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In Retail Mark-Up Case, NJ Supreme Court May Soon Provide Clarity on 'Ascertainable Loss' Under the CFA



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June 22, 2023 at 01:37 PM

Retail



Colleen Murphy



What You Need to Know

- The New Jersey Supreme Court has granted certification to SPARC Group after the Appellate Division sided with plaintiff consumers in their claim over false advertising of clothing prices.
- The plaintiff's complaint alleged that the defendant, Simon Properties Authentic Retail Properties, owner of brands such as Brooks Brothers, Eddie Bauer, and Forever 21, falsely advertised clothing at two Aeropostale stores.
- The Appellate Division decision in the case concluded that the "use of a fictitious former price" constitutes a violation of the CFA.

The New Jersey Supreme Court has granted certification to SPARC Group—the owner of brands including Aeropostale, Brooks Brothers, Eddie Bauer, and Forever 21—after the Appellate Division sided with plaintiff consumers in their claim over false advertising of clothing prices.

In February, the New Jersey Appellate Division held that a [trial judge erred](#) in dismissing of a claim of false advertising of clothing prices over the age-old retail industry trick of marking up prices before offering items "on sale." While the [appeals court found](#) that the trial judge thoroughly addressed all the statutory and common-law counts, it disagreed with

the determination that the plaintiffs failed to alleged an ascertainable loss.

Mark Oberstaedt, assistant chair of the business litigation group at Archer in Voorhees, previously said that the Appellate Division decision in the case opened a potential avenue of liability over a practice that is common in retail. Oberstaedt said Thursday in an email to the New Jersey Law Journal that this case presents the state's highest court with the opportunity to clarify what constitutes an "ascertainable loss" under the New Jersey Consumer Fraud Act.

The plaintiff consumer's complaint alleged that the defendant, Simon Properties Authentic Retail Properties, falsely advertised clothing at two Aeropostale stores. According to the appeals court opinion, plaintiff Christa Robey claimed that on March 4, 2021, she purchased a hoodie at the store's Cherry Hill location that was marked down to 60% off an original price of \$59.95 and three T-shirts advertised as "buy one get two free." Plaintiff Maureen Reynolds made a similar claim about her purchase on March 7, 2020. The two plaintiffs alleged that the items they purchased were never available at the higher price and asserted violations of the Consumer Fraud Act (CFA), the Truth in Consumer Contract, Warranty, and Notice Act (TCCWNA).

According to the Appellate Division opinion, the trial judge granted SPARC's Rule 4:6-2(e) motion to dismiss. The plaintiffs appealed and argued that they adequately pleaded an illegal, fraudulent or wrongful practice under the CFA and the TCCWNA. The per curiam opinion by Judges Richard J. Geiger, Maritza Berdote Byrne and Clarkson S. Fisher Jr. stated that the plaintiffs were not required to prove their allegations and that Rule 4:6-2(e) is a very low bar for pleaders to hurdle.

As to the question of whether the plaintiffs adequately pleaded a violation of the CFA, the opinion stated that the "use of a fictitious former price" does constitute a violation of the CFA. However, according to the opinion, the more difficult question posed was "whether plaintiffs pleaded either that they sustained an ascertainable loss under the Consumer Fraud Act or that they are aggrieved consumers under the TCCWNA."

The court held that the loss of the discounts constitutes ascertainable losses, which it held was consistent with the New Jersey Supreme Court's views of the CFA's ascertainable-loss requirement expressed in *Furst v. Einstein Moomjy*. The opinion stated that although the allegations in *Furst* are not exactly the same as those alleged here, it is essentially the same type of monetary loss. Therefore, the court held that the trial judge's holdings here were erroneous as the plaintiffs did not fail to state claims on which relief could be granted.

Berdote Byrne, temporarily assigned to the appeals court, joined Geiger and Fisher in reversing and remanding the case, but issued a concurring opinion departing from the other judges on the issue of ascertainable loss.

She wrote that the "benefit of the bargain rule" allows for "recovery for the difference between the price paid and the value of the property had the representations made been true" and that the "out-of-pocket" approach "provides recovery for the difference between the price paid and the actual value of the property acquired."

Berdote Byrne concluded that the pleadings do not constitute an ascertainable loss that can be measured by the "benefit of the bargain metric." She stated that the plaintiffs can recoup treble their out-of-pocket losses if they can prove a deceptive trade practice not protected by the N.J.A.C. 13:45A-9.6(b)'s safe harbor provisions. On remand, Berdote Byrne stated that she would instruct the trial court to allow ascertainable losses limited to out-of-pocket expenses.

"It would be helpful for the Court to use this opportunity to give the lower courts better guidance on what constitutes an 'ascertainable loss' because a significant amount of trial court practice in Consumer Fraud Act cases concerns that issue," said Oberstaedt. "The case also presents an interesting angle on injunctive relief available under the Consumer Fraud Act. It is not entirely clear how a trial court could fashion an appropriate injunction in a case like this and it will be interesting to see whether the Supreme Court takes on that issue."