

Interstate Parties and NJ's Consumer Fraud Act

Although the CFA and Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) are both remedial statutes serving similar purposes, there are a number of significant differences.

By **Stephen Hankin**

Practitioners engaged in consumer protection oft-times are less than circumspect in instituting litigation under New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (CFA), due to its liberal construction, mandatory treble damages and fee-shifting provisions. Despite being dubbed as one of the nation's strongest consumer protection laws, where an out-of-state defendant is contemplated, care should first be taken to determine whether the CFA applies in the first instance.



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Take the scenario of a Pennsylvania-based automobile auction at which a New Jersey retail dealer purchases a vehicle and sells it to an ultimately dissatisfied New Jersey consumer. Assume the client—in New Jersey—wishes to sue not only his retail dealer

but also the Pennsylvania auction and the non-New Jersey based automobile wholesaler who sold the vehicle through the auction. This article only focuses upon the New Jersey buyer's claims against the auction and the wholesale seller. Because of its strikingly dissimilar consumer laws, we employ Pennsylvania as our example to underscore a practitioner's need to make a pre-litigation, threshold choice-of-law analysis.

The Standard to Be Applied

In resolving choice-of-law issues, New Jersey courts generally have adopted the "most significant relationship test" of the Restatement (Second) of Choice of Law. *See P.V. v. Camp Jaycee*, 197 N.J. 132 (2008). Under this standard, the law of the state where the injury occurs is applicable *unless* another state has a more "significant relationship" to the parties and issues. This determination involves a two-step analysis.

The first step in analyzing the most significant relationship test is to determine whether an actual conflict exists between the laws of the potential forums. If there is a difference, the second step is to determine which jurisdiction has the "most significant" relationship to the claim. When fraud or misrepresentation is alleged, the factors set forth in §148 of the Restatement are used to determine which jurisdiction has the most significant relationship.

The CFA and Pennsylvania's UTPCPL Conflict

Although the CFA and Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) are both remedial statutes serving similar purposes, *Daaleman v. Elizabeth Gas Co.*, 77 N.J. 267, 270 (1978) (CFA's focus is upon sharp consumer practices); *Grimes v. Enter. Leasing Co. of Philadelphia*, 66 A.3d 330 (Pa. Super. 2013) (the UTPCPL seeks to prevent deceptive acts or practices), there are a number of significant differences. *See Fink v. Ricoh Corporation*, 365 N.J. Super. 520, 543 (Law Div. 2003) (noting some of the differences between the CFA and UTPCPL).

Without consideration of the existence of personal jurisdiction, counsel would be remiss in not first examining the UTPCPL which requires that any claimant be either a citizen of, or have purchased the automobile within, Pennsylvania. *Brown v. Johnson & Johnson*, 64 F.Supp.3d 717 (E.D.Pa.2014). That leaves for consideration whether the CFA is applicable which, in turn, requires a determination of the differences between the CFA and the UTPCPL.

A consumer's reliance is not a requisite under New Jersey's CFA. *Union Ink Co. v. AT&T*, 352 N.J. Super. 617 (App. Div. 2002). However, actual reliance is a requirement under Pennsylvania's UTPCPL. Pa. Stat. Ann. §73:201-45; *Prime Meats v. Yochin*, 619 A.2d 769, 773 (Pa. 1993) ("In order to recover under [the UTPCPL], the elements of common law fraud must be proven" which include reasonable reliance); *Zajick v. The Cutler Group*, 169 A.3d 677 (Pa. Super. 2017) (where there are no representations or communications exchanged there is no reliance.).

Another significant difference between the UTPCPL and the CFA is that in "New Jersey the assessment of treble damages and attorney fees is mandatory when a violation of the Consumer Fraud Act has been proved." *Huffmaster v. Robinson*, 221 N.J. Super. 315, 320 (1986). However, under Pennsylvania's UTPCPL, an award of treble damages is merely discretionary. *Schwartz v. Rockey*, 932 A.2d 885 (2007).

Additionally, parties to a consumer fraud case in New Jersey are entitled to a trial by jury, *Zorba Contractors v. Housing Authority of the City of Newark*, 362 N.J. Super. 124 (App. Div. 2003), while under Pennsylvania's UTPCPL they are not. *Fazio v. Guardian Life*, 62 A.3d 396 (Pa. 2012).

The *Fink* decision notes three additional differences: unlike the CFA, the UTPCPL provides for a "minimum damage award of \$100 for a violation," "limit[s] damages for violations to purchasers and lessees of goods and services for personal, family or household purposes," and contains "differences in the treatment of concealment of material facts in N.J.S.A. 56:8-19." *Fink v. Ricoh Corp.*, at 543.

Once there has been a determination that there is a conflict between the laws of any potential forums—in our example, Pennsylvania and New Jersey—the factors enumerated in §148 of the Restatement must be applied. *Maniscalco v. Brother Int'l*, 709 F.3d 202, 206-207 (3rd Cir. 2013). Under subsection (1) of §148, when a plaintiff's reliance takes place in the state where the false representations were made *and* received there is a presumption that the law of that state applies. In contrast, under subsection (2) of §148, when a plaintiff's reliance takes place in a different state than where the false representations were made and received, courts weigh the following factors:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement §148(2).

The factors enumerated in §148(2) should be evaluated on the qualitative rather than a quantitative basis. *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1119 (3rd Cir. 1994). The relative importance given to each factor should be determined in light of the choice-of-law principles stated in the Restatement, §148 cmt. e. Those principles are: "(1) the

interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." *Camp Jaycee*, at 147.

Maniscalco, adopts the Restatement's commentary that "[i]f any two of the 148(2)'s contents apart from the defendant's domicile, state of incorporation or place of business, are located wholly in a single state, this will usually be the State of the applicable law with respect to most issues." *Maniscalco*, 709 F.3d at 209. Also see *Grandalski v. Quest Diagnostics*, 767 F. 175 (3d. Cir. 2014), (reaffirming *Maniscalco*) and *Cooper v. Samsung Electronics America*, 2010 WL 1220946 (3rd Cir. March 30, 2010) (noting "[t]he transaction in question bears no relationship to New Jersey other than the location of Samsung's headquarters" and the claim "bears the most significant relationship with Arizona, the state in which the television was marketed, purchased and sold.")

With the foregoing principles as a guide, a review of the following factors in our example demonstrates the applicability of Pennsylvania law:

- The physical conduct of the auction, the sale, the purchase and payment by the retail dealer occurred in Pennsylvania.
- The wholesale seller's and auctioneer's alleged conduct occurred in Pennsylvania where the auction occurred.
- The retail dealer took delivery of the vehicle from the auction in Pennsylvania.

Accordingly, under the most significant relationship test, Pennsylvania, not New Jersey law must be analyzed to determine the propriety of a plaintiff's claims against the auction and the automobile wholesaler. Indeed, in our example the only contact New Jersey had with the purchase of the vehicle was the fortuitous New Jersey location of plaintiff and the retail dealer.

In sum, it is now quite clear that the law of the consumer's home state should be applied only when a product is purchased in that state and the seller has a corporate place of business there. See *Real v. Radir Wheels*, 198 N.J. 511 (2009), (New Jersey law

applied where Missouri resident relying upon internet auction representations purchased a used car *from a New Jersey seller*).

Accordingly, while New Jersey law would apply in our example to the plaintiff's claims vis-à-vis his New Jersey retail dealer, Pennsylvania law would apply to his claims against the automobile wholesaler and the auction. Since under the UTPCPL the claimant was neither a resident of nor purchased the vehicle in Pennsylvania, no claim would exist either under the UTPCPL or the CFA, thereby leaving the plaintiff with only common law remedies.

It is thus strongly recommended that counsel closely examine the laws of the relevant jurisdictions before proceeding with any consumer claim, most especially if the undertaking is solely based upon the thought of a treble damage recovery and/or fee-shifting.

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