

The End of No-Injury CFA Claims?

Litigation Law Alert

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On March 25, 2024, the New Jersey Supreme Court decided the case of *Robey v. SPARC Grp.*, 256 N.J. 541(2024), which represents the latest attempt towards a stricter interpretation of the ascertainable loss requirement of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (the “CFA”).

The New Jersey Supreme Court issued an important decision in the consumer class action space, effectively ending the so-called “no injury” class actions by clarifying the standard a Plaintiff must demonstrate to establish an “ascertainable loss” to recover money damages in a private action under the CFA. Because the CFA is often asserted in many suits filed as putative class actions for an array of business practices, *Robey* will now preclude many lawsuits that could have been brought earlier under the CFA.

The Supreme Court in *Robey* has now closed the “flood gates” unless a Plaintiff can demonstrate an actual – rather than a merely theoretical – loss. Mere subjective claims of injury will not suffice any longer.

Robey involved Aeropostale, a retail chain’s pricing where Plaintiffs alleged the pricing was fictitious. Named plaintiff Maureen Reynolds bought a pair of pants advertised as 50% off their original price of \$36.50 (\$18.25) and named plaintiff Christa Robey purchased a “hoodie” advertised as being 60% off an original price of \$59.95 (\$23.98). Plaintiffs alleged they later learned that neither of these items was ever sold at the “original” higher prices.

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Plaintiffs sued, including on behalf of a putative class, alleging that Aeropostale's owner, SPARC Group, violated the CFA by using false reference pricing, because the clothing was falsely advertised as discounted and was never available at the higher reference prices. Plaintiffs sought money damages and an injunction.

Although SPARC did not dispute that Aeropostale's pricing practices violated a relevant New Jersey regulation, the company argued that because plaintiffs failed to plead a legally-cognizable ascertainable loss, the claim was not viable. The trial court agreed with SPARC, granting its motion to dismiss. The Appellate Division reversed, however, holding that, by pleading that plaintiffs received no value for the advertised discount, they had, in fact, suffered a "real and quantifiable" loss of money and thus, an ascertainable loss.

The Supreme Court reversed and reinstated the dismissal order. The court held, after a thorough review of the law on ascertainable-loss, that plaintiffs had not alleged a CFA claim because their alleged loss was not "quantifiable or measurable," but was only "hypothetical or illusory," and thus, not an ascertainable loss under the statute.

The court also rejected a companion claim alleging that Aeropostale violated a related statute, the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 et seq. (TCCWNA), which prohibits the inclusion of provisions in consumer contracts that violate a consumer's "clearly established legal right." TCCWNA, however, only confers standing to sue upon "aggrieved" consumers who are parties to such contracts. The court held that plaintiffs had not met the definition of an "aggrieved consumer" because they had not sustained an ascertainable loss under the CFA and thus had not suffered adverse consequences because of the violation.

A three-justice minority of the court dissented, relying on legislative intent in passing one of the strongest consumer protection statutes in the nation.

Robey should thus be read as a strong statement that the New Jersey courts will not allow a CFA claim in the absence of any real monetary injury to the plaintiff. *Robey* also has importance in federal cases asserting CFA and TCCWNA claims because, as a New Jersey Supreme Court opinion, it is controlling state law.

The decision leaves the door open, however, for the attorney general to bring enforcement actions against businesses. Companies doing business in New Jersey can no longer be the target of a CFA claim where a "consumer", as defined under the Act, cannot show an injury.

For more information about the issues raised in this Alert, please contact:

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