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Commentary

Deflating the 'Puffery' Defense

Its abolition would vindicate the Supreme Court's burial of caveat emptor

By Bruce D. Greenberg

According to the state Supreme Court in *Strawn v. Canuso*, 140 N.J. 43, 56 (1995), caveat emptor "no longer prevails in New Jersey." Yet, a vestige of that discredited doctrine — the defense of "puffery" (or "dealer's talk") — still plagues consumer fraud cases. Though some recent appellate cases have rejected puffery arguments, other cases have reaffirmed the doctrine. For the purpose of consumer fraud litigation, it is time to bury puffery alongside caveat emptor.

Puffery has been defined by several New Jersey courts as an "exaggerated claim of quality" on which consumers are expected not to rely. That is caveat emptor, as recognized by an early New Jersey case, *Roemer v. Conlan*, 52 N.J.L. 53 (Sup. 1889). Prosser candidly called puffery a "seller's privilege to lie" in *Torts*, §109 (4th. Ed. 1971). There is nothing to recommend its continued existence.

The abrogation of caveat emptor parallels the increased complexity and diversity of products and services. Sellers make their living from their products and are therefore well-informed about them. In contrast, consumers simply can no longer know all

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characteristics of what they are being offered, whether there is a substitute and how that substitute compares.

This imbalance in information is compounded by sellers' pervasive and sophisticated promotional techniques. That advertising is by definition designed to induce consumers to make purchases. As a result, in a suit by a purchaser of goods or services, it is logical to presume that the advertising achieved its purpose and induced that purchase.

Our courts have long recognized that permitting sellers to escape liability for their promotional statements is unjustified. Nearly 40 years ago, the Appellate Division noted, in *Hamilton v. Schwadron*, 82 N.J. Super. 493 (App. Div. 1964), a "growing unwillingness ... to allow statements to be made, without liability, which are calculated to induce, and do induce, action on the part of the hearer."

Kugler v. Koscot Interplanetary Inc., 120 N.J. Super. 216 (Ch. Div. 1972), observed that the New Jersey Consumer Fraud Act was designed to reject improper practices even if they had previously been accepted as normal business conduct. *Koscot* held that "statements made to prospective purchasers which are aimed to induce a purchase by them may not be characterized as mere 'puffery.'"

Some cases have accepted a puffery defense on the grounds that the seller's statement was of opinion rather than fact. This notion appears frequently in

cases involving a seller's statement about the value of what is being sold. Cases say that a fact can be the subject of personal knowledge, while an opinion cannot. This fact vs. opinion distinction is at best a slippery one that is difficult to apply.

In *Judson v. Peoples Bank & Trust Co.*, 25 N.J. 17 (1957), the Supreme Court held that people who have specialized knowledge are liable for their opinions just as for statements of fact. Since professional sellers have expertise in their products and services, they should be equally liable for statements of fact or opinion.

Some older cases treat exaggerated "dealer's talk" as routine and therefore not actionable. It is difficult, however, to see why such statements should be protected. The notion that consumers should expect, but not believe, what a seller later contends was exaggeration again smacks of caveat emptor and ignores the rule that a wrongdoer cannot argue that his victim should have been more astute, as outlined in *Judson*.

Sellers already are forbidden from making statements that are false or misleading, even if they are literally true. It "just nudge[s] the law forward an inch or so" to bar statements that are untrue because they are exaggerated, to borrow Justice Robert Clifford's phrase from *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426 (1993).

Rodio v. Smith Obstacle

The biggest impediment to the elimination of the puffery defense is *Rodio v. Smith*, 123 N.J. 345 (1991). There, the Supreme Court ruled that "You're in good hands with Allstate" was not a statement of fact but,

"[h]owever persuasive," was "nothing more than puffery." The Court noted the plaintiffs' claim "that the slogan was a false representation of fact that Allstate was looking out for plaintiffs' best interest." The Court did not offer any reasoning to support its rejection of that claim, and its entire discussion of the issue consumed just one paragraph.

After *Rodio*, the Supreme Court recognized, in *Pickett v. Lloyd's*, 131 N.J. 457 (1993), that insurance companies owe insureds certain duties of good

faith. Thus, a jury might reasonably have found that by touting its "good hands" treatment of insureds, Allstate was indeed representing that it would protect their interests. If a jury so found, it should also have been allowed to decide whether Allstate had acted in accordance with its representation.

Rodio mistakenly affirmed the puffery doctrine, in a cursory portion of an opinion that focused primarily on unrelated issues relating to trial by jury. The Court should take the next opportu-

nity to overrule *Rodio* on the puffery issue.

By allowing sellers to contend, after they have reaped the benefit of a sale, that their sales techniques lacked content or should not have been believed, the puffery notion revives the worst aspects of caveat emptor. Abolishing the puffery defense would vindicate the Supreme Court's burial of caveat emptor, with no detrimental effect on the ability of honest sellers to market their products and services. ■