HOME IMPROVEMENT AND THE NEW JERSEY CONSUMER FRAUD ACT
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Introduction

If you represent home improvement contractors or homeowners, you need to remain informed with the NJ Consumer Fraud Act (the "**CFA**") and Home Improvement Contractors Registration Act (the "**CRA**"). If a client's home is damaged by or during the work performed by a home improvement contractor, the CFA can provide not only relief but a punitive damage component as well. For attorneys that represent home improvement contractors, we have the obligation to inform those clients about how to handle their contracts and the dangers of not performing the work properly. As part of New Jersey's Consumer Fraud Act, homeowners can enforce strict laws against home improvement contractors that breach contracts, perform negligently, cause damage to homes, misrepresent facts and commit fraud. Thus, there is a very high level of risk for home improvement contractors who violate these laws. And, even the otherwise good home improvement contractor is not immune to the reach of the CFA.

Home Improvement

Pursuant to N.J.A.C. 13:45A-16.1, "home improvement" means the remodeling, altering, painting, repairing, or modernizing of residential or noncommercial property or the making of additions thereto, and includes, but is not limited to, the construction, installation, replacement, improvement, or repair of driveways, sidewalks, swimming pools, terraces, patios, landscaping, fences, porches, windows, doors, cabinets, kitchens, bathrooms, garages, basements and basement waterproofing, fire protection devices, security protection devices, central heating and air conditioning equipment, water softeners, heaters, and purifiers, solar heating or water systems, insulation installation, aluminum siding, wall-to-wall carpeting or attached or inlaid floor coverings, and other changes, repairs, or improvements made in or on, attached to or forming a part of the residential or noncommercial property, but does not include the construction of a new residence. Thus, any contractors that perform any of the aforementioned work fall within the ambit of the CFA.

Legislative Intent

The CFA was enacted to protect consumers against predatory merchants and home improvement contractors by imposing a broad array of prohibitions and requirements on sellers, advertisers, and contractors. As stated by the NJ Supreme Court:

> The [CFA] has three main purposes: [1] to compensate the victim for his or her actual loss; [2] to punish the wrongdoer through the award of treble damages; and, [3] 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.

Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139 (1999) (citing Silva v. Autos of Amboy, Inc., 267 N.J.Super. 546, 555, 632 A.2d 291 (App.Div.1993).

As a remedial statute, the CFA's provisions are "construed liberally in favor of the consumer" to accomplish its deterrent and protective purposes. Id.; Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 69 (1985). While the CFA originally provided only for enforcement by the Attorney General, see L. 1960, c. 39, § 3, it now provides a private cause of action. See L. 1971,c. 247, § 7; amended 1997, c. 359.

The remedial section of the CFA provides:

> Any person who suffers any 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 [the CFA] may bring an action or assert a counterclaim therefor 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.

N.J.S.A. 56:8-19. The CFA includes a multitude of provisions for acts and omissions that constitute violations that fall within the reach of this remedial statute. These violations can be found under the NJ Contractor' Registration Act (see N.J.S.A. 56:8-136 to -152); the Home Improvement Practices Regulations (see N.J.A.C. 13:45A-16.1 to -16.2) and the Contractor Registration Regulations (see N.J.A.C. 13:45A-17.1 to -17.14) (collectively, the "CFA").

Violations of the CFA

Among the long list of possible violations of the CFA, some common violations of the CFA include:

1. Failure to provide home improvement registration information.
2. Failure to provide contractor's insurance information.
3. Failure to have a written contract for home improvement work.
4. Failure to state start dates and completion dates in the written contract.
5. Failure to obtain proper licenses and permits prior to performing work.
6. Seeking payment before it is due under the terms of the contract or before the work is complete.
7. Failure to begin or complete the work within scheduled time or at all without proper reason or cause and a written extension of the time.
8. Substituting materials for lesser quality materials than promised or warranted.
9. Failure to list products in the contract.
10. Attempting to charge additional money without having a written and signed change order.
11. Failure to state homeowner's 3-day right to cancel contract in at least 10-point bold type print.
12. Poor workmanship that causes homeowner to repair and/or replace goods and services.
13. Unconscionable commercial practices.

Scienter Not Necessarily Required

Within the strict liability framework of the CFA, contractors are presumed to be familiar with the CFA and its regulations. See Cox v. Sears Roebuck & Co., 138 N.J. 2, 18-19 (1994). Moreover, liability under the CFA does not require that the consumer actually be misled or defrauded by a

merchant; any violation is enough to create liability. Skeer v. EMK Motors, Inc., 187 N.J.Super. 465, 470 (App.Div.1982), quoted in Sprenger v. Trout, 375 N.J.Super. 120, 131 (App.Div.2005). A contractor's actual intent is irrelevant under the CFA.

As the Supreme Court stated in Fenwick v. Kay American Jeep, Inc.:

> The capacity to mislead is the prime ingredient of deception or an unconscionable commercial practice. Intent is not an essential element. Since consumer protection is the ultimate goal, the standards of conduct established by the [CFA] and implementing regulations must be met regardless of intent except when the Act specifically provides otherwise.

72 N.J. 372, 378 (1977).

Causation and Damages

In order to be eligible to recover treble damages, a party must prove a "causal link between the violation [of the CFA] and damages." Branigan v. Level on the Level Inc., 326 N.J. Super. 24 (App. Div. 1999); Roberts v. Cowgill, 316 N.J. Super. 33 (App. Div. 1998). And, to demonstrate a loss, a victim must simply supply an estimate of damage, calculated within a reasonable degree of certainty. Cox v. Sears Roebuck & Co., 138 N.J. 2, 22 (1994). It is not necessary to actually expend damages in order to prove damages. Id.

However, to have an "ascertainable loss", the loss must be quantifiable and measurable and not speculative. In Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234 (2005), the NJ Supreme Court held that a "future hypothetical dimunition of value" of the property was too speculative to satisfy the ascertainable loss requirement to prove damages. In that case, the repairs to the automobiles were performed at no cost because of the fulfillment of an applicable warranty obligation. But the plaintiff did not produce an expert witness to support the inference of loss in value.

The Court's holding in Thiedemann can be applied to the loss in value to a homeowner's home. If the homeowner cannot prove loss of value through some expert witness testimony, then the court would likely deny the award of treble damages, notwithstanding a violation of the CFA and damages to the home. The homeowner must be vigilant about proving causation and damages through expert witness testimony to be best assured of the application of the treble damages remedy.

Failure to Obtain Permits Prior to Starting Work

Many home improvement contractors violate the CFA by beginning work on homes without obtaining permits or prior to receiving permit approval. N.J.A.C. 13:45A-16.2(a)(10)(i) requires contractors to obtain required permits prior to doing any home improvement work. Building permits are generally required for any project that will involve construction or substantial electrical, plumbing, or mechanical work in New Jersey. This includes building new buildings and altering or remodeling existing buildings. It can also include building decks, fences, sheds, tree houses, detached garages, and other separate structures depending on the town's building regulations.

In Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994), the court found that a contractor who agreed to perform home improvement work on consumer's residence engaged in "***unlawful acts in***

violation of the CFA" by failing to obtain necessary permits, with result that contractors were allowed to perform in substandard manner with no government supervision or inspection. "Once a permit is obtained, a code inspector will inspect the residence periodically and issue a Certificate of Continued Occupancy to conform to the municipality's inspection process. Because no permit was ever issued for the Cox home, no inspections took place and no certificate was issued." Id. at 19-20.

As further stated by the NJ Supreme Court in Cox,

> Had all applicable permits been obtained before Sears began work, the issued permits would have triggered periodic inspections of the renovations. An inspector would have detected any substandard electrical wiring or cabinet work and would not have permitted the work to progress or have issued the required certificates until Sears corrected the deficiencies. Because the inspections did not occur, the wiring remained unsafe, the cabinets remained unattractive and both resulted in a loss measured by the cost of repairing those conditions.

Id. at 22. In Cox, the plaintiff used expert witnesses to successfully prove causation and damages flowing from the failure to obtain permits and was awarded treble damages.

Attorneys' Fees

Recovery of attorneys' fees is a statutory remedy expressly permitted under the CFA, so long as the party seeking such remedy proves an actual violation of the CFA, notwithstanding lack of proof of actual damages caused by any such violation. According to the Supreme Court,

> a consumer-fraud plaintiff can recover reasonable attorneys' fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages.

Cox, supra, 138 N.J. at 24 (citing Performance Leasing Corp. v. Irwin Lincoln-Mercury, 262 N.J.Super. 23, 31, 34 (App.Div.), certif. denied, 133 N.J. 443 (1993)). That rule does not distinguish between "technical," "per se," or "substantive" violations of the CFA. Czmyr v. Avalanche Heating and Air Conditioning, Inc. 2011 WL 519871(App. Div. 2/16/2011) (citing BJM Insulation & Constr., Inc. v. Evans, 287 N.J.Super. 513, 517-18 (App.Div.1996)).

In Branigan v. Level on the Level, Inc., the court emphasized:

> Although we think the facts now before us demonstrate the lowest conceivable level of violation under the Consumer Fraud Act, and although we have difficulty seeing how the salutary goals of this Act are furthered by the award of fees, the statute nevertheless supports such an award. The Supreme Court has made it clear that the statute mandates an award of counsel fees and costs for any violation of the Act, **even if that violation caused no harm to the consumer**.

326 N.J.Super. 24, 30-31 (App.Div.1999)(Emphasis added)(citing Roberts v. Cowgill, 316 N.J. Super. 33, 45 (App. Div. 1998)).

Expert Fees

Oddly, expert fees are not given the same degree of certainty as attorneys' fees under the CFA. One would think that if one needed an expert to prove causation and damages that the remedy to recover expert fees should be automatic under the CFA but it's not. Rather, the legislature either failed to clarify its intent to ensure that expert fees should be part of the remedy or wisely left it to the courts to decide whether expert fees are an appropriate remedy.

The CFA explicitly provides:

> 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***.

N.J.S.A. 56:8-19. [Emphasis supplied.]

According to the emphasized language in the preceding sentence, it appears that the CFA delegated sufficient authority to the courts to award expert fees as a remedy, even if such remedy is not explicitly listed as is listed attorneys' fees. However, such language does not require the courts to award expert fees. Accordingly, expert fees are subject to the decision of the courts.

In Josantos Construction v. Bohrer, 326 N.J. Super. 42 (App. Div. 1999), the court instructs us that the term "reasonable costs of suit" do not include expert fees as a remedy. In Josantos Construction, the court denied expert fees as part of the remedy to which the successful party was entitled notwithstanding such party's proof that the contractor violated the CFA. Id. The court stated:

> In our view, expert witness fees are not encompassed within the phrase "reasonable costs of suit." The general rule is that litigants bear their own expenses for fees and costs, except where specifically authorized by statute, rule or agreement. Velli v. Rutgers Casualty Ins. Co., 257 N.J.Super. 308, 309, 608 A.2d 431 (App.Div.), certif. denied, 130 N.J. 597, 617 A.2d 1220 (1992). Expert fees are not taxable costs under N.J.S.A. 22A:2-8. Buccinna v. Micheletti, 311 N.J.Super. 557, 565, 710 A.2d 1019 (App.Div.1998). Nor do we think the Legislature intended the phrase to encompass expert fees. When the Legislature intends the recovery of expert fees, it is perfectly capable of saying so explicitly. See, e.g., N.J.S.A. 39:6A-34 (expert fees recoverable in de novo trial following rejected automobile arbitration award); and N.J.S.A. 54:51A-22 (expert fees recoverable as litigation costs when taxpayer prevails on certain tax matters). Expert fees are properly classified as litigation costs, as N.J.S.A. 54:51A-22 demonstrates. Thus a general provision allowing recovery of "all reasonable litigation costs" is arguably sufficient to encompass expert fees. See, Weed v. Casie Enter., 279 N.J.Super. 517, 533, 653 A.2d 603 (App.Div.1995), so indicating in the context of N.J.S.A. 2A:15-59.1, the "frivolous litigation" statute. Accord, Fagas v. Scott, 251 N.J.Super. 169, 197-200, 597 A.2d 571 (Law Div.1991). Here the Legislature chose the broader phrase "reasonable costs of suit." We have found no reported case under the Consumer Fraud Act that has awarded expert fees. In our view, they are not intended within the statutory language. We also agree with the trial judge that in this case the vast majority of the expert's testimony did not go to establishing a breach of the Consumer Fraud Act or to calculating damages thereunder.

It appears that the court in the Josantos Construction case denied the recovery of expert fees because the expert witness testimony in that case was not inextricably linked to proving the

breach of the CFA or to calculating the damages thereunder. In that regard, perhaps, the court was not impressed enough to award expert fees as "other appropriate legal … relief." See N.J.S.A. 56:8-19. Therefore, the prudent approach would be to advise the client that there is a risk that the costs of the expert being used to prove violation of the CFA or damages may not be recoverable unless the expert testimony is successful in actually doing so.

Amount in Controversy and Jurisdiction

Pursuant to R. 6:1-2(a)(1), $15,000 is the jurisdictional limit for amounts in controversy for claims brought in Special Civil Part. Any claims having amounts in controversy over $15,000 must be brought in regular Law Division. When calculating damages to determine the amount in controversy and proper venue, the courts exclude attorneys' fees.

The NJ Supreme Court expressly held that, in determining the amount in controversy, attorneys' fees that may be awarded under the CFA are excluded from calculation of the jurisdictional limit. Lettenmaier v. Lube Connection, Inc., 162 N.J. 134 (1999); see also Surf Cottages Homeowners Assoc., Inc. v. Janel Assocs., Inc., 362 N.J. Super. 70 (App. Div. 2003). Among the many reasons given by the court, the court stated that "[w]hat amount of counsel fees will be incurred as a result of the twists and turns of litigation is not ascertainable at that point. Those fees will accrue as the case proceeds and will indeed not even be calculable until the judgment is entered." Lettenmaier, 162 N.J. at 143.

However, the Court in Lettenmaier stated that "the jurisdictional amount in controversy… can refer only to the monetary damages that a plaintiff claims were sustained as a result of the defendant's actions, plus trebling." Id. at 143. Thus, within the Court's dicta, the Court explicitly recognized the trebled portion of the damages as part of the amount in controversy. See also Nieves v. Baran, 164 N.J. Super. 86 (App. Div. 1978), wherein the Appellate Division held that treble damages under the CFA were part of the jurisdictional amount in controversy. Therefore, only the actual damages sustained by the party plus treble damages under the CFA are calculated as part of the jurisdictional amount in controversy for purposes of R.6:1-2(a)(1).

Conclusion

Violations of the CFA can be prevented by careful compliance with its provisions by both contractors and homeowners alike. Even though there may be good and qualified contractors out there, many contractors continue to violate the Act. They still need to revise their existing contracts and practices in order to comply with the Act. Both the homeowners and home improvement contractors ought to try to work together to make sure all of the requirements are addressed early and stated in the written contract to ensure compliance and avoid misunderstandings and litigation.

When the violations of the CFA occur, it is important for the homeowner to be able to carefully build the case using expert witnesses where necessary to prove causation and damages flowing from such violations in order to collect treble damages. Attorneys should rest assured because attorneys' fees shall be paid regardless of whether causation of damages is proven. Rather, attorneys' fees shall be awarded so long as the violation of the CFA is proven. Therefore, in light of the availability for treble damages and attorneys' fees afforded by the CFA, homeowners and attorneys should be more comfortable bringing the case, even if the amount of damages seems at first glance to be too small to justify a lawsuit.

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