

# Appellate Docket

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## New Jersey Supreme Court Addresses Duty of Candor

Over the past year, the Appellate Division's opinion in Brundage v. Estate of Carambio, 394 N.J. Super. 292 (App. Div. 2007), has been the subject of much debate and controversy. That opinion greatly expanded the duty of candor that a lawyer owes to a court during the course of litigation and on appeal. On July 15, 2008, the Supreme Court rendered its decision, reversing the Appellate Division, but in an opinion that raises new concerns on this issue for all members of the Bar.

### The Facts

In Brundage, plaintiff sued defendant's estate for palimony, although the parties had never cohabited. Plaintiff's counsel had previously filed an unrelated lawsuit, Levine v. Konvitz, asserting a claim that was identical to the claim in Brundage. The trial court in Levine dismissed the Complaint, holding that cohabitation is an indispensable element of a palimony claim. This ruling would obviously require dismissal of the claim in Brundage if applied by the Brundage Court. Plaintiff in Levine appealed, and the appeal was pending when the Brundage Complaint was filed.

While the Levine appeal was pending, the defendant in Brundage moved for summary judgment, claiming that cohabitation is indispensable to a palimony claim (as the Court had held in Levine, unbeknownst to Defendant). The trial court rejected defendant's argument, and denied summary judgment. The defendant then sought leave to appeal, which was denied. Neither the trial court judge nor the Appellate Division panel in Brundage appear to have been aware of the pending appeal in Levine on the identical issue.

The Brundage lawsuit then settled. Soon thereafter, the Appellate Division decided Levine, holding that cohabitation in a marital-type relationship is indispensable to a palimony claim. Levine v. Konvitz, 383 N.J. Super. 1 (App. Div.), cert. den., 186 N.J. 607 (2006). When defendant's counsel in Brundage learned of the Levine ruling, he asserted that had he or his client

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# Warning! Don't Forget to Seek Leave to Appeal

Ordinarily, an appeal can be filed only from an order that is final i.e., one that resolves all issues as to all parties in a matter. Exceptions exist for specified types of orders that courts treat as final even though they really are not, but those exceptions rarely occur. Therefore, in most cases, interim, or “interlocutory”, orders can be appealed only with the Appellate Division’s express permission given through the grant of a motion seeking leave to appeal.

In the past, when an appeal was improperly taken from what was an interlocutory (rather than a final) order, no adverse consequences usually followed. The Appellate Division treated the matter as though leave to appeal had been sought and granted, simply noting the error and excusing the omission.

However, recent Appellate Division cases signal that a new era appears to have begun. In these cases, the Appellate Division has signaled its retreat from its prior, almost routine, practice of hearing an appeal that is interlocutory where leave to appeal had not been granted. Informally, Appellate Division judges have announced that the court will rarely grant leave to appeal unless it is properly requested by a motion for leave to appeal. More formally, the Presiding Judge of Administration of the Appellate Division, Honorable Edwin H. Stern, implemented the Court’s pronouncement by dismissing an appeal improperly taken from an interlocutory order without leave to appeal having been sought or granted. See *Vitanza v. James*, 397 N.J. Super. 516 (App. Div. 2008). The Court in *Vitanza* drove home its point by referencing its prior decision in *Parker v. City of Trenton*, 382 N.J. Super. 454 (App. Div. 2006), where leave to appeal was neither sought nor granted, and so the appeal was dismissed even though it had been fully briefed. Quoting from its prior decision in *Parker*, the *Vitanza* Court stated: “However, if we treat every interlocutory appeal on the merits just because it is fully briefed, there will be no adherence to the Rules, and the parties will not feel there is a need to seek leave to appeal from interlocutory orders.” The Court’s message is succinctly stated at the conclu-

sion of the opinion: “The time has come to enforce the Rules and not to decide an appeal merely because the respondent did not move to dismiss it and it was fully briefed.”

The solution to this dilemma is not Rule 4:42–2, which allows a party to ask the trial court to certify an interlocutory order as final. This was made clear by another recent Appellate Division decision. In *Janicky v. Point Bay Fuel, Inc.*, 396 N.J. Super. 545 (App. Div. 2007), the Court reiterated that a certification of finality under Rule 4:42–2 is appropriate only in the limited context specified in the Rule, including the requirement that the order for which finality certification is sought be one that is subject to process to enforce a judgment pursuant to Rule 4:59 if it were final. Elaborating on that point, the Court in *Janicky* provided an in-depth and helpful discussion of the use and misuse of a finality certification under Rule 4:42–2. In that regard, the Court explained that the purpose of the finality certification under Rule 4:42–2 is to render an order final for purposes of collection and enforcement under Rule 4:59, and so permit execution on a partial summary judgment. The fact that the order, having been certified as final under Rule 4:42–2, is also then a final order from which an appeal can be filed is merely an ancillary consequence of a finality certification, not its principal purpose. As the Court in *Janicky* recognized, a contrary result — recognizing certifications of finality by trial courts that do not satisfy the requirements of Rule 4:42–2, or allowing trial courts to declare orders final simply so that they may be appealed — would circumvent the exclusive authority of the Appellate Division to determine whether leave to appeal an interlocutory order should be granted.

Nor can counsel circumvent the interlocutory nature of a trial court’s decision by private agreement. In *A-1 Property Management LLC v. Bergenwood Commons Condo. Ass’n*, A-970-07T2 (July 31, 2008), an unpublished opinion, the trial court entered an order denying defendant Association’s motion

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# Orders Compelling Arbitration Held to Constitute Final Orders That are Immediately Appealable

On April 14, 2008, the New Jersey Supreme Court decided an issue on which case law around the country is split: whether orders compelling arbitration are final or interlocutory. The United States Supreme Court, which considered the issue under the Federal Arbitration Act, held such orders to be final determinations. If orders compelling arbitration are treated as final orders, then a party seeking to challenge the order on appeal must do so shortly after the order is entered and before the arbitration begins. However, this raises a significant prospect of delay in the final determination of the dispute, thereby negating one of the principal benefits of arbitration. Alternatively, if orders compelling arbitration are deemed interlocutory, an appeal must await the completion of arbitration. While this result will expedite the arbitration, it could increase the number of arbitration awards that are challenged on appeal and thus erode the finality of arbitration awards.

In Wein v. Morris, 194 N.J. 364 (2008), the Supreme Court held that an order compelling arbitration is a final judgment appealable as of right, regardless of whether the Court, in so ruling, dismisses the pending lawsuit or instead stays the action. The Court viewed its determination as promoting uniformity, judicial economy and assisting in the speedy resolution of disputes. In light of its decision, the Court then exercised its rulemaking authority to amend Rule 2:2-3(a) to add an order compelling arbitration to the list of orders deemed to be final judgments for appeal purposes. The opinion in Wein affects both arbitration law and appellate procedure, with the potential for further-reaching implications in other types of cases as well.

The trial court in Wein ordered binding arbitration. Defendants objected, but voluntarily complied with the order after it was entered. A protracted and expensive arbitration proceeding

followed, at the conclusion of which an award was entered in the plaintiff's favor, and plaintiff obtained an order enforcing the arbitration award.

Defendants appealed, asserting that the trial court erred in compelling arbitration. The plaintiff moved to dismiss the appeal as untimely, contending that it should have been filed when the case was first referred to arbitration and before the arbitration proceeded. The Appellate Division held that the referral order was interlocutory, and that the proper time for an appeal was after the arbitration was completed. Wein v. Morris, 388 N.J. Super. 629 (App. Div. 2006).

The Supreme Court disagreed. Noting that there "was nothing left for the trial court to decide between the parties", the Court held that "the order of the trial court was a final judgment subject to an immediate appeal." 194 N.J. at 379. As a result, it is now clear that a party wishing to appeal from an order compelling arbitration must do so before the arbitration proceeds. Since many parties currently resort to alternate dispute resolution, including mediation, as an expeditious method of resolving disputes, the holding in Wein is of utmost importance, particularly in directing the need for timely action if a party seeks to challenge a referral to arbitration. The challenge must be asserted within forty-five days of the order of referral; waiting until after the arbitration is concluded will be too late.

Another aspect of the Court's opinion has potentially broader implications. Beyond holding that an order compelling arbitration is final, the Court stated that even if that order had been interlocutory, the defendant had waived the right to appeal by consenting to the arbitrator's jurisdiction and proceeding

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# New Jersey Supreme Court to Determine Whether Demand for Refund is a Prerequisite to Consumer Fraud Claim

Nearly a decade ago, the Appellate Division held that a consumer who is overcharged does not suffer an “ascertainable loss” as required for a claim under the Consumer Fraud Act (“CFA”), N.J.S.A. 56:8–1 to –20, unless and until the consumer demands a refund and the merchant refuses to give one. Feinberg v. Red Bank Volvo, Inc., 331 N.J. Super. 506 (App. Div. 2000). In October 2007, a different panel of the Appellate Division declined to follow Feinberg, holding that a pre-litigation demand is not an essential element of a claim under the CFA. Bosland v. Warnock Dodge, Inc., 396 N.J. Super. 267 (App. Div. 2007). On February 4, 2008, the New Jersey Supreme Court agreed to review the Bosland decision and settle the question raised by the conflicting Appellate Division decisions, by determining whether an attempt to obtain redress is an essential element of a claim under the CFA.

In Bosland, the plaintiff bought a vehicle from Warnock Dodge,

which charged her a \$117 “registration fee.” Plaintiff later learned that the actual registration fee charged by the Motor Vehicle Commission was the lesser amount of \$97. Plaintiff sued under the CFA to recover the \$20 overcharge, and also sought relief on behalf of a class of all others similarly situated.

The trial court dismissed the Complaint, finding the claims barred because plaintiff had not first asked Warnock Dodge to refund the \$20 overcharge before filing suit. The Appellate Division reversed, noting that the CFA is a remedial statute that should be interpreted liberally. The Court rejected the ascertainable-loss requirement applied in Feinberg, concluding that a loss occurs the moment that a consumer is overcharged.

In anticipation of the Court’s ruling, we note that various middle-ground approaches are available to the Supreme Court

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## PRACTICE TIP

### Supplementing the Record on Appeal

In the event that it becomes necessary to refer, on appeal, to a document or other evidence that was not part of the record before the trial court, such evidence cannot simply be inserted into the brief or appendix being filed on the appeal. If that is done, the attorney runs the risk of sanctions being imposed by the Court. Instead, a motion to the Appellate Division seeking permission to supplement the record is required. Rule 2:5-5(b), which states the procedure for supplementing the record on appeals from administrative agencies, has been construed as applicable to appeals to the Appellate Division from the trial court as well. Regarding the motion itself, if additional proofs are not necessary to admit the supplemental evidence, the Appellate Division may grant the motion to supplement without further proceedings. If, however, additional proofs are required, the Appellate Division will temporarily remand the matter to the trial court for such further proceedings and fact-finding and then supplementation of the record if found appropriate based on the proofs presented. Supplementation of the record will be permitted only if the evidence is material to the issues on appeal, and only where the evidence was not known to the party seeking supplementation at the time of the proceedings before the trial court. Therefore, an attorney seeking to add evidence to the record on appeal should be careful to follow these procedures. ✍

*New Jersey Supreme Court to Determine continued from page 4*

beyond the diametrically opposed rulings of the Appellate Division on the issue presented. The Supreme Court could rule that demand to the merchant for reimbursement is required only for technical or unintentional violations of the CFA, while intentional violations trigger liability without regard to prior demand for refund. Alternatively, the Supreme Court could hold that a defendant sued under the CFA cannot avoid the Act merely by asserting the lack of demand as a defense, but instead must promptly and voluntarily provide full redress to the consumer. These middle-ground options might prove unworkable, though, because it may be difficult for consumers to judge when demand

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*Warning! Don't Forget to Seek Leave to Appeal continued from page 2*

for an extension of time to serve expert reports. Rather than seek leave to appeal, the parties devised an alternative way to get the matter before the Appellate Division as of right. They “settled” the case. As part of the settlement, the Association agreed to dismiss with prejudice all claims that it had asserted against plaintiff. The parties further agreed that the Association’s right to appeal was preserved. The Association then filed an appeal from the order denying an extension of time to serve expert reports. The Appellate Division saw through this subterfuge, writing: “The Association’s attempts at preserving its right to appeal by inserting language to that effect in the stipulation of dismissal is merely a transparent attempt to circumvent our rules governing interlocutory review.” The Appellate Division dismissed the

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*Orders Compelling Arbitration continued from page 3*

with the arbitration. While the Court’s discussion was confined to the context of orders compelling arbitration, nothing about the Court’s logic would preclude a broader application.

If the ruling is applied more broadly, it could lead to difficult litigation decisions. When a judge issues an order that a party does not agree with, the best practice usually is to preserve the right to appeal, and then to comply with the ruling. But the

is required and when it is not.

Until the Supreme Court decides Bosland, one seeking to assert a CFA claim would be well advised to formally demand a refund from the merchant before filing suit. The drawback to this is that if the demand is accepted, the consumer would not receive the broad remedies available under the CFA. On the other hand, failure to make demand might jeopardize the claim. Likewise, defendants in CFA cases should plead the lack of demand as a defense, and consider tendering compensation for the consumer’s asserted loss. Depending upon the Court’s ruling in Bosland, such action by a defendant may avoid exposure for broad consumer remedies provided by the CFA. ↪

appeal as moot, stating that since the case had been dismissed there were no issues remaining to litigate, consequently discovery was no longer necessary and there was thus no need for review of the trial court’s discovery ruling denying an extension of time to submit an expert report.

The lessons of these three Appellate Division decisions are clear, and appellate practitioners should be attentive to them. If the order in question is interlocutory, appellate review can be obtained only if permitted by the Appellate Division by the grant of leave to appeal. If leave to appeal is neither sought nor granted, the issue can be presented to the Appellate Division for review only by an appeal from a final judgment at the conclusion of the matter, or from an order that may have been certified as final after satisfying the requirements of Rule 4:42–2. ↪

Wein opinion suggests that that may not always suffice. Instead, whether an appeal has been waived now depends on “the totality of the circumstances.” 194 N.J. at 383. To preserve error for review on appeal, a party may have to object repeatedly, or perhaps even seek leave to appeal. It remains to be seen whether this aspect of the Court’s decision will be applied narrowly, or expanded beyond its immediate context. If expanded, the potential impact could be enormous. ↪

*New Jersey Supreme Court continued from front cover*

known about the pending Levine appeal, his client would not have settled. Defendant then moved to set aside the settlement, contending that “plaintiff’s counsel’s failure to inform him of the pending Levine appeal violated his ethical obligations under the Rules of Professional Conduct.” The trial court denied the motion, and defendant appealed.

## The Appellate Division’s Decision

The Appellate Division reversed, vacating the settlement. The Court held that plaintiff’s counsel violated his duty of candor to the tribunal under RPC 3.3(a)(5), which requires disclosure of any “material fact”, the omission of which counsel knows is “reasonably certain to mislead the tribunal.” The Appellate Division held that the pendency of the same issue in another appeal is “material.”


## The Supreme Court’s Opinion in Brundage

In an opinion rendered on July 15, 2008, the New Jersey Supreme Court reversed the Appellate Division decision, thereby reinstating the settlement. 195 N.J. 575. The majority opinion, written by Justice Hoens, held that plaintiff’s counsel’s conduct approached the line of impropriety, but did not cross it. The Court was unable to find any rule or other requirement creating a duty in counsel that was violated. The Court explained that the conduct did not violate RPC 3.3(a)(1) as a “false statement of a material fact or law” made to a tribunal. Likewise, there was no violation of RPC 3.3(a)(3) because there is no duty to disclose unpublished decisions and because trial

court opinions are not binding upon other trial courts. There was also no violation of RPC 3.3(a)(5) in failing to disclose the pending unrelated appeal in the papers filed on the motion for leave to appeal. Accordingly, the Court held that counsel’s conduct did not violate the Rules of Professional Conduct, and so could not be the subject of sanctions. Nevertheless, in a strongly worded opinion, the Court stated that counsel’s conduct was “entitled to our stern condemnation”, and then went on to emphasize that point at great length.

The Supreme Court’s ruling creates a disquieting dilemma for counsel. Since the Court could not identify any rule that counsel violated, one must wonder about the real source of the Court’s concern and whether it will trigger sanctions upon counsel in the future, without counsel knowing in advance that the conduct was improper.

In a brief but pointed concurrence, Justice Albin (joined by Justice Wallace) questioned why the majority chose to “condemn” counsel for conduct that did not cross the line of impropriety, particularly in light of counsel’s duty to represent his client zealously, as the result of which counsel could not have justified prejudicing his client’s case by disclosing to the court facts that he was not ethically obligated to disclose.

While the Court’s opinion decided the specific question presented in Brundage regarding the validity of the settlement involved there, it also opens a Pandora’s box, raising new concerns with respect to ethics and professionalism that should give counsel pause and warrant further consideration by the Court. 

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