

New Jersey Law Journal

VOL. 201 - NO 12

SEPTEMBER 20, 2010

ESTABLISHED 1878

IN PRACTICE

BUSINESS LAW

Employees Who Participate in a Corporation's Inadvertent Violation of a Consumer Fraud Regulation May Be Held Liable

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The Appellate Division recently addressed, for the first time, the standard governing whether an employee or officer of a corporation may be held liable under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -184 ("NJCFA") for the corporation's violation of a New Jersey consumer protection regulation in *Allen v. V and A Brothers, Inc.*, 997 A.2d 1067 (App. Div. 2010). The court concluded that the standard for imposition of NJCFA liability on any officer or employee is "personal participation in the regulatory violation." In light of the ambiguity inherent in the term "participation," the number and scope of consumer protection regulations, the serious consequences of liability under the NJCFA and the fact that intent is not a necessary element of NJCFA liability based on a regulatory violation, the decision in *Allen v. V and A Brothers* may have far-reaching impact for employees of a wide variety of corporations.

A claim can be asserted under the NJCFA, whenever a "person" uses or employs an "unlawful practice" in con-

nection with the sale or advertisement of merchandise or real estate which causes any person to suffer an ascertainable loss. N.J.S.A. 56:8-2 and 56:8-19. See also *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994). "Person" is defined to 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 cestuis que trustent thereof. N.J.S.A. 56:8-1d.

The consequences of application of the NJCFA are quite serious. Any person held liable under the act is responsible to pay treble damages and attorneys fees. N.J.S.A. 56:8-19.

An unlawful practice can consist of (1) an affirmative act, (2) a knowing omission or (3) a regulatory violation. The regulations which can provide the basis for strict liability under the act are set forth in N.J.A.C. 13:45A-1.1 through 13:45A-30.9. Some of the regulations are targeted and govern activities in connection with the sale or advertisement of specific products such as meat, kosher and halal food, hazardous products, entertainment tickets, animals, furniture delivery, Internet dating services, home improvement, motor vehicles, tires, toys, bicycles, motorized wheelchairs and sleeping bags, or ser-

vices such as health clubs, servicing and repairing home appliances, watercraft repairs, and automotive repairs. Other regulations have broad application and govern such matters as general advertising, unit pricing of consumer commodities and disclosure of refund policies in retail establishments

Intent is not an element of claims for NJCFA liability based on the violation of a regulation. Parties subject to these regulations are assumed to be familiar with them, so that any violation of regulations, regardless of intent or moral culpability, constitutes a violation of the act.

In *Allen*, the plaintiffs allege that the defendant corporation improperly constructed a retaining wall and substituted inferior backfill for that specified in the plans, which resulted in the failure of the wall, causing ascertainable loss to the plaintiff. The complaint contained a count for breach of contract and a count for violation of the NJCFA by the defendant corporation, its principals, and one of its employees. An order of partial summary judgment was granted dismissing the NJCFA claims against all of the individual defendants. After a jury trial, judgment was entered against the defendant corporation for \$100,000 in damages on the breach-of-contract count as well as a total of \$130,000 on

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the NJCFA count based on violations of various regulations, including failure to execute a written contract (N.J.A.C. 13:45A-16.2(a)(12)), failure to obtain final approval of a project before accepting final payment from plaintiffs (N.J.A.C. 13:45A-16.2(a)(10)(ii)), and modifying the design of the retaining wall and substituting inferior backfill material for that specified without plaintiffs' knowledge or consent (N.J.A.C. 13:45A-16.2(a)(3)(iv)). After trebling, the award for the NJCFA violations equaled \$490,000, plus attorneys' fees. Plaintiffs appealed from the dismissal of the NJCFA claims against the individual defendants.

The *Allen* court relied on prior decisions in which, "courts have imposed liability upon individuals who were principals or employees of corporations sued for consumer fraud and who directly participated in the conduct giving rise to CFA liability." The court noted that individual liability in these cases was not premised on piercing the corporate veil. Rather, it was based on a reading of the use of the term "person" in N.J.S.A. 56:8-2 and as defined in N.J.S.A. 56:8-1(d), "to impose individual liability when [the] individual committed the unconscionable commercial practice or other prohibited act and ascertainable loss resulted." The court recognized that the conduct in all of the prior cases was comprised of affirmative acts, rather than regulatory violations; however, the court found no principled basis for distinguishing between cases based on conduct comprised of affirmative acts and conduct consisting of regulatory violations for purposes of imposition of individual liability.

The *Allen* court concluded that dis-

missal of claims against individual defendants in *Allen* was erroneous but rejected plaintiff's argument that summary judgment should automatically be granted for CFA liability against individual defendants. The court concluded that "Liability can be imposed only upon proof of personal participation by an individual in a particular regulatory violation." The case was remanded for a determination of such liability.

The holding of the court in *Allen*, and the personal participation standard may be troubling for employees of New Jersey business corporations. Based on this standard, any employee who inadvertently "participates" in a violation of a consumer protection regulation will be subject to liability under the Act, including the resulting treble damages and attorney's fees. This holding apparently applies to all employees and not only principals and persons at any specific level of authority. In the *Allen* case itself, two of the individual defendants were principals, but the third is described as simply an employee.

This seems to be a particularly counterintuitive and potentially unfair outcome in light of the absence of a intent element. While it may be reasonable to take the position that corporations and their principals should be assumed to be familiar with the regulations governing their activities, the same may not be said for all employees who merely "participate" in the violation of the regulation.

The difficulty in applying personal NJCFA liability to cases based on regulatory violations can also be seen by contrast to the prior cases that the *Allen* court relied on, which related to liability based

on affirmative acts. In each of these cases, the individual defendants were alleged to have made false statements to the purchaser or to have otherwise engaged in other plainly dishonest conduct.

While it may be reasonable to hold individuals who actually make false statements liable under the Act, imposition of personal liability on employees at any level of a corporation who "personally participate in" a violation of a regulation may be another matter. For example, several regulations require that certain forms used by specific businesses employ utilize a particular point typeface. See, e.g., N.J.A.C. 13:45A-26B.2(a)(2). As another example, one of many regulations governing home improvement contractors prohibits delays in beginning or ending work except for certain specifically listed reasons. See N.J.A.C. 13:45A-16.2(a)(7)(ii). Unless the "personal participation" standard is modified in practice to incorporate factors such as the level of decision-making authority of the individual against whom liability is sought, and whether, under the circumstances, it is reasonable to expect that person to be aware of the relevant regulation, the standard could place a wide range of innocent employees at risk of substantial liability. It may be that the exercise of this discretion is exactly what the *Allen* court had in mind when it remanded the case for further fact finding. Nevertheless, the impact of *Allen* is that NJCFA claims alleging a regulatory violation must be viewed by counsel with an enhanced appreciation for the broadened universe of potential defendants for which *Allen* seemingly paves the way. ■