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Rivals Have Standing To Sue For Statutory Violations

CUTPA grants standing for competitors to sue for broad range of conduct

By JONATHAN M. FREIMAN

Over the last year, the Connecticut Supreme Court released a thick folder full of cases important to the business community, ranging from a decision bolstering requirements for class action lawsuits to opinions setting new contours for the scope and bounds of arbitration.

Two decisions in particular, though, are of vital concern for companies.

In *Eder Bros., Inc. v. Wine Merchants of Conn., Inc.*, 275 Conn. 363 (2005), the Court held that a plaintiff corporation could sue its industry rival for violation of an industry-regulating statute, even where the legislature vested enforcement power solely in a state official and did not give competitors the right to sue.

The case involved an act that prohibits distributors from offering certain pricing discounts to retailers. When a distributor allegedly offered the forbidden discounts, its competitor filed suit under both the discount law and CUTPA. The trial court dismissed the suit, finding that the discount law created no cause of action for competitors and that the rival could not piggyback on CUTPA to bring its discount law claim.

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The Supreme Court reversed. It found that while the competitor had no standing to sue under the discount law, it could sue under CUTPA. *Eder Brothers* reaffirmed prior case law—the court decided a similar issue in the insurance context in 2002—reminding businesses that competitors have standing to sue under CUTPA for violation of any statute binding the business, whether or not the statute gives competitors the right to sue, or even whether it aims to protect the competitors.

In fact, competitors can sue under CUTPA even for conduct that the legislature did not prohibit in the other statute at all, but which comes within the statute's "penumbra." Such claims pass muster, the Court reiterated, when they are "consistent with the regulatory principles established by the underlying statute."

Personal Liability

If the specter of competitors and consumers filing suit for violation of statutorily-undefined "regulatory principles" isn't enough to convince businesses to keep things above-board, their officers and directors might want to review *Ventres v. Goodspeed*, 275 Conn. 105 (2005), a decision with important consequences for the personal liability of officers.

Ventres involved an individual who, acting on behalf of his airport-owning company, directed a contractor to cut down trees near the airport's runway. The trial court concluded that the clear-cutting of trees violated Connecticut environmental and wetlands laws.

'Immaterial' Distinction

On appeal, the owner claimed that he could not be held personally liable because he had acted on behalf of his company, not in his individual capacity. The Supreme Court rejected that distinction as flatly "immaterial," emphasizing the continuing vitality of the common-law principle that a corporate officer is liable for torts in which he directly participates.

The owner had claimed that the Court's adoption of the "responsible corporate officer" doctrine in *BEC Corp. v. DEP*, 256 Conn. 602 (2001), had superseded the long-standing "direct participation" principle. *BEC* had created a new source of individual officer liability in Connecticut. Relying in part on a statute that explicitly defined "person" to include corporate officers, the Court found that an individual officer commits a tort whenever he had "a position of responsibility and influence from which he could have prevented the corporation from engaging in the [prohibited] conduct." *Ventres*, 275 Conn. at 144.

BEC emphasized that it was "by no means establishing the responsibility of corporate officers in general with respect to corporate activity." But while the *BEC* Court did not create a sweeping doctrine of vicarious officer liability for all corporate

conduct, it did create liability for omissions, i.e., for failures to stop others from committing torts for the company.

Omission liability is a significant step beyond direct participation liability. Perhaps mindful of this significant expansion, the *BEC* Court framed its holding narrowly, stating that it "restrict[s] the application of the responsible corporate officer doctrine solely to violations of the [Water Pollution Control] act."

Ventres abandoned the narrowness. The Court held that the responsible corporate officer doctrine applies to all "strict liability public welfare offenses committed by the corporation." That was so even though the statutes at issue in *Ventres* did not define "person" to include corporate officers, contrary to the Water Pollution Control Act; and even though the *BEC* Court had thought that inclusion of officers in the statutory definition of "person" in the Water Pollution Control Act was significant.

Moreover, the *Ventres* Court made clear that the two kinds of officer liability are cumulative. Even when the responsible corporate officer doctrine does not apply, a corporate officer may still find herself liable for torts in which she directly participates. The *Ventres* Court thus reaffirmed the "black letter principle that a corporate officer may be held personally liable for *tortious* conduct in which the officer *directly* participated, regardless of whether the statutory basis for the claim expressly allows liability to be imposed on corporate officers."

Further litigation will likely clarify what statutes fall within the category of "strict liability public welfare offenses." For now, the state's businesses and their officers would be wise to bear in mind that competitors and consumers can wield potent legal tools, as *Eder Bros*. and *Ventres* made clear. ■