

HOW EXTRATERRITORIAL APPLICATION OF THE NEW JERSEY CONSUMER FRAUD ACT AND OPIOID LITIGATION WILL FUEL THE ADDICTION TO CONSUMER FRAUD CLAIMS IN NEW JERSEY

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I. INTRODUCTION.....	109
II. AN OVERVIEW OF THE NEW JERSEY CONSUMER FRAUD ACT.....	113
A. The Act's Legislative History	113
B. The Act's Provisions	115
III. HOW THE NJCFA DIFFERS FROM OTHER STATE CONSUMER FRAUD ACTS.....	118
A. Mandatory Treble Damages and Attorneys' Fees Without Proof of Ascertainable Loss.....	118
B. International Union v. Merck and Potential for Nationwide Application of the NJCFA	118
IV. THE NEED TO AMEND THE NJCFA WHEN CONSIDERING THE RAMIFICATIONS OF OPIOID LITIGATION	124
A. The Opioid Epidemic and Related Litigation	124
B. The Potential Impact of Opioid Litigation on New Jersey's Pharmaceutical Industry and Judicial System	127
C. The Need for an Amendment to Prevent Consumer Fraud Claims by Non-Residents for Out-of-State Transactions.....	132
V. CONCLUSION	134

I. INTRODUCTION

Before the inception of consumer protection laws, the cornerstone of common-law consumer protection litigation was *caveat emptor*—"let the buyer beware."¹ Under this standard, aggrieved consumers were forced to rely on common-law fraud claims when seeking relief for any

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¹ Joanna Shepherd, *The Expansion of New Jersey's Consumer Fraud Act: Causes and Consequences*, THE AMERICAN NEW JERSEY CIVIL JUSTICE INSTITUTE, http://www.civiljusticenj.org/wpcontent/uploads/2014/09/14Oct_Shepherd_TheExpansionOfNJCFACausesAndConsequences.pdf (last visited Nov. 19, 2018).

misrepresentations regarding the nature or quality of goods they purchased.² While common-law fraud claims theoretically provided consumers an avenue for redress, the requirements to obtain such relief created a strenuous uphill battle for plaintiffs.³

The common-law fraud requirements reflected “assumptions about the symmetry of the consumer-merchant relationship.”⁴ It was assumed that consumers and merchants had equal bargaining power and were on a level playing field.⁵ These assumptions, however, were undermined at the turn of the twentieth century, when the scales began to tip in favor of sellers.⁶ The growing complexity of consumer products left buyers unable to determine the quality and nature of the products they were purchasing.⁷ Conversely, sellers became larger, more sophisticated, and further removed from their consumers.⁸ This changing relationship between manufacturers and consumers created a belief among the general public that manufacturers, who were now dealing with product disputes internally, were escaping liability for unfair practices.⁹

Seeking to address the growing power imbalance between consumers and sellers, Congress enacted the Federal Trade Commission Act (“FTC Act”) in 1914.¹⁰ The FTC Act created the Federal Trade Commission (“FTC” or the “Commission”) and gave the FTC the power to define what constitutes an “unfair or deceptive act or practice” in or affecting commerce.¹¹ Additionally, the FTC Act gave the FTC the authority to protect consumers against such unfair or deceptive acts or practices.¹² Recognizing that “unfair and deceptive acts or practices” could include a wide variety of commercial dealings, Congress limited the law’s enforcement by: (1) allowing only the FTC to sue under the FTC Act, and (2) limiting the FTC’s relief to injunctive relief.¹³ While the FTC Act was initially well-received, it was soon viewed as ineffective due to political

² *Id.* (stating that “[c]ontract and tort law provided some remedies for major breaches of the merchant-consumer relationship, with aggrieved consumers resorting to fraud claims for misrepresentations as to the nature or quality of purchased goods for single transactions.”).

³ *Id.* (requiring that common-law fraud claims are: “an intentional misstatement of fact delivered with the purpose of deceiving the victim, the victim’s justified reliance, and demonstrable damages . . .”).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 4.

⁷ Shepherd, *supra* note 1, at 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² *Id.* (internal citations omitted).

¹³ Shepherd, *supra* note 1, at 5.

influence, mismanagement, lack of direction, and confusion regarding the Commission's consumer protection mission.¹⁴ In response, several states adopted their own consumer protection laws in the 1960s and 1970s.¹⁵

New Jersey enacted one of the first state consumer fraud statutes in the nation.¹⁶ In 1960, the New Jersey Legislature passed the New Jersey Consumer Fraud Act (the "NJCFA" or the "Act"), which prohibited "fraud, deception, false promises, and similar misrepresentations or omissions."¹⁷ The NJCFA allowed the state Attorney General to "investigate unlawful practices and seek injunctions and restitutions for violations of the consumer fraud statute."¹⁸ In 1971, the New Jersey Legislature amended the NJCFA, adding provisions allowing for private causes of action by individual consumers, and mandating treble damages against parties found in violation of the Act.¹⁹

Following its 1971 amendment, the NJCFA gained a reputation as one of the strongest consumer protection statutes in the United States.²⁰ Liberal interpretations of the NJCFA by New Jersey state courts strengthened and broadened the application of the Act's provisions.²¹ This broad application of the Act has been criticized by many in the legal community, who view it as an invitation to bring excessive, and sometimes frivolous, litigation into the state's courts.²² Critics of the Act asserted that New Jersey's judiciary interpreted the Act to apply outside of the state.²³ "Many New Jersey courts have ruled that the [NJ]CFA affords a claim to residents of other states, for transactions occurring in other states, simply because the defendant is headquartered in New Jersey."²⁴ This interpretation of the Act has been criticized because it allows a statute intended to protect New Jersey consumers to instead benefit out-of-state consumers and lawyers "at the expense of New Jersey businesses and employees."²⁵

¹⁴ *Id.* (citing Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 47 n.1 (1969)).

¹⁵ *Id.* at 5–6.

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 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, 197 (2004) (citing *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (1999)).

²⁰ *Id.* at 194 (citing Press Release, Governor William T. Cahill, Assembly Bill No. 2402 (June 29, 1971)).

²¹ *Weinberg v. Sprint Corp.*, 173 N.J. 233, 257 (2002) (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994)).

²² Shepherd, *supra* note 1, at 11.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Interpreting the NJCFA to apply nationwide has created a loophole that upsets the statute's balance of "consumer-protecting benefits" against "commerce-restraining costs."²⁶ In 2010, the New Jersey Legislature recognized the need to close this loophole and proposed an amendment to the Act.²⁷ The amendment would have placed "jurisdictional limits on the events giving rise to claims that consumers can bring under the [A]ct."²⁸ It would have also "narrow[ed] the statute's application to only those claims arising out of transactions that occurred in [the] state."²⁹ However, both proposed amendments, N.J. A.B. 3333 and N.J. S.B. 2855, progressed no further than introduction to the Assembly Committee on Consumer Affairs and the Senate Committee on Commerce, respectively.³⁰ Thereafter, neither bill was ever voted on.³¹

However, in the Legislature's 2018 session, a similar bill, N.J. A.B. 303, proposed to, among other things, amend the Act and limit individual causes of action solely to New Jersey residents.³² This bill would limit application of the NJCFA "only to New Jersey residents, or to transactions that take place in the State."³³

This note will discuss why the Legislature's newly-proposed amendment to the NJCFA should be signed into law. The proposed amendment would prevent out-of-state residents from filing claims against companies headquartered in New Jersey for transactions occurring outside the state. Such an amendment is needed now more than ever, with consumer fraud litigation related to the sale of prescription opioids increasing across the country.³⁴ Without the protection of an amendment to the NJCFA, such litigation would be especially problematic in New Jersey, the epicenter of the global pharmaceutical industry.³⁵

Part II of this note will examine the NJCFA: discuss its legislative

²⁶ *Id.*

²⁷ Lisa Ann T. Ruggiero & Erica R. Stein, *N.J.'s Consumer Fraud Act: A Runaway Train*, N.J.L.J. (June 8, 2011), <https://www.law.com/njlawjournal/almID/1202496524907/?sreturn=20171010164657>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ A.B. 3333, 2010 Leg., 214th Gen. Assemb., Reg. Sess. (N.J. 2010); S.B. 2855, 2010 Leg., 214th Gen. Assemb., Reg. Sess. (N.J. 2010).

³¹ A.B. 3333, 2010 Leg., 214th Gen. Assemb., Reg. Sess. (N.J. 2010); S.B. 2855, 2010 Leg., 214th Gen. Assemb., Reg. Sess. (N.J. 2010).

³² A.B. 303, 2018 Leg., 218th Gen. Assemb. Reg. Sess. (N.J. 2018).

³³ *Id.*

³⁴ David Schwartz, David Talarico & Giovanni Ciavarrà, *Opioid Litigation: What's On The Horizon*, LAW360 (Aug. 17, 2017), <https://www.law360.com/articles/955070/opioid-litigation-what-s-on-the-horizon>.

³⁵ *NJ & Pharmaceuticals: New Jersey Leads the World*, NEW JERSEY BUSINESS ACTION CENTER (Sept. 22, 2017), <https://www.nj.gov/njbusiness/documents/industry/Pharma.pdf>.

history, specific provisions, available damages, and the requirements for private causes of action by consumers. Part III will discuss the provisions that differentiate the NJCFA from other state consumer fraud acts, and decisions by New Jersey courts that have applied the NJCFA extraterritorially. Part IV will explore the potential ramifications that nationwide application of the Act would have on the state's pharmaceutical industry and judicial system, given the current increase in opioid litigation. It will also argue why an amendment restricting consumer fraud claims to transactions occurring in the state is necessary considering the aforementioned concerns.

II. AN OVERVIEW OF THE NEW JERSEY CONSUMER FRAUD ACT

A. The Act's Legislative History

In 1960, the New Jersey Legislature first passed the NJCFA.³⁶ The Legislature's intent in passing the Act was "to address sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive, or other similar kinds of selling or advertising practices."³⁷ At its inception, only the state Attorney General could enforce the Act.³⁸ "The original Act gave the Attorney General the exclusive authority to investigate unlawful practices and to obtain injunctions against any persons engaging in, or about to engage in, unlawful practices and to seek restitution *parens patriae* for those individuals harmed by the unlawful acts."³⁹

Eleven years later, the Legislature amended the Act, and transformed it into one of the most consumer-friendly fraud protection statutes in the country.⁴⁰ The most significant changes of the 1971 amendment were provisions that: (1) allowed individual consumers to bring private causes of action, and (2) instituted mandatory treble damages.⁴¹ Private causes of action allowed victims of consumer fraud to be compensated for the losses they suffered, which meant that aggrieved consumers would no longer need

³⁶ Trembly & Bevacqua, *supra* note 19, at 196.

³⁷ *Id.* (citing *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 271 (1978)).

³⁸ *Id.* (citing *Daaleman*, 77 N.J. at 271) (emphasis added)).

³⁹ Shepherd, *supra* note 1, at 9; see also Richard C. Ausness, *Prescription Drug Abuse: The Law's Struggle to Address an Epidemic: The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1146 (2014) ("In a *parens patriae* action, the state contends that it has standing to sue to protect its 'quasi-sovereign' interests. A quasi-sovereign interest is one that is distinct from the interests of particular parties and includes such things as an interest in the health and well-being—both physical and economic—of its residents in general.") (internal quotations omitted).

⁴⁰ Trembly & Bevacqua, *supra* note 19, at 196.

⁴¹ *Id.* (citing N.J. STAT. ANN. §§ 56:8-2.11–2.12 (West 2004)).

to rely solely on the Attorney General for relief.⁴² Treble damages were also now available to punish the perpetrators of fraud and prevent them from engaging in further fraudulent behavior.⁴³ It was thought that treble damages would benefit injured consumers by making consumer fraud cases more attractive for attorneys to take on.⁴⁴

Notably, there are fundamental differences between actions brought by the Attorney General and private actions brought by injured consumers.⁴⁵ For one, in private actions, plaintiffs have a greater burden to show that they have standing.⁴⁶ Consumers must show an “ascertainable loss” of money or property to have standing to bring a consumer fraud action.⁴⁷ Conversely, the Attorney General can sue for purely injunctive relief, bringing suit to enjoin the offender from going forward in violation of law.⁴⁸

Concerning violations, a seller violates the NJCFA when it commits an “unlawful practice” against a consumer.⁴⁹ The Act explicitly defines what an unlawful practice is and indicates that there are several ways in which a seller can commit an unlawful practice.⁵⁰ For example, it is an unlawful practice for someone to operate under a name or in a manner which would lead a consumer to believe they are affiliated “with a department or agency of the federal or state government” when, in reality, no such affiliation exists.⁵¹ Unlawful practices can also be committed in other ways, including mislabeling Kosher foods or making improper representations regarding used cars.⁵²

The 1971 amendment expanded the scope of what constitutes an “unlawful practice” to include “unconscionable commercial practices.”⁵³ While “unconscionable commercial practices” are not defined in the Act, New Jersey Supreme Court jurisprudence defined it as “an amorphous

⁴² *Id.* at 197 (citing *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (1999)).

⁴³ *Id.*; see also *Damages*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “treble damages” as “[d]amages that, by statute, are three times the amount of actual damages that the fact-finder is owed.”).

⁴⁴ Trembly & Bevacqua, *supra* note 19, at 197.

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *Weinberg v. Sprint Corp.*, 173 N.J. 233, 257 (2002)).

⁴⁷ *Id.*; see also *Thiedemann v. Mercedes-Benz, USA, LLC.*, 183 N.J. 234, 248 (2005) (defining “ascertainable loss” as the type of damage that can be quantified or measured).

⁴⁸ Trembly & Bevacqua, *supra* note 19, at 197; see also *Injunction*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “injunction” as “[a] court order commanding or preventing an action.”).

⁴⁹ Trembly & Bevacqua, *supra* note 19, at 197.

⁵⁰ *Id.* at 199.

⁵¹ N.J. STAT. ANN. § 56:8-2.1 (West 2016).

⁵² N.J. STAT. ANN. § 56:8-64 (West 2016); N.J. STAT. ANN. § 56:8-68 (West 2016).

⁵³ *D’Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J. Super. 11, 24 (App. Div. 1985).

concept obviously designed to establish a broad business ethic.”⁵⁴ The New Jersey Supreme Court also interpreted the term “unconscionable” as suggesting a “lack of good faith, honesty in fact, and observance of fair dealing.”⁵⁵ Despite the aforementioned guidance from the state’s judiciary, there are no bright-line rules for when a seller commits an unlawful practice.⁵⁶ Instead, what constitutes an unlawful practice is a fact-sensitive determination that is judged on a case-by-case basis.⁵⁷

B. The Act’s Provisions

The NJCFA applies to “all consumer transactions that involve the sale of consumer merchandise or services generally sold to the public at large.”⁵⁸ The Act forbids the commission of an “unlawful practice,” which is defined as follows:

[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, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived, or damaged thereby is declared to be an unlawful practice . . .⁵⁹

The Act’s terms and purposes were drafted to be intentionally broad in order to encompass a wide scope of activities.⁶⁰ “Merchandise” includes “any objects, wares, goods, commodities, services, or anything offered, directly or indirectly to the public for sale.”⁶¹ A “sale” is defined as “any sale, rental or distribution, offer for sale, rental or distribution or attempt to

⁵⁴ Trembly & Bevacqua, *supra* note 19, at 197 (citing *Kugler v. Romain*, 58 N.J. 522 (1971)).

⁵⁵ *Id.* at 197–98 (citing *Kugler*, 58 N.J. at 543).

⁵⁶ *Id.* at 198.

⁵⁷ *Id.* at 198–200 (“Pursuant to the Act, the Division of Consumer Affairs has enacted extensive regulations to govern many of the practices susceptible to consumer-fraud violations, such as home-improvement contracts. Specific regulations adopted by the Division which govern the conduct of certain businesses include: Deceptive Mail Order Practices; Meat Sales; Banned Hazardous Products; the Delivery of Household Furniture and Furnishings; Merchandise Advertising; Servicing and Repairing of Home Appliances; the Sale of Animals; Unit Pricing of Consumer Commodities in Retail Establishments; Disclosure of Refund Policy in Retail Establishments; Home Improvement Practices; Resale of Entertainment Tickets; Sale of Food Represented as Kosher; Deceptive Practices Concerning Watercraft Repair; Toy and Bicycle Safety; Health Club Services; Motor Vehicle Advertising Practices; Automotive Sales Practices; and Automotive Repairs.”).

⁵⁸ *Id.* at 198–200.

⁵⁹ N.J. Stat. Ann. § 56:8-2 (West 2016).

⁶⁰ Trembly & Bevacqua, *supra* note 19, at 198 (citing *New Mea Constr. Corp. v. Harper*, 203 N.J. Super. 486, 499 (App. Div. 1985)).

⁶¹ *Id.* (citing N.J. STAT. ANN. § 56:8-1(c) (West 2016)).

directly or indirectly sell, rent or distribute.”⁶² “Persons” are “any natural person or any business entity such as partnerships, corporations, companies, associations, etc.”⁶³ At its core, the Act seeks to prohibit fraud.⁶⁴ As they have with the Act’s other terms and provisions, New Jersey’s courts have expansively interpreted the definition of “fraud.”⁶⁵ It is understood to include “any misrepresentation or knowing omission of a material fact regarding the sale of merchandise with the intent that the consumer will rely upon the misrepresentation or omission.”⁶⁶

The Act specifically prohibits unlawful practices and unconscionable commercial practices “in connection with the sale or advertisement of any merchandise or real estate.”⁶⁷ Unlawful practices come in three forms: (1) an affirmative act; (2) a knowing omission; or (3) a violation of an administrative regulation.⁶⁸ Regardless of the type of unlawful practice, the “capacity to mislead” is a central tenet of each action that the court examines.⁶⁹ Notably, only the *potential* for a consumer to be misled is required to find that a seller committed an unlawful practice. There is no requirement that a seller *actually* mislead a consumer.⁷⁰

Unlike the capacity to be misled, the requirement of scienter differs for each type of unlawful practice. “Scienter” is “a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act’s having been done knowingly, especially as a ground for civil damages or criminal punishment.”⁷¹ When a seller’s unlawful practice is an affirmative act, there is no scienter requirement necessary to prove that the seller committed an unlawful practice.⁷² To have a consumer fraud claim, the injured consumer must merely show that he or she sustained an ascertainable loss from the seller’s action.⁷³ However, the scienter requirement is essential for such a claim if the unlawful practice by omission.⁷⁴ To succeed on a claim of unlawful practice by omission, a consumer must show that the seller intentionally made an omission.⁷⁵

⁶² *Id.* (citing N.J. STAT. ANN. § 56:8-1(e) (West 2016)).

⁶³ *Id.* (citing N.J. STAT. ANN. § 56:8-1(d) (West 2016)).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Trembly & Bevacqua, *supra* note 19, at 198.

⁶⁷ *Id.* (citing N.J. STAT. ANN. § 56:8-2 (West 2016)).

⁶⁸ *Id.* at 199 (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 17 (1994)).

⁶⁹ *Id.* (citing *Cox*, 138 N.J. at 17).

⁷⁰ *Id.* at 199 (citing *Cox*, 138 N.J. at 16).

⁷¹ *Scienter*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁷² Trembly & Bevacqua, *supra* note 19, at 199 (citing *Cox*, 138 N.J. at 17–18).

⁷³ *Id.* (citing *Cox*, 138 N.J. at 17–18).

⁷⁴ *Id.* (citing *Cox*, 138 N.J. at 18).

⁷⁵ *Id.* at 199 (citing *Cox*, 138 N.J. at 18).

Finally, there is no scienter requirement when a seller violates “regulations promulgated by the Attorney General.”⁷⁶ Strict liability also attaches to violations of regulations that the New Jersey Division of Consumer Affairs implements.⁷⁷ Therefore, in the final situation, a consumer must only prove that the seller violated one of these regulations to succeed on a consumer fraud claim.⁷⁸

Once it is determined that a seller committed a consumer fraud violation, the Act lays out specific provisions for damages. The NJCFA provides for both remedial and punitive damages.⁷⁹ Remedial damages are available to compensate the victim for their loss and make them whole again.⁸⁰ Punitive damages, on the other hand, are intended to punish the seller for his or her wrongdoings and deter them from engaging in future deceptive practices.⁸¹ In this domain, the NJCFA allows for the mandatory imposition of payment for treble damages, attorneys’ fees, filing fees, and costs upon parties in violation of the NJCFA.⁸²

Though the NJCFA is regarded as one of the most consumer-friendly consumer fraud statutes nationwide, there are some limitations that preclude consumers from bringing actions under the Act. For one, the Act itself imposes a six-year statute of limitations that prevents consumer suits brought under the NJCFA after the statute has run.⁸³ Additionally, New Jersey’s “Entire Controversy Doctrine” could effectively bar a consumer fraud action under the NJCFA. The “Entire Controversy Doctrine” states that “a party must assert all claims against all parties in a single judicial proceeding if the claims or parties have a material interest in the same series of transactions.”⁸⁴ Therefore, a litigant who does not bring a consumer fraud claim when suing for another cause of action may be unable to bring a consumer fraud action sometime in the future.⁸⁵ It should also be noted that courts are barred from raising consumer fraud claims *sua sponte*.⁸⁶ A court raises an issue *sua sponte* without prompting or suggestion from counsel.⁸⁷ Therefore, a court may permanently bar consumer fraud claims if a plaintiff fails to raise them

⁷⁶ *Id.* (citing *Cox*, 138 N.J. at 18–19).

⁷⁷ *Id.*

⁷⁸ Trembly & Bevacqua, *supra* note 19, at 199.

⁷⁹ *Id.* at 200 (citing *Weinberg*, 173 N.J. at 249).

⁸⁰ *Id.* (citing *Cox*, 138 N.J. at 21).

⁸¹ *Id.* at 200 (citing N.J. STAT. ANN. § 56:8-19 (West 2016)).

⁸² *Id.*

⁸³ *Id.* at 203 (citing *Mirra v. Holland Am. Line*, 331 N.J. Super. 86, 90 (App. Div. 2000)).

⁸⁴ Trembly & Bevacqua, *supra* note 19, at 203 (citing *K-Land Corp. No. 2 v. Sewerage Auth.*, 173 N.J. 59, 70 (2002)).

⁸⁵ *Id.* (citing *Prevratil v. Mohr*, 145 N.J. 180, 190 (1996)).

⁸⁶ *Id.*

⁸⁷ *Sua Sponte*, BLACK’S LAW DICTIONARY (10th ed. 2014).

in a pending action.⁸⁸

III. HOW THE NJCFA DIFFERS FROM OTHER STATE CONSUMER FRAUD ACTS

A. Mandatory Treble Damages and Attorneys' Fees Without Proof of Ascertainable Loss

The NJCFA's provision for mandatory treble damages sets it apart from many other state consumer fraud acts.⁸⁹ While other state consumer fraud acts typically allow for treble damages, these damages are granted at the discretion of the court in some or all situations.⁹⁰ New Jersey judges, however, do not have this same discretion.⁹¹ This is because the NJCFA is one of the only state consumer fraud statutes that *requires* the imposition of treble damages.⁹²

The NJCFA also deviates from other state consumer fraud statutes in its handling of attorneys' fees. While other states permit courts to award attorneys' fees, the NJCFA is unique in that New Jersey courts automatically award attorneys' fees to the plaintiff, so long as a that plaintiff can prove an individual or entity committed an unlawful practice.⁹³ Notably, to encourage consumers to bring good faith claims, plaintiffs can still recover attorneys' fees and equitable relief even if they ultimately fail to prove a quantifiable loss.⁹⁴ Therefore, to receive attorneys' fees and equitable relief, a plaintiff must only show: (1) a good faith claim of ascertainable loss, and (2) the commission of an unlawful practice.⁹⁵

B. International Union v. Merck and Potential for Nationwide Application of the NJCFA

Though the provisions for mandatory treble damages and the ease with which plaintiffs can recover attorneys' fees sets the NJCFA apart from other state consumer fraud statutes, the Act's most significant departure from similar consumer fraud statutes is its potential for nationwide application.

⁸⁸ Trembly & Bevacqua, *supra* note 19, at 203 (citing *Prevratil*, 145 N.J. at 190); *see also* R. Wilson Plumbing & Heating, Inc. v. Wademen, 246 N.J. Super. 615, 619 (App. Div. 1991).

⁸⁹ Shepherd, *supra* note 1, at 10.

⁹⁰ Shepherd, *supra* note 1, at 11; *see, e.g.*, DEL. CODE ANN. tit. 6 § 2583(b) (West 2017); IND. CODE ANN. § 24-5-0.5-4(a) (LexisNexis 2017); OHIO REV. CODE ANN. § 1345.09(B) (West 2017).

⁹¹ Shepherd, *supra* note 1, at 11.

⁹² *Id.* (citing N.J. STAT. ANN. § 56:8-19 (West 2016)).

⁹³ *Id.* at 10–11 (citing N.J. STAT. ANN. § 56:8-19).

⁹⁴ Trembly & Bevacqua, *supra* note 19, at 201 (citing *Weinberg*, 173 N.J. at 251).

⁹⁵ Shepherd, *supra* note 1, at 11 (citing *Weinberg*, 173 N.J. at 253).

New Jersey's Appellate Division has held that consumers can sue under the NJCFA for transactions occurring in other states, so long as the defendant is a business headquartered or based in New Jersey.⁹⁶ Most other states restrict suits under their consumer fraud statutes to resident-plaintiffs when conduct occurring outside of the state is at issue.⁹⁷ On the other hand, the NJCFA "has never included a nexus requirement," so "the alleged misconduct need not have occurred in New Jersey."⁹⁸ Because the alleged misconduct can occur anywhere in the United States, an increase in "litigation tourism" has plagued the state.⁹⁹

Both New Jersey's state and federal courts have examined the extraterritorial application of the NJCFA, primarily as a choice of law issue in class-action suits. In some cases, application of the Act to a nationwide class action is contingent on whether the court certifies a class.¹⁰⁰ The Appellate Division applied the application of the NJCFA to a nationwide class action suit extensively in *International Union of Operating Engineers Local #68 Welfare Fund v. Merck & Co., Inc.*¹⁰¹

International Union was one of many Vioxx litigation cases that took place in the mid-2000's.¹⁰² The plaintiff in *International Union* alleged that Merck, the pharmaceutical company that manufactured and marketed Vioxx, a prescription anti-inflammatory drug, "fraudulently misrepresented and suppressed material information regarding the drug and its comparative safety and efficacy as compared with traditional competitors."¹⁰³ The plaintiff further claimed that Merck specifically targeted third-party health insurance payors across the country with false marketing, advertising, and promotions to justify the high cost of Vioxx when compared to similar drugs.¹⁰⁴ Because of the alleged nationwide marketing and sales efforts, the plaintiff sought to certify a class consisting of all "third-party non-

⁹⁶ *Id.* (citing *Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co., Inc.*, 384 N.J. Super. 275, 305 (App Div. 2006), *rev'd*, 192 N.J. 372 (2007)); *see also*, *Elias v. Ungar's Food Prods., Inc.*, 252 F.R.D. 233 (D.N.J. 2008).

⁹⁷ *Shepherd*, *supra* note 1, at 11; *see, e.g.*, *Goshen v. Mut. Life Ins. Co.*, 774 N.E.2d 1190, 1195 (N.Y. 2002) (holding that a deceptive practice must occur in New York to file under the Consumer Fraud Act); *Avery v. State Farm Mut. Ins. Co.*, 835 N.E.2d 801, 853 (Ill. 2005) (limiting causes of action under the Illinois Consumer Fraud Act to transactions in the state); *Marshall v. Priceline.com Inc.*, No. 05C-02-195 WCC, 2006 Del. Super. LEXIS 447, at *5-6 (Del. Super. Ct. Oct. 31, 2006) (determining that Delaware's consumer fraud statute is not applicable outside of the state).

⁹⁸ *Ruggiero & Stein*, *supra* note 27, at 2.

⁹⁹ *Id.*

¹⁰⁰ *Int'l Union, Inc.*, 384 N.J. Super. At 275.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 281-82.

¹⁰⁴ *Id.* at 282.

government payors [in all States and the District of Columbia] who have paid any person or entity for the purchase of [Vioxx].”¹⁰⁵

On appeal, Merck argued (1) that the trial judge did not properly certify a nationwide class, given its conclusion that common issues of law or fact among the class’s members predominated; and (2) that the court should decide the consumer fraud dispute itself under the NJCFA.¹⁰⁶ The Appellate Division upheld the Law Division’s class certification, as well as the application of the NJCFA to the class-action.¹⁰⁷

The court buttressed its decision to apply the NJCFA to the dispute by looking to: (1) the NJCFA’s legislative intent, and (2) the process in deciding which state’s law should apply to each member of the class in its predominance determination.¹⁰⁸ The court stated that the Act’s legislative history supported a nationwide application of the NJCFA.¹⁰⁹ The legislative history showed that the Legislature intended to make it “one of the strongest consumer protection laws” in the country.¹¹⁰ It also indicated that there is “little doubt that the New Jersey Legislature intended its Consumer Fraud Statute to apply to sales New Jersey sellers made even if the buyer is an out-of-state resident and some aspect of the transaction took place outside of New Jersey.”¹¹¹

Aside from looking to the Act’s legislative history, the court’s predominance analysis further supported the notion that the NJCFA should apply to all members of the nationwide class.¹¹² In order for a group of people to obtain a class certification in New Jersey state court, four general prerequisites must be met:

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of claims or defenses of the class, and . . . (4) the representative parties will fairly and adequately protect the

¹⁰⁵ *Id.*

¹⁰⁶ *Int’l Union*, 384 N.J. Super. at 275.

¹⁰⁷ *Id.* at 305.

¹⁰⁸ *Id.* at 292–93.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 287 (citing *New Mea Constr. Corp. v. Harper*, 203 N.J. Super. 486, 501–02 (App. Div. 1985)).

¹¹¹ *Id.* at 288 (citing *Boyes v. Greenwich Boat Works, Inc.*, 27 F. Supp. 2d 543, 547 (D.N.J. 1998)).

¹¹² N.J. Ct. R. 4:32-1(b)(3) (regarding “predominance,” the New Jersey Court rules state that “[a]n action may be maintained as a class action if the prerequisites of paragraph (a) [of New Jersey Court Rule 4:32] are satisfied, and in addition . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . .”).

interests of the class.¹¹³

In addition to these general prerequisites, other requirements must also be met by a plaintiff seeking to certify a class. The additional requirements at issue in this case concern predominance and superiority, namely: (1) “whether the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,” and (2) “that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”¹¹⁴

A critical aspect in determining whether a plaintiff satisfies this predominance requirement is discerning which state’s law should be applied to the members of the class.¹¹⁵ The court uses a “flexible governmental interest analysis” when deciding which law should apply in a multi-state dispute.¹¹⁶ Such an analysis seeks to apply the law of the state which has the greatest interest in governing the ultimate issue of the lawsuit.¹¹⁷ The governmental interest test requires two steps: (1) “determining whether there is an actual conflict between the laws of the states involved,” and (2) if there is such a conflict, “identify[ing] the governmental policies underlying the law of each state and how those policies are affected by each of the state’s contacts to the litigation and to the parties.”¹¹⁸ Regarding the second step, the qualitative, rather than the quantitative, nature of the contacts is relevant to the analysis.¹¹⁹

The Appellate Division upheld the Law Division’s finding that the differences between the NJCFA and other state consumer fraud statutes were sufficient to constitute an actual conflict.¹²⁰ Agreeing with the Law Division that there was an actual conflict, the Appellate Division then turned to the second step of the analysis: identifying the governmental policies behind each state statute and how each state’s contact to the action and parties implicates those policies.¹²¹ A state does not have an interest in applying its law if that state’s contacts with the action are unrelated to the policies underlying its statute.¹²²

The courts consider several contacts relevant when examining

¹¹³ *Int’l Union*, 384 N.J. Super. at 284 (citing N.J. Ct. R. 4:32-1(a)).

¹¹⁴ *Id.* (citing N.J. Ct. R. 4:32-1(b)(3)).

¹¹⁵ *Id.* at 292 (citing *Fink v. Ricoh Corp.*, 365 N.J. Super. 520, 568 (Law Div. 2003)).

¹¹⁶ *Id.* at 293 (citing *Erny v. Estate of Merola*, 171 N.J. 86, 94 (2002)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Int’l Union*, 384 N.J. Super. at 293.

¹²⁰ *Id.* at 293–94 (discussing differences regarding private causes of action, the scope of transactions actionable, scienter, etc. as sufficient to constitute actual conflicts with the NJCFA).

¹²¹ *Id.* at 294.

¹²² *Id.*

consumer fraud cases: “the place of injury; where the conduct causing injury took place; the domicile, residence, nationality, place of incorporation, and the place of business of the parties; and where the relationship, if any, between the parties is centered.”¹²³ The Restatement (Second) of Conflict of Laws provides further guidance in fraud and misrepresentation cases.¹²⁴ The court considers certain contacts in determining which state has the most significant relationship to the matters and parties in situations where the plaintiff’s actions in reliance on a fraud or misrepresentation were made in a different state than where the false representations were made.¹²⁵ These contacts include:

(a) the place . . . where the plaintiff acted in reliance upon the defendant’s representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the . . . place of incorporation and place of business of the parties, (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.¹²⁶

While the place where the defendant made his or her false representations is relevant, “it is as important a contact in the selection of the law governing actions fraud and misrepresentation as is the place of the defendant’s conduct in the case of injuries to persons or tangible things.”¹²⁷

The Appellate Division in *International Union* held that New Jersey’s contacts in this case were extensive and substantial enough to give the state a far more substantial interest in this litigation than any of the other states.¹²⁸ The court noted that, among other things: Merck is a New Jersey corporation located in New Jersey; Vioxx research, development, and testing occurred in the state; the alleged fraud was envisioned and effectuated in the state; senior directors overseeing the development of the drug were located in New Jersey; a board of scientific advisors who expressed concerns about the drug was located in New Jersey; and parties compromised the clinical studies in question in the state.¹²⁹ In contrast, the court deemed that “the contacts each prospective member of the plaintiff’s class has had with [the] litigation relate

¹²³ *Id.* at 295 (citing Restatement (Second) Conflict of Laws § 145 (Am. Law Inst. 1971)).

¹²⁴ *Id.*

¹²⁵ *Int’l Union*, 384 N.J. Super. at 295 (citing Restatement (Second) Conflict of Laws § 148(2)(a)–(f) (Am. Law Inst. 1971)).

¹²⁶ *Id.* (citing Restatement (Second) Conflict of Laws § 148(2)(a)–(f) (Am. Law Inst. 1971)).

¹²⁷ *Id.* at 297 (citing Restatement (Second) Conflict of Laws § 148 (Am. Law Inst. 1971)).

¹²⁸ *Id.* at 297–99.

¹²⁹ *Id.* at 297.

to the receipt of the alleged fraudulent communications and the resulting economic loss.”¹³⁰ The court reasoned that, by applying the NJCFA to this action, the court did not undermine the other states’ interests.¹³¹ The court also explained that, while it is rare to certify a nationwide class-action applying one state’s law, it is not unprecedented.¹³²

While the Appellate Division affirmed the Law Division’s certification of the class and application of the NJCFA in *International Union*, the New Jersey Supreme Court ultimately reversed and remanded the decision.¹³³ However, the New Jersey Supreme Court’s reasoning for this decision revolved around the class certification issue, rather than extraterritorial application of the NJCFA.¹³⁴ Both parties sought to make the choice of law analysis the focal point of their arguments on appeal, but the court declined and more generally analyzed the questions of predominance and superiority.¹³⁵ Ultimately, despite strong arguments regarding the choice of law question, the court “express[ed] no view on the Appellate Division’s choice of law reasoning or the result it reached as to the applicability of [New Jersey] law to all members of a nationwide class.”¹³⁶ Therefore, the potential for nationwide application of the NJCFA remains intact, despite the reversal of *International Union* on other grounds.¹³⁷

Other state consumer fraud acts contain provisions, such as those proposed by the New Jersey Legislature, which limit out-of-state consumers

¹³⁰ *Id.*

¹³¹ *Int’l Union*, 384 N.J. Super. at 298 (“Application of New Jersey law will not undermine other states’ interests in compensating their injured residents because that interest is not actually implicated or compromised by allowing a consumer fraud action brought by non-residents of New Jersey to proceed against a New Jersey corporation.”) (internal citations omitted).

¹³² *Id.* at 303–04; *see*, *Wershba v. Apple Computer, Inc.*, 92 Cal. App. 4th 224, 243 (Ct. App. 2001) (indicating in a similar class action to *Int’l Union*, the California court stated that its “more favorable laws may properly apply to benefit nonresident plaintiffs when their home states have no identifiable interest in denying such persons full recovery” when the fraud claims originated in California); *Clark v. TAP Pharmaceutical Prods., Inc.*, 343 Ill. App. 3d 538 (Ct. App. 2003) (A case where the Illinois appellate court affirmed certification of a nationwide class of “[a]ll individuals or non-ERISA third-party payor entities in the United States who paid any portion of the 20% co-payment or deductible amount for beneficiaries under the Medicare Part B for [prescription drug] Lupron . . .” because of “[t]he practical effect of applying Illinois law . . . to control conduct within the boundaries of Illinois, namely, the reporting by the defendants, headquartered in Illinois, of a deceptively inflated price for Lupron to uniformly defraud Medicare and its beneficiaries.”).

¹³³ *Int’l Union of Operating Eng’rs Local #68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372, 372 (2007).

¹³⁴ *Id.* at 376 (concluding that “the [Appellate Division] erred in finding that common questions of law or fact predominate and that a class action would be superior to other mechanisms for adjudicating the claims.”).

¹³⁵ *Id.* at 387–88.

¹³⁶ *Id.* at 388 n.3.

¹³⁷ *Id.*

to relief for transactions occurring within the state. For example, the New York Court of Appeals determined that the language of New York's Consumer Protection Act only addresses consumer fraud violations occurring within the state.¹³⁸ The Supreme Court of Illinois, also citing to the language of the Illinois Consumer Fraud Act, stated that it was only applicable to transactions occurring within Illinois.¹³⁹

IV. THE NEED TO AMEND THE NJCFA WHEN CONSIDERING THE RAMIFICATIONS OF OPIOID LITIGATION

A. The Opioid Epidemic and Related Litigation

The United States is currently in the throes of an opioid epidemic unprecedented in its scope and severity.¹⁴⁰ The statistics available on the nationwide opioid epidemic paint a disturbing picture of what has become the norm for many individuals in American society. The use of opioid drugs has increased dramatically over the past few decades.¹⁴¹ Most experts trace the origin of the epidemic to the introduction of OxyContin, a slow-release opioid painkiller purportedly safe for long-term use.¹⁴² In the time since OxyContin's introduction and the market approval of similar prescription opioid painkillers, over 2.4 million individuals in the United States have developed opioid use disorders.¹⁴³ Of those 2.4 million people, ninety-one die each day from an opioid-related overdose.¹⁴⁴ Despite the great dangers associated with opioid abuse, the number of prescriptions for opioid painkillers continues to increase daily.¹⁴⁵ Compounding the crisis is the

¹³⁸ *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324–26 (2002) (“The reference in section 349 to deceptive practices [in New York’s Consumer Fraud Act] in ‘the conduct of any business, trade or commerce or in the furnishing of any service in this state unambiguously evinces a legislative intent to address commercial misconduct occurring within New York . . . Thus, to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York.’”).

¹³⁹ *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 180 (2005) (explaining that the phrase “wherever situated” in the Illinois Consumer Fraud Act definition of “trade” and “commerce” refers to “any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value” and not to fraudulent transactions, limiting the scope of the Act to consumer transactions occurring in the state).

¹⁴⁰ *HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (November 16, 2018, 11:23 PM), <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html> (stating that in 2017, the U.S. Department of Health and Human Services declared the national opioid crisis a public health emergency).

¹⁴¹ Schwartz, Talarico, and Ciavarra, *supra* note 34.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

ready availability of heroin across the nation.¹⁴⁶ Most opioid users turn to heroin to fuel their addiction once legal opioids become unavailable or prohibitively expensive.¹⁴⁷ Consequently, the number of heroin users and heroin-related deaths has risen sharply, and in-step with the increasing number of opioid prescriptions.¹⁴⁸

Such a widespread increase in prescription opioid abuse has opened the door to a titanic number of opioid-related litigation actions. Plaintiffs who have used prescription opioids are now filing lawsuits against pharmaceutical companies that manufacture these drugs.¹⁴⁹ Some litigants are claiming that they were deceived or defrauded by pharmaceutical companies regarding the safety of these drugs.¹⁵⁰ They are now seeking relief under state consumer fraud statutes.¹⁵¹ These consumers point to specific promotional language used by drug companies to describe and market their products.¹⁵²

State attorneys general, government entities, and consumers across the nation have brought actions under consumer fraud statutes. In June 2017, Oklahoma Attorney General Mike Hunter filed a lawsuit in state court against four manufacturers of opioid pain medication—Purdue Pharma, Allergan, Cephalon, and Janssen Pharmaceuticals—alleging that their deceptive marketing practices played a part in causing the state's current opioid epidemic.¹⁵³ Several counties in New York also sued opioid manufacturers after hiring a private law firm to prosecute the matter, with Suffolk County being the most recent county to file as of August 2016.¹⁵⁴ New York's counties allege that the named drug manufacturers utilized deceptive practices in their promotion and advertisement of the drugs' effectiveness and safety in pain management.¹⁵⁵

New Hampshire also filed a suit against Purdue Pharma concerning its opioid marketing practices.¹⁵⁶ Specifically, the state alleges that Purdue

¹⁴⁶ *Id.*

¹⁴⁷ Schwartz, Talarico, and Ciavarra, *supra* note 34.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Schwartz, Talarico, and Ciavarra, *supra* note 34; *see also*, Press Release, Oklahoma Office of the Attorney General, Attorney General Mike Hunter files Lawsuit against four Opioid Manufacturers (June 30, 2017).

¹⁵⁴ Schwartz, Talarico, and Ciavarra, *supra* note 34.

¹⁵⁵ *Id.*

¹⁵⁶ Nate Raymond, *New Hampshire sues Purdue Pharma over opioid marketing practices*, Reuters (Aug. 8, 2017), <https://www.reuters.com/article/us-new-hampshire-purdue/new-hampshire-sues-purdue-pharma-over-opioid-marketing-practices-idUSKBN1AO29W>.

Pharma engaged in deceptive marketing practices through its promotion of OxyContin, which played a significant part in creating the state's severe opioid crisis.¹⁵⁷ Such practices include significantly downplaying the risk of addiction to OxyContin, as well as overstating the drug's benefits to long-term pain treatment.¹⁵⁸ New Hampshire's lawsuit follows similar cases against Purdue Pharma and other drug makers in Oklahoma, Mississippi, Ohio, and Missouri, as well as several cities and counties in California, Illinois, Ohio, Oregon, Tennessee, and New York.¹⁵⁹

New Jersey's former attorney general, Christopher Porrino, followed the trend and initiated a four-count lawsuit against Arizona-based pharmaceutical manufacturer Insys Therapeutics in October 2017.¹⁶⁰ In its report on the suit, the *Bergen Record* asserted:

New Jersey joins a growing number of states taking legal action against manufacturers of the drugs at the heart of a national epidemic. More than two dozen cities, counties, and states have filed suits against drug companies alleging deceptive marketing practices and understating the addictive effects of drugs like OxyContin, Duragesic and Percoset.¹⁶¹

Porrino alleged that Insys pushed fentanyl prescriptions (a synthetic, highly-potent opioid) to a broader population, and at higher doses, than approved by the FDA.¹⁶² In doing so, he alleged that the company violated both the NJCFA and the New Jersey False Claims Act.¹⁶³

Aside from actions by state attorneys general, individual opioid-related causes of action have been brought against pharmaceutical companies under state consumer protection laws.¹⁶⁴ For example, the plaintiff in *Bayless v. Purdue Frederick Co., Inc.*¹⁶⁵ asserted a claim against Purdue Pharma under the Connecticut Products Liability Act. Ms. Bayless was originally prescribed OxyContin for back pain but quickly developed an addiction that

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Dustin Racioppi, *N.J. sues opioid drugmaker Insys over its role in deadly epidemic*, THE BERGEN RECORD (Oct. 6, 2017), <http://www.northjersey.com/story/news/new-jersey/2017/10/05/nj-sues-opioid-drugmaker-insys-over-its-role-deadly-epidemic/733854001/>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* (alleging that Insys "'routinely' misled consumers by falsely representing that doctors were prescribing Subsys based on their unbiased, independent clinical judgment. But that clinical judgment had been 'co-opted based on Insys's unlawful payment of kickbacks to prescribers.'")

¹⁶⁴ Richard C. Ausness, *Prescription Drug Abuse: The Law's Struggle to Address an Epidemic: The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1123 (2014).

¹⁶⁵ No. FSTCV095012157, 2011 WL 6117927 (Conn. Super. Ct. Nov. 14, 2011).

led to her filing for bankruptcy and attempting suicide.¹⁶⁶ While the Superior Court of Connecticut denied Purdue's motion for summary judgment because questions of fact existed regarding the statute of limitations and proximate cause, the case was never decided on the merits of the Connecticut Products Liability Act.¹⁶⁷

Plaintiffs harmed by opioids have also brought class action lawsuits against manufacturers under consumer fraud statutes.¹⁶⁸ For example, a class action was brought against Purdue Pharma in Missouri alleging, in part, a violation of the Missouri Merchandising Practices Act.¹⁶⁹ Plaintiffs claimed that Purdue's marketing tactics were aggressive, misleading, and coercive in depicting OxyContin as an "all purpose" pain reliever and in persuading physicians and pharmacists to overprescribe the drug.¹⁷⁰

In *Williams v. Purdue Pharma Co.*, the plaintiffs filed a class action alleging violations of the District of Columbia Consumer Protection Procedures Act for deceptive advertising.¹⁷¹ The class claimed that Purdue deceptively advertised OxyContin as a superior pain reliever, lasting longer than competing opioid painkillers.¹⁷² However, later studies showed that OxyContin did not last longer than less expensive alternatives, leading plaintiffs to allege that they were injured by paying a higher price as a result of Purdue's advertising campaign.¹⁷³ Consumers of OxyContin in Kentucky filed a similar class action against Purdue claiming, among other causes of action, a violation of the Kentucky Consumer Protection Act.¹⁷⁴

The aforementioned claims, filed against opioid manufactures by either individual plaintiffs, classes of plaintiffs, or state attorneys general, show that the public intends to hold opioid manufactures responsible for the public health crisis now crippling all levels of American society. This case law also shows that consumer fraud statutes provide a potential avenue for holding such entities responsible for their wrongdoings.

B. The Potential Impact of Opioid Litigation on New Jersey's Pharmaceutical Industry and Judicial System

An increase in opioid-related consumer fraud litigation would have a profoundly negative impact on New Jersey's already-overburdened judicial

¹⁶⁶ *Id.* at *3–4.

¹⁶⁷ *Id.* at *33. There is no subsequent history available regarding this action.

¹⁶⁸ Ausness, *supra* note 164, at 1137.

¹⁶⁹ *Campbell v. Purdue Pharma, L.P.*, No. 1:02 cv 00163 TCM, 2004 U.S. Dist. LEXIS 31173, *8–9 (E.D. Mo. 2004).

¹⁷⁰ *Id.* at *7–8.

¹⁷¹ *Williams v. Purdue Pharma Co.*, 297 F. Supp.2d 171, 172 (D.D.C. 2003).

¹⁷² *Id.*

¹⁷³ *Id.* at 172–73.

¹⁷⁴ *Salisbury v. Purdue Pharma, L.P.*, 166 F. Supp. 2d 546, 548 (E.D. Ky. 2001).

system. New Jersey's consumer fraud lawsuits have increased substantially in recent history.¹⁷⁵ The number of reported decisions under the NJCFA have increased 447% from 2000 to 2009.¹⁷⁶ Not only is this figure staggering in its own right, but it is also far greater than the national average.¹⁷⁷ Unfortunately, these figures are likely *underestimated*, since they include only *reported* decisions.¹⁷⁸ Such statistics omit actions filed, actions settled, or actions whose decisions were unreported.¹⁷⁹

These statistics and data support the notion that a broad interpretation of the NJCFA has placed a substantial burden on the state court system.¹⁸⁰ This increase in consumer litigation is linked to the incentives consumers face when filing under the NJCFA: "Consumers respond rationally to litigation incentives, and states that invite additional consumer protection litigation through imprecise standards, low burdens of proof, and more generous awards ought not be surprised when enterprising lawyers initiate more litigation, whether meritless or not."¹⁸¹

Interpreting the NJCFA broadly to allow out-of-state consumers to sue New Jersey-based companies for transactions occurring outside the state will also have a destructive effect on one of the state's largest economic sectors: the pharmaceutical industry.¹⁸² Known for decades as "The Medicine Chest of the World," New Jersey is home to seventeen of the world's twenty largest pharmaceutical companies.¹⁸³ Such companies include, among others, Novartis, Johnson & Johnson, Merck & Co., Novo Nordisk, and Bayer Healthcare.¹⁸⁴ Further supporting the fact that New Jersey is the epicenter of the global pharmaceutical industry is the fact that New Jersey is the site of 2,200 active or open clinical trials.¹⁸⁵

In New Jersey, the pharmaceutical industry is big business. Statistics

¹⁷⁵ Shepherd, *supra* note 1, at 12.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* See also, *Bluebook Guide: Unpublished Opinions*, GEORGETOWN LAW LIBRARY (Nov. 17, 2018, 12:07 AM), <https://guides.ll.georgetown.edu/c.php?g=261289&p=2339386> ("[O]nly a small percentage of cases are actually designated for publication by a court and published in a reporter. Many cases are unpublished, but still available in databases, such as Westlaw, Lexis, Bloomberg Law, or elsewhere.")

¹⁷⁹ Shepherd, *supra* note 1, at 12 (emphasis added).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 13.

¹⁸² *New Jersey's Life Sciences: By the Numbers*, HEALTHCARE INSTITUTE OF NEW JERSEY (Nov. 17, 2018, 12:21 AM), <http://hinj.org/life-sciences-new-jersey/by-the-numbers/> (stating that the "total economic output supported by the biopharmaceutical sector in New Jersey . . . represented eighteen percent of New Jersey's 2014 gross domestic product.").

¹⁸³ *NJ & Pharmaceuticals: New Jersey Leads the World*, *supra* note 35.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

put into perspective what a crucial and substantial role the pharmaceutical industry plays in New Jersey's overall economy.¹⁸⁶ As of early 2017, 3,100 life sciences entities operate in New Jersey.¹⁸⁷ In 2015, the biopharmaceutical sector's total direct impact on the New Jersey economy was \$42.9 billion.¹⁸⁸ The industry's indirect or "spin-off" economic activity in that same year contributed an additional \$61.9 billion to the state's economy.¹⁸⁹ The total economic output supported by the biopharmaceutical sector in 2014 amounted to \$81.7 billion, which consisted of 19.9% of the state's total GDP for that year.¹⁹⁰

The pharmaceutical industry is such a critical part of New Jersey's economy that the state structures its tax code to benefit pharmaceutical companies and attract more to the state.¹⁹¹ In fact, a new state policy increased the allowable research and development tax credit to 100% of a company's corporate tax liability.¹⁹² This tax incentive is especially attractive to pharmaceutical companies, considering the immense amount of time, energy, and capital expended on research and development ("R&D") for creating new drugs and bringing them to market. Such a strong incentive created by the state to attract and retain these companies could very well be undercut by the risk of nationwide consumer fraud litigation under the NJCFA. Pharmaceutical companies may decide that the risk of such costly litigation could outweigh New Jersey's R&D tax benefits.

Many New Jersey citizens are also directly employed by the biopharmaceutical industry, or benefit from it, either directly or indirectly.¹⁹³ It is estimated that 89,500 jobs in the state are directly connected to the biopharmaceutical and medical devices industries.¹⁹⁴ This number increases to 440,000 when considering jobs that are indirectly supported by these sectors.¹⁹⁵ Therefore, 10.3% of all jobs in the state relate to the

¹⁸⁶ *New Jersey's Life Sciences: By the Numbers*, *supra* note 182.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *The Medicine Chest of the World*, BIO NJ (Sept. 14, 2018, 12:38 PM), <https://bionj.org/membership/medicine-chest-of-the-world>. ("The success of biotechnology in New Jersey is due largely to a supportive state government and its innovative programs and policies. A prime example is the Technology Business Tax Certification Transfer Program. This program provides a new source of monies to small and mid-sized biotechnology companies by allowing them to sell net operating loss credits to profitable companies for cash.").

¹⁹² *NJ & Pharmaceuticals: New Jersey Leads the World*, *supra* note 35.

¹⁹³ *New Jersey's Life Sciences: By the Numbers*, *supra* note 182.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

biopharmaceutical and medical devices sectors, directly or indirectly.¹⁹⁶ One in ten New Jersey residents are economically associated with these industries.¹⁹⁷

While it is clear that New Jersey citizens benefit greatly from the jobs created by the state's pharmaceutical industry, the state itself benefits as well. In 2015, New Jersey received a total of \$7.7 billion in personal taxes paid by New Jersey employees in the biopharmaceutical sector.¹⁹⁸

The pharmaceutical industry's critical position in the state's economy is also evident through New Jersey's continued efforts to expand and strengthen it.¹⁹⁹ In August 2017, "three pharmaceutical manufacturers received nearly [two] million [dollars] in combined Grow New Jersey incentives from the state Economic Development Authority."²⁰⁰ As a result, pharmaceutical company Geri-Care is expected to bring more than 130 new jobs to the state, and is projected to spend \$1.3 million on expansion of its manufacturing capabilities.²⁰¹ Likewise, Aptapharma, another pharmaceutical company is also investing \$4.9 million in upgrading its Camden site, which will create thirty-five new positions in New Jersey.²⁰²

While the Act's detrimental effects on the state's courts and pharmaceutical industry support the notion it should be curtailed in scope, it should be noted that extraterritorial application of the NJCFA harms New Jersey residents and businesses as well. The increase in NJCFA-based litigation is not necessarily benefiting those the New Jersey Legislature intended to assist.²⁰³ For instance, "[ninety-three] percent of plaintiffs suing pharmaceutical companies in [NJ]CFA class actions do not . . . reside in New Jersey."²⁰⁴ The Act intended to benefit "downtrodden consumers finally vindicating economically-small but significant claims against uncaring businesses."²⁰⁵ Instead, partly due to the Act's broad interpretation, sophisticated litigants are taking advantage of "low burdens of proof and generous remedial provisions" to profit off of New Jersey businesses.²⁰⁶ As a result, these businesses raise prices to compensate for costs they face in

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Eric Strauss, *EDA approves \$2M in annual incentives for trio of pharma firms*, NJBIZ (Aug. 8, 2017), <http://www.njbiz.com/article/20170808/NJBIZ01/170809844/eda-approves-2m-in-annual-incentives-for-trio-of-pharma-firms> (emphasis omitted).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Ruggiero & Stein, *supra* note 27.

²⁰⁴ *Id.*

²⁰⁵ Shepherd, *supra* note 1, at 13.

²⁰⁶ *Id.* at 13–14.

2019] EXTRATERRITORIAL APPLICATION OF NJCFA 131

defending such consumer fraud suits, which harm New Jersey consumers in the long run.²⁰⁷

The issue of significantly increased costs businesses face is compounded by the fact that they incur litigation costs for defending against consumer fraud claims, whether valid or not.²⁰⁸ New Jersey businesses are also burdened by attorneys' fees because of the ease at which the NJCFA allows plaintiffs to recover these fees.²⁰⁹ While these increased "costs are initially borne by [New Jersey] businesses, they are passed on to [New Jersey] consumers through increased prices, fewer innovations, lower product quality, lower wages, and lower employment."²¹⁰

The effects of economic prices paid by both businesses and consumers are especially problematic for the pharmaceutical industry. It is important to consider the high research and development costs faced by pharmaceutical companies.²¹¹ Pharmaceutical companies often justify the high price of US prescription drugs based on high R&D costs.²¹² Many consumers already struggle to afford drugs necessary for their health and well-being, and an increase in costs for pharmaceutical companies would only increase the burdens that consumers already face.²¹³ A decrease in innovation would also

²⁰⁷ *Id.* at 12–14 ("Both data and theory prove that excessive increases in litigation . . . is a direct consequence of the perverse incentives [the New Jersey Consumer Fraud Act] creates [S]ophisticated litigants predictably exploit low burdens of proof and generous remedial provisions to extract rents from businesses, raising prices, and ultimately harming local consumers Although these costs are initially borne by businesses, they are ultimately passed on to consumers through increased prices, fewer innovations, lower product quality, lower wages, and lower employment.").

²⁰⁸ Shepherd, *supra* note 1, at 14.

²⁰⁹ *Id.* at 10.

²¹⁰ *Id.* at 14.

²¹¹ Matthew Herper, *The Cost Of Developing Drugs Is Insane. That Paper That Says Otherwise Is Insanely Bad*, FORBES (Oct. 16, 2017), <https://www.forbes.com/sites/matthewherper/2017/10/16/the-cost-of-developing-drugs-is-insane-a-paper-that-argued-otherwise-was-insanely-bad/> ("The amount spent to develop any individual drug depends mostly on what it costs to conduct studies to prove it is safe and effective to secure regulatory approval. That can range from \$10 million to \$2 billion, depending on what the drug is used for.").

²¹² Nancy L. Yu, Zachary Helms, & Peter B. Bach, *R&D Costs For Pharmaceutical Companies Do Not Explain Elevated US Drug Prices*, HEALTH AFFAIRS (Mar. 7, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170307.059036/full/>. While the main thrust of this article states that pharmaceutical companies price drugs higher than necessary to cover research and development costs, it also states that pharmaceutical companies commonly justify their high US pricing scheme on high research and development costs.

²¹³ *Most Say They Can Afford Their Prescription Drugs, But One In Four Say Paying Is Difficult, Including More Than Four In Ten People Who Are Sick*, HENRY J. KAISER FAMILY FOUNDATION (Aug. 20, 2015), <https://www.kff.org/health-costs/press-release/most-say-they-can-afford-their-prescription-drugs-but-one-in-four-say-paying-is-difficult-and-more-than-four-in-ten-for-people-who-are-sick/> ("[A]bout a quarter [of individuals] (24%) say paying for their drugs is difficult, and the share facing difficulties rises among those with low incomes (33%) or currently taking four or more prescription drugs (38%), and is highest for those in

negatively affect these companies and the consumers who rely on their products, as they would not be able to discover new treatments and therapies for diseases. Finally, lower wages and lower employment would be especially damaging for New Jersey, considering that pharmaceutical industry employs a significant number of the state's citizens.²¹⁴

The disadvantages created by interpreting the NJCFA too broadly, including applying it extraterritorially, are clearly against the intentions of the New Jersey Legislature.²¹⁵ "While the Legislature expressly sought to create a consumer-friendly statute, it surely could not have meant to encourage forum-shopping among attorneys nor nationwide class actions against New Jersey businesses."²¹⁶ This unintended interpretation of the Act has had the result of discouraging business owners from operating in New Jersey, which in turn has decreased the number of jobs and revenue within the state.²¹⁷

*C. The Need for an Amendment to Prevent Consumer Fraud Claims
by Non-Residents for Out-of-State Transactions*

As opioid litigation becomes more frequent, many of the negative externalities that New Jersey will face can be addressed by amending the NJCFA to limit consumer fraud actions to in-state transactions.²¹⁸ "Eliminating the possibility of extraterritorial application will deter professional consumer litigators from drumming up nationwide class actions in hope of taking advantage of New Jersey's indulgent [NJCFA] provisions."²¹⁹

Such an amendment would not only bring the NJCFA back in line with the original intent of the Legislature to protect New Jersey consumers but would also protect the state's businesses and economy. As previously mentioned, the NJCFA's legislative history indicates that it was designed to protect *New Jersey* consumers, not to allow consumers outside of the state to sue New Jersey-based businesses for transactions occurring outside of the state.²²⁰ Clarification that these types of actions are impermissible under the NJCFA, through an amendment to the Act, will protect both New Jersey's

fair or poor health (43%)."); *see also*, Howard LeWine, M.D., *Millions of adults skip medications due to their high cost*, HARVARD HEALTH BLOG (Jan. 30, 2015), <https://www.health.harvard.edu/blog/millions-skip-medications-due-to-their-high-cost-201501307673>.

²¹⁴ *New Jersey's Life Sciences: By the Numbers*, *supra* note 182.

²¹⁵ Ruggiero & Stein, *supra* note 27.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Shepherd, *supra* note 1, at 18.

²¹⁹ *Id.*

²²⁰ Shepherd, *supra* note 1, at 11.

businesses and the state's overall economy.²²¹

An amendment that would have addressed this very issue was first proposed in 2010.²²² New Jersey Assembly Bill 3333 was introduced to the Assembly Committee on Consumer Affairs on October 7, 2010, and New Jersey Senate Bill 2855 was introduced to the Senate Committee on Commerce on May 12, 2011.²²³ Neither bill progressed further than introduction to their respective committees, as they were never voted on or even discussed thereafter.²²⁴ Generally, the bills proposed “revise[] individual cause[s] of action under [the] consumer fraud act and make[] certain other revisions regarding the applicability of the act.”²²⁵

The drafters of the amendment noted that the Act in its current form, “does not place jurisdictional limits on the events giving rise to claims that consumers can bring under the [A]ct.”²²⁶ A section of the proposed amendment sought to modify this issue with the NJCFA by limiting the application of the statute to “claims arising out of transactions that occurred in the state.”²²⁷ Doing so would greatly decrease the number of consumer fraud claims filed in New Jersey, including nationwide class actions.²²⁸

An amendment similar to the one proposed by N.J. A.B. 3333 and N.J. S.B. 2855 has recently been introduced by the New Jersey Legislature in 2018.²²⁹ Such a bill would significantly reduce the threat that opioid litigation poses to the state. As previously stated, this amendment would limit the application of the NJCFA to New Jersey residents or transactions occurring in New Jersey.²³⁰ Explicitly stating that the Act is limited in its extraterritorial application would clarify that its purpose is to protect New Jersey consumers.²³¹

It is critical that the Legislature pass this bill, as such an amendment would strike a balance between protecting New Jersey's vital pharmaceutical industry while still allowing out-of-state consumers an avenue for suit when appropriate. This amendment would prevent an onslaught of consumer fraud litigation by consumers against pharmaceutical companies headquartered or based in New Jersey under the consumer-friendly NJCFA. However, out-of-state consumers would still be able to seek relief against New Jersey-

²²¹ *Id.*

²²² 214th Gen. Assemb., Reg. Sess. (N.J. 2010–2011).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Ruggiero & Stein, *supra* note 27, at 3.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ A.B. 303, 2018 Leg., 218th Gen. Assemb., Reg. Sess. (N.J. 2018).

²³⁰ *Id.*

²³¹ Shepherd, *supra* note, 1 at 18.

based companies in contract or tort actions.

V. CONCLUSION

Precluding consumer fraud opioid litigation from proliferating within the state by amending the NJCFA is critical to protect New Jersey's pharmaceutical industry, courts system, consumers, and residents. Continuing to allow out-of-state consumers to sue companies based in the state for transactions that do not occur within the state will create a great harm as opioid litigation increases across the country. It is extremely likely that the consumer-friendly construction and interpretation of the NJCFA will result in forum-shopping among opioid litigants, who will select New Jersey as the most favorable venue to bring their case.