

SECURITIES LAW ALERT

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NEW JERSEY SUPREME COURT HOLDS THAT THE CONSUMER FRAUD ACT DOES NOT APPLY TO SECURITIES TRANSACTIONS OR SERVICES RELATED TO SUCH TRANSACTIONS

In *Lee v. First Union National Bank*, ___ N.J. ___, slip op. (Sup. Ct. June 3, 2009), for the first time, the New Jersey Supreme Court has recently held that the New Jersey Consumer Fraud Act (“CFA”) does not apply to securities transactions, nor does it apply to a broker’s “services” in allegedly misappropriating a customer’s funds that were to be used to purchase securities. The holding that the CFA does not apply to securities transactions confirms a number of New Jersey state appellate and trial court and federal district court decisions that had similarly held that securities transactions are outside the scope of the CFA.

The plaintiff in *Lee* alleged that the defendant bank’s registered representative induced her to give him \$2,000 in cash to purchase shares of a mutual fund and that the defendants converted her money. The plaintiff alleged, among other things, that she suffered an economic loss as a result of the alleged misapplication of her funds, thereby constituting an unconscionable commercial practice in violation of the CFA. *Lee*, slip op. at 3-5. The trial court had dismissed the CFA claim for failing to state a claim, holding that the CFA is

inapplicable to the sale of securities. The Appellate Division reversed and reinstated the plaintiff’s CFA claim, holding that although securities are not “merchandise” subject to the CFA, the defendant registered representative’s “misappropriation” of plaintiff’s money, i.e., not the purchase of the mutual fund itself, constituted the unlawful practice that plaintiff claimed violated the CFA. *Id.* at 5-6.

The Supreme Court reversed, holding first that securities are not meant to be included in the definition of merchandise under the CFA. In this regard, the Supreme Court noted approvingly the numerous state and federal court decisions that had reached the same conclusion. *Id.* at 12-14. The Court found further that plaintiff’s allegations should not be “contorted” to achieve coverage under the CFA by calling defendant registered representative’s conduct a fraudulent “service” in order to draw it within the ambit of the CFA. Based on its examination of the legislative intent of the statute, the Supreme Court concluded that the CFA was not meant to reach the sale of securities and that this limitation prevents the plaintiff from characterizing the defendant registered representative’s alleged wrongful conduct as a “service” connected

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with the sale of securities. *Id.* at 15. The Court observed that permitting liability under the CFA for “services” in connection with items that are not merchandise under the CFA would effectively provide an end-run around the statutory definition of “merchandise,” thereby rendering the definition of merchandise superfluous and

making the CFA's scope limitless. The Court concluded that where an entire category of items is intentionally excluded from the definition of “merchandise” under the CFA, such as securities, the “service of selling that item is an inseparable component of the marketplace for that item.” *Id.* at 15-16. ■

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