

Defending Per Se Consumer Fraud Litigation
Claims involving Home Improvement
Contracts

A presentation to the Home Building Industry

By:

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A. GENERAL OVERVIEW OF CONSUMER FRAUD ACT (CFA)

I. N.J.S.A 56:8-1 et. seq.: The Consumer Fraud Act (CFA)

- a. It was enacted in New Jersey in 1960 and significantly strengthened over the years. It is one of most pro-consumer statutes in the country. It includes an expanded definition of what is an unlawful practice, expanded rights to private causes of action, the imposition of treble damages and attorneys' fees and costs.
- b. In addition to private causes of action, the CFA provides the AG with authority to promulgate remedial rules to protect consumers from unconscionable business practices

II. Elements to be proven: to recover under CFA, claimant must prove:

- a. Unlawful practice
- b. Resulting in *ascertainable loss* of money or property
- c. *Causal connection* between the unlawful conduct and the loss
- d. *Intent* is not an element

III. Types of Consumer Fraud

- a. Knowing affirmative misrepresentation
- b. Knowing omission or non-disclosure of material fact
- c. Violation of regulations adopted by the Division of Consumer Affairs (DCA); "Per Se" violations – {for example, deceptive mail order practices, motor vehicle advertising practices, auto sale practices, servicing and repairing home appliances, disclosure of refund policies in retail establishments. }

IV. DCA Regulations regarding home improvements

- a. Home Improvement Regulations
- b. Contractor Registration Act and related Regs

B. Home Improvement Regulations:
N.J.A.C. 13:45A-16.1 et. seq.

- I. “PER SE” LEGAL REQUIREMENTS (not exhaustive list)
- a. Describes a number of deceptive business practices, such as “bait selling”
 - b. No work to be commenced until contractor sure all permits have been issued
 - c. All guarantees/warranties must be in writing
 - d. final payment upon completion / issuance of C of O
 - e. All contracts over \$500 in writing and signed
 - f. All change orders to be in writing and signed
 - g. Legal name and business address of seller in understandable language in contract
 - h. Prices specified
 - i. Commencement and completion dates must be specified
 - j. As consumer contract, it requires a 3 day atty review/right of rescission
 - k. Contract to name not only seller, but also salesman who solicited
 - l. Description of work and products/materials to be used
 - m. Total price, including all finance charges, hourly rate of labor if based upon time charges
 - n. Cannot request buyer to sign certificate of completion or make final payment prior to completion

C. Contractors Registration Act (N.J.S.A. 56:8-136 et seq.)
And Regulations (N.J.A.C. 13:45A-17.1)

I. General Description:

Amended CFA, requiring registration for home improvement contractors – by Dec 31, 2005 (with limited exceptions), with annual renewals, background checks and proof of insurance. Often enforced at muni level by construction officials – before issuing permits.

II. CRA Requirements:

- a. Name and Registration number to be displayed on all documents, vehicles, promotional/marketing materials
- b. Must maintain a commercial general liability insurance policy with a minimum of \$500,000 per occurrence
- c. Copy of insurance cert to be provided with tel # of ins co.
- d. Post registration certificate at each place of business
- e. 3 day right of rescission in 10 POINT **bold faced type**
- f. Toll free number of DCA to be in all correspondence, contracts, etc.
- g. Consequences of failure to register in addition to civil suit exposure include:
 - I. 4th degree crime, with penalties up to \$10,000 for first offense
 - II. Can't obtain permits

Note: pending legislation to expand requirements may impose additional requirements

D. The Courts

- I. Over time, courts generally expanded the reach of CFA in Home Construction**
 - a. Personal Liability for CFA Violations – if participate in violation)*
 - b. Subs in new construction when owner acts as own GC*
 - c. Special Civil Part Jurisdictional Amount Limitation and Treble Damages*
 - d. Expansion of right to attorney’s fees, even if ultimately claimant unsuccessful as long as claimant survives SJ or motion for involuntary dismissal*

- II. Required Proof and Findings to Support Treble Damages: Causal Link Between the Violation and Ascertainable Loss.**
 - a. Need not be ONLY cause.*
 - b. Reliance (nor intent) not needed*
 - c. Once violation and causal connection is shown, burden shifts to HIC contractor to prove loss is NOT the result of the violation.*

- III. Recent unpublished appeals court cases provide some level of optimism.**
 - a. Woodstone Group, LLC v. Treacy (Appeal from Morris County)– counterclaim in breach of contract case where tech violation (no permit re chimney removal). Previous cases tended to preclude the right to recovery in breach or quantum meruit claim if violation of CFA occurred; yet this Court found K breach and allowed damages. The court also said no ascertainable loss causally related to the violation proven and thus counterclaim dismissed. **WHAT IT MEANS:** Contractor may be able to sue for breach, even if technical violation of CFA existed.*

 - b. Leoncini v Peri-Okonny (Appeal from Mercer County)-Court appears to instruct lower court to consider whether text messages would qualify as a written contract. **WHAT IT MEANS:** It appears, in the electronic age of today, courts may be more inclined to relax rigid compliance. However, it is too soon to rely upon this as determinative.*

- IV. How do we Defend these claims?**
 - a. Equitable Estoppel as a Defense to CFA claims– c.f. Long standing relationship (brother in law); Insistence on expediency even when contractor requests change order be signed*
 - b. Are alleged damages caused by a non-CFA violation? Jury instructions are critical*
 - c. Are alleged damages consistent with this HI contract (“apples to apples”)*
 - d. Identify claimant’s sophistication and past dealings – I believe we will see this*
 - e. Assess sophistication of customer*

- V. How to prepare to avoid these claims**
 - a. Good business practice–communicate, everything in writing and signed, etc. and document everything – this is not only per se concerns*
 - b. Ensure contractual documents are compliant with statutes and regulations – this includes trades*
 - c. Ensure sufficient insurance coverages exist to cover non-CFA claims that may be involved.*