



Professional Consultants May See Increased Liability Exposure In New Jersey

By John L. Grossman

Professional engineers may soon learn whether and when certain services they perform will no longer be protected from the penal provisions of the New Jersey Consumer Fraud Act (the CFA), which provides for payment of treble damages and attorney's fees if violations are found. In a case pending in the Superior Court in Camden County, a trial judge recently ruled from the bench that a state-regulated engineering company remained exempt from the provisions of the CFA, despite its having been accused of several CFA violations in connection with its installation of helical piers as structural supports for the foundation of a residential property, undergoing soil excavation and remediation necessitated by a leaking oil tank. The bench ruling is the subject of a motion for reconsideration; if the motion is not granted, the ruling likely will be appealed to the Appellate Division of the Superior Court, which should decide whether the exemption for professional engineers still applies when their work consists of mere excavation or construction.

The case, *CEMCO-Custom Environmental Management Co., v. Ohio Casualty Insurance Co., et als.*, should be watched by all state-regulated professionals, including architects, engineers, planners, surveyors, and other state-licensed consultants. All such professionals currently remain beyond the reach of the CFA as long as they operate in their professional capacities. CEMCO, assuming the case is appealed, should resolve the issue of when those professionals are no longer deemed to be acting within the scope of their professions.

In *CEMCO*, the engineering firm drew plans and submitted a proposal for the installation of the helical piers in connection with the excavation; it also installed the piers. The engineering firm was sued for violations of the CFA, which put it at risk of liability for payment of treble damages and attorney's fees. At issue was whether the installation of the helical piers was a professional service requiring licensure, or whether that installation was merely a construction task that typically follows engineering plans drawn by a professional, similar to that of a carpenter who follows architectural drawings in framing a house. The lower court felt that the installation was part of the professional service, concluded that the engineering firm was exempt from the CFA, and dismissed those allegations against it.

New Jersey law consistently has refused to apply the CFA to a representation involving the rendering of services by a learned professional. For example, an eye surgeon's representations in its advertising materials that laser surgery would be performed by properly licensed doctors were held to have been made in its professional capacity regarding its professional services, and thus exempt from the CFA. This was so, even though the particular surgery at issue was performed by a "doctor" who was not fully licensed. *Macedo v. Dello Russo*, 178 N.J. 340 (2004). However, the exemption does not apply when a professional acts in a capacity outside of his or her learned profession.

In *Blatterfein v. Larken Associates*, 323 N.J. Super. 167 (App. Div. 1999), the Superior Court held that an architect was not immune from suit under the CFA in a case in which several families sued the architect after discovery of serious structural, functional, and aesthetic defects in their homes. In so ruling, the Superior Court held that the conduct of the architect, who allegedly made false representations of commonplace variety about building materials to be used in new homes, bore directly upon the sale of the homes and did not constitute the rendition of a professional service. Where the architect has involved himself either as a principal or a retained professional in a real estate marketing venture, wherein he permits his services to be held out as part of what is being sold or provided by way of influencing purchasers to enter into contracts, he becomes subject to the CFA just as every other person involved in inducing the sale may be.

Architects who engage in design-build services, in addition to the other professionals mentioned, should follow the *CEMCO* case carefully to determine whether and when they may cease to be exempt from the provisions of the CFA, even on jobs for which they were previously exempt by their provision of professional services.

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