

# Chapter 8

## Equitable Relief

### 8-1 EQUITABLE RELIEF AVAILABLE TO PRIVATE LITIGANTS

The CFA provides equitable remedies to halt the commission of consumer fraud.<sup>1</sup> The CFA expressly “allows a private cause of action to proceed for all available remedies.”<sup>2</sup> The equitable remedies available to private litigants are the following:

- Refund of money or property lost as a result of consumer fraud.<sup>3</sup>
- Any other appropriate equitable relief.<sup>4</sup>
- Cancellation of a debt that is the product of fraud.<sup>5</sup>

The first two of these remedies are expressly included in the CFA, while the last is discernible from case law interpreting the CFA. The words “any other appropriate...equitable relief” are found in Section 19, which created a CFA cause of action for private litigants.<sup>6</sup> Such other “equitable relief” might include the following remedies, some of which are otherwise expressly available to the Attorney General:

<sup>1</sup> *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572, 578 (Ch. Div. 1972).

<sup>2</sup> *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 467 n.17 (D.N.J. 2009) (citing *Weinberg v. Sprint Corp.*, 173 N.J. 233, 253 (2002)).

<sup>3</sup> N.J.S.A. 56:8-2.11 to -2.12.

<sup>4</sup> N.J.S.A. 56:8-19.

<sup>5</sup> See, e.g., *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 80 (Law Div. 2005); *Talented IT, Inc. v. Data Group, Inc.*, No. A-1836-08T1, 2009 WL 3488465 (N.J. Super. App. Div. Oct. 28, 2009); *Cox v. Sears Roebuck and Co.*, 138 N.J. 2, 21 (1994); *Data Informatics, Inc. v. Amerisource Partners*, 338 N.J. Super. 61, 80 (App. Div. 2001).

<sup>6</sup> N.J.S.A. 56:8-19.

- Appointment of a receiver.<sup>7</sup>
- An accounting.<sup>8</sup>
- Entry of an injunction against the merchant, such as the prohibition against future misconduct or preventing an individual from managing or owing any business organization in New Jersey.<sup>9</sup>
- Revocation of a merchant's licenses, permits or certificates issued pursuant to New Jersey laws or administrative regulations.<sup>10</sup>
- Merchant's disgorgement of profits.<sup>11</sup>
- Mandatory product recalls.
- Inspections, testing and repairs, if necessary.<sup>12</sup>
- Requiring merchant to issue revised advertising statements, marketing materials and product packaging.<sup>13</sup>

## 8-2 INJUNCTIVE RELIEF

Private CFA claimants may not pursue a CFA action solely for injunctive relief.<sup>14</sup> While a consumer may seek injunctive relief simultaneously with a suit to recover damages for an ascertainable

<sup>7</sup> N.J.S.A. 56:8-8.

<sup>8</sup> See, e.g., *Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002).

<sup>9</sup> N.J.S.A. 56:8-8. See, e.g., *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. Civ. A. 03-5448, 2008 WL 4126264 (D.N.J. Sept. 3, 2008) (wherein CFA claimants demanded that court prohibit automobile manufacturer from selling allegedly defective automobiles).

<sup>10</sup> N.J.S.A. 56:8-8. For example, if a home repair contractor licensed pursuant to the CRA violates the CFA on a grand scale, class action CFA claimants might seek to strip the contractor of that license.

<sup>11</sup> See, e.g., *Cartiglia v. Johnson & Johnson Co.*, No. MID-L-2754-01, 2002 WL 1009473 (N.J. Super. Law Div. Apr. 24, 2002); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. Civ. A. 03-5448, 2008 WL 4126264 (D.N.J. Sept. 3, 2008); *Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002).

<sup>12</sup> See *Schmoll v. J.S. Hovnanian & Sons, LLC*, 394 N.J. Super. 415 (App. Div. 2007) (CFA claimants suing mass home builder sought a court-administered program, at builder's expense, for inspection and testing of their units and if necessary, repairs to bring homes up to code); see also *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. Civ. A. 03-5448, 2008 WL 4126264 (D.N.J. Sept. 3, 2008) (CFA claimants demanded that court require automobile manufacturer to repair allegedly defective automobiles).

<sup>13</sup> *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364 (D.N.J. 2004).

<sup>14</sup> *Medical Soc'y of N.J. v. AmeriHealth HMO, Inc.*, No. A-3542-03T1, 376 N.J. Super. 48 (App. Div. 2005) (citing *Weinberg v. Sprint Corp.*, 173 N.J. 233, 254 (2002)).

loss, litigation seeking exclusively injunctive relief is only available to the Attorney General.<sup>15</sup> Therefore, to have initial standing under the CFA, a claimant seeking an injunction must plead that they sustained an ascertainable loss of money or property.<sup>16</sup> On a summary judgment motion and a motion to dismiss made at trial, the CFA claimant seeking equitable relief must prove they sustained an ascertainable loss – such as by providing an estimate of damages causally linked to the fraudulent conduct.<sup>17</sup> But once the claimant reaches the jury and proves the commission of consumer fraud, a CFA claimant is not required to prove that they sustained an ascertainable loss to be entitled to equitable relief.<sup>18</sup>

## 8-3 REFUND OF MONEY OR PROPERTY

### 8-3:1 The Refund Provision Generally

Any party violating the CFA is liable for a refund of all money they acquired by means of the violation.<sup>19</sup> The CFA's refund provisions state:

<sup>15</sup>. *Medical Soc'y of N.J. v. AmeriHealth HMO, Inc.*, No. A-3542-03T1, 376 N.J. Super. 48 (App. Div. 2005) (citing *Weinberg v. Sprint Corp.*, 173 N.J. 233, 254 (2002)).

<sup>16</sup>. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 251-53 (2002) (discussing the issue in the context of injunctive relief).

<sup>17</sup>. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 251-253 (2002).

<sup>18</sup>. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 251-53 (2002).

<sup>19</sup>. N.J.S.A. 56:8-2.11 to -2.12. This relief furthers the CFA's purpose of promoting the disclosure of relevant information to enable consumers to make intelligent decisions when selecting products and services. *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 471 (App. Div. 2001); *Division of Consumer Affairs v. G.E. Co.*, 244 N.J. Super. 349, 353 (App. Div. 1990).

For a less orthodox view of the CFA's refund provisions, see *Henry v. Somertime Pool & Spa Service, Inc.*, No. A-1179-05T2, 2006 WL 2068353 (N.J. Super. App. Div. July 27, 2006).

In *Henry*, it apparently took a lawsuit to compel the contractor to correct its misconduct. Compare the court's holding in *Ayad v. Fleet Bank*, No. A-2135-04T5, 2005 WL 3991111 (N.J. Super. App. Div. May 10, 2006). In the midst of litigation, a bank had to provide claimants a refund, whereupon the merchant unsuccessfully argued that claimant failed to prove an ascertainable loss. The CFA's intent is compromised if merchants escape liability by belatedly correcting their fraudulent conduct. The Supreme Court of New Jersey rejected the argument that CFA claimants must serve a presuit demand for relief upon merchants. See *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267 (App. Div. 2007), aff'd, 197 N.J. 543 (2009). Henry failed to explain away certain reported cases endorsing the refund provision (i.e., *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997); *Weinberg v. Sprint Corp.*, 173 N.J. 233, 290 (2002); *Glukowsky v. Equity One, Inc.*, 360 N.J. Super. 1 (App. Div. 2003)). Also, contrary to *Henry's* dicta regarding whether the refund provision applies to all CFA causes of action instead of merely those pertaining to foods, no portion of a legislative enactment is assumed to be superfluous. *G.E. Capital Mortgage v. Marilao*, 352 N.J. Super. 274 (App. Div. 2002) (citing *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 204 (1999); *Medical Soc'y of New Jersey v. New Jersey Dep't of Law and Pub. Safety*, 120 N.J. 18, 26-27 (1990)).

Any person violating the provisions of the within act shall be liable for a refund of all moneys acquired by means of any practice declared herein to be unlawful.<sup>20</sup>

The refund of moneys herein provided for may be recovered in a private action or by such persons authorized to initiate actions pursuant to P.L.1975, c. 376 (C. 40:23-6.47 et seq.).<sup>21</sup>

The Supreme Court explained the separate cause of action available for refunds as follows:

The CFA vests the Attorney General with jurisdiction to enforce its provisions through a variety of mechanisms, N.J.S.A. 56:8-3 to -8, -11, -15 to -18, & -20, but it also provides individual consumers with a cause of action to recover refunds, N.J.S.A. 56:8-2.11 to -2.12, and treble damages for violations, whether in good faith or otherwise, N.J.S.A. 56:8-19.<sup>22</sup>

### **8-3:2 Refund Provision May Not Require Proof of Ascertainable Loss**

The Appellate Division also recognized the independent cause of action for refunds, stating:<sup>23</sup>

The Consumer Fraud Act prohibits “unconscionable commercial practices.” N.J.S.A. 56:8-2. It also provides for a private right of action, to recover monies lost as a result of such practices, N.J.S.A. 56:8-2.12, and states that the rights protected under the Act are cumulative of other rights and remedies under New Jersey law. N.J.S.A. 56:8-2.13.<sup>24</sup>

<sup>20</sup> N.J.S.A. 56:8-2.11.

<sup>21</sup> N.J.S.A. 56:8-2.12. The last reference in this provision to “P.L.1975, c. 376 (C. 40:23-6.47 et seq.)” refers to actions by the offices of the Department of Consumer Affairs.

<sup>22</sup> *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997).

<sup>23</sup> *See Glukowsky v. Equity One, Inc.*, 360 N.J. Super. 1 (App. Div. 2003).

<sup>24</sup> *Glukowsky v. Equity One, Inc.*, 360 N.J. Super. 1 (App. Div. 2003).

Since the refund provisions do not refer to the ascertainable loss requirement of N.J.S.A. 56:8-19, the CFA's language does not expressly require claimants seeking refunds to plead or prove ascertainable loss.<sup>25</sup> In this regard, no portion of a legislative enactment is assumed to be superfluous.<sup>26</sup> "The refund provision is a statutory remedy, not based on the proving of any damages."<sup>27</sup> A CFA claimant is "entitled to the refund regardless of whether he suffered any ascertainable loss. There is no causal relationship needed to be eligible for a refund."<sup>28</sup> The refund provisions allow CFA claimants to recover a refund where they prove a deceptive business practice but are unable to prove an ascertainable loss.<sup>29</sup> The CFA's application is not limited only to situations where the attempt to deceive was successful or actually resulted in injury.<sup>30</sup> To recover a refund from a merchant, the CFA claimant need only prove that the merchant acquired the money sought by means of any practice violating the CFA.<sup>31</sup> The party receiving a CFA refund is also entitled to a mandatory award of counsel fees, filing fees and costs.<sup>32</sup> Courts are often reluctant to award treble damages on refunds awarded to CFA claimants, because the refund remedy is distinct from the remedies provided by N.J.S.A. 56:8-19 and therefore, refunds aren't subject to being trebled.<sup>33</sup> While the Supreme Court's decision in *Weinberg v. Sprint Corp.*,<sup>34</sup> acknowledged the existence of the CFA's refund provisions, the Court did not address the aforesaid issue.<sup>35</sup>

<sup>25</sup> See N.J.S.A. 56:8-2.11 to -2.12.

<sup>26</sup> *G.E. Capital Mortgage v. Marilao*, 352 N.J. Super. 274 (App. Div. 2002) (citing *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 204 (1999); *Medical Soc'y of New Jersey v. New Jersey Dep't of Law and Pub. Safety*, 120 N.J. 18, 26-27 (1990)).

<sup>27</sup> *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 89 (Law Div. 2005).

<sup>28</sup> *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 89 (Law Div. 2005); *accord Block v. Plosia*, 390 N.J. Super. 543, 551 (App. Div. 2007).

<sup>29</sup> *Ollendorf v. Monk*, No. A-5031-05T5, 2007 WL 2198243 (N.J. Super. App. Div. May 22, 2007).

<sup>30</sup> *Hyland v. Zuback*, 146 N.J. Super. 407, 415 (App. Div. 1976).

<sup>31</sup> N.J.S.A. 56:8-2.11.

<sup>32</sup> *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 89 (Law Div. 2005) (citing *BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513 (App. Div. 1996)).

<sup>33</sup> *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 89 (Law Div. 2005).

<sup>34</sup> *Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002).

<sup>35</sup> *Weinberg v. Sprint Corp.*, 173 N.J. 233, 290 (2002).

### 8-3:3 Examples of Cases Where CFA Claimants Were Awarded Refunds

The following are examples of cases where courts awarded CFA claimants refunds:

- A contract for consumer financial help services where the merchant charged CFA claimants \$195.00 to \$260.00 simply for referring them to an attorney, when such a referral could be obtained for free through a bar association lawyer referral service.<sup>36</sup>
- Unlicensed landscape irrigation contractor sued a consumer to collect an unpaid bill for a sprinkling system but violated Home Improvement Practice regulations by failing to issue customer written change orders and failing to include an ending date or a time for performance in the contract.<sup>37</sup>
- Home repair contractor sued homeowner for sale of storm windows and doors but failed to follow certain requirements of the Door-to-Door Home Repair Sales Act, N.J.S.A. 17:16C-95 to -103 and thereby violated the CFA. The customer was entitled to cancel the contract and obtain a refund.<sup>38</sup>
- Home repair contractor violated Home Improvement Practice regulations by (1) failing to register with the City of Jersey City as required by municipal ordinance at the time of the home-improvement work; (2) failing to post the performance bond required by municipal ordinance; (3) starting the demolition necessary to prepare for the home improvements without having obtained the necessary permits;

---

<sup>36</sup> *In re Fleet*, 95 BR 319, 337 (Bankr. E.D. Pa. 1989) (citing *Huffmaster v. Robinson*, 221 N.J. Super. 315 (Law Div. 1986)).

<sup>37</sup> *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 80 (Law Div. 2005).

<sup>38</sup> *Swiss v. Williams*, 184 N.J. Super. 243 (Dist. Ct., 1982), *overruled on other grounds*, *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465 (App. Div. 1982).

- (4) installing an inadequate cooling and heating system which was not properly sized for the needs of the plaintiff and the work contracted; and
- (5) delaying completion of the work and, in some respects, failing to complete the work.<sup>39</sup>

#### 8-3:4 Examples of Cases Where CFA Claimants Were Denied Refunds

The following are cases where courts refused to award CFA claimants refunds:

- Home repair contractor allegedly failed to build plaintiffs an in-ground pool suitable for diving and concealed the pool's unsuitability long after full payment was received and the jury found consumer fraud and returned a verdict in favor of plaintiffs.<sup>40</sup>
- A contractor committed various per se violations, including the failure to include the requisite notice of decision to terminate the right to rescind the contract within three days of signing. The customer breached the contract by canceling it based upon a change of mind concerning the wisdom of incurring the expense of the home repair in light of her financial position. The contractor was entitled

<sup>39</sup>. *Cardillo v. Bolger*, A-1117-07T2, 2009 N.J. Super. Unpub. LEXIS 218 (N.J. Super. App. Div. Jan. 12, 2009).

<sup>40</sup>. *Henry v. Somertime Pool & Spa Service, Inc.*, No. A-1179-05T2, 2006 WL 2068353 (N.J. Super. App. Div. July 27, 2006). In *Henry*, it apparently took a lawsuit to compel the contractor to correct its misconduct. Compare the court's holding in *Ayad v. Fleet Bank*, No. A-2135-04T5, 2005 WL 3991111 (N.J. Super. App. Div. May 10, 2006). In the midst of litigation, a bank had to provide claimants a refund, whereupon the merchant unsuccessfully argued that claimant failed to prove an ascertainable loss. The CFA's intent is compromised if merchants escape liability by belatedly correcting their fraudulent conduct. The Supreme Court of New Jersey rejected the argument that CFA claimants must serve a presuit demand for relief upon merchants. See *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267 (App. Div. 2007), *aff'd*, 197 N.J. 543 (2009). *Henry* failed to explain away certain reported cases endorsing the refund provision (i.e., *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997); *Weinberg v. Sprint Corp.*, 173 N.J. 233, 290 (2002); *Glukowsky v. Equity One, Inc.*, 360 N.J. Super. 1 (App. Div. 2003)). Also, contrary to *Henry's* dicta regarding whether the refund provision applies to all CFA causes of action instead of merely those pertaining to foods, no portion of a legislative enactment is assumed to be superfluous. *G.E. Capital Mortgage v. Marilao*, 352 N.J. Super. 274 (App. Div. 2002) (citing *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 204 (1999); *Medical Soc'y of New Jersey v. New Jersey Dep't of Law and Pub. Safety*, 120 N.J. 18, 26-27 (1990)). For further principles of legislative interpretation contradicting *Henry's* holding, See Chapter 2, § 2-1.3.

to retain the customer's deposit because it was not acquired by unlawful means.<sup>41</sup>

- In the sale of an automobile loss deterrent system, there was no causal connection between the sums paid to the merchant and the alleged misconduct.<sup>42</sup>

### 8-3:5 Treble Damages on Refunds Unavailable

Treble damages are not available in New Jersey state court on money refunded pursuant to the CFA's refund provisions.<sup>43</sup> However, at least one District Court awarded treble damages on a consumer fraud refund recovered pursuant to those provisions.<sup>44</sup> If a claimant seeks damages pursuant to N.J.S.A. 56:8-19 in lieu of a refund and those damages amount to a refund of money paid to a merchant, such damages would be subject to trebling.<sup>45</sup>

### 8-3:6 Fraud Statutory Refund Remedy Separate from but Cumulative to CFA

A remedy separate from and cumulative to the CFA's refund provision is N.J.S.A. 2A:32-1, titled "Remedies of person defrauded," which states:

(w)henever there is a fraud in the execution or consideration of a contract, the person defrauded at any time thereafter may institute a civil action,

<sup>41</sup>. *Czmyr v. Avalanche Heating and Air Conditioning, Inc.*, No. A-1674-09T1, 2011 N.J. Super. Unpub. LEXIS 351 (N.J. Super. App. Div. Feb. 16, 2011). But the CFA's application is not limited only to situations where the attempt to deceive was successful or actually resulted in injury. *Hyland v. Zuback*, 146 N.J. Super. 407, 415 (App. Div. 1976).

<sup>42</sup>. *Kaplan v. Moroz*, A-2182-07T3, 2009 N.J. Super. Unpub. LEXIS 1179 (N.J. Super. App. Div. May 15, 2009). But the CFA's application is not limited only to situations where the attempt to deceive was successful or actually resulted in injury. *Hyland v. Zuback*, 146 N.J. Super. 407, 415 (App. Div. 1976).

<sup>43</sup>. See *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 77, 80 (Law Div. 2005), an unlicensed landscape irrigation contractor sued a consumer to collect an unpaid bill for a sprinkling system and the consumer counterclaimed, alleging that the contract was not enforceable because the contractor violated the CFA. While entitled to a refund, claimant failed to prove ascertainable loss and the court refused to award the consumer treble damages by trebling the amount of the refund.

<sup>44</sup>. *In re Fleet*, 95 BR 319, 337 (Bankr. E.D. Pa. 1989) (applying N.J.S.A. 56:8-2.11 to contract for consumer financial help services).

<sup>45</sup>. See, e.g., *Huffmaster v. Robinson*, 221 N.J. Super. 315, 322-23 (Law Div. 1986); *Ollendorf v. Monk*, No. A-5031-05T5, 2007 WL 2198243 (N.J. Super. App. Div. Aug. 2, 2007).

to recover the money owing on such contract although, by its terms, the debt contracted or the money secured to be paid thereby is not then due or payable; and the person defrauded may, upon discovery of the fraud, either rescind the contract entirely and recover the money or property obtained by the fraud, or, sue on the contract to recover thereon.<sup>46</sup>

The CFA expressly provides that the rights, remedies and prohibitions provided by the CFA are in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or New Jersey statutes.<sup>47</sup> The CFA should not be construed to deny, abrogate or impair any such common law or State statutory right, remedy or prohibition, such as that afforded to fraud victims under N.J.S.A. 2A:32-1.<sup>48</sup> CFA claimants seeking refunds should also invoke and seek relief under N.J.S.A. 2A:32-1.

## 8-4 CANCELLATION OF DEBTS ARISING FROM CONSUMER FRAUD AND DISMISSAL OF SUITS SEEKING TO COLLECT SUCH DEBTS

### 8-4:1 Generally

At common law, unconscionability invalidates a contract.<sup>49</sup> If a merchant attempts to enforce a contract that violates the CFA, such as via a collection action, the merchant is estopped from doing so.<sup>50</sup>

<sup>46</sup> N.J.S.A. 2A:32-1.

<sup>47</sup> N.J.S.A. 56:8-2:13; *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997).

<sup>48</sup> N.J.S.A. 56:8-2:13; *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997).

<sup>49</sup> *Saxon Constr. v. Masterclean*, 273 N.J. Super. 231 (App. Div. 1994); *Discover Bank v. Shea*, 362 N.J. Super. 200 (Law Div. 2001), *appeal dismissed*, 362 N.J. Super. 90 (App. Div. 2003).

<sup>50</sup> *Huffmaster v. Robinson*, 221 N.J. Super. 315 (Law Div. 1986); *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 80 (Law Div. 2005); *Scott v. Mayflower Home Improvement Corp.*, 363 N.J. Super. 145, 160 (Law Div. 2001), *rev'd in part on other grounds*, 378 N.J. Super. 221 (App. Div. 2005). This relief furthers the CFA's purpose of promoting the disclosure of relevant information to enable consumers to make intelligent decisions when selecting products and services. *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 471 (App. Div. 2001); *Division of Consumer Affairs v. G.E. Co.*, 244 N.J. Super. 349, 353 (App. Div. 1990). Since it is remedial legislation drafted in favor of consumers, courts should construe the CFA liberally to achieve this purpose. *Delaney v. Garden State Auto Park*, 318 N.J. Super. 15, 20 (App. Div. 1999). Moreover, the CFA's application is not limited only to situations where the attempt to deceive was successful or actually resulted in injury. *Hyland v. Zuback*, 146 N.J. Super. 407, 415 (App. Div. 1976).

Since two of the CFA's purposes are to punish the wrongdoer and to deter others from engaging in consumer fraud, noncompliance with the CFA and its associated regulations may have severe consequences, such as cancellation of a debt.<sup>51</sup> The merchant is deprived of the power to enforce the fraudulent contract.<sup>52</sup> To permit a violator of the CFA to enforce such a contract would strip the CFA of the severity of its remedial purpose.<sup>53</sup> Contract and tort claims are typically precluded if a plaintiff acts "contrary to the regulatory scheme designed to preclude unlicensed agencies or services from benefiting from unlawful conduct."<sup>54</sup> Judge Haines described the reasoning behind the CFA's cancellation remedy:

The New Jersey act, while silent as to its effect upon the contract, must be read as depriving a technically violating repairman of any enforcement capacity. Otherwise, the act would make no sense. Contracts involving consumer fraud as defined in our act and our administrative code are therefore unenforceable by violators because:

<sup>51</sup>. *Talented IT, Inc. v. Data Group, Inc.*, No. A-1836-08T1, 2009 N.J. Super. Unpub. LEXIS 2724 (N.J. Super. App. Div. Oct. 28, 2009).

<sup>52</sup>. *Huffmaster v. Robinson*, 221 N.J. Super. 315 (Law Div. 1986); *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 80 (Law Div. 2005).

<sup>53</sup>. *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 80 (Law Div. 2005). In *Artistic*, a landscape irrigation contractor brought an action against their customer, seeking the balance due on sprinkler installation contract and the customer responded with a CFA counterclaim. The court dismissed the contractor's suit, reasoning that:

(t)o now permit the plaintiff to enforce the contract in the face of the unlawful regulatory violations and its failure to operate with the mandated license and recover the unpaid sums otherwise due would strip the Consumer Fraud Act of the gravitas intended by the Legislature as a remedial statute. For the reasons set forth above, the plaintiff's complaint is dismissed.

*Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 88 (Law Div. 2005). Another court explained:

(t)o enforce contracts which violate or were obtained by practices which violate important regulatory statutes enacted for the benefit of consumers would be clearly contrary to public policy and the authority of the Legislature.

*Scott v. Mayflower Home Imp. Corp.*, 363 N.J. Super. 145 (Law Div. 2001), *rev'd in part on other grounds*, 378 N.J. Super. 221 (App. Div. 2005) (citing *Vasquez v. Glassboro Service Ass'n, Inc.*, 83 N.J. 86, 98 (1980); *Tanenbaum v. Sylvan Builders, Inc.*, 29 N.J. 63, 71-2 (1959) (The Act licensing Real Estate Brokers is a regulatory measure and represents the strong public policy of our state; hence an unlicensed broker is not entitled to compensation for his services either in contract or tort)).

<sup>54</sup>. *Talented IT, Inc. v. Data Group, Inc.*, No. A-1836-08T1, 2009 N.J. Super. Unpub. LEXIS 2724 (N.J. Super. App. Div. Oct. 28, 2009) (citing *Data Informatics, Inc. v. Amerisource Partners*, 338 N.J. Super. 61, 80 (App. Div. 2001) (applying the Private Employment Agency Act, N.J.S.A. 34:8-43 to -66—specifically N.J.S.A. 34:8-45(b) and N.J.S.A. 56:8-1.1.)).

- (1) They are void, being contrary to public policy as expressed in the act. *Vasquez v. Glassboro, Services Ass'n*, 83 N.J. 86, 99 [415 A.2d 1156] (1980); or
- (2) They have not been consummated because the conditions precedent established by the Act have not been fulfilled. *Campbell, supra*; or
- (3) They are illegal as to the violator of the Act. *Williston, Contracts*, (3 ed. Jaeger) § 1631, provides that “[a]n innocent plaintiff may recover on an illegal agreement which is not declared void by statute.”<sup>55</sup>

In *Cox v. Sears Roebuck & Co.*,<sup>56</sup> while not applying the CFA to bar the contract, the Supreme Court of New Jersey nevertheless explained that CFA claimants are under no obligation to pay debts arising from consumer fraud.<sup>57</sup> Also, a repairman seeking a mechanics’ lien for services procured by fraud is not likely entitled to the lien.<sup>58</sup>

#### 8-4:2 Ascertainable Loss and Debts That Are the Product of Consumer Fraud

Debts that are the product of consumer fraud may provide proof of ascertainable loss and therefore be subject to trebling.<sup>59</sup> But

<sup>55</sup>. *Huffmaster v. Robinson*, 221 N.J. Super. 315 (Law Div. 1986).

<sup>56</sup>. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994).

<sup>57</sup>. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994). Claimant contracted with Sears Roebuck & Company to renovate the claimant’s kitchen, financing the cost of the renovations on his Sears credit card. Dissatisfied with Sears’ performance, Cox sued Sears on theories of, among others, breach of contract and violations of the CFA, whereupon Sears counterclaimed for the full contract price. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 7-8 (1994). The trial court entered an order dismissing Sears’ counterclaim and ordered Sears to remove any charges to plaintiff’s Sears charge account and any lien on plaintiff’s house. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 10 (1994). The *Cox* Court noted that the consumer is not obligated to pay an indebtedness arising out of conduct that violates the CFA. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994). Nevertheless, the *Cox* Court explained that, in the case before it,

the debt and the lien, although losses to Cox, and properly cancelled by the trial court for Sears’ breach of contract, were not the result of Sears’ violation of the CFA. Rather, those losses occurred before any consumer fraud took place.

*Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994).

<sup>58</sup>. *Huffmaster v. Robinson*, 221 N.J. Super. 315 (Law Div. 1986).

<sup>59</sup>. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 23 (1994).

when merely defending against an action to collect a fraudulent debt, a CFA claimant is not required to prove ascertainable loss.<sup>60</sup>

### 8-4:3 Examples of Cases Where Courts Cancelled Fraudulent Debts

The following are examples of courts invalidating contracts and/or refusing to permit collection thereon because the contracts violated the CFA:

- A contract for consumer financial help services where the merchant charged CFA claimants \$195.00 to \$260.00 simply for referring them to an attorney, when such a referral could be obtained for free through a bar association lawyer referral service.<sup>61</sup>
- A disputed automotive repair bill wherein the repairman violated the DCA's automotive repair regulations by failing to obtain written authorization for work signed by automobile's owner and failing to give the owner a written estimate of the price of repairs.<sup>62</sup>
- Home repair contractor was deprived of right to enforce its contract for extras for violating Home Improvement Practices requirements that all

---

<sup>60</sup>. See *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75 (Law Div. 2005). For example, in *Artistic*, a contractor sued a customer claimant was unable to prove an ascertainable loss and yet, the court refused a landscaping contractor to collect its bill for services.

<sup>61</sup>. *In re Fleet*, 95 BR 319, 337 (Bankr. E.D. Pa. 1989) (citing *Huffmaster v. Robinson*, 221 N.J. Super. 315 (Law Div. 1986)).

<sup>62</sup>. *Huffmaster v. Robinson*, 221 N.J. Super. 315 (Law Div. 1986). In a dispute between a Pennsylvania repair shop and a New Jersey consumer about a bill for repairs to a vehicle registered in New Jersey, plaintiff believed he paid the shop in full for the repairs prior to their performance. However, when the repairs were done, the consumer refused to pay an additional sum that he was billed and thus, the shop refused to release the vehicle to the consumer, who then sued the shop. The automobile repair dealer thereupon counterclaimed for \$4,000.00, plus storage charges. While the court found that the repairman rendered complete, good-faith performance of the parties' agreement, the court nonetheless found that the repairman violated the DCA's administrative regulations governing automotive repairs by: (1) failing to obtain written authorization for work signed by the customer; and (2) failing to give the customer a written estimate of the price of repairs. The court concluded that the repair dealer could not enforce the contract to repair the owner's automobile. *Huffmaster v. Robinson*, 221 N.J. Super. 315, 322 (Law Div. 1986).

changes in a home improvement contract be in writing and signed by the parties.<sup>63</sup>

- Home repair contractor sued homeowner to collect bill but violated the CFA and the Door-to-Door Home Repair Sales Act, N.J.S.A. 17:16C-95 to -103.<sup>64</sup>
- Home repair contractor sued homeowner for sale of storm windows and doors but failed to follow certain requirements of the Door-to-Door Home Repair Sales Act, N.J.S.A. 17:16C-95 to -103 and thereby violated the CFA. The customer was entitled to cancel the contract and obtain a refund.<sup>65</sup>
- Homeowners commenced a class action against financial institutions purchasing mortgage loans used to finance home repairs by alleged unscrupulous home contractors.<sup>66</sup>
- A breach of employment agreement suit by a corporation that recruits and places computer

<sup>63</sup>. *Blake Constr. v. Paylick*, 236 N.J. Super. 73 (Law Div. 1989), *overruled on other grounds*, 246 N.J. Super. 615 (App. Div. 1991).

<sup>64</sup>. *BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513, 515 (App. Div. 1996). Plaintiff sued defendant alleging that she had breached certain home repair contracts. Defendant denied the allegations of breach and asserted, in defense that plaintiff violated the CFA and the Door-to-Door Home Repair Sales Act, N.J.S.A. 17:16C-95 to -103. *BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513, 515 (App. Div. 1996). After a period for discovery, defendant moved for summary judgment and the court granted the motion, thereby dismissing the complaint with prejudice in an order noting that plaintiff had been found to be in violation of the statutes cited by defendant. *BJM Insulation & Constr., Inc. v. Evans*, 287 N.J. Super. 513, 515 (App. Div. 1996).

<sup>65</sup>. *Swiss v. Williams*, 184 N.J. Super. 243 (Dist. Ct., 1982), *overruled on other grounds*, *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465 (App. Div. 1982).

<sup>66</sup>. *Scott v. Mayflower Home Improvement Corp.*, 363 N.J. Super. 145 (Law Div. 2001), *rev'd in part on other grounds*, 378 N.J. Super. 221 (App. Div. 2005). The home repair contracts failed to disclose cash price, the interest, the total of the principal and interest and all credit charges, the number of installments required, the amount of each installment and the due dates thereof, a description of the work to be done, the principal products and materials to be used or installed, including where applicable the name, make, size, capacity, model, and model year of principal products or fixtures to be installed and the type, grade, quality, size or quantity of principal building or the construction materials to be used. The financial disclosure forms were backdated and the total cash prices listed were substantially lower than the total amounts to be paid on the contracts, including interest. *Scott v. Mayflower Home Improvement Corp.*, 363 N.J. Super. 145, 160-161 (Law Div. 2001), *rev'd in part on other grounds*, 378 N.J. Super. 221 (App. Div. 2005).

consultants with its clients to work on projects on a temporary basis was dismissed on defendant's motion for summary judgment for plaintiff's failure either to be licensed under the Private Employment Agency Act, N.J.S.A. 34:8-43 to -79, or to be registered with the Attorney General as a "temporary help service firm" under N.J.S.A. 56:8-1.1.<sup>67</sup>

- Unlicensed temporary agency attempted to collect a debt for temporary services rendered to a customer; agency's claims that it was not actually an employment agency were unsuccessful.<sup>68</sup>

<sup>67</sup>. *Camo Techs., Inc. v. Pathan*, No. A-2793-07T3, 2009 WL 17890 (N.J. Super. App. Div. Jan. 2, 2009) (citing *Data Informatics, Inc. v. Amerisource Partners*, 338 N.J. 61, 78-80 (App. Div. 2001)). In so holding, the *Camo Technologies* court

rejected plaintiff's argument that even if it was barred from maintaining a claim for breach of contract, it could pursue its other claims against defendant, such as its claim for tortious interference with the contractual relations with plaintiff's clients. The court also rejected plaintiff's arguments that its failure to register with the Attorney General did not bar the claims against defendant because he was placed with a client outside of New Jersey and that [plaintiff's] registration after defendant terminated his employment authorized plaintiff to maintain this action because defendant's conduct constituted a "continuing wrong" that was still ongoing when plaintiff became registered.

<sup>68</sup>. *Data Informatics, Inc. v. Amerisource Partners*, 338 N.J. Super. 61, 80 (App. Div. 2001) (applying the Private Employment Agency Act, N.J.S.A. 34:8-43 to -66—specifically N.J.S.A. 34:8-45(b) and N.J.S.A. 56:8-1.1.). The court rejected plaintiff's alternative argument that, even if its collection of a fee is barred by its failure to be licensed or registered, it wasn't precluded from recovering on its tort and contract claims. That argument contradicted the regulatory scheme designed to preclude unlicensed agencies or services from benefiting from unlawful conduct. Because the Private Employment Agency Act is "regulatory and penal" in nature, the agency's agreement was void as illegal and unenforceable as a matter of public policy. *Data Informatics, Inc. v. Amerisource Partners*, 338 N.J. Super. 61, 78-79 (App. Div. 2001) (citing *Accountemps Division of Robert Half, Inc. v. Birch Tree Group, Ltd.*, 115 N.J. 614, 626 (1989) (collecting cases where failure to comply with licensing statutes precluded contract enforcement and recovery of fees); *Nitta v. Yamamoto*, 31 N.J. Super. 578, 584 (App. Div. 1954) (holding restrictive covenant unenforceable where plaintiff failed to obtain employment agency license); *Saks Theatrical Agency v. Mentine*, 24 N.J. Misc. 332, 333 (Dist. Ct. 1946)). The court refused to countenance plaintiff seeking to do by indirection, that which it couldn't do directly, especially in the face of a significant regulatory scheme designed to protect not only employees and employers, but the public as well. *Data Informatics, Inc. v. Amerisource Partners*, 338 N.J. Super. 61, 79 (App. Div. 2001) (citing *R.A. Intile Realty Co., Inc. v. F.P. Raho*, 259 N.J. Super. 438, 474 (Law Div. 1992) (quoting *Smith v. Cyprus Indus. Minerals Co.*, 178 N.J. Super. 7, 14 (App. Div. 1981)); *McCann v. Biss*, 65 N.J. 301, 310 (1974)).

- Unlicensed temporary agency attempted to collect a debt for temporary services rendered to a customer.<sup>69</sup>
- Contacts for sale of packages of educational material that were: (2) of dubious value to children in the age group and socio-economic position the seller represented would be benefited by it; (2) sold for two-and-a-half times their reasonable value.<sup>70</sup>
- Unlicensed landscape irrigation contractor sued a consumer to collect an unpaid bill for a sprinkling system but violated Home Improvement Practices regulations by failing to issue customer written change orders and failing to include an ending date or a time for performance in the contract.<sup>71</sup>
- A contractor committed various per se violations, including the failure to include the requisite notice of decision to terminate the right to rescind the contract within three days of signing. The customer breached the contract by canceling it based upon a change of mind concerning the wisdom of incurring the expense of the home repair in light of her financial position. While entitled to the customer's initial deposit, the contractor was not liable for treble damages but was liable for counsel fees for the per se violations and could not recover for damages for the expenses incurred in anticipation of performing the work and for lost profits, after deducting the deposit.<sup>72</sup>

---

<sup>69</sup>. *Talented IT, Inc. v. Data Group, Inc.*, No. A-1836-08T1, 2009 N.J. Super. Unpub. LEXIS 2724 (N.J. Super. App. Div. Oct. 28, 2009).

<sup>70</sup>. *Kugler v. Romain*, 58 N.J. 522, 547-48 (1971).

<sup>71</sup>. *Artistic Lawn & Landscape Co., Inc. v. Smith*, 381 N.J. Super. 75, 80 (Law Div. 2005). *Artistic Lawn* is a prime example of a home repair contractor's CFA violation resulting in the cancellation of the debt that plaintiff sought to recover via a collection action.

<sup>72</sup>. *Czmyr v. Avalanche Heating & Air Conditioning, Inc.*, No. A-1674-09T1, 2011 N.J. Super. Unpub. LEXIS 351 (N.J. Super. App. Div. Feb. 16, 2011).

#### 8-4:4 Fraud Statutory Cancellation Remedy Separate from but Cumulative to CFA

A remedy separate from and cumulative to the CFA's remedy of cancellation of fraudulent debts is N.J.S.A. 2A:32-1, titled "Remedies of person defrauded," which states:

(w) whenever there is a fraud in the execution or consideration of a contract, the person defrauded at any time thereafter may institute a civil action, to recover the money owing on such contract although, by its terms, the debt contracted or the money secured to be paid thereby is not then due or payable; and the person defrauded may, upon discovery of the fraud, either rescind the contract entirely and recover the money or property obtained by the fraud, or, sue on the contract to recover thereon.<sup>73</sup>

The CFA expressly provides that the rights, remedies and prohibitions provided by the CFA are in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or New Jersey statutes.<sup>74</sup> The CFA should not be construed to deny, abrogate or impair any such common law or State statutory right, remedy or prohibition, such as that afforded to fraud victims under N.J.S.A. 2A:32-1.<sup>75</sup> CFA claimants seeking to cancel fraudulent debts should also invoke and seek relief under N.J.S.A. 2A:32-1.

---

<sup>73</sup>. N.J.S.A. 2A:32-1.

<sup>74</sup>. N.J.S.A. 56:8-2:13; *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997).

<sup>75</sup>. N.J.S.A. 56:8-2:13; *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255 (1997).