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COMMENTARY

Consumer Fraud Is More Than an Unlawful Act and Ascertainable Loss

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In *Matera v. M.G.C.C. Group, Inc.*, a New Jersey court found for the first time that a cause of action under the state's Consumer Fraud Act required only an "unlawful act," an "ascertainable loss" and a causal nexus between the two.

The 2007 Law Division holding is troubling. It expanded the scope of the CFA to instances of unlawful acts in transactions in which the claimants were in no way involved.

Though *Matera* is not specifically referenced in the Feb. 4 ruling in *Marrone v. Greer & Polman Construction, Inc.*, its holding is called into question.

The CFA is intended to deter unconscionable commercial conduct. It is applicable when an unlawful act is committed in the sale or advertisement of real estate or merchandise. Treble damages and attorneys' fees are available remedies.

It is well settled that plaintiffs have the burden of showing (1) the existence of an unlawful practice, such as a misrepresentation or an improper omission, and (2) a causal nexus between such conduct and the consumers' ascertainable loss, as noted in the 2000 Appellate Division ruling in *Varacallo v. Mass. Mutual Life Ins. Co*.

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But, in cases where causal nexus was in issue, New Jersey courts have found that the burden of demonstrating such a link between an unlawful act and an ascertainable loss could not be met without a further showing that the plaintiff had some contact with the entity accused of the unlawful act.

Thus, in *O'Laughlin v. National Community Bank*, the Appellate Division found in 2001 that a CFA claim could not be sustained against the seller of real estate, where the plaintiffs acquired their homes from the seller's predecessor in title. Under those circumstances, the seller could not have made any direct or indirect promises to the plaintiffs.

Similarly, in *Chattin v. Cape May Greene*, an appeals court held in 1987 that homeowners could not establish a causal nexus between misrepresentations about the insulating quality of windows and their ascertainable loss, where they never received a brochure or an oral representation about the windows. Although privity of contract is not a requirement (as the Supreme Court held in 1997 in *Gennari v. Weichert Co. Realtors*), nor must one prove actual reliance (under the CFA), only *Matera* went so far as to permit CFA claims where there was no misrepresentation made to the claimants.

Relying on cases in which the required direct or indirect promises were not in issue and, therefore, not discussed as a component of causal nexus, the motion judge in *Matera* found that causal nexus merely required a nexus between the alleged unlawful act and the plaintiffs' alleged ascertainable loss. In *Matera*, the unlawful act was a lender's alleged misrepresentation to the Howell Township Planning Board about the effectiveness of a drainage plan. It was asserted that the lender knew the drainage design would cause flooding on bordering lots not owned by the lender and ultimately purchased by plaintiffs. Flood damage was the alleged ascertainable loss.

Surprisingly, the plaintiffs survived the lender's motion to strike the CFA claims, even though the lender was not in the plaintiffs' chains of title. The plaintiffs admitted that they never had contact with the lender and there was no allegation that any predecessors in title had contact with the lender. *Matera* was a major expansion of the CFA, finding a cause of action for an alleged unlawful act in the sale of real estate, a sale in which the plaintiffs were not even a part.

In *Marrone*, the Appellate Division effectively reaffirmed the notion that causal nexus requires that promises be made to the claimants. In that case, the plaintiff homeowners purchased their home from owners who acquired it from the defendant builder. It was alleged that the builder constructed the home with defective siding, resulting in water infiltration. The plaintiffs brought CFA claims against the builder, and the siding's manufacturer and distributor.

The *Marrone* court cited *Chattin*'s holding that homeowners who received oral or written representations were entitled to pursue CFA claims, but subsequent purchasers who had no contact with the builder were not so entitled. Requiring more than a simple nexus

between the misrepresentation and plaintiffs' ascertainable loss, the *Marrone* court stated that there must be "proof of a causal connection between the … defendants' alleged misrepresentations about their product and plaintiffs' decision to purchase the house." In the absence of representations having been made to or received by the plaintiffs, the *Marrone* court affirmed the trial court's dismissal of the CFA claims.

So, is *Matera* still, or was it ever, good law? We may find out. The Materas' neighbors brought similar CFA claims last August. ■