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Appellate Division Ruling on 'Fake Sales' Likely to Spawn Class Action Claims Against Retailers

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After the New Jersey Appellate Division sided with shoppers over the age-old retail industry trick of marking up prices before offering items “on sale,” some observers are predicting an uptick in class action claims—but these cases likely won’t be cut-and-dry.

In a published Feb. 9 opinion in *Robey v. SPARC Group*, the appeals court held that a trial judge erred in dismissing a claim of false advertising brought by consumers against SPARC Group over clothing prices. SPARC Group, or Simon Properties Authentic Retail Properties, is the owner of brands such as Brooks Brothers, Eddie Bauer, and Forever 21. While the court found that the 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, said the decision certainly opened a potential avenue of liability over a practice that is common in retail. However, Oberstaedt cautioned, the Appellate Division’s ruling on a motion to dismiss is not the same as if there had been a trial.

“Sometimes, attorneys get a little ahead of themselves in terms of the facts,” said Oberstaedt. “But that said, this case certainly represents an important decision because the court is saying, ‘If these facts are true—if, in fact, these plaintiffs are able to prove this—that it is going to create a potential avenue of liability in a practice that is not uncommon in retail.”

Oberstaedt said the *Robey* ruling “could have significant ramifications on a few things.”

“One is certainly that the court talks about the prospect for injunctive relief as opposed to only damages,” he said. “The court is talking about the prospect of potentially enjoining defendants from engaging in these practices going forward.”

“And if that is the case,” Obberstaedt continued, “what is that going to mean for some of these retailers that use that as part of the marketing strategy? So it will be very interesting to see what impact that has New Jersey on retailers and it could have an impact on how retail sales are done here.”

Lisa R. Considine, of DiSabato & Considine in Rutherford, represents victims of consumer fraud in class actions, serves on the Consumer Protection Law Committee, and is the co-chair of the Class Actions Special Committee of the New Jersey State Bar Association. Considine clarified that her comments on the Robey case are as a practitioner, not on behalf of the bar association.

“It was important that the court recognized the fact that the plaintiffs might not have, themselves, purchased from the same real retailer again, but that does not eliminate the ability to pursue injunctive relief under the CFA,” said Considine.

Still, Considine stated that, in terms of the impact this may have on retailers, it is important to remember that the decision does not affect all sales, just fake sales, and that exposure is easy for a retailer to avoid.

“This is an important distinction to note, because there is some chatter amongst the defense part about how this is going to affect retailers in New Jersey,” said Considine. “But again, this doesn’t affect every retailer and it doesn’t affect every sale—it only affects a fictitious sale. That is something that the Legislature has already determined as a prohibited practice here. We are not asking retailers to do anything differently. We are just reminding them to comply with the law.”

“I think it is fair to predict that there will be a little bit of a bloom of class action in the short term because there are a number of retailers in New Jersey that offer these fictitious sales,” said Considine. “And I think it’s reasonable to expect that we will see a little bit of an uptick in class actions related to this practice, as we should.”

In *Robey*, the appeals court held that a trial judge erred in dismissing a claim of false advertising brought by consumers against SPARC Group over clothing prices. While the court found that the judge thoroughly addressed all the statutory and common-law counts, it disagreed with the determination that the plaintiffs failed to alleged an ascertainable loss.

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. 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.

Counsel to the plaintiffs, Stephen P. DeNittis of DeNittis Osefchen Prince, called it a ”landmark” decision.

“This is what we call ‘fake sales,’” DeNittis said of the retail mark-up practice. “The court’s holding that the loss of the discounts constitutes ascertainable losses is consistent with how the Supreme Court views the Consumer Fraud Act’s ascertainable-loss requirement.”

According to the 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, the Truth in Consumer Contract, Warranty, and Notice Act.

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, according to the opinion.

Counsel to SPARC Group, Stephanie Sheridan, a partner at Steptoe & Johnson, said she was surprised and disappointed with the appeals court’s decision and that she and her client are considering options for next steps.

Whether consumer protection attorneys across New Jersey are spurred to action by the *Robey* decision remains to be seen. But even if they are, Oberstaedt said there’s no guarantee that these cases would be clear winners.

“There may be some lawyers out there who are interested in pursuing this type of claim if they can find the right plaintiffs,” he said. “However, I do not know if we’re going to see a rush yet. I think the next play here is in the class action context. There are going to be some challenges to see if there is a class you could bring. I do not think it is going to be as easy as some lawyers might think it could be.”