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New Jersey Supreme Court Holds “Illusory Discounts” Do Not Support a Claim of Ascertainable Loss Under the Consumer Fraud Act

In a 4–3 opinion, the New Jersey Supreme Court held that the mere purchase of a product falsely represented as “discounted” does not, without more, satisfy the “ascertainable loss” element under the New Jersey Consumer Fraud Act (NJCFCA). [In *Robey v. SPARC Group LLC*](#), the plaintiffs – a proposed class of shoppers at the retail clothing store Aéropostale – alleged that the store advertised clothing as being discounted when, in fact, the items had never been offered or sold at the higher prices off of which the “discount” was taken. The plaintiffs contend that this practice of so-called “illusory discounts” violated the NJCFCA, the Truth in Consumer–Contract, Warranty and Notice Act (TCCWNA), and various common law contract rights.

The trial court dismissed the complaint for failure to state a claim, determining that the plaintiffs failed to allege an “ascertainable loss.” [The Appellate Division majority disagreed and reversed](#), noting some confusion as to whether the NJCFCA’s “ascertainable loss” requirement was the same as the TCCWNA’s “aggrieved consumer” requirement. The Supreme Court granted certification and reversed, finding that the plaintiffs’ NJCFCA claim failed because they could show neither of the two recognized types of “ascertainable loss” for a claim based on a seller’s alleged deception: an out-of-pocket loss or a loss of the benefit-of-the-bargain.

First, the plaintiffs failed to allege an out-of-pocket loss because they did not allege that the items they received “were worthless or unsuitable for their intended use, or that they have spent or will spend additional funds ... to make the items usable for their intended purpose.” Indeed, the plaintiffs did not dispute that the items they bought were precisely what they intended to buy; rather, they alleged that they suffered an out-of-pocket loss of the purchase price because they either would not have bought the

items at the prices that they ultimately paid, or they would not have purchased the goods at all but for the deceptive advertising. Notably, the plaintiffs did not claim that they attempted to return the items or that Aéropostale refused to accept such a return. The majority held that these facts were insufficient to establish an out-of-pocket loss.

Second, the court rejected the plaintiffs' argument that because they did not receive a higher-value item for a discounted price, they were denied the benefit of their bargain and thus suffered an ascertainable loss. The plaintiffs here "suffered no loss – they purchased and received clothing that was not defective or damaged or worth less than they paid." The plaintiffs also did not argue that the items were non-conforming or materially different from what they thought they were purchasing. In short, the plaintiffs "objectively received what they paid for."

The majority also dismissed the plaintiffs' TCCWNA claim, reasoning that because the plaintiffs did not incur an ascertainable loss, they were not "monetarily aggrieved" for purposes of TCCWNA under the facts pled.

In a dissenting opinion, Justice Douglas M. Fasciale said the case was a clear-cut example of deceit and that was enough to show that the consumers were aggrieved under the law. The dissent opined that the plaintiffs sufficiently pled ascertainable loss because they "bought products on sale with the expectations of obtaining promised bargains, but those expectations were never realized."

Before the Supreme Court weighed in, *Robey* had the potential to greatly expand the type of consumer fraud cases that could be brought under the NJCFA. Fortunately for companies doing business in New Jersey, the Supreme Court made clear that consumers have no NJCFA claim for buying the non-defective product they thought they were buying, even if advertised as discounted when it was not.

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