

HERO OR VILLAIN: THE NEW JERSEY CONSUMER FRAUD ACT

*Samuel M. Silver**

I. BACKGROUND—CAVEAT EMPTOR	236
A. <i>Early New Jersey Case Law</i>	237
B. <i>The Mail Fraud Act of 1872</i>	238
C. <i>The Bureau of Corporations</i>	238
D. <i>The Jungle</i>	239
E. <i>The Federal Trade Commission</i>	240
II. THE MODERN CONSUMER PROTECTION MOVEMENT	244
A. <i>The Post-War Economy</i>	244
B. <i>New Jersey—Consumer “Liberty and Prosperity”</i>	245
C. <i>New Jersey’s Consumer Fraud Act of 1960</i>	246
D. <i>The “Me Decade” and Caveat Venditor—“Let the Seller Beware”</i>	249
E. <i>“To Infinity, and Beyond?”</i>	251
III. WHERE DOES THE LAW GO FROM HERE?.....	256
A. <i>The Structure of the Act.</i>	256
B. <i>Substantive Changes to the Act</i>	262
C. <i>Plaintiff’s Pre-Suit Demand</i>	263
D. <i>“Only In New Jersey”</i>	264
E. <i>Treble Damages; Fee Awards For Technical Violations.</i>	266
i. <i>Treble Damages</i>	266
ii. <i>Technical Violations</i>	266
IV. CONCLUSION.....	268

* Samuel M. Silver has been a licensed attorney since 1994 and is admitted to practice in New Jersey; he is a graduate of the Washington College of Law – American University and earned an LL.M. in Advocacy from Stetson University College of Law. He presently serves as Counsel to the New Jersey Law Revision Commission. My thanks for the assistance with research and the collection of the information included in this article, or used as background material, that was provided by current students who work or have worked with the New Jersey Law Revision Commission, including: Erik Topp (J.D. Candidate 2018, Seton Hall University School of Law); Kyle A. Silver (B.A. Candidate 2019, Rutgers University). My sincerest thanks, as well, to Laura C. Tharney, Executive Director, New Jersey Law Revision Commission, whose tireless patience, guidance and support cannot be exaggerated and serve as inspiration to this writer.

“[I]n this world, with great power there must also come—great responsibility.”¹

I. BACKGROUND—CAVEAT EMPTOR

“Life, liberty and the pursuit of happiness”² form the cornerstones of American independence. Having freed themselves from the yoke of colonial oppression while living on a continent resplendent with natural resources, Americans were imbued with an abundant source of individualism.³ By 1787, the United States Constitution recognized that a government with limited powers was not welcome to intrude upon free enterprise.⁴ Merchants in America were free to determine the saleable qualities of their goods.⁵ The interaction between a merchant and a consumer was governed by the presumption in favor of the freedom of contract.⁶

Historically, aggrieved consumers could seek a remedy by filing an action against a merchant and the judiciary would determine whether any impropriety tainted the transaction. In their moving papers the complainant would be required to plead common law causes of action in either contract or tort law. The policy of minimal government intervention in transactions between private parties predominated America’s economic landscape. The results of legal actions would largely be governed by the aphorism *caveat emptor*, “let the buyer beware.” Judicial reliance on this maxim was often predicated upon the belief that buyers and sellers, before the industrial revolution, had an equal responsibility to judge the quality of the goods being sold.⁷ These individuals, negotiating at “arm’s length,” were thought to be in equal position to one another and therefore competent to judge both the goods and services being bought and sold in the marketplace.

¹ *Kimble v. Marvel Ent., LLC*, 135 S.Ct. 2401, 2415 (2015) (citing Stan Lee & Steve Ditko, *Introducing Spider Man*, *Amazing Fantasy*, Aug. 1962, at 13).

² THE DECLARATION OF INDEPENDENCE, at ¶ 2 (1776).

³ Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *YALE L.J.* 1133, 1183 (1931).

⁴ *Id.*

⁵ *Id.*

⁶ Michael S. Greve, *Consumer Law, Class Actions and the Common Law*, 7 *CHAP. L. REV.* 155, 157 (2004).

⁷ See JOANNA SHEPHERD, AM. TORT REFORM FOUND., *THE EXPANSION OF NEW JERSEY’S CONSUMER FRAUD ACT: CAUSES AND CONSEQUENCES* 3 (2014). See, e.g., Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 *AM. L. REG.* 273, 337-38 (1905); Hamilton, *supra* note 3.

A. Early New Jersey Case Law

The 1793 case of *Mason v. Evans* involved an “action of debt” on a bond.⁸ The Supreme Court of Judicature of New Jersey, in its opinion, noted that there was a cause of action available to the defendant, an “action of covenant on his warranty.”⁹ The court further noted that if the defendant “omit[ted] that prudent precaution, the maxim of *caveat emptor* [was] fairly applicable.”¹⁰ One year later, in 1794, the Supreme Court of Judicature of New Jersey issued its opinion in the case of *Journey v. Hunt*.¹¹ In addressing the seller’s vague representations regarding a tract of land the Court held, “[t]he purchaser in every case, more especially when the representation is couched in . . . ambiguous and general words . . . [should] satisfy himself of the quality of the land by previous inquiry or personal examination.”¹² The Court went on to hold that, “[t]he maxim of *caveat emptor* is a just and valuable one, and its application to a case like the present cannot be considered harsh or iniquitous.”¹³ This legal principle, which placed a burden upon the buyer to check both the quality and suitability of goods before a purchase, appeared to be embedded in the Garden State’s jurisprudence. Furthermore, these cautionary watchwords would not be limited in their application to transactions involving land.

The onus placed upon buyers to investigate the nature or quality of commodities and chattel arose in the case of *Renton v. Maryott*.¹⁴ A mortgagee sold the shares of a mining company to a mortgagor for \$1,000.¹⁵ During the course of the transaction, the mortgagee represented that he had paid \$1,000 for the shares of stock, which ultimately turned out to be worthless.¹⁶ The Court held, “[t]he rule of *caveat emptor* applies as well to the sale of stocks as of chattels.”¹⁷ The exception to this “rule” was that the vendor would only be found liable for misrepresentations or fraud.¹⁸

Historically, New Jersey Courts required the complainant to

⁸ *Mason v. Evans*, 1 N.J.L. 182, 182 (1793).

⁹ *Id.* at 189.

¹⁰ *Id.*

¹¹ *Journey v. Hunt*, 1 N.J.L. 235, 235 (1794).

¹² *Id.* at 237.

¹³ *Id.* (citations omitted).

¹⁴ *Renton v. Maryott*, 21 N.J. Eq. 123, 123 (1870).

¹⁵ *Id.* Adjusted for inflation \$1,000 in 1870 is the equivalent of \$17,997.91 in 2017. See *Inflation Calculator*, OFFICIALDATA.ORG, <http://www.in2013dollars.com/1870-dollars-in-2017?amount=1000> (last visited May 10, 2018).

¹⁶ *Renton*, 21 N.J. Eq. at 124.

¹⁷ *Id.*

¹⁸ *Id.*

specifically plead fraud, misrepresentation, or deceit.¹⁹ In addition, the complainant was required to set forth specific damages in their complaint.²⁰ Where a party failed to articulate, with specificity, the circumstances of the fraud and misrepresentation, the dismissal of the cause or the reversal of the judgment was frequently the result.²¹ Lawsuits based on misrepresentation or fraud were often difficult and expensive for the consumer to prove.²² Frequently, the expense of pursuing a fraud claim far outweighed the damage award for the successful prosecution of such a claim.²³ In the early part of 1870, the United States Congress began a movement toward consumer protection.

B. The Mail Fraud Act of 1872

The Mail Fraud Act²⁴ was one of the earliest consumer protection statutes promulgated by the United States government. During the debate, Representative Farnsworth identified the villains whose predatory behavior the Mail Fraud Act was designed to curtail.²⁵ In his opinion, the mail fraud statute was essential “to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers and rapsallions generally, for the purpose of deceiving and fleecing the innocent people in the country.”²⁶ In an effort to deter fraudulent behavior, the Mail Fraud Act made it a misdemeanor to effectuate a “scheme or artifice to defraud” another by means of “the post-office establishment of the United States.”²⁷ If found guilty of violating the Mail Fraud Act, the perpetrator faced up to a \$500 fine and up to eighteen calendar months in prison.²⁸ Ne’er-do-wells who utilized the postal system to perpetrate their frauds were not the only individuals gaining the attention of the federal government and the public.

C. The Bureau of Corporations

On February 14, 1903, President Theodore Roosevelt created the

¹⁹ Lummis v. Stratton, 2 N.J.L. 229, 230 (1807).

²⁰ *Id.*

²¹ Sexton v. Cramer, 3 N.J.L. 908, 908 (1811).

²² See Mason v. Evans, 1 N.J.L. 182, 184-85 (1793).

²³ *Id.* See DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 10:1 (2013); see also Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1766-67 (2007). See also *infra* Section II.D., for a discussion on the economic impact of the New Jersey Consumer Fraud Act.

²⁴ Act of June. 8, 1872, ch. 335, 17 Stat. 323 (1872).

²⁵ McNally v. United States, 483 U.S. 350, 356 (1987).

²⁶ CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Representative Farnsworth).

²⁷ Act of June. 8, 1872, ch. 335, 17 Stat. 323 (1872).

²⁸ *Id.*

Bureau of Corporations.²⁹ The Bureau had the far-reaching power to make “diligent investigation into the organization, conduct and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States”³⁰ and to inspect the corporate ledgers of all companies engaged in interstate commerce.³¹ During the course of their investigation, the Bureau could “subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths.”³² Information concerning corporations engaged in interstate, intrastate or foreign commerce would then be gathered, compiled and published by the Bureau. The information gathered by the Bureau of Corporations was designed to “enable the President of the United States to make recommendations to Congress for legislation [to] regulat[e]. . .commerce.”³³ This entity would serve as the predecessor to the Federal Trade Commission.³⁴

D. The Jungle

In 1905, author Upton Sinclair serialized the disturbing experience of a Lithuanian immigrant living in Chicago and working in the meatpacking industry. These articles were published in the Socialist magazine “Appeal to Reason.”³⁵ The installments were eventually collected and published as a book published under the name, *The Jungle*. In addition to detailing the horrific working conditions endured by the meatpacking workers, the book also set forth what can conservatively be described as “grotesque descriptions” of the contaminated food produced by this then unregulated industry.³⁶

The original point of Sinclair’s exposé was to bring the dehumanization of workers and the brutal treatment of animals to the public’s attention.³⁷ The readers, however, chose to focus on the health risks associated with unsanitary stockyards and meatpacking facilities.³⁸ Shortly after the book was published, the White House received “100

²⁹ An Act to Establish the Department of Commerce and Labor, ch. 548, § 6 (1903).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* For a discussion of the Federal Trade Commission, see *infra* Section E.

³⁵ Daniel E. Slotnik, *Upton Sinclair, Whose Muckraking Changed the Meat Industry*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/interactive/projects/cp/obituaries/archives/upton-sinclair-meat-industry>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

letters a day demanding a Federal cleanup of the meat industry.”³⁹ The outrage of the American citizenry, ignited by the investigative journalism of *The Jungle*, is often credited with being the impetus for the creation of the Food & Drug Administration.⁴⁰

To say that Upton Sinclair had gained the attention of the President of the United States is an understatement. The two gentlemen frequently exchanged correspondence. The issues set forth in *The Jungle* were among the topics that Upton Sinclair discussed with President Theodore Roosevelt.⁴¹ Alarmed by the book’s content, as well as the allegations set forth in Sinclair’s correspondence, the President was compelled to declare that, “the specific evils you point out shall, if their existence be proved, and if I have power, be eradicated.” With that letter, the executive branch of government began what would be a long-standing commitment to combatting socio-economic evil in the marketplace.

E. The Federal Trade Commission

The Bureau of Corporations served as the predecessor to the Federal Trade Commission.⁴² An act to create the Federal Trade Commission, to define its powers and duties, was enacted on September 26, 1914.⁴³ The Act authorized the President to appoint, with the advice and consent of the Senate, a bipartisan commission consisting of five commissioners.⁴⁴ Since Franklin D. Roosevelt symbolically set the cornerstone of the Commission’s headquarters, the Federal Trade Commission (“F.T.C.”) has maintained the unique dual missions of protecting consumers through the prohibition of unfair methods and promoting competition in interstate commerce.⁴⁵ During the early part of the Twentieth Century, Congress was primarily concerned with corporate monopolies. The F.T.C.’s mandate was to regulate “unfair methods of competition.”⁴⁶ This goal rests solely within the domain of the F.T.C., because the Act did not

³⁹ *Id.* (quoting Alden Whitman, author of Sinclair’s obituary).

⁴⁰ Spencer Weber Waller, Jillian G. Brady & R.J. Acosta, *Consumer Protection in the United States: An Overview*, EUR. J. OF CONSUMER L., May 2011, at 1.

⁴¹ Letter from Upton Sinclair, Author, to Theodore Roosevelt, U.S. President (March 10, 1906), (on file at Records of the Office of the Secretary of Agriculture).

⁴² *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history> (last visited May 10, 2018); *see also supra* Section C.

⁴³ An Act to Create a Federal Trade Commission, to Define its Powers and Duties, and for other purposes, ch. 311, 38 Stat. 717 (1914).

⁴⁴ *Id.* at § 1.

⁴⁵ *What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> (last visited May 10, 2018).

⁴⁶ Federal Trade Commission Act, ch. 311, 38 Stat. 717, 719 (codified at 15 U.S.C. § 45).

provide for private actions.⁴⁷ The limits of the F.T.C.'s authority would not go unnoticed by the United States Supreme Court.

In 1931, the Raladam Company manufactured and distributed a concoction known as "Marmola" to wholesalers, retailers and ultimately consumers.⁴⁸ This product, which was to be ingested by its purchaser, was marketed as an "obesity cure."⁴⁹ Advertisements for this product were circulated in the United States.⁵⁰ These advertisements, as well as the printed labels, specified that "the preparation [was] of scientific research, knowledge, and accuracy," and "that it is safe and effective and may be used without discomfort, inconvenience, or danger or harmful results to health."⁵¹ The F.T.C., under section 5 of the Federal Trade Commission Act,⁵² issued a complaint against the Raladam Company charging them with unfair methods of competition in interstate commerce.⁵³ The F.T.C. ordered the Raladam Company to "cease and desist" from representing its "obesity cure" as a scientifically tested method for treating and curing obesity.⁵⁴ Further, the F.T.C. ordered that statements regarding this "cure" could not be made, unless accompanied by a statement that it could not be taken safely except under medical direction.⁵⁵ The Raladam Company, disquieted by the decision of the F.T.C., appealed the order of injunction.⁵⁶

The Court of Appeals was then called upon, by Raladam, to review the action of the Commission.⁵⁷ After reviewing the action, the court reversed the injunction issued by the F.T.C.⁵⁸ The Supreme Court granted certiorari and dealt solely with the issue of jurisdiction.⁵⁹ The Supreme Court held that the Commission's authority to issue a final order to "cease and desist" is predicated upon the existence of "competition."⁶⁰ In affirming the decision of the Court of Appeals, the Supreme Court

⁴⁷ The enumeration of private actions under state consumer protection statutes, serves as a primary distinction between the F.T.C. Act and Consumer Protection Acts (CPAs).

⁴⁸ DEAN K FUEROGHNE, *LAW & ADVERTISING: A GUIDE TO CURRENT LEGAL ISSUES* 39 (2017).

⁴⁹ *F.T.C. v. Raladam Co.*, 283 U.S. 643, 644 (1931).

⁵⁰ *Id.* at 645.

⁵¹ *Id.*

⁵² Federal Trade Commission Act, ch. 311, 38 Stat. 717, 719 (codified at 15 U.S.C. § 45).

⁵³ *Raladam*, 283 U.S. at 644.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 646.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Raladam*, 283 U.S. at 646.

⁶⁰ *Id.* at 654.

warned the F.T.C. that it could not give itself jurisdiction to make such an order if none existed.⁶¹ The Court concluded, “if . . . it turn[s] out that the preliminary assumption of competition is without foundation, jurisdiction to make [a final cease and desist order] necessarily fails, and the proceeding must be dismissed by the Commission.”⁶² Thus, it was clear to the F.T.C., and to merchants, that the Supreme Court of the United States would not extend the powers of the F.T.C. beyond those enacted by Congress. In the years that followed, the decision of the Court would be the subject of discussion among the Commissioners.

Heretofore, the F.T.C.’s power was limited to curtailing corporate practices that unfairly affected competition in the marketplace among businesses. In 1935, however, the Commission sought, “clear jurisdiction over a practice which is unfair or deceptive to the public” even if this practice did not affect a competitor.⁶³ The Commission noted that, “[t]here are times when [an unfair or deceptive] practice is so universal in an industry that the public is primarily injured rather than individual competitors. In such cases it is very difficult, if not impossible, to show injury to competitors, but the injury to the public is manifest.” The Annual Report issued by the F.T.C. recommended a modification to section 5 of the Federal Trade Commission Act. The proposed amendment sought to extend the powers of the F.T.C., “. . . so as to specifically prohibit not only unfair methods of competition in commerce but also unfair or deceptive acts and practices in commerce.”⁶⁴ The F.T.C.’s recommendation to expand its authority, eventually adopted by Congress,⁶⁵ would serve as the basis for modern consumer protection law.⁶⁶ Before the F.T.C. would be vested with this authority, the Supreme Court would be asked to examine yet another “cease and desist” order issued by the Commission.

After service of a complaint, and extensive hearings, the F.T.C. made findings of fact from testimony and ordered the Standard Education

⁶¹ *Id.*

⁶² *Id.* See generally *F.T.C. v. Raladam Co.*, 316 U.S. 149 (1945) (affirming an injunction against Raladam and holding that the F.T.C. “found with meticulous particularity” that Raladam had made many misleading and deceptive statements which had the “tendency and capacity” to induce people to purchase their product in preference and to the exclusion of products of competitors).

⁶³ AN. REP. OF THE FED. TRADE COMM’N FOR THE FISCAL YEAR ENDED JUNE 30 1935 15 (1935), https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1935/ar1935_0.pdf.

⁶⁴ *Id.*

⁶⁵ Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a) 2000)).

⁶⁶ Victor E. Shwartz & Cary Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 8 (2005).

2018]

HERO OR VILLAIN

243

Society to “cease and desist” from certain practices used in furthering the sales of books in interstate commerce.⁶⁷ The Commission made specific findings that the defendant’s practices were “unfair, false, deceptive and misleading.”⁶⁸ The Circuit Court of Appeals for the Second Circuit, however, both modified and weakened the Commission’s Order concluding,

we cannot take too seriously the suggestion that a man who is buying a set of books and a ten years’ extension service will be fatuous enough to be misled by the mere statement that they are given away, and that he is paying only for the second. Such trivial niceties are to impalpable for practical affairs, they are will-o’-the-wisps, which divert attention from substantial evils.⁶⁹

By this time, both the executive and legislative branches of government had embraced the concept of consumer protection. In 1937, the decision of the Circuit Court of Appeals for the Second Circuit would force the F.T.C. to bring the issue of consumer protection directly to the Supreme Court of the United States.

Upon application by the F.T.C., the Supreme Court of the United States granted *certiorari*.⁷⁰ After reviewing the holding of the Court of Appeals, Justice Black, delivering the opinion of the court, stated,

[t]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

This holding cautioned that unsavory business practices would not be tolerated in this Country. One year later, that statement would “apply with even greater force.”⁷¹ In 1938, Congress passed the Wheeler-Lea Act, which proscribed “unfair or deceptive acts or practices” as well as “unfair methods of competition.”⁷²

The Wheeler-Lea Act strengthened the power of the F.T.C. to fight “unfair or deceptive acts or practices” employed by unscrupulous

⁶⁷ F.T.C. v. Standard Educ. Soc., 58 U.S. 113, 113 (1937).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ R.E. Freer, Commissioner, Fed. Trade Comm’n, Address before the An. Convention of the Proprietary Ass’n: The Wheeler Act (May 17, 1938).

⁷² Wheeler-Lea Act of 1938, Pub. L. No. 75-447, §3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. §45(a) 2000)).

merchants.⁷³ Congress appears to have purposely left these terms without clear definitions. Rather than attempting to undertake the endless task of enumerating these prohibited acts, Congress decided to “leave it to the commission to determine what practices were unfair.”⁷⁴ In vesting the Commission with this superpower, Congress expected the Commission’s members would “possess substantial business and commercial backgrounds,” enabling them to distinguish “malevolent business practices harming consumers from disingenuous claims of ‘unfairness’ prompted only by consumer litigation.”⁷⁵ The F.T.C., strengthened by the Wheeler-Lea Act, initially enjoyed tremendous popularity.

In time, the popularity of the F.T.C. would wane and the Commission would not be without its detractors.⁷⁶ By the middle of the twentieth century the F.T.C. was seen by some as, “. . . rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent.”⁷⁷ In addition, there was a growing frustration among consumers with common law causes of action.⁷⁸ These critics, however, did not quell what amounted to a popular demand for consumer protection and business regulation.⁷⁹ The convergence of these three forces would lead states to enact their own Consumer Protection Acts.⁸⁰

II. THE MODERN CONSUMER PROTECTION MOVEMENT

A. *The Post-War Economy*

After “three years, eight months, and twenty-two days,” World War

⁷³ See generally *Id.* at § 5; see also Shwartz & Silverman, *supra* note 66.

⁷⁴ Shwartz & Silverman, *supra* note 66.

⁷⁵ See Shepherd, *supra* note 7, at 5.

⁷⁶ See Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 47 n.1 (1969) (citing GERARD C. HENDERSON, *THE FED. TRADE COMM’N: A STUDY IN ADMIN. L. AND PROC.* (1924); COMM’N ON ORG. OF THE EXECUTIVE BRANCH OF GOV., TASK FORCE ON REG. COMM’NS Appendix N (1949); J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT ELECT (1960); Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN L. REV. 383, 383 (1964); E. COX, R. FELLMETH & J. SCHULZ, *THE CONSUMER AND THE FED. TRADE COMM’N* (1969), reprinted in 115 CONG. REC. E. 370 (daily ed. Jan. 22, 1969); REP. OF THE ABA COMM’N TO STUDY THE FED. TRADE COMM’N (1969)). See also FED. TRADE COMM’N MGMT. SURV. REP. OF ROBERT HELLER & ASSOCIATES, INC. (1954); U.S. CIV. SERV. COMM’N, EVALUATION OF PERSONNEL (1965). Memorandum from Philip Elman, F.T.C. Chairman on Admin. Reform, Fed. Trade Comm’n, to the Chairman of the Senate Subcommittee on Admin. Practice and Procedure.

⁷⁷ Posner, *supra* note 76, at 47.

⁷⁸ Henry N. Butler & Joshua Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 167 (2011).

⁷⁹ *Id.*

⁸⁰ *Id.*

II ended for the United States.⁸¹ Domestically, the 1950s and 1960s were marked by rapid acceleration toward a “consumer-oriented society.”⁸² The post-war era ushered in products and services that were becoming increasingly complex.⁸³ Local merchants began to give way to large-scale business organizations.⁸⁴ As the marketplace grew, so too did the level of impersonal interactions between the merchant and the consumer.⁸⁵ Traditional consumer transactions, formerly resplendent with “good will” and “mutual acquaintance,” gave way to adhesion contracts and the rise of “deceptive trade practices, poor service and shoddy merchandise.”⁸⁶

When left unchecked either by the corporate entity or by the executive branch, unscrupulous merchants “generally discovered that they [could] impose upon consumers the cost of their own laxity, ‘sharp trading’ or conscious deception because they [were] not adequately disciplined by loss of good will in sales or by threat of effective legal remedy from their customers.”⁸⁷ These *laissez faire* attitudes toward consumers would not, however, enjoy the longevity that *caveat emptor* enjoyed during the prior two centuries.

B. New Jersey—Consumer “Liberty and Prosperity”⁸⁸

In a flourishing post-war economy Americans came to believe that they were entitled to “. . . a good life of material plenty, comfort, safety and security.”⁸⁹ As America moved into the 1960s, a portion of the population began to experience a cultural awakening. During the 1960s and 1970s, “quality-of-life” issues would become the focus of governmental regulation.⁹⁰ In an attempt to combat injustice, the federal

⁸¹ *World War II*, U.S. HISTORY, <http://www.u-s-history.com/pages/h1661.html> (last visited May 10, 2018).

⁸² J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 354 (1992).

⁸³ *Kugler v. Romain*, 58 N.J. 522, 535 (1971) (noting that there can be no doubt, in today’s society, sale of consumer goods, especially on an installment credit basis, has become a matter of ever-increasing state of national anxiety); see also Shepherd, *supra* note 7, at 7.

⁸⁴ William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 725 (1971).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 726.

⁸⁸ Adopted in 1777, “Liberty and Prosperity” is the motto of the State of New Jersey. See also N.J. STAT. ANN. § 52:2-1(a) (West 1992).

⁸⁹ Franke & Ballam, *supra* note 82, at 355. See generally MANSEL G. BLACKFORD & K. AUSTIN KERR, *BUS. ENTERPRISE IN AM. HIST.* 12-17 (1986).

⁹⁰ Franke & Ballam, *supra* note 82, at 355.

government began to focus on issues such as: environmentalism,⁹¹ civil rights,⁹² occupational safety,⁹³ and consumer protection. States, such as New Jersey, started to focus on these pressing social issues.

In 1960, the New Jersey marketplace was rife with fraudulent practices.⁹⁴ The dubious behavior of merchants did not escape the attention of the legislative branch of New Jersey's government. In response to consumer complaints, and in an attempt to quell fraudulent commercial practices, eleven senators moved a groundbreaking piece of legislation by way of an emergency resolution.⁹⁵ The situation was so dire that on April 11, 1960, New Jersey Senator John A. Waddington, along with ten fellow senators⁹⁶ introduced S199, "An Act Concerning Consumer Fraud, its Prevention, and Providing Penalties Therefor."⁹⁷ The Senate passed this legislation on May 9, 1960.⁹⁸ Seven days after passage in the Senate, the Assembly passed this emergency legislation.⁹⁹ By the late spring of 1960, the legal principle of *caveat emptor*, which previously placed the onus on the consumer to check the quality and suitability of goods before making a purchase, was no longer welcome in the Garden State. With the signature of Governor Robert B. Meyner, on June 9, 1960, New Jersey became one of the first states in the country to enact a consumer protection statute.¹⁰⁰

C. New Jersey's Consumer Fraud Act of 1960

Born from emergency legislation, the New Jersey Consumer Fraud Act ("NJCFA" or the "Act") contained only twelve sections.¹⁰¹ The

⁹¹ See generally RACHEL CARSON, *SILENT SPRING* (2002).

⁹² See Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).

⁹³ See Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590 (1970).

⁹⁴ *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 11 (2004) (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 21 (1994)).

⁹⁵ *Id.*

⁹⁶ Sponsors for this consumer protection legislation included: Senators Donal Fox, Thomas F. Connery, John A. Lynch, Anthony Grossi, Sido L. Ridolfi, Walter H. Jones, Wesley L. Lance, Wayne Dumont, Jr., Robert Crane and William E. Ozzard.

⁹⁷ Legislative History of R.S. 56:8-1 through 14 (March 17, 1971). It should be noted that history surrounding the passage of this Act is scant to non-existent. According to a handwritten note contained in the legislative history, the Governor's statement on enacting this legislation is "[n]ot in bound bills. Not with the histories for c. 40 & c. 41 (signed at the same time). NJ Documents has no press releases for 1960."

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Consumer Fraud Act, ch. 39, §§ 1-12, 1960 NJ Laws 137 (codified as amended at N.J. Rev. Stat. §§ 56:8-1 to 56:8-195 (2016)).

¹⁰¹ *Id.* § 13 ("This act shall take effect immediately[.]").

2018]

HERO OR VILLAIN

247

NJCFA defined five terms: advertisement,¹⁰² Attorney General,¹⁰³ merchandise,¹⁰⁴ person,¹⁰⁵ and sale.¹⁰⁶ These terms form the foundation of the NJCFA.¹⁰⁷ Despite its diminutive size, the purpose of the Act was clear:

[t]he purpose of this bill is to permit the Attorney General to combat the increasingly widespread practice of defrauding the public. The Authority conferred will provide effective machinery to investigate and prohibit deceptive and fraudulent advertising and selling practices which have caused extensive damage to the public.¹⁰⁸

Absent from the statutory schema was the right of a private individual to enforce violations of the Act. The NJFTC emulated the F.T.C.'s focus on preventing consumer fraud, providing restitution to victims and establishing the Attorney General as the chief law enforcement officer responsible for enforcing the Act.¹⁰⁹

The NJFTC vested the New Jersey Attorney General with sole authority to investigate alleged violations of the newly minted consumer fraud laws.¹¹⁰ The Legislature imbued the Attorney General with the statutory tools necessary to protect consumers. To detect and quash devious merchants, the Attorney General now had the power to require a person to issue a written statement under oath,¹¹¹ examine under oath any person in connection with a questioned transaction,¹¹² and examine and even impound merchandise, records, books, documents, accounts or papers.¹¹³ Further, to accomplish the objectives and carry out the duties prescribed by the Act, the Attorney General was granted the power to "issue subpoenas to any person, administer an oath . . . and conduct hearings in aid of any investigation."¹¹⁴ Finally, the Legislature granted the Attorney General the greatest superpower of all, the ability to

¹⁰² N.J. STAT. ANN. § 56:8-1(a) (West 1960).

¹⁰³ *Id.* at § 56:8-1(b).

¹⁰⁴ *Id.* at § 56:8-1(c).

¹⁰⁵ *Id.* at § 56:8-1(d).

¹⁰⁶ *Id.* at § 56:8-1(e).

¹⁰⁷ Over the next fifty-five years the New Jersey Consumer Fraud Act would come to include a total of 254 statutes, 30 of which would define an additional 186 terms. These additional "definitions" frequently define the same term in multiple sections of the NJCFA. *See infra* Sections on treatment of definitions sections.

¹⁰⁸ *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572, 577 (N.J. Ch. Div. 1972).

¹⁰⁹ *See Shepherd*, *supra* note 7, at 6; *see also* Consumer Fraud Act, ch. 39, §§1-12, 1960 NJ Laws 137 (codified as amended at N.J. REV. STAT. §§ 56:8-1 to 56:8-148 (2010)).

¹¹⁰ N.J. STAT. ANN. § 56:8-3 (West 1960).

¹¹¹ *Id.* at § 56:8-3(a).

¹¹² *Id.* at § 56:8-3(b).

¹¹³ *Id.* at § 56:8-3(c)(d).

¹¹⁴ N.J. STAT. ANN. § 56:8-4 (West 1960).

“promulgate such rules and regulations[,] which shall have the force of law.”¹¹⁵ The authority to stamp out villainy in the marketplace had one limitation; it had to be exercised to benefit the “public interest.”¹¹⁶ The state’s chief law enforcement officer would not neglect the exercise of this power.

The codification of all rules and regulations made by the executive branch, or its agencies, can be found in the New Jersey Administrative Code (NJAC). Pursuant to the authority granted to the Attorney General under the NJCFA, detailed and extensive regulations have been adopted that govern both the sale of goods and the advertising practices of merchants in the area of consumer sales.¹¹⁷ Although not adopted all at once, the NJAC has gradually expanded to encompass twenty-seven titles.¹¹⁸ For example, Title 13 addresses issues of law and public safety.¹¹⁹ Within Title 13, Chapter 45A contains 258 code sections and spans 266 pages setting forth the rules administered by the Division of Consumer Affairs.¹²⁰

Seven years after its enactment, an additional power was bestowed upon the Attorney General.¹²¹ Once in receipt of evidence that a provision of the NJCFA had been violated, the Attorney General was “. . . empowered to hold hearings upon said violation and upon finding the violation to have been committed, to assess a penalty against the person alleged to have committed such violation[.]”¹²² Even to the most obtuse merchant, there was little question at the time that the Legislature intended to confer upon the Attorney General “the broadest kind of power to act in the interest of the consumer public.”¹²³ What merchants might not have expected was the expansion of the NJCFA to include what would become commonly referred to as “private attorneys general.”¹²⁴

¹¹⁵ *Id.*

¹¹⁶ § 56:8-3.

¹¹⁷ *See generally* N.J. ADMIN. CODE § 13:45A-1.1 (LEXIS 2018).

¹¹⁸ *Id.*; *see also* N.J. ADMIN. CODE § 1:1-9:67 (LEXIS 2018).

¹¹⁹ § 13:45A-1.1.

¹²⁰ *Id.*

¹²¹ N.J. STAT. ANN. § 56:8-3.1 (West 1967).

¹²² *Id.*

¹²³ *Kugler v. Romain*, 58 N.J. 522, 537 (1971).

¹²⁴ *Lemellendo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 268 (1997). *Cf.* *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151 (1987) (“both statutes bring to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chose to reach the objective . . . is the carrot of treble damages.”).

2018]

HERO OR VILLAIN

249

D. The “Me Decade” and Caveat Venditor—“Let the Seller Beware”

By 1971, the New Jersey Consumer Fraud Act suffered from three problems. First, after eleven years, the authority to enforce the New Jersey Consumer Fraud Act had remained solely within the Office of the Attorney General. The resources of the executive branch were not unlimited and the Attorney General could not prosecute every case.¹²⁵ Second, an aggrieved individual was free to initiate a private cause of action against a disreputable merchant. Under this schema, however, a consumer was left with the arduous task of pleading, and ultimately proving, common-law fraud causes of action against a seller. Third, in many cases, the consumers’ claims were so small, the expense of hiring an attorney so great and the legal requirements so complex that they would simply abandon their claims.¹²⁶ In 1971, proposed modifications to the New Jersey Consumer Fraud Act were sought to ameliorate each of these obstacles to consumer protection.

The Attorney General supported the proposed amendments to the New Jersey Consumer Fraud Act.¹²⁷ Attorney General Kugler directed a letter to the Senators who supported the changes to the NJCFA. In his letter, the Attorney General advised the Senators regarding what he believed to be the most significant aspects of the proposed legislation:

[P]erhaps one of the most substantial and necessary remedies provided by this legislation grants the consumer a private right of action against persons violating the Consumer Fraud Act. In addition, the provision mandates treble damages, reasonable attorneys’ fees and reasonable costs of suit in such an action.¹²⁸

The Attorney General also stressed the socio-economic importance of the proposed damage provisions:

[W]e found through our study that consumers are often without adequate remedy for redressing violations such as those contained in the Consumer Fraud Act. In addition, we found that consumers most often cannot afford the cost of pursuing what remedies they do have available and that attorneys are not generally attracted to individual consumer suits which involve a great amount of work and very little monetary award. Consequently, we included the above private right of action in order to provide a vehicle for private consumer redress, to make that vehicle economically feasible

¹²⁵ See *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 557 (2011).

¹²⁶ Henry N. Butler & Jason S. Johnston, *Consumer Harm Acts? An Economic Analysis of Private Actions Under State Consumer Protection Acts 2* (Nw. U. Sch. of L., Working Paper No. 184, 2009). See also *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 512 (N.J. Super. Ct. App. Div. 1982) (discussing the cost of private litigation of consumer complaints).

¹²⁷ *Skeer*, 187 N.J. Super. at 472.

¹²⁸ *Id.* at 473.

to the private consumer and to make it economically and professionally attractive to the attorneys of this State.

With the foresight and cooperation of the Legislature, these recommendations became a reality.¹²⁹

On June 21, 1971, Governor William T. Cahill enacted legislation that gave New Jersey one of the strongest consumer protection laws in the nation.¹³⁰ The modifications to the NJCFA were specifically designed to “provide increased protection for consumers.”¹³¹ The Governor’s message heralded the newest modifications to the consumer protection statute. In addition, the Governor’s press release, although not considered part of the Act’s legislative history, confirms the unwavering support of the executive branch for the Act that made New Jersey a leader in consumer protection law.¹³²

The 1971 amendments broadened the definition of consumer fraud, streamlined enforcement procedures and increased the penalties for violations of the Act.¹³³ In passing upon the efficacy of the newly enacted statutes, the Governor recognized that “. . . this bill coupled with recent legislation, which created a new Division of Consumer Affairs gives New Jersey the enforcement power it needs to protect the consumer.”¹³⁴ With this new grant of authority, the Attorney General now had the ability to seek restitution of money or property for a defrauded consumer.¹³⁵ In addition, the Legislature empowered the Attorney General,

to enjoy the ownership or management of businesses used for unlawful practices and after a hearing to order that money acquired by unlawful means be restored to the consumer. The bill also provides that the Attorney General have hearing orders which are ignored, filed with the court as a judgment thus avoiding the need for further hearing or trial.¹³⁶

The Legislature did not limit the authority to combat consumer fraud to the Attorney General. According to the Governor, this consumer protection juggernaut expanded the NJCFA and authorized private citizens to file actions against merchants alleging a violation of the Consumer Fraud Act.¹³⁷

Simply amending the NJCFA to provide a consumer with a private

¹²⁹ *Id.* at 471.

¹³⁰ *Id.*

¹³¹ *Id.* at 473.

¹³² *See id.* at 472 (discussing the meager legislative history and the fact that no hearing or committee reports are available regarding the passage of these amendments).

¹³³ *Skeer*, 187 N.J. Super. at 472. N.J. STAT. ANN. 56:8-1 to 56:8-1-20 (West 1971).

¹³⁴ *Skeer*, 187 N.J. Super. at 471.

¹³⁵ *Id.*

¹³⁶ *Id.* at 472.

¹³⁷ *Id.*

2018]

HERO OR VILLAIN

251

cause of action against a merchant would not have dramatically altered the consumer protection landscape. For the previous two centuries, an aggrieved consumer was permitted to file a lawsuit against a merchant. This, however, was not always a practical solution to a very real problem.¹³⁸ The poor and the powerless needed someone to champion their causes of action. The NJCFA was enacted to fill that void.¹³⁹ The ability to seek treble damages, reasonable attorneys' fees, and reasonable costs of suit would have a threefold effect on the consumer.¹⁴⁰ Fee awards would, "... provide easier access to the courts for the consumer . . . increase the attractiveness of consumer actions to attorneys and . . . help reduce the burdens on the Division of Consumer Affairs."¹⁴¹ These remedies "reflect an apparent legislative intent to enlarge [the] fraud-fighting authority [of the Act] and to delegate that authority among various governmental and nongovernmental entities, each exercising different forms of remedial power."¹⁴²

Consumer-plaintiffs would not be the only ones to feel the impact of the amendments to the NJCFA. The punitive aspects of the Act were, by design, meant to leave a lasting impression on the unprincipled merchants and serve as a warning to others. The treble damage, fee-shifting and cost of suit provisions were calculated to ". . . punish the wrongdoer and to deter others from engaging in similar practices."¹⁴³ The judiciary's liberal interpretation of the Act, specifically regarding the attorneys' fees, would have a secondary effect on merchants. The award of attorney's fees would, "attract competent counsel to counteract the 'community scourge' of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual."¹⁴⁴ By 1971, consumers were equipped with the tools necessary to level the playing field with merchants and, for the most part, they did.

*E. "To Infinity, and Beyond?"*¹⁴⁵

After almost 200 years of being alone in the marketplace, the passage of the New Jersey Consumer Fraud Act signaled a departure from the legal principle of *caveat emptor* ("buyer beware"). In just over ten years after the NJCFA was enacted, the 1971 amendments to the Act

¹³⁸ See *id.* (discussing the cost of private litigation and consumer complaints).

¹³⁹ *Gonzalez v. Wilshire Credit*, 207 N.J. 557, 585 (2011).

¹⁴⁰ *Skeer*, 187 N.J. Super. at 472.

¹⁴¹ *Id.*

¹⁴² *Gonzalez*, 207 N.J. at 585.

¹⁴³ *Id.* (emphasis added).

¹⁴⁴ *Sprenger v. Trout and Bridgeton Spring & Welding*, 375 N.J. Super. 120 (N.J. Super. Ct. App. Div. 2005) (citing *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (1999)).

¹⁴⁵ *TOY STORY* (Walt Disney Pictures 1995).

dramatically changed the dynamic in commercial transactions. These amendments ushered in an era of *caveat venditor*, “seller beware.” The actions of all three branches of government put merchants on notice that unscrupulous business practices would no longer be tolerated in New Jersey.

The social norms and the needs of a society may change gradually, or dramatically, over time. Changes in morality, ethics, technology, or even catastrophic events bring to the fore the necessity of codifying new laws or modifying the existing laws.¹⁴⁶ Although the laws that influence social behavior have the ability to change norms over time, they too may require alterations to address societal changes.¹⁴⁷ The New Jersey Consumer Fraud Act is not impervious to the need for change.

Originally enacted to combat “sharp practices and dealings” that preyed upon unknowing consumers by enticing them to purchase goods or services through deceptive means,¹⁴⁸ the Act, by its very nature, is considered remedial legislation. To achieve the goal of the NJCFA, Courts have resisted any effort “to import into the [NJ]CFA obstacles that would impede access to the broad remedial protections for consumers that our Legislature so obviously intended to create.”¹⁴⁹ The consumer protections set forth in the 1971 amendments are substantial. They would not, however, be the only changes made to the NJCFA by the legislature.

As noted previously, New Jersey’s “Act Concerning Consumer Fraud, its Prevention, and Providing Penalties Therefore” was originally set forth in one chapter.¹⁵⁰ It was never the intention of the drafters to set forth every prohibited practice.¹⁵¹ In *Lemelledo v. Beneficial Management Corp. of America*, the defendant moved to dismiss the plaintiff’s class action lawsuit by arguing that the NJCFA, and its implementing regulations, did not specifically include a reference to insurance.¹⁵² In denying the defendant’s request for relief the Supreme Court explicitly acknowledged that the Act could never enumerate every

¹⁴⁶ See *What is Law Reform?*, LAWGOVPOL, <http://lawgovpol.com/what-is-law-reform/> (last visited May 10, 2018).

¹⁴⁷ Clifton B. Parker, *Laws May be Ineffective if They Don’t Reflect Social Norms*, *Stanford Scholar Says*, STANFORD NEWS (Nov. 24, 2014), <https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html>.

¹⁴⁸ *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 2 (1994) (citing *D’Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J. Super. 11 (N.J. Super Ct. App. Div. 1985)).

¹⁴⁹ *Boseland v. Warnock Dodge, Inc.*, 197 N.J. 543, 559 (2009). For a comprehensive analysis of the New Jersey Consumer Fraud Act see PAUL DEPETRIS, N.J. CONSUMER FRAUD ACT & FORMS 9 (2017).

¹⁵⁰ Consumer Fraud Act, ch. 39, §§1-12, 1960 NJ Laws 137 (codified as amended at N.J. REV. STAT. §§ 56:8-1 to 56:8-195 (2016)).

¹⁵¹ See *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 265 (1997).

¹⁵² *Id.*

possible evil that it was created to combat. The Court found:
 [t]he fertility of [human] invention in devising new schemes of fraud is so great . . . the CFA could not possibly enumerate all, or even most, of the areas and practices that it covers without severely retarding its broad remedial powers to root out fraud in its myriad, nefarious manifestations.¹⁵³

The Court also noted the futility of having the Legislature set forth each and every type of fraud in the Consumer Fraud Act.¹⁵⁴ In doing so, the Court paid homage to the language of the holding in *Federal Trade Comm'n v. Sperry & Hutchinson Co.*,¹⁵⁵ wherein the United States Supreme Court found that,

[e]ven if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin [redrafting the list] again [,constituting] . . . an endless task.¹⁵⁶

Nevertheless, in an attempt to clarify the Act and define acceptable contemporary behavior between merchants and consumers, the New Jersey Legislature would add new provisions to the NJCFA.

As originally enacted, the NJCFA contained twelve statutory provisions.¹⁵⁷ Now, the New Jersey Consumer Fraud Act contains twenty-eight, frequently undesignated, subchapters.¹⁵⁸ Presently, there are 254 consumer protection statutes spanning 106 pages.¹⁵⁹ While the text of the original Act contained only five definitions,¹⁶⁰ it now contains thirty different definition sections that cover 186 terms.¹⁶¹ Figure 1 sets

¹⁵³ *Id.* (citations omitted).

¹⁵⁴ *Id.*

¹⁵⁵ *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972).

¹⁵⁶ *Id.* at 240. *See* *Bosland v. Warnock Dodge, Inc.* 197 N.J. 543, 556 (2009) (stating the judiciary will “construe the [CFA] broadly, not in a crabbed fashion.”)

¹⁵⁷ Consumer Fraud Act, ch. 39, §§1-12, 1960 NJ Laws 137 (codified as amended at N.J. REV. STAT. §§ 56:8-1 to 56:8-195 (2016)).

¹⁵⁸ N.J. STAT. ANN. §§ 56:8-1 to 56:8-195 (West 2016).

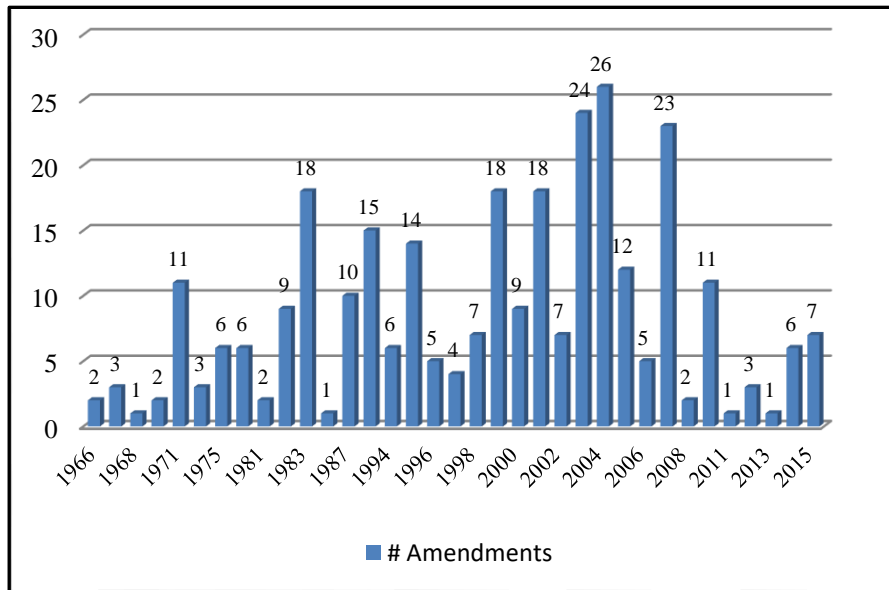
¹⁵⁹ *Id.*

¹⁶⁰ N.J. STAT. ANN. §§ 56:8-1(a)-(e) (West 1960).

¹⁶¹ *See* N.J. STAT. ANN. § 56:8-1 (West 1999); N.J. STAT. ANN. § 56:8-2.15 (West 1982); N.J. STAT. ANN. § 56:8-2.29 (West 2006); N.J. STAT. ANN. § 56:8-14.2 (West 2017); N.J. STAT. ANN. § 56:8-22 (West 1975); N.J. STAT. ANN. § 56:8-39 (West 1987); N.J. STAT. ANN. § 56:8-49 (West 1991); N.J. STAT. ANN. § 56:8-53.1 (West 2007); N.J. STAT. ANN. § 56:8-55 (West 1991); N.J. STAT. ANN. § 56:8-62 (West 1994); N.J. STAT. ANN. § 56:8-67 (West 1997); N.J. STAT. ANN. § 56:8-83 (West 1996); N.J. STAT. ANN. § 56:8-86 (West 1998); N.J. STAT. ANN. § 56:8-93 (West 2015); N.J. STAT. ANN. § 56:8-99 (West 2000); N.J. STAT. ANN. § 56:8-104 (West 2000); N.J. STAT. ANN. § 56:8-108 (West 2001); N.J. STAT. ANN. § 56:8-110 (West 2012); N.J. STAT. ANN. § 56:8-115 (West 2002); N.J. STAT. ANN. § 56:8-120 (West 2003); N.J. STAT. ANN. § 56:8-130 (West 2015); N.J. STAT. ANN. § 56:8-137 (West 2014); N.J. STAT. ANN. § 56:8-153 (West 2004); N.J. STAT. ANN. § 56:8-157 (West 2005); N.J. STAT. ANN. § 56:8-161 (West 2005); N.J. STAT. ANN. § 56:8-170 (West 2007); N.J. STAT. ANN. § 56:8-175 (West 2007); N.J. STAT. ANN. § 56:8-185 (West 2009); N.J. STAT. ANN. § 56:8-196 (West 2014).

forth the 298 amendments to the NJCFA since it was enacted by the Legislature.¹⁶²

Figure 1: Amendments to the New Jersey Consumer Fraud Act From 1966 through 2017.



It should come as no surprise that the expansion of the Consumer Fraud Act to permit private causes of action, treble damages and attorneys' fees contributed to the deluge of consumer protection litigation.¹⁶³ Consumer actions in either tort or general litigation were outnumbered by private complaints filed pursuant to the New Jersey Consumer Fraud Act. The increase in litigation from 2000 to 2009 brought with it an increase in the number of reported consumer protection decisions.¹⁶⁴ During the first decade of the twenty-first century, the number of reported decisions increased by 447 percent.¹⁶⁵ Using published decisions as a milestone for measuring the amount of consumer protection litigation, New Jersey easily exceeded the national trend.¹⁶⁶

¹⁶² The NJCFA Amendments were calculated by reviewing each statute, the date that the section was proposed and amended prior to or after enactment.

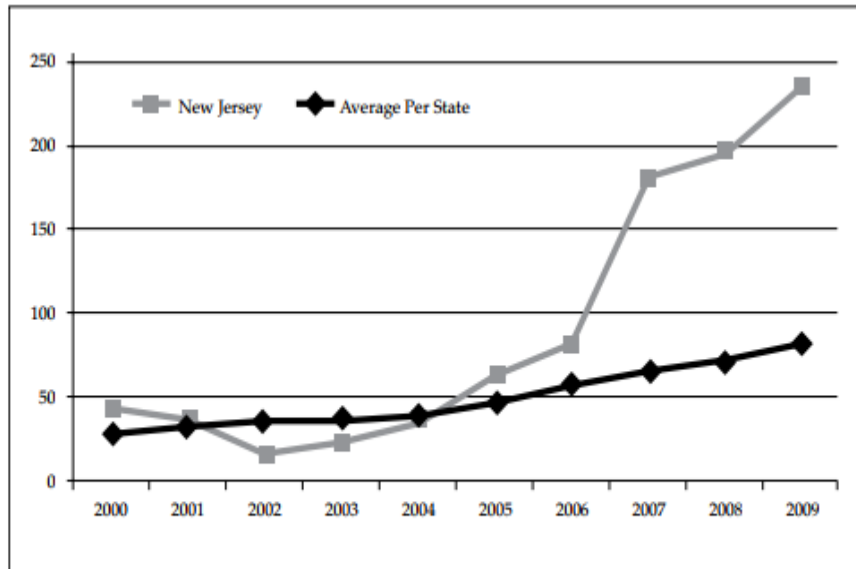
¹⁶³ See Shepherd, *supra* note 7 (Regarded as a thoughtful treatment of the consequences of New Jersey's expansion of the Consumer Fraud Act).

¹⁶⁴ See Shepherd, *supra* note 7.

¹⁶⁵ See Shepherd, *supra* note 7.

¹⁶⁶ Shepherd, *supra* note 7.

**Figure 2: Trends in Consumer Protection Litigation 2000-2009;
New Jersey versus the National Average.**



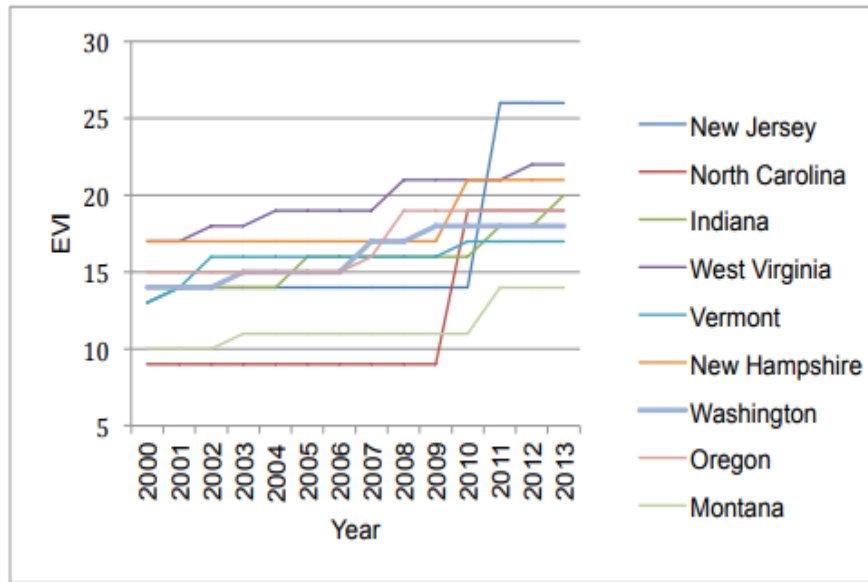
Data from the Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation (Preliminary Report) 6* (2009), available at <http://ssrn.com/abstract=1708175> [hereinafter Searle Study], updated to 2009.

The increase in published opinions, supports the supposition that New Jersey enjoys one of the country's strongest consumer protection acts in the country. This approach, however, is not the only method to confirm that New Jersey leads the country in "pro-plaintiff" consumer laws.

Developed in 2009, the Expected Value Index (EVI) serves as another method to determine the extent to which a statute is likely to encourage litigation.¹⁶⁷ An act may contain a significant number of statutes that make it easier for a plaintiff to prevail in an action, thereby making it more likely a plaintiff will institute their lawsuit. These types of Acts receive a high EVI score. Between 2000 and 2013, New Jersey had the largest change in EVI of the states examined.¹⁶⁸

¹⁶⁷ JAMES C. COOPER & MATTHEW D. SIBERY, SEARLE CIV. JUST. INST., STATE CONSUMER PROTECTION ACT LITIGATION: UPDATES ON TRENDS 8 (2016).

¹⁶⁸ *Id.* at 11.

Figure 3. Top EVI Growth: Without Definitional Changes.¹⁶⁹

Despite New Jersey's high EVI score, in recent years it appears that a plateau has been reached.¹⁷⁰ The New Jersey judiciary would have an opportunity to interpret Consumer Fraud Act in the years following its passage. The judiciary would not be the only branch of government that would concern itself with various provisions of the Act.

III. WHERE DOES THE LAW GO FROM HERE?

A. *The Structure of the Act.*

For over fifty years, the New Jersey Consumer Fraud Act has been amended by the Legislature in an attempt to protect consumers. In its current form, the Act looks radically different than it did when it was originally enacted by the Legislature. The Act began with twelve statutes and now contains 195 sequentially numbered statutes set forth within twenty-eight frequently undesignated subchapters.¹⁷¹ When N.J.S.A. 56:8-2 was originally enacted, it was titled, "Unlawful Practice."¹⁷² In its current form, section two now contains thirty-two separate statutes and

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 14.

¹⁷¹ N.J. STAT. ANN. § 56:8-1 to 56:8-195 (West 2016).

¹⁷² § 56:8-2.

two acts.¹⁷³ At first blush, the statutes appear to have been added chronologically; the structure of the NJCFA, however, is not that simple.

As substantive statutes were added to the Act, so too were statutes that sought to define the terms contained in the newly added code sections. The Act now contains thirty separate and distinct definition statutes that define 186 terms.¹⁷⁴ These new sections frequently duplicate terms that have already been defined by the Act. The term “director,” pertaining to the Director of the Division of Consumer Affairs in the Department of Law and Public Safety, is defined thirteen times in thirteen separate statutes within the Act.¹⁷⁵ The presence of these duplicative definitions tends to make the Act cumbersome and difficult to navigate.

To many, the arrangement of the Act is as confusing as it is redundant. It may be beneficial to reorganize the Act to clarify confusing provisions and excise redundancies. First, duplicative definitions could be eliminated in an effort to streamline and simplify the Act.¹⁷⁶ Additionally, sections of general applicability should be grouped together.¹⁷⁷ Finally, rather than being set forth in a chronological order the statutes should be organized by subject matter.¹⁷⁸

Review of the statute by the New Jersey Law Revision Commission (“NJLRC” or “Commission”) has resulted in the consideration of revisions to the structure of the New Jersey Consumer Fraud Act as follows¹⁷⁹:

1. Generally applicable provisions

a. Definitions.¹⁸⁰

¹⁷³ § 56-2 (including the “Refund Policy Disclosure Act of 1982” (N.J. STAT. ANN. § 56:8-2.14 (West 1982)) and the “Raincheck Policy Disclosure Act of 2006” (N.J. STAT. ANN. § 56:8-2.28 (West 2006))).

¹⁷⁴ See Shepherd, *supra* note 7.

¹⁷⁵ See N.J. STAT. ANN. § 56:8-22 (West 1975); N.J. STAT. ANN. § 56:8-26 (West 2008); N.J. STAT. ANN. § 56:8-39 (West 1987); N.J. STAT. ANN. § 56:8-49 (West 1991); N.J. STAT. ANN. § 56:8-62 (West 1994); N.J. STAT. ANN. § 56:8-67 (West 1995); N.J. STAT. ANN. § 56:8-86 (West 1998); N.J. STAT. ANN. § 56:8-93 (West 1999); N.J. STAT. ANN. § 56:8-99 (West 2000); N.J. STAT. ANN. § 56:8-120 (2003); N.J. STAT. ANN. § 56:8-137 (West 2004); N.J. STAT. ANN. § 56:8-170 (West 2007); N.J. STAT. ANN. § 56:8-175 (West 2007); N.J. STAT. ANN. § 56:8-185 (West 2009).

¹⁷⁶ See Memorandum from Susan Thatch, to the New Jersey Law Rev. Comm. 4 (Mar. 9, 2015).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* The proposed revisions represent the preliminary assessment of the statute performed by Susan Thatch. See also N.J. STAT. ANN. § 56:8-2.4 (West 1973).

¹⁸⁰ See N.J. STAT. ANN. § 56:8-1 (West 1960); N.J. STAT. ANN. § 56:8-2.15 (West 1982); N.J. STAT. ANN. § 56:8-2.29 (West 2006); N.J. STAT. ANN. § 56:8-14.2 (West 1999); N.J. STAT. ANN. § 56:8-22 (West 1975); § 56:8-39; § 56:8-49; N.J. STAT. ANN. § 56:8-53.1 (West 2007); N.J. STAT. ANN. § 56:8-55 (West 1991); § 56:8-62; § 56:8-67; N.J. STAT. ANN. § 56:8-

- b. General Fraud.¹⁸¹
- c. Remedies and Construction of the Act.¹⁸²
- d. Attorney General's Authority, Enforcement Powers, and Penalties.¹⁸³
- e. Civil Cause of Action and Penalties.¹⁸⁴
- f. Promulgation of Regulations.¹⁸⁵
- g. Severability.¹⁸⁶
- h. Educational Programs related to the CFA.¹⁸⁷

2. Merchandise

- a. Advertisement of Unassembled Merchandise as Assembled in Picture or Illustration; Prohibition.¹⁸⁸

83 (West 1996); § 56:8-86; § 56:8-93; § 56:8-99; N.J. STAT. ANN. § 56:8-104 (West 2000); N.J. STAT. ANN. § 56:8-108 (West 2001); N.J. STAT. ANN. § 56:8-110 (West 2002); N.J. STAT. ANN. § 56:8-115 (West 2002); § 56:8-120; N.J. STAT. ANN. § 56:8-130 (West 2003); § 56:8-137; N.J. STAT. ANN. § 56:8-153 (West 2004); N.J. STAT. ANN. § 56:8-157 (West 2005); N.J. STAT. ANN. § 56:8-161 (West 2005); § 56:8-170 ; § 56:8-175; § 56:8-185; N.J. STAT. ANN. § 56:8-196 (West 2014).

¹⁸¹ N.J. STAT. ANN. § 56:8-2 (West 1960).

¹⁸² N.J. STAT. ANN. § 56:8-2.13 (West 1979).

¹⁸³ N.J. STAT. ANN. §§ 56:8-3 to 14.4 (West 1960); N.J. STAT. ANN. §§ 56:8-15 to 18 (West 1971).

¹⁸⁴ § 56:8-15; N.J. STAT. ANN. § 56:8-19 (West 1971); N.J. STAT. ANN. § 56:8-20 (West 1999).

¹⁸⁵ N.J. STAT. ANN. § 56:8-2.32 (West 2006); N.J. STAT. ANN. § 56:8-14.7 (West 1999); N.J. STAT. ANN. § 56:8-24 (West 1975); N.J. STAT. ANN. § 56:8-25 (West 1975); N.J. STAT. ANN. § 56:8-28 (West 1983); N.J. STAT. ANN. § 56:8-31 (West 1983); N.J. STAT. ANN. § 56:8-36 (West 1983); N.J. STAT. ANN. § 56:8-48 (West 1987); N.J. STAT. ANN. § 56:8-52(b) (West 1991); N.J. STAT. ANN. § 56:8-53.5 (West 2007); N.J. STAT. ANN. § 56:8-56(c) (West 1991); N.J. STAT. ANN. § 56:8-59 (West 1991); N.J. STAT. ANN. § 56:8-78 (West 1995); N.J. STAT. ANN. § 56:8-89 (West 1998); N.J. STAT. ANN. § 56:8-97 (West 1999); N.J. STAT. ANN. § 56:8-111 (West 2002); N.J. STAT. ANN. § 56:8-118 (West 2003); N.J. STAT. ANN. § 56:8-134 (West 2003); N.J. STAT. ANN. § 56:8-138.2 (West 2014); N.J. STAT. ANN. § 56:8-147 (West 2004); N.J. STAT. ANN. § 56:8-152 (West 2004); N.J. STAT. ANN. § 56:8-165 (West 2005); N.J. STAT. ANN. § 56:8-174 (West 2007); N.J. STAT. ANN. § 56:8-180 (West 2007); N.J. STAT. ANN. § 56:8-195 (West 2009).

¹⁸⁶ N.J. STAT. ANN. § 56:8-12 (West 1960).

¹⁸⁷ N.J. STAT. ANN. § 56:8-14.5 (West 1995); N.J. STAT. ANN. § 56:8-14.6 (West 1999).

¹⁸⁸ N.J. STAT. ANN. § 56:8-2.4 (West 1973).

2018]

HERO OR VILLAIN

259

- b. Sale, Attempt to Sell or Offer for Sale of Merchandise Without Tag or Label with Selling Price.¹⁸⁹
- c. Copy of Transaction or Contract; Provision to Customer.¹⁹⁰
- d. “Going Out of Business Sale”; Time Limits.¹⁹¹
- e. Refund Policy Disclosure Act.¹⁹²
- f. Solicitation of Used Goods or Wares by Profit-Making Enterprise; Disclosures.¹⁹³
- g. Misrepresentation of Geographic Origin or Location of Merchandise.¹⁹⁴
- h. Raincheck Policy Disclosure Act.¹⁹⁵
- i. Unit Price Disclosure Act.¹⁹⁶
- j. Resale of Tickets.¹⁹⁷
- k. Health Clubs.¹⁹⁸
- l. Child Product Safety.¹⁹⁹
- m. Information Services.²⁰⁰
- n. Change in Telecommunications Services Providers.²⁰¹
- o. Pet Purchase Protection Act.²⁰²
- p. Unlawful Selling of Certain Merchandise at Excessive Price During a State of Emergency.²⁰³

¹⁸⁹ N.J. STAT. ANN. § 56:8-2.5 (West 1973); N.J. STAT. ANN. § 56:8-2.6 (West 1973).

¹⁹⁰ N.J. STAT. ANN. § 56:8-2.22 (West 1982).

¹⁹¹ N.J. STAT. ANN. § 56:8-2.8 (West 1979).

¹⁹² N.J. STAT. ANN. §§ 56:8-2.14 to 56:8-2.21 (West 1982).

¹⁹³ N.J. STAT. ANN. § 56:8-2.23 (West 1985).

¹⁹⁴ N.J. STAT. ANN. § 56:8-2.25 (West 1997).

¹⁹⁵ N.J. STAT. ANN. §§ 56:8-2.28 to 56:8-2.32 (West 2006).

¹⁹⁶ N.J. STAT. ANN. §§ 56:8-21 to 56:8-25 (West 1975).

¹⁹⁷ N.J. STAT. ANN. §§ 56:8-26 to 56:8-38 (West 2008).

¹⁹⁸ N.J. STAT. ANN. §§ 56:8-39 to 56:8-48 (West 1987).

¹⁹⁹ N.J. STAT. ANN. §§ 56:8-49 to 56:8-53.5 (West 1991).

²⁰⁰ N.J. STAT. ANN. §§ 56:8-54 to 56:8-60 (West 1991).

²⁰¹ N.J. STAT. ANN. §§ 56:8-86 to 56:8-91 (West 1998).

²⁰² N.J. STAT. ANN. §§ 56:8-92 to 56:8-97 (West 1999).

²⁰³ N.J. STAT. ANN. §§ 56:8-107 to 56:8-109 (West 2001).

- q. Gift Certificate or Card; Value; Expiration; Dormancy Fee; Balance Under Five Dollars; Penalty.²⁰⁴
- r. Prepaid Calling Cards and Services.²⁰⁵

3. Food and Drugs

- a. Sale of Non-Prescription Drugs, Infant Formula and Baby Food Beyond Expiration Date.²⁰⁶
- b. Halal Food Consumer Protection Act.²⁰⁷
- c. Kosher Food Consumer Protection Act.²⁰⁸
- d. Misrepresentation of Identity of Food in Menus or Advertisements of Eating Establishments.²⁰⁹
- e. Unsolicited Credit Cards and Checks.²¹⁰

4. Cars

- a. Sale of Used Cars.²¹¹
- b. Motor Vehicle Window Tinting.²¹²
- c. Sale of Vehicle Protection Product Warranties.²¹³

5. Construction

- a. Contractors' Registration Act.²¹⁴
- b. Contractors' Contracts; Required Terms and Conditions.²¹⁵

6. Employment and Conditions of

- a. Temporary Help Services.²¹⁶

²⁰⁴ N.J. STAT. ANN. §§ 56:8-110 to 56:8-112 (West 2012).

²⁰⁵ N.J. STAT. ANN. §§ 56:8-175 to 56:8-181 (West 2007).

²⁰⁶ N.J. STAT. ANN. § 56:8-2.27 (West 1998).

²⁰⁷ N.J. STAT. ANN. §§ 56:8-98 to 56:8-103 (West 2000).

²⁰⁸ N.J. STAT. ANN. §§ 56:8-61 to 56:8-66 (West 1994).

²⁰⁹ N.J. STAT. ANN. §§ 56:8-2.9 to 56:8-2.12 (West 1979).

²¹⁰ N.J. STAT. ANN. §§ 56:8-153 to 56:8-156 (West 2004).

²¹¹ N.J. STAT. ANN. §§ 56:8-67 to 56:8-80 (West 1997).

²¹² N.J. STAT. ANN. § 56:8-117 (West 2003); N.J. STAT. ANN. § 56:8-118 (West 2003).

²¹³ N.J. STAT. ANN. § 56:8-167 (West 2007).

²¹⁴ N.J. STAT. ANN. §§ 56:8-136 to N.J. STAT. ANN. § 56:8-152 (West 2004).

²¹⁵ *Id.*

²¹⁶ N.J. STAT. ANN. §§ 56:8-1.1 to N.J. STAT. ANN. § 56:8.2 (West 2007).

2018]

HERO OR VILLAIN

261

- b. International Labor Matching.²¹⁷
- c. Industrial Hygienist Truth in Advertising Act.²¹⁸
- d. Exemption from Consumer Fraud Law, Certain Real Estate Licensees.²¹⁹

7. Fraudulent and Unlawful Practices

- a. Operation Simulating Governmental Agency as Unlawful Practice.²²⁰
- b. Scheme to Not Sell Item or Service Advertised.²²¹
- c. Notification to Person that He Has Won Prize and Requiring Him to Perform Act.²²²
- d. Solicitation of Funds or Contributions, or Sale or Offer for Sale of Goods or Services Under False Representation of Solicitation for Charitable or Nonprofit Organization or of Benefit for Handicapped Persons.²²³
- e. Senior Citizens; Home Solicitation for Certain Loans Prohibited.²²⁴
- f. Safety Professional Truth in Advertising Act.²²⁵
- g. Telemarketing Calls.²²⁶
- h. Unsolicited Advertisements Over Telephone Lines.²²⁷

²¹⁷ N.J. STAT. ANN. §§ 56:8-185 to N.J. STAT. ANN. § 56:8-195 (West 2009).

²¹⁸ N.J. STAT. ANN. §§ 56:8-81 to N.J. STAT. ANN. § 56:8-85 (West 1996).

²¹⁹ N.J. STAT. ANN. § 56:8-19.1 (West 2004).

²²⁰ N.J. STAT. ANN. § 56:8-2.1 (West 1968).

²²¹ N.J. STAT. ANN. § 56:8-2.2 (West 1969).

²²² N.J. STAT. ANN. § 56:8.2.3 (West 1969).

²²³ N.J. STAT. ANN. § 56:8-2.7 (West 2017).

²²⁴ N.J. STAT. ANN. §§ 56:8-104 to 56:8-106 (West 2000).

²²⁵ N.J. STAT. ANN. §§ 56:8-113 to 56:8-116 (West 2002).

²²⁶ N.J. STAT. ANN. §§ 56:8-119 to 56:8-135 (West 2003).

²²⁷ N.J. STAT. ANN. §§ 56:8-157 to 56:8-160 (West 2005).

- i. Security of Personal Information.²²⁸
- j. Internet Dating Safety Act.²²⁹

The proposed structural reorganization would clarify and simplify the Act making it easier for practitioners and laypersons to navigate and understand.

B. Substantive Changes to the Act

New Jersey's case law pertaining to the NJCFA navigates the broad concepts set forth in the Act. In the absence of an extensive legislative history,²³⁰ the judiciary has been called upon to interpret significant aspects of the Act, including: pre-suit demand for a refund; the extraterritorial application of the Act to nationwide class actions; fee-shifting for technical violations;²³¹ and mandatory treble damages.²³² Recently, legislation has been introduced in an effort to amend or codify the aforementioned issues.²³³

Over the past several years, bills regarding the Consumer Fraud Act have been introduced in the Legislature. The bills identified in this Article that were introduced in prior legislative sessions have not yet moved through the legislative process nor have they been enacted. The bills introduced in the 2018-2019 legislative session have not had the opportunity to move through the process as of publication. As a result, although the Commission does not generally work in areas that are a current focus of the Legislature, the fact that the legislative proposals currently under consideration do not comprehensively address all the issues the NJLRC has reviewed means that the NJLRC has continued to work in the area of consumer fraud with the expectation of furnishing a "Final Report" to the Legislature, that supplements and supports the work being done by that august body.

²²⁸ N.J. STAT. ANN. §§ 56:8-161 to 56:8-166 (West 2006).

²²⁹ N.J. STAT. ANN. §§ 56:8-168 to 56:8-174 (West 2007).

²³⁰ *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 471 (N.J. Super. Ct. App. Div. 1982).

²³¹ *B.J.M. Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513, 517 (N.J. Super. Ct. App. Div. 1996).

²³² N.J.S.A. 56:8-19 (2016).

²³³ Assemb. 303, 218th Leg., 1st Sess. (N.J. 2018); *see also* Assemb. 1556, 218th Leg., 1st Sess. (N.J. 2018) (discussing proposed revisions to regarding the pre-suit demand requirement under certain circumstances).

C. Plaintiff's Pre-Suit Demand

In *Bosland v. Warnock Dodge, Inc.*²³⁴ a consumer purchased a vehicle from an automobile dealer. At the time of her purchase, the buyer was unaware that the seller had included undisclosed service fees in her registration paperwork.²³⁵ Rather than seek a refund of these fees, the buyer filed a complaint against the defendant and alleged a violation of the Consumer Fraud Act.²³⁶ In dismissing the plaintiff's complaint, the trial court found that "she never complained about these charges . . . [and] these fees were Defendant['s] profit . . . paid without objection."²³⁷ The Appellate Division disagreed with the lower court's dismissal of the plaintiff's cause of action and explicitly rejected the premise that a pre-suit demand was required in order to sustain an action under the NJCFA.²³⁸ The defendant's petition for certification, on the issue of whether a pre-suit demand was an essential prerequisite for a CFA claim was granted by the New Jersey Supreme Court.²³⁹

In reviewing this matter, the Court examined the plain language of the Consumer Fraud Act.²⁴⁰ The Court explicitly found that: "[t]he plain language of the CFA [did] not . . . impose upon any putative plaintiff the requirement that he or she first seek a remedy directly from the offending merchant." Rather, "any person who suffers an ascertainable loss" resulting from a defendant's violation of the CFA may file an action.²⁴¹ The Court went on to find that reading a pre-suit demand requirement into the Act could conceivably "permit practices that the statute was designed to deter . . . to continue unabated and unpunished."²⁴² Given the clear legislative intent to "empower consumers to seek to secure relief for themselves and for others who may not be aware that they have been victimized," the court refused to adopt this requirement.²⁴³

The Court acknowledged that it could imagine circumstances in which a pre-suit demand for relief might be appropriate.²⁴⁴ Unwavering in its holding, the Court explained that "the language and intent of the

²³⁴ *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 543 (2009).

²³⁵ *Id.* at 548.

²³⁶ *Id.*

²³⁷ *Id.* at 549.

²³⁸ *Id.* at 550.

²³⁹ *Id.*

²⁴⁰ *Bosland*, 197 N.J. at 557.

²⁴¹ *Id.*

²⁴² *Id.* at 561.

²⁴³ *Id.*

²⁴⁴ *Id.* at 562.

statute are clear . . . its purposes are plain” and that the requirement of a pre-suit demand for relief, “call[s] for an examination and weighing of public policy considerations not within the language of the CFA itself.”²⁴⁵ In affirming the decision of the Appellate Court, the Supreme Court advised the defendants that the requirement of a pre-suit demand for a refund involved, “an examination and a weighing of public policy considerations that . . . are [reserved] for the Legislature.”²⁴⁶ Such a consideration follows.

It appears that, after examining the subject matter and weighing the public policy considerations set forth in *Bosland*, Assembly Bills A303²⁴⁷ and A1556²⁴⁸ were pre-filed for introduction during the 2018-2019 legislative session. Each bill seeks to amend N.J. Rev. Stat. § 56:8-19. Although these two bills vary slightly in their approach, both require an aggrieved consumer issue a pre-suit demand for a refund upon the seller. These bills seek to avoid the use of the NJCFA to punish merchants for accidental violations of the Act or honest mistakes made during the course of a consumer transaction. Furthermore, the requirement that a plaintiff file a pre-suit demand for relief appears to be consistent with New Jersey’s long-standing policy requiring plaintiffs to seek “mitigation” in all cases involving claims for damages.²⁴⁹

D. “Only In New Jersey”

As a state with some of the strongest remedies for consumers, the possibility exists that out-of-state litigants may wish to avail themselves of New Jersey’s Consumer Protection statutes.²⁵⁰ The traditional rule is that litigation is conducted on behalf of the individual named parties

²⁴⁵ *Id.*

²⁴⁶ *Bosland*, 197 N.J. at 562.

²⁴⁷ Assemb. 303, 218th Leg., 1st Sess. (N.J. 2018).

²⁴⁸ Assemb. 1556, 218th Leg., 1st Sess. (N.J. 2018).

²⁴⁹ See, e.g., *State by Comm’r of Transp. v. Weiswasser*, 149 N.J. 320 (1997) (finding condemnee seeking severance damages in partial-taking condemnation action has duty to mitigate those damages); *Martin Marietta Corp. v. New Jersey Nat’l Bank*, 653 F.2d 779 (3d Cir. 1981) (remanding an action against bank for wrongful conversion of sand to determine whether buyer reasonably discharged their duty to mitigate damages under New Jersey law for lost profits); *Fanarjian v. Moskowitz*, 237 N.J. Super. 395 (N.J. Super. Ct. App. Div. 1989) (stating commercial landlords have duty to mitigate damages.); *Frank Stamato & Co. v. Borough of Lodi*, 4 N.J. 14, 21 (1950) (involving the requirement to mitigate damages in a contract action); *Ostrowski v. Azzara*, 111 N.J. 429, 437 (1988) (analyzing the mitigation of damages in a tort action); *Covino v. Peck*, 233 N.J. Super. 612, 616 (N.J. Super. Ct. App. Div. 1989); *Stark v. Nat’l Research and Design Corp.*, 33 N.J. Super. 315, 323 (N.J. Super. Ct. App. Div. 1954) (illustrating breach of an agreement for assignment of lease of business premises).

²⁵⁰ See *Shepherd*, *supra* note 7, at 18.

only.²⁵¹ If, however, a litigant believes that his or her claim against a corporation is too small or the expense of prosecuting such a claim is too large, they may seek to initiate class action litigation.²⁵² If specific requirements are met,²⁵³ a trial court may certify a class action in order to equalize the ability of the claimants to, “prepare and pay for the advocacy of their rights.”²⁵⁴ To the consternation of the business community, New Jersey courts have determined that class actions are one mechanism that a plaintiff may employ in order to litigate consumer fraud actions.²⁵⁵

In *International Union of Operating Engineers Local No. 68 v. Merck & Co., Inc.*, the New Jersey Supreme Court found that the frequency of nationwide class certification is rare.²⁵⁶ The scrutiny that potential plaintiffs are required to undergo in order to be certified as a nationwide class frequently results in the denial of class certification.²⁵⁷ The Court also noted that, “[the] application of the law of a single state to all members of such a class is even more rare.”²⁵⁸ Under the right circumstances, however, the possibility remains that the size of a class could be expanded to include non-New Jersey residents whenever a New Jersey corporation is a defendant.

In an attempt to narrow the use of the New Jersey Consumer Fraud Act by out-of-state litigants or nationwide classes, legislation has been introduced that would limit the Act solely to New Jersey residents.²⁵⁹ Under the proposed legislation, the New Jersey Consumer Fraud Act would “apply only to New Jersey residents, or to transactions that take place in the State.”²⁶⁰ Clarifying the extraterritorial application of the NJCFA would make it clear that the purpose of the Act is to protect New Jersey consumers.²⁶¹ The proposed legislation would not, however,

²⁵¹ Dugan v. TGI Fridays, Inc., 231 N.J. 24, 46 (2017).

²⁵² *Id.* at 46; *see* Frink v. Ricoh Corp., 365 N.J. Super. 520, 520 (N.J. Super. Ct. Law Div. 2003).

²⁵³ A discussion of the requirements necessary to certify a class action are beyond the scope of this note. *See* N.J. STAT. ANN. § 4:32-1(a); *see generally* PAUL DEPETRIS, N.J. CONSUMER FRAUD ACT & FORMS 1 (2017) (discussing class actions in the context of the Consumer Fraud Act).

²⁵⁴ *Frink*, 365 N.J. Super. at 537.

²⁵⁵ *Id.*

²⁵⁶ *Int’l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.* 192 N.J. 372, 394 n.3 (2007).

²⁵⁷ *See id.* Beegal v. Park West Gallery, 394 N.J. Super. 98, 98 (N.J. Super. Ct. App. Div. 2007); Hannan v. Weichert South Jersey, No. A-5525-05T5, 2007 N.J. Super. Unpub. LEXIS 1238, at *35-36 (N.J. Super. Ct. App. Div. April 17, 2007).

²⁵⁸ *Id.*

²⁵⁹ Assemb. 303, 218th Leg., 1st Sess., at § 2 (N.J. 2018).

²⁶⁰ *Id.*

²⁶¹ *See* Shepherd, *supra* note 7, at 18.

eliminate an out-of-state consumer's cause of action, in either contract or tort, against a New Jersey based company.

E. Treble Damages; Fee Awards For Technical Violations.

i. Treble Damages

Since 1971, individual consumers have been permitted to bring private actions to recover refunds and treble damages for violations of the New Jersey Consumer Fraud Act.²⁶² To be eligible to collect treble damages, a plaintiff must prove that the defendant's conduct was unlawful and demonstrate an ascertainable loss.²⁶³ In addition, the claimant must also establish "a causal relationship between the unlawful conduct and the ascertainable loss."²⁶⁴ If a plaintiff is successful in proving all three of the aforementioned elements then the award of legal and/or equitable relief, treble damages and reasonable attorney's fees are mandatory.²⁶⁵ For the purpose of imposing treble damages, the NJCFA does not discriminate between a nefarious merchant and one who was acting in good faith with no intent to defraud a consumer.

ii. Technical Violations

In New Jersey, if a consumer-fraud plaintiff is able to prove both an unlawful practice under the NJCFA and an ascertainable loss then an award of treble damages and attorneys' fees is mandatory under N.J. Rev. Stat. § 56:8-19.²⁶⁶ The compulsory language of the statute would be tested in a case involving a "technical" violation of the New Jersey Consumer Fraud Act.

The defendant in *BJM Insulation & Construction, Inc. v. Evans*,²⁶⁷ having been sued for an alleged breach of a home repair contract, denied the allegations and interposed a defense that the plaintiff had, among other things, violated the Consumer Fraud Act.²⁶⁸ After completing discovery, the defendant successfully moved for summary judgment.²⁶⁹ The trial court judge noted in the order of dismissal that the

²⁶² Dugan v. TGI Fridays, Inc., 231 N.J. 24, 50-51 (2017).

²⁶³ *Id.* at 52.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 80.

²⁶⁶ *BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513, 513 (N.J. Super. Ct. App. Div. 1996) (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994)).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 515.

²⁶⁹ *Id.*

2018]

HERO OR VILLAIN

267

plaintiff had violated the provisions of the CFA.²⁷⁰ The trial court, however, denied the defendant's request for attorneys' fees and costs.²⁷¹ The defendant appealed this decision.²⁷²

The Appellate Division held, ". . . the question of whether a trial judge has the discretion to deny counsel fees to a successful claimant of Consumer Fraud Act protection is no longer an open one."²⁷³ The Court made it clear that if a consumer-fraud plaintiff is able to prove both an unlawful practice under the NJCFA and an ascertainable loss then an award of attorneys' fees is mandatory under N.J. Rev. Stat. § 56:8-19.²⁷⁴ Finding that reasonable counsel fees serve as a financial obligation owed by a claimant, the Court rejected the plaintiff's argument suggesting that a separate, "ascertainable loss" must be proffered before one could recoup counsel fees and costs.²⁷⁵ The Court reasoned that, ". . . the plain sense of the Act . . . [is] to ensure that the financial burden to one who claims the Act's protection is minimized"²⁷⁶

Finally, the Court addressed the plaintiff's argument that any transgression of the Act should be forgiven because it was merely a "technical" violation.²⁷⁷ To this request for leniency, the Court could only find one answer, ". . . the Consumer Fraud Act [would make] no distinction between 'technical' violations and more 'substantive' ones."²⁷⁸ A dispensation for technical violations of the Act would require legislative intervention.

Assembly Bill A303 has been introduced to the Legislature to address the mandatory imposition of treble damages and attorneys' fees against merchants whose alleged violation of the Act is technical in nature. If enacted, this legislation would effectively amend N.J. Rev. Stat. § 56:8-19 to leave the imposition of treble damages against a vendor to the discretion of the trial court judge. The relevant portion of the statute would be amended to read:

In any action under this section, the court may, in addition to any other appropriate legal or equitable relief, award up to threefold the actual damages sustained by any person in interest.²⁷⁹

²⁷⁰ *Id.*

²⁷¹ *BJM Insulation & Constr., Inc.*, 287 N.J. Super. at 513.

²⁷² *Id.*

²⁷³ *Id.* (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994)).

²⁷⁴ *Id.* at 516.

²⁷⁵ *Id.* at 517.

²⁷⁶ *Id.*

²⁷⁷ *BJM Insulation & Constr.*, 287 N.J. Super. at 517.

²⁷⁸ *Id.* at 518.

²⁷⁹ Assemb. 303, 218th Leg., 1st Sess., at § 7(a) (N.J. 2018). The italicized text represents the proposed changes to the statute.

In addition, subsection c.1 of this bill provides:

Notwithstanding the provisions of subsection a. of this section, attorneys' fees, filing fees, and reasonable costs of suit shall not be awarded for a technical violation of P.L. 196, c.39 (C.56:8-1 et seq.).

In order to be exonerated for a "technical violation" of the Act, the merchant must have been acting in "good faith" and with "no intent to defraud the consumer."²⁸⁰ In addition, the violation must neither impact the quality of the product nor service provided,²⁸¹ nor result in an ascertainable loss to the person.²⁸² The proposed legislation appears to provide those who technically violate the NJCFA with the dispensation denied to the plaintiff in *BJM Insulation & Construction, Inc. v. Evans*.

Since the Commission has not yet completed its process in this area of the law and has not issued a formal recommendation regarding modifications to the New Jersey Consumer Fraud Act it will continue to monitor the pending legislation and engage in outreach to the stakeholders and scholars in this area in order to provide support to the Legislature.

IV. CONCLUSION

The interactions between consumers and merchants that were once parochial and familiar have become more cosmopolitan and impersonal. Over time, the bedrock legal principle of *caveat emptor* began to crumble with the collective realization that innocent people deserved to be protected from the "thieves, forgers and rapscallions"²⁸³ among us.

Forged from the irons of the American Industrial Revolution, the federal government established the Federal Trade Commission. In the years that followed, the F.T.C. would come to protect consumers from deceptive practices and acts in commerce. By 1960, New Jersey recognized the necessity of defending its own citizenry from the predatory practices of unscrupulous merchants. Thereafter, and for over a decade, the Attorney General emerged as an individual anointed by the Legislature to shield consumers from harm. This "army of one" would soon be joined by legions of "private attorneys general" each of whom would come armed with the sword of mandatory treble damages and attorneys' fees.

²⁸⁰ *Id.* at § 7(c)(2).

²⁸¹ *Id.* at § 7(c)(2)(a).

²⁸² *Id.* at § 7(c)(2)(b).

²⁸³ CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Representative Farnsworth).

2018]

HERO OR VILLAIN

269

A hero is “a [person] admired for [their] achievements and noble qualities and considered a model or ideal.”²⁸⁴ With the advent of modern consumer protection laws, the marketplace now contains two powerful factions—merchants and consumers. For some, the New Jersey Consumer Fraud Act is lauded as the hero of the consumer protection movement. For others, it is the villain of all commercial enterprises. The answer to the question of whether the New Jersey Consumer Fraud Act is a “hero” or a “villain” is clear to those who champion a specific interest. For those in the middle, the question will remain as difficult to answer as which superheroes are better “Marvel or DC?”

²⁸⁴ *Hero*, MERRIAM-WEBSTER DICTIONARY (3d ed. 1986).