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New Jersey Courts' Liberal Interpretation of Consumer Fraud Act Claims Also Governs the Courts' Review of Attorneys' Fees Claims Under the Act

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New Jersey's Consumer Fraud Act¹ is among the broadest and most consumer-friendly in the country. The act furthers three main purposes: to compensate victims for actual losses, to punish wrongdoers through the award of treble damages, and, "by way of the counsel fee provision, to attract competent counsel to counteract the community scourge of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual."² Courts interpreting the act have consistently emphasized that it is to be "construed liberally" in favor of consumers.³

The fee-shifting provision in Section 56:8-19 "advances the Act's policy of ensuring that plaintiffs with *bona fide* claims are able to find lawyers to represent them and encouraging counsel to take on private cases involving an infringement of statutory rights."⁴ Furthering the policy underlying the act, the New Jersey courts have almost uniformly interpreted the fee-shifting provision in favor of claimants, with recent decisions making recovery of attorneys' fees and costs mandatory to successful claimants and, in some instances, even awarding fees where proofs of ascertainable loss fall short. As a result, it is clear that the courts' general pro-consumer approach to the act also applies to claims for attorneys' fees under the act.

The Act

The Consumer Fraud Act provides:

Any person who suffers ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. *In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.*⁵

Unlawful conduct in violation of the act falls into three discernable categories— affirmative acts, knowing omissions and violations of regulatory provision designed to further the policies of the act.⁶ The third category of unlawful acts consists of violations of specific regulations promulgated under the act. In those instances, intent is not an element of the unlawful practice, and a violation of the regulation constitutes *per se* unlawful practice under the act. Parties subject to the regulations are assumed to be familiar with them, so that any violation of the regulations, regardless of intent or moral culpability, constitutes a violation of the act.⁷ A claimant must demonstrate that a defendant's unlawful conduct in violation of the act caused the claimant to suffer an ascertainable loss (*i.e.*, the claimant must establish a causal connection between the unlawful conduct and the alleged loss).⁸

Claims for Attorneys' Fees Under the Act

As indicated above, the act permits an award of reasonable attorneys' fees, filing fees and reasonable costs of suit. The threshold for recovering attorneys' fees and costs in claims brought pursuant to the act is lower than that for treble damages, and a fact-

finder's determination not to award treble damages does not necessarily preclude an award of attorneys' fees. The Appellate Division has stated that the two remedies are "clearly independent of each other."⁹

To succeed on a claim for treble damages under the act, a claimant must plead and establish unlawful conduct by the defendant, an ascertainable loss and a causal relationship between the unlawful conduct and the ascertainable loss.¹⁰ However, a consumer-fraud claimant can recover reasonable attorneys' fees, fees and costs "if that claimant can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages."¹¹

In awarding fees to a claimant who establishes a violation of the act but falls short of showing an ascertainable loss, New Jersey courts have noted that the act "makes no distinction between 'technical' violations and more 'substantive' ones,"¹² and "[t]he fundamental remedial purpose of the Act dictates that plaintiffs should be able to pursue consumer-fraud actions without experiencing financial hardship."¹³

However, the mere filing of a claim under the act does not automatically entitle the claimant to attorneys' fees and costs. It is insufficient for a claimant to simply allege ascertainable loss. A claimant who pleads a claim under the act but cannot survive a motion for summary judgment on the issue of ascertainable loss, may not proceed with remaining claims for attorneys' fees under the act.

In *Weinberg v. Sprint Corp.*, the plaintiff demonstrated that the defendant committed a regulatory violation of the act, but the plaintiff's Consumer Fraud Act claim did not survive summary judgment on the issue of ascertainable loss. The New Jersey Supreme Court found that the plaintiff failed to present a "bona fide claim" of ascertainable loss because the regulation the defendant

violated precluded the plaintiff from any claim to monetary damages.¹⁴ Finding that the plaintiff never had a *bona fide* claim of an ascertainable loss, the court did not permit the plaintiff to move forward with his claim for counsel fees and costs under the act. Thus, a claimant must demonstrate a *bona fide* claim of ascertainable loss related to a violation of the act "that raises a genuine issue of fact requiring resolution by the fact-finder to trigger the fee-shifting provision" of the act, even if the plaintiff ultimately loses on the damage claim.¹⁵

Similarly, in Consumer Fraud Act cases where the claimant proves a regulatory violation but the defendant obtains a motion for involuntary dismissal at the end of the claimant's case for failure to prove an ascertainable loss, and the "fact-finder is not called upon to decide whether an ascertainable loss has been proved, plaintiff is not entitled to recover attorneys' fees."¹⁶

In contrast, where the issue of ascertainable loss is submitted to the fact-finder for its determination, the claimant is entitled to an award of attorneys' fees under the act.¹⁷

It must be noted that the Appellate Division compared the standard for the grant of summary judgment with the standard for the grant of an involuntary dismissal at the end of the plaintiff's case, and concluded that those standards "are the same and functional equivalents."¹⁸

In a recent unreported case, the Appellate Division determined that where a plaintiff survives a summary judgment motion on the issue of whether they sustained an ascertainable loss but then loses a motion for involuntary dismissal at the end of the plaintiffs' case, the plaintiffs are entitled to an award of attorneys' fees.¹⁹ The court explained that a plaintiff is not required "to overcome the double hurdle of surviving both a summary judgment and a motion for involuntary dismissal to demonstrate a *bona fide* claim of ascertainable loss."²⁰

As a result, in order to be entitled to attorneys' fees, a plaintiff must be able to present sufficient evidence of such loss to survive a motion for summary judgment or a motion for involuntary dismissal.

The explanation for such a result, namely that a Consumer Fraud Act claimant is entitled to fees whenever he or she is able to present a *bona fide* claim that survives summary judgment, is that the claimant has done enough simply by presenting persuasive evidence sufficient to support a claim and to present a jury question. Whether or not the jury finds in favor of the claimant is irrelevant to the issue of whether the claimant is entitled to attorneys' fees. Stated differently, the Consumer Fraud Act claimant could ultimately lose the damage claim but nonetheless be entitled to fees under the act. This result is dramatically different than, for instance, an award of attorneys' fees under Rule 4:42-9, which permits recovery only to a "successful" claimant.

The act also has been interpreted to allow attorneys' fees claims in cases that settle. At least one court has held that neither adjudication nor admission of liability is required to invoke the fee-shifting provision of the act.

In *Schmoll v. J.S. Hovmanian & Sons, LLC*, the Appellate Division upheld the trial court's award of counsel fees and costs under the act after a mid-trial settlement of a multi-count class action. The Appellate Division found the award proper since the plaintiffs' claim for injunctive relief was still viable, the injunctive relief was what the plaintiff had substantially sought in their complaint, the defendant chose to litigate the case until mid-trial, and injunctive relief alone was sufficient to warrant a counsel fees award under the act.²¹

In that case, the Appellate Division noted that the defendant was aware the plaintiff was reserving the right to pursue a counsel fee award, so the holding of *Schmoll* is limited to cases in which

the parties settle but carve out the claim for attorneys' fees.

How Are Attorneys' Fees Calculated?

Only reasonable attorneys' fees will be awarded pursuant to the act, and the amount of fees to be awarded is within the sound discretion of the trial court. In determining a proper fee, the court will initially look at the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. This initial fee calculation is called the lodestar amount.²² Excluded from this initial fee calculation are hours that were not "reasonably expended," (*i.e.*, excessive, unnecessary or redundant time expended during the litigation).²³ Further, in terms of a "reasonable" hourly rate, the court is to apply the "rates charged by attorneys of ordinary ability, skill and experience," which in one case meant a reduction of hourly rate from a requested \$240/hour to \$175/hour.²⁴ The courts' analysis regarding the determination of a reasonable fee follows that set forth in RPC 1.5(a).²⁵

Moreover, other factors may warrant an upward or downward modification of the lodestar, including the important factor of "the results obtained."²⁶

When a complaint contains a Consumer Fraud Act claim and several causes of action that do not provide for attorneys' fees, and counsel's efforts are spread among all claims, the court will consider this factor in determining an appropriate award of counsel fees.²⁷ In cases where the plaintiff seeks "distinctly different claims for relief," the court will not consider counsel's work on the unrelated claims as part of the pursuit of the ultimate results obtained on the Consumer Fraud Act claim.²⁸

Where the complaint includes a number of claims, including consumer fraud claims and other claims that are factually and legally related, the Appellate Division has determined that trial courts should avoid the "mechanical approach" of dividing reasonable counsel fees by

the number of claims.²⁹ Instead, the court must focus on the "significance of the overall relief obtained" by the plaintiff in relation to the hours reasonably expended on the litigation. In other words, the court is to employ a "principle of proportionality" between the amount involved and the results obtained. Further, while there is no requirement that counsel fees be proportionate to damages, the amount of damages a claimant recovers is relevant to the amount of attorneys' fees to be awarded.³⁰

If a claimant achieves excellent results in a lawsuit, counsel fees should not be reduced on the ground that the claimant did not prevail on each claim advanced.³¹ By contrast, when a claimant achieves only partial or limited success, the lodestar may be excessive even if the claims were interrelated and raised in good faith.³²

New Jersey courts have emphasized that the critical factor is the degree of success obtained. Where claimant's counsel was retained based upon a contingency fee arrangement, that fact alone may be grounds for enhancing the fee in view of the risks involved in a contingent fee arrangement.³³

Practitioners should be aware that consumer fraud counsel fees are not included in jurisdictional "amount in controversy."³⁴ Regarding costs, expert witness fees are not encompassed within the phrase "reasonable costs of suit" for the purpose of the act.³⁵

A Push to Limit the Breadth of the Act

On May 12, 2011, the Consumer Fraud Reform Bill, S-2855, was introduced in the Senate. In addition to limiting recovery to only private individual consumers and making an award of treble damages a judicial determination, the proposed amendment seeks to cap the recovery of attorneys' fees. Under the proposed amendment to the act, "[a]ttorneys' fees awarded under this section shall be limited to attorneys' fees and costs reasonably attributable to the pros-

ecution of the claim brought under P.L.1960, c.39³⁶ that results in the judgment, and shall not exceed the greater of \$150,000 or one-third of that judgment."

Conclusion

It is increasingly clear that, tasked with the obligation to liberally construe the Consumer Fraud Act, New Jersey courts are continuing to expand the scope of the act. In terms of the award of attorneys' fees, the only conclusion to be drawn is that close only matters in horse-shoes, hand grenades and Consumer Fraud Act attorneys' fees claims. ⚖

Endnotes

1. N.J.S.A. 56:8-1, *et seq.*
2. *Roberts v. Cowgill*, 316 N.J. Super. 33, 45 (App. Div. 1998).
3. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994).
4. *Coleman v. Fiore Brothers, Inc.*, 113 N.J. 594, 598 (1989).
5. N.J.S.A. 56:8-19.
6. *Performance Leasing Corp. v. Irwin Lincoln-Mercury*, 262 N.J. Super. 23, 31 619 A.2d 1024 (App. Div.), *certif. denied*, 133 N.J. 443, 627 A.2d 1147 (1993), *citing Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 605 (1997).
7. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18-9 (1994).
8. *Cox, supra*, 138 N.J. at 18.
9. *Cowgill, supra*, 316 N.J. Super. at 45.
10. *Id.*
11. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 24 (1994) (*citing Performance Leasing Corp., supra*, 262 N.J. Super. 23, 31, 34; *Weinberg v. Sprint Corp.*, 173 N.J. 233, 252-53 (2002); *see also Thiedemann v. Mercedes-Benz, USA, LLC*, 183 N.J. 234, 247 (2005)).
12. *BJM Insulation & Const., Inc. v. Evans*, 287 N.J. Super. 513, 517-18 (App. Div. 1996).
13. *Cox, supra*, 138 N.J. at 25.
14. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 253 (2002).
15. *Sema v. Automall 46, Inc.*, 384 N.J.

- Super. 145, 151-152 (App. Div. 2006), citing *Weinberg, supra*, 173 N.J. at 253.
16. *Pron v. Carlton Pools, Inc.*, 373 N.J. Super. 103 (App. Div. 2004).
 17. *Sema, supra*, 384 N.J. Super. 145, 151, citing *Scibek v. Longette*, 339 N.J. Super. 72, 86 (App. Div. 2001); *Branigan v. Level on the Level, Inc.*, 326 N.J. Super. 24, 30-1 (App. Div. 1999); *Cybul v. Atrium Palace Syndicate*, 272 N.J. Super. 330, 335-36 (App. Div.), *certif. denied*, 137 N.J. 311 (1994); *Performance Leasing, supra*, 262 N.J. Super. at 33-4.
 18. *Pron, supra*, 373 N.J. Super. 103, 112.
 19. *Perez v. Professionally Green, LLC*, No. A-2850-09T3 (App. Div. Oct. 13, 2011).
 20. *Perez v. Professionally Green, LLC*, No. A-2850-09T3 (App. Div. Oct. 13, 2011) (slip op. at 5).
 21. *Schmoll v. J.S. Hovnanian & Sons, LLC*, 394 N.J. Super. 415, 419-20 (App. Div. 2007). *See also, Coleman v. Fiore Brothers, Inc.*, 113 N.J. 594 (1989) (authorizing counsel fees in settlement of CFA claims).
 22. *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590, 610 (App. Div. 1990).
 23. *Silva v. Autos of Amboy*, 267 N.J. Super. 546 (App. Div. 1993); citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983).
 24. *Silva, supra*, 267 N.J. Super. 546 at 559.
 25. *Walker v. Giuffre*, 415 N.J. Super. 597, 607 (App. Div. 2010).
 26. *Id.*
 27. *Silva, supra*, 267 N.J. Super. 546 at 555.
 28. *Id.*
 29. *Silva, supra*, 267 N.J. Super. 546 at 551.
 30. *Chattin*, 243 N.J. Super. at 616.
 31. *Id.*
 32. *Silva, supra*, 267 N.J. Super. 546 at 556, citing *Hensley, supra*, at 436, 103 S. Ct. at 1941, 76 L. Ed. 2d at 52.
 33. *Walker, supra*, 415 N.J. Super. 597 at 606.
 34. *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (1999).
 35. *Josantos Const. v. Bohrer*, 326 N.J. Super. 42, 47 (App. Div. 1999).
 36. C.56:8-1 *et seq.*

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