

Consumer Fraud Protection for Business Consumers

“For Who? For What?” Revisited

by James J. Ferrelli and Francesco P.L. Suglia

In 1995, former Philadelphia Eagles running back Ricky Watters was criticized by the local media for his self-preserving, half-hearted attempt to catch an over-the-middle pass during a loss to the Tampa Bay Buccaneers. His response to that criticism is, perhaps, the most infamous pair of questions in Philadelphia sports history: “For who? For what?”

In 2006, after running face-first into the centerfield fence of Citizens Bank Park to catch a fly ball that would have otherwise scored three runs, Philadelphia Phillies centerfielder Aaron Rowand was asked and answered Watters’ questions: “For who? My teammates. For what? To win.”

For who and for what the New Jersey Consumer Fraud Act (CFA) affords protection have proven to be more difficult questions in the context of CFA claims brought by business entities. As discussed more fully in this magazine’s February 2008 article on the topic,¹ the CFA creates a private right of action for “[a]ny *person* who suffers any ascertainable loss...as a result of the use or employment by another *person* of any...practice declared unlawful under [the CFA].”² Business entities, as well as individuals, are “person[s]” within the ambit of the CFA.³ Thus, by its terms, the CFA appears to afford equal protections to individual consumers and business-entity consumers.

In the context of a business dispute, inclusion of a claim under the CFA opens the door to treble damages and counsel fee remedies, as well as streamlined proofs, as compared to a common law fraud claim. Obviously, such considerations can substantially change the course of a case.

While the CFA specifically declares certain enumerated practices to be unlawful,⁴ the most regularly invoked provision of the CFA (Section 8-2) prohibits “any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, 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*....”⁵ The CFA defines “merchandise” as “any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale.”⁶

Although New Jersey courts have stated that Section 8-2 is applicable to the sale/advertisement of “merchandise” “without regard to its intended use or the nature of the buyer,” New Jersey courts have more closely scrutinized Section 8-2 claims brought by business entities, opining that “certain practices [that would be] unlawful in a [transaction that results in loss to] an individual consumer [may] not be held unlawful in a transaction between particular business entities.”⁷ As a result, the ability of a business-entity consumer to assert a claim under Section 8-2 based on a given transaction “hinges on the nature of [the] transaction, requiring a case by case analysis.”⁸

In conducting this case-by-case analysis, courts have construed the CFA’s definition of merchandise as excluding from the scope of the CFA transactions involving merchandise that is not capable of being sold “to the public.”⁹ In other words, courts have held that the CFA applies only to “consumers in the popular sense.” Where the merchandise that is the subject of the transaction at issue is not of a type that is sold to the public at large, the claimant is not a “consumer” involved in a “consumer transaction,” and the CFA is inapplicable.¹⁰

Based on the foregoing, courts have excluded from the scope of the CFA transactions involving the purchase and sale of goods for resale. The reasoning, understandably, is that, because the purchaser in such transactions does not ‘consume’ the goods, but rather resells them to another purchaser for ‘consumption,’ such transactions are not ‘consumer transactions.’¹¹

Additionally, where the purchaser of the merchandise at issue is a business entity, courts have relied upon a construction of the term “merchandise” to exclude transactions involving specialized goods and services, even where the business purchaser of those goods and services was the ultimate

consumer.

*BOC Group, Inc. v. Lummus Crest, Inc.*¹² and *R.J. Longo Constr. Co., Inc. v. Transit America, Inc.*¹³ are two of the cases most often cited in this context. The claims asserted in *BOC* related to the design of a highly specialized and complex petroleum refining process.¹⁴ In *R.J. Longo*, the merchandise involved was highly specialized rail cars.¹⁵ Recent cases demonstrate that courts applying New Jersey law continue to wrestle with the principles enunciated in *BOC* and *R.J. Longo* to determine whether claims by business-entity consumers fall within the scope of the CFA.

Finderne Mgmt. Co. v. Barrett¹⁶

In some recent cases, the products and services at issue were complex and specialized to a degree similar to those at issue in *BOC* and *R.J. Longo*. In *Finderne*, for example, the plaintiffs (owner-operators of a New Jersey trucking business) alleged that the defendants (insurance agents) made misrepresentations to them concerning certain tax benefits they claimed would result from participating in a complex, multiple-employer welfare benefit plan being offered by the defendants.¹⁷

Specifically, the plaintiffs alleged the defendants represented to them that contributions to the plan (upon which the defendants earned commissions for the sale of life insurance products) were tax deductible and could be used to fund pre-retirement death benefits for the plaintiffs via certain convertible life insurance products.¹⁸ The plaintiffs alleged these claimed tax savings induced them to participate in the defendants' plan.¹⁹ After the plaintiffs made substantial contributions to the plan, however, the IRS determined the contributions were not tax deductible.²⁰ As a result, the plaintiffs incurred increased income tax liability and penalties.²¹ Based on their allegations, the plaintiffs brought claims against the

defendants under the CFA.²²

The trial court granted the defendants' motion for summary judgment, concluding that "an aggressive tax strategy...hardly merits the protective cocoon of the CFA."²³ The Appellate Division affirmed, holding that the plan was simply "a device to shelter income from taxation," and that the provision of such a device "is not a consumer transaction as envisioned by the...CFA."²⁴ The court also concluded that the transaction at issue did not represent one for "services generally...of the type sold to the general public."²⁵

In support of this conclusion, the court relied upon the following factors: 1) the plan, and plan documents the defendants provided to the plaintiffs before they joined the plan (including, particularly, the plan disclosure statement), were "very complex"; 2) the plaintiffs were not "unsophisticated" consumers; 3) the plan documents expressly recommended that the plaintiffs seek independent professional guidance; and 4) the plaintiffs, in fact, consulted with an accountant and an attorney before joining the plan.²⁶

Contrary to *Finderne*, most decisions that have addressed the principles enunciated in *BOC* and *R.J. Longo* since 2008, however, involve products and services that do not appear to be particularly complex or specialized. Nonetheless, as reflected in the cases discussed below, the related transactions were, more often than not, held to fall outside the CFA's scope.

PIM Brands LLC v. Cabot Acquisitions, LLC²⁷

In *PIM Brands*, the lessee of a manufacturing facility brought, among other claims, a claim under the CFA against its lessor alleging that the lessor engaged in deceptive business practices in connection with the lease.²⁸ The court dismissed the lessee's CFA claim on summary judgment on the basis that the

subject facility was "not the type of product or service available to the general public or the type of product sold to consumers in the popular sense."²⁹

The court relied on the following factors in support of this conclusion: 1) the leased premises was a multi-million dollar, 182,000-plus-square-foot manufacturing plant that produced almost \$1 million in rent for the lessor; 2) the parties were "sophisticated"; 3) the lease agreement was complex and was negotiated over several months; and 4) the parties were represented by counsel in connection with the lease negotiations.³⁰ The court found unconvincing the lessee's claim of unequal bargaining power, holding that "assuming such disparity exists, [it] is insufficient to render such a [l]ease the type of transaction protected by the CFA."³¹

Professional Cleaning and Innovative Building Services v. Kennedy Funding³²

Professional Cleaning involved claims of unlawful business practices under the CFA in the context of non-traditional, alternative financing.³³ The plaintiff in *Professional Cleaning* was a corporation engaged in the purchasing, leasing and maintenance of commercial property.³⁴ The defendants are described by the court as "a New Jersey based lender of last resort" that provided so-called "hard money financing," and the lender's employees.³⁵ The plaintiff alleged that, in order to induce the plaintiff to pay to the defendant-corporation a non-refundable \$54,000 loan commitment fee and \$6,000 appraisal fee, the defendants made numerous misrepresentations and omissions regarding the circumstances under which the loan would be approved, and otherwise engaged in bad-faith conduct in refusing to provide to the plaintiff the amount of financing requested.³⁶

The court granted summary judgment in favor of the defendants. The

court held that the transaction before it did not qualify as a commercial transaction within the ambit of the CFA because the parties “are experienced commercial entities with relatively equal bargaining power [who] negotiated the terms of the loan commitment prior to its execution.”³⁷ The court then continued (without significant discussion of how the financing at issue differs materially from more traditional financing):

Moreover, the hard money financing offered to [the plaintiff] is not “merchandise” which is “of the type sold to the general public...” Unlike the sale of credit to the general public, [the defendant-corporation] specializes in “unconventional financing” where speed and attention to special circumstances are critical. As evidenced by [the defendant-corporation’s] website, the company markets itself not as a standard commercial lender, but as “America’s leading commercial hard money lender” that provides “creative funding solutions.” This type of funding does not qualify as the sale of credit in the “popular sense.”³⁸

U. S. Land Resources, LP v. JDI Realty LLC³⁹

The plaintiffs in *U.S. Land Resources* obtained second mortgage financing from the defendant to purchase a commercial warehouse.⁴⁰ As a condition for the financing, the defendants required what was essentially an assignment of the mortgaged property to them as collateral.⁴¹ The deal was structured so that, as collateral for the loan, the plaintiffs were required to transfer to the defendants their partnership interests in the entity that would own the mortgaged property. This would enable the defendants effectively to foreclose on the property in the event of default without having to institute foreclosure proceedings.⁴² Upon full payment of the loan amount, the defendants would relin-

quish their interest in the partnership and, thus, the property.⁴³ At the end of the loan term, the plaintiffs were unable to pay off the loan.⁴⁴

According to the plaintiffs, the defendants assured them that as long as they continued to make principal and interest payments going forward, the defendants would honor their agreement to relinquish their interest in the property when the loan was paid off.⁴⁵ Instead, the defendants sold the property to a third party.⁴⁶ Thereafter, the plaintiffs filed suit against the defendants for, among other causes of action, consumer fraud under Section 8-2.⁴⁷

The court granted the defendants’ motion to dismiss the plaintiffs’ CFA claim, holding that “the second mortgage financing, where parties engage in extensive negotiations unique to a particular property and craft a novel financing structure involving the transfer of partnership interests as security does not reflect the ordinary meaning of the consumer in the marketplace.”⁴⁸

Multi-Media International LLC v. Clark Group, Inc.⁴⁹

Multi-Media concerned a dispute between a magazine publisher and a provider of mass-shipping services over allegedly overstated/fraudulent fuel surcharges charged by the shippers to the publisher.⁵⁰

The court dismissed the publisher’s CFA claim on summary judgment, concluding that the “service provided by the [shippers] cannot qualify as the sale of merchandise to the general public.”⁵¹ In doing so, the court accepted the shipper’s arguments that the services they provided could not be likened to general carrier services, but rather, the shipper’s services were specialized to “the consolidation and shipping of mass market books, magazines and newspaper inserts to a single, target group—the printing and publishing industry...[and] to the transportation of bulk mail to

U.S. Postal service bulk mail centers from large bulk mail distributors.”⁵²

Salamon v. Teleplus Enterprises⁵³

The plaintiff in *Salamon* (Salamon) was in the business of arranging alternative third-party financing for business entities that could not secure traditional, asset-collateralized bank loans.⁵⁴ The defendant (Teleplus), a distributor of cellular devices and wireless telephone service, entered into an agreement with Salamon to attempt to obtain third-party financing for Teleplus.⁵⁵ Teleplus agreed that it would pay Salamon an amount equal to 10 percent of any financing he procured.⁵⁶ Salamon alleged that he, in fact, procured over \$12 million in financing for Teleplus from a private lender involving a relatively complex equity-based collateralization structure.⁵⁷ Teleplus, however, refused to pay Salamon the agreed-upon 10-percent fee.⁵⁸ Salamon commenced suit against Teleplus.

Teleplus asserted various counterclaims against Salamon, including a claim under the CFA, alleging that Salamon made numerous fraudulent misrepresentations.⁵⁹ Salamon moved to dismiss Teleplus’s CFA counterclaim, arguing that Salamon’s services fell outside the scope of the CFA.⁶⁰

Despite Salamon’s claim that the services he provides are “unique” and directed to a limited demographic comprised of “corporations for which traditional asset-collateralized loans are not a viable option,” the court held that he provided insufficient evidence to permit the court to conclude summarily that the services he provides are not of a type that can be “offered to the general public.”⁶¹ To the contrary, based on Salamon’s deposition testimony that he “ha[d] made ‘cold calls’ to offer his services to ‘[m]ore than a thousand’” potential clients, and the court’s own inferences regarding the nature of Salamon’s services, the court concluded that his

target client base “could conceivably encompass a reasonable percentage of corporate entities.”⁶² Based on the foregoing (and on the court’s conclusion that the services Salamon provided otherwise satisfy the definition of merchandise under the CFA), the court denied Salamon’s summary judgment motion.⁶³

Closing Observations

Where the claimant is a business entity, recent cases reveal that courts generally appear to be taking an increasingly restrictive approach in determining whether, for purposes of the CFA, the transaction at issue involves merchandise that is capable of being sold to the public. Historically, the transactions courts deemed to fall outside of the CFA’s scope on this basis were, in fact, transactions involving goods and services of a significantly specialized nature, such as the petroleum refining process at issue in *BOC*. In recent cases, however, courts have excluded from the CFA’s reach what appear to be generally common business transactions, such as the financing, leasing and shipping transactions discussed in the cases noted above, albeit transactions offered to a more limited class of business ‘consumers’ of the ‘merchandise’ at issue.

With the exception of the square-footage and value of the leased premises at issue in *PIM Brands*, there appears to be no appreciable difference between that lease and any other commercial lease, and the remaining factors the court relied upon in excluding that lease transaction from the reach of the CFA (*i.e.*, relative sophistication of the parties and a lengthy negotiation over the lease agreement with counsel) are likely common in most commercial leases.

Similarly, the only palpable difference between the loan transaction in *U.S. Land Resources* and any other loan to finance the acquisition of commercial property is that in *U.S. Land Resources*, the lender’s security interest

in the property was secured through an assignment of partnership interests in the title holder, as opposed to the recording of a mortgage. What factors make the financing in *Professional Cleaning* any different from any other commercial financing (or from the financing at issue in *Salamon*, for that matter), or make the shipping services in *Multi-Media* any different from any other commercial shipping services, is even less clear.

What is clear from recent CFA cases is that the application of the CFA in the context of a business dispute is becoming increasingly less favored by the courts. While efficient in terms of case disposition, this trend is contrary to the broad remedial purpose of the CFA, and the history of liberal construction of the CFA in light of its broad remedial purpose to protect consumers of all kinds, both individuals and businesses.⁶⁴

Nevertheless, the inquiry regarding the applicability of the CFA in any particular case remains highly fact sensitive. Accordingly, these recent cases underscore the need for counsel to develop facts and argument demonstrating that the ‘merchandise’ at issue is, in fact, offered to some appreciable class of business consumers, and that the alleged unlawful practices involved pose the kind of threats of deception to such business consumers that the CFA is intended to remedy. It is imperative that counsel for both the plaintiff and the defendant in such cases drill down into the specific facts of the transaction at issue in the case in order to present the best argument for or against application of the CFA in that case.

Thus, from the perspective of business entities, for who and for what the CFA affords protection remains an ongoing question, to be resolved in the context of specific cases as they arise. ♣

Endnotes

1. Ferrelli, James J., “Consumer Fraud

- Act Claims in Business Litigation – A Primer on Who May Sue Whom,” *New Jersey Lawyer Magazine* (February 2008).
- 2. N.J.S.A. 56:8-19 (emphasis added).
- 3. N.J.S.A. 56:8-1. *See also, Hundred East Credit Corp. v. Schuster*, 212 N.J. Super. 350 (App. Div. 1986).
- 4. N.J.S.A. 56:8-1, *et seq.*
- 5. N.J.S.A. 56:8-2 (emphasis added).
- 6. N.J.S.A. 56:8-1.
- 7. *Hundred East*, 212 N.J. Super. at 357.
- 8. *Papergraphics Int’l., Inc. v. Correa*, 389 N.J. Super. 8, 13 (App. Div. 2006).
- 9. *BOC Group, Inc. v. Lummus Crest, Inc.*, 251 N.J. Super. 271, 278 (Law Div. 1990).
- 10. *BOC*, 251 N.J. Super. at 278 and *R.J. Longo Constr. Co., Inc. v. Transit America, Inc.*, 921 F. Supp. 1295 at 1311-12 (D.N.J. 1996) and Ferrelli, James J., “Consumer Fraud Act Claims in Business Litigation – A Primer on Who May Sue Whom” *NJLM* (2008).
- 11. *See generally, Papergraphics Int’l., Inc. v. Correa*, 389 N.J. Super. 8 (App. Div. 2006).
- 12. *BOC Group, Inc. v. Lummus Crest, Inc.*, 251 N.J. Super. 271 (Law Div. 1990).
- 13. *R.J. Longo Constr. Co., Inc. v. Transit America, Inc.*, 921 F. Supp. 1295 (D.N.J. 1996).
- 14. *BOC Group, Inc. v. Lummus Crest, Inc.*, 251 N.J. Super. 271 (Law Div. 1990).
- 15. *R.J. Longo Constr. Co., Inc. v. Transit America, Inc.*, 921 F. Supp. 1295 (D.N.J. 1996).
- 16. *Finderne Mgmt. Co., Inc. v. Barrett*, 402 N.J. Super. 546 (App. Div. 2008).
- 17. *Id.* at 552-54.
- 18. *Id.*
- 19. *Id.*
- 20. *Id.*
- 21. *Id.*
- 22. *Id.*
- 23. *Id.* at 564.
- 24. *Id.* at 572.

25. *Id.* at 570-72.
26. *Id.* at 571-72.
27. *PIM Brands LLC v. Cabot Acquisitions, LLC*, 2008 WL 5114467 (N.J. Super.).
28. *Id.* at *21.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Prof'l Cleaning and Innovative Bldg. Serv. v. Kennedy Funding*, 2009 WL 1651131 (D.N.J.).
33. *Id.* at *1
34. *Id.*
35. *Id.*
36. *Id.* at *1-4.
37. *Id.* at *4.
38. *Id.* at *5 (citations omitted).
39. *U. S. Land Resources, LP v. JDI Realty LLC*, 2009 WL 2488316 (D.N.J.).
40. *Id.* at *1.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at *2.
48. *Id.* at *20 (internal quotations omitted).
49. *Multi-Media Int'l LLC v. Clark Group, Inc.*, 2010 WL 2545165 (D.N.J.).
50. *Id.* at *1-2.
51. *Id.* at *7.
52. *Id.* at *4.
53. *Salamon v. Teleplus Enterprises*, 2008 WL 2277094 (D.N.J.).
54. *Id.* at *1
55. *Id.*
56. *Id.*
57. *Id.* at *1-2.
58. *Id.*
59. *Id.* at *10-12.
60. *Id.* at *11.
61. *Id.* at *12.
62. *Id.*
63. *Id.*
64. *See, e.g., Delaney v. Garden State Auto Park*, 318 N.J. Super. 15, 20 (App. Div.), *certif. denied*, 160 N.J. 477 (1999).

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