

BUSINESS LITIGATION UPDATE

CLIENT ALERT

DECEMBER 2008

New Jersey Appellate Division Issues Opinions Concerning Personal Liability of Corporate Officers

In October, the New Jersey Appellate Division issued two opinions concerning the personal liability of corporate officers for violations of the Consumer Fraud Act, N.J.S.A. 56:8-1 to 184 (“CFA”). In *Milgram v Comfort Direct, Inc.*, No. A-0360-07T2, 2008 WL 4702810 (App. Div. Oct. 2, 2008), the individual defendant was the president and fifty percent shareholder of the defendant company. He appealed the trial court ruling, which pierced the corporate veil and entered judgment against him individually. In *Lanza v. Secret Gardens Landscaping, Inc.*, No. L-1692-05, 2008 WL 4646890 (N.J. Super. App. Div. Oct. 14, 2008), the plaintiff appealed, claiming that the trial court erred by not piercing the corporate veil to hold the defendant corporate president and CEO liable under the CFA.

In both cases, the Appellate Division found that the CFA imposes direct personal liability on any “officer, director, . . . stockholder” personally engaged in unlawful activity. N.J.S.A. 56:8-1(d) (defining “person” as used in the CFA). In both cases, the Appellate Division recognized that piercing the corporate veil is unnecessary in CFA actions because the CFA “by its very terms imposes direct liability on a corporate principal.” *Milgram, supra*. According to the *Lanza*

court, “[o]ur case law has long recognized that a corporate officer or employee who participates personally in a violation of the CFA or its implementing regulations may be held individually liable for the violation.” *Lanza, supra*.

The CFA prohibits fraudulent conduct in connection with the sale or advertisement of merchandise or real estate. The Act “is to be liberally construed in favor of consumers.” *Gennari v. Weichert Co. Realtors*, 288 N.J. Super. 504, 533 (App. Div. 1996). Under the CFA, consumers enjoy far greater protection than under common law. Victims of consumer fraud may bring an action (or assert a counterclaim) for treble damages against any person in violation of the CFA. Plaintiffs may also seek attorneys’ fees, filing fees, and costs. N.J.S.A. 56:8-19.

The significance of the *Milgram* and *Lanza* cases is the following: (1) the Courts’ explicit recognition of a cause of action against principals and stockholders of business associations, holding them personally liable for CFA violations in which they personally engage or participate, even where their actions were performed within the scope of their corporate duties; and (2) the Courts’ explicit obviating of corporate veil piercing with regard to individual liability for CFA violations.

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Essentially, New Jersey courts have held that corporate form is of no consequence with regard to CFA claims. Where an individual personally participates in the fraudulent conduct, that individual faces liability for three times the actual damages suffered by the complaining party, in addition to attorneys' fees and costs. Thus, corporate principals and stockholders, as well as members of limited liability companies, should be

extra wary of their personal participation in conduct that potentially violates the Consumer Fraud Act. The corporate form provides no protection from personal liability with regard to CFA violations. Treble damages, in addition to costs and fees, could be far more devastating to an individual than they might be for a corporation. ■

■ Brian J. Ellis, Esq.

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Is Your Product Safe? Better Have Proof For Trial...

Generally, product liability defendants want to tout their product's safety record in defense of claims against them, but that record may not be admitted at trial without solid proof to back it up. If a product liability defendant plans to incorporate the absence of other accidents into its defense, it must be prepared to lay a proper foundation, which usually consists of a well documented safety record.

In *Forrest v. Beloit Corp.*, 424 F.3d 344 (3rd Cir. 2005), the Third Circuit held that where a manufacturer has sold many machines over several decades and compiled no information about the safety history of those machines, testimony alone to support the manufacturer's contention that there were no prior accidents should not be admitted at trial. In that case, a mill worker was injured when his arm became

stuck between two multi-ton rollers of a machine manufactured by defendant Beloit. At trial the court permitted defense witnesses to testify that they were not aware of any similar accidents involving the machine. The jury ultimately reached a defense verdict.

On appeal, the Court held that for a no-prior-accidents defense to be presented at trial, the defendant must demonstrate that the testimony relates to substantially identical products used in similar circumstances, provide information about the number of prior units sold and their use, and show that the defendant would likely have known about prior accidents if they had occurred. Without these specifics, testimony alone would be insufficient to admit a product's safety record into evidence.

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Recently, the Third Circuit employed its *Forrest v. Beloit* analysis in *Harold v. Black & Decker U.S. Inc.*, a consumer products liability case. There, the plaintiff was injured while using a Black & Decker Rotary Hammer. The trial court excluded records offered by Black & Decker consisting of a customer complaint hotline and reports of every claim of loss against Black & Decker. The jury returned a plaintiff's verdict. On appeal, the Third Circuit found that the district court erred in not admitting Black & Decker's evidence because the company satisfied its burden by maintaining and proffering a comprehensive database of claims made and lawsuits brought against it and its subsidiaries.

The lesson learned here is to maintain records that are up to date and specific. A defendant must be prepared to present concrete evidence of the safety history of substantially identical products used in similar circumstances, and this evidence must be presented by a witness with direct knowledge of the product's safety record. If you carry a solid safety record, be ready to demonstrate it down the road when it matters most. Without tangible evidence of a safety record, a court will likely exclude no-prior-accidents evidence. ■

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