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Split Take On NJ 'Fake' Sale Case Disrupts Biz-Friendly Pattern

By **George Woolston**

Law360 (April 25, 2024, 6:40 PM EDT) -- A recent New Jersey Supreme Court decision rejecting "fake discounts" as a source of consumer fraud was a boon for the class action defense bar, but the takes of three dissenting judges and Attorney General Matt Platkin show that the state's largely business-friendly jurisprudence on what qualifies as an ascertainable loss isn't quite settled.

Several attorneys who regularly help fend off claims like the ones filed by Christa Robey and Maureen Reynolds viewed the March 25 decision, which undid a consumer-friendly take from a lower appeals court, as tightening the screws around the high court's stance that consumers must show an ascertainable loss in order to collect damages under the state's consumer protection laws.

But despite holding the line and not expanding what qualifies as an ascertainable loss, experts see the dissenting opinion and the AG's amicus input — both finding that customers were denied the benefit of the bargain — as a warning that retailers should be more careful in advertising.

"This is an unqualified win [for the defense] under New Jersey's Consumer Fraud Act because it does not expand any further the definition of ascertainable loss," Jeffrey S. Jacobson of Faegre Drinker Biddle & Reath LLP, who argued the case for amici curiae the U.S. Chamber of Commerce and the New Jersey Civil Justice Institute, told Law360.

"But it is not a green light to retailers in the state to violate the regulation because the attorney general is clearly paying attention to this. And it can't be remedied through the Consumer Fraud Act and a private lawsuit. It can be remedied by the attorney general in civil enforcement," he said.

The suit by Robey and Reynolds accused the owner and operator of Aeropostale, SPARC Group LLC, of a "markup to markdown" scheme that flouted the state's Consumer Fraud Act and Truth in Consumer-Contract, Warranty and Notice Act.

They claimed the retailer listed clothes by as much as 60% off, even though the clothes had never been sold for more than the advertised price. While the plaintiffs were able to show the false discounts did violate the CFA, they were unable to show an ascertainable loss, the high court held in a rare 4-3 split decision. Justice Lee Solomon, writing for the majority, concluded there was no ascertainable loss because "they purchased non-defective, conforming goods with no objective, measurable disparity between the product they reasonably thought they were buying and what they ultimately received."

While the decision doesn't stray far from the high court's previous rulings in cases such as Spade v.

Select Comfort and f' target='_blank' style='color: #990000'>Wenger v. Bob's Discount Furniture from 2018, in which the court held that consumers must prove they were actually harmed to collect a monetary payout under the CFA and TCCNWA, experts say the decision put a "finer point" on the high court's stance that consumers must show an ascertainable loss.

"It's definitely a pro-business decision in that it makes it even more concrete, even less abstract," said David Murphy, litigation counsel in the Reed Smith LLP's financial industry group. "It reiterated an existing principle that without the ascertainable loss for your plaintiff representative, you're going to have a rough time trying to get a class certified."

"There's a lot of practitioners who probably think this is a more concrete way of interpreting the statute and making it a little bit easier to argue these cases going forward," Mark J. Oberstaedt, assistant chair of Archer & Greiner PC's business litigation group, told Law360.

However, Oberstaedt can't ignore the more consumer-friendly take by Justice Douglas M. Fasciale.

Joined by Justices Rachel Wainer Apter and Michael Noriega, Justice Fasciale said "it is clear to me that plaintiffs here have sufficiently pleaded that they suffered an ascertainable loss under a benefit-of-the-bargain theory after being deceived by Aéropostale's fictitious pricing scheme." Informing his stance was the CFA's basic purpose to protect consumers, the legislature's intent in creating a private right of action to help the attorney general's enforcement burdens, case precedent such as the court's 2004 decision in Furst v. Einstein Moomjy, consumer behavior research, and the insight provided by the attorney general's amicus argument.

Oberstaedt said the split came down to "what do you consider to be the benefit of the bargain to determine whether there's an ascertainable loss."

"So the majority is looking at it as, did someone get what they bargained for when they went into the store and buy a hoodie for the value that you paid for it? There was nothing wrong with the product. It was what you thought it was, the price was what you thought it was. And that was your benefit of the bargain," he said.

"The dissent looks at it and says, the benefit of your bargain was you thought you were getting a discount, and you weren't really getting a discount. And inherent in that is the idea that maybe it was a higher-quality product that was worth more, but you were getting it cheaper. And that was the benefit of the bargain," Oberstaedt continued.

To Jacobson, the court's disagreement over the damages suffered by Robey and Reynolds shows there was no ascertainable loss.

"The problem is people who wanted there to be damages, including the three justices who dissented, had some difficulty explaining what those damages would be and why. And to me that highlights that there was never an ascertainable loss in the first place," he said.

The majority opinion, for example, asks if a consumer would not have paid the discounted price to buy a sweatshirt, despite receiving what they expected, if they knew the sweatshirt wasn't actually discounted, Jacobson said. Did they try to return it? Robey and Reynolds did not allege they attempted that, he noted.

The alternative is if it were advertised with an original price of $60 and sold for $27, then the damages would be the $33 difference, he pointed out.

"That would put the plaintiff in a better position than they would have been otherwise, which doesn't seem consonant with the Consumer Fraud Act," Jacobson said.

If there were, however, a slight deviation in the case's facts there would probably lead to a different outcome, Murphy said, referencing the hypothetical posed by Justice Fasciale in his dissent in which a customer buys a $1,000 coat at 70% for $300.

"To make it more tangible, he has to come up with this sort of outlandish-like luxury product discount to make it even more approachable. But I think that's kind of what he's getting at, is if you have just a slight deviation [of] these facts, you probably could get a different outcome," he said, noting Robey and Reynolds couldn't articulate their injury in a concrete way.

While dissenting opinions can be persuasive in later cases or become the majority view of the court under different circumstances, lower courts are obligated to follow the majority's decision, Oberstaedt noted.

Another possible reason for the court's split, he said, could be the ambiguous language around the term "ascertainable loss."

"What does it really mean? And it's been left to the courts to determine that; the legislature could always step in and say this is what we consider to be the loss, the type of loss that's covered by the Consumer Fraud Act," Oberstaedt said.

The ambiguous language has been around for a long time, he said, and the legislature has been willing to let the courts interpret what "ascertainable loss" means in a wide variety of circumstances over the years. But if it stepped in and took the lead from the dissenting opinion or the attorney general's amicus argument, it would help clear things up, he said.

"But sometimes it takes a case like this in order to get them to say, well, what do we really want this to cover? And if they cleaned it up and amended the statute, that would certainly be a welcome response," Oberstaedt said.

--Editing by Adam LoBelia.
