NJ Supreme Court Dodges Question of Whether Consumer Fraud Act Can Be Applied in Context of Commercial Dispute Between Merchants

By Kevin J. O'Connor*

In my prior articles I've reviewed the dramatic changes in the law of late, where New Jersey courts have applied the New Jersey Consumer Fraud Act ("CFA") in any number of circumstances beyond the consumer context. Opinions on this subject are mixed, with some arguing that the law is being expanded to provide greater protection to those who need it, and others arguing that these cases are setting dangerous precedents that deter businesses from expanding in this State.

It was hoped that the New Jersey Supreme Court would squarely address the appropriateness of applying the CFA in a dispute between two commercial businesses when it agreed to hear the appeal in Pomerantz Paper Corp. v. New Community Corp., 2010 N.J. Super. Unpub. Lexis 1458 (App. Div. July 1, 2010), certif. granted, 205 N.J. 16 (2010). Pomerantz involved a janitorial supply products company which sued a non-profit corporation organized to manage properties in Newark, NJ. The supply company learned the hard way how the CFA can be both a sword and shield, and was tagged with a treble damage award of $214,711 and made to pay a counsel fee award of $86,015 on what it thought was an ordinary book account case.

On appeal, the Appellate Division relied upon its decision in Marascio v. Campanella, 298 N.J. Super. 491 (App. Div. 1997) in holding that "[a] consumer transaction occurs whenever there is a 'sale of consumer goods regardless of who purchases those goods and for what purpose.'" The Court further held that while the word "consumer" has historically connoted an individual, the courts have expanded the definition "to include businesses that purchase goods for use in their business operations. '[S]o long as the disputed contract involves goods . . . generally sold to the public at large, the mere fact that a corporation purchases the goods for use in its business does not preclude invocation of the' CFA." The court defined a consumer as "one who diminishes or destroys the economic goods as opposed to one who purchases the goods and passes it on for the benefit of another." (Id. quoting Arc Networks, Inc. v. Gold Phone Card Co., 333 N.J. Super. 587 (Law Div. 2000)).

The Supreme Court, in its July 25, 2011 decision, reversed the Appellate Division with respect to the CFA counterclaim and held that the lower court had erred in letting in expert testimony which was the sole support for the CFA claim. 2011 N.J. Lexis 787 (July 25, 2011). The Court completely dodged the question of whether the CFA can apply in the context of a commercial dispute, holding only that "[it] need not address that question because defendant's CFA claim fails for want of sufficient evidence." Id. * 13. It directed the trial court to vacate the judgment on the counterclaim.

The Court's decision in Pomerantz leaves for another day the question of whether the CFA can be used in a claim strictly between merchants. The Pomerantz case offers up further proof that the CFA can be either a sword or shield, and that a litigant suing in an ordinary business suit must be cognizant of the possibility of such a claim arising.

*This blog is maintained by Kevin J. O'Connor, Esq. The views expressed herein are those of the author and not necessarily those of the law firm Peckar & Abramson, PC.