THE PASCHOS LAW UPDATE NEWSLETTER
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ATTORNEYS AT LAW

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I. CORPORATE LAW LITIGATION

Employees and Officers of a Corporation May be Individually Liable Under the Consumer Fraud Act (CFA) for Acts they Undertake Through the Corporate Entity

In *Allen v. V and A Brothers*, --- A.3d ---, 2011 WL 2637270 (N.J. July 7, 2011), Plaintiffs, William and Vivian Allen, contracted defendant, V and A Brothers, Inc. to landscape their property and build a retaining wall. After the work was completed, plaintiffs noticed what they perceived to be evidence of defective work. Plaintiffs hired an engineer to investigate who concluded that the problems with the retaining wall were the result of V and A Brothers' work.

Plaintiffs filed a two-count complaint naming both corporate and individual defendants. The first count against V and A Brothers, Inc., the corporate defendant, alleged that the corporation breached its contract with plaintiffs by improperly constructing the retaining wall and by using inferior backfill. The second count of the complaint was directed to the corporation, but also asserted claims individually against Angelo and Vincent's estate, the two owners of the corporation, and against Thomas Taylor, the company's employee. That count of the complaint alleged three violations of the CFA: (1) the failure to execute a written contract; (2) the failure to obtain final approval for the construction before accepting final payment; and (3) the failure to obtain plaintiffs' consent before modifying the design of the retaining wall and substituting the inferior backfill material.

The lower court, granted plaintiffs' summary judgment against the defendant corporation on both the breach of contract claim and on the claim that the contractor had violated the CFA. However, the court dismissed the CFA claims against the individual shareholders of the contractor-corporation.

The Appellate Division reversed the trial court's order dismissing the claims against the individual defendants finding support for individual liability in the statutory language that defines a violation of the CFA as the commission of an "unlawful practice" by a "person," and relying on precedents in which liability was imposed "upon individuals who were principals or employees of corporations ... and who directly participated in the conduct giving rise to CFA liability." The Supreme Court granted plaintiffs' petition for certification challenging the conclusions of the appellate court.

The court was presented with a question regarding the interplay between CFA claims brought against corporate entities and individual employees or officers who are also named as

defendants. Specifically, the court considered whether, and under what circumstances, the owners and employees of a corporation may be individually liable for CFA violations that are directly attributable to acts undertaken by them through the corporate entity.

The court held that "[i]n light of the broad remedial purposes of the CFA and the expansive sweep of the definition of "person," it is clear that an individual who commits an affirmative act or a knowing omission that the CFA has made actionable can be liable individually." In support of this the Court cited prior decisions in which the court held that corporate officers and employees could be individually liable pursuant to the CFA for their affirmative acts of misrepresentation to a consumer. Furthermore, the court noted that the appellate division and trial courts have also recognized that individuals may be independently liable for violations of the CFA, notwithstanding the fact that they were acting through a corporation at the time.

As such, the court held that employees and officers of a corporation may be found to bear individual liability to consumers under the CFA.

<u>The Community Interest Privilege Applies Only to Those Communications That Were Truly Made in the Course of a Joint Defense Effort</u>

In *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, 2011 WL 2623306 (E.D.Pa. July 5, 2011), class action plaintiffs filed antitrust claims against Cephalon alleging that it established an illegal monopoly for the drug Provigil by paying more than $200 million in settlements to four generic manufacturers in return for agreements that they would delay going to market with cheaper versions of the drug. The suits allege that Cephalon concocted a "reverse payment" scheme in which it filed patent suits against the four generic firms and then, instead of pressing those claims, opted to make a series of payments to the defendants to preserve its monopoly. The four generic firms named as defendants were Barr Pharmaceuticals Inc., Teva Pharmaceutical Industries, Ranbaxy Laboratories Ltd. and Mylan Laboratories Inc. Plaintiffs allege that the reverse payment settlements constituted an unlawful restraint of trade.

In the course of litigation, Plaintiffs requested documents in discovery regarding communications that Barr had with its pharmaceutical supplier, Chemagis. Barr refused to produce certain documents, raising the community-of-interest privilege. Plaintiffs filed a motion before the Court.

An in camera review revealed that the documents related to the settlement between Barr and Cephalon and how, financially, the settlement terms would affect Chemagis. The documents withheld were generated from December of 2005 through January of 2006. The settlement between Barr and Cephalon occurred shortly thereafter on February 1, 2006.

The community-of-interest privilege raised by Barr allows attorneys "representing different clients with similar legal interests to share information without having to disclose it to others." Barr justified withholding the documents in question based upon several theories under this privilege. First, Barr asserted that the community-of-interest privilege applies because it shared a substantially similar legal interest with Chemagis as they jointly developed a generic version of Provigil® and thus both were at risk of being sued for infringement by Cephalon. Barr claims that

application of this privilege applies even where one entity, here, Chemagis, was not a party to the patent litigation between Cephalon and Barr.

Plaintiffs argued that the documents in question are discoverable because Chemagis' interests in the Cephalon/Barr patent litigation were purely “financial” and that a common “legal interest,” which is required for the community-of-interest privilege to apply, did not exist between the two companies. Plaintiffs also stressed that there was never a joint defense strategy between Barr and Chemagis, especially where Chemagis was never sued by Cephalon.

The court rejected plaintiffs’ argument that the privilege did not apply because Chemagis was not sued in the Cephalon/Barr patent case and that Chemagis had no expectation that they would be sued. The court noted that in prior cases, courts have recognized the community-of-interest privilege even where one of the parties has not been sued.

In further analyzing whether the privilege applied, the court noted that in order for the community-of-interest privilege to apply, the party asserting the privilege must establish that: 1) the communications were made in the course of a joint defense effort; 2) the statement was designed to further the effort; and 3) the privilege has not been waived.

The court concluded that Barr was unable to meet these standards finding that the timing in which the documents were created did not support the fact that the communications were made as part of an ongoing, coordinated, legal defense strategy, or that the communications were made to further that effort. Barr and Chemagis entered into a supply agreement in August of 2001, while the Cephalon/Barr patent litigation commenced in March of 2003 and continued for three years, settling in February of 2006.

Barr also relied heavily upon a “Joint Defense Agreement” entered into with Chemagis on February 19, 2003, just prior to the commencement of the Cephalon/Barr litigation. While this document does reflect Barr and Chemagis' intention to engage in a shared defense, nothing else in the record before the Court reflected that any actual concrete, tangible steps were taken to effectuate or implement that joint defense. A joint defense agreement, drafted in February of 2003, that recites terms such as “mutuality of interest in a common and joint defense” did not establish that communications made two years later were part of a joint, ongoing, coordinated defense strategy. As such, the court held that there was never a joint, coordinated and ongoing defense strategy and therefore, the community-interest privilege did not apply.

II. EMPLOYMENT LAW LITIGATION

The NJLAD Does Not Provide for an Affirmative Defense to a Claim of Age Discrimination that “Lawful Considerations Other than Age” Motivated a Force Reduction Decision

In *O’Brien v. Telcordia Technologies, Inc.*, 20 A.3d 1154 (N.J.Super. June 13, 2011), Plaintiff was a long-term employee of Telcordia, occupying, since 1998, a position as a managing

director in the company's Customer Service and Care Center (CSCC). As the result of an economic downturn in the telecommunications industry, commencing in 2001, Telcordia began a process of reducing its workforce from a peak of 8,000 employees to less than 2,600 in 2007. In 2002, Telcordia reduced its workforce by 787 employees, including plaintiff, who was laid off on October 30, 2002 at the age of fifty-one, after employment by Telcordia and its predecessors of more than twenty-nine years.

Following her lay-off, on July 24, 2003, plaintiff filed suit, alleging both age discrimination and "sex-plus" discrimination, based on her status as a mother of two small children. Following extensive discovery, Telcordia successfully moved for summary judgment. A subsequent motion by plaintiff for reconsideration of the dismissal of her age discrimination claim was denied. Plaintiff appealed only the judgment dismissing that claim.

Among other things, plaintiff argued that "as a matter of first impression" that the NJLAD provides a distinct affirmative defense to a claim of age discrimination that Telcordia did not satisfy. In making this argument, plaintiff focused on the emphasized portions of N.J.S.A. 10:5–12a, which states:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status [etc.] ... of any individual ... to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual ....
It was plaintiff's position that this statutory provision required Telcordia to establish, as an affirmative defense, that "lawful considerations other than age" motivated its force reduction decision in plaintiff's case. Plaintiff analogized the underscored language to the ADEA's provision that "it shall not be unlawful for an employer" to take action otherwise prohibited by the ADEA when the action "is based on reasonable factors other than age." 29 U.S.C.A. § 623(f)(1). The court noted that the United States Supreme Court has interpreted this language as creating an affirmative defense that a defendant employer must raise and prove. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 92, 128 S.Ct. 2395, 2401, 171 L.Ed.2d 283, 291 (2008).

The court rejected plaintiff's argument. The court instead accepted Telcordia's view that the emphasized language in the NJLAD qualifies the conditions under which forced retirements can occur. In support of that position, Telcordia noted that in 1998, the Legislature amended the NJLAD to prohibit forced retirements on the basis of age. When doing so, the Legislature amended N.J.S.A. 10:5–12(a) to add the emphasized language, in order to ensure that retirements could be mandated on the basis of other legitimate considerations. The court agreed with Telcordia's analysis, finding nothing in the legislative history of the amendment that would suggest an interpretation such as plaintiff suggests. As such, the court rejected plaintiff's arguments based on this theory.

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