹²⁴ A small or large business that sells items on eBay would unquestionably qualify as "any natural person or his legal representative, partnership, corporation, company, trust, business entity or association." N.J. STAT. ANN. § 56:8-1(d). Because such businesses are professional sellers attempting to distribute mass amounts of goods to consumers, those businesses are capable of causing recurring harm to consumers. See *Kugler v. Romain*, 279 A.2d 640, 648 (N.J. 1971) (stating that "deception, misrepresentation and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods frequently produce an adverse effect on large segments of disadvantaged and poorly educated people"). Further, a small or large business's advertisement and sale of goods on eBay constitutes a "sale or advertisement of any merchandise," § 56:8-2, which includes any "objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." § 56:8-1(c).

¹²⁵ See eBay, Inc., *Who We Are*, *supra* note 10.

¹²⁶ Notably, the court in *Radir Wheels* asserted that "[a]t least one state has amended its consumer protection statute clearly to reach such transactions." *Real v. Radir Wheels, Inc.*, 969 A.2d 1069, 1071 n.1 (N.J. 2009) (emphasis added) (citing CAL. BUS. & PROF. CODE § 17500 (West 2008) (making it "unlawful for any person, firm, corporation or association, or any employee thereof" to engage in deceptive advertising or other deceptive commercial practices)). Like the CFA, California's consumer-protection law, as well as many other states' consumer-protection laws, applies to a "person" who commits an unconscionable commercial practice. Nonetheless, no reported case in any state (other than *Radir Wheels* in New Jersey) has ever extended consumer-fraud liability to individual eBay sellers. Thus, although California's consumer-protection law and other states' consumer-protection laws clearly could reach sales by individual eBay sellers, no state other than New Jersey has yet to provide for such an application.

only two decisions of any state even remotely involving a plaintiff asserting the application of a consumer-fraud statute to an individual eBay seller, Tennessee courts both times avoided articulating whether Tennessee's Consumer Protection Act (TCPA)¹²⁷ could govern the transactions.¹²⁸

Accordingly, because the court's holding in *Radir Wheels* is vitally important for consumers and sellers alike, the decision is simultaneously vehemently supported and attacked. Some would say that the *Radir Wheels* ruling "offers tremendous protections for consumers, and true deterrence to people who might otherwise commit fraud."¹²⁹ But others would assert that the *Radir Wheels* decision is an unjustified expansion of the CFA because now "[a]ny individual in the state who has a garage sale or puts something up on eBay is potentially liable under the [CFA]."¹³⁰ Those who oppose the *Radir Wheels* ruling warn that "[t]his certainly opens up a multitude of other avenues for plaintiffs' litigation."¹³¹

Despite any criticism, the *Radir Wheels* court correctly made a vital extension of the CFA's general antifraud provision. As the court in *Radir Wheels* properly stated, whether the CFA's general antifraud provision applies to individual eBay sellers is a question of statutory interpretation.¹³² When engaging in statutory interpretation, a court's "overarching duty is to construe and apply the statute as enacted."¹³³ A court must "begin[] with the plain language of the statute"¹³⁴:

¹²⁷ TENN. CODE ANN. §§ 47-18-101 to -130 (West, Westlaw through 2009 First Reg. Sess.).

¹²⁸ See *Smith v. Marquross*, 276 S.W.3d 926, 927–28 (Tenn. Ct. App. 2008) (affirming the liability of defendant, an individual seller, for breach of contract and failing to articulate the reason for which plaintiff's TCPA claim against defendant failed at trial level); *Evans v. Matlock*, No. M2001-02631-COA-R9-CV, 2002 Tenn. App. LEXIS 906, at *1–2 (Tenn. Ct. App. Dec. 23, 2002) (addressing only procedural claim of plaintiff, a purchaser, that eBay arbitration clause was inapplicable to consumers and failing to address plaintiff's substantive claim that defendants, individual sellers, were liable under the TCPA).

¹²⁹ Michael Booth, *Court Extends Consumer Fraud Act to Internet Auction Site Transactions*, 196 N.J. L.J. 83, 83 (2009) (internal quotation marks omitted).

¹³⁰ *Id.* (internal quotation marks omitted).

¹³¹ *Id.* (internal quotation marks omitted).

¹³² See *Real v. Radir Wheels, Inc.*, 969 A.2d 1069, 1077 (N.J. 2009).

¹³³ *Daidone v. Buterick Bulkheading*, 924 A.2d 1193, 1198 (N.J. 2007) (internal quotation marks omitted).

¹³⁴ *Id.* at 1198–99 (citations and internal quotation marks omitted).

[A] court should not resort to extrinsic interpretative aids when the statutory language is clear and unambiguous, and susceptible to only one interpretation. That said, if there is ambiguity in the statutory language that leads to more than one plausible interpretation, [a court] may turn to extrinsic evidence, including legislative history, committee reports, and contemporaneous construction. . . . [A court] may also resort to extrinsic evidence if a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language.¹³⁵

Utilizing those principles of statutory construction, numerous arguments demonstrate both the correctness and importance of the *Radir Wheels* decision. Beginning with the statutory language, the CFA's general antifraud provision's plain language unambiguously encompasses individual eBay sellers. Moreover, the CFA was enacted with a broad protective purpose, and to adhere to that purpose, individual eBay sellers, who are clearly capable of defrauding consumers, must be held accountable under the CFA because other fraud-prevention measures and remedies are ineffective. Furthermore, by analogy to an articulation by a Connecticut court applying Connecticut's consumer-protection laws in a context outside of eBay, because individual eBay sellers operate in a business context, individual sellers should be required to comply with the CFA's standards regardless of how few or how many times they have previously sold items on eBay. And finally, the CFA should be interpreted analogically to the Uniform Commercial Code (UCC), Article 2, which applies to all sellers, whether individual or merchant.

A. *The CFA's General Antifraud Provision's Plain Language*

The correctness of the *Radir Wheels* decision is clear because the CFA's general antifraud provision's plain language unambiguously applies to individual eBay sellers. The CFA's general antifraud provision prohibits "[t]he act, use or employment by any person of any unconscionable commercial practice" or other fraud "in connection with the sale or advertisement of any merchandise or real estate."¹³⁶ Logically, an individual eBay seller qualifies as a "person" as used in the CFA's general antifraud provision.¹³⁷ The CFA further explains that a "person" includes "any natural person or his legal representative, partnership, corporation, company, trust, business entity or associa-

¹³⁵ *Id.* at 1198 (citations and internal quotation marks omitted).

¹³⁶ N.J. STAT. ANN. § 56:8-2 (West 2001) (emphasis added).

¹³⁷ *Id.*

tion, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof.”¹³⁸ Saying that an individual eBay seller would not fall under this all-encompassing definition would be absurd.

Nothing in the CFA’s general antifraud provision indicates that the CFA applies only to merchant sellers. Indeed, the CFA’s general antifraud provision applies to “any person[’s] . . . sale or advertisement of any merchandise,”¹³⁹ which includes any “objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale.”¹⁴⁰ Items placed for sale on Internet-auction Web sites, whether by individual or merchant sellers, are subject to the CFA’s general antifraud provision.

B. The Broad Protective Purpose of the CFA

The broad protective purpose behind the CFA further proves that the *Radir Wheels* decision was a necessary extension of the CFA’s general antifraud provision to individual eBay sellers. Without the CFA’s general antifraud provision, current e-commerce fraud-prevention measures and remedies are insufficient to protect consumers. Further, the holdings of New Jersey courts and the courts of other states that articulate that consumer-protection laws do not regulate individual sellers’ sales of their personal residences can be distinguished because, unlike isolated sales of residences by homeowners, sales by individual eBay sellers are capable of inflicting large-scale harm on the consuming public. Thus, to effectuate the CFA’s purpose of preventing the risk of recurring harm to the consuming public, the CFA must govern individual eBay sellers.

1. Ineffectiveness of Fraud Prevention Without the CFA

Understanding the fact that current e-commerce fraud-prevention measures and remedies are ineffective is essential to comprehending why the CFA’s protective purpose necessitates applying the CFA’s general antifraud provision to individual eBay sellers. Although consumers who are defrauded by individual eBay sellers may rely on traditional causes of action, those causes of action are insufficient to protect or make whole defrauded consumers. Further, adequate causes of action specific to e-commerce have not been adopted

¹³⁸ *Id.* § 56:8-1(d) (emphasis added).

¹³⁹ § 56:8-2.

¹⁴⁰ § 56:8-1(c).

to provide any added form of consumer protection. And finally, the current means used by the government and Internet-auction Web sites to prevent fraud are ineffective to protect consumers from increasing Internet fraud committed by individual sellers.

Traditional causes of action are insufficient to protect consumers who are defrauded by individual eBay sellers because, even if the consumer wins, the consumer usually “ha[s] his or her award or settlement offset” or far surpassed “by counsel fees and costs.”¹⁴¹ Admittedly, consumers do have *some* protection outside of the CFA from Internet-auction fraud committed by individual eBay sellers. Consumers may rely on common-law causes of action in contract, tort, property,¹⁴² and fraud.¹⁴³ Further, an aggrieved consumer could invoke application of New Jersey’s version of Article 2,¹⁴⁴ which applies to all “transactions in goods,”¹⁴⁵ regardless of whether the seller is a merchant or non-merchant, and thereby includes sales by individual eBay sellers to consumers.¹⁴⁶ But those causes of action do not prevent fraud; they merely repair *some* of the damage done by the fraud. Unlike a consumer relying on the CFA, a consumer utilizing a claim in common-law contracts, torts, property, or fraud or based on New Jersey’s version of Article 2 will have to pay their own costs and attorney’s fees. Because doing so would be an impossibility for some consumers, those consumers are barred from ever being made whole, and those who perpetrated the fraud reap the benefits. A perfect example can be found in *Radir Wheels*, in which the plaintiff incurred attorney’s fees of \$29,950 and costs of \$6,544.81.¹⁴⁷ The average consumer who is defrauded by an individual eBay seller cannot afford to incur such heavy expenses to recover an amount in damages when that amount in damages will most likely be far less than the expenses.¹⁴⁸

¹⁴¹ Booth, *supra* note 129, at 83.

¹⁴² See *Zeeman v. Black*, 273 S.E.2d 910, 915 (Ga. Ct. App. 1980).

¹⁴³ See, e.g., *Kavky v. Herbalife Int’l of Am.*, 820 A.2d 677, 678–79, 685 (N.J. Super. Ct. App. Div. 2003).

¹⁴⁴ N.J. STAT. ANN. §§ 12A:2-101 to -725 (West 2004).

¹⁴⁵ § 12A:2-102.

¹⁴⁶ See Scott J. Burnham, *Why Do Law Students Insist That Article 2 of the Uniform Commercial Code Applies Only to Merchants and What Can We Do About It?*, 63 BROOK. L. REV. 1271, 1273, 1281 (1997).

¹⁴⁷ See *Real v. Radir Wheels, Inc.*, 969 A.2d 1069, 1073 (N.J. 2009).

¹⁴⁸ See e.g., *id.* (providing that actual damages incurred by plaintiff were \$8,651).

Although “[t]he importance of consumer protection to the development of electronic commerce is underscored in proposed laws presently under consideration which address commercial transactions in cyberspace,”¹⁴⁹ those proposed laws offer e-commerce consumers no protection because the laws are merely *proposed*. Two proposed but unadopted laws are noteworthy. First, the American Law Institute (ALI) created a revised version of Article 2, which includes a proposed subpart (Subpart 2B) that both explicitly makes clear that Article 2 governs the electronic sale of goods and provides additional laws that apply specifically to such electronic sales of goods.¹⁵⁰ Second, the United Nations Commission on International Trade Law has also demonstrated its concern for consumer protection in e-commerce through its promulgation of a Model Electronic Commerce Act, which sets forth specific provisions that afford protection to consumers.¹⁵¹ Nonetheless, these laws fail to protect Internet consumers because they have not been adopted, and even if the laws were to be adopted, they ultimately offer no more protection to con-

¹⁴⁹ 3 IAN C. BALLON, *E-COMMERCE AND INTERNET LAW: TREATISE WITH FORMS* 31-2 (2001).

¹⁵⁰ See DAVID BAUMER & J.C. POINDEXTER, *CYBERLAW AND E-COMMERCE: SECURITY, RISK MANAGEMENT, AND CONTROL* 57 (2002). The ALI, however, never approved Subpart 2B for incorporation into a revised version of the UCC. See Kenneth L. Carson & Gail E. Horowitz, *Software and Computer Law: Old Questions to Be Answered in the New Millennium*, BOSTON B.J., Sept./Oct. 1999, at 10, 22–23. Thereafter, the National Conference of Commissioners on Uniform State Laws created two new proposed uniform state laws—the Uniform Computer Information Transactions Act (UCITA) and the Uniform Electronic Transaction Act (UETA)—both of which were, in part, derived from Subpart 2B. See BAUMER & POINDEXTER, *supra*, at 57–58, 60. Although the UCITA does include specific consumer-protection provisions, the UCITA governs the licensing of electronic information. See *id.* at 58; 3 BALLON, *supra* note 149, at 31-3. Thus, the UCITA is inapplicable to the vast majority of eBay transactions, which deal with the sale of goods. See BAUMER & POINDEXTER, *supra*, at 57. Additionally, although the UETA would govern eBay transactions, it has little bearing on the issue of the applicability of consumer-protection laws because it deals not with the substantive law of electronic transactions but governs procedural issues such as ensuring that electronic records, including e-mails, would satisfy the statute of frauds where satisfaction thereof would be required to enforce a contract. See *id.* at 60–61. Presently, no state has adopted Subpart 2B, see CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 1067 (6th ed. 2007); two states (Maryland and Virginia) have adopted the UCITA, see Warren E. Agin & Scott N. Kumis, *A Framework for Understanding Electronic Information Transactions*, 15 ALB. L.J. SCI. & TECH. 277, 284 n.16 (2005); and forty-seven states, the District of Columbia, and the U.S. Virgin Islands have adopted the UETA, see Unif. Law Comm’rs, *A Few Facts About the Uniform Electronic Transactions Act*, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited October 18, 2009).

¹⁵¹ See 3 BALLON, *supra* note 149, at 31-3.

sumers from individual eBay sellers than is provided by traditional causes of action, which ultimately fail to protect or make whole defrauded consumers.¹⁵²

Finally, consumers need the CFA to deter consumer fraud by individual eBay sellers because individual eBay sellers are not sufficiently halted from committing fraud by government and Internet-auction Web site fraud-prevention measures. Although a consumer could report to eBay a fraudulent sale through eBay's Resolution Center, eBay would only investigate the claim and potentially issue "disciplinary actions rang[ing] from formal warnings or temporary account restrictions to indefinite suspension of a member's account."¹⁵³ But individual eBay sellers who commit Internet-auction fraud are not deterred by warnings, account restrictions, or suspensions. Scammers would continue to perpetrate fraud and, at most, would be inconvenienced by having to create a new account. Moreover, the government's e-commerce fraud-prevention measures do not protect consumers. Countless commentators have criticized the failure of the government's current means of fraud prevention and have stressed the need for, among other things, more extensive state and federal regulation and improved consumer education.¹⁵⁴

2. Distinction from Personal Real-Estate Sales

The CFA's general antifraud provision's application to individual eBay sellers can be distinguished from the New Jersey judiciary's decisions in *Neveroski v. Blair*¹⁵⁵ and *Di Bernardo v. Mosley*,¹⁵⁶ which both

¹⁵² See *supra* notes 141–48 and accompanying text.

¹⁵³ eBay, What To Do When You Don't Receive Your Item or It's Not as Described, *supra* note 15.

¹⁵⁴ See, e.g., RONALD J. MANN & JANE K. WINN, ELECTRONIC COMMERCE 304 (2d ed. 2005); Mary M. Calkins, Comment, *My Reputation Always Had More Fun Than Me: The Failure of eBay's Feedback Model to Effectively Prevent Online Auction Fraud*, 7 RICH. J.L. & TECH. 33 (2001), <http://law.richmond.edu/jolt/v7i4/note1.html>; Hynes, *supra* note 22; James M. Snyder, Note, *Online Auction Fraud: Are the Auction Houses Doing All They Should or Could to Stop Online Fraud?*, 52 FED. COMM. L.J. 453 (2000).

¹⁵⁵ 358 A.2d 473 (N.J. Super. Ct. App. Div. 1976), *superseded by statute*, N.J. STAT. ANN. § 56:8-2 (West 2001), *as stated in* Finderne Mgmt. Co. v. Barrett, 955 A.2d 940, 952 n.9 (N.J. Super. Ct. App. Div. 2008) ("*Neveroski* was abrogated on other grounds by the 1976 statutory amendment adding 'the sale or advertisement of . . . real estate' to the provisions of [the CFA's general antifraud provision]."). *Neveroski* held that the CFA did not apply to any real-estate transactions, regardless of whether the seller was an individual or a merchant, because the CFA's general antifraud provision prior to the 1976 amendment stated that the CFA applied to transactions in merchandise, but it was silent in regard to transactions in real estate. See *Di Bernardo v. Mosley*, 502 A.2d 1166, 1168 (N.J. Super. Ct. App. Div. 1986). The 1976 amendment super-

held that the CFA does not govern an individual seller's sale of his personal residence. The courts in both *Neveroski* and *Di Bernardo* explained that the CFA was intended to prevent the public harm caused by the unconscionable acts of "professional sellers seeking mass distribution of many types of consumer goods," . . . not . . . the isolated sale of a *single family residence* by its owner."¹⁵⁷ Notably, all other states but one addressing the issue have also specifically held that their consumer-fraud statutes do not regulate an individual seller's sale of his personal residence.¹⁵⁸

But unlike a homeowner selling his own dwelling, whose fraud will not be a recurring threat to consumers and, therefore, will have no significant impact on the general public, individual eBay sellers clearly are capable of committing recurring fraudulent acts against consumers.¹⁵⁹ Undeniably, eBay is a consumer marketplace¹⁶⁰ because eBay enables worldwide trade among a diverse community of individ-

seded *Neveroski* only insofar as the amendment made clear that the CFA's general antifraud provision also applies to transactions in real estate. *See id.* But the 1976 amendment made no assertion as to whether the CFA would apply to individual sellers of real estate in addition to its patent application to merchant sellers. *See id.* Consequently, *Neveroski's* reasoning as to why the CFA does not apply to an *individual* seller's sale of his personal residence is still valid law, which is evidenced by New Jersey courts' continued reliance on *Neveroski* in rejecting the notion that the 1976 amendment brought *all* transactions in real estate under the purview of the CFA. *See id.*

¹⁵⁶ 502 A.2d 1166.

¹⁵⁷ *Id.* at 1168 (emphasis added) (quoting *Kugler v. Romain*, 279 A.2d 640, 647–48 (N.J. 1971)).

¹⁵⁸ Most states have held that their consumer-fraud statutes do not apply to the isolated real-estate transaction of a homeowner selling his residence. *See, e.g.,* *Young v. Joyce* 351 A.2d 857, 860 (Del. 1975) (stating that the Delaware Consumer Fraud Act does not apply to a homeowner's sale of his own residence); *Zeeman v. Black*, 273 S.E.2d 910, 914, 915 (Ga. Ct. App. 1980) (finding that the Georgia Fair Business Practices Act does not apply to a homeowner's sale of his own residence); *Zimmerman v. Northfield Real Estate, Inc.*, 510 N.E.2d 409, 418 (Ill. App. Ct. 1986) (holding that the Illinois Consumer Fraud Act does not apply to a homeowner's sale of his own residence); *Lantner v. Carson*, 373 N.E.2d 973, 974–77 (Mass. 1978) (articulating that the Massachusetts Consumer Protection Act does not apply to a homeowner's sale of his own residence); *Ganzevoort v. Russell*, 949 S.W.2d 293, 298 (Tenn. 1997) (stating that the TCPA does not apply to a homeowner's sale of his own residence). Apparently, only one state has held that its consumer-fraud statute applies to an individual homeowner's sale of his own residence. *See Gabriel v. O'Hara* 534 A.2d 488, 489–93 (Pa. Super. Ct. 1987) (holding that the Pennsylvania Unfair Trade Practices and Consumer Protection Law applies to a homeowner's sale of his own residence).

¹⁵⁹ *See Zeeman*, 273 S.E.2d at 915.

¹⁶⁰ *See id.*

ual buyers and sellers as well as small and large businesses.¹⁶¹ And those fraudulent acts or omissions by individual eBay sellers are and will continue to be recurring threats that impact the general consuming public¹⁶² because individual eBay sellers can easily engage in fraud through material misrepresentations or omissions.¹⁶³ The unwary eBay consumer, who is often separated by hundreds or thousands of miles from the individual seller and item for sale, cannot conduct a firsthand inspection prior to purchasing the product on which the consumer is bidding. Consequently, the consumer must rely on the individual eBay seller to accurately and truthfully represent the item.

Although an individual who sells his home has no more bargaining power than any given consumer,¹⁶⁴ the same cannot be said for an individual eBay seller. While selling his residence, the individual seller regularly allows consumers inside to inspect the home prior to the sale; while selling an item on eBay, the individual seller can effortlessly misrepresent his goods to the entirety of the World Wide Web from the comfort of his living room without ever facing inspection or inquisition until after he commits the fraudulent sale. Indeed, the simplicity of committing Internet-auction fraud has resulted in eBay scammers repeatedly taking advantage of bidding consumers.¹⁶⁵ The fact that individual sellers account for eighty-four percent of all Internet-auction fraud¹⁶⁶ further demonstrates that individual eBay sellers pose a recurring threat capable of impacting the consumer public's¹⁶⁷ millions of Internet-auction transactions each day.¹⁶⁸ Consequently, sales by individual eBay sellers can be distinguished from a homeowner's private sale of his home in that eBay sales are much more "public."¹⁶⁹

3. The CFA's Protective Purpose

Because other e-commerce fraud-prevention measures and remedies are incapable of providing security to eBay consumers, who

¹⁶¹ eBay, Inc., Who We Are, *supra* note 11.

¹⁶² See *Zeeman*, 273 S.E.2d at 915.

¹⁶³ See *supra* notes 13–18 and accompanying text.

¹⁶⁴ See *Lantner v. Carson*, 373 N.E.2d 973, 977 (Mass. 1978).

¹⁶⁵ See *Fortunato*, *supra* note 15; INTERNET CRIME COMPLAINT CTR., *supra* note 16, at 5.

¹⁶⁶ See INTERNET FRAUD COMPLAINT CTR., *supra* note 5, at 10.

¹⁶⁷ See *Zeeman v. Black*, 273 S.E.2d 910, 915 (Ga. Ct. App. 1980).

¹⁶⁸ See eBay, Inc., Who We Are, *supra* note 11.

¹⁶⁹ N.J. STAT. ANN. § 56:8-1(c) (West 2001).

purchase in an environment vastly different from individuals purchasing personal residences, the CFA's protective purpose necessitates extension of the CFA's general antifraud provision to individual eBay sellers. New Jersey courts have stated that, as a remedial statute, the CFA's provisions must be construed liberally to protect the consumer.¹⁷⁰ And the burden of ensuring consumer protection through effective use of the provisions provided by the CFA does not fall solely on the shoulders of the Division of Consumer Affairs or the legislature.¹⁷¹

Whether [consumer-protection statutes] will adequately protect consumers' rights is largely dependent upon the range of wrongs [consumer-protection statutes] combat. . . . [A consumer-protection statute's] ultimate success in novel situations may depend upon broad judicial interpretation. With that approach [a consumer-protection statute] may provide the vehicle for exploring new and uncharted areas of consumer fraud.¹⁷²

Accordingly, the judiciary has consistently adopted a broad interpretation of the CFA to give its remedial provisions their greatest possible effect.¹⁷³

The situation in *Radir Wheels* was no exception. Unlike individuals who sell their personal residences, individual eBay sellers pose a significant, recurring threat to the consuming public.¹⁷⁴ Moreover, current remedies and e-commerce fraud-prevention measures are obviously insufficient to protect individual eBay sellers' consumer victims.¹⁷⁵ The court boldly carried the CFA in a direction demanded by the novel situation created by individual eBay sellers "exploring new and uncharted areas of consumer fraud."¹⁷⁶ Thus, the Supreme Court of New Jersey continued its tradition of broad interpretation of the

¹⁷⁰ See *Lettenmaier v. Lube Connection, Inc.*, 741 A.2d 591, 593 (N.J. 1999).

¹⁷¹ See Bossemeyer, *supra* note 25, at 49.

¹⁷² Note, *Consumer Remedies—Statutes—A New Approach—Mass. Gen. Laws Ann. Ch 93A (Supp. 1969); N.C. Gen. Stat. § 75-16 (1969)*, 1 SETON HALL L. REV. 208, 212–13 (1970) [hereinafter *A New Approach*].

¹⁷³ See Bossemeyer, *supra* note 25, at 49–51; see e.g., *Int'l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1079 n.1 (N.J. 2007) (stating that despite disclaiming that the court reserved judgment for a case in which the issue was presented to the court, plaintiff, a "joint union-employer" and New Jersey corporation, presumably qualified as a "consumer" under CFA, which does not define "consumer," because the CFA has "been repeatedly recognized to be remedial legislation which should be construed liberally").

¹⁷⁴ See *supra* Part V.B.2.

¹⁷⁵ See *supra* Part V.B.1.

¹⁷⁶ *A New Approach*, *supra* note 172, at 213.

CFA according to the statute's expansive remedial purpose by taking a necessary step to provide adequate protection for the eBay marketplace.

C. Selling on eBay Constitutes Making a Sale in a Business Context

The *Radir Wheels* decision gains further support via an assessment of individual eBay sellers' actions through the lens of Connecticut's consumer-protection laws, which hold liable any fraudulent actor in a business context. Although New Jersey courts have never held that where a transaction takes place in a business context it thereby falls under the purview of the CFA, a Connecticut court's holding that any and all transactions that take place in a business context are governed by Connecticut's consumer-protection laws should be used as persuasive authority to support application of the CFA's general antifraud provision to individual eBay sellers.

Connecticut's consumer-protection law, the Connecticut Unfair Trade Practices Act (CUTPA),¹⁷⁷ contains broad language that provides that "[n]o person shall engage in . . . unfair or deceptive acts or practices in the conduct of any trade or commerce."¹⁷⁸ In *Duncan v. PEH I*, the plaintiff, administratrix of her son's estate, brought suit against two hotel companies on the grounds of negligence and violation of the CUTPA in connection with her son's drowning in the hotel's pool.¹⁷⁹ Specifically, the plaintiff claimed that the defendants' allegedly negligent acts and omissions that encouraged her son's use of the pool, which led to his death, constituted deceptive business practices in violation of the CUTPA.¹⁸⁰ The defendants moved to dismiss the CUTPA claim for failure to state a claim on which relief could be granted.¹⁸¹ The court held that the "CUTPA is an expansive remedial statute that, by its own terms, applies to a broad spectrum of commercial activity, and, therefore, it should be liberally construed."¹⁸² Consequently, the court found that "under a CUTPA claim, a transaction need not take place in the defendant's *ordinary course of business*

¹⁷⁷ CONN. GEN. STAT. ANN. §§ 42-110a to -110q (West, Westlaw through Sept. 2009 Spec. Sess.).

¹⁷⁸ § 42-110b(a).

¹⁷⁹ See No. CV020817088S, 2003 Conn. Super. LEXIS 1020, at *1-2 (Conn. Super. Ct. Apr. 1, 2003).

¹⁸⁰ See *id.* at *2-3.

¹⁸¹ See *id.*

¹⁸² *Id.* at *8.

so long as it takes place in a ‘*business context*.’”¹⁸³ Thus, the court concluded that maintaining and advertising a hotel pool falls under the purview of selling accommodations, and therefore, the plaintiff’s CUTPA claim should not be dismissed.¹⁸⁴

The court’s holding in *Duncan* means that under the CUTPA, even where a seller engages in only a single transaction in a given business context, that seller’s actions in that sale are still governed by the CUTPA. And if the phrase “unfair or deceptive acts or practices in the conduct of any trade or commerce”¹⁸⁵ brings all transactions in a business context under the purview of the CUTPA, then certainly the language “any unconscionable commercial practice, deception, [or] fraud . . . in connection with the sale or advertisement of any merchandise or real estate”¹⁸⁶ similarly permits the CFA to regulate all transactions in a business context. Moreover, e-commerce is defined as “the consolidation of technology, material, people, and processes on an electronic network for *commercial transactions*.”¹⁸⁷ E-commerce transactions, which include transactions through eBay,¹⁸⁸ obviously take place in a business context.¹⁸⁹ Thus, because the CFA is at least as protective as the CUTPA, the Connecticut court’s holding in *Duncan* supports the notion that the *Radir Wheels* court correctly extended CFA liability to individual eBay sellers, whose transactions undoubtedly take place in a business context, even if the sale is not in the sellers’ ordinary courses of business.

D. *Parallel to UCC*

The similarities between the CFA and the language, intent, and structure of Article 2, which applies to merchants and non-merchants (including individual eBay sellers), analogically indicate that the *Radir Wheels* court correctly concluded that the CFA’s general antifraud provision applies to both individual and merchant eBay sellers. Because Article 2’s broad language applies to both merchants and non-merchants, the CFA’s similarly broad language should be interpreted

¹⁸³ *Id.* at *7 (emphasis added).

¹⁸⁴ *See id.* at *19.

¹⁸⁵ CONN. GEN. STAT. ANN. § 42-110b(a) (West, Westlaw through Sept. 2009 Spec. Sess.).

¹⁸⁶ N.J. STAT. ANN. § 56:8-2 (West 2001).

¹⁸⁷ DAVID JOHNSTON ET AL., *CYBERLAW: WHAT YOU NEED TO KNOW ABOUT DOING BUSINESS ONLINE* 37 (1997) (emphasis added).

¹⁸⁸ *See Sayeedi v. Walser*, 835 N.Y.S.2d 840, 842 (N.Y. Civ. Ct. 2007).

¹⁸⁹ *See Duncan*, 2003 Conn. Super. LEXIS 1020, at *9.

to govern both individual and merchant sellers. Further, just as the legislature intended for Article 2 to focus on merchants but nonetheless to regulate both merchants and non-merchants, the legislature correspondingly intended the CFA to concentrate on merchant sellers but still apply to individual eBay sellers. And finally, the CFA's specific antifraud provisions, which dictate explicit standards to certain sellers in given commercial settings, parallel the way in which Article 2 regulates both merchants and non-merchants but subjects merchants to higher standards.

1. Comparison of the Legislative Intent Behind and the Plain Language of the CFA and Article 2

Comparison to Article 2's uncontested application to both merchants and non-merchants proves that the *Radir Wheels* court properly ruled that the CFA's general antifraud provision's unambiguous plain language governs both merchant and individual eBay sellers. Article 2 applies to all "transactions in goods,"¹⁹⁰ and even though Article 2 never explicitly uses the word "non-merchant," Article 2's provisions govern both merchant and non-merchant sellers.¹⁹¹ Although Article 2 intentionally places an emphasis on merchants through the several provisions that specifically apply only to or impute a higher level of duty on merchants,¹⁹² Article 2 in its entirety was intended to govern merchants and non-merchants by "simplifying, clarifying, and modernizing the law that governs commercial transactions, to foster the expansion of commercial practices[,] and to promote uniformity of the law."¹⁹³ Notably, when the ALI developed Article 2's revised version, the ALI created proposed Subpart 2B.¹⁹⁴ In Subpart 2B, the ALI explains that Article 2 regulates the electronic sale of goods and delineates numerous additional provisions that apply specifically to such

¹⁹⁰ N.J. STAT. ANN. § 12A:2-102 (West 2004).

¹⁹¹ See Burnham, *supra* note 146, at 1273, 1281 ("Article 2 covers all transactions in goods, regardless of the sophistication of the parties who enter the transaction. Article 2 covers transactions in which one party is a merchant, transactions between merchants, consumer transactions, and transactions between two nonmerchants.") (internal citations omitted).

¹⁹² See *infra* Part V.D.2.

¹⁹³ Jennifer B. Cannata, Note, *Time is Running Out for Customized Software: Resolving the Good Versus Service Controversy for Year 2000 Contractual Disputes*, 21 CARDOZO L. REV. 283, 305 (1999).

¹⁹⁴ See BAUMER & POINDEXTER, *supra* note 150, at 57.

electronic sales of goods;¹⁹⁵ however, Subpart 2B has not been adopted by New Jersey or any other state.¹⁹⁶

Much like Article 2, the CFA's general antifraud provision is extraordinarily broad. The general antifraud provision prohibits "any person" from engaging in "any unconscionable commercial practice . . . in connection with the sale or advertisement of any merchandise or real estate."¹⁹⁷ The CFA then further defines "any person" to include "any natural person or . . . business entity or association."¹⁹⁸ Furthermore, New Jersey courts have stated that the CFA must be construed liberally to effectuate its remedial purpose of protecting the consumer.¹⁹⁹

If the phrase all "transactions in goods"²⁰⁰ brings under the purview of Article 2 both merchants and non-merchants, then certainly the *Radir Wheels* court correctly held that the phrase "any natural person or . . . business entity or association" engaged in selling or advertising merchandise or real estate²⁰¹ includes under the umbrella of the CFA both merchant eBay sellers and individual eBay sellers. Article 2 may even be less inclusive than the CFA. The CFA governs the sale and advertisement of real estate, which Article 2 does not.²⁰² Moreover, the CFA's stated purpose, which is to liberally ensure consumer protection,²⁰³ is broader than Article 2's stated purpose, which is to ensure certainty in contract and commercial law.²⁰⁴

2. Comparison of the CFA's and UCC's Double Standards

Evaluating the relationship of the statutory structures of Article 2 and the CFA demonstrates the correctness of the *Radir Wheels* court's articulation that the CFA's general antifraud provision applies to individual eBay sellers. Because the CFA's general antifraud provision always applies and the CFA's numerous regulations and specific anti-

¹⁹⁵ See *id.*

¹⁹⁶ See KNAPP ET AL., *supra* note 150, at 1067; see also *supra* Part V.B.1.

¹⁹⁷ N.J. STAT. ANN. § 56:8-2 (West 2001).

¹⁹⁸ *Id.* § 56:8-1(d).

¹⁹⁹ See Lettenmaier v. Lube Connection, Inc., 741 A.2d 591, 593 (N.J. 1999).

²⁰⁰ N.J. STAT. ANN. § 12A:2-102 (West 2004).

²⁰¹ § 56:8-1(d).

²⁰² See Amelia H. Boss, *Panacea or Nightmare? Leases in Article 2*, 64 B.U. L. REV. 39, 44 n.31 (1984) (stating that "the structure of Article 2 excludes . . . sales of securities, intangibles, and real estate").

²⁰³ See Lettenmaier, 741 A.2d at 593.

²⁰⁴ See Cannata, *supra* note 191, at 305.

fraud provisions govern only certain types of sellers in particular situations, the CFA invokes a double standard that strongly resembles the way in which Article 2 governs both merchants and non-merchants but holds merchants to higher standards.

Article 2 explicitly distinguishes between merchants and non-merchants. Under Article 2, a merchant is

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.²⁰⁵

Thus, any party who does not fall under Article 2's definition of a merchant constitutes a non-merchant. Although most of Article 2's provisions govern all parties, merchant or non-merchant, to any transaction in goods,²⁰⁶ a number of Article 2's provisions either govern only merchants or impose more stringent requirements and burdens on merchants.²⁰⁷

Similarly, the CFA's general antifraud provision contains broad language that makes unlawful "any person[']s" engagement in "any unconscionable commercial practice . . . in connection with the sale or advertisement of any merchandise or real estate."²⁰⁸ But the CFA also contains numerous regulations and specific antifraud provisions

²⁰⁵ § 12A:2-104(1).

²⁰⁶ *Id.* § 12A:2-102.

²⁰⁷ *See id.* § 12A:2-608 (Official Comments) (stating that "[f]ollowing the general policy of this Article, the requirements . . . are less stringent in the case of a non-merchant" than in case of merchant); Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495, 1499-1500 n.17 (1984) (reviewing LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983)) (stating that "[i]n general, the provisions of article 2 apply to all transactions in goods . . . and it is the exceptional provision that applies only to merchants" and providing examples of provisions specifically applicable only to merchants); *see, e.g.*, § 12A:2-205 (imposing more stringent firm-offer requirements on merchants); *id.* § 12A:2-207(2)(a) (providing that for merchants, under certain circumstances additional terms in an acceptance become part of the contract); *id.* § 12A:2-312(3) (stating that "a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person"); *id.* § 12A:2-314(1) (providing that "warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind"); *id.* § 12A:2-603(1) (stating that "a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller").

²⁰⁸ N.J. STAT. ANN. § 56:8-2 (West 2001); *see also supra* Part III.A.1.

that apply only to certain sellers in the particular commercial settings designated by each regulation or specific antifraud provision.²⁰⁹

The CFA regulations and specific antifraud provisions implicitly invoke a double standard for individual sellers and merchant sellers strikingly similar to Article 2's double standard for merchants and non-merchants. Many of Article 2's provisions apply only to or require a higher standard of action from merchants, and the remainder of Article 2's provisions, which contain no such designation or limitation, apply to both merchants and non-merchants.²¹⁰ Correspondingly, the CFA's regulations and specific antifraud provisions impute particular requirements to the sellers subject to those regulations and specific antifraud provisions.²¹¹ For each CFA regulation and specific antifraud provision, the sellers to whom that regulation or specific antifraud provision applies effectively are deemed, for purposes of comparison to Article 2's double standard, merchants.

But like many of Article 2's provisions, the CFA's general antifraud provision contains no such designation of or limitation on the sellers that it governs.²¹² Consequently, the CFA's general antifraud provision should be interpreted by way of comparison to the Article 2 provisions that contain no limitation on their application and thereby govern both merchants and non-merchants. Based on analogy to those unrestricted Article 2 provisions, the *Radir Wheels* court properly construed the CFA's general antifraud provision to regulate all sellers, both individual and merchant.

VI. CONCLUSION

Continuing technological advances require the judiciary to interpret and apply established laws to comport with new, unanticipated situations. Such a dilemma existed in regard to the applicability of the CFA's general antifraud provision to individual sellers' Internet-auction sales through Web sites such as eBay. But in *Radir Wheels*, the Supreme Court of New Jersey became the first court of any

²⁰⁹ See *supra* Part III.A.2-3. Notably, the CFA regulations and specific antifraud provisions apply alongside the CFA's general antifraud provision. See *id.* Therefore, for each commercial transaction to which a CFA regulation or specific antifraud provision could pertain, the CFA's general antifraud provision always applies, even where the CFA regulation's or specific antifraud provision's explicit requirements to govern are not satisfied. See *id.*

²¹⁰ See *supra* notes 191, 207 and accompanying text.

²¹¹ See *supra* Part III.A.2-3.

²¹² See *supra* Part III.A.1.

state to explicitly extend liability under a consumer-protection law to individual eBay sellers.

The court in *Radir Wheels* certainly reached the correct decision. The CFA's general antifraud provision's unambiguous plain language, the need for the CFA to remain true to its broadly protective purpose, the fact that eBay sales occur in a business context, and analogy to Article 2's governance of merchants and non-merchants all demonstrate that the CFA's general antifraud provision must apply to individual eBay sellers. Consequently, as the reasons for which the CFA has long been and will continue to be known as one of the most consumer-friendly consumer-protection laws in the United States expand, *Radir Wheels* will ensure clarity of the law in the face of eBay's evolving and increasingly popular commercial sphere.