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Recovering Damages Against Construction Principals and Employees Under the CFA

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Enacted in 1960, and amended in 1971, the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, is an expansive, remedial statute intended to protect consumers from fraud from those engaged in the sale of goods and services. In general, the CFA protects consumers, including those purchasing construction goods and services, who have fallen victim to three separate kinds of unlawful practices: affirmative misrepresentations, knowing omissions and regulatory violations.

Under the 1971 amendments, the CFA became one of the strongest consumer protection laws in the United States, expanded to provide consumers with a private cause of action, and an award of treble damages, attorney's fees and costs as a result of violations of the CFA. N.J.S.A. 56:8-2.11 to -2.12; and 19. To recover under the CFA, a consumer plaintiff must prove: (1) an "unlawful practice" (as defined by the CFA); (2) resulting in an ascertainable loss of money or property; and (3) a causal connection between the unlawful conduct and the loss. N.J.S.A. 56:8-19; *Lee v. Carter-Reed Co., Inc*., 203 N.J. 496, 521 (2010).

Historically, New Jersey courts have held that corporate officers and employees are individually liable pursuant to the CFA for their affirmative acts of misrepresentation to a consumer. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 608-10 (1997). Further, independent liability for violations of the CFA may be imposed notwithstanding the fact that individuals acted through a corporation at the time of the violations. *New Mea Constr. Corp. v. Harper*, 203 N.J. Super. 486 (App. Div. 1985); *Hyland v. Acquarian Age 2,000, Inc*., 148 N.J. Super. 186, 193 (Ch. Div. 1977); and *Kugler v. Koscot Interplanetary, Inc*., 120 N.J. Super. 216, 251-57 (Ch. Div. 1972). In each of these instances, the individuals were not liable merely because of the act of the corporate entity; rather, courts focused on the acts of the individual employee or corporate officer to determine whether the specific individual had engaged in conduct prohibited by the CFA.

In July 2011, in *Allen v. V&A Bros., Inc*., 208 N.J. 114 (2011), the New Jersey Supreme Court once again examined the interplay between claims brought against corporate and other business entities and individual employees or owners who are also named as defendants. In *Allen*, the plaintiffs' CFA claims were based on the defendants' regulatory violations in the context of a residential home improvement contract for construction of a retaining wall in combination with installation of a swimming pool.

Analyzing the language used in the CFA and regulations, and traditional theories used by New Jersey courts to impose personal liability in circumstances in which acts are undertaken through, or in conjunction with, a corporation, including "veil-piercing" theories and the "tort participation" theory, the *Allen* Court held that an individual who commits an affirmative act or a knowing omission that the CFA has made actionable can be liable individually. Further, although the CFA would also impose liability on the individual's corporate employer for such an affirmative act,

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there was no basis on which to conclude the CFA meant to limit recourse to the corporation, and thereby to shield the individual from any liability in doing so.

The *Allen* Court began its analysis by examining the language used in the CFA and regulations promulgated by the attorney general pursuant to its statutory authority to enforce the CFA. *See* N.J.S.A. 56:8-4. The CFA uses the term "person," which the statute itself defines as follows: "The term 'person' as used in this act shall include 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 [beneficiary] thereof[.]" N.J.S.A. 56:8-1(d).

The cause of action the statute creates is broadly defined as:

> The 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 with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. N.J.S.A. 56:8-2.

Additionally, three separate regulations formed the basis for the plaintiffs' regulatory CFA claims against the corporate and individual defendants: (1) the defendants failed to provide a written contract; (2) the defendants substituted a 50 percent taller retaining wall and inferior fill materials without the homeowners' permission; and (3) the defendants submitted a final invoice to the plaintiffs before the issuance of a final inspection certificate by local authorities. N.J.A.C 13:45A-16.2(a)(12), -16.2(a)(10)(ii) and -16.2(a)(3)(iv). The Court found that the defendants' failure to follow these "Home Improvement Practices" regulations were, by definition, unlawful and therefore constituted violations of the CFA.

The more complicated issue presented to the Court in *Allen* was whether individual corporate officers and employees were liable for the regulatory violations, in particular, because a corporation is held strictly liable under the CFA for such violations. Each of the regulations imposed liability on a "seller." The Court noted that, like the definition of "person" in the CFA, the term "seller" is broadly defined in the home improvement regulations to "a person engaged in the business of making or selling home improvements, and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees."

In the end, the *Allen* Court rejected a definitive legal conclusion on the issue, holding that "individual liability for regulatory violations ultimately must rest on the language of the particular regulation in issue and the nature of the actions undertaken by the individual defendant." The Court differentiated between employees of a corporation who have no control over the practices that violate regulations and the principals of a corporation who "may be broadly liable, for they are the ones who set the policies that the employees may be merely carrying out."

Of particular importance to individual defendants in these types of matters, the *Allen* Court opined that "these necessarily fact-sensitive determinations often will not lend themselves to adjudication on a record presented in the form of a summary judgment motion," and that, "a trial court may need to await presentation of all of plaintiff's proofs [i.e., following the conclusion of the plaintiff's case at trial] about the potential individual liability of corporate officers or employees before there is an adequate record to support a decision."

The *Allen* Court also considered the liability of corporate principals and officers as discussed in *Saltiel v. GSI Consultants, Inc*., 170 N.J. 297 (2002), a case pertaining to common-law causes of action for breach of contract and negligence. It concluded that individual liability under the CFA is consistent with individual liability under tort law, which has recognized a "participation theory" in holding individuals liable for tort when acting on behalf of a corporation. Thus, under the *Allen* decision, an individual may be held personally liable if he or she participated and had sufficient involvement in the commission of a tort or a CFA violation.

The *Allen* opinion also cited in support of its holding *Reliance Ins. Co. v. The Lott Group, Inc.*, 370 N.J. Super. 563, 580-82 (App. Div.), *certif. denied*, 182 N.J. 149 (2004), which applied the tort participation theory to impose individual liability under the Construction Trust Fund Act, N.J.S.A. 2A:44-148, for the defendant's knowing diversion of trust funds to his own account. The *Reliance* opinion is instructive not only for its application of the *Saltiel* holding, but for its survey of New Jersey precedent, holding individual defendants personally liable even in the absence of allegations of personal benefit.

Following *Allen*, the Appellate Division in an unreported decision in *Kort v. Van Answegen*, 2011 WL 5137833 (App. Div. Nov. 1, 2011), declined to impose personal liability for regulatory violations of the CFA on the owners of a limited liability company that breached a home improvement contract. The Appellate Division held that while one of the owners of the defendant company participated directly in regulatory violations of the CFA, the evidence presented did not establish the required causal nexus between the violations and the plaintiffs' losses. Accordingly, the court declined to award judgment against the individual owners and to treble it, as permitted by the CFA.

The Appellate Division did rule, however, that the plaintiffs' failure to prove an ascertainable loss caused by violations of the CFA was not a bar to their recovery of attorney's fees and costs against both the individual owner and the company.

In addition, because the defendants had defaulted, the plaintiff had been unable to obtain evidence against the individual defendants to establish an alternative theory of personal liability, such as piercing the corporate veil. Under the circumstances, the Appellate Division held that the trial court should have dismissed the plaintiffs' claims against the individual defendants without prejudice so as to permit the plaintiffs to move under N.J.R. 4:50-1(b) to modify their judgment to expand its reach to the individual defendants if the plaintiffs discovered new evidence in supplementary proceedings that could not have been discovered earlier. ■