

## Legal Pipeline

# Consumer Fraud Statutes Can Affect Design Professionals, Too

Be mindful of your state's consumer fraud statutes to receive appropriate protections.



By Steven Nudelman

Every person who purchases goods or services is a consumer. A consumer, however, is not restricted to an individual person; businesses may also be consumers. Various states across the country have enacted laws known as “consumer fraud” or “deceptive practices” statutes, designed to protect consumers — individuals and businesses alike — from deceptive or fraudulent business practices.

While many states exempt architects, engineers and other licensed professionals from liability under such statutes, others do not. In this article, we take a closer look at a particular case in Illinois where an architect did, in fact, face liability under that state's consumer protection statute.

Before turning to Illinois, let's take a brief look at New Jersey, a state whose consumer fraud statute generally exempts architects and engineers from liability.

### Consumer Fraud in New Jersey

The New Jersey Consumer Fraud Act (NJCFA) defines a consumer as “any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof.” N.J.S.A. 56:8-1.

The statute protects consumers from, among other things, “unlawful” business practice, which is defined as an “act, use or employment by a person of any ... deception, fraud, false pretense, false promise, misrepresentations, 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.” N.J.S.A. 56:8-2.

Specifically exempted from the scope of the NJCFA are “learned professionals,” including lawyers, physicians, dentists and accountants. The theory behind the exemption is that because these professions have testing, licensing and regulatory requirements, the consumer is adequately protected by these existing safeguards (which also include monetary penalties for regulatory violators).

**Disclaimer:** This article is for informational purposes only and not for the purpose of providing legal advice. Nothing in this article should be considered legal advice or an offer to perform services. The application and impact of laws may vary widely based on the specific facts involved. Do not act upon any information provided in this article, including choosing an attorney, without independent investigation or legal representation. The opinions expressed in this article are the opinions of the individual author and may not reflect the opinions of his firm.



Similarly, in construction, those exempt from facing NJCFA liability include any “person regulated by [New Jersey] as an architect, professional engineer, landscape architect, land surveyor, electrical contractor, master plumber, or any other person in any other related profession requiring registration, certification or licensure.” N.J.S.A. 56:8-140.

These statutory exemptions are not ironclad; there may be circumstances under which a professional may be liable under the NJCFA. In *Blatterfein v. Larken Associates*, New Jersey's Appellate Division held that an architect could be liable under the NJCFA when he does not act in his capacity as an architect but rather acts as a real estate agent. 323 N.J. Super. 167, 183 (App. Div. 1999).

Similarly, in *Gilmore v. Berg*, the court allowed lawyers and accountants to face liability under the NJCFA when they acted as real estate sellers and misrepresented building prices. 761 F. Supp. 358 (D.N.J. 1991). In sum, while the NJCFA generally insulates learned professionals from liability, such learned professionals may still face NJCFA liability when they are not operating in their professional capacities. *Macedo v. Dello Russo*, 178 N.J. 340, 346 (2002).

### Illinois Homebuilder Vs. Homeowners

Illinois' consumer protection law is known as the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA). It is a “regulatory and remedial statute intended to protect consumers, borrowers and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices.” *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (Ill. 2002). Although ICFA is very similar in design and function to the NJCFA, the former does not include a statutory exemption for design professionals.

In *Parkman & Weston Assocs., Ltd. v. Ebenezer*

## Legal Pipeline

African Methodist Episcopal Church, the district court held that architects may be liable under the ICFA because unlike attorneys, architects are not fiduciaries and no evidence was presented showing that architects are otherwise similarly situated to attorneys. No. 01 C 9839, 2003 WL 22287358, at \*8 (N.D. Ill. Sept. 30, 2003).

In *Smith v. NVR*, a case not involving design professionals, the court analyzed a seller's duty to the consumer in making proper representations regarding a house that was being sold. 17 C 8328, 2018 WL 6335051, at \*1 (N.D. Ill. 2018).

Paul and Deborah Smith purchased a house from homebuilder NVR that the Smiths alleged did not include everything NVR had promised. For example, NVR promised that the couple would receive 30-year architectural, self-sealing shingles and wooden cabinets in the kitchen and bathroom. Instead, the builder installed 25-year shingles and cabinets with an artificial, nonwood wrap. While these changes were undetectable visually at first glance, NVR was providing the Smiths with significantly inferior products.

Additionally, the homebuilder installed a 2.5-ton Goodman Mfg. condenser rated at 30,000 BTU's instead of the 3-ton, 60,000 BTU model that was promised. NVR also installed a 60,000 BTU Goodman Mfg. furnace instead of the promised 80,000 BTU unit. Finally, NVR installed a significantly inferior HVAC system than it initially promised to the Smiths. As a result of these "changes," the couple asserted an ICFA claim against the company.

To prevail on their ICFA claim, the Smiths had to prove there was a deceptive act or promise by NVR, that the seller intended for the Smiths to rely on that deceptive act, that the deceptive act occurred during a course of conduct involving trade or commerce and that the couple suffered actual damages as a result of NVR's deceptive act. The damages the Smiths suffered also had to have been proximately caused by NVR's deceptive acts — meaning that the damages needed to be caused by the homebuilder's fraudulent actions.

In their complaint, the Smiths had to support their ICFA claims with detailed factual allegations. Under the Federal Rules of Civil Procedure — applicable because the Smiths brought their action against NVR in federal district court — a general claim of fraud is insufficient. The complainant must include the who, what, where, when and how of the fraud. *Camasta v. Jos. A. Bank Clothiers, Inc.* 761 F.3d 732, 737 (7th Cir. 2014).

The court found that the Smiths were only able to meet part of their burden of proof. While NVR seemed to misrepresent the quality and existence of several items including the shingles, cabinets, condenser and furnace downgrades and more, the court held that the homeowners could only succeed on an ICFA claim for the shingles and cabinets.

NVR used the cabinets and shingles in their advertising material to induce consumers to purchase homes with high-quality products, when, in fact, the products were significantly inferior. The court found it to be rea-

sonable that a consumer would rely on the information a company would give about those products before a sale when deciding whether to purchase a home.

Additionally, the differences between the high- and low-quality products were undetectable to the naked, untrained eye, which allowed NVR to conceal the change of products.

The Smiths were unable to prevail on their ICFA claims relating to the HVAC systems and water lines because they were unable to show that NVR's misrepresentations proximately caused their damages. Here, the quality and types of products were not referenced in any advertising material. Instead, NVR allegedly made representations during the permitting process and the Smiths were indirectly deceived by these representations the company made.

The indirectness of the misrepresentations was not the issue. Rather, the core of the issue was when the Smiths learned of the misrepresentations. In this case, the Smiths had already purchased their home when the discussions regarding the HVAC and water systems took place. Consequently, the couple could not have relied on this information when they made their decision to purchase their home. Without this reliance to purchase, the proximate cause was not proven and the Smiths' ICFA claim failed.

### Remedies

States allow for different types of penalties to violators of consumer protection statutes. These penalties often include recovery for the amount of actual damage suffered and reasonable attorney's fees and costs. Approximately one-half of the states allow for the recovery of so-called "enhanced damages" (e.g., double damages, treble damages, etc.) and many states also allow for the recovery of counsel fees by the prevailing party.

Consumer fraud protections are important for both the consumer and the seller. As illustrated in the above examples, states consider varying components to determine whether there has been a consumer fraud violation. While the consumer may be protected from fraud, deception, misrepresentations and unfair practices, the seller also has some protection against frivolous lawsuits by the heightened pleading requirements and proofs needed to prevail.

Importantly, both the protections provided and elements to be proven vary by state. Design professionals, including architects and engineers, must be mindful of their state's consumer fraud statutes so they may receive appropriate protections, both as a consumer and as a purveyor of goods and services. ●

*Steven Nudelman is a partner at the law firm of Greenbaum, Rowe, Smith & Davis LLP in Woodbridge and Roseland, N.J. He is a member of the firm's Litigation Department and its Construction, Community Association, Alternative Dispute Resolution and Alternative Energy and Sustainable Development Practice Groups. He may be reached at 732-476-2428 or snudelman@greenbaumlaw.com.*