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COMMERCIAL LAW

Consumer Fraud Act Expands

Court eschews opportunties to limit the scope of the act

By Arthur L. Raynes

The overriding theme of the past term with respect to commercial law has to do with the expansiveness of the Consumer Fraud Act, N.J.S.A. 56:8-1 et. seq. In three separate cases the Court eschewed opportunities to limit the scope of the CFA, and instead broadly interpreted that act to allow for its application.

The issue in *Bosland v. Warnock Dodge, Inc.* 197 N.J. 543 (2009), was whether a plaintiff, prior to filing a lawsuit under CFA, must first request a refund of a claimed overcharge from a merchant. The trial court had held that a plaintiff must first demand the refund, and had dismissed Bosland's case for having failed to do so.(See Ronald Grayzel, Tort Law, 197 N.J.L.J. 769).

The plaintiff, Rhonda Bosland, had purchased a new vehicle from the defendant, Warnock Dodge, Inc. Warnock issued a "Retail Buyer's Order" to Bosland that included a $117 charge that was described as a "Registration Fee." The plaintiff later learned that the applicable title and registration fees cost less than $117 and concluded that the "Registration Fee" must have included "an additional documentary service fee that was neither disclosed nor itemized as required by the applicable automotive sales regulations." Rather than request a refund from the defendant, Bosland immediately filed a complaint.

The Court examined the legislative intent behind the CFA to determine whether the plaintiff was required to demand a refund from Warnock before filing a lawsuit. It noted that the "plain language of the CFA does not… impose upon any putative plaintiff the requirement that he or she first seek a remedy directly from the offending merchant." The CFA simply "refers to the right of 'any person who suffers any ascertainable loss… as a result of' defendant's violation of the CFA to file an action." The Court concluded that to interpret the CFA to require a plaintiff to demand a refund would "impede access to the broad remedial protections for consumers that our Legislature so obviously intended to create." Significantly, the Court noted that if it required plaintiffs to demand a refund prior to filing suit, merchants could rely on this requirement, "boldly imposing inflated charges at no risk, and planning to refund the overcharges only when asked." It went on to stress that it was the legislature's clear intent to empower consumers and "reading a pre-suit demand for refund requirement into the CFA would thwart those salutary purposes."

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Accordingly, the Court unanimously held that a plaintiff is not required to request a refund before filing a complaint under the CFA.

In *Real v. Radir Wheels, Inc*., 198 N.J. 511 (2009), the issue was whether the CFA applies to an Internet purchase of a used automobile from a "casual seller." (See Ronald Grayzel, Tort Law, 197 N.J.L.J. 769).

The plaintiff, a Missouri resident, sought to purchase at auction a vintage Corvette over the Internet from the defendant, Radir Wheels, Inc., a company owed by defendant Richard Conklin. After placing a bid on the vehicle, the plaintiff contacted Conklin to verify the contents of the advertisement and to inquire whether the vehicle could be driven from the defendants' place of business in New Jersey to the plaintiff's home in Missouri. Defendant Conklin assured the plaintiff that the car was in good condition and could in fact be driven from New Jersey to Missouri. The plaintiff ultimately won the vehicle in the auction and he again contacted Conklin. This time, however, the defendants told the plaintiff that the car might not be safe to drive to Missouri, since the headlights and windshield wipers did not work and the car did not have a spare tire. Conklin had not revealed these defects in the auction listing or during his prior telephone conversation with the plaintiff. The plaintiff opted to have the vehicle shipped to Missouri.

Upon arrival, the plaintiff brought the vehicle to a specialty shop to be inspected. This examination revealed that the car's frame had rusted nearly in half, thereby disqualifying it from Missouri registration; the convertible top was in poor condition, even though it was listed

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as being in good condition in the auction; the carburetor was out of tune; the driver's seat frame was broken; there were engine issues; and finally, the radio player was not original equipment. According to the plaintiff, he paid over $13,000 for a car that was worth approximately $5,000 to $8,000. Moreover, he paid a substantial amount to get the car in shape.

The Court rejected the defendants' argument that the Used Car Lemon Law, N.J.S.A. 56:8-67-80, which was not applicable to casual sellers of used cars, prevented the plaintiff from recovering under the CFA. Specifically, the Court noted that the issue of whether the defendant was a "dealer" under the Used Car Lemon Law was irrelevant. The Used Car Lemon Law provides that nothing "in this act shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law." Additionally, the Court stressed that the CFA and the Used Car Lemon Law, by their very terms, supplement each other. As such, the Court found that the CFA was applicable to this transaction. The trial court had found as a fact that "Conklin intentionally had engaged in unconscionable commercial practices in connection with the advertisement and sale of merchandise," and that the plaintiff suffered an ascertainable loss. The Supreme Court concluded that this was a "textbook claim under the CFA."

The third CFA case was *Czar, Inc. v. Heath*, 198 N.J. 195 (2009). The issue there was whether a contractor hired by a homeowner to design and install a kitchen and to perform other interior work in a new home then being constructed by another contractor was engaged in new home construction, thus limiting the homeowner's claim to the New Home Warranty and Builders' Act, or was instead performing home improvements, and subject to suit under the Consumer Fraud Act.(See Ronald Grayzel, Tort Law, S-xx.)

Each party sued the other, and the actions were consolidated. The homeowner ended up the defendant and the contractor the plaintiff. The Court analyzed whether the plaintiff contractor was engaged in new home construction or performed home improvements by examining the interplay between the CFA, the Contractor's Registration Act (CRA) and regulations, and the New Home Warranty and Builders' Act (NHWBA) and regulations. Specifically, the Court stressed the "sweeping language" in the definition of home improvements in the CRA. Moreover, it noted that "the statutory enforcement mechanisms chosen by the Legislature [in the CRA] independently suggest an intention to provide strong protections to consumers." The CRA also identifies the CFA as its "principal civil enforcement mechanism," which the Court interpreted to show that the "Legislature intended to broadly empower consumers."

The plaintiff argued that it was involved in the building of a new home and thus was exempt from the remedies under the NHWBA. At the same time, Czar had not registered as a new home builder under the NHWBA or made available the warranty, as required under that act. Ultimately, the Court found that the legislature did not intend that a contractor could escape registration and participation in the warranty program applicable to new home builders and also avoid registration and compliance under the home improvement statute and regulations.

The Court held because the CFA, CRA, and NHWBA and the regulations promulgated pursuant to each were designed to provide an integrated scheme of protections for homeowners, the plaintiff contractor, which neither acted as the general contractor nor qualified as a builder of new homes, was engaged in the business of home improvements and was subject to the remedies of the CFA.

The dissent stressed that all claims involving construction of a new home do not necessarily fall under one of the statutory schemes discussed by the majority, and that the so-called gaps in the statutory law are filled by the common law. The homeowners still retained their claims of breach of contract, negligence, fraud, negligent infliction of emotional distress, conversion, beach of the implied covenant of good faith and fair dealing, unjust enrichment, and unlawful possession of goods, and thus, according to the dissent, would still have had a remedy.

Defamation

In a case as colorful as its Wildwood boardwalk setting, the Court had occasion to struggle once again with defamation in the business context.

The Supreme Court in *Senna v. Florimont*, 196 N.J. 469 (2008), evaluated the applicable defamation standard where employees of a company that ran a boardwalk game of chance repeatedly, and in many different ways, announced over a loudspeaker that a competitor was a cheat. The dispute arose between two rival Wildwood area boardwalk Fascination game operators. The Fascination game machines generated tickets redeemable for prizes to the first player who rolled balls into a row.

Senna had discussed with Florimont where Senna should open a new Fascination game arcade. Florimont recommend Rehoboth Beach, Delaware, but Senna instead opened shop in Wildwood near Florimont's North Wildwood location. When Florimont learned of Senna's plans, he advised that he would run him out of business. Senna owned a location in Seaside Heights and took out an ad in the paper that he would honor the redemption tickets from that location. Florimont's employees began telling customers that Senna would not honor the tickets and that he cheated his customers, leaving them with worthless tickets. Repeated statements about Senna being dishonest, a crook, etc., were made over the loudspeaker.

Senna sued for defamation and other civil claims. The trial court had dismissed the case, holding that since games of chance were a highly regulated industry, they were therefore a matter of public concern and the actual malice standard applied. The trial court found that the plaintiff could not prove actual malice, that is, that the false statements were made with knowledge of or a reckless disregard for their falsehood. The appellate division affirmed.

The question was whether the comments were entitled to the heightened protections of the actual-malice standard. The Supreme Court balanced the rights of individuals "to enjoy their reputations unimpaired by false and defamatory attacks," against the right to speak freely about matters of public concern. After providing a detailed history of defamation decisions, the Court noted that the "'content, form and context' formula, infused by" other fac-

tors, creates the distinction between actual-malice and the negligence standard. The actual-malice standard generally applies to governmental and political discussion, while the negligence standard applies to commercial speech that is likely beneficial to the business interests of the speaker.

Thus, the Court noted, the source of the speech is a critical factor, e.g., disinterested media discussing current topics versus a business owner criticizing its competitor for economic benefit. The Court concluded that the comments about the honesty of the business competitor were commercial speech and therefore not entitled to the protections of the actual-malice standard. Accordingly, the negligence standard should have been applied to the comments made, and summary judgment should not have been granted to the business owner based on the actual-malice standard.

Lease Assignments

The Court also had occasion to address a complex case dealing with the assignment of commercial leases. The issue in *Pagano Co. v. 48 South Franklin Turnpike, LLC* 198 N.J. 107 (2009), was whether a purchaser of commercial property is liable for the real estate broker commissions due under the leases it acquired under a general assignment from the seller.

In February 2007, Pagano Company ("Pagano"), a licensed real estate broker, entered into an agreement with Heritage III Office Center ("Heritage"), the owner of commercial property located at 48 South Franklin Turnpike in Ramsey. This agreement gave Pagano the exclusive right to procure tenants and negotiate leases for the 48 South Franklin Turnpike property, on behalf of Heritage. The agreement also provided that the "Owner agrees to pay Pagano Company a real Estate Brokerage commission of five (5%) percent of the total lease price" in connection with any lease entered into pursuant to the brokerage agreement, including options, extensions, and renewals. Additionally, the "Schedule of Lease Commissions" included with the brokerage agreement addressed the commission obligation in the event of an assignment.

In June 2004, Heritage and the defendant, 48 South Franklin Turnpike, LLC ("Franklin"), had entered into a contract for the purchase of the property. This contract included a "Due Diligence and Investigation" clause, which provided that the buyer (Franklin) could inspect the books and records relating to the property and if the buyer believed any information was missing, the buyer would notify the seller. Franklin reviewed the lease agreements at issue and made no further requests for information or documents from Heritage. The closing took place on September 20, 2004, and as part of the transaction, Heritage assigned to Franklin "all of the Leases, Rents and Security deposits related to any and all existing tenancies at the Property" and Franklin assumed all of Heritage's obligations with regard to those tenancies. At the time, there were three tenants on the property. Their lease agreements noted that the provisions of the lease "shall apply to, bind and inure to the benefit of the Lessor and Lessee, and their respective heirs, successors, legal representatives, and assigns." These agreements additionally contained a provision that provided that the Lessor was required to pay the broker a commission pursuant to a separate commission agreement and letter of understanding.

Franklin never paid commissions to Pagano for the rents received under the leases. Thereafter, Pagano filed suit against Franklin to recover the claimed commissions.

In *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 556 (1994), the Court had held that a purchaser must *affirmatively assume* a seller's obligation to pay commissions in order to incur liability after an assignment. Here, the Court cited *VRG* for the principle that when a purchaser accepts assignments of leases that "include or refer to the obligation to pay commissions," he or she may be considered to have affirmatively assumed that obligation. Heritage specifically assigned to Franklin all leases and other agreements affecting the property. Pursuant to the lease, the term "Lessor" not only applied to Heritage, but also to any successors in interest, including Franklin. Moreover, each of the assigned leases included a paragraph detailing the Lessor's liability for commissions owed to Pagano, the broker. The Court noted that Franklin was a sophisticated purchaser, and as such, had a fair opportunity to request access to the Pagano agreement. The Court also stressed that Franklin admitted to reviewing the assigned lease agreements, which included the provision about paying commissions to Pagano. Ultimately, the Court held that the purchaser, Franklin, affirmatively assumed the commission agreement between the seller and the broker.

The dissent found insufficient evidence in the property documents to hold Franklin liable. Significantly, Justice LaVecchia, who was joined in the dissenting opinion by Chief Justice Rabner, stressed that the general assignment executed here, which incorporated by reference lease documents that did not contain any covenant or promise to the broker about the payment of commissions, failed to demonstrate a clear affirmative assumption by the purchaser to pay broker commissions.

Bid Specifications

The issue presented in *Jen Electric, Inc. v. County of Essex* was whether the provisions of the 2000 amendment to N.J.S.A. 40A:11-13 limit the standing of those who wish to challenge the bid specification in a public contract, or whether those provisions only represent a limitations period within which such a challenge must be perfected. (See Edward Buzak, Municipal Law, 197 N.J.L.J. 749).

In October 2007, the defendant, County of Essex, issued specifications and bid documents for proposed traffic signal operations and roadway improvements in Newark. By letter dated October 23, 2007, the plaintiff, Jen Electric, Inc., a registered public works contractor that supplies, installs, and maintains traffic signal equipment, objected to the specifications set forth by the county. The plaintiff objected to the specifications because they named a specific manufacturer, Econolite, to the exclusion of the manufacturer the plaintiff represented. The plaintiff requested that the county amend the specifications. As a result of the plaintiff's objection, the defendant county issued addenda that permitted bids using equal, alternate products in lieu of the brands listed in the specifications. The first addendum, however, required that any proposed products be prequalified. The plaintiff again object-

ed. Accordingly, the county, in response, issued another addendum, that removed the prequalification requirement.

Ultimately, however, the county rejected all of the bids received in October 2007, only to issue revised specifications and re-bid the project in December 2007. In December, the plaintiff again objected to the defendant's use of the Econolite name in the specifications, alleging a violation of the Local Public Contract Law, N.J.S.A. 40A:11-13(d) and the relevant regulations, N.J.A.C. 5:34-9.2(d). The Local Public Contract Law provides in relevant part that "[a]ny specifications for the provision or performance of goods or services under this act shall be drafted in a manner to encourage free, open and competitive bidding." Moreover, the regulations prohibit requiring a brand name product, but "may in all cases require 'brand name or equivalent.'" The plaintiff also objected to the county's requirement that any equal or equivalent products be pre-approved. The plaintiff asserted that this requirement violated the clear injunction set forth in N.J.A.C. 5:34-9.2(d) that "[u]nder no circumstance shall specifications require any form of 'pre-approval' or 'pre-qualification' of an equivalent product before the submission of bids." The plaintiff filed suit against the county in January 2008, two days before bids were to be opened.

The county argued that the plaintiff did not have standing to challenge the bid specification, alleging that pursuant to the Local Public Contract Law, only bidders, prospective bidders, and taxpayers may bring such a challenge. In its analysis, the court examined the language of the amendment, set forth in Section 13(d), which provides that no "prospective bidder" may challenge a bid specification unless he does so in writing at least three business days before the opening bid. The Court stated that the plain language of the statue makes it clear that is sets forth limitations on how and when such a challenge must be prosecuted. Accordingly, the Court found that this provision simply defines what actions must occur before a bid specification challenge will be time-barred and is not, as the defendant argued, a restriction upon who has standing to challenge a bid specification. Moreover, the Court examined the plain meaning of the term "prospective bidders" and stressed that when contractors have not yet bid on a contract there are no "bidders," only "prospective bidders." As a result, the Court found that N.J.S.A. 40A:11-13-(e) provides only a time-bar by which to gage whether bid specification challenges are timely and thus, is not a legislative declaration of who may bring such a challenge.

The Court held that nothing in the 2000 amendment limits, restricts, or otherwise substitutes for traditional notions of standing and thus concluded that the plaintiff had standing to challenge the bid specifications issued by the governmental contracting entity.

Conclusion

Clearly, businesses must be alert to ramifications under the Consumer Fraud Act in light of the Court's expansive interpretation. ■