

RE-EXAMINING NEW JERSEY'S CONSUMER FRAUD ACT: LOOPHOLES FOR PROFESSIONALS?

In 1960, the New Jersey Legislature passed a landmark piece of legislation known as the Consumer Fraud Act.¹ The sponsor statement which accompanied the bill promised significant protection to the consumer:

The purpose of this bill is to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer. The authority conferred will provide effective machinery to investigate and prohibit deceptive and fraudulent advertising and selling practices which have caused extensive damage to the public.²

The past two decades have witnessed a general broadening of this protection by legislative amendment and judicial interpretation. Recently, there have been cases decided that have strayed from this trend. The courts of this State have expressed a willingness to exclude certain industries and classes of persons from the jurisdiction of the Act.³

Two groups against whom neither the courts nor the Legislature have expressly applied the Act are lawyers and doctors. A legislative and judicial history examining the development and application of the Act will be useful in determining its direction and future. The first part of this analysis will examine the development of the Act and the judicial response to its provisions. The final section will explore the issue of professional liability under the Act. The implications of such liability will be examined in light of the emerging "consumer" market for legal and medical services.

The Development of the Consumer Fraud Act

When Governor Meyner signed the original New Jersey Consumer Protection Act⁴ he stated that this "legislation gives us new weapons to

¹ N.J. STAT. ANN. §§ 56:8-1 to -25 (West 1964 & Supp. 1982).

² S. 199, 189th Leg., 1st Sess. (1960) (codified as amended at N.J. STAT. ANN. §§ 56:8-1 to -25 (West 1964 & Supp. 1982)).

³ See *Neveroski v. Blair*, 141 N.J. Super. 365, 358 A.2d 473 (App. Div. 1976) (Consumer Fraud Act deemed not to apply between vendors and purchasers); *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 560 (1978) (consumers of public utility services did not have a cause of action under the Consumer Fraud Act).

⁴ N.J. STAT. ANN. §§ 56:8-1 to -25 (West 1964).

police against commercial abuses."⁵ Indeed, the old weapons had been clearly inadequate. For example, if a citizen had been the victim of unscrupulous sales tactics, he or she had to overcome the judicially favored presumption of freedom of contract and the general principle that, absent fraud, one who does not read a contract cannot later free himself of its burdens.⁶ The consumer had little more than the common law concepts of misrepresentation, unconscionability, and undue influence with which to work. While the New Jersey courts made significant progress in protecting the consumer under the common law,⁷ litigation simply could not address the widespread harm caused by consumer fraud. Professor Leff pointed out that:

[T]he problem is . . . with the common-law tradition itself when sought to be used to regulate the quality of transactions on a case by case basis, each one of which is economically trivial . . . and each one of which depends upon several doses of 'the total context of the fact situation' and 'copious examination of the manifestations of the parties and the surrounding circumstances followed by a balancing effort.' . . . One cannot think of a more expensive and frustrating course than to seek to regulate goods or 'contract' quality through repeated lawsuits against inventive 'wrongdoers.'⁸

Government intervention was necessary for consumer protection, argued Leff.⁹ The fact that the poor were often the targets of fraudulent sellers seemed to preclude private litigation as a viable method of protecting their interests from an economic standpoint. The Consumer Fraud Act as

⁵ Office of the Governor, Press Release (June 9, 1960) (available in Rutgers-Newark Law School Library).

⁶ See *Commercial Credit Corp. v. Coover*, 101 N.J.L. 530, 129 A. 187 (1925). Defendant had been charged with knowledge of a car dealer's right to assign a conditional bill of sale which had been printed in a sales contract. Defendant lost his car in a replevin action by an assignee even though the full purchase price had been paid to the dealer. See also *Silvestri v. South Orange Storage Corp.*, 14 N.J. Super. 205, 81 A.2d 502 (App. Div. 1951). In a bailment situation the plaintiff was deemed to have knowledge of the contract terms limiting the liability of the storage company although she had not read the document, nor had such limitation been directed to her attention.

⁷ See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). In this celebrated case the plaintiff had been seriously injured in an accident resulting from a defect in a car. The New Jersey Supreme Court used arguments based upon "unequal bargaining power" and "unconscionability" in refusing to enforce a provision in the dealer's sales contract which limited the manufacturer's liability to replacement of defective parts and disclaimed all other warranties, express or implied.

⁸ Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 356 (1969).

⁹ *Id.* at 351.

well as others were passed to provide a public remedy on a large-scale public level.¹⁰ As Justice Francis later noted, in an analysis influenced by Professor Leff's argument: "[The Legislature] recognized that the deception, misrepresentation, and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods frequently produce an adverse effect on large segments of disadvantaged and poorly educated people"¹¹

This Act was the beginning of a legislative effort which would ultimately give significant protection to New Jersey consumers. The operative provision of the Act is section two. The statute, as originally passed in 1960, provided, in pertinent part:

[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice¹²

Section three¹³ granted investigative powers to the Attorney General and section eight¹⁴ authorized him to obtain an injunction against anyone "who has engaged in, is engaging in or is about to engage in" practices proscribed by the Act. The creation of the Office of Consumer Protection¹⁵ in 1967 was an attempt to give substance to the legislative mandate that government be responsive to the needs of the consumer public. However, it was felt these steps were inadequate. An independent study a decade after passage of the Act charged that:

New Jersey consumers have been short-changed by [S]tate government. They have not been served well by the [L]egislature which has repeatedly rejected tough new measures designed to strengthen the position of the consumer in the market place. At the same time, it has denied the executive branch adequate funds to enforce the consumer laws now on the books. Likewise, the governors and attorneys general of both the

¹⁰ *Kuglar v. Romain*, 58 N.J. 522, 536-37, 279 A.2d 640, 648 (1971).

¹¹ *Id.* at 536, 279 A.2d at 648.

¹² N.J. STAT. ANN. § 56:8-2 (West 1964).

¹³ *Id.* § 56:8-3 (West 1964).

¹⁴ *Id.* § 56:8-8 (West 1964).

¹⁵ *Id.* § 52:17B-5.6 (West 1970). In 1971, the office was replaced by the Division of Consumer Affairs in the Department of Law and Public Safety. *Id.* § 52:17B-120 (West Supp. 1982-83).

past and present administrations have allowed the Office of Consumer Protection, for which they are responsible, to assemble an unskilled staff, to operate with chronic inefficiency, and to vitiate the laws against fraud through timid, weak enforcement.¹⁶

One of the major recommendations made by the researchers was the creation of a private cause of action under the Act providing for treble damages and attorneys' fees.¹⁷ The advantage, they proposed "would be in inducing the private bar to enter the fight against consumer fraud Consumers would no longer have to stand by helplessly while their claims of fraud languished in the Office of Consumer Protection."¹⁸

A year later in 1971, the New Jersey Legislature responded by adopting just such a provision granting a private right of action, treble damages, and costs.¹⁹ In signing the bill, Governor Cahill recognized the benefits of the provision, stating that it "will provide easier access to the courts for the consumer, will increase the attractiveness of consumer actions to attorneys and will help reduce the burdens on the Division of Consumer Affairs."²⁰ In that same bill, the Legislature broadened the definition of unlawful practices in section two to include "any unconscionable commercial practice"²¹ and granted the Attorney General the administrative authority to seek restoration of money or property to a defrauded consumer.²² The Legislature, in 1975, acted again to extend the reach of section two, to cover unlawful practices in the sale or advertisement of real estate.²³ Finally, a number of supplemental provisions have been passed

¹⁶ CENTER FOR ANALYSIS OF PUBLIC ISSUES, THE NEW JERSEY OFFICE OF CONSUMER PROTECTION—A PROMISE UNFULFILLED 5 (1970) [hereinafter cited as Consumer Report].

¹⁷ *Id.* at 67.

¹⁸ *Id.*

¹⁹ Act of June 29, 1971, ch. 247, § 7, 1971 N.J. Laws 1394 (codified at N.J. STAT. ANN. § 56:8-19 (West Supp. 1982-83)).

²⁰ Office of the Governor, Press Release No. A-2402 (June 29, 1971).

²¹ Act of June 29, 1971, § 2, 1971 N.J. Laws 1394 (codified at N.J. STAT. ANN. § 56:8-2 (West Supp. 1982-83)).

²² *Id.* § 3 (codified at N.J. STAT. ANN. § 56:8-15 (West Supp. 1982-83)).

²³ Act of Jan. 19, 1976, ch. 294, 1976 N.J. Laws 1184 (codified as amended at N.J. Stat. Ann. § 56:8-2 (West Supp. 1982-83)). Section two presently reads:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice

which define very specific unlawful practices.²⁴ Slowly the consumer's arsenal has grown.

Judicial Response to the Act

The burden of securing these consumer protections does not rest solely with the Legislature or the Division of Consumer Affairs.²⁵ The strength of the Act largely depends upon the courts. As one early commentator noted:

Whether the newly enacted state statutes will adequately protect consumers' rights is largely dependent upon the range of wrongs they can combat [T]heir ultimate success in novel situations may depend upon broad judicial interpretation. With that approach these statutes may provide the vehicle for exploring new and uncharted areas of consumer fraud.²⁶

The hallmark of the judicial response to the Consumer Fraud Act has indeed been to adopt a broad interpretation to give greatest effect to its remedial provisions. In *Kugler v. Romain*,²⁷ the New Jersey Supreme Court's first opportunity to interpret the Act, the court faced a challenge to the Attorney General's right to bring a class action suit under the provisions of the Act.²⁸ The defendant in *Kugler* had sold books, represented to be of educational value, in predominately low income neighborhoods. In fact, the books were of little educational value to these buyers who had paid more than twice the reasonable market price for such goods. The Attorney General argued the price was unconscionable under section 2-302 of the Uniform Commercial Code and, therefore, was also fraudulent and deceptive within the meaning of section two of the Act.²⁹ Such

²⁴ See N.J. STAT. ANN. § 56:8-2.1 to -2.13 (West Supp. 1982-83). Since 1975, seven subsections have been added to section 2. These include misrepresentation in the solicitation of funds for noncharitable purposes (-2.7); time limits on "going out of business" sales (-2.8); misrepresentation as to identity of food on menus and ads (-2.9); misrepresentation as to identity of food generally (-2.10); liability for violations (-2.11); refunds in private actions (-2.12); cumulative rights and remedies (-2.13).

²⁵ N.J. STAT. ANN. § 52:17B-120 (West Supp. 1982-83).

²⁶ *Consumer Remedies—Statutes—A New Approach*, 1 SETON HALL L. REV. 208, 212-13 (1970).

²⁷ 58 N.J. 522, 279 A.2d 640 (1971).

²⁸ See Consumer Report, *supra* note 16, at 69. Class actions are viewed by consumer advocates as an effective way to address consumer problems of the poor, since they avoid piecemeal litigation upon individual amounts frequently less than the sum of the court costs.

²⁹ *Kugler v. Romain*, 58 N.J. 522, 534, 279 A.2d 640, 646 (1971); N.J. STAT. ANN. § 12A:2-302 (West 1962).

unconscionable prices, he reasoned, provided the common set of facts necessary for a class action. The trial court rejected this argument, citing the absence of the word "unconscionable" within the provisions of the Consumer Fraud Act.³⁰ The state supreme court, in reviewing the decision, urged "a sensitive awareness of the climate of our time as it has been influenced by legislative and judicial measures affecting the buyer-seller relationship in the marketing of consumer goods."³¹ The court was unpersuaded by the trial court's interpretation and remanded the case with an order that judgment be entered for the entire class of injured buyers. The court determined that "unconscionability" could be equated with the other prohibitory terms of the Act and provide a basis for a class action.

We do not consider that absence of the word "unconscionable" from the statute detracts in any substantial degree from the force of this conclusion. That view is aided and strengthened by the plain inference that the Legislature intended to broaden the scope of the responsibility for unfair business practices by stating in Section 2 that the use of any of the described practices is unlawful 'whether or not any person [the consumer] has in fact been misled, deceived or damaged thereby.'³²

Central to the court's reasoning is its early determination that "the Legislature intended to confer on the Attorney General the broadest kind of power to act in the interest of the consumer public"³³ It is this observation which becomes the keynote to subsequent judicial interpretations of the Act.

In *Hyland v. Zuback*,³⁴ the appellate division examined a claim under the Act leveled at a boat repairman who had made false representations as to the cost and amount of repairs necessary on plaintiff's boat. The court rejected defendant's argument "that the Consumer Fraud Act is aimed solely at the 'shifty, fast talking and deceptive merchant' and does not reach a businessman such as he—'a nonsoliciting artisan.'"³⁵ As support for this conclusion, the court referred to the broad power of the Attorney General to act on behalf of the consumer public as cited in *Romain*.³⁶

³⁰ 58 N.J. at 542, 279 A.2d at 651 (1971). The word "unconscionable" was not added to section two of the Act until 1971. See *supra* note 23.

³¹ 58 N.J. at 535, 279 A.2d at 647 (1971).

³² *Id.* at 544, 279 A.2d at 652 (1971).

³³ *Id.* at 537, 279 A.2d at 648 (1971).

³⁴ 146 N.J. Super. 407, 370 A.2d 20 (App. Div. 1976).

³⁵ *Id.* at 413, 370 A.2d at 23.

³⁶ *Id.* at 413, 370 A.2d at 23-24 (quoting *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971)).

The New Jersey Supreme Court in *Fenwick v. Kay American Jeep, Inc.*³⁷ referred to the same "broad rule-making power conferred by statute on the Attorney General."³⁸ The court upheld a regulation making it an unlawful advertising practice to withhold a true odometer reading when selling a used car. The defendant in this case argued that his act was unintentional. The court, however, held that intent was not an essential element of the standards of conduct established by the Act "except when the Act specifically provides otherwise."³⁹ The appellate division, in *Levin v. Lewis*,⁴⁰ held that regulations governing auto repairs, promulgated pursuant to the Consumer Fraud Act, applied to a defendant who claimed to be engaged in the restoration of antique cars and not auto repairs. The court cited the principle that "[t]he Consumer Fraud Act should be construed liberally in favor of protecting consumers as well as construed to confer upon the Attorney General the broadest kind of power to act in the interest of the consumer."⁴¹

There has been one notable exception to these broad standards of interpretation adopted by the New Jersey courts: they have hesitated in applying the Act to professionals or other non-traditional market transactions. There is no specific language in the Act exempting professionals. The language of section two, defining practices unlawful under the Act, refers broadly to the acts of "any person."⁴² While such unlawful practices must be "in connection with the sale or advertisement of any merchandise . . ."⁴³ section one of the Act defines "merchandise" to include services.⁴⁴ Additionally, the Attorney General by summary action under section eight of the Act, may seek an injunction to prevent a person from continuing the unlawful practices.⁴⁵ Yet, the court in *Neveroski v. Blair*⁴⁶ was unpersuaded by the broad language of the Act. In *Neveroski* the court considered a claim under the Act by house purchasers against a broker who had deliberately withheld information about termite infestation in the house. The court began its analysis by stating:

³⁷ 72 N.J. 372, 371 A.2d 13 (1977).

³⁸ *Id.* at 378, 371 A.2d at 16.

³⁹ *Id.*

⁴⁰ 179 N.J. Super. 193, 431 A.2d 157 (App. Div. 1981).

⁴¹ *Id.* at 200, 431 A.2d at 161.

⁴² N.J. STAT. ANN. § 56:8-2 (West Supp. 1982-83).

⁴³ *Id.*

⁴⁴ *Id.* § 56:8-1 (West Supp. 1982-83).

⁴⁵ *Id.* § 56:8-8 (West Supp. 1982-83).

⁴⁶ 141 N.J. Super. 365, 358 A.2d 473 (App. Div. 1976).

[I]t is our considered opinion that the entire thrust of the Consumer Fraud Act is pointed to products and services sold to consumers in the popular sense. Such consumers purchase products from retail sellers of merchandise consisting of personal property of all kinds or contract for services of various types brought to their attention by advertising or other sales techniques. The legislative language throughout the statute and the evils sought to be eliminated point to an intent to protect the *consumer* in the context of the ordinary meaning of that term in the market place.⁴⁷

The court went on to find the broker not liable:

A real estate broker is in a far different category from the purveyors of products or services or other activities. He is in a semi-professional status subject to testing, licensing, regulations and penalties through other legislative provisions, See *N.J.S.A. 45:15-1 et seq.* Although not on the same plane as other professionals such as lawyers, physicians, dentists, accountants or engineers, the nature of his activity is recognized as something beyond the ordinary commercial seller of goods or services—an activity beyond the pale of the act under consideration.⁴⁸

The court used broad language to reject the possibility that the provisions of the Act would apply to professionals:

Certainly no one would argue that a member of any of the learned professions is subject to the provisions of the Consumer Fraud Act despite the fact that he renders "services" to the public. And although the literal language may be construed to include professional services, it would be ludicrous to construe the legislation with that broad a sweep in view of the fact that the nature of the services does not fall into the category of consumerism.⁴⁹

In *Daaleman v. Elizabethtown Gas Co.*⁵⁰ the state supreme court examined a claim by consumers that the Consumer Fraud Act prohibited allegedly fraudulent activity by the gas company in its billing practices. The trial court relied upon the "market place" language of *Neveroski* to rule that the Act did not apply to the gas company and dismissed the complaint.⁵¹ The appeals court, although recognizing that the Board of Public Utilities Commissioners had primary jurisdiction, modified the

⁴⁷ *Id.* at 378, 358 A.2d at 480.

⁴⁸ *Id.* at 379, 358 A.2d at 480-81.

⁴⁹ *Id.* at 379, 358 A.2d at 481.

⁵⁰ 77 N.J. 267, 390 A.2d 566 (1978).

⁵¹ 142 N.J. Super. 531, 535, 362 A.2d 70, 72 (Law Div. 1976).

trial court by ruling that the Act conferred concurrent jurisdiction upon the court as well.⁵² "We can perceive no discernible basis for construing the [A]ct as not having been intended to apply either to this or any other regulated industry, profession or other business."⁵³ The state supreme court left the issue undecided by ruling that the billing practices of the gas company did not constitute a selling or advertising practice within the meaning of the Act.⁵⁴ This holding may be viewed as an acknowledgment that the Act did apply in general to such businesses. However, it should be noted that the court took pains to point out the limitations of the Act in dealing with regulated industries. First, it indicated that a situation might arise where "separate state agencies would have the right to exercise concurrent jurisdiction and control over Elizabethtown's billings with a real possibility of conflicting determinations, rulings and regulations affecting the identical subject matter."⁵⁵ Furthermore, the treble damage provision of the Act in the context of a public utility is "counterproductive because, in the long run, it is the public users of the utility on whom the punitive award will fall."⁵⁶ Justice Pashman, apparently recognizing the ambiguity in the majority opinion, wrote a separate concurrence "to note that a regulated utility may nevertheless be covered by that Act when it engages in commercial activity not governed by the comprehensive scheme of PUC rate regulation."⁵⁷ At least one New Jersey court has recognized that the *Daaleman* and *Neveroski* decisions "evidence a judicial perception of a need to reasonably confine the ambit of the Act despite broad statutory language"⁵⁸

Professional Liability Under the Act

Should the New Jersey Consumer Fraud Act apply to professionals? Two of the major problems which arise when applying the Act to professionals include: 1) jurisdictional conflicts between agencies and 2) possible "double penalties" for professionals violating the Act. The trends in law and medicine toward creating a consumer market for these services, raise

⁵² 150 N.J. Super. 78, 374 A.2d 1237 (App. Div. 1977).

⁵³ *Id.* at 82, 374 A.2d at 1239.

⁵⁴ 77 N.J. 267, 271, 390 A.2d 566, 568-69 (1978).

⁵⁵ *Id.* at 272, 390 A.2d at 569.

⁵⁶ *Id.*

⁵⁷ *Id.* at 274, 390 A.2d at 570.

⁵⁸ *Jones v. Sportelli*, 166 N.J. Super. 383, 388, 399 A.2d 1047, 1049 (Law Div. 1979). In *Jones*, the court held, *inter alia*, that the sale of an IUD through plaintiff's physician was sufficient to bring the manufacturer within the purview of the Act.

important countervailing issues. The potential for consumer fraud in such a market is serious and may require the broadly drafted protections of the Act.

The State Attorney General has issued an agency advice letter stating that "in general, the Consumer Fraud Act and the regulations promulgated pursuant to it are applicable to persons licensed under the various occupational and professional licensing statutes" ⁵⁹ In making this determination, the Attorney General recognized that the Act could pose a jurisdictional conflict with the regulatory scheme of the Uniform Enforcement Act. ⁶⁰ The Act provides for the uniform enforcement of the consumer protection laws and regulations pertaining to the professional and occupational boards to be administered by the Division of Consumer Affairs. ⁶¹ Under the Act, a board may deny, suspend or revoke a license where an individual has "engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense" ⁶² The same conduct would permit the Attorney General to ask the court to revoke an individual's license under the Consumer Fraud Act. ⁶³ The Attorney General noted in his advisory letter that two recent New Jersey Supreme Court cases established guidelines for the resolution of such jurisdictional conflicts. ⁶⁴ In *Hinfrey v. Matawan Regional Board of*

⁵⁹ Administrative Agency Advice Letter No. M80-4675 from Div. of Law, Att'y Gen. James Zazzali to Div. of Consumer Affairs, Director Adam K. Levin at 7 (Dec. 11, 1981) [hereinafter cited as Advice Letter].

⁶⁰ *Id.* at 3-4 (construing various sections of N.J. STAT. ANN. § 45:1-21 to -22 (West Supp. 1982-83)).

⁶¹ N.J. STAT. ANN. § 45:1-14 (West Supp. 1982-83). The Division of Consumer Affairs administers the following professional and occupational boards:

[T]he New Jersey State Board of Certified Public Accountants, the New Jersey State Board of Architects, the State Board of Barber Examiners, the Board of Beauty Culture Control, the Board of Examiners of Electrical Contractors, the New Jersey State Board of Dentistry, the State Board of Mortuary Science of New Jersey, the State Board of Professional Engineers and Land Surveyors, the State Board of Marriage Counselor Examiners, the State Board of Medical Examiners, the New Jersey Board of Nursing, the New Jersey State Board of Optometrists, the State Board of Examiners of Ophthalmic Dispensers and Ophthalmic Technicians, the Board of Pharmacy, the State Board of Professional Planners, the State Board of Psychological Examiners, the State Board of Examiners of Master Plumbers, the State Board of Shorthand Reporting, and the State Board of Veterinary Medical Examiners.

Id. § 45:1-15 (West Supp. 1982-83).

⁶² *Id.* § 45:1-21(b) (West Supp. 1982-83).

⁶³ *Id.* § 56:8-8 (West Supp. 1982-83).

⁶⁴ Advice Letter, *supra* note 59, at 3-4.

*Ed.*⁶⁵ the court suggested that when "there is no inevitable incompatibility intrinsic in the administration of or application of the laws" implied repeal of one is unnecessary.⁶⁶ Using this test, the court in *Hinfrey* held that the Division on Civil Rights and the Department of Education had concurrent jurisdiction to hear complaints of sex discrimination in a school district.⁶⁷ The court in *City of Hackensack v. Winner*⁶⁸ applied this same test to find that the Civil Service Commission and the Public Employment Relations Commission had concurrent jurisdiction to hear unfair labor practices disputes.⁶⁹ *Hinfrey* went on to determine that "principles of comity and deference"⁷⁰ must be used to identify the agency which will decide the issue. Specifically, the court stated that a controversy "will be resolved by the forum or body which on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter."⁷¹ Reviewing the principles presented in these cases, the Attorney General advised that "the breadth of the Consumer Fraud Act provisions in comparison with the equally expansive statutory sections governing the licensing boards convinces us that concurrence of jurisdiction should be found here."⁷² The Attorney General further advised however, that:

[J]urisdiction under the Consumer Fraud Act should be exercised or declined upon an evaluation of whether the dominant issue in the controversy broadly involves consumer fraud or more specifically involves a type of occupational activity which might better be considered by the licensing board as the agency possessing the requisite expertise.⁷³

This appears to be the practice followed by the Division of Consumer Affairs. The policy of the Division is to refer complaints against professionals to the appropriate regulatory board where such expertise seems necessary.⁷⁴

⁶⁵ 77 N.J. 514, 391 A.2d 899 (1978) (Complainant alleged sex discrimination in public school curricula).

⁶⁶ *Id.* at 528, 391 A.2d at 906, *quoted in* Advice Letter, *supra* note 59, at 3.

⁶⁷ 77 N.J. at 520, 391 A.2d at 902.

⁶⁸ 82 N.J. 1, 410 A.2d 1146 (1980).

⁶⁹ *Id.* at 26-27, 410 A.2d at 1158.

⁷⁰ 77 N.J. at 531, 391 A.2d at 907.

⁷¹ *Id.* at 532, 391 A.2d at 908.

⁷² Advice Letter, *supra* note 59, at 5.

⁷³ *Id.* at 5-6.

⁷⁴ Interview with Stuart Gavzey, Deputy Director, Div. of Consumer Affairs (April 12, 1983).

Another problem presented by extending the sanctions of the Act to persons licensed by the professional and occupational boards is the possibility that that person could incur a double penalty. A licensing board may deny, revoke or suspend an individual's license⁷⁵ as well as assess a sizeable civil penalty⁷⁶ if a professional is deceptive or fraudulent. This same conduct could give a consumer a private cause of action under the Consumer Fraud Act and enable him to collect treble damages as well as attorney's fees.⁷⁷ Since the treble damages are arguably a penalty to encourage compliance with the Act, an individual could conceivably be penalized twice for the same fraudulent act. The opinion in *Winner* addressed this issue. The court stated that the presence of the public interest as an "added dimension" in agency adjudications may require agencies to:

[E]xercise their statutory powers over controversies properly before them regardless of whether other administrative or judicial avenues for relief are also open to the complainants. This may be so regardless of the fact that aggrieved parties thereby proverbially gain two strings to the bow or two bites of the apple.⁷⁸

The fairness of such a double penalty is questionable. An analogy to the Constitutional prohibition against double jeopardy may be apt. Over one hundred years ago, the United States Supreme Court declared: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense."⁷⁹ The Court admitted that "there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence. . . ."⁸⁰ The courts now hold, however, that a single act by a defendant may bring a conviction for two separate offenses only if each offense "requires the proof of a fact not essential to the other."⁸¹ The Uniform Enforcement Act proscribes the "use or employment of dishonesty, fraud, deception, [or] misrepresentation"⁸² The Consumer Fraud Act prohibits,

⁷⁵ N.J. STAT. ANN. § 45:1-2(b) (West Supp. 1982-83).

⁷⁶ *Id.* §§ 45:1-22(b), -25 (West Supp. 1982-83).

⁷⁷ *Id.* § 56:8-19 (West Supp. 1982-83).

⁷⁸ 82 N.J. at 30, 410 A.2d at 1160.

⁷⁹ *Ex parte Lange*, 85 U.S. (18 Wall.) 168 (1873).

⁸⁰ *Id.*

⁸¹ *Pereira v. United States*, 347 U.S. 1, 9 (1954).

⁸² N.J. STAT. ANN. § 45:1-21(b) (West Supp. 1982-83).

among other things, "[t]he act, use or employment . . . of any . . . deception, fraud, false pretense, false promise, [or] misrepresentation . . . in connection with the sale or advertisement of any merchandise" ⁸³ The Consumer Fraud Act requires proof of a fact not essential to the Uniform Enforcement Act, i.e., that the fraud be "in connection with [a] sale or advertisement."⁸⁴ The facts required to establish a violation under the Uniform Enforcement Act, however, are entirely contained in those needed to show unlawful conduct under the Consumer Fraud Act. A professional stands, therefore, to be punished twice for a single fraudulent act.

The issues of conflicting jurisdiction and double penalties are not insignificant. They must be weighed, nevertheless, against a threat to consumers raised by recent changes in the practice of such professions as law and medicine. In 1977, the United States Supreme Court recognized the first amendment right of lawyers to advertise.⁸⁵ Since that decision, lawyers have increasingly sought to expand their business by advertising. As one journalist has noted, "[l]ike the mechanic, the beautician, the restaurateur and other service providers, the general practice lawyer who gets the business is often the one who advertises in the print and broadcast media."⁸⁶ One New Jersey county bar association has expressed concern over the possible dissemination of misleading information by lawyers who attempt to advertise areas of expertise as well as the potential for "bait and switch" tactics by lawyers who advertise their fees.⁸⁷ Physicians have also begun to enter the consumer market by opening fast service, high volume medical clinics typically located in suburban shopping centers.⁸⁸ These clinics often advertise themselves as "emergency centers."⁸⁹ Critics claim that by using the term "emergency" on a sign, the clinic promises services which it cannot deliver.⁹⁰ One New Jersey physician opened a clinic in a shopping mall in Wayne and advertised as the "New Jersey Emergency Room."⁹¹ After complaints by the state medical authorities that the word

⁸³ *Id.* § 56:8-2 (West Supp. 1982-83).

⁸⁴ *Id.*

⁸⁵ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

⁸⁶ *Coder, Lawyer Advertising Catches On*, 104 N.J.L.J. 463 (1979).

⁸⁷ *Monmouth Bar Responds to Lawyer Advertising*, 100 N.J.L.J. 1085, 1100 (1977).

⁸⁸ *Freudenheim, Shopping Mall Medicine*, N.Y. Times, Dec. 5, 1982, (Magazine), at 146.

⁸⁹ *Id.* at 147.

⁹⁰ *Id.*

⁹¹ *Id.* at 148.

“emergency” was misleading and the use of the state name was a misrepresentation, the physician changed the name.⁹²

If courts pursue a course of action which excludes professionals from the sanctions of the Consumer Fraud Act, a potential Equal Protection problem may arise. A classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”⁹³ As the shopping mall physicians or lawyers become more ubiquitous their clientele become more akin to those individuals described in *Neveroski v. Blair* as “the consumer in the context of the ordinary meaning of that term in the market place.”⁹⁴ Merchants, to whom the Act clearly applies, may justly ask if similarly situated persons are being treated equally by the State.

Conclusion

The history of the Consumer Fraud Act has been one of a continual effort by the legislature and judiciary to broaden and extend the protections of the Act. The courts have hesitated, however, in applying the sanctions of the Act to professionals. Professional liability under the Act could create problems with jurisdictional conflicts between agencies as well as possible double penalties for violators regulated by a licensing board. These problems must be weighed against the threat of fraud in the growing consumer market for professional services. It seems unwise to foreclose consumers from the protection of the Act in this new “market-place.” The better policy would be to continue to resolve conflicts through agency deference and discretion. In this manner, New Jersey consumers will receive the full benefit of their legislators’ broadly drafted protections.

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⁹² *Id.* It should be noted that N.J. STAT. ANN. § 56:8-2.1 makes it unlawful to “operate under a name . . . which wrongfully implies that . . . [a] person is a branch of or associated with any department . . . of this State”

⁹³ *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

⁹⁴ 141 N.J. Super. at 378, 358 A.2d at 480 (App. Div. 1976).