

**HARWOOD LLOYD, LLC CLIENT BULLETIN**

**NJ SUPREME COURT UPHOLDS APPLICATION OF CONSUMER FRAUD ACT  
REGULATORY VIOLATIONS TO BUSINESS PRINCIPALS AND EMPLOYEES**

**By: Upneet S. Teji, Esq. and Russell Anderson, Esq.**

***Principals, Owners and Employees vulnerable to strict liability for  
their entity's violations in certain cases***

New Jersey's Consumer Fraud Act (the "CFA") at N.J.S.A. 56:8-1, et seq., is frequently employed by consumer plaintiffs across the State alleging fraudulent or other "unconscionable commercial" practices by businesses and other sellers of certain products and services. While similar in concept to common law fraud claims, the CFA prescribes a statutory regime of prohibited acts and practices in a variety of commercial contexts, including real estate transactions, "Going out of business sales", and food sales. However, CFA claims are generally pursued more aggressively due in significant part to their considerably favorable damages awards – *successful CFA claims are awarded treble (triple) damages and attorneys' fees.*

Previously, CFA claims involving regulatory violations were commonly asserted against business entities as a result of their regulatory violations as prescribed by the New Jersey Division of Consumer Affairs ("DCA"). However, on July 7, 2011, the New Jersey Supreme Court in Allen v. V and A Bros., Inc. upheld the Appellate Division's ruling which disregarded the barrier of entity protection, and allowed for principals and employees of businesses to be personally liable for their employer's violations.

**Categories of CFA Liability**

Generally, CFA claims fall into three categories:

- (1) Affirmative acts;
- (2) Omissions;
- (3) Violations of administrative regulations promulgated by the DCA.

This third category arising from regulatory violations is set forth in N.J.A.C. 13:45A-1, et seq., which includes DCA regulations for industries including, but not limited to: the sale of meat at retail; delivery of furniture; internet dating services; prepaid calling cards; home appliance services; and animal sales.

### **CFA Liability to Individuals under Gennari**

The New Jersey Supreme Court previously held in Gennari v. Weichert Co. Realtors that corporate officers and employees can be held personally liable for damages claimed under the CFA for their affirmative acts of misrepresentation and omissions to consumers. In those cases, liability was applied to individuals upon a showing that the individuals themselves participated in the prohibited conduct manifested by affirmative misrepresentations and omissions.

In contrast, liability and penalties arising from regulatory violations are generally asserted only against the entity (seller or business) in violation.

### **Personal Liability for CFA Regulatory Violations**

However, in Allen, the Supreme Court honed in on the issue of whether an officer or employee of an entity could be personally liable for a regulatory violation. The Court noted that it could not uniformly attach personal liability to every regulatory violation, thereby requiring a review of the particular regulation at issue.

The Court opined that a determination on whether a regulatory violation warrants personal liability to an officer or employee should be based on whether the relevant violation is one “over which an employee, for example, will have no input and therefore no control”. This test effectively distinguishes those violations which contain technical violations outside of individual employee control (such as a deviation from a required contract font size), from those violations that arise specifically from individual behavior (such as an employee unilaterally concluding that an inferior product be used instead of the product contracted for). In furtherance of this test, the Supreme Court drew a distinction between principals and employees of an entity.

#### *Distinguishing between Principals and Employees*

Specifically, the Court noted that principals can be “broadly” liable for regulatory violations, as they control and set business policies. In many cases, when the principals of an entity have adopted a course of conduct or general business practice for their firm which is in violation of a regulation, there is no reason to further extend liability to individual employees. The Court further concluded that when an employee unilaterally decides to deviate from the regulatory guidelines, the resulting liability should not be limited to principals and may extend to the employees themselves.

This holding is consistent with the “tort participation theory” prescribed in Saltiel, and does not require consumers to employ veil-piercing principles to assert liability against principals and employees of a business entity.

In Allen, the Court specifically addressed CFA regulations promulgated for Home Improvement Practices. Although the relevant regulations only imposed liability on a “seller”, the definition of a “seller” is broad and includes: “a person engaged in the business of making or selling home

improvements and includes corporations, partnerships, associates and any other form of business organization or entity, and their officers, representatives, agents and employees.” This broad definition opens the door to the potential attachment of personal liability to the individuals operating the entity or “seller” committing the regulatory violation.

### **Considerations**

Allen strengthens an already potent set of consumer protection laws by allowing consumer plaintiffs to directly claim liability against principals and employees of entities in violation of the DCA’s regulations without having to resort to veil-piercing principles.

The implications of this extension are considerable. Defense attorneys routinely find CFA claims offered in conjunction with a number of other claims. In many cases, if a principal or employee is not named, defendant business entities might not address such CFA claims in a prompt fashion. Moreover, in light of the economic regression for small businesses throughout the State, consumers may be faced with proceeding with CFA regulatory violation claims against undercapitalized businesses. Allen allows plaintiffs to directly assert claims of CFA regulatory violations directly against principals, and more importantly, employees, of business entities not in compliance with the relevant code.

It is a foregone conclusion that every business operating in New Jersey should be aware of the CFA regulations applicable to their industry. These include businesses engaged in:

- a) retail meat sales;
- b) furniture delivery;
- c) internet dating sites;
- d) general advertising;
- e) home improvement contractors;
- f) sale of animals;
- g) automotive sales and repair;
- h) and many others, as set forth in N.J.A.C. 13:45A-1 et seq. and N.J.S.A 56:8-1 et seq.

Business owners should review their business and employee management practices to ensure that *ultra vires* acts of employees are not attached to principals resulting from a firm-wide practice or policy. Conversely, employees of any CFA regulated business should be cautious in making independent judgment calls that depart from their employer’s established business practices as such a deviation might results in a regulatory violation could be held strictly against the employee.

*Harwood Lloyd, LLC regularly advises and represents businesses in New Jersey and New York in connection with DCA compliance and Consumer Fraud Act litigation.*