

CONSUMER FRAUD ACT IN STATE vs. FEDERAL COURT

I. SUBSTANTIVE DIFFERENCES

- a. **Deceptive conduct requirement** – Can a CFA claim be sustained for unconscionable practices without deceptive conduct, e.g., price gouging during an emergency?

Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 472 (1988) (“To prove a violation of section 56:8-2, it is not necessary to show actual deceit or a fraudulent act; any unconscionable commercial practice is prohibited... [which] we have defined...as “[t]he standard of conduct contemplat[ing] * * * good faith, honesty in fact and observance of fair dealing.” *Kugler v. Romain*, 58 N.J. 522, 544 (1971). We anticipated that courts would “pour content” into the concept on a case-by-case basis. *Id.* at 543.)

Ciser v. Nestle Waters N. Am., Inc., 596 F. App'x 157, 162 (3d Cir. 2015) (Dismissing CFA claim based on unconscionably high late fees and holding, “Until the New Jersey Supreme Court decides otherwise, we read precedent as suggesting that the CFA requires some element of deceptive conduct, explicit or implicit, to be actionable as an unconscionable practice. The capacity to deceive is [required even though]... [t]he CFA does not require actual deception or an intent to deceive.”)

- b. **Learned Professional Exception** – Does Billing and Collection for professional services fall within the exception.

DiCarlo v. St. Mary Hosp., 530 F.3d 255, 260 (3d Cir. 2008) (Hospital immune from CFA liability for billing uninsured patients significantly more for services than insured patients.)

Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 124, (2014) (“We have serious doubts that the billing and collection function at issue in this case would qualify for the learned professional exception to the CFA, ‘whereby certain transactions fall outside the CFA’s purview because they involve services provided by learned professionals in their professional capacity.’”)

- c. **CFA Public Injunctions and (b)(2) Notice Relief – New Jersey vs. Federal Article III Standing**

Laufer v. U.S. Life Ins. Co., 385 N.J. Super 172, (App. Div. 2006) held that once the lead plaintiff establishes ascertainable loss under the CFA, she could adequately represent the interests of a (b)(2) class for declaratory and injunctive (notice) relief that the plaintiff herself would not benefit from.

Smith v. SBC Communs., Inc., 178 N.J. 265 (2004) (affirming CFA public injunction against BJ’s Wholesale prohibiting it from selling prepaid phone cards with fewer minutes than advertised).

Maniscalco v. Brother Int’l Corp. (USA), 2008 U.S. Dist. LEXIS 50122, at *28-29 (D.N.J. June 26, 2008) (declining to apply *Laufer* because it “may not be compatible with the standing requirements that Article III imposes on federal courts.”)

II. PROCEDURAL DIFFERENCES

a. Class actions

- i. New Jersey precedent strongly favours class certification in CFA cases. *In re Cadillac*, 93 N.J. 412, 435 (1983) (“the class action rule should be construed liberally in a case involving allegations of consumer fraud.”)
- ii. New Jersey courts have rejected ascertainability
- iii. New Jersey has broader precedent for (b)(2) Certification in CFA cases, including liability only declaratory judgments with notice relief to absent class members. See *Laufer v. U.S. Life*, 385 N.J. Super 172 (App. Div. 2006)
- iv. Settlements not subject to CAFA (Class Action Fairness Act) settlement provisions, 28 U.S.C. §§ 1711 - 1715
 - No “coupon settlement” restrictions - 28 USCS § 1712 -Attorney’s fees restricted in coupon settlements Percentage of fund not permitted on face value – must wait to see value actually redeemed, or else limit fees to lodestar.
 - No delays, hassles, costs of CAFA notice – 28 U.S.C. §1715 – Final approval hearing can’t be scheduled until 90 days after a specified notice package is sent to state and federal officials, which must be sent within 10 days of filing for preliminary approval.

- b. Pleading standards**- Surviving a motion to dismiss is the gateway to discovery, which in consumer cases, especially class actions, is crucial, since the business typically possesses all relevant information.

New Jersey maintains a liberal version of the fact-pleading standard. *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989) (“[C]ourts must search the Complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim.”)

The SCOTUS adopted a “plausibility” pleading standard not found in the court rules. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)(Plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face” to avoid dismissal under Rule 12(b)(6)).

III. HOW TO STAY OUT OF FEDERAL COURT

- a. **In both class and non-class cases, don't plead unnecessary federal claims (e.g., Truth in Lending) if you have good NJ claims.**
- b. **In individual claims, state in the complaint that total recovery sought is less than \$75K to avoid diversity jurisdiction** – unless you think that damages and statutory attorney's fees really are more than \$75K. In reality, in non-class cases, federal court is not necessarily worse than state court, depending on the judge you draw.
- c. **In class actions, avoid CAFA jurisdiction if possible**
 - i. **CAFA** - expanded federal diversity jurisdiction to include putative class actions in which at least one defendant and one putative class member are from different states, and the aggregate amount in controversy is at least \$5 million.
 - ii. **Local Controversy/Home State Exceptions** - CAFA provides for mandatory abstention if two-thirds of the putative class members at the time of filing are New Jersey citizens, the injury occurred in New Jersey, there hasn't been another similar class action against any of the defendants for three years prior to your case, and
 - at least one "significant" defendant is a New Jersey citizen (local controversy exception), or
 - the "primary defendants" are New Jersey citizens (home state exception).

This is useful if your claims are genuinely New Jersey-ish, e.g., claims based on New Jersey consumer regulations, or involving issues that the NJ Supreme Court has addressed in an especially aggressive manner (e.g., rent-to-own usury claims)

If you are thinking of trying this, make sure that:

1. You qualify your class definition with "and who were New Jersey residents at the time of filing of this action."
2. Your New Jersey defendant(s) is (are) not a sham defendant(s)
3. Read *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144 (3d Cir. 2009) and *Vodenichar v. Halcón Energy Props.*, 733 F.3d 497 (3d Cir. 2013)