NJ App Div, at the Request of the NJ Supreme Court, Addresses Question of Whether Consumer Fraud Act Can Be Applied in Context of Commercial Dispute Between Commercial Parties

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). As I wrote in my prior blog on the subject, the Court ultimately dodged the question by reversing on an issue relating to expert testimony. 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 therefore left for another day the issue 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.

An October 21, 2011 published decision of the Appellate Division, Princeton Healthcare Sys. v. Netsmart N.Y., Inc., 2011 N.J. Super. Lexis 190, shows the courts' growing hostility toward applying the CFA in the context of a commercial dispute between sophisticated parties. There, a non-profit corporation that provides healthcare services sued a company that provides computer software products and services, over a failed contract for certain computer-based services. The trial court had denied the service provider's motion for summary judgment on the CFA claim and held that the goods and services were "marketed and sold to the general public" and, therefore, a CFA claim could be presented to a jury. Id. at *2.

Netsmart moved for leave to appeal which was denied, and then moved for leave before the Supreme Court of New Jersey, which ***granted*** the appeal and sent it to the Appellate Division for consideration "on the merits." The Appellate Division reversed the lower court, dismissing the CFA claim:

> "The contract between Princeton House and Netsmart for the installation and implementation of a complex computer system at Princeton House did not constitute a simple purchase of computer software sold to the public at large. The contract resulted from a request for proposals for an upgrade in Princeton House's computer system, which Princeton House prepared with the assistance of PHCS's computer consultant…. The contract did not provide for simply the installation of a standardized computer software program but rather the design of a custom-made

> program to satisfy Princeton House's unique needs and Netsmart's active participation in implementation of this program. Moreover,… Princeton House, with the assistance of PHCS's computer consultant and legal counsel, engaged in lengthy negotiations over its terms with Netsmart. This kind of heavily negotiated contract between two sophisticated corporate entities does not constitute a 'sale of merchandise' within the intent of the CFA." Id. at *4.

The Appellate Division in Princeton relied on old precedents, such as its decision in Marascio v. Campanella, 298 N.J. Super. 491 (App. Div. 1999) in recognizing 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 has continued to recognize the broad definition of the word "consumer" to include businesses that purchase goods for use in their business operations, but will require definitive proof that the goods and services are "generally sold to the public at large" before it will let the CFA come into play and impose treble damages and attorneys' fees.

The fact-specific test articulated by the Court in Princeton means that determinations such as these will often need to await expensive discovery, and that a litigant suing in an ordinary business suit must be cognizant of the possibility of such a claim arising.

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