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Appellate Division Holds Plaintiffs Can State a Claim Under New Jersey's CFA and TCCWNA Statutes Where an Advertised Discount Is Alleged to Be Illusory

A recent split [decision](#) from the New Jersey Appellate Division called into question whether the "ascertainable loss" requirement for pleading a claim under the New Jersey Consumer Fraud Act (NJCFA) is the same as the "aggrieved consumers" requirement under the Truth in Consumer Contract, Warranty and Notice Act (TCCWNA). Without deciding that question, the court found that the pleading sufficiently alleged both in asserting that the defendant inflated its prices to offer an illusory discount.

The plaintiffs alleged that the defendant, SPARC Group LLC, falsely advertised clothing at two of its Aeropostale stores as being discounted from a higher price when the clothing allegedly had never been sold in those stores at the higher price. The plaintiffs asserted that this "markup to markdown" practice violates both the NJCFA, the TCCWNA, and the common law. The trial judge dismissed the complaint for failure to state a claim and largely rested her decision on a determination that the plaintiffs failed to allege an "ascertainable loss." The Appellate Division majority disagreed and reversed.

The majority noted some confusion as to whether the NJCFA's "ascertainable loss" requirement was the same as the TCCWNA's "aggrieved consumer" requirement. The New Jersey Supreme Court has held that an "ascertainable loss" must be "quantifiable and measurable" and not "hypothetical or illusory," while the TCCWNA requires that a plaintiff be an "aggrieved consumer," which is defined as someone who has suffered an adverse consequence but not necessarily harm that may give rise to an award of damages. The majority commented they were satisfied that the plaintiffs had alleged a loss under either standard by pleading that they "received

no value for the offered discount” and “defendant’s offers of discounts” were included in the “exchange of promises” of the transaction, and therefore, the plaintiffs had alleged a failure to receive the benefit of the bargain. The concurring opinion agreed that the plaintiffs had pleaded an “ascertainable loss” but disagreed about the nature of the loss, noting that the shoppers should only be allowed to seek the amount they actually paid for the clothes.

Given this potential for a wide-ranging effect, the New Jersey Supreme Court is likely to have further commentary if it grants the defendant’s petition for certification.

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