

BUSINESS LITIGATION ALERT

MAY 2009

Do You Advertise Online? New Jersey Supreme Court Reminds Businesses That The Consumer Fraud Act Applies To Online Advertisements

Do you advertise online? On April 8, 2009, the New Jersey Supreme Court issued a reminder to businesses that online advertisements are subject to the New Jersey Consumer Fraud Act (“CFA”). In *Real v. Radir Wheels, Inc.*, the Court held that the CFA applied to a transaction where an out-of-state consumer purchased a used automobile from an in-state seller based on an internet advertisement. Given the CFA’s potential for treble damages and award of attorneys fees, all businesses in New Jersey must take careful note when advertising online.

In *Real*, Plaintiff, a Missouri resident, purchased a vintage Chevrolet Corvette from Defendant, a New Jersey resident, through an internet auction. Defendant’s online advertisement represented that the car had a good frame, good soft top, original radio, and new exhaust system. Plaintiff placed a bid for the car based on the ad. After placing the bid, Plaintiff spoke with the Defendant over the telephone. During the conversation, Defendant reiterated the representations made in the online advertisement. Thereafter, Plaintiff’s bid won the auction.

The car was shipped to Missouri. Upon receipt, Plaintiff took the car to a specialty repair shop for an examination. The exam revealed that the car’s frame was rusted nearly in half, disqualifying the vehicle from Missouri registration, the top was

in poor condition, the seats were torn, the driver’s seat frame was broken, the radio was not the original, the engine hesitated during acceleration, and the carburetor was out of tune. Plaintiff was adamant that he never would have purchased the car had he known its true condition.

Plaintiff filed suit in New Jersey alleging violations of the CFA. At trial, Defendant argued that he made no misrepresentations in his online advertisement, and also argued that he was not a “dealer” subject to the CFA. The trial court found in favor of Plaintiff, awarded actual damages representing the difference in value of the amount paid for the car and the actual value of the car upon receipt, trebled the damages; and awarded attorneys’ fees and costs. Although the Appellate Division affirmed the award under a theory of common law fraud, it reversed the trial court’s finding of a CFA violation. The Appellate Division dismissed Plaintiff’s CFA claim because there was no evidence that Defendant was a “dealer” or “merchant” under the CFA.

The New Jersey Supreme Court reversed. The Court found that the Defendant did violate the CFA and held that Defendant met the definition of “person,” that the car met the definition of “merchandise” under the CFA, and that Plaintiff suffered an ascertainable loss. As a result, the New Jersey Supreme Court reinstated the treble damages, attorneys fees and costs.

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The Court noted that the CFA outlaws “[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact . . . in connection with the sale or advertisement of any merchandise or real estate.” *N.J.S.A. 56:8-2*. The term “merchandise” includes “any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale[.]” *N.J.S.A. 56:8-1(c)*. The term “person” includes “any natural person or his legal representative, partnership,

corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director member, stockholder, associate, trustee or cestuis que trustent thereof[.]” *N.J.S.A. 56:8-1(d)*. In light of the CFA’s broad and expansive reach, the Court held that the CFA applied to this online transaction.

This decision offers a strong reminder that the CFA applies to online transactions. Therefore, in this age of technology, all New Jersey businesses must be particularly careful how they advertise online. ■

Appellate Division Affirms a No Damages Award, Despite Jury Finding of Discriminatory Discharge from Employment

In an interesting recent employment discrimination case, a New Jersey state appeals court agreed with the jury’s award of no damages even though the Plaintiff proved a discriminatory discharge based on his disability.

In *Jeter v. NJ Transit*, the Plaintiff bus driver, an African American, sued his employer for wrongful termination, hostile work environment, retaliation, and infliction of emotional distress. Although he succeeded on liability, Plaintiff failed to prove that his “injury” warranted a monetary award.

Plaintiff suffered post traumatic stress disorder (PTSD) and took six months medical leave in 1999 after he was involved in a bus/car traffic accident resulting in three fatalities. Over the next four years, Plaintiff filed 12 disability and six workers compensation claims. He was also disciplined for several work-related infractions, including falsifying his passenger log to indicate he had 12 riders when his bus was empty. In 2005, he was terminated for falsely registering passengers, but because the

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termination violated the collective bargaining agreement, he was reinstated. The following month, he went on disability again.

During the investigation of Plaintiff's latest disability claim, NJT terminated him again for failure to provide adequate medical support to substantiate his claim for benefits. An arbitrator later found his medical records sufficient and that Plaintiff had been wrongly terminated. Consequently, he was reinstated with back pay.

Meanwhile in 2003, Plaintiff filed his discrimination complaint in Superior Court seeking damages for wrongful termination. In 2007, Plaintiff's race and handicap discrimination claims were tried to a jury. The jury returned a verdict for NJT on Plaintiff's race claim but found NJT liable for wrongful termination based on disability. However, the jury awarded the Plaintiff no compensatory damages.

On appeal, Plaintiff argued, among other things, that the no-damages award was a miscarriage of justice in light of the jury's finding that Plaintiff suffered a discriminatory termination based on disability. The Appellate Division reasoned that because Plaintiff was reinstated with back pay and presented no medical evidence in support of an emotional distress claim, the jury's verdict did not shock the conscience and did not constitute a miscarriage of justice. This case demonstrates that in defending a discrimination in employment case, or for that matter, any business related lawsuit, it is critically important to focus on and challenge Plaintiff's damages claims as well as his claims for liability. ■

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