

4.43 CONSUMER FRAUD ACT (Approved 5/1998; Revised 12/2011)***NOTE TO JUDGE***

Right to Trial by Jury under the *Consumer Fraud Act*, N.J.S.A. 56:8-1 *et seq.*

There appears to be no right to a jury trial 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). In one Supreme Court case, *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590 (App. Div. 1992), *aff'd. o.b.* 124 N.J. 520 (1991), the Court discussed, without resolving the issue, whether there is a right to a jury trial in a suit brought by a private individual. *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) (in which the Appellate Division noted without deciding the issue whether there is a right to a jury trial under the Act), *certif. denied*, 104 N.J. 399 (1986). A private right of action under the *Consumer Fraud Act* was added by amendment in 1971 without providing for jury trials.

In *Zorba Contractors, Inc. v. Housing Authority, City of Newark*, 362 N.J. Super. 124, 138-139 (App. Div. 2003), the Appellate Division noted: “Therefore, even though the Legislature did not specifically refer to the right to a jury trial in the three-sentence provision authorizing private actions under the [Act], a legislative intent to allow jury trials can be reasonably implied from the fact that the relief authorized by this provision is legal in nature.” See Also *Debrah F. Fink, D.M.D., MS, PC v. Ricoh Corp.*, 365 N.J. Super. 520, 575 (Ch. Div., 1972).

In sum, the Committee believes that there is a right to jury trial for a *Consumer Fraud Act* claim brought by a plaintiff other than the Attorney General.

Format of the Model Charge

There are three possible bases for responsibility under the Act. Two are established by N.J.S.A. 56:8-2; the third is derived 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, listed in *N.J.A.C.* 13:45A-1.1 *et seq.* Page 15 of this Model Charge lists those topics covered by the administrative regulations.

The first of the three alternatives 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 relates 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.

Under the Act, the term “merchandise” includes any objects, goods, commodities, services or anything offered directly or indirectly to the public for sale. “Merchandise” does not include “securities”. *Lee v. First Union National Bank*, 199 N.J. 251, 261 (2009).

See also 539 Absecon Blvd., L.L.C. v. Shan Enterprises Ltd. Partnership, 406 N.J. Super. 242, *certif. denied*, 199 N.J. 541 (2009) regarding limits on the application of the Act to the sale of a business.

[The introduction applies to all three alternatives.]

A. Introduction

Many of us have heard the Latin phrase *caveat emptor*: “let the buyer beware.” That statement allows little relief to a customer. That statement does not reflect current law in New Jersey. Here, we have a more ethical approach in business dealings with one another. Therefore, each of us may rely on representations made by another in a business transaction. This approach is reflected in a statute, New Jersey’s *Consumer Fraud Act*.

There are three possible bases for responsibility¹ under the Act. The Act itself declares two general categories of conduct as unlawful. The first category makes “any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation” unlawful. These are considered affirmative acts. The second category involves the “knowing concealment, suppression or omission of any material fact.” These are considered conduct by omission. The third basis for responsibility under the Act involves either a specific-situation statute or administrative regulations enacted to interpret the Act itself. Such statutes and regulations define specific conduct prohibited by law.

[Insert Those Definitions Applicable to the Specific Case]

An “affirmative act” is something done voluntarily by a person. The act may be physical but also may be any steps taken voluntarily by a person to advance a plan or design or to accomplish a purpose.

An “omission” is neglecting to perform what the law requires. Liability must be imposed for such inaction depending on whether there is a duty to act under the circumstances.

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¹ The trial judge may modify the language of this paragraph to address only those bases for responsibility present in the particular case.

Here, plaintiff(s)² claim(s) that defendant(s) committed 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*) commits a consumer fraud.³

B. First Alternative – Affirmative Act

Specifically, defendant(s) allegedly used, by means of an affirmative act, an (*unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation*) in connection with (*the sale/advertisement of any merchandise/real estate*) (*state specifically the factual allegations made by plaintiff*).

[Insert Those Definitions Applicable to the Particular Case]

An “unconscionable commercial practice” is an activity which is basically unfair or unjust which materially departs from standards of good faith, honesty in fact and fair dealing in the public marketplace.⁴ To be unconscionable, there must be factual dishonesty and a lack of fair dealing.

² (Plaintiff) and (defendant) are placed in parentheses to signify that the trial court may refer to the parties by name, rather than status in this litigation, if he or she wishes.

³ The *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 Alternative.

⁴ *See D’Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J. Super. 11, 29 (App. Div. 1985), for

“Deception” is conduct or advertisement which is 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. It does not matter whether the conduct or advertisement actually have misled plaintiff(s). The fact that defendant(s) may have acted in good faith is irrelevant. It is the capacity to mislead that is important.

“Fraud”⁵ 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, communicated to another person, to create the possibility that that other person will be misled.

A “misrepresentation” is an untrue statement made about a fact which is important or significant to the sale/advertisement, and is communicated to another

illustrative criteria in evaluating unconscionability.

⁵ 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.*, supra at 22 (App. Div. 1985). Therefore, the definitions provided for these four terms do not require either intent or knowledge.

person to create the possibility that other person will be misled. A “misrepresentation” is a statement made to deceive or mislead.

A “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.

A “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, endorsement, 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.

“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 an improvement on the land, that improvement as well.

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It is not necessary for liability under the Act that a person actually be misled or deceived by another's conduct. It is not necessary for (plaintiff) to show that (defendant) intended that his/her/its 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*]. Intent is not an essential element. [*Add if the claim is an affirmative act only: Consumer fraud consisting of an affirmative act does not require a showing of intent.*]

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 (plaintiff(s)) for the purpose for which he/she/it/they was persuaded to buy the goods and which it appeared they would serve, the price paid by (plaintiff(s)) becomes one factor relevant to weighing the wrong which the statute seeks to prevent and which it prohibits.

Using those definitions outlined earlier, 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 (the 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*], you must next 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.)]

C. Second Alternative – Acts of Omission

Plaintiff(s) allege(s)/further allege(s) that 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 Definitions from Below and from First Alternative Applicable to the Specific Case]

⁶ 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.*, *supra* at 33 (App. Div. 1982), where there are two or more causes of action, one of which arises 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.

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. “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.

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It is not necessary that any person be, in fact, misled or deceived by another's conduct.⁷ What is important is that defendant(s) must have meant to mislead or deceive when he/she/it/they acted.

The fact that defendant acted knowingly or with intent is an essential element of acts of omission under the Act. Knowledge or intent must be shown. Where the alleged consumer fraud can be viewed as either an omission or an affirmative act, (defendant) is liable for the conduct as an omission only where defendant committed a consumer fraud by omission and intent is shown.

Considering the above definitions, you must decide whether plaintiff(s) has/have proven to you that defendant(s) knowingly (concealed/suppressed/omitted) an important and significant fact with the intent that [an]other[s] would rely on the facts as communicated to him/her/them 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 proved 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

⁷ *But see, Knapp v. Potamkin Motors Corp.*, 253 N.J. Super. 502 (L. Div. 1991), where 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 Act.

by others, you must then decide whether that conduct brought about damage to plaintiff(s) and, if so, how much.⁸

[Insert Definition of Proximate Cause and Applicable Instructions on Damages.⁹ (See General Statements on Damages, Section G of this Charge.)]

D. Separate Defense Applicable to Owners, Publishers, or Operators of Instrumentality by Which an Advertisement Is Conveyed

(Defendant) says that it, 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/it had no knowledge of the intent, design or purpose of the advertiser. The burden of proving this lack of knowledge by a preponderance of the evidence rests with (defendant). If you find that (defendant) proved by the preponderance of the evidence that he/she/it was unaware of what the advertiser meant to do through the advertisement, the owner/publisher/operator cannot be held responsible or liable under the Act.

⁸ The burden of proof is on the plaintiff to establish his/her/their claim by a preponderance of the evidence.

⁹ See footnote 6.

E. THIRD ALTERNATIVE

[Recite Elements of Particular Statute or Regulation as Well as any Applicable Definitions.¹⁰]

In accordance with the previous definitions, you must decide whether (plaintiff(s)) has/have proven that ((defendant)s) [insert conduct]. If plaintiff(s) has/have shown that those acts took place and therefore violated the statute/regulations, you will next 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.¹¹ (See General Statements on Damages, section G of this Charge.)]

NOTE TO JUDGE

The above three alternative forms of jury instruction incorporate the elements of a claim under the *Act* as clarified by *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590 (App. Div. 1992), *aff'd. o.b.*, 124 N.J. 520 (1991). “Intent” may not be an element of omission violations in a case brought under the Third Alternative. *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 in violation of the regulation even absent proof of intent.

¹⁰ Specific-situation statutes are itemized following the administrative regulation references at the end of this charge.

¹¹ *See* footnote 6.

GENERAL STATEMENT ON DAMAGES

(Plaintiff(s)) claim that he/she/it/they lost money/property as a result of (defendant's) conduct. If you decide from the evidence in this case that (defendant) violated *the statute or regulation*, you have decided that (defendant) committed an unlawful practice. If so, (plaintiff(s)) is/are allowed to receive an award of money for his/her/its/their loss proximately caused by ((defendant)s).

If you find that the *Consumer Fraud Act* was violated and you award damages, the law requires me to triple whatever amount of damages you award. The tripling of your award is meant to punish ((defendant)s). In addition, if you award damages to (plaintiff(s)), the law also requires me to compel (defendant) to pay whatever reasonable attorney fees (plaintiff) incurred in this case. I will determine at a later time what that amount of attorney fees is.¹² These are functions which the court, not the jury, will perform.

¹² See *Wanetick v. Gateway Mitsubishi*, 163 N.J. 484 (2000). 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 has the discretion to withhold this instruction if it would tend to confuse or mislead the jury or produce a manifestly unjust result. *Wanetick, supra* at 495.

**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 & FURNISHINGS
- SUBCHAPTER 6 - DECEPTIVE PRACTICES CONCERNING AUTOMOTIVE SALES PRACTICES
- SUBCHAPTER 7 - DECEPTIVE PRACTICES CONCERNING AUTOMOTIVE 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, FIREFIGHTING 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 WATERCRAFT 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