Personal Liability for Tortious Acts Performed as an Employee

Update on Recent Litigation

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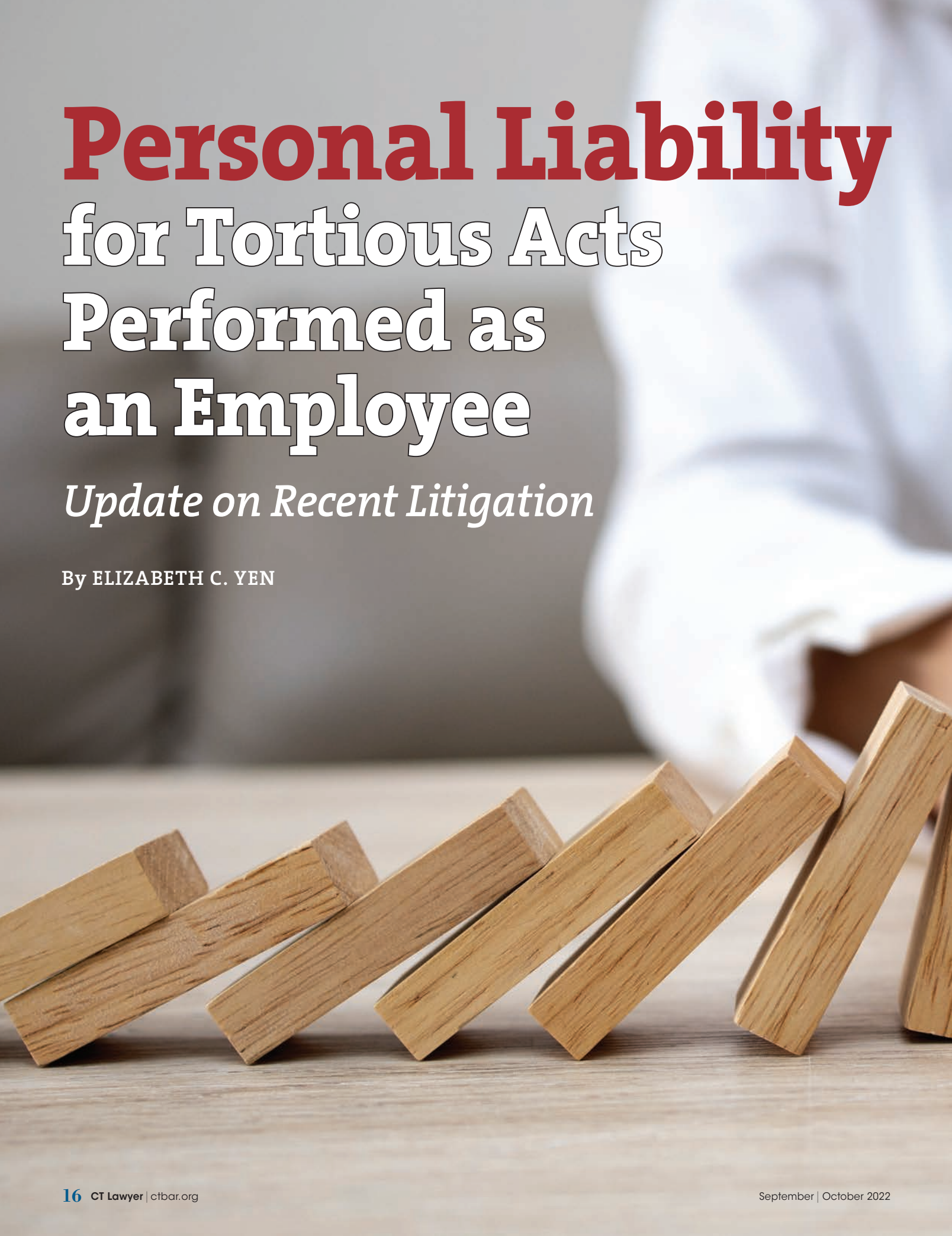

RECENT DECISIONS from Connecticut and other jurisdictions are useful reminders that employees may be held personally liable for certain violations of law while acting within the scope of their employment. Employers should consider reviewing their existing errors and omissions insurance coverages for their employees' work-related tortious acts.

In *Scott v. FedChoice Federal Credit Union*, 274 A.3d 318 (DC App. 2022), the plaintiff (a District of Columbia resident) alleged that FedChoice Federal Credit Union (FedChoice) and its then employee (Ms. Kelly) each violated Maryland consumer debt collection statutes in 2019 while attempting to collect a past due credit card debt from Mr. Scott. The relevant credit card agreement stated that it was governed by Maryland law, and the credit card issuer (FedChoice) was headquartered in Maryland. Among other things, Mr. Scott alleged that several debt collection communications were made directly to him in 2019 by Ms. Kelly on behalf of FedChoice (her then employer), in violation of Maryland law after she was advised that Mr. Scott was represented by legal counsel and also after she was advised that Mr. Scott was in the hospital. The communications at issue included both "dunning letters and phone calls after learning [Mr. Scott] had retained counsel to deal with them and after learning of his health issues." (274 A.3d at 326.) On appeal, the court held that Mr. Scott's claims against Ms. Kelly could be pursued, because violations of Maryland's consumer debt collection statutes (if proven) are torts, and "[u]nder agency principles in both Maryland and the District of Columbia, '[t]he general rule is that the corporate officers or agents are personally liable for those torts which they personally commit, or which they inspire or participate in, even though performed in the name of an artificial body.'" (274 A.3d at 327, footnote intentionally omitted.)

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Connecticut courts follow the same rule. For example, in *Coppola Construction Co. v. Hoffman Enterprises*, 309 Conn. 342, 350 (Conn. 2013), the Court agreed that "an agent of a principal is personally liable for his own torts regardless of whether...the principal itself is liable." In Connecticut, a judicial or administrative determination that an employee working for certain types of Connecticut-licensed businesses has violated a law or regulation applicable to the conduct of that licensed business may also provide a basis for the applicable state regulator to take administrative action against the licensee.[1]

The Federal Trade Commission (FTC) has similarly asserted jurisdiction under Section 5 of the FTC Act (15 USC Section 45) over individuals that cause false, misleading, or deceptive representations to be made to consumers using interstate commerce, regardless of the individuals' good or bad faith and regardless of actual deception. (*See*, e.g., *Feil v. Federal Trade Commission*, 285 F.2d 879 (9th Cir. 1960) and *Federal Trade Commission v. Cyberspace.Com*, 453 F.3d 1196, 1202 (9th Cir. 2006) ("An individual is personally liable for a corporation's FTCA § 5 violations if he 'participated directly in the acts or practices or had authority to control them' and "had actual knowledge of material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.'") (citations intentionally omitted).) An individual's actual knowledge of or reckless indifference to misleading or deceptive commercial or business practices may be established even if the individual relied on the advice of legal counsel. (*See*, e.g., *Federal Trade Commission v. Grant Connect*, 763 F.3d 1094 (9th Cir. 2014), cited with approval in *Consumer Financial Protection Bureau v. CashCall*, 35 F.4th 734 (9th Cir. 2022) (applying the same standard for individual liability for a corporation's violation of the Consumer Financial Protection Act, 12 USC Section 5536; see also 12 USC Section 5481 et seq.).)

Connecticut courts follow a similar standard for individual liability for an entity's unfair or deceptive trade practice under Connecticut's Unfair Trade Practices Act (Conn. Gen. Stat. Section 42-110a et seq. or "CUTPA"). An individual's liability for an entity's unfair or deceptive trade practice depends on the individual's participation in the unfair or deceptive practice, or authority to control the practice, and the individual's knowledge of the practice. (*See*, e.g., *Pointe Residential Builders BH v. TMP Construction Group*, 213 Conn. App. 445, 455 (June 28, 2022). See also *Joseph General Contracting v. Couto*, 317 Conn. 565, at 589-592 (Conn. 2015) (if an entity has committed an unfair or deceptive trade practice in violation of CUTPA, an individual who either "participated directly in the entity's deceptive or unfair acts or practices" or "had the authority to control them" may also be liable under CUTPA; the individual "must knowingly or recklessly engage in unfair or unscrupulous acts...in the conduct of a trade or business") (footnote intentionally omitted).)

The *Joseph General Contracting* case noted above cited with approval to *Pabon v. Recko*, 122 F.Supp.2d 311, 313 (D. Conn. 2000), which held that an employee of a creditor or collection agency that violated applicable Connecticut consumer debt collection practices laws or regulations could be liable under CUTPA if the employee participated in, controlled, or directed the unlawful collection acts or practices. Asserting such claims against both employer and employee could increase a prevailing plaintiff's entitlement to damages and costs. (For example, CUTPA authorizes a higher punitive damages award than Connecticut's creditor collection practices statute (see Conn. Gen. Stat. Sections 42-110g and 36a-648), and the defined term "creditor" in Section 36a-645 does not include a creditor's employees.) Perhaps more importantly, the risk of personal liability may encourage some employees to act with greater care and deliberation on behalf of their employers, which may help reduce the incidence of certain unfair, deceptive, or otherwise tortious practices. ■

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NOTES

1. *See*, e.g., Conn. Gen. Stat. Sections 36a-804 and 36a-852 (applicable to Connecticut-licensed consumer collection agencies and student loan servicers, respectively). Similar provisions appear in Connecticut's mortgage lender, mortgage broker, and money transmitter license statutes. (*See* Conn. Gen. Stat. Sections 36a-494 and 36a-608.)