

## 4.23 MODEL CHARGE UNDER CONSUMER FRAUD ACT (5/98; revised 1/01)

### Introductory Comments to Trial Judge:

#### Right To Trial By Jury

It may be asserted that there is no right to trial by jury for a cause of action arising under the *Consumer Fraud Act*, N.J.S.A. 56:8-1 *et seq.*

The Chancery Division determined that no right to a jury exists in an action brought by the Attorney General under the Act seeking both financial penalties and equitable relief. *See Kugler v. Market Dev. Corp.*, 124 N.J. Super. 314, 319 (Ch. Div. 1973); *Kugler v. Banner Pontiac-Buick Opel, Inc.*, 120 N.J. Super. 572, 581-582 (Ch. Div. 1972). Although *Consumer Fraud Act* claims have been presented to juries, *see, e.g., Ramanadhan v. N.J. Mfrs. Ins. Co.*, 188 N.J. Super. 30 (App. Div. 1992) and *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590 (App. Div. 1992), *aff'd. o.b.* 124 N.J. 520 (1991), neither the Appellate Division nor the Supreme Court has directly addressed whether there is a right to a jury trial. *See Chattin, supra.* 124 N.J. at 522 (Stein, J., concurring); *Pierzga v. Ohio Casualty Group of Ins. Cos.*, 208 N.J. Super. 40, 47 n.1 (App. Div. 1986) (noting without addressing issue of whether there is a right to a jury trial under the *Consumer Fraud Act*), *certif. denied*, 104 N.J. 399 (1986).

It is unclear that such a right would be sustained. A private right of action under the *Consumer Fraud Act* was added by amendment in 1971. The legislature did not provide for jury trials. Justice Stein has suggested that a right to a jury trial would not exist.

The 1971 amendment of the Act, however, did not provide for jury trials, and no right to a jury trial has been recognized in suits brought under the Act by the Attorney General seeking equitable relief and financial penalties. *See Kugler v. Market Dev. Corp.*, 124 N.J. Super 314, 319, 306 A. 2d 289 (Ch. Div. 1973); *Kugler v. Banner Pontiac-Buick Opel, Inc.*, 120 N.J. Super. 572, 581-582, 295 A. 2d 385 (Ch. Div. 1972). Although this Court in *Shaner v. Horizon Bank Corp.*, 116 N.J. 433, 561 A. 2d 118 (1989), rejected the right to jury trial in the context of a claim for discriminatory termination on the basis of age under the *New Jersey Law Against Discrimination*, N.J.S.A. 10:5-1 to - 42, its holding could be read to suggest by analogy that a statutorily created cause of action under the *Consumer Fraud Act* does not carry with it the right to a jury trial. *Id.* at 454-55, 561 A. 2d 1130. In any event, that issue is not before us and I advert to it only to emphasize my perception that the issue remanded by the Appellate Division for retrial is not particularly well-suited for resolution by a jury.

[*Chattin, supra*, 124 N.J. at 522 (Stein, J., concurring)]

In sum, the Committee expresses no opinion regarding whether there exists a right to jury trial for a *Consumer Fraud Act* claim.

## Format Of The Model Charge

There are three possible bases for responsibility under the Act. Two of those exist under the language of *N.J.S.A. 56:8-2*, while the third comes about from either specific-situation statutes (such as prize notification under *N.J.S.A. 56:8-2.3* or food misrepresentation under *N.J.S.A. 56:8-2.9* through 2.13) or regulations enacted under *N.J.S.A. 56:8-4*. Those regulations are contained in *N.J.A.C. 13:45A-1.1 et. seq.* Attached to the last page of this model charge is a listing of the topics covered by the administrative regulations.

This model charge is set up by the use of three alternatives. The first relates to that part of *N.J.S.A. 56:8-2* which declares that "any unconscionable commercial practice, deception, fraud, false pretense, false promise [or] misrepresentation" is an unlawful practice. The second alternative goes to a "knowing concealment, suppression or omission of any material fact" under the same statute. The third alternative uses the specific-situation statutes and the administrative regulations.

*[The introductory paragraphs which follow are applicable to all three alternatives.]*

### **A. Introductory Paragraphs to Jury**

Many of us have heard the Latin phrase *caveat emptor*, which means "let the buyer beware." While it may state how the law was, it is not true of how the law is today. We have abandoned that old rule in favor of a more ethical attitude or approach in our dealings with one another. It is now the law that a person has the right to rely on representations made by another when dealing with that other person. New Jersey's *Consumer Fraud Act* sets forth provisions defining this law.

There are three possible bases for responsibility under the *Consumer Fraud Act*. The Act itself declares two general categories of conduct as unlawful. The first relates to that part of the Act which states that "any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation" is an unlawful practice. These are considered affirmative acts. The second general category of unlawful conduct is referred to as acts of omission. Such conduct involves the "knowing concealment, suppression or omission of any material fact". The third basis for responsibility under the Act is found in either specific-situation statutes or administrative regulations enacted to interpret the Act itself. Such statutes and regulations define specific conduct that is prohibited by law.

*[Insert Definitions As Applicable]:*

An "affirmative act" is something done voluntarily by a person. It includes not merely physical acts, but also any steps taken voluntarily by a person to advance a plan or design, or to accomplish a purpose.

An "omission" is the act of neglecting to perform what the law requires. Liability must be imposed for such inaction, depending upon the existence of a duty to act under the circumstances.

*[Return to Charge]:*

The plaintiff(s) here claim(s) that defendant(s) committed what is commonly known as a consumer fraud when defendant(s) (insert description of conduct). The *Consumer Fraud Act* says that anyone who (insert relevant parts of *N.J.S.A. 56:8-2* or other specific statute or regulation) is chargeable with a consumer fraud.(1)

**B. First Alternative**

Specifically, the defendant(s) allegedly used by means of an affirmative act, an (unconscionable commercial practice/deception/fraud/false pretense/false promise/misrepresentation) in connection with (the sale/advertisement of any merchandise/real estate) (how defendant(s) would act or perform after an agreement to buy was made/plaintiff(s) responded to or answered the advertisement).

*[Insert Definitions As Applicable]:*

An "unconscionable commercial practice" is an activity in the public marketplace which is basically unfair or unjust, which materially departs from standards of good faith, honesty in fact and fair dealing. (2) To be unconscionable, there should be factual dishonesty and a lack of fair dealing.

"Deception" is conduct/advertisement misleading to an average consumer to the extent that it is capable of, and likely to, mislead an average consumer. It does not matter that at a later time it could have been explained to a more knowledgeable and inquisitive consumer, nor need the conduct/advertisement actually have misled the plaintiff(s). The fact that the defendant(s) may have acted in good faith is unimportant. It is the capacity to mislead that is important.

"Fraud"(3) is a perversion of the truth, a misstatement or a falsehood communicated to another person creating the possibility that that other person will be cheated.

"False pretense" is an untruth knowingly expressed by a wrongdoer.

"False promise" is an untrue commitment or pledge (which is communicated to another person) to create the possibility that that other person will be misled.

A "misrepresentation" is an untrue statement which is made about a fact which is important or significant to the sale/advertisement, and is communicated to another person to create the possibility that other person will be misled. A "misrepresentation" is a statement made to deceive or mislead.

The term "person" includes not only a human being or his/her legal representative but also a partnership, corporation, company, trust, business entity, association as well as his/her agent, employee, salesperson, partner, officer, director, member, stockholder, associate, trustee or beneficiary of a trust.

The term "sale" includes transfer of ownership; rental; distribution; offer to sell, rent, or distribute; and attempt to sell, rent or distribute, either directly or indirectly.

An "advertisement" is a notice designed to attract public attention. Modes of communication include the attempt, directly or indirectly, by publication, dissemination, solicitation, indorsement, circulation or in any way to induce any person to enter or not enter into an obligation, acquire any title or interest in any merchandise, increase the consumption of any merchandise or make any loan.

The term "merchandise" includes any objects, wares, goods, commodities, services or anything offered directly or indirectly to the public for sale.

"Real estate" is land and, if there is a building on it, that building as well.

*[Return to Charge]:*

It is not necessary that a person has in fact been misled or deceived by another's conduct, nor is it necessary for the plaintiff to show that the defendant intended that his/her conduct should deceive. What is important is that the affirmative act must have had the potential to mislead or deceive when it was performed. The capacity to mislead is the prime ingredient of the affirmative consumer fraud alleged *[state the specific unlawful practice if desired]*. Intent is not an essential element. Consumer fraud consisting of affirmative acts does not require a showing of intent.

In making your decision, you should know that the price charged is only one factor in your consideration. For example, if you find that the price is grossly excessive in relation to the seller's costs and, as well, the goods sold have little or no value to the consumer(s) for the purpose for which he/she was persuaded to buy it/them and which it appeared they would serve, the price paid by plaintiff(s) becomes one fact which is relevant in weighing the wrong which the statute seeks to prevent and which it prohibits.

In accordance with the definitions that I have just given you, you must decide whether plaintiff(s) has/have shown or proven to you that defendant(s) used (an unconscionable commercial practice or other applicable characterizing noun) in connection with (sale or how defendant(s) would act) when (summarize acts alleged). If plaintiff(s) has/have shown that those acts took place and that they were [an unconscionable commercial practice or other applicable characterizing noun], then you are next going to have to decide whether that conduct brought about damage to plaintiff(s) and, if so, how much.

*[Insert Definition of Proximate Cause and Applicable Instructions on Damages.(4) (See General Statements on Damages at End of Charge.)]*

### **C. Second Alternative**

The plaintiff(s) allege(s)/further allege(s) that the defendant(s) knowingly concealed, hid/suppressed,

kept something from being known/omitted, or left out or did not mention an important or significant fact purposely or with the intent that others would rely on that concealment/suppression/omission in connection with (the sale/advertisement of any merchandise/real estate) (how defendant(s) would act or perform after an agreement to buy was made/plaintiff(s) responded to or answered the advertisement).

*[Insert Applicable Definitions From Below and From First Alternate as Applicable]*

A person acts "knowingly" if he/she is aware that his/her conduct is of a nature that it is practically certain that his/her conduct will cause a particular result. He/She acts with knowledge, consciously, intelligently, willfully or intentionally.

To "conceal" is to hide, secrete or withhold something from the knowledge of others or to hide from observation, cover or keep from sight or prevent discovery of. A "concealment" is a withholding of something which one is bound or has a duty to reveal so that the one entitled to be informed will remain in ignorance.

To "suppress" is to put a stop to a thing actually existing, to prohibit or put down, or to prevent, subdue, or end by force. "Suppression" is the conscious effort to control or conceal unacceptable impulses, thought, feelings or acts.

A person acts "purposely" if it is his/her conscious object to engage in conduct that of a certain nature or cause a particular result and he/she is aware of hopes or believes that the attendant circumstances exist.

"Intent" is a design, resolve, or determination with which a person acts. It refers only to the state of mind existing when an act is done or omitted.

*[Return to Charge]:*

It is not necessary that any person has in fact been misled or deceived by another's conduct.(5) What is important is that the defendant(s) must have meant to mislead or deceive when he/she acted.

The fact that the defendant(s) acted knowingly is an essential element of consumer fraud acts of omission. Knowledge and intent must be shown. Where the alleged consumer fraud can be viewed as either an omission or an affirmative act, the defendant(s) can be held liable for the conduct as an omission only where the defendant(s) has/have committed a kind of consumer fraud, just defined, that constitutes an omission and intent is shown.

In accordance with the definitions that I have just given you, you must decide whether plaintiff(s) has/have shown or proven to you that defendant(s) knowingly (concealed/suppressed/omitted) an important and significant fact with the intent that others would rely on the facts as communicated to him/her without having the opportunity to also consider the other facts which were (concealed/suppressed/omitted) an important and significant fact intending that others rely on the facts as communicated to him/

her without having the opportunity to also consider the other facts which were (concealed/suppressed/omitted) in connection with (the sale or how defendant(s) would act) when (summarize acts alleged). If plaintiff(s) has/have shown that those acts took place and, if so, that those acts were a knowing concealment/suppression/omission of an important fact intended to be relied on by others, then you are next going to have to decide whether that conduct brought about damage to plaintiff(s) and, if so, how much.

*[Insert Definition of Proximate Cause and Applicable Instructions on Damages.(6) (See General Statements on Damages at End of Charge.)]*

#### **D. Separate Defense Applicable to Owners/Publishers/Operators of Instrumentality by Which an Advertisement Is Conveyed**

There is one additional factor for you to consider. Defendant(s) say(s) that as the (owner/publisher of the newspaper/magazine/publication/printed matter in which the advertisement appeared) [or] (owner/operator of the radio/television station on which the advertisement appeared), he/she is had no knowledge of the intent, design or purpose of the advertiser. He/She is correct as long as he/she in fact had no knowl edge of the advertiser's intent, design or purpose. This is something the defendant(s) has/have to prove. He/She must prove that what the advertiser meant to do was unknown to him/her. If you find that defendant(s) has/have shown by the greater weight of the evidence that he/she was unaware of what the advertiser meant to do through the advertisement, then the owner/publisher/operator cannot be held to be responsible or liable under the statute.

#### **E. Third Alternative**

*[Recite Elements of Particular Statute or Regulation as Well as any Applicable Definitions.(7)]*

In accordance with the definitions that I have just given you, you must decide whether plaintiff(s) has/have shown or proven to you that defendant(s) *[insert conduct]*. If plaintiff(s) has/have shown that those acts took place and therefore violated the statute/regulations, then you are next going to have to decide whether that conduct brought about damage to plaintiff(s) and, if so, how much.

*[Insert Definition of Proximate Cause and Applicable Instructions on Damages.(8) (See General Statements on Damages Which Follow.)]*

**[NOTE TO THE COURT:** The above three alternate forms of jury instruction incorporate the elements of a claim under the *Consumer Fraud Act* as clarified by the Appellate Division decision in *Chattin v. Cape May Greene, Inc. and Capital Products Corp.*, 243 N.J. Super. 590 (App. Div. 1990).

But note, "intent" may not be an element of omission violations, in the case of Third Alternative regulatory matters. See, e.g., *Fenwick v. Kay American Jeep*, 72 N.J. 372 (1977), where the omission, from a vehicle advertisement, of the odometer reading was held violative of the regulation even absent

proof of intent.]

## **F. General Statements on Damages** (revised 1/01)

Plaintiff(s) claim that he/she lost money/property as a result of defendant's conduct. If you decide from all of the evidence in this case that defendant has violated the statute, that means that defendant has committed an unlawful practice. And what that means is that plaintiff is allowed to get an award of money for his/her loss that was proximately caused by defendant.

If you find that the Consumer Fraud Act was violated and you award damages, you should understand that the law requires me to triple whatever amount of damages you award. This is because the Consumer Fraud Act is punitive in nature and the tripling of your award is meant to punish the defendant.

In addition, should you award damages to plaintiff, the law also requires me to compel the defendant to pay whatever reasonable attorney fees plaintiff incurred in bringing this case. I will determine at a later time what the reasonable amount of attorney fees should be for this case.(9)

### **ADMINISTRATIVE RULES OF THE DIVISION OF CONSUMER AFFAIRS**

*N.J.A.C. 13:45A-1 et seq.*

SUBCHAPTER 1 -DECEPTIVE MAIL ORDER PRACTICES

SUBCHAPTER 2 -MOTOR VEHICLE ADVERTISING PRACTICES

SUBCHAPTER 3 -SALE OF MEAT AT RETAIL

SUBCHAPTER 4 -BANNED HAZARDOUS PRODUCTS

SUBCHAPTER 5 -DELIVERY OF HOUSEHOLD FURNITURE & FUR NISHINGS

SUBCHAPTER 6 -DECEPTIVE PRACTICES CONCERNING AUTOMO TIVE SALES PRACTICES

SUBCHAPTER 7 -DECEPTIVE PRACTICES CONCERNING AUTOMO TIVE REPAIRS AND  
ADVERTISING

SUBCHAPTER 8 -TIRE DISTRIBUTORS AND DEALERS

SUBCHAPTER 9 -MERCHANDISE ADVERTISING

SUBCHAPTER 10 -SERVICING & REPAIRING OF HOME APPLIANCES

SUBCHAPTER 11 -(RESERVED)

SUBCHAPTER 12 -SALE OF ANIMALS

SUBCHAPTER 13 -POWERS TO BE EXERCISED BY COUNTY AND MUNICIPAL OFFICERS OF CONSUMER AFFAIRS

SUBCHAPTER 14 -UNIT PRICING OF CONSUMER COMMODITIES IN RETAIL ESTABLISHMENTS

SUBCHAPTER 15 -DISCLOSURE OF REFUND POLICY IN RETAIL ESTABLISHMENT

SUBCHAPTER 16 -HOME IMPROVEMENT PRACTICES

SUBCHAPTER 17 -SALE OF ADVERTISING IN JOURNALS RELATING OR PURPORTING TO RELATE TO POLICE, FIRE FIGHTING OR CHARITABLE ORGANIZATIONS

SUBCHAPTER 18 -PLAIN LANGUAGE REVIEW

SUBCHAPTER 19 -(RESERVED)

SUBCHAPTER 20 -RESALE OF TICKETS OF ADMISSION TO PLACES OF ENTERTAINMENT

SUBCHAPTER 21 -REPRESENTATIONS CONCERNING AND REQUIREMENTS FOR THE SALE OF KOSHER FOOD

SUBCHAPTER 22 -INSPECTIONS OF KOSHER MEAT DEALERS AND KOSHER POULTRY DEALERS; RECORDS REQUIRED TO BE MAINTAINED BY KOSHER MEAT DEALERS AND KOSHER POULTRY DEALERS

SUBCHAPTER 23 -DECEPTIVE PRACTICES CONCERNING WATER CRAFT REPAIR

## **LISTING OF SPECIFIC SITUATION**

## **STATUTES UNDER THE CONSUMER FRAUD ACT**

### **(ALTERNATIVE THREE)**

56:8-2.1 Operation simulating governmental agency

56:8-2.2 Scheme not to sell as advertised

56:8-2.3 Notification of prize winner

56:8-2.4 Picturing assembled merchandise

56:8-2.5 Selling item without price label

56:8-2.7 False solicitation of contribution

56:8-2.8 Going out of business sale

56:8-2.9 Misrepresentation of food

56:8-2.14 Refund Policy Disclosure Act

56:8-2.22 Providing copy of contract to consumer

56:8-2.23 Soliciting used goods

56:8-21 Unit Price Disclosure Act

56:8-26 Resale of tickets

(1)The *Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.*, includes many specific types of conduct which are designated to be an unlawful practice. For example, see *N.J.S.A. 56:8-2.3*. If a particular act declared to be an unlawful practice under a specific statute is alleged, the court should note that individual statute to the jury and then refer to the Third Alternate.

(2)Reference might be made to *D'Ercole Sales, Inc. v. Fruehauf Corp.*, 206 *N.J. Super.* 11, 29 (App. Div. 1985), for illustrative criteria in evaluating unconscionability.

(3)The Committee recognizes that the terms "fraud," "false pretense," "false promise" and "misrepresentation" have traditionally been defined in this State as requiring an awareness by the maker of the statement of its inaccuracy accompanied by an intent to mislead. However, in *Fenwick v. Kay Amer. Jeep, Inc.*, 72 *N.J.* 372, 377 (1977), the Supreme Court noted that "the requirement that knowledge and intent be shown is limited to the concealment, suppression or omission of any material fact." See, also, *D'Ercole Sales, Inc. v. Fruehauf Corp.*, 206 *N.J. Super.* 11, 22 (App. Div. 1985). Therefore, the definitions provided for these four terms do not require either intent or knowledge.

(4) In addition to damages awarded by the jury, the judge may award additional appropriate legal or equitable relief under *N.J.S.A. 56:8-19*.

Damages awarded by the jury are limited to an ascertainable loss of money or property under *N.J.S.A. 56:8-19*. This would not include damages for pain and suffering. *Jones v. Sportelli*, 166 *N.J. Super.* 383, 390-392 (Law Div. 1979).

As directed in *Ramanadham v. N.J. Mfrs. Ins. Co.*, 188 *N.J. Super.* 30, 33 (App. Div. 1982), where there are two or more causes of action, one of which is under the Act, damages determined under the Act must be separated from and non-duplicative of damages under another cause of action so that only Act damages are trebled.

(5) *But see*, *Knapp v. Potamkin Motors Corp.*, 253 *N.J. Super.* 502 (Law Div. 1991), wherein the court reconsidered its own instruction to the jury that "it is not necessary for the plaintiff to prove that he was misled" in a private action brought under the Consumer Fraud Act.

(6) *See* footnote 4.

(7) Specific-situation statutes are itemized following the administrative regulation references at the end of the model charge.

(8) *See* footnote 3.

(9) *See* *Wanetick v. Gateway Mitsubishi*, 163 *N.J.* 484 (2000) requiring that the jury be instructed, as set forth in this charge, of the trebling of the damage award and reasonable attorney fees upon the jury's finding of a violation of the Consumer Fraud Act.

The Appellate Division has applied the same reasoning to require a treble damage instruction where violation of the Federal Odometer Law is alleged. *Cogar v. Monmouth Toyota*, 331 *N.J. Super.* 197 (App. Div. 2000).

In complex cases involving multiple questions and many parties, the trial court retains its discretion to withhold this instruction if it would tend to confuse or mislead the jury or produce a manifestly unjust result. *Wanetick*, *supra* 163 *N.J.* at 495.