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COMMENTARY

Don't Eviscerate Consumer Fraud Act

By Bruce D. Greenberg

Can we help New Jersey's economy recover by encouraging businesses to defraud consumers? Of course not.

But that is the latest argument offered by corporate special interests in support of *Senate Bill 2855* and *Assembly Bill 3333*, companion measures that propose to gut the New Jersey Consumer Fraud Act.

The legislation would eliminate the CFA's mandatory treble damage provision. Businesses that are caught ripping off consumers would merely have to pay back what they stole. There would no longer be punishment for or deterrence of consumer fraud. The guilty parties could simply return to their evil ways and try harder not to get caught in the future. Other potential scammers would face only the risk of having to repay their wrongful gains, a mere "cost of doing business" that would not deter anyone.

The bills would also make it harder for victims to join together in a class action. Yet, a class action is often the only realistic way for consumers to get redress, as our Supreme Court has long recognized.

Another pernicious amendment would make the CFA inapplicable to any transaction regulated by any state or federal agency. But a key reason why the CFA was amended in 1971, under

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a Republican governor, to provide for private CFA lawsuits was the recognition that government agencies were overstretched and underfunded. That is even more true now, when government at all levels has fewer resources. Taking away the "private attorney general" function of private CFA actions would mean that most CFA violations could never be redressed.

But the drive to cripple the CFA has not stopped there. The legislation seeks to discourage lawyers from handling CFA cases, so that consumers with meritorious claims will not be able to bring them.

A-3333 and S-2855 delete the CFA's mandatory attorneys' fees provision. That by itself discourages counsel from taking CFA cases. The legislation also imposes a hard cap on fees. Consumers will not be able to attract counsel to sue defendants who can be expected to engage in "scorched earth" defense tactics, since counsel will not be paid for combating those tactics once the fee cap has been reached.

The CFA means little if victims cannot obtain counsel. By restricting consumers' access to counsel, the proposed amendments would bring about indirectly what the CFA's opponents could never achieve directly: the abrogation of the CFA.

In order to divert attention from these effects of the proposed legislation, the special interests argue that we must undo the CFA in order to make New Jersey more "business-friendly."

That is fallacious on multiple levels.

First, the proposed bills actually harm businesses by depriving them of the CFA's protection when they themselves are consumers. For example, if a small business buys telephone equipment, computers or other items, and the seller engages in fraudulent behavior, the CFA currently allows the business to sue, just as an individual can. The proposed amendments take away that right. Those bills thus represent a giant step backward for small businesses, which create most of the new jobs in our economy.

Second, a strong CFA protects reputable businesses against unfair competition. *Riley v. New Rapids Carpet Center*, 61 N.J. 218 (1972), recognized that "[t]he reputable vendor, too, has an interest in the suppression of dishonest competition." By eviscerating the CFA, the proposed bills would allow fraudsters to compete unfairly at the expense of honest businesses who stay within the law. Again, the legislation harms rather than helps New Jersey's honest businesses.

Third, New Jersey is already business-friendly. A 2010 report by the Information Technology and Innovation Foundation of Washington, D.C., rated New Jersey fourth in the United States in support for entrepreneurship and innovation, the very things that lead to job creation and economic revitalization. Gov. Chris Christie visited Illinois to tout New Jersey's business environment and urge Illinois businesses to move here.

According to the New Jersey Economic Development Authority's 2010 annual report, at least 20 busi-

nesses relocated to New Jersey from Pennsylvania, New York, California, North Carolina, Georgia, Tennessee and Maryland in 2010 alone. Within the past few weeks, it was announced that Sears is considering moving its headquarters from Illinois to New Jersey. When Panasonic wanted to

move its headquarters out of Secaucus, the company chose to stay in New Jersey and to construct a new building in Newark.

New Jersey is in fact a first-rate place for honest businesses to prosper and create jobs. Thanks to the CFA, though, it is not a very good place for

sleazy operators who bilk the public. We should not make our state a haven for such villains while harming consumers and reputable businesses. We will not improve our economy by giving snake-oil sales people carte blanche to rip off consumers. But that is what S-2855 and A-3333 would do. ■