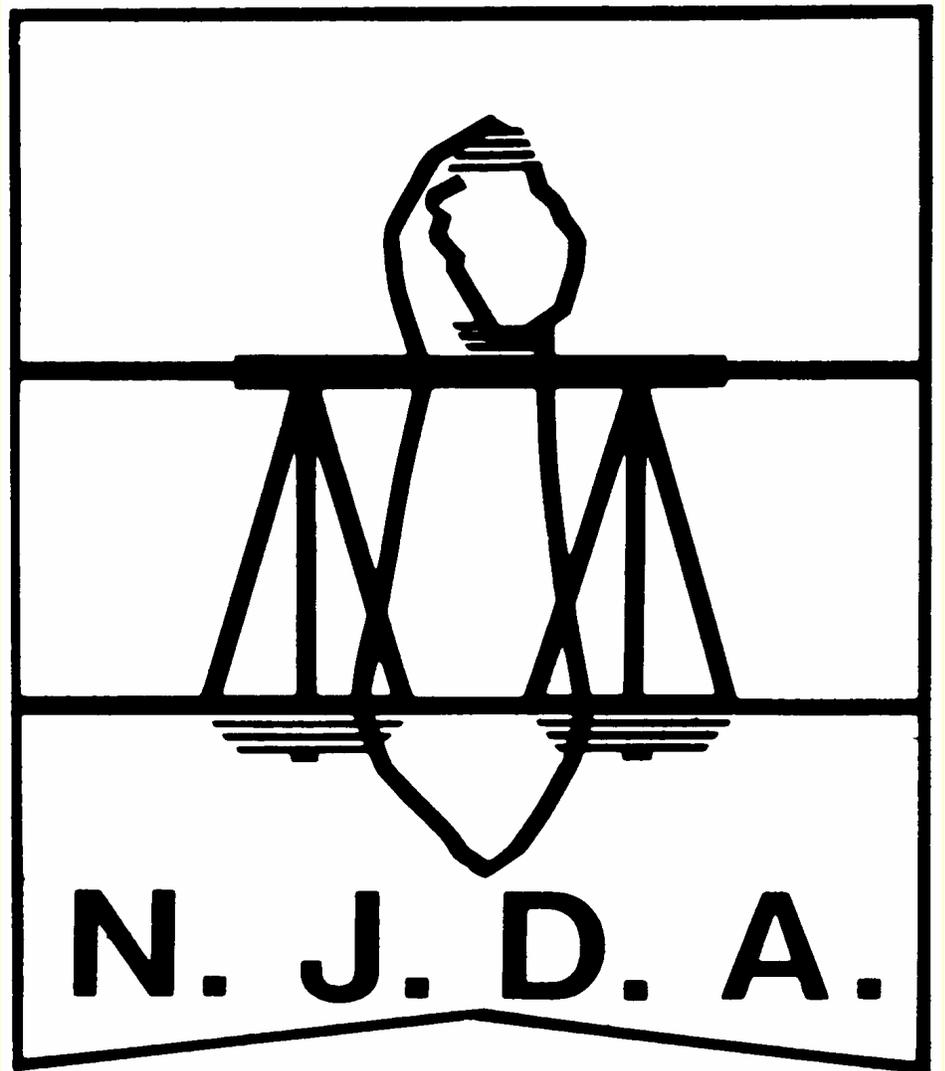


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# New Jersey Defense

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# SELLER BEWARE! A TIMEBOMB COULD BE TICKING WITHIN YOUR GOOD FAITH BUSINESS PRACTICES

*Steven A. Karg, Esq.*<sup>1</sup>

The New Jersey Consumer Fraud Act (the “CFA”) is a powerful tool consumers can use against sellers. Consumers can recover for economic<sup>2</sup> losses that result from 1) a seller’s innocent or intentional misrepresentations in an affirmative statement, 2) a seller’s intentional omissions of material fact, or 3) a seller’s innocent or intentional violation of applicable regulations.<sup>3</sup> In addition to the powers the CFA gives to the Attorney General to penalize such conduct, consumers can recover treble damages and attorney’s fees in a direct civil lawsuit.<sup>4</sup> These heavy damages, coupled with the potential for class action status<sup>5</sup>, have the potential to wipe out a small business even in some cases where the business acted in good faith.

The New Jersey Supreme Court’s recent interpretation of the CFA in *Bosland v. Warnock Dodge*<sup>6</sup> compounds the problem for all sellers of consumer products or services. The *Bosland* Court held that a consumer is not required to ask its seller for a remedy (e.g. refund or fair compensation) before suing the seller for treble damages and attorneys’ fees under the CFA. In *Bosland*, a car dealer sold a vehicle to the plaintiff and charged a \$117 fee. The fee was described on the Retail Buyer’s Order as a “Registration Fee”.<sup>7</sup> Plaintiff asserted that the charge included a “fee that was neither disclosed nor itemized as required by the applicable automobile sale regulations.”<sup>8</sup> Instead of asking the dealer to refund the improper portion of the fee, Plaintiff filed a putative class action lawsuit against the dealer for treble damages and attorneys’ fees, three years after the purchase. The issue before the New Jersey Supreme Court was

whether the CFA would permit such a lawsuit to continue, even after Plaintiff failed to tell the dealer about the problem prior to bringing the lawsuit.

The buyer-plaintiff in *Bosland* argued that the Legislature did not expressly or impliedly require a pre-lawsuit demand for CFA claims. It urged the Court to interpret the CFA broadly in favor of a remedy. Finally, it expressed a concern that a pre-lawsuit demand requirement would “subvert the CFA’s purposes, because the merchants would be free to violate the CFA, providing refunds only to those consumers savvy enough to request them while reaping unfair profits from unconscionable practices committed against all other consumers without fear of reprisal.”<sup>9</sup>

The dealer-defendant argued that, absent a pre-suit demand, Plaintiff could not demonstrate any resulting “ascertainable loss” as required by the CFA. It urged the Court to conclude that the alleged loss was *de minimus* in relation to the cost of the vehicle. Finally, it asserted that, absent a demand requirement, consumers would have incentive to run into Court and file suit for treble damages and attorneys’ fees, “rather than simply asking for a refund that would make them whole.”<sup>10</sup>

The *Bosland* Court felt constrained to interpret the CFA in light of its language and legislative history. It concluded that, at least under the circumstances of the *Bosland* case, the CFA did not require a pre-suit demand.<sup>11</sup> Although it commented on the public policy arguments of both parties, the Court left any public policy con-

*(Continued on next page)*

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siderations for the Legislature.<sup>12</sup>

As a result of the *Bosland* opinion, New Jersey merchants must be extra vigilant in creating and monitoring their business practices and documents. This advice is even more critical for merchants dealing in volume. A ten-dollar honest mistake made on ten-thousand transactions might result in a bet-the-farm class action where Plaintiffs are seeking much more than a refund – treble damages and attorneys fees, totaling in the

millions. With a six year limitations period and no demand requirement, the CFA under *Bosland* might let a merchant go unwarned for years while a problem compounds. The resultant accumulation of trebled damages and a recovery of attorneys’ fees have the potential to destroy some businesses. In such an environment, New Jersey merchants need to be extra vigilant to protect against potential catastrophe.

## SELLER BEWARE! ENDNOTES

<sup>1</sup> The author, Steven A. Karg, is member of the Bridgewater, New Jersey office of Norris, McLaughlin & Marcus, PA, where he defends product manufacturers, distributors and sellers. The author thanks William A. Dreier for his contribution to this article.

<sup>2</sup> Economic losses, as opposed to losses deriving from personal injury or property damage claims are the proper subject of the CFA. New Jersey and Federal cases have also held that physical property damage or even the cost of a product that was found defective because of warning defects otherwise remediable under the Products Liability Act are not the subject of consumer actions under the CFA. See *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51, 66 (2008) and *McDarby v. Merck & Co., Inc.*, 401 N.J.Super. 10, 94-98 (App.Div. 2008).

<sup>3</sup> *Bosland v. Warnock Dodge*, 197 N.J. 543, 556 (2009); *N.J.S.A.* 56:8-1 to 20.

<sup>4</sup> *N.J.S.A.* 56:8-19.

<sup>5</sup> See *Bosland*, 197 N.J. at 561.

<sup>6</sup> *Bosland v. Warnock Dodge*, 197 N.J. 543 (2009).

<sup>7</sup> *Id.* at 548.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 551.

<sup>0</sup> *Id.* at 550-551.

<sup>11</sup> *Id.* at 562.

<sup>12</sup> *Id.* In its discussion of public policy, the Court expressed concern that merchants could overcharge their customers “at no risk, and [plan] to refund the overcharges only when asked.” *Id.* at 561. The Court was concerned that a demand requirement would let merchants go unchecked because nobody would bring lawsuits. It should be noted, however, that the imposition of a demand requirement for a civil suit would not affect the Attorney General’s strong powers to deal with such sharp practices. *N.J.S.A.* 56:8-1, *et seq.* The Attorney General has broad powers to stop a merchant who is repeatedly overcharging its customers. The Legislature should take the Attorney General’s existing powers into consideration if it reviews the civil demand requirement of the CFA as suggested by the New Jersey Supreme Court. *Id.* at 562.