Home Improvement Disputes Under the Consumer Fraud Act

Background, Recent Case Law, and Practice Pointers

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The Consumer Fraud Act (CFA) was enacted in 1960 "to give consumers relief from fraudulent practices in the market place and to deter merchants from employing those practices."[1] The Legislature was concerned with "sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kinds of selling or advertising practices."[2]

The attorney general was authorized to enforce the act by investigating consumer fraud complaints and promulgating rules and regulations. In 1971, the CFA was amended, giving New Jersey one of the strongest consumer protection laws in the United States. The 1971 amendments:

1. Expanded the definition of "unlawful practice" under the act;
2. Broadened the attorney general's enforcement powers; and
3. Provided for private causes of action and an award of treble damages, attorney's fees and costs.[3]

The act applies to all consumer transactions that involve the sale of consumer merchandise or services generally sold to the public. Merchandise is defined as including any objects, wares, goods, commodities, services, or anything offered, directly or indirectly, to the public for sale.[4] Because the CFA is remedial legislation, it is construed "liberally to accomplish its broad purpose of safeguarding the public."[5]

To recover under the CFA, a plaintiff must prove 1) an unlawful practice 2) resulting in an ascertainable loss of money or property; and 3) a causal connection between the unlawful conduct and the loss.[6] An unlawful practice is defined under the act as "any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation...in connection with the sale or advertisement of any merchandise...."[7]

An unlawful practice may arise from: 1) an affirmative act; 2) a knowing omission; or 3) a violation of an administrative regulation.[8] An affirmative act, such as a written or oral representation, violates the act if it has the capacity to mislead the consumer regardless of whether the person was actually misled, and regardless of the intent of the merchant making the representation.[9] By contrast, a knowing omission is the failure to make a representation of material fact and requires proof that the defendant had knowledge and acted with the intent to deceive the consumer.[10]

As will be discussed in more detail, *infra*, a breach of contract alone is not a violation of the act. However, if aggravating circumstances are present, such as bad faith or a lack of fair dealing, a breach of contract can be elevated to an unconscionable commercial practice in violation of the act.

The third category of unlawful practices involves violations of regulations adopted by the Division of Consumer Affairs (DCA) under the act. Under this category, a merchant violates the act regardless of his or her intent, and is strictly liable for any damages resulting from its violation. Specific regulations adopted by the division that govern the conduct of certain businesses include, among other things: deceptive mail order practices; motor vehicle advertising practices; automotive sales practices and automotive repairs; the delivery of household furniture and furnishings; merchandise advertising; serv-

icing and repairing of home appliances; and disclosure of refund policy in retail establishments.

The DCA has also adopted specific regulations governing home improvement practices.[11] The regulations require, *inter alia*, that contractors place in writing all contracts for improvements in excess of $500, as well as any changes to the contract.[12] All written contracts must be signed by all parties and must include the following terms and conditions in "understandable language": 1) the legal name and business address of the contractor; 2) a description of the work and the principal products and materials that will be used or installed; 3) the total contract price, including all finance charges and, when the contract is based on time, the hourly rate for labor; 4) the date or time period when work will begin and be completed; 5) a description of any mortgage or security interest that will be taken in connection with financing or sale of the improvement; and 6) a statement of any guarantee or warranty relating to any materials, products, labor or services made by the seller.[13]

If any guarantees or warranties are provided, the seller must furnish the buyer with a written copy, which shall be specific and include all exclusions and limitations regarding their duration or scope.[14] The copy must be given to the buyer at the time of the bid and when the contract is executed, except that separate guarantees or warranties for products or material can be given at the time of installation.[15]

Regarding proscribed actions under the regulations, a contractor cannot do any of the following: 1) engage in bait selling; 2) offer or advertise any gift, bonus or free item without full disclosure of the terms and conditions, including the expiration date and date when the gift, bonus or free item will be given; 3) misrepresent or mislead the buyer into believing that no obligation will accrue from signing any documents or that the buyer will be relieved from some or all obligations under the contract by signing any documents; 4) request a buyer to sign a certificate of completion or make final payment prior to the completion of the work; 5) fail to begin or complete work on the date set forth in the contract; 6) fail to give the homeowner timely written notice of any reasons beyond the contractor's control for a delay in the performance and completion of the work and when the work will commence or be completed; and 7) misrepresent that the home or a part thereof is defective, dangerous or in need of repair or replacement.[16]

The regulations provided for in N.J.A.C. 13:45A-16.2(a) are not meant to be exhaustive.[17] As such, practices not specified in the regulations may nevertheless constitute unlawful consumer fraud.[18]

In addition to the regulations, in 2004 the Legislature adopted the Contractor's Registration Act (CRA), which supplements and amends the CFA.[19] The CRA requires contractors (with certain limited exceptions) to register with the DCA on or before Dec. 31, 2005, to annually register thereafter with the director and to file an amended registration within 20 days after any change occurs in the information provided in the registration.[20] Under the CRA, any contractor engaged in home improvements must maintain commercial general liability insurance with a minimum amount of $500,000 per occurrence.[21]

The CRA, like the CFA, requires that all home improvement contracts in excess of $500 be in writing, be signed by all parties and contain certain terms.[22] However, unlike the CFA, the CRA requires that the contract include a copy of the insurance certificate and the telephone number of the insurance company.[23] Significantly, under the CRA a consumer has the right to cancel the contract within three business days after receiving a copy of it, and the contract must contain the following language:

> Notice to Consumer
>
> You may cancel this contract at any time before midnight of the third business day after receiving a copy of this contract. If you wish to cancel this contract, you must either:
>
> 1. Send a signed and dated written notice of cancellation by registered or certified mail, return receipt requested; or
> 2. Personally deliver a signed and dated written notice of cancellation to:
>
> (Name of contractor)
>
> (Address of contractor)
>
> (Phone number of contractor)
>
> If you cancel this contract within the three-day period, you are entitled to a full refund of your money. Refunds must be made within 30 days of the contractor's receipt of the cancellation notice.[24]

Additionally, regulations have been adopted to implement the CRA and establish standards to facilitate enforcement of the act.[25] Under the regulations, a contractor must include his or her registration number on all advertisements and business documents, such as contracts and invoices.[26] Further, as of Nov. 4, 2008, a contractor must include the phone number for the DCA on all contracts, invoices and correspondences given to consumers.[27]

A failure to comply with the CRA is considered an unlawful practice under the CFA.[28] Further, a person who knowingly violates the CRA is guilty of a fourth-degree crime.[29]

Recent Appellate Decisions (2008–2010) in Home Improvement Litigation Under the CFA[30]

With one or two notable exceptions, appellate decisions addressing home improvement disputes under the CFA during the past three years broke little new ground. Those not addressing new or novel questions instead fleshed out

the meaning and application of existing principles, and applied them to new factual situations. In doing so, these decisions elucidated and clarified the meaning of existing but important legal principles under the CFA, and provide useful guidance for practitioners in this area.

The questions and issues addressed in this area under the CFA have included: the circumstances under which a contractor performing work in connection with construction of a new home can be subject to liability under the CFA; the theory and principles applicable to determine whether an individual owner, officer, director or employee of a contracting entity can be personally liable for CFA violations; treble damages under the CFA and the special civil part jurisdictional limitation of $15,000; the necessity of proof and findings of the causal link between a CFA violation and ascertainable loss in order to support a treble damage award; and the circumstances under which the defense of equitable estoppel will preclude a claimed violation of the CFA.

A review of the decisions on these issues is useful not only for how each issue was resolved, but also for important points of law and practice under the CFA.

The CFA and New Home Construction

In *Czar, Inc. v. Heath,*[31] the Supreme Court addressed the question of whether a contractor hired by a homeowner to design and install a kitchen and to perform certain other interior work in a new home then being built for the homeowner by a different contractor was engaged in new home construction, which would make him exempt from the CFA and the claim subject to the New Home Warranty and Builders' Registration Act,[32] or was instead performing home improvements, which would subject him to potential liability under the CFA.[33]

In a six to one decision,[34] the Court concluded:

> Because the several statutes relied upon by the parties, and the regulations promulgated pursuant to each of them, were designed to be understood and applied as an integrated scheme of protections for homeowners, and because adopting [the contractor's] analytical approach might leave these homeowners without the remedy that the Legislature intended to be available to them, we conclude that [the contractor], which neither acted as the general contractor, nor qualified as a builder of new homes, was engaged in the business of home improvements and subject to the remedies of the CFA.[35]

The homeowners in *Czar* had contracted with the general contractor to build a new home, and after much of the home had been completed, they hired a different contractor to design the kitchen, which included relocating plumbing and electrical fixtures, building and installing custom kitchen cabinets, and performing other interior work relating to the kitchen. After the homeowners refused to pay the kitchen contractor the full contract price, claiming he failed to perform his work according to the terms of the contract and that the work was not workmanlike or completed on time, and that the kitchen cabinets were not as had been promised, two resulting actions, one by the contractor for the balance of the contract price and one by the homeowners claiming relief on several grounds, including the CFA, were consolidated.

The trial court dismissed the CFA claim on the ground the work was essential to the construction of a new residence, and thus was properly classified as the construction of a new residence rather than performance of home improvements. The Appellate Division reversed,[36] finding the exemption for construction of a new residence inapplicable to the kitchen contractor's work, in part because the contractor "was not the general contractor hired to construct the new residence, did not install or build any structural improvements in the home, but rather contracted directly with the homeowners for the installation of custom kitchen cabinets, front door, interior doors and certain moldings."[37]

Alternatively, the Appellate Division concluded that even if the contractor was considered to be engaged in new home construction, that separate statutory scheme included a reservation of, and an election of remedies under N.J.S.A. 46:3B-9, which would preserve a CFA cause of action as an alternative form of relief.[38] The Supreme Court affirmed.

The Court analyzed the interplay between the CFA, the Contractors' Registration Act amendments to the CFA,[39] the regulations adopted pursuant to those amendments, the New Home Warranty Act, and the regulations promulgated to implement that statute, N.J.A.C. 5:25-1.1 to 5.5.[40] Concerning the CFA, the Court noted that it "need only reiterate that it is broad remedial legislation enacted for the protection of consumers for a variety of goods and services…and that its history has been marked by the 'constant expansion of consumer protection.'"[41] The Court further noted that "over the years following the initial adoption of the CFA, the Legislature has repeatedly amended and expanded the reach of its provisions, often by adding sections to address particular areas of concern and to include them specifically within its protective sweep."[42]

After reviewing provisions of the New Home Warranty Act and the CFA, the Court determined that the Legislature planned to "create a seamless web of protections for the homeowner," with "complementary protections for people who were, on the one hand, either building or

buying new homes or, on the other hand, using the services of persons or entities who are engaged in making home improvements."[43] However, the Court found no basis to conclude that "the Legislature intended that its exemption from registration for contractors covered by the New Home Warranty Act would create a broad exemption from the requirements it was imposing on home improvement contractors in its CFA amendments."[44] Unlike the expansive language used in the statutory scheme regulating home improvement contractors, the simple definition of "builders" contained in the New Home Warranty Act[45] did not warrant a broad reading as the contractor argued, which would expand the phrase "engaged in the construction of new homes" to include anyone "participating in" or "playing a role in" the construction of a new home, or anyone "working on the premises" of a new home under construction.[46]

The Court found it critical that the kitchen contractor, while arguing to apply the definitions in the New Home Warranty Act, never suggested that it either registered as a new home builder pursuant to the act, or made available to the homeowners the remedy that is central to that statute's protections.[47] The Court rejected the contractor's position because it would require reading the two statutes in a manner that would leave some contractors not subject to either statute and would provide diminished protection for homeowners.[48]

The Court found no basis on which to conclude the "Legislature intended that a contractor engaged by a homeowner could escape registration and participation in the warranty program applicable to new home builders and also avoid registration and compliance with the applicable remedies available under the statute and regulations that govern home improvement contractors."[49] There is no place in the statutory obligations of contractors or statutory protections for homeowners "for a contractor to use the one with which it did not comply as a sword against the homeowners' whose rights the Legislature intended to protect."[50]

> That defendants hired plaintiff to build the kitchen and make other changes to the home not yet completed is of no moment. Instead we look beyond the description and location of the work to be performed, and focus on whether the entity hired to perform it would have been required to, or could have adhered to, the New Home Warranty Act registration warranty program. As [kitchen contractor] simply did not, we think it plain that its argument that it was engaged in the construction of a new home fails.[51]

The Court thus affirmed the judgment of the Appellate Division.[52]

As a result of the decision in *Czar*, and as pointed out by the dissent, any claim involving the construction of a new home will now almost certainly fall under either the CFA or the New Home Warranty Act. If the contractor has not registered under the New Home Warranty Act and has not made available the warranty required by the act, it is unlikely the contractor will be allowed to defend against a claim under the CFA on the ground that it was involved in the construction of a new home. Finally, in determining which act applies, the *Czar* decision requires courts to focus on whether the entity hired to perform work would have been required to and could have adhered to the New Home Warranty Act registration and other requirements.

Personal Liability for CFA Violations

The issue of personal liability for CFA violations is currently pending in the New Jersey Supreme Court. Although several earlier decisions had found individual owners or officers personally liable for CFA violations or acknowledged the viability of such a claim,[53] the applicable theory and standard for determining such liability had not been clear. In *Cardillo v. Bolger*[54] the Appellate Division clarified these issues. The homeowner had sought a refund under the CFA from both the corporate contractor and its individual owner based upon alleged violations of the CFA regulations governing home improvement practices. At trial, in seeking to impose personal liability on the individual, the homeowner relied upon the individual's active participation in the violations, and upon the tort participation theory of liability recognized in *Saltiel v. GSI Consultants, Inc.*,[55] which had not involved a claim under the CFA.

The trial court found the homeowner had established a CFA claim against the corporate contractor based upon several regulatory violations, including failure to have a license, commencing work without the requisite permits, misrepresenting adequacy of materials and failing to complete the work as required by the contract. However, the court dismissed the claims against the individual owner on the grounds that: 1) he was not involved in a fraudulent scheme and the tort participation theory of individual liability was inapplicable, since that theory as described in *Saltiel* required more than was necessary to impose strict liability for CFA regulatory violations; and 2) the CFA claim sounded in contract rather than tort and thus the tort participation theory had not been proven.[56]

The homeowner appealed, arguing that the corporation's CFA violation sounded in tort rather than contract, and that the owner was made individually liable for his own acts, though done as a corporate officer and shareholder, pursuant to the definition of "person" in the CFA.[57]

The Appellate Division reversed. The court first noted that the CFA and the

home improvement practices regulations apply equally to corporations and the individuals acting on their behalf, based upon: 1) the definition of "person" under the act, which includes any natural person and any officer or stockholder of a corporation; and 2) the definition in the regulations of "seller" as "a person engaged in the business of making or selling home improvements and includes corporations…and their officers…and employees."[58]

Noting the CFA's remedial purpose and its liberal construction in favor of consumers, the court was satisfied that "the trial judge had erred in applying the tort participation theory to the CFA claim to exonerate [the owner of the corporate contractor] because he is directly liable to [the homeowner] under the definition of 'persons' in the CFA and of 'seller' in the applicable regulations."[59]

The decision in *Saltiel* did not require a different result, because that case did not involve a CFA claim, and the Supreme Court did not consider the necessity of using the tort participation theory to determine whether liability should be imposed on corporate officers under the CFA.

The court explained its holding as follows:

> We find the Judge's conclusion that [individual owner of the contractor] was not liable for his acts in violation of the CFA because they were essentially contractual in nature to be inconsistent with the plain language of the CFA and the regulations, which are to be given a liberal construction. The tort –participation theory simply cannot circumscribe the reach of the CFA and the remedies it provides to consumers. In any event, even if it is applicable, the *Saltiel* citation to *Koscot* can reasonably be construed to suggest that corporate officers, directors, shareholders and employees are individually liable for statutory violations in which they participate, just as they are individually liable for intentional torts in which they participate because the duty is imposed by law, like a tort. We, thus, find the distinction between contract and tort irrelevant to the imposition of individual liability for statutory violations by corporate officers, directors, shareholders, and employees within the scope of their authority to act for the corporation and conclude that [individual owner of the contractor] is personally liable for the refund ordered.[60]

Subsequent to the *Cardillo* decision, the Appellate Division decided *Allen v. V and A Brothers, Inc*.[61] In *Allen*, the court found that the principals and employees of a contractor corporation could be personally liable to homeowners for CFA violations to the extent that they participated in the violation of regulations requiring execution of written contract, obtaining final approval of work before final payment and modifying the original design of a retaining wall without the homeowners' knowledge or consent. Although the *Allen* court did not cite to the *Cardillo* decision, its rationale and analysis is consistent with the *Cardillo* decision.

Based upon the current law, individual owners, officers, directors, and employees of corporations are personally liable for CFA violations in which they participate, even if within the scope of their authority to act for the corporation. The distinction between contract and tort is irrelevant. It should not matter whether the contract for the work that is the subject of an alleged CFA violation was made exclusively with the corporate entity.

The New Jersey Supreme Court granted certification in *Allen* and it is expected to resolve the issues of personal liability under the CFA.

Special Civil Part Jurisdictional Amount Limitation and Treble Damages

Rule 6:1-2(a)(1) provides that only "[c]ivil actions seeking legal relief when the amount in controversy does not exceed $15,000" are cognizable in the special civil part. Rule 6:1-2(c) further provides:

> Where the amount recoverable on a claim exceeds the monetary limit of the Special Civil Part…, the party asserting the claim shall not recover a sum exceeding the limit plus costs and on the entry of judgment shall be deemed to have waived the excess over the applicable limit.

In *Della Valle v. Angel Remodeling,*[62] the Appellate Division held that treble damage awards under the CFA are limited to the $15,000 jurisdictional limit on cases in the special civil part.

Della Valle involved two separate and unconsolidated actions in the special civil part: one by the homeowners alleging breach of contract and violations of the CFA and its home improvement practices regulations, and one by the contractors for breach of contract and conversion. On the date scheduled for trial of the homeowners' action, the trial court tried that case and entered judgment, despite the objection of the contractors (appearing *pro se*), who had requested an adjournment to obtain their documentation necessary to try their separate action.[63] The judgment included an award of $15,000 for breach of the home improvement contract, $45,000 for treble damages for violations of the CFA, and an award of counsel fees under the CFA.

The Appellate Division reversed, holding that the trial court's denial of the request for a continuance was a mistaken exercise of discretion in the circumstances.[64] It also held that the judgment was erroneous because the $45,000 award of treble damages

exceeded the $15,000 jurisdictional limit on cognizable claims in the special civil part.[65] In reaching this conclusion, the court in part relied upon a 1978 decision, *Nieves v. Baran,*[66] in which it had determined that a calculation of the then jurisdictional limit of the county district court of $3,000 included the treble damages provided in the CFA, but did not include counsel fees under the CFA. The Supreme Court subsequently determined that an award of counsel fees under the CFA is not subject to or to be considered part of the $15,000 jurisdictional amount limitation on actions filed in the special civil part.[67]

Equitable Estoppel as a Defense to CFA Violations

Equitable estoppel is:

> The effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed…as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse….The doctrine is designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience.[68]

Since the 2001 decision in *Joe D'Egidio Landscaping, Inc. v. Apicella*,[69] equitable estoppel applies to the Consumer Fraud Act.

In *Apicella*, the contractor sued a homeowner for damages owed in connection with paving of the homeowner's driveway. The homeowner counterclaimed, alleging poor workmanship, and also defended on the basis that the contract was unenforceable because it was not in writing as required by a regulation under the Consumer Fraud Act.[70] The Appellate Division held that the homeowner was equitably estopped from invoking the shield of the regulation because it was his very own conduct (*i.e.*, insisting that a written contract was unnecessary in light of his longstanding relationship with the contractor) that caused the violation.[71]

In *B&H Securities, Inc. v. CKC Condominium Association, Inc*.[72] the Appellate Division again addressed whether an alleged CFA violation was subject to the defense of equitable estoppel. There, a fire alarm system contractor sued a condominium association for the outstanding balance due on the contract for completion of a prior contractor's work in installing a fire alarm system at the condominium association's premises. After commencing the work, the contractor advised the association that the work necessary to complete the project would exceed the estimated work in the original proposal, and suggested that, per the contract proposal, a change order should be executed.[73] The association representative responded that he did not have time to prepare a change order, and gave the contractor permission to proceed with the expanded schedule, telling the contractor to do what he needed to get the job done.[74]

The trial court rejected, as a matter of law, the association's claim that the contractor had violated the CFA and its home improvement regulations requiring contract modifications to be in writing, thus rendering the contract unenforceable.[75] The trial court not only found that there had been no violation either of the act or the regulations, but also that the association was barred by equitable estoppel from raising those violations as a defense.[76] The Appellate Division affirmed substantially for the reasons stated by the trial court, but elaborated on the portion of the trial court's ruling that the condominium association was equitably estopped from asserting the defense under the particular facts and circumstances as found by the trial court.

The court held no meaningful difference existed between the circumstances in *Apicella* and those before the court in the current matter, stating:

> [The contractor] relied on [the association's representative's] insistence that the work proceed to completion without benefit of a formal, written work order. Even more significant here, [the contractor] attempted to comply with the applicable regulations by offering to draft a change order, but [the association representative] declined the invitation, opting instead to forego formality in favor of expediency. Under the circumstances, were we to conclude that [the association] is entitled to invoke the very statutory and regulatory protections [it] consciously repudiated, the result would be to permit [the association] to retain, at no cost, the fruits of the contractor's labor. Such a result would further none of the laudable legislative or regulatory objectives implicated here, nor be responsive to the demands of justice or good conscience.[77]

Required Proof and Findings to Support Treble Damages: Causal Link Between the Violation and Ascertainable Loss

The CFA provides that "[a]ny person who suffers any ascertainable loss…as a result of the use or employment…of any…practice declared unlawful under this Act…may bring an action or assert a counterclaim therefor in any court of competent jurisdiction."[78] This now well-established "ascertainable loss" requirement of the act, which is necessary to support an award of treble damages, and which requires that the loss result from or be caused by the CFA violation, was addressed by the court in *Fernandes v. Navas*,[79] in a situation involving both breaches of contract and violations of the CFA.

There, homeowners sued their home renovation contractor for breach of contract and violations of the CFA. The homeowners had paid the contractor a total of $120,000 against a total proposal/contract price of $124,000, and the contractor demanded an additional $60,000 to finish the work. When the homeowners refused, the contractor failed to perform any further work.[80] Proofs at trial included regulatory deficiencies in the contract and incomplete or deficient work concerning most aspects of the renovation, and expenses exceeding $100,000 incurred to finish the renovation work.[81]

The trial court found that the contract violated the CFA's regulations, and that performance of the job was incomplete and not in accordance with the proposal, and that "because of the delays, and the representations that were not kept, [homeowners] incurred an additional $114,641.51 in actual out-of-pocket costs for items that should have been included in the contract."[82] The trial court viewed this expense completion amount and the amount paid on the contract of $120,000, which it described as the amount representing the refund remedy, as alternative measures of ascertainable loss.[83] The trial court chose to use the refund amount of $120,000 as the measure of ascertainable loss, which the court tripled under the treble damage provision of the act, and entered judgment in the amount of $360,000.[84]

As described by the Appellate Division, the trial court "premised his damages award solely on defendant's violation of regulations" and, although finding the homeowner incurred damages due to the contractor's "delays and the representations that were not kept," the court did not address the extent to which those delays and unkept representations constituted violations of the CFA.[85]

The Appellate Division agreed that the contractor had violated numerous home improvement practices regulations relating to the form and substance of the proposal.[86] However, the court noted that the trial judge had failed to consider whether the delays and misrepresentations by the contractor constituted "unconscionable commercial practices," which would be a separate violation of the CFA, independent of the regulatory violations, and also failed to consider whether any of the losses stemmed from contractual breaches by the contractor that did not amount to unlawful practices under the CFA.[87]

The court also noted that the trial court had chosen the $120,000 figure as the measure of damages without engaging in any further analysis.

> The trial judge thus failed to make any findings on the critical issue of the amount of "loss" that was directly attributable to defendant's violations of the CFA…[T]he judge failed to identify what losses stemmed from defendant's regulatory violations and/or from defendant's "unconscionable commercial practice[s]" of "delays and misrepresentations." [T]he judge also neglected to consider whether any of plaintiff's losses resulted from contractual breaches that did not rise to the level of unlawful practices" prohibited by the CFA.[88]

The court concluded that under the circumstances the contract price awarded by the trial court may not have been the correct measure of damages because some of the contractor fraud occurred in the course of performance, not in the actual contracting for the work, and the homeowners' ascertainable loss attributable to the regulatory violations may not have been equal to the full amount of the $120,000 paid to the contractor.[89]

The trial record before the Appellate Division was insufficient to determine whether the homeowners had satisfied their burden of proving the amount of the ascertainable loss that was caused by the CFA violation sufficient to support the treble damage award, rather than by simple breach of contract. Consequently, the court vacated the damage award and remanded for more specific findings on the damages issue.

> The trial judge failed to make express findings regarding the "causal connection" between [contractor's] unlawful practices and [homeowner's] losses. It appears that at least some of those losses were sustained as a result of [contractor's] improper performance of the contract, rather than the regulatory violations in the formation of the contract itself…[I]t may also be that some of [contractor's] conduct amounted to contract breaches that do not constitute "unlawful practice[s]" within the purview of the CFA. On remand, the trial judge must consider this and make more specific findings on the damages issue.
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> Therefore, because the record contains no meaningful analysis either of [homeowner's] ascertainable loss or the "causal connection" between such loss and [contractor's] conduct, we remand this matter to the trial court for reconsideration of these issues.[90]

The recent Supreme Court decision of *Lee v. Carter-Reed Co., LLC*, addressed the ascertainable loss requirement in the context of determining whether to certify a class.[91] That case involved a class action suit against, among others, the manufacturer and distributor of Relacore, a dietary supplement, alleging, *inter alia*, violations of the CFA due to the false advertising and representations of the effectiveness of the product. The Court reiterated its earlier decision that an ascertainable loss is one that is quantifiable or measurable and not illusory or hypothetical.[92] The Court gave examples of ascertainable losses, such as an

out-of-pocket expense and the replacement cost for a defective product. Further, there is no requirement that the consumer demand a refund before filing suit. With respect to the sale of Relacore, the Court found that each purchase of Relacore, not refunded, is an ascertainable loss.[93]

In *Hayden v. D'Amico*,[94] the Appellate Division addressed the ascertainable loss requirement in the context of an appeal from the trial court's affirmance of an arbitration award[95] entered in favor of the homeowners against a home improvement contractor. The homeowners claimed the contractor's home renovation work was not performed correctly or in accordance with the contract and plan specifications, and that some work was incomplete. The arbitrator found that the contract fell within the provisions of the CFA and its home improvement regulations. Although the contractor was guilty of certain "technical violations" of the act, the contractor's conduct did not rise to the level of prohibited unconscionable commercial practices, nor did the technical violations cause any of the damages sustained by the homeowners. Thus they were not entitled to treble damages.[96] The homeowners were awarded the difference between the contract price and the cost of completion of the work.[97] The trial court denied the homeowners' motion to modify the award to include treble damages.

The Appellate Division noted that the CFA makes no distinction between "technical" and "substantive" violations, and that if the homeowners had suffered damages as a result of even a technical violation of the CFA, they would have been entitled to treble damages.[98] However, bound by the factual findings of the arbitrator, the court accepted that the homeowners' only damages resulted from the contractor's breach of contract, and not from violations of the CFA or the home improvement regulations.[99] Moreover, a breach of contract alone is insufficient justification to award treble damages; there must additionally be "substantial aggravating circumstances present," such as "bad faith or lack of fair dealing," to elevate a simple breach of contract to the level of an "unconscionable commercial practice," which does constitute a violation of the act.[100]

Because it was bound by the arbitrator's fact finding, including the finding that "the proofs of the actions of the contractor did not rise to the level of unconscionable business practices," the Appellate Division accepted that no "substantial aggravating factors" existed to constitute a violation of the act warranting the award of treble damages.[101] Consequently the court affirmed.

Hayden is also noteworthy for its treatment of the homeowners' additional claim that judgment should have been rendered against the individual principal of the contracting corporate entity. The arbitrator had concluded the homeowners had contracted with the entity and not with the individual.[102] The homeowners had also moved unsuccessfully in the trial court to modify the arbitrator's award to include judgment for personal liability against the individual.[103] On appeal, the homeowners challenged the factual finding of the arbitrator that they had contracted with the entity and not with the individual.

The Appellate Division disposed of this issue on the sole basis that factual findings of an arbitrator under the Arbitration Act[104] are binding on both the trial court and on the appellate court, and it thus would not disturb that portion of the award.[105] This treatment of the issue of personal liability is, at best, curious, since it appears to make dispositive of the issue whether the contract was with the entity or the individual. Resolving the issue on that basis is inconsistent with the decision in *Cardillo*, discussed above, which held that the determinative standard was whether the individual owner or officer had participated in the CFA violation. Perhaps the issue was so disposed of because it was framed as a challenge to an arbitrator's fact finding, rather than on the basis of the theory and standard determinative of such liability as a legal matter.

The Take-Aways From Recent Decisions: Practice Pointers and Considerations

1. When representing a party to a dispute involving a home improvement contract, the facts should be carefully examined to determine whether, in addition to potential contractual claims and remedies, a potential claim exists under the CFA or its regulations. Given the breadth and depth of protections offered to consumers by the act and its regulations, a discerning review of the facts may well show a colorable claim that facially triggers exposure to the mandatory treble damage and attorney's fee remedies of the act, which from the perspective of counsel for homeowners, provides powerful equalizing leverage in the dispute and strong incentives to settle. From the perspective of counsel for a contractor, the same factual evaluation for a colorable claim under the CFA will provide information material to the magnitude of the contractor's exposure, which should be seriously considered in determining settlement value.

   If the circumstances present a new legal issue regarding whether a potential claim exists under the CFA, or whether certain conduct constitutes a violation of the CFA or its regulations, serious consideration should be given by counsel for homeowners to raising and pursuing the issue, on appeal if necessary. Given the history in New Jersey of constant expansion by the Legisla-

ture and by the courts of the protections afforded to homeowners under the act and its regulations, especially in the area of home improvements, and the consistent liberality of construction of the relevant provisions, the issue is likely to receive a friendly reception in court. For that same reason, serious consideration should be given to raising a good faith challenge to existing lower court authority if contrary to the position necessary for a homeowner to prevail. From the perspective of counsel for contractors, this history and approach to the CFA and its protections should be factored into any assessment of a new or novel issue, and a determination whether to settle the dispute and at what value, both at the trial level and in connection with a potential appeal.

2. When conducting an early case assessment, a practitioner will want to know whether any potential defendant has previously been sued for consumer fraud or subject to a complaint or regulatory filing by the OCP. Thus, it may be helpful to visit the website of the OCP. Through the site, practitioners can search by name for any business or individual recently named as a defendant in consumer fraud litigation or regulatory filings.[106] A copy of the filing can also be obtained from the website. The information available on the website is limited to fairly recent filings, so it would also be helpful to file an Open Public Records Act request with the OCP to obtain information, as well as copies of all non-privileged documents in the OCP files. Additionally, practitioners can search the DCA website for the licenses of all businesses and individuals.[107]
3. Although a breach of contract alone does not constitute a violation of the CFA, if aggravating circumstances are present, such as bad faith or lack of fair dealing, the breach potentially can be elevated to an unconscionable commercial practice, which is a violation of the CFA sufficient to trigger its remedies. As a result, every potential breach of contract involving a dispute concerning home improvements should be carefully examined to determine whether there is a basis for finding or inferring the requisite aggravating circumstances. For counsel to homeowners, this assessment will be especially important in situations where no independent violation of the CFA or its regulations exists, and the only potential basis for triggering the act is a contract breach involving aggravating circumstances. From the perspective of counsel to contractors, it will be important to seek to establish the absence of such circumstances or inferences by developing or shaping the facts to rebut such a finding.
4. If the dispute concerns work on a new home, consider whether the facts arguably bring the situation within the principles of *Czar,* giving rise to a claim under the CFA. Specifically, assess whether the contract was for only part of the work on a new home, and most importantly, whether the contractor would have been required to or could have adhered to the New Home Warranty Act. If the contractor did not or could not comply with that act, there likely is a potential claim under the CFA, even if the work was in connection with a new home.
5. If the circumstances of the home improvement dispute involve an entity that has committed CFA violations, consider whether there is a potential for personal liability of any individual principal, owner, officer, director or employee of the entity, in which case the CFA claim should name that individual as well. This determination of potential personal liability will turn on whether the individual participated in the CFA violation(s) of the entity. It should not matter if the contract was only with the entity, or if the claim sounds in contract rather than tort.
6. Before instituting an action with a CFA claim in the special civil part, consider whether the damages for the CFA violation (*i.e.*, the ascertainable loss) are in an amount that, when trebled, will exceed the $15,000 jurisdictional limit of the special civil part on the amount in controversy. If so, consider whether the action should instead be started in the Law Division, since the excess amount over the $15,000 jurisdictional limit will not be recoverable in the special civil part because treble damages are considered subject to the jurisdictional limit, although attorneys' fees are not.
7. In representing a contractor (individual or entity) against whom a CFA claim has been made, consider whether the facts will support a colorable defense of equitable estoppel to the claimed violation. Specifically, consider whether the claimant's conduct induced or caused the violation, and whether the contractor relied upon that conduct in committing the alleged violation. For example, consider whether the claimant rejected the contractor's offered conduct that would have been in compliance with the act or its regulations.
8. During trial of a CFA claim, it is important for the claimant to prove, and to assist and facilitate the court in being able to analyze and make specific findings concerning, the causal link between the CFA viola-

tion (as distinct from the breach of contract) and the ascertainable loss for which the claimant will seek treble damages. This is especially important in circumstances where there are several causes of loss or damage, with some loss resulting from the CFA violation and some from the breach of contract. Unless there are aggravating circumstances that elevate the breach of contract to an unconscionable commercial practice, only the CFA violations and not the breach of contract are subject to the treble damage remedy. The claimant must prove and the court must find which loss is due to the CFA violation and which loss is due to a simple breach of contract. Consider proposing findings of fact to assist the trial court (or jury interrogatories in a jury trial), which will facilitate specific record findings regarding the ascertainable loss subject to treble damages, thus increasing the chances that any treble damage award will be sustained on appeal.

9. If a home improvement dispute is to be arbitrated, make a record regarding which statute the arbitration will be held under (*i*.e., the Alternative Procedure for Dispute Resolution Act or the Arbitration Act). The applicable statute will determine the extent to which, if at all, the Appellate Division can review the award and any confirmation, modification or vacation of the award in the Law Division. It will also determine the scope and content of that review.
10. In evaluating the taking of or exposure to a potential appeal of a trial court's decision, each side should be aware of the appellate scope of review, especially the deference paid to fact findings of the trial court, for which the scope of review is generally narrow. Fact findings in the trial court are critical, not only in determining resolution of the dispute, but also in making the record for a potential appeal. It is therefore critical to help shape those fact findings, either by proposed findings of fact or jury interrogatories. ⚖

Endnotes

1. *Furst v. Einstein Moomjy, Inc.,* 182 N.J. 1, 11 (2004). *See also, Cox v. Sears Roebuck & Co*., 138 N.J. 2 (1994).
2. *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 271 (1978).
3. N.J.S.A. § 56:8-2.11 to -2.12; and -19.
4. N.J.S.A. § 56:8-1(c).
5. *Lee v. Carter-Reed Co., LLC*, 203 N.J. 496, 521 (2010) (*quoting Furst,* 182 N.J. 11-12).
6. N.J.S.A. § 56:8-19; *Lee*, 203 N.J. 521; *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 557 (2009); *Thiedemann v. Mercedes-Benz USA, LLC,* 183 N.J. 234, 246-47 (2005); *Weinberg v. Sprint Corp*., 173 N.J. 233, 237, 251 (2002); *New Jersey Citizen Action v. Schering Plough Corp.,* 367 N.J. Super. 8, 15 (App. Div.), *certif. denied,* 178 N.J. 249 (2003).
7. N.J.S.A. § 56:8-2.
8. *See Cox*, 138 N.J. at 17.
9. *Theidemann*, 183 N.J. at 245.
10. *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590 (App. Div. 1992), *aff'd o.b.*, 124 N.J. 520 (1991). *See also* Model Civil Jury Charges 4.43 (June 2010).
11. *Cox,* 138 N.J. at 18.
12. N.J.A.C. 13:45A-16.2(a)(12). The Office of Consumer Protection (OCP) of the DCA "is the primary investigative section for consumer complaints. The main responsibility of the OCP is to enforce the Consumer Fraud Act and its regulations." www.njconsumeraffairs.gov/ocp/. Anyone can search the legal filings of OCP on their website. See, www.njconsumeraffairs.gov/ocp/filings.htm. The names of the defendant businesses are listed in alphabetical order.
13. N.J.A.C. 13:45A-16.2(a)(12)(i) - (vi).
14. *Id*. 16.2(a)(11).
15. *Id.*
16. *Id* 16.2(3), (5), 6(iv), -(vi), (7)(ii) and (iii) and 9(iii).
17. *Id*. 16.2(a).
18. *Id.*
19. N.J.S.A. § 56:8-136, *et. seq*.
20. *Id.* § 56:8-138. One of the exceptions is that the CRA does not apply to any person required to register pursuant to "The New Home Warranty and Builders' Registration Act." *Id.* § 56:8-140(a).
21. N.J.S.A. § 56:8-142.
22. *Id.* § 56:8-151.
23. *Id*. § 56:8-151(a)(2).
24. *Id.* § 56:8-151(b).
25. *See,* N.J.S.A. 13:54A-17.1(a).
26. *Id*. 17.11(d)(2).
27. *Id*. 17.11(f).
28. N.J.S.A. § 56:8-146(a).
29. *Id*. § 56:8-146(b).
30. The section does not include an exhaustive review of all CFA decisions, but rather discusses certain notable decisions on selective issues in home improvement litigation.
31. 198 N.J. 195 (2009).
32. N.J.S.A. 46:3B-1 to 20.
33. The issue arose based upon the following definitional and exemption provisions of the acts and relevant regulations: the New Home Warranty Act, which preceded the provisions requiring registration of home improvement contractors passed as an amendment to the CFA (*see* Contractor's Registration Act, N.J.S.A. 56:8-136 to 152 and its implementing regulations promulgated thereunder, N.J.A.C. 13:45A-16.1 to 17.14) defines "builder" simply in terms of entities "engaged in the construction of new homes" (N.J.S.A. 46:3B-2(f); *see also* N.J.A.C.

5:25-1.3, the regulations defining "new home builder" as one "engaged in the construction of new homes.") and requires a builder engaged in the business of constructing new homes to register. *See* N.J.S.A. 46:3B-5 ("no builder shall engage in the business of constructing new homes unless he is registered with the [Department of Community Affairs]"; N.J.A.C. 5:25-2.1(a) requiring those "engage[d] in the business of constructing new homes" to register); while the amendments to the CFA requiring registration of home improvement contractors specifically excludes from its registration requirements "any person required to register pursuant to the 'The New Home Warranty And Builders' Registration Act.'"(N.J.S.A. 56:8-14(a)) Additionally, the CFA and its regulations contain broad definitions of "home improvement," from which the CFA regulations expressly exclude "the construction of a new residence." (N.J.S.A. 56:8-137; N.J.A.C. 13:45A-16.1A).

34. Justice Rivera-Soto dissented.
35. 198 N.J. at 197.
36. 398 N.J. Super. 133 (App. Div. 2008).
37. *Id*. at 135.
38. 398 N.J. Super. at 140.
39. N.J.S.A. 56:8-136 to 152.
40. 198 N.J. at 200-01.
41. N.J. at 201.
42. 198 N.J. at 201.
43. *Id*. at 204, 207.
44. *Id*. at 207-208.
45. *See* note 41, *supra*.
46. 198 N.J. at 205.
47. *Id*. at 208.
48. *Id*. at 209.
49. *Id*.
50. *Id*.
51. *Id*. at 209-10.
52. In affirming, the Court expressly did not consider or endorse the Appellate Division's alternative holding regarding an election of remedies. *Id*. at 206 n.2.
53. *See Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 608-10 (1997); *Lanza v. Secret Gardens Landscaping, Inc*., 2008 WL 4646890 (N.J. App. Div. Oct. 14, 2008); *New Mea Const. Corp. v. Harper*, 203 N.J. Super. 486, 502 (App. Div. 1985); *Hyland v. Aquarian Age, 2,000 Inc*., 148 N.J. Super. 186, 193 (Ch. Div. 1977); *Kugler v. Koscot Interplanetary, Inc*., 120 N.J. Super. 216, 251-257 (Ch. Div. 1972).
54. 2009 WL 62866 (N.J. App. Div. 2009).
55. 170 N.J. 297 (2001).
56. 2009 WL 62866, at 1-2.
57. *See* N.J.S.A. § 56:8-1(d).
58. *See* N.J.S.A. 56:8-1(d); and N.J.A.C. 13:45A-16.1A.
59. *Id*. at 4.
60. *Id*. at 5.
61. 414 N.J. Super. 152 (App. Div. 2010), *cert. granted*, __ N.J. __ (Oct. 21, 2010).
62. 2010 WL 772453 (N.J. Super. A.D. 2010).
63. *Id*. at 1-2.
64. *Id*. at 2-3
65. *Id*. at 3-4
66. 164 N.J. Super. 86, 89 (App. Div. 1978).
67. *Lettenmaier v. Lube Connection, Inc*., 162 N.J. 134, 140-141 (1999).
68. *Heuer v. Heuer*, 152 N.J. 226, 237 (1998) (citation and quotations omitted).
69. 337 N.J. Super. 252, 257-258 (App. Div. 2001).
70. *Id*. at 255-256.
71. *Id*. at 257.
72. 2008 WL 508082 (N.J. App. Div. Feb. 27, 2008).
73. *Id*. at 1.
74. *Id*.
75. *Id*. at 2.
76. *Id*. at 2-3
77. *Id*. at 4.
78. N.J.S.A. § 56:8-19. This same section of the act also provides for the mandatory award of treble damages and reasonable attorneys' fees.
79. 2008 WL 960295 (N.J. App. Div. April 10, 2008).
80. *Id*. at 2.
81. *Id*. at 2.
82. *Id*. at 3.
83. *Id*. at 3.
84. *Id*. at 4.
85. *Id*. at 4.
86. *Id*. at 4-5.
87. *Id*. at 5.
88. *Id*.
89. *Id*. at 6.
90. *Id*. at 6-7.
91. 203 N.J. 496, 521 (2010).
92. *Id.* at 522 (*citing Thiedemann*, 183 N.J. at 248).
93. *Id*. at 528.
94. 2009 WL 3079199 (N.J. App. Div. Sept. 17, 2009).
95. Following the filing of homeowners' complaint, the parties consented off the record to having the matter resolved through arbitration. *Id*. at 2. The Appellate Division stated that the homeowners' appeal "turns on whether their case was submitted to arbitration under the Alternative Procedure for Dispute Resolution Act, N.J.S.A. § 2:23A-30…or the Arbitration Act, N.J.S.A. § 2A:23B-1 to 32 because each Act offers a different standard for judicial review." *Id*. Because the agreement to arbitrate was made off the record, it was not apparent which statute was applicable to the arbitration, and therefore which standard for judicial review would apply. The Appellate Division resolved the question in favor of the Arbitration Act. *Id*. at 3-4.

    Concerning the potential standards for judicial review, under the Alternative Procedure for Dispute Resolution Act (APDRA), the trial court will not disturb the decision of an umpire on the facts as long as there is substantial evidence to support

that decision. N.J. Stat. Ann. § 2A:23A-13(b). When the application to the court to vacate the award is based on a party being prejudiced by certain specified grounds, the court must make an independent determination of any facts relevant to those grounds *de novo*. N.J. Stat. Ann. § 2A:23A-13(b) & (c). Generally, under the APDRA, following the trial court's review of the umpire's decision there is no right to any further appeal or review. *See* N.J. Stat. Ann. § 2A:23A-18(b). However, the New Jersey Supreme Court has concluded that there are certain exceptions to this rule based on an appellate court's supervisory function. *Mt. Hope Dev. Assoc. v. Mt. Hope Waterpower Project L.P.*, 154 N.J. 141, 152, (1998). For example, the APDRA's general elimination of appellate jurisdiction does not apply to child support orders or counsel fee awards. *Id.* Moreover, an appellate court will review a decision of the trial court under the APDRA where the trial court has exceeded its jurisdiction by failing to follow the APDRA's applicable statutory standards. *See Morel v. State Farm Ins. Co.*, 396 N.J. Super. 472, 476 (App. Div. 2007). There is no right to a broad review of the merits of the umpire or trial court's conclusions. *See Fort Lee Surgery Ctr. v. Proformance Ins. Co.*, 412 N.J. Super. 99, 104 (App. Div. 2010); *Liberty Mut. Ins. Co. v. Garden State Surgical Center*, L.L.C., 413 N.J. Super. 513, 520 (App. Div. 2010).

Under the Arbitration Act:

> arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes set forth in [N.J.S.A. 2A:23B–24]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award.
>
> *Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc.*, 135 N.J. 349, 358 (1994) (internal citations omitted). The factual findings of an arbitrator under the Arbitration Act are binding both on the trial court and the appellate court. *Amalgamated Transit Union, Local 1317 v. DeCamp Bus Lines, Inc.*, 382 N.J. Super. 418, 421 (Law Div. 2005); *see also Hayden v. D'Amico*, 2009 WL 3079199, *5 (App. Div. 2009). However, unlike under the ADPRA, the merits of a trial court's decision of whether to vacate or modify an arbitration award based on the enumerated statutory reasons is subject to review by an appellate court. *See* N.J. Stat. Ann. § 2A:23B–28.; *see also Hayden*, *supra*, 2009 WL 3079199 at *3.

96. 2009 WL 3079199, at 2.
97. *Id*. at 2.
98. *Id*. at 5.
99. *Id*. at 6.
100. *Id.*
101. *Id*. It can be questioned whether the arbitrator's finding that the contractor's actions did not rise to the level of unconscionable business practices was a factual or legal determination.
102. *Id*. at 2.
103. *Id*. at 2.
104. *See* note 91, *supra*.
105. *Id*. at 5.
106. *See*, www.njconsumeraffairs.gov/ocp/filings.htm. It appears from the OCP website that the available records on the website only date back until 2008.
107. *See*, https://newjersey.mylicense.com/verification/

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