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## COMMERCIAL LAW

### Nondrafting Party Loses Favor

Unequal bargaining power is prerequisite to application of contra proferentem

By Arthur L. Raynes

There were no landmark commercial law cases this past term. Instead, there were some specific developments in various areas of commercial law. There were also some unusual situations presented, including a significant contract ruling arising from a matrimonial case, an antitrust case seeking to disguise itself as a consumer fraud claim, and a dissertation on when attorneys are bill collectors subject to federal law.

#### Contra Proferentem

A matrimonial case set the stage for the Court's major pronouncement on contract law this past term. The Court greatly limited the use of the doctrine of contra proferentem. That rule of contract interpretation requires a Court to adopt the meaning that is most favorable to the nondrafting party.

The issue before the Supreme Court in *Pacifico v. Pacifico*, 190 N.J. 258 (2007), was whether the doctrine of contra proferentem may be used to interpret an ambiguous contract term against its final drafter where both parties' attorneys had a role in drafting the agreement and were in apparently equal bargaining positions.

In that case, the Supreme Court was asked to interpret a property settlement agreement that provided the plaintiff ex-wife the right of first refusal to purchase the interest of the ex-husband on the mari-

tal home, contingent upon the occurrence of certain conditions. However, the contract did not specify whether the ex-wife would exercise the option based on the value of the marital home at the time of the contract (1996) or at the current market value at the time the option would be exercised.



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The ex-husband's attorney prepared the first draft of the property settlement agreement, which provided for valuation at the market value at the time of the sale of the property, and the ex-wife's attorney prepared the second draft that froze the ex-husband's interest at the 1996 value. Ultimately, the ex-husband's attorney drafted the third and final version of the agreement after the parties could not agree on the prior drafts. Applying the doctrine of contra proferentem, the Appellate Division concluded that the agreement was

ambiguous and should be interpreted against the ex-husband, whose attorney drafted the final version of the agreement.

The Supreme Court held the doctrine of contra proferentem should not have been applied here because the Court did not find unequal bargaining power between the parties, which it held to be a prerequisite to the application of the doctrine. The Court emphasized that the matrimonial settlement process is a complex series of negotiations between parties and, therefore, property settlement agreements are not the product of one singular "drafter" within the meaning of the doctrine. The Court also held that contra proferentem may be employed only as a doctrine of last resort, after a court has examined the terms of the contract in light of the common usage and custom, and considered the circumstances behind its execution.

The *Pacifico* decision significantly limits the doctrine of contra proferentem not only in the matrimonial settlement context, but very likely in all areas of contract law where agreements are reached after mutual negotiations. Moreover, this decision also explicitly requires a finding of unequal bargaining position between the parties before the doctrine of contra proferentem may be applied.

#### Attorneys as Debt Collectors

In *Hodges v. Sasil Corp.*, 189 N.J. 210 (2007), the issue was whether a law firm or an individual lawyer from that firm who regularly engages in filing summary dispossess proceedings are "debt collectors," and thereby subject to the restrictions and requirements of the Fair Debt Collection Practices Act (FDCPA).

Numerous summary dispossess actions had been filed against two sisters, plaintiffs, who lived in subsidized Section

8 housing, seeking their eviction for non-payment of rent. Federal law defined their rental obligation as 30 percent of their adjusted monthly household income. The building owner, however, through its lawyers, included other charges in the description of the amount of rent owed, such as late fees and attorney's fees. The complaints did not, though, alert plaintiffs that to avoid eviction they were only required to pay their rental obligation, and not the late charges or attorney's fees.

Plaintiffs alleged that the summary dispossession complaints were filed to induce them to believe they would be evicted unless they paid all enumerated charges, including amounts exceeding their statutorily-defined rental obligation; therefore the landlord, and its attorney, through the filing of the summary dispossession actions for the purpose of inducing them to pay and labeling late charges and legal fees as "rent," violated the Brooke Amendment to the United States Housing Act, the New Jersey Anti-Eviction Act, the Fair Debt Collection Practices Act, and the New Jersey Consumer Fraud Act.

Procedurally, the trial court granted defendants' summary judgment, dismissing all counts except the Consumer Fraud Act claim against the building owner and its law firm. Plaintiffs filed a motion for leave to appeal the dismissal of the FDCPA claim against the law firm, which the Appellate Division granted. The Appellate Division then reversed the dismissal of the FDCPA claim against the law firm. The Supreme Court granted the law firm's motion for leave to appeal.

The Supreme Court held that "a law firm that regularly files summary dispossession actions for nonpayment of rent is a debt collector subject to the FDCPA." The Court reached this holding first, by determining that residential "rent" falls under the FDCPA definition of "debt." Second, the Court acknowledged that one of the goals of a summary dispossession action, over and above possession, is to secure the payment of back rent. As such, attorneys who regularly file summary dispossession claims fit into the definition of "debt collector" under the FDCPA. Therefore, the Court held that a law firm and an individual lawyer from that

firm, regularly engaged in bringing summary dispossession proceedings, are "debt collectors," and thereby subject to the Fair Debt Collection Practices Act (FDCPA).

The Court indicated that it did not have enough information in the record to determine if the particular law firm or lawyer involved in this case "regularly engaged" in bringing summary dispossession actions, and remanded the matter for that determination.

The Court, in an effort to harmonize the state's summary dispossession process with its holding, referred the matter to the Special Civil Part Practice Committee and directed the Committee to draft appropriate rules. The Court asked the Committee to consider mandating that any summary dispossession complaint filed against a defaulting tenant expressly state the amount the tenant is required to pay to avoid eviction and to determine whether rules governing eviction proceedings should apply uniformly to all litigants regardless of their status as "debt collectors."

To prevent confusion while the Committee acted on the Court's directive, the Court set forth provisional rules to be followed until the Committee's rules are adopted. The Court mandated that complaints expressly state the amount of the debt owed, the creditor's identity, and mandated that the amount must be paid to the landlord or the clerk before 4:30 p.m. on the date of the trial for the case to be dismissed. The interim rules would apply to all landlords, regardless of their status as "debt collectors" under the FDCPA.

Justice Jaynee LaVecchia, concurring in part and dissenting in part, disagreed with the proposition that attorneys who regularly file summary dispossession claims are "debt collectors." In her view, because New Jersey's summary dispossession statute prohibits the awarding of money damages and only allows for possession of the subject premises, the attorney seeking the remedy of possession cannot be considered to be a "debt collector," regardless of how often they engage in the behavior. She agreed with the majority, however, that going forward, verified complaints in summary dispossession actions must identify with particularity the amount of rent that the tenant is required to remit to prevent eviction.

### The Computer Related Offense Act

Without determining whether certain parties were "actors" within the meaning of the Computer Related Offenses Act, the Supreme Court unanimously determined that several defendants were not liable under the act in *Fairway Dodge, LLC v. Decker Dodge, Inc.*, 191 N.J. 460 (2007), because they did not "purposefully and knowingly" violate the act.

Generally, the Computer Act provides for monetary damages against actors whose purposeful or knowing conduct results in the unauthorized alteration, taking, or destruction of computer files, systems, or networks. See N.J.S.A. 2A:38A-3. The act does not define "actor."

In the *Fairway Dodge* case, upon learning that Fairway was going to be sold, three Fairway employees, Fair, Morgan, and Kennedy, resigned and went to work for Decker Dodge. Fair and Morgan took with them information surreptitiously taken from Fairway's computer system, which they handed over to a third party that had been hired by Decker Dodge to develop a new computer system. The purchaser of Fairway eventually sued the three Fairway employees, as well as Decker Dodge, its owner, Decker, and its manager, Bibbo, alleging violations of the Computer Act and various common-law business torts. The trial court entered partial summary judgment against Fair, Morgan and Decker Dodge for violations of the Computer Act, and the remaining issues were eventually tried before a jury. The jury returned a verdict in favor of Plaintiff as to all causes of action, and awarded substantial compensatory and punitive damages. Defendants appealed.

The Appellate Division affirmed the entry of partial summary judgment against Decker Dodge, Fair, and Morgan for violations of the Computer Act. Because the individuals admitted to accessing Fairway's computer system, the Appellate Division found that their conduct amounted to violations of the act, while Decker Dodge was liable under a theory of respondeat superior. However, the Appellate Division vacated the judgment against the remaining individuals, reasoning that to fall within the scope

of the act, an actor must “actually access, alter, damage, take or destroy computer information.” The Appellate Division also vacated other portions of the judgment against Bibbo, Decker and Kennedy, but those issues were not addressed in the Supreme Court’s opinion.

As to the Computer Act issues, the Supreme Court affirmed the Appellate Division without answering the question of who falls within the definition of actor under the act. Instead, the Court focused on the act’s “purposeful and knowing” requirement, concluding that there was insufficient evidence to support a finding of liability against Decker and Bibbo. In fact, there was no evidence to suggest they knew anything about the improper conduct until after the lawsuit had been filed. The Court did not address Kennedy, so it is presumed that the plaintiff did not pursue the issue against her before the Court.

The other issue before the Court was whether it was error for the trial court to preclude witness testimony on the issue of damages. During trial, the plaintiff offered expert testimony from a certified public accountant, who offered, inter alia, a calculation for goodwill. The defense offered opposing expert testimony, and it also sought to admit the testimony of several former Fairway customers who were prepared to testify that they purchased vehicles from Decker Dodge without any solicitation from the defendants. The trial court precluded their testimony for “lack of competency.” The Appellate Division reversed, finding the preclusion to be in error, as the testimony “was admissible to show the motivation of the former customers in choosing to do business with Decker Dodge rather than Fairway Dodge and could have influenced the jury in the assessment of damages.”

The Supreme Court affirmed the Appellate Division, finding that the trial court erred in precluding fact-witness testimony that would have offered evidence of their “motive for choosing to do business with Decker Dodge.” That testimony may have “undercut” plaintiff’s expert testimony and resulted in a lesser jury award. The matter was remanded for a new trial on damages.

### Antitrust as Consumer Fraud

An interesting case dealt with an attempt to mask an unsuccessful antitrust claim as a consumer fraud claim. The issue before the Supreme Court in *Wilson v. General Motors Corp.*, 190 N.J. 336 (2007), was whether the actions of car manufacturer and dealer defendants, calculated to prevent New Jersey consumers from buying new cars in Canada, where they are sold at lower prices, violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et al. (CFA). Specifically, the Court considered whether the defendants’ actions constituted “unconscionable commercial practices” under the CFA.

Agreements were allegedly made among the manufacturers and dealer associations to discourage vehicles sold by the manufacturers to Canadian dealers from being exported to the United States. The consumer plaintiffs charged that these actions, which included: refusing to sell to Canadian dealers who exported the cars to the United States, firing of uncooperative dealers, establishing “chargebacks,” tracking VIN numbers, refusing to provide recall information to American purchasers of Canadian cars and causing American dealers to refuse to honor warranties or to install imperial measure odometers and speedometers, violated the CFA.

Based on fairly established federal precedent, it was apparent that antitrust claims would not lie based on these facts because of standing issues regarding indirect purchasers of the vehicles. The Court relied on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which the United States Supreme Court had held that indirect purchasers of vehicles did not have a private cause of action under the federal antitrust laws against defendants who did not directly sell them cars. Our Court reasoned that the New Jersey Antitrust Act would be similarly applied.

In its unanimous decision, the Court also affirmed the majority opinion of the Appellate Division and held that there was no violation of the CFA by the defendants. The Court supported its opinion on the grounds that plaintiffs did not claim that the defendants had made any direct or indirect

statements or communications to any plaintiff “in connection with the sale or advertisement” of the cars. See N.J.S.A. 56:8-2, -1. Absent the communications with New Jersey purchases, the Court would not allow a CFA claim to stand where the antitrust claim had fallen.

### Restrictive Covenants

Even where a defendant can establish that clients would have followed him away from his former employer absent a solicitation concededly in violation of a restrictive covenant, he may still be liable for damages resulting from his solicitation. So held the Supreme Court in *Totaro, Duffy, Cannova and Co., L.L.C. v. Lane, Middleton & Co., L.L.C.*, 191 N.J. 1 (2007).

In that case, the defendant accountant had a solo accounting practice dating back to 1978. In 1996, the defendant decided to change the concentration of his practice, shifting his focus from compliance work, which includes services such as preparing tax returns, general bookkeeping, payroll, etc., to financial and estate planning. Around that time, the defendant agreed to form a new accounting practice with David Middleton. Although the resulting firm was known as Lane, Middleton & Co., the firm was wholly owned by Middleton, and the defendant had a consulting agreement with Lane, Middleton. Approximately four years later, Lane, Middleton was sold to the plaintiff. One of the terms of the sale was the defendant’s agreement, in exchange for certain consideration, to be bound by a nonsolicitation provision, prohibiting him from soliciting compliance work from Lane, Middleton clients for a period of four years. Shortly thereafter, the defendant opened his own firm across the hall from the plaintiff, and sent out solicitation packages to approximately 150 clients the defendant had agreed not to solicit. Part of that solicitation package included a draft “disengagement” letter for the clients to send to the plaintiff. Within two months of the defendant’s departure, the plaintiff was, daily, receiving 10 to 20 of the disengagement letters drafted by the defendant. The plaintiff sued the defendant, alleging breach of contract and numerous business torts. By the time the parties had a

bench trial, the plaintiff had apparently abandoned the tort theories, and aside from the injunctive relief, the trial court's decision addressed only the breach of contract.

During the bench trial, the defendant conceded breach but argued that the plaintiff had failed to offer proof that it had suffered damages because the solicited clients were all long-time clients of the defendant who, even absent the solicitation, would not have remained with the plaintiff upon the defendant's departure. While acknowledging that the calculation of damages was difficult, the trial court determined there was "no question" that the plaintiff suffered damages. The court then developed a complex calculation in which it first pared down the list of clients at issue and then calculated a sum representing lost work from the remaining clients. Then, the trial court subtracted an estimated attrition rate based on testimony by one of the plaintiff's principals, related to his prior experience in purchasing accounting firms. Next, the court applied a profit rate based on the plaintiff's historical net profits, and finally, that amount was multiplied by three for the number of years remaining in the nonsolicitation agreement. (The trial court determined that by the time the defendant breached the nonsolicitation agreement, the plaintiff had already received the benefit of the restriction for that calendar year). The defendant appealed.

The majority of the appellate panel upheld the trial court, relying on the close proximity between the solicitations and the plaintiff's receipt of disengagement letters. One panel member dissented, arguing that the trial court erred by failing to consider a "proximate cause analysis to link the mailing of the solicitation letter to the damages plaintiff suffered." The lone dissenter further determined that the majority had "erred in confusing uncertainty of proof of liability for any damages with mere uncertainty as to the appropriate amount of damages."

Thus, the sole issue before the Supreme Court was whether the trial court erred in failing to apply a proximate cause analysis. Although a "seemingly simple" inquiry, the determination required the following three-prong test: (a) was a "but for" analysis appropriate in light of the conced-

ed breach; (b) if not, "what [was] the appropriate relationship ... between the conceded breach and the asserted loss"; and (c) was the evidence in the record sufficient to support the trial court's calculation of damages.

First, the Court concluded that a "but for" analysis was not appropriate. The trial court had based its findings of liability on basic contract principles. Before the Appellate Division and Supreme Court, however, the defendant's argument of "but for" proximate cause sounded in business tort theories. Therefore, the Court reasoned that there was no basis to apply a tort-based proximate cause query. Instead, applying basic notions of contract law, the Court determined that "a party who breaches a contract is liable for all of the natural and probable consequences of the breach of that contract" ... and that the "exact amount of the loss need not be certain." The Court went on to determine that it was clear that the loss of clients was a foreseeable consequence of the defendant's breach. Although the defendant was relying on the argument that the clients would have terminated their relationship with the plaintiff even absent his solicitation, the Court concluded that the relevant inquiry was not "whether they would have left eventually," but instead, "whether they would have left when they did."

However, there was insufficient evidence to support the trial court's decision to multiply the loss by the three years remaining on the nonsolicitation agreement. In other words, there was no evidence to support that the clients would have remained with the plaintiff for three more years. Thus, applying principles of compensatory damages, i.e., to place the plaintiff in a position it would have been but for the breach, the plaintiff was entitled to damages only for the one year it would have taken the clients to learn of the defendant's departure. The matter was remanded to the trial court for such a recalculation of damages.

#### Riparian Grants

The Supreme Court faced an ostensibly straightforward issue in *Panetta v. Equity One, Inc.*, 190 N.J. 307 (2007). There, the primary issue was whether a riparian grant, like

a riparian right, runs appurtenant with an abutting parcel pursuant to N.J.S.A. 46:3-16, where the conveyance does not reference the grant. Riparian lands are lands lying along the banks of streams or other bodies of water. The Court determined that a riparian grant is a fee simple requiring an explicit conveyance from the grantor.

In 1992, Rowina Francis and her son, George Francis, were the owners of property in Brick Township; specifically, an upland lot designated as Block 934, Lot 23.01, and a riparian grant designated as Block 934, Lot 23.03. That year, Rowina and George deeded both the upland lot and the riparian grant to themselves and George's wife, Carolyn. In 1995, the three individuals deeded only the upland lot to George and Carolyn, who eventually used the lot to secure a loan with Equity One. After George and Carolyn defaulted on the loan, Equity One foreclosed on the mortgage, and put the upland lot up for auction, in which it was the successful bidder. Thereafter, Equity One received offers from parties Panetta, McKenna and Convey to purchase the property. All of the offers were rejected, and Equity One then initiated a closed bidding process, which it limited to the three previous offerees. The bid letter required that the bids not contain realtor commissions. Panetta submitted an unconditional bid in the amount of \$255,000; McKenna submitted a bid, which included the riparian grant and a condition regarding the realtor's fee, for \$287,000; and Convey submitted a bid, also including the riparian grant, in the amount of \$280,000. Because Equity One's attorney believed an error had been made in the bidding process, all bids were rejected and the parties were advised that Equity One would reopen the process to an open competitive bidding process. This suit followed.

Following a rather complex procedural history, the matter finally found its way to the Appellate Division, which determined that the riparian grant was included in the deed of the upland lot as a matter of law. The Appellate Division reasoned that N.J.S.A. 46:3-16 requires deeds to be construed broadly to include all appurtenances to avoid grantors from "secretly" retaining property through "ambiguous drafting."

The Supreme Court unanimously reversed the Appellate Division on the grounds that the Appellate Division failed to distinguish between a riparian grant and a riparian right. The Court determined that a riparian grant is a “separate estate in land” and is therefore not governed by N.J.S.A. 46:3-16.

Riparian lands are the “lands lying along the banks or a stream or other body of water ... [and] [t]he State owns in fee simple all lands that are flowed by the tide up to the high-water line or mark.” Pursuant to N.J.S.A. 12:3-7 and N.J.S.A. 12:3-10, a riparian grant “is a method by which the

State conveys riparian lands to its citizens.” The Court summed up the issue quite neatly by indicating that “a riparian grant is the conveyance of real property divided from the uplands by a fixed boundary, no different from any other conveyance of land,” and therefore, must be explicitly mentioned in a deed to effectuate a conveyance. Accordingly, because the deed conveying the Francises’ lot to Equity One was silent as to the riparian grant, it was not conveyed in the initial auction and was not included in the bidding process that was at the heart of this litigation.

Finally, the Court addressed the bidding

process that initiated the litigation. As addressed above, following receipt of the bids, Equity One’s attorney rejected all bids, believing there was an error with the bidding process. The Court held that was legally impermissible because, given the nature of the bidding process, the highest conforming bid created an enforceable agreement, and Equity One could not withdraw the property from the bidding process once the conforming bid was received. Thus, Panetta’s bid was the highest conforming bid, as the only bid not containing the riparian grant, and specific performance was ordered. ■