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FILING ID #	1040532	**APPELLATE #**	A-001384-21
SUPREME #	087981	**TRIAL COURT COUNTY**	BERGEN
CASE TITLE	CHRISTA ROBEY AND MAUREEN REYNOLDS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED V. SPARC GROUP LLC		
CASE TYPE	CIVIL	**DISPOSITION DATE**	02/09/2023
CATEGORY	LAW-CIVIL PART		
TRIAL COURT JUDGE			

PARTY/ATTORNEY

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DOCUMENTS

DOCUMENT / FILE NAME	FILING PARTY	FIRM NAME/ATTORNEY NAME	SOURCE	DATE POSTED	DOCUMENT STATUS	SUPREME MODE
MOTION FOR LEAVE TO APPEAR AMICUS CURIAE	NATIONAL RETAIL FEDERATION	LOWENSTEIN SANDLER LLP - CHRISTOPHER S PORRINO	SYSTEM GENERATED	04/03/2023	SUBMITTED	M-UNASSIGNED-2
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CERTIFICATION OF SERVICE	NATIONAL RETAIL FEDERATION	LOWENSTEIN SANDLER LLP - CHRISTOPHER S PORRINO	SYSTEM GENERATED	04/03/2023	SUBMITTED	C-UNASSIGNED-1

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SUPREME COURT OF NEW JERSEY

APP. DIV. # **A-001384-21**

SUPREME COURT # **087981**

Christa Robey and Maureen Reynolds, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

Sparc Group LLC,

Defendant-Petitioner.

NOTICE OF MOTION
MOTION FOR LEAVE TO APPEAR AMICUS CURIAE

PLEASE TAKE NOTICE THAT PURSUANT TO R. 1:13-9, NATIONAL RETAIL FEDERATION ("NRF") AND RETAIL LITIGATION CENTER, INC. ("RLC") HEREBY APPLY TO THE SUPREME COURT OF NEW JERSEY FOR LEAVE TO APPEAR AS AMICI CURIAE TO SUPPORT DEFENDANT'S PETITION FOR CERTIFICATION; AND

PLEASE TAKE FURTHER NOTICE THAT IN SUPPORT OF THIS APPLICATION, NRF AND RLC SHALL RELY UPON THE BRIEF AND APPENDIX IN SUPPORT OF SPARC GROUP LLC'S PETITION FOR CERTIFICATION.

Attorney for NATIONAL RETAIL FEDERATION

Dated: **04/03/2023**

S/ CHRISTOPHER S PORRINO

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CHRISTA ROBEY and MAUREEN REYNOLDS, on behalf of themselves and all others similarly situated, Plaintiffs-Respondents, v. SPARC GROUP LLC, Defendant-Petitioner.	SUPREME COURT OF NEW JERSEY Docket No. 087981 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-1384-21 SAT BELOW: Hon. Maritza Berdote Byrne, J.A.D. Hon. Clarkson S. Fisher, J.A.D. Hon. Richard J. Geiger, J.A.D. Civil Action Dated: April 3, 2023

BRIEF AND APPENDIX OF AMICI CURIAE NATIONAL RETAIL FEDERATION AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF SPARC GROUP LLC'S PETITION FOR CERTIFICATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

REGULATIONS

ANNEXED TO PETITION

PRELIMINARY STATEMENT

Review of the Appellate Division's decision is warranted because it departs from all existing precedent interpreting "ascertainable loss" under the Consumer Fraud Act. According to the majority, a customer that purchases an item at a discount from an allegedly deceptive "reference price" (e.g., an advertisement with a strike-through price: "~~$9.99~~, $7.99") has suffered an ascertainable loss that is the "value" of the discount advertised (i.e., the difference between the price they paid and the reference price), which amount should be potentially trebled as part of a damages calculation. The concurrence disagreed with this formulation of both ascertainable loss and damages (because it believed such amounts would "put plaintiffs in a significantly better economic position than they would have been") yet found that the ascertainable loss consisted of the price Plaintiffs paid for the clothing, potentially trebled.

Both of these theories are inconsistent with both the "benefit of the bargain" and "out-of-pocket" losses under New Jersey law. Under either formulation, the Plaintiff would keep the item they received and also recover up to triple the value of the discount advertised or the price they paid. Plaintiffs here do not allege that the products were worth any less than they paid for them, or that they were defective in any way. Plaintiffs thus have suffered no ascertainable loss. Yet the Appellate Division's decision would allow them to keep the product they purchased, for the price they agreed to pay, and then receive a gratuitous windfall.

The Appellate Division's decision conflicts with prior decisions of the Appellate Division and federal courts applying New Jersey law, all of which have analyzed the same claims and found consumers suffered no ascertainable loss. The decision itself is internally inconsistent—the panel not only disagreed with each other, but the concurrence contradicted itself by rejecting a damages calculation it perceived to be a windfall, and then endorsing a different theory that provided a similar windfall. It also conflicts with authority from other courts across the country under analogous consumer-fraud laws. And most importantly, it is inconsistent with the precedent of this Court.

Certification is warranted here. This Court has delved deeply into the meaning of "ascertainable loss" in the context of the Consumer Fraud Act only once. Because that case, <u>Thiedemann</u>, does not squarely address the precise issue here, the lower courts have interpreted the precedent in a number of confusing ways. Guidance is also necessary under the Truth-in-Consumer Contract, Warranty, and Notice Act and whether there are any difference(s) between the "aggrieved consumer" of that statute and the "ascertainable loss" standard of the Consumer Fraud Act. This Court has never spoken on the issue and, as the diverging opinions below demonstrate, the lower courts need that guidance.

STATEMENT OF INTEREST OF AMICI CURIAE

Founded in 1911 as the National Retail Dry Goods Association, today the National Retail Federation ("NRF") is the world's largest retail trade association. Its members include department stores; specialty, discount, catalog, and independent retailers; chain restaurants; grocery stores; multi-level marketing companies; and vendors of retail businesses. Among other things, the NRF educates policy makers at both the state and federal government on the pressing issues of the day for the retail industry. The NRF also monitors important litigations throughout the country, appearing as amicus curiae wherever appropriate to help ensure the retail industry's voice is heard.

The Retail Litigation Center, Inc. ("RLC"), provides courts with the perspective of the retail industry on important legal issues affecting its members. Since its founding in 2010, the RLC has filed more than 200 amicus briefs that have been favorably cited or admitted by this Court and others. See, e.g., South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 542 (2013); Spade v. Select Comfort Corp., 232 N.J. 504 (2018).

Since their establishment, the NRF and RLC have amassed institutional knowledge and perspective critical to striking the right balance between retailers and the consumers purchasing their wares. Retail is the largest private-sector industry in the United States, consisting of over 3.8 million retail establishments and supporting more than 52 million employees. The issues that amici champion affect quite literally every consumer in the entire country.

The panel's decision here is part of a national debate on which the NRF and RLC have spoken previously on multiple occasions. They seek status as amici curiae to offer the Court their perspectives on these important issues and, respectfully, urge the Court to reverse the decision below.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs Christa Robey and Maureen Reynolds filed a civil complaint against Defendant SPARC Group LLC ("SPARC"), which owns and operates Aéropostale clothing stores. Plaintiffs alleged that SPARC informed consumers that items are on "sale" when "Aeropostale [sic] never or only rarely offers or sells its products at the advertised list price." (Pa6 at ¶ 6).[1] This conduct, Plaintiffs allege, violates the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -227 ("CFA"), the Truth-in-Consumer Contract, Warranty, and Notice Act,

[1] "NRFa" denotes the documents appended to this submission. "Aa" denotes the documents appended to Defendant's Petition for Certification. "Pa" denotes Plaintiffs' April 18, 2022 appellate appendix filed below. "PbApp" denotes Plaintiffs' April 18, 2022 appellate merits brief filed below. "PbSupr" denotes Plaintiffs' March 24, 2023 opposition to the petition for certification.

N.J.S.A. 56:12-14 to -18 ("TCCWNA"), and the common law.

Discounts to consumers, in the form of markdowns from higher reference prices, are common in the retail industry. Consumers are familiar with (and expect) discounts from reference prices, and benefit from them. Different retailers define reference prices in different ways. For example, some retailers may use a reference price that is the former price at which that retailer offered the item for sale for a reasonable period of time, or the price at which a reasonable number of sales were made by that retailer. Some may use a reference price that is the price at which the item or comparable items were sold or offered for sale by other businesses in the retailer's trade area. The New Jersey Administrative Code authorizes comparison to such reference prices when done appropriately. See N.J.A.C. 13:45A-9.6(a), (b) (a reference price is not "fictitious" if other retailers offer "comparable merchandise of like grade or quality . . . within the advertiser's trade area in the regular course of business").[2]

Plaintiffs allege that they purchased various Aéropostale products at the prices advertised, obtaining the exact quantity and quality of products they intended to purchase. Plaintiffs do not claim that the products were defective in any way, or that they received something objectively different than what they

[2] The Complaint agrees that bona fide sales by other retailers—not just the subject retailer itself—make a pre-sale price legitimate. See (Pa16 at ¶ 47).

desired. Instead, Plaintiffs allege that because SPARC itself did not previously sell the products at the stated reference price, Plaintiffs have private causes of action under the CFA, TCCWNA, and common law.

The trial court dismissed Plaintiffs' Complaint for failure to state a claim. A divided panel of the Appellate Division reversed and remanded in a published decision, resuscitating all of Plaintiffs' causes of action. SPARC sought certification, which Plaintiffs oppose. Amici now respectfully urge this Court to grant certification and then reverse the decision below.

ARGUMENT

I. The Supreme Court Should Grant Certification

The published, precedential decision below substantially expands the definition of "ascertainable loss" under the CFA, embarking into theories that this Court has neither endorsed nor reviewed. Indeed, Plaintiffs' counsel has repeatedly proclaimed that it was a "landmark decision" for New Jersey.[3] The opinion of the divided panel here was also contrary to another panel's decision on the exact issue and inconsistent with this Court's own precedent. Respectfully, certification is warranted.

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[3] See Ryan Harroff, Split NJ Panel Revives Suit Over 'False' Aeropostale Discounts, LAW360 (Feb. 9, 2023) (quoting Stephen DeNittis, Esq.) (NRFa02); Colleen Murphy, Appellate Division Ruling on 'Fake Sales' Likely to Spawn Class Action Claims Against Retailers, N.J. LAW JOURNAL (Mar. 6, 2023) (NRFa21).

A. The appeal presents a question of general public importance which has not been but should be settled by the Supreme Court.

For years after the CFA's enactment, the only person authorized to enforce the statute was the Attorney General. See Weinberg v. Sprint Corp., 173 N.J. 233, 247-48 (2002). The Legislature thereafter afforded a private right of action to persons "who suffer[] any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under" the CFA. N.J.S.A. 56:8-19. As this Court recognized, one can "neither ascribe a plain meaning to the term ascertainable loss, nor find legislative history that sheds direct light on those words." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 11 (2004). But "[t]he ascertainable loss requirement operates as an integral check upon the balance struck by the CFA between the consuming public and sellers of goods." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 251 (2005); accord Perez v. Professionally Green, LLC, 215 N.J. 388, 401 (2013) (emphasizing that even if there is a CFA violation, a private plaintiff must prove an "ascertainable loss" to sue).

Applying the liberal pleading standard, the panel below concluded that the Complaint alleged a CFA violation. (Aa6-7). Whether that alleged violation caused Plaintiffs an ascertainable loss was, as the majority stated, "[t]he more difficult question posed." (Aa8). Indeed, that "difficult" question split the panel.

The majority said that such a loss had been pled because Plaintiffs "received no benefit from the discounts" they thought they were receiving. (Aa9). The minority disagreed: "the pleadings here do not indicate plaintiffs were deprived of any benefit of the bargain," and the Supreme Court has not "endorsed the benefit of the bargain theory . . . where the contract has been performed and plaintiffs allege no facts about receiving non-conforming or defective goods." (Aa17) (emphasis added). Instead, the minority accepted the unpled theory that "plaintiffs suffered an ascertainable loss and monetary damages because they would not have purchased the items had they known the items had not been regularly offered at the higher list price." (Aa18) (alterations omitted).[4]

Even further dividing the panel was the measure of damages, which

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[4] Plaintiffs emphasized below that they did not advance the "ascertainable loss" theory that the minority accepted. See (PbApp44-45) ("[T]he Complaint do[es] not allege that Defendant's false statements caused them to make a purchase that they otherwise would not have made. Rather, these allegations state that Defendant's false statements caused Plaintiffs to pay more money for the merchandise than they would have been willing to pay if Plaintiffs had known these statements were false." (emphasis in original)). Plaintiffs have now changed tack at the certification stage, claiming the exact opposite. See (PbSupr13). In any event, other courts have rejected that asserted theory of "purchase-as-injury" even when it was asserted. See, e.g., Shaulis v. Nordstrom, Inc., 865 F.3d 1, 11 (1st Cir. 2017) (concluding that theory conflates deception with injury).

concept is distinct from a loss conferring standing to sue. See D'Agostino v. Maldonado, 216 N.J. 168, 192 (2013) (explaining that "ascertainable loss" and "damages sustained" are "two concepts [with] separate functions in the analysis"). The majority believed that Plaintiffs should receive triple "the value of the discounts that defendants offered." (Aa10). That is, Plaintiffs could keep the defect-free merchandise at the price they agreed to pay, plus triple the difference between the sold-at and reference prices. The minority disagreed: "Having alleged and proven the items were never worth the higher fictitiously advertised price, that inflated price cannot serve to establish the value of the benefit of their bargain." (Aa19). Instead, the minority believed (even though Plaintiffs disclaimed such theory) the proper metric was "the out-of-pocket damages," i.e., "the price plaintiffs paid for the articles of clothing." (Aa20).

That the same panel analyzing the same facts was so divided, both on the CFA elements and the measure of damages, itself suggests that Supreme Court guidance is necessary. Cf. R. 2:2-1 (allowing an appeal as of right when there is a dissent in the Appellate Division). Even Plaintiffs acknowledged below that their theory of ascertainable loss "appears to be a novel issue in New Jersey state court." (PbApp47-48). Plaintiffs are right. Except for one unpublished decision (which reached the opposite conclusion, see infra), Plaintiffs' theories were untested in New Jersey state court. More importantly, they are issues on which this Court has never squarely spoken.

As the parties and the panel below agreed, only two Supreme Court decisions are even remotely analogous: Furst and Thiedemann.[5] But on their face, those cases offer limited guidance to the important questions here. Furst analyzed how to calculate the "replacement value" for a defective product sold at a discount. 182 N.J. at 13. Contrary to Plaintiffs' wishful thinking supported by a presumably inadvertent misquotation (PaSupr8-9),[6] the decision said nothing about the circumstances presented here—whether there is an ascertainable loss where a product is not defective. See (Aa17) (minority below agreed that the Supreme Court has never addressed this issue). And the issue in Thiedemann was whether a plaintiff suffers an ascertainable loss when the seller's warranty program corrects the defective product and makes the

[5] The other Supreme Court decisions touching upon "ascertainable loss" and "benefit of the bargain" are too distant to provide real guidance here. See, e.g., Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464 (1988) (defendant's misconduct must proximately cause the consumer's ascertainable loss); Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994) (cost to repair shoddy construction is an ascertainable loss); Bosland v. Warnock Dodge, Inc., 197 N.J. 543 (2009) (consumer need not seek a refund of an impermissible overcharge to show ascertainable loss); Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344 (2011) (net opinion insufficient to demonstrate ascertainable loss); D'Agostino v. Maldonado, 216 N.J. 168 (2013) (losing title to a house is ascertainable loss even if court later uses equitable remedy to restore title).

[6] Plaintiff attributes a key quotation as coming from this Court when it was actually from the divided panel below. See (PbSupr8) (inaccurately attributing quoted language to Furst, 182 N.J. at 13-14).

consumer whole. 183 N.J. 252.

While these two decisions offer some guidance to the lower courts, they are distinguishable in numerous respects. Never has this Court discussed the particular practice alleged here of comparing one's prices to a higher reference price, let alone whether that practice causes an "ascertainable loss" under the CFA. Nor has this Court explained what sorts of damages would be available to such a plaintiff if, in fact, the practice caused an ascertainable loss.

The panel's decision under TCCWNA also warrants the Court's attention. Whereas the CFA confers standing on consumers suffering an "ascertainable loss," TCCWNA reserves standing for the "aggrieved consumer." N.J.S.A. 56:12-17. The majority below acknowledged that "it is not clear . . . whether the Supreme Court views the [CFA's] ascertainable-loss requirement as the equivalent of [TCCWNA's] aggrieved-consumer requirement." (Aa8-9). But the majority conflated these two inquiries, holding that if a consumer alleges an "ascertainable loss" under the CFA she *per se* alleges aggrieved-consumer status under TCCWNA. (Aa9). This Court has never examined the distinction(s) between "ascertainable loss" and "aggrieved consumer," or set forth any guidance to the lower courts about whether a finding of one informs a finding of the other. Indeed, the only time this Court ever analyzed the meaning of "aggrieved consumer" was <u>Spade</u>, 232 N.J. 504, and that case leaves unanswered the questions posed here.

Respectfully, Robey presents the Court with a prime opportunity to guide the lower courts on these important issues under both the CFA and TCCWNA. Indeed, other state Supreme Courts have very recently accepted certification of similar questions relating to their respective states' consumer protection laws. See, e.g., Leigh-Pink v. Rio Properties, LLC, 989 F.3d 735 (9th Cir. 2021) (certifying question to Nevada's highest court); Leigh-Pink v. Rio Properties, LLC, 512 P.3d 322 (Nev. 2022) (answering certified question by holding plaintiffs had not suffered monetary loss); Clark v. Eddie Bauer LLC, 30 F.4th 1151 (9th Cir. 2022) (certifying question to Oregon's highest court); Clark v. Eddie Bauer LLC, 510 P.3d 880 (Or. 2022) (accepting certified question).

B. The decision under review is in conflict with another decision of the New Jersey Appellate Division and Supreme Court precedent.

The published decision here was not the first time that the Appellate Division considered a purported "false sale" claim under the CFA. But it was the first time that a panel concluded that such claim pled an ascertainable loss.

In 2011 a different panel (Judges Messano and LeWinn) decided Hoffman v. Macy's, Inc., 2011 WL 6585 (N.J. App. Div. June 28, 2010), certif. denied, 204 N.J. 38 (2010) (Aa60). The CFA theory there was virtually identical to that pled here: the reference price was illusory. Id. at *1. That earlier panel concluded that, even if there was a CFA violation, plaintiff failed to plead any "ascertainable loss." Id. at *2. "Defendant delivered the espresso machine at the advertised price of $299.99. The claim that defendant misrepresented the MSRP or 'regular price' of this item provides no basis for establishing an 'ascertainable loss.'" Id. at *4.

Hoffman and the new Robey decision are at complete odds with one another. The question here of "ascertainable loss" thus not only divided the Robey panel, but also created a fissure with another panel in the New Jersey Appellate Division. It has likewise created a division with other courts that, applying New Jersey law, have rejected the Robey line of reasoning. See, e.g., Robey v. PVH Corporation, 495 F. Supp. 3d 311, 321 (S.D.N.Y. 2020) (applying New Jersey law and rejecting exactly the same "ascertainable loss" theory pled here).[7]

The published decision below creates a conflict in New Jersey law. Not only is it inconsistent with other Appellate Division precedent, it also conflicts with this Court's own guidance. See infra. Respectfully, the Court should grant the Petition.

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[7] The plaintiff (Christa Robey) and counsel (Stephen P. Denittis, Esq.) in the federal Robey case are the same as those in the state Robey decision below, and the Complaints are largely identical. The federal judge rejected Ms. Robey's arguments while the divided panel below endorsed them because of the lack of clear guidance from this Court.

C. The interests of justice require certification.

Even further underscoring the need for Supreme Court guidance are public-policy considerations and the interests of justice given the wide-ranging effects that the decision may have on retailers and consumers alike.

During the 1950s and 1960s, the Federal Trade Commission ("FTC") aggressively pursued retailers that it believed were committing reference-pricing violations. See Muris, Economics and Consumer Protection, 60 Antitrust LJ 103, 112 (1991) (explaining history) (NRFa07). But as modern economic knowledge evolved, the FTC realized that aggressive enforcement of such cases actually harmed consumers. Id. at 113. As former FTC Chairman Robert Pitofsky noted, "The FTC has not brought a single fictitious price case since 1979, and the last two chairs of the FTC—one presiding during a Democratic Administration and the other during a Republican Administration—have indicated that enforcement actions in the area often do more harm than good." R. Pitofsky, R. Shaheen, and A. Mudge, Pricing Laws Are No Bargain for Consumers, 18-SUM Antitrust at 62 (2004) (NRFa16).

Chairman Pitofsky explained that enforcement actions may dampen the robust price competition that ultimately benefits consumers. Because discounters—particularly retail outlets such as Defendant here—are natural targets for these claims, aggressive enforcement of unfair trade practices laws could raise the costs to sellers "of ascertaining whether particular discount claims are accurate [and thus] deter them from making such claims at all." Ibid. That is, if the rule prevented retailers from including a reference price unless the retailer first undertook an extensive analysis to determine whether it had sold at least one item in the same style and color at that price that had not been returned, the effort would be unjustified. No retailer could afford to undergo that level of effort for every item that was to be put on sale. See ibid. As another former FTC Chairman commented, allowing "such an enforcement campaign will discourage exactly the kind of aggressive price competition that the government should seek to encourage." Muris, 60 Antitrust LJ at 113 (NRFa07).

The effect of the aptly dubbed "landmark decision" in this case is tremendous. Retailers across the state routinely offer sales, comparison information, and other discounts to their customers. The published decision below invites plaintiffs with contingency counsel to sue everyone based on subjective theories of subjective worth and false discounts.[8] The litigations themselves, without regard to ultimate success, could herald a fundamental shift in the way that retail is conducted across the state. See, e.g., Gerboc v.

[8] See Colleen Murphy, Appellate Division Ruling on 'Fake Sales' Likely to Spawn Class Actions Claims Against Retailers (commenter stated that "the decision certainly opened a potential avenue of liability over a practice that is common in retail") (NRFa20).

ContextLogic, Inc., 867 F.3d 675, 679 (6th Cir. 2017) (stating that such complaints "would change the nature of online, and even in-store, sales dramatically").

Respectfully, Supreme Court review is warranted before New Jersey consecrates through judicial creation what is essentially a new, sweeping law.

II. After Granting Certification the Supreme Court Should Reverse.

The trial court judge here properly dismissed Plaintiffs' Complaint for failing to state a claim, and the Appellate Division erred when it ruled otherwise. Respectfully, for numerous reasons the Court should reverse.

A. The panel's decision is inconsistent with this Court's CFA precedent.

According to the Complaint, each Plaintiff examined a particular piece of clothing and agreed to pay the advertised price for the product. Plaintiffs do not claim that the clothing was defective in any way, that they were charged more than the price quoted, or that they unsuccessfully sought a refund. Nor do they claim that the product was worth less than they paid for it. Instead, they allege that because they thought the retailer previously sold the products to other customers at significantly higher prices, they do not have the benefit of the desired "bargain," i.e., obtaining a product "worth" more than the charged price. This was the theory the majority (but not the minority) accepted for ascertainable loss—Plaintiffs "received no value for the offered discount."

(Aa9). Respectfully, the panel misapplied this Court's precedent when reaching that conclusion.

In Thiedemann the car seller allegedly "concealed, suppressed, and omitted to disclose the fuel sending unit defect, with the intent that others rely upon the concealment" and purchase defective vehicles. 183 N.J. at 239. But the seller nevertheless fixed the defects at no cost to the consumer pursuant to a warranty program. Id. at 243. The Court rejected that a "theoretical . . . loss in value" could substitute for an "ascertainable loss." Id. at 250. "Plaintiffs needed to produce specific proofs to support or infer a quantifiable loss in respect of their benefit-of-the-bargain claim; subjective assertions without more are insufficient . . . ." Id. at 252. The loss cannot be "hypothetical or illusory," but instead "must be presented with some certainty demonstrating that it is capable of calculation." Id. at 248.

Thus in Thiedemann, the plaintiffs were deceived into buying actually defective products. Yet because they ultimately enjoyed the benefit of their bargain (a defect-free vehicle at the agreed-upon purchase price) they did not suffer an "ascertainable loss." Speculation that the deceit and former defect might lower the resale value was insufficient. Id. at 252-53.

The decision below violates that central holding of Thiedemann. Unlike in that case, Plaintiffs here did not receive defective products; they obtained exactly what they thought they would receive at the price they agreed to pay. That they thought the product was subjectively "worth" more than they paid is precisely the sort of "hypothetical or illusory" theory that this Court rejected in Thiedemann.

The majority's decision also conflicts with Furst. There, this Court held that a buyer who received a defective product was entitled to the "benefit of the bargain" as damages. 182 N.J. at 14. That is, "[t]he merchant who promises to deliver a product at a particular price must, at the option of the consumer, either deliver the product or render its replacement value." Ibid. The buyer has the right to the benefit of their bargain, whether in the form of the product itself or the cost to replace the product. Critically, the Court emphasized that "the regular price is only evidence—not conclusive proof—of replacement value." Id. at 19. If the buyer proves that the replacement value is higher than advertised (i.e., the seller underpriced the product), that is the "bargain" for damages. Ibid. But if the seller proves that the replacement value is less than the advertised price (i.e., the seller overpriced the product), that is instead the "bargain" for damages. Ibid. Yet the panel here concluded that the allegedly illusory reference price was "conclusive proof . . . of replacement value," ibid., and therefore the quantum of damages based on Plaintiffs' subjective feelings of "worth."[9]

It would be a slippery slope to find actionable consumer fraud just because the consumer thought the product was "worth" a higher amount different than they paid. There are many things sellers can (and do) do to make the consumer place greater subjective worth on a product. These include using premium packaging, showcasing the product in the store, or hiring celebrities to enjoy the product in commercials. Sometimes sellers even charge extra for the product because consumers associate higher price with higher value. No one would claim that such practices have caused an "ascertainable loss" to the consumer if the buyer merely paid the price agreed upon for the defect-free product. The subjective "worth" of a product is difficult to quantify, and courts should not be in the business of doing so.

If the product is not defective (which is the case here), then the consumer enjoys the benefit of her bargain. If the buyer subjectively thought the product

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[9] Put another way, Furst instructs that a consumer should receive either a defect-free product at the agreed-upon price, "or" the cost to replace such a defect-free product. 182 N.J. at 14. The majority nevertheless confers upon Plaintiffs the windfall of both a defect-free product at the agreed-upon price and the allegedly illusory discount. New Jersey courts loathe such windfalls. See Finderne Management Co. v. Barrett, 402 N.J. Super. 546, 580 (App. Div. 2008) ("New Jersey has a strong public policy against permitting double recoveries"), certif. denied, 199 N.J. 542 (2009); MMU of N.Y., Inc. v. Grieser, 415 N.J. Super. 37, 47 (App. Div. 2010) ("the court has equitable authority to preclude unjust enrichment in the form of windfall or double recovery" (quotation omitted)).

was "worth" more than she paid, that subjective belief cannot create an ascertainable loss. And it should not matter why she holds that subjective belief of worth or what dollar amount she ascribes to it. If a seller does in fact engage in a pricing scheme that violates the CFA, then the Attorney General can decide whether the conduct warrants intervention. See Thiedemann, 183 N.J. at 250-51 (agreeing that there is a "broader category of actions that may be brought by the Attorney General, which encompasses circumstances where there is no ascertainable loss to an individual but there exists an industry practice that the State seeks to curtail"). But it does not change that the buyer is unharmed, having obtained the promised, conforming product at the agreed-upon price. The panel below erred when it held otherwise.[10]

B. The panel's decision is inconsistent with decisions from other jurisdictions interpreting similar consumer fraud statutes.

New Jersey's CFA is not the only consumer fraud statute in the country requiring a loss to confer standing to a private plaintiff. Indeed, such requirement appears in laws all throughout the country in analogous statutes. Interpreting that like language, sister courts routinely reject the theory of loss

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[10] To the extent that the panel sought to permit private injunction actions by plaintiffs who have not suffered an "ascertainable loss," that was also error. Compare (Aa13-14) (stating that CFA plaintiffs are "private attorneys general" allowed to seek injunctions); with Thiedemann, 183 N.J. at 247 (stating that absent an "ascertainable loss," "only the Attorney General [may] bring actions for purely injunctive relief" (quotation omitted)).

accepted below. See, e.g., Shaulis v. Nordstrom, Inc., 865 F.3d 1, 12 (1st Cir 2017) (rejecting theory because the "complaint fails to identify any bargained-for characteristics of the sweater that [plaintiff] has not received"); Gerboc, 867 F.3d at 681 (rejecting theory because plaintiff "got what he paid for: a $27 item that was offered as a $27 item and that works like a $27 item"); Kim v. Carter' Inc., 598 F.3d 362, 366 (7th Cir. 2010) (rejecting theory because "the plaintiffs in this case got the benefit of their bargain and suffered no actual pecuniary harm"); Mulligan v. QVC, Inc., 888 N.E.2d 1190, 1197 (Ill. App. Div. 2008) (rejecting theory because "before we can apply the benefit-of-the-bargain rule, we must first consider whether [plaintiff] has been actually harmed").

The rationale found in these decisions is sound. As the First Circuit aptly put it, "the subjective belief as to the nature of the value [plaintiff] received . . . does not state a legally cognizable economic injury . . . because it fails to identify anything objective that [plaintiff] bargained for that she did not, in fact, receive." Shaulis, 865 F.3d at 12 (quotation omitted). Indeed, Thiedemann suggests that this Court would also disagree that the fact of purchase alone can cause an "ascertainable loss" under the CFA. In Thiedemann the plaintiffs alleged that the seller induced them to buy cars that defendant knew to be defective. 183 N.J. at 239. The plaintiffs there did not advance a "purchase-as-injury" claim, id. at 244-45, nor did this Court suggest that one otherwise might exist.

Respectfully, if New Jersey courts are finally to publish precedent in this national debate, it should come from the Supreme Court rather than a divided Appellate Division panel. And, for all the reasons stated above, the New Jersey precedent should reject such faulty theories of ascertainable loss.

C. The panel's interpretation of TCCWNA is wrong.

TCCWNA states that an "aggrieved consumer" may bring private suit against defendants for purported violations. N.J.S.A. 56:12-17. By the plain language of the statutes themselves, the TCCWNA "aggrieved consumer" is not synonymous with one suffering a CFA "ascertainable loss." Yet the divided panel below jumbled the concepts together, concluding that finding the former *ipso facto* justifies the latter. Respectfully, that was error.

As this Court instructed, the mere fact of a TCCWNA violation does not make a consumer "aggrieved." Spade, 232 N.J. at 522. Instead, the "aggrieved consumer" is someone "who has suffered some form of harm as a result of the defendant's conduct" even if the harm is less than one compensable by monetary damages. Id. at 522-23. Thus, if the violation wrongly deters someone from returning a defective product or deprives her of the product on the timetable promised, those might be sufficient grievances to confer standing. Id. at 523-24. But if the buyer's product "was delivered conforming and on schedule, and he or she has incurred no monetary damages or adverse consequences, that consumer has suffered no harm [and] . . . is not an 'aggrieved consumer.'" Id. at 524.

The same analysis applies here. Plaintiffs acquired conforming goods at the agreed-upon price, which products they never sought to return. They have what they bargained for at a price they accepted. Their only allegation is that, because of an alleged violation, they thought the product was subjectively "worth" more. But as this Court held in Spade, the fact of a violation does not itself confer TCCWNA standing on a consumer. Something more is required and that "something" is lacking here. See Robey, 495 F. Supp. 3d at 322-23 (applying New Jersey law, rejecting that a false reference price could make the buyer an "aggrieved consumer" under TCCWNA). Just as the panel below was wrong to find an "ascertainable loss" under the CFA, so too was it wrong to transplant that analysis into the separate TCCWNA inquiry.

CONCLUSION

For the above reasons, the NRF and RLC respectfully urge the Court to grant certification and then reverse the divided panel's decision below.

Respectfully submitted,

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Split NJ Panel Revives Suit Over 'False' Aeropostale Discounts

By **Ryan Harroff**

Law360 (February 9, 2023, 4:09 PM EST) -- A split New Jersey state appeals court panel revived class claims accusing the owner of multiple Aeropostale stores of advertising fake discounts in a precedential ruling Thursday, but disagreed on what kind of injury the shoppers are able to establish in court.

Shoppers Christa Robey and Maureen Reynolds had accused retail company Sparc Group LLC in June 2021 of running a "markup to markdown" scheme where it marked clothes at two of its Aeropostale locations as discounted by as much as 60% off, when in fact the clothes had never been sold at the higher price from which they were supposedly on sale. A state court tossed the suit for failing to state an "ascertainable loss," but the Appellate Division panel said Robey and Reynolds had clearly alleged their losses.

"We are satisfied that plaintiffs have alleged such a loss by pleading, in essence, that they received no value for the offered discount; that is something real and quantifiable," the majority wrote.

Sparc and the lower court had said the shoppers' claims did not constitute a violation of New Jersey's Consumer Fraud Act or Truth in Consumer Contract, Warranty and Notice Act. But the appeals panel found Thursday that the lower court wrongly required Robey and Reynolds to prove their allegations to survive dismissal.

The majority also criticized Sparc's argument from its dismissal bid, which accused the shoppers of objecting to the company "putting items on sale too often" and described the allegations as a "straightforward sales transaction: Sparc offered items at a specified price, plaintiffs each decided to pay that price and they received the goods they wanted."

According to the majority's opinion, Sparc's argument sidesteps the actual claims made against it.

"Defendant's argument seems to be that plaintiffs have not alleged an ascertainable loss because, even accepting the allegations as true, they bought — using our simpler example — $50 items for $50," the opinion states. "This argument, however, completely ignores that part of the exchange of promises included defendant's offers of discounts, and plaintiffs claim they received no benefit from the discounts."

The panel revived Robey and Reynolds' proposed class action on the grounds that they had plausibly alleged they were deceived by Sparc and should be able to pursue their claimed losses, both for the price they paid out of pocket for the clothes and for the monetary value of the bargain they thought they were getting at the time, or the "benefit of the bargain" they missed out on.

New Jersey Appellate Judge Maritza Berdote Byrne disagreed on the benefit of the bargain issue and wrote in her concurring opinion that the shoppers should only be allowed to seek the amount they actually paid for their clothes.

"Having alleged and proven the items were never worth the higher fictitiously advertised price, that inflated price cannot serve to establish the value of the benefit of their bargain," Judge Byrne said. "The allegations here do not rise to a bait and switch, an advertised but unavailable product, inherent defect or wrong item. The goods conformed with every expectation but for the fictitious higher price."

Judge Byrne and the majority concerned part of their opinion with whether the sold clothes were defective, because the benefit of the bargain theory of loss comes from the New Jersey Supreme Court's decision in Furst v. Einstein Moomjy Inc. In that case, a consumer returned a defective carpet that they bought on discount and won a refund of the full listed price, not the discounted rate.

The majority of the appellate panel decided that the stated value of the product, not the defect in that carpet, was what entitled the consumer to a full-price refund rather than an out-of-pocket payback for the discounted rate, while Judge Byrne held the opposite.

Stephen DeNittis, counsel for Robey and Reynolds, told Law360 Thursday that the panel's opinion is a "landmark decision," which clearly shows that retailers in New Jersey cannot deceive consumers with fake discounts to move products. He said he disagreed with Judge Byrne's take on which losses his clients could claim, but that he was happy overall with the ruling.

"I do think that both damages are available, as the majority held, but I'm happy, though, that the concurring opinion at least recognized the out-of-pocket loss," DeNittis said, adding that Judge Byrne's stance that his clients should not be able to claim the benefit of the bargain is still better for consumers than the lower court's denial for both loss theories.

Stephanie Sheridan, counsel for Sparc, told Law360 Thursday, "We are surprised and disappointed by the decision, and are considering our options for next steps."

New Jersey Appellate Judges Richard J. Geiger, Maritza Berdote Byrne and Clarkson S. Fisher sat on the panel.

Robey and Reynolds are represented by Stephen P. DeNittis, Joseph A. Osefchen and Shane T. Prince of DeNittis Osefchen Prince PC.

Sparc Group is represented by Meegan B. Brooks, Stephanie A. Sheridan and Anthony J. Anscombe of Steptoe & Johnson LLP, and Charles J. Falletta, Michael S. Carucci and Jeffrey J. Greenbaum of Sills Cummis & Gross PC.

The case is Christa Robey, et al. v. Sparc Group LLC, case number A-1384-21, in the Superior Court of New Jersey Appellate Division.

--Editing by Melissa Treolo.

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60 Antitrust L.J. 103

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Timothy J. Muris [a1]

ECONOMICS AND CONSUMER PROTECTION

I. INTRODUCTION

My task is to discuss basic economics and its application to current consumer protection issues. First, the economics. I will discuss the general role of government in markets, particularly the importance of the government in defining the rules of exchange and the role of government agencies in enforcing those rules. I will also briefly introduce the economics of government institutions—that is, what clues to the performance of government institutions can we gather from a discussion of the constraints and incentives that face the regulators, in this case the Federal Trade Commission and the states. I will then consider four applications of these economic lessons: fraud, other contract breaches, deceptive pricing, and national advertising.

II. BASIC ECONOMICS

A. PUBLIC GOODS AND MARKET FAILURE

A useful departure point for a discussion of economics and consumer protection is the concept of public goods. By "public goods," I mean "goods" as in goods and services, not "goods" as in goods and bads. National defense is a frequently-stated example of a public good. It is difficult to have private national defense. The problem is the inability efficiently to exclude consumers who receive the benefit if someone else provides the defense. If someone else has Patriot missiles in your neighborhood, you benefit without paying. Without exclusivity, many consumers get the good for free. This joint consumption of the production of national defense by both those who pay and those who do not is what leads to its characterization as a classic public good. Because those who do not have to pay for the good can free ride, less than the optimal amount will be provided, leading to a standard argument for government intervention.

***104** A kind of public good more relevant for consumer protection is what results in litigation. Litigation produces not just a resolution of the dispute before the court—which is what the parties are primarily, if not exclusively, interested in—but it also often produces a precedent to guide others, usually in the form of a written opinion. Many can obtain the benefit of that precedent for their legal planning without paying for it.

As with defense, there is a problem of efficiently excluding those who receive the benefit. To force only the parties who are before the court to pay for providing the precedent would be inefficient in the sense that they do not receive all the benefits; the benefits are widely diffused. Individuals who do not receive the full benefits will be unwilling to pay the costs of producing those benefits when the costs exceed the amount of the individuals' gain. Because the benefits transcend the parties, we have an argument for public subsidization of the court system.

The nature of the public goods of national defense and judicial precedents is one reason why economists say markets fail. The concept of market failure can be used to support a quite conservative or quite activist consumer protection policy, depending on your bent. But it is important to talk about the concept of market failure with care because the issue is failure compared to what. In the real world, institutions are imperfect, both government institutions and market institutions. It makes no sense to compare an imperfect reality to a hypothetical perfection. A vast literature exists on government failure, as large as or larger than the literature on market failure. [1]

NRFa03

B. DEFINING THE RULES OF EXCHANGE

One of the crucial roles for government, as we are seeing in Eastern Europe, is to define and allocate property rights. Courts—and government agencies as well, as we shall see shortly—are very useful in defining and protecting those rights. As an illustration, consider the most basic doctrine in contract law, consideration. For hundreds of years, English and American courts have allowed a contract to create legally enforceable rights when parties exchange promises of future performance.

If parties could breach without legal consequence, voluntary exchange of promises of future performance would not disappear. Indeed, before the doctrine of consideration arose, there was a quite active system of voluntary exchanges, with the parties using credit bureaus, bonding, relying on experience from past dealings, and similar devices to ensure ***105** performance.[2] Nevertheless, compared to the system of contract law that developed, the alternative system was probably inefficient because it was almost certainly more costly. Credit bureaus and bonding, for example, increase the cost of contracting, at least by the fact that the parties need another contract to protect themselves from the consequences of breach. In some cases—what economists like to call "at the margin"—those costs would be so high that certain exchanges would not be made at all.

One of the most useful purposes for the courts and for the legislative branch is to provide what are called default rules. When contracts are formed, even the most highly profitable corporations do not find it useful to define the terms for every contingency possible. Instead, courts, legislatures, and agencies have developed default rules—terms that apply when the parties do not explicitly specify otherwise. These rules are like buying off-the-rack clothing rather than specially tailored clothes, i.e., rather than writing your own contract, you get it "off the rack," as it has come down in the court and legislative pronouncements. In this way, a vast common law has evolved to govern consumer and other commercial transactions.

What role does this process leave for government consumer protection agencies? The agencies can and should enforce these basic rules although, of course, most of these rules are so basic—for example, rules dealing with fraud, breach of contract, and prevention of deceptive advertising—that we do not even think about them as rules at all. The traditional government method for enforcing those rules has been the courts. As is well known, however, for consumer transactions going to court is usually not economically feasible. When disputes involve small losses to consumers, private lawsuits will not work. Nor have class actions evolved to provide adequate enforcement. Further, small claims courts do not sufficiently reduce the costs of litigation. Thus, government consumer protection agencies have become part of the process to enforce the basic rules as well as to provide modification and amplification.

C. ECONOMICS OF GOVERNMENT INSTRUCTIONS

Besides providing a justification for agency involvement in consumer protection, economics is useful for understanding how the agencies act. Government agencies are not run by philosopher kings who descend from Olympus to protect us. Instead, government agencies are, themselves, governed by rules that constrain what they can do, and they are run by individuals who are striving to advance or succeed, just as we all ***106** are. These constraints and incentives will influence how an agency acts in the public interest.

There is a crucial difference between the constraints facing antitrust and consumer protection. An increasingly important constraint in antitrust, i.e., something that influences the opportunities available to the agencies, is the courts. In consumer protection, that constraint is much less relevant. At the Federal Trade Commission, for example, when a court overturns the agency it is because the order was too strenuous or because the Commission did not have jurisdiction; it is not because the court disagreed about the substantive violation that the Commission found.

Turning to the other constraints and incentives facing the consumer protection agencies, there are important differences between the FTC and the states. One is that even though the number of regulators dropped significantly over the last decade, the FTC has many times the resources of individual states. Second, the attorneys general are elected, and they are often running for higher office. On the other hand, those at the FTC seek advancement, not through election, but in the bar or in higher government jobs. Of course, these characterizations do not describe every action by every employee in every agency, but they do describe a significant body of the regulators.

What are the consequences of these differences? One consequence is that the state will tend to use simple theories more often than the federal government. The states simply do not have the resources to do otherwise. (Below, I will discuss standards for deception, illustrating one important difference between the states and the FTC.)

Second, the states are seeking highly visible cases. Was it a coincidence that when some states chose to sue national retailers for deceptive pricing, those suits were filed at the height of the Christmas shopping season? Moreover, the states now are concerned about so-called down-sizing of packages, a highly visible issue, about which the Federal Trade Commission at the height of its activism in the 1970s decided to do nothing. The FTC is hardly opposed to visibility, but it has more of a tendency than the states to develop a complex body of law. The FTC has more resources and developing that body of law is useful in gaining the expertise that helps the careers of those at the Commission.

A third difference is that the states are more reluctant to risk litigation. Litigation is expensive, with little additional payout in visibility compared to a settlement. At the FTC, litigation provides both experience for FTC attorneys and is a forum for developing the complex body of law. The ***107** state experience in consumer protection with litigation has not been favorable. In the May Company case, [3] for example—the only recent example of a completed large-small consumer protection litigation involving the states—Colorado sued May for deceptive pricing. The state spent huge sums on the case, failed to obtain the relief it sought, and obtained only nominal damages for consumers. Although the court did award the state money for costs, the amount was far less than the state claimed it had spent. Moreover, in the election last year, the opponent of the attorney general who had filed the case used the AG's failures against May Company in an advertisement. Whatever the impact of the ad, the incumbent lost.

Another example involves ongoing litigation against Mobil. Several states have sued Mobil on somewhat inconsistent theories regarding Mobil's environmental claims for its Hefty trash bags. The case is a quagmire for the states because it involves complicated scientific issues and complicated issues of consumer perception. The states simply do not have the resources to engage in such litigation systematically. At the FTC, such litigation, although not the common method of resolving cases, occurs much more frequently. Because of the unwillingness to litigate and the greater emphasis on visibility, the states, compared to the Federal Trade Commission, issue weak orders. Many of the states' most publicized efforts are merely assurances of voluntary compliance.

III. APPLYING THE ECONOMICS

A. FRAUD

Rules against fraud are among the most basic for protecting consumers. Yet, the 1969 ABA Report criticized the FTC for failing to address consumer fraud adequately. [4] Dismissing the FTC's objections that it lacked adequate legal authority to challenge fraud, the Report charged the FTC with the responsibility to:

> engage in a sufficiently active program of detection, enforcement and study of consumer fraud problems to report to Congress on the exact nature and dimensions of the problem, the economic conditions that permit these fraudulent schemes to flourish . . . and the needs, in terms of appropriations and new legislation, to cope effectively with this important problem area. [5]

***108** The FTC's complaint about its lack of effective enforcement tools was a more serious objection than the Report's reply indicated, and even the ABA felt that some strengthening of enforcement tools would be useful. [6] The tools available to the FTC today, however, are far superior to those of 1969. The FTC Act was significantly amended in the 1970s, making changes especially useful for attacking consumer fraud. In 1973, Congress expanded the Commission's power by adding Section 13(b) to the FTC Act to allow the Commission to seek preliminary injunctions in district courts to enforce its statutes. [7] This Section has become the foundation of the Commission's consumer fraud program.

The agency has used Section 13(b) to seek affirmative equitable relief such as an ex parte asset freeze or asset escrow pending an administrative adjudication and subsequent district court action. [8] Section 13(b) also permits the Commission in a "proper" case

NRFa05

to seek a permanent injunction to enforce any provision of law within the Commission's jurisdiction. [9] Such cases include those in which the Commission relies on established precedent and "does not desire to further rely upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order." [10] The Commission has successfully used Section 13(b) in consumer fraud cases to obtain affirmative relief, including monetary damages in suits for permanent injunctions. The courts have used their equitable authority to award monetary relief in Section 13(b) actions, [11] including restitution to defrauded consumers [12] and permanent asset freezes or receiverships to preserve the possibility of further monetary ***109** relief. [13] Because Section 13(b) presents to the Commission a faster and more complete remedy than that available through traditional administrative action, fraud cases are now pursued under 13(b) rather than litigated administratively. [14]

The Commission has expanded its use of consumer redress and injunctive remedies to challenge many types of fraud, most notably in recent years, telemarketing fraud. In FY 1983, the Commission spent about nine work years investigating and prosecuting telemarketing fraud cases; the number tripled by FY 1987. [15] For four reasons, the most common means by which the Commission proceeds against telemarketing fraud is through Section 13(b). Most important, these actions can be initiated ex parte. In telemarketing cases, such surprise is essential because defendants (and their assets) disappear quickly when they become aware of enforcement activity. Second, courts can provide immediate relief without final proof of FTC Act violations. Third, the courts retain considerable flexibility in granting ancillary Section 13(b) relief. Courts may order a defendant's assets frozen, rescission of contracts, or other appropriate relief to prevent further consumer harm. [16] Finally, optimal use of FTC ***110** prosecutorial advantages requires the FTC to move quickly. The shift to Section 13(b) and away from traditional administrative actions seems to accomplish this goal. A typical case takes three to six months from the time the staff hears about the alleged wrongdoing until an ex parte asset freeze can be ordered.

The Commission's attack on telemarketing fraud has had success. From June 1983 through September, 1988, redress ordered in these cases totaled $85,632,000, of which consumers received $4,337,500, $3,795,000 was on deposit in a bank, and receivers held $15,228,000. [17] Moreover, the agency is trying to strengthen its fraud program. Cooperation between the FTC and the state attorneys general has increased. In August 1987, the FTC and the National Association of Attorneys General implemented an automated databank on telemarketing fraud. The databank pools information compiled by the participating offices both to identify and prosecute the most flagrant law violators and to identify trends in telemarketing for closer monitoring. [18] Further, the FTC is now expanding its effort to so-called factors, that is, to suppliers and others that sponsor and facilitate the fraud. This effort began in the late 1980s, and has received renewed emphasis under Chairman Janet Steiger and Bureau of Consumer Protection Director Barry Cutler.

B. OTHER CONTRACT ACTIONS

It is not just the fly-by-night operators of classic fraud cases who breach their promises to consumers. The Commission has successfully attacked other examples of contract violation. For example, in Orkin Exterminating ***111** Co., [19] the agency found it unfair for Orkin to raise the annual renewal fee on its "lifetime" contracts covering extermination services for specific properties. Orkin had initially offered lifetime contracts subject to a fixed annual renewal fee, but had increased the renewal fee customers were required to pay to keep the contracts in force. The Commission required Orkin to roll back the renewal fees to the fixed fee established in the contract. [20]

Other examples exist. In Lomas & Nettleton Financial Corp., [21] the Commission challenged the failure of respondents to process in a timely manner homeowners' correspondence and as a result fail to make timely payments for the hazard insurance premiums on those homes. Moreover, the agency has sued home builders for breach of their warranties. In one case, a company offered a warranty to cover problems with the construction, but did not honor the warranty. [22] A final example involves sellers who portray an item as fit for a purpose for which it is not. In Figgie, [23] the Commission challenged advertising for a heat detector because it did not provide sufficient warning to allow safe escapes from most residential fires. [24]

C. DECEPTIVE PRICING

1. The Development of the Law

Price information is fundamental to a competitive economy. Consumer decisions to buy low and refrain from purchasing high are essential for ***112** setting competitive prices. If finding a lower price is too costly, however, sellers can raise prices to levels higher than otherwise. Advertising is a powerful tool for reducing consumers' costs of learning about prevailing prices. Checking the newspaper ads or watching a commercial are far easier than visiting competing sellers or even telephoning to determine prices. Because shopping for the lowest price through advertising is less costly, consumers shop more, and sellers have powerful incentives to cut prices to attract consumers.

Studies of restrictions on advertising have repeatedly found that the inability to advertise prices increases prices. For example, before such restrictions were struck down as unconstitutional, states that prohibited advertising the price of prescription drugs had significantly higher prices than states without such restrictions. [25] Similarly, posting the retail price of gasoline at service stations lowers price significantly. [26] Other studies have found that the more restrictions that are imposed on advertising, the higher the price. [27]

The American Bar Association's 1989 Committee to Study the Federal Trade Commission also strongly cautioned against excessive regulation of price advertising. It stated:

> Excessive regulation of pricing claims can harm consumers, as experts on advertising have come to appreciate in the past two decades. It is all too easy to drive useful information out of advertisements, and this is likely to happen if compliance with pricing claim regulations becomes onerous. For instance, prohibiting "sales" featuring less than 10 percent price reductions could increase pricing rigidity. [28]

The FTC has long recognized the importance of price advertising to a competitive economy, but it was not always so. The Commission's approach has evolved, based on the experience it has gained and the understanding it has developed. The Commission's adoption of the 1958 Guides Against Deceptive Pricing marked the height of its restrictions upon allegedly deceptive pricing. In the early 1960s, as many as thirty percent of consumer protection cease-and-desist orders related to deceptive or "fictitious" price claims, such as the claim that a product was being sold at "50% off" the advertiser's former price or at an "all time low ***113** price." [29] In defining the seller's former price used as the basis for such former price comparison advertising, the Guides were interpreted to require that the seller had made substantial sales at the advertised former price. Thus, an advertiser could not represent or imply a reduction from its former price if "the claim was based on infrequent or isolated sales." [30]

As discussed in more detail below, a requirement of substantial sales as the defining characteristic of a permissible former price comparison makes it harder to communicate price information. In the 1960s the FTC began to realize that its enforcement policies were depriving consumers of useful information, which led to the adoption of substantially revised guides in 1964. The 1964 Guides noted that comparing a sale price to an advertiser's own former price is "one of the most commonly used forms of bargain advertising." They authorize such comparisons, as long as the former price "is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time." [31] Thus, the regulatory standard focuses on the offer, rather than on how often the offer is accepted.

Although a substantial improvement, the 1964 Guides did not end the difficulties that are inherent in close regulation of allegedly deceptive pricing claims. As former Commissioner Robert Pitofsky noted, a natural target for such enforcement has been discounting, and the usual complainants have been competitors of the firm cutting price. [32] The risk that such an enforcement campaign will discourage exactly the kind of aggressive price competition that the government should seek to encourage is apparent.

As a result of these concerns, the Commission continued to deemphasize application of even the 1964 Guides. The 1969 ABA Report and the subsequent revitalization of the Commission marked the beginning of the end of such efforts. In 1977, Pitofsky noted that "during the last eight years, enforcement of the fictitious pricing guides has been negligible." [33] Since then, the

NRFa07

Commission has pursued cases in which an advertiser misrepresented its current transaction price,[34] but it has not brought ***114** cases based on allegedly deceptive former price comparisons. As Pitofsky concluded, the change in enforcement policy "is consistent with the principle of minimum enforcement where consumers, as opposed to competitors, are unlikely to be seriously injured and where rigid substantiation might suppress a useful form of competition."[35]

Most states have followed the Commission's 1964 lead. Unfortunately, a few attorneys general have challenged the wisdom of this assessment. They have variously argued that a particular percentage of sales (as high as fifty percent in some states) must occur at the reference price before a retailer may rely upon that price for comparison advertising; that sales made at particular times of the year are not valid bases for comparisons; that complicated formulas should determine a retailer's allowable markup for purposes of comparison price advertising; or that certain offers, no matter how openly and actively made, cannot be used as valid comparisons. Indeed, different approaches and standards have even been applied to different retailers within the same state.

Despite the efforts of these outlying attorneys general, to date the courts have not retreated from the principles enunciated by the Commission. The only decided case testing the effort to impose a sales requirement, State of Colorado v. The May Department Stores Co.,[36] rejected that effort. Instead, the court tested the good faith of the advertiser under the 1964 Guides.

2. The Problems of a Substantial Sales Test

Under the substantial sales requirement, merchants are in trouble if sales increase too much when they lower prices. The more noncompetitive the initial price, the more quickly the merchant recognizes it, and the more successful his correction, the smaller the fraction of sales that will occur at the original price. But, if that fraction is "too small," it will likely be found "insubstantial," leading to the conclusion that the merchant had engaged in "deception" by informing consumers that the price had been reduced.

Thus, in precisely those circumstances in which competition in the market would demand a price reduction, a substantial sales regulation would prohibit announcing it. The more quickly the market punishes pricing errors, the more difficult it is to inform consumers that the price has been reduced. In essence, the substantial sales requirement holds ***115** that the failure to sell more at the original high price is deceptive. In the name of consumer protection, the seller must either find a way to sell more at a higher price, or reduce the price without telling anyone. Neither result is worthy of the name.

The inconsistency of a substantial sales requirement is most obvious when, as some states are arguing, it requires at least fifty percent of sales to occur at the reference price. Because economics teaches that consumers will purchase more when price falls, orders will be greater at the lower price. That, after all, is the reason for having a sale. If consumers buy "too much" when the price is low, the only way for a merchant to comply is to have fewer sales, effectively increasing the price. Consumers can hardly afford such protection.

Of course, sales also occur for reasons that have nothing to do with mistakes by merchants. Sales are a normal part of retailing, designed to build traffic in the store, clear out inventory, increase volume, or counteract normal seasonal variation in total sales. A substantial sales requirement poses difficulties in these instances as well.

Consumers are well aware that certain merchandise is often available at reduced prices, and adjust their shopping behavior to take advantage of this fact. Durable goods such as mattresses or television sets are seldom emergency purchases; instead the consumer has considerable discretion in timing the purchase. Many consumers, knowing sales are common, are likely to shop over time as well as over competing merchants, postponing such purchases until a sale occurs. Similarly, consumers can purchase and stockpile any storable commodity on sale, taking advantage of the lower prices. Consumers who are unwilling or unable to postpone purchases pay higher regular prices, but a large share of total purchases occurs on sale. If this response is too great, an advertiser may not have substantial sales at the regular price.

White sales are a clear example of consumer adaptation to a pattern of sales. Originally introduced as a way to build store traffic in the slower post-Christmas season, white sales have become an institution well known to consumers. Many consumers postpone purchases, waiting for the sale. Only a few, with a more urgent need (for example, sheets or towels were ruined accidentally), purchase at the higher prices that prevail most of the year. Consequently, most purchases occur during white sales.

In another common example, a retailer may offer watches at the same regular price as its competitors, but promote them for short periods preceding holidays such as Mother's Day and Christmas. Consumers may recognize the pattern and defer purchasing

NRFa08

from that retailer until the ***116** sale; most sales are thus not at the regular price. Other dealers in the trade area, however, may routinely sell the same watches at the same regular price. Under the substantial sales requirement, the retailer can either stop advertising its sales promotions, which would harm consumers, or it would have to engage in elaborate surveys to substantiate the prevailing price in the market.

Seasonal patterns increase the risk that sales at a bona fide regular price may be insubstantial. The majority of sales of certain items widely given as gifts, such as jewelry, occur around Christmas and Valentine's Day, for example. Because many consumers shop for these items then, sales to build store traffic are particularly attractive to merchants. Regardless of the price, however, most sales will occur around those holidays; even more sales will occur with a holiday price reduction. A substantial sales requirement poses a considerable risk of prohibiting advertised specials during peak seasons precisely because consumers are most likely to buy during those periods. Such a result hardly protects consumers.

Other problems of a substantial sales requirement abound. Problems may arise when a retailer decides to promote one of a line of items. If, for example, the retailer promotes the mid-price model, rather than the high or low price model, it may well find that most sales of that particular model occur at the sale price. Nonetheless, the regular price bears a sensible relationship to the prices of the other models, and is the best way to indicate to consumers the relative value of this model. In other instances, the regular price may be a convenient way to tell consumers which model is on sale (e.g., the $79.95 model rather than the $99.95 model) even if there are no sales at the regular price.

Further, the substantial sales standard creates particular problems for big-ticket merchandise that an individual retailer may sell infrequently. A music store, for example, might offer a piano for $6,000 for two months without selling it. It might then rationally decide to lower the price to $4,000 to avoid continued carrying costs. The store, however, may sell no pianos of that type or only a few pianos a year, which could preclude it from advertising the price reduction.

D. NATIONAL ADVERTISING

1. The Evolution of the FTC's Standards

Over the last few decades, the Commission has come to recognize the competitive importance of advertising, both as a spur to effective price competition and as an aid in developing products that best satisfy consumer demands. Indeed, a consensus has emerged that restrictions on ***117** truthful advertising are most likely to harm consumers. This consensus is reflected in the Commission's movement away from cases that primarily protect competitors from vigorous competition, and toward actions that enhance the ability of advertising to provide information for consumers.

In the 1950s and 1960s, the Commission pursued numerous trivial cases with little appreciation of the importance of advertising in enhancing competition. The Commission often seemed more interested in protecting competitors from vigorous competition than in encouraging truthful advertising as a means of enhancing consumer welfare. As former Commissioner Pitofsky wrote in describing this period, the FTC often:

> acted as a surrogate enforcement arm for competitors . . . many enforcement actions against advertisers grew directly out of competitor complaints and appear to have been primarily intended to protect sellers against competition from cheaper substitutes. [37]

Throughout the 1970s, the Commission's recognition of the importance of advertising as a source of information grew. For example, the Commission criticized restrictions on comparative advertising imposed by two television networks. After informal meetings and correspondence with the FTC staff, the two networks agreed in 1972 to permit advertising that named competitors. In 1979, the Commission adopted a policy statement in support of comparative advertising, and opposing restrictions imposed by broadcasters or self-regulatory bodies. Moreover, it stated that standards for substantiation should be no different for comparative advertising and unilateral claims. [38]

During the 1970s the Commission began to remove restrictions on advertising. Using consumer protection theories, the Commission initiated a rulemaking to remove state restrictions on advertising prices of prescription drugs in 1975. The next year, it initiated the Trade Regulation Rule on Advertising on Ophthalmic Goods and Services, which was promulgated in

NRFa09

1978.[39] Using antitrust theories, the Commission also challenged private restraints on advertising contained in professional codes of ethics.[40] Each of these actions was predicated on the belief that advertising provides information to consumers that is essential to a well-functioning competitive marketplace.

***118** Past and present FTC officials have long been unanimous in their belief that truthful advertising is an important competitive weapon that should be encouraged. Former Commissioner Robert Pitofsky, observing the changes that occurred in FTC enforcement during the 1970s, wrote that "the major recent programs designed . . . [to regulate advertising] are based on a revised and more sensible view of the function of advertising in the market and should result in higher levels of consumer welfare."[41] And former Commissioner Michael Pertschuk wrote, " o ver-regulation of advertising can chill aggressive competition and impose fruitless burdens on a shaky economy."[42]

2. Current State Activity

Unfortunately, however, some state enforcement authorities have not yet accepted this important premise. Instead, these states seem to be pursuing the symptoms of vigorous competition, much like the Commission did until the 1970s. The likely consequence is the suppression of information important for consumer choices.

Perhaps the clearest example of the states' failure to appreciate the importance of advertising as a means of informing consumers is NAAG's June, 1988, resolution on health claims, calling on the Food and Drug Administration to restore its prohibition on all claims about the relationship between diet and disease on food labels.[43] As the FTC staff recognized in commenting on the FDA's proposals:

> truthful health information in both food labeling and advertising offers a powerful means of providing consumers with information that may enable them to improve their health. Manufacturers may respond to the greater opportunity to use truthful health claims in marketing their products by devoting additional resources to producing information about diet and health. Moreover, allowing food manufacturers greater latitude to emphasize the health benefits of their products is likely to increase demand for products with those benefits and thus increase incentives to produce such products. The FDA's action in removing its prior ban on such information on food labels can thus lead to a healthier population.[44]

***119** The Commission itself has long recognized the importance of encouraging, rather than prohibiting, health information in advertising. When advertising claims began linking cholesterol and heart disease in the 1960s, the Commission brought several cases to assure that the advertising accurately represented the evidence. It did not, however, seek to prohibit the claims; indeed, it expressly rejected a staff recommendation to do so when it proposed the Food Advertising Rule in 1974.[45] The growing evidence of the benefits of a low fat, low cholesterol diet, as well as the significant dietary changes that have occurred, amply attest to the wisdom of the Commission's policy of permitting such claims.

A recent study by the FTC's Bureau of Economics demonstrates the benefits of health claims. The study examined the changes in the market for high fiber cereals since Kellogg began advertising for All-Bran that referenced the National Cancer Institute's (NCI) recommendation that diets high in fiber may reduce the risk of some kinds of cancer. The Bureau of Economics analyzed two time periods, the first prior to 1985, when only government and noncommercial sources provided information about fiber consumption and cancer; the second since 1985, when commercial advertising and labeling began. Although scientific evidence of the link between fiber consumption and cancer developed rapidly through the 1970s and the 1980s, between 1978 and 1984, before commercial promotion, the study found no significant shift in consumption of higher fiber cereals. Once commercial promotion began, however, a significant increase did occur.

The manner in which both manufacturers and consumers responded to commercial promotion is revealing. Cereal manufacturers developed new products. Although many new fiber cereals were introduced after 1978, the study found that cereals introduced between 1979 and 1984 contained an average of 1.7 grams of fiber per ounce while those introduced between 1985 and 1987 averaged 2.6 grams of fiber per ounce.

Regarding the impact on consumers, the study found significant differences in female choices of cereals across demographic groups prior to commercial promotion. (Consumption data was only available for ***120** women.) Women who had less education, smoked, lived in households without a male head, or were nonwhite, chose lower fiber cereals than other women. After commercial promotion of health claims began, with the exception of the difference of education, all of the differences were reduced. In short, health claims in advertising and on labels encouraged consumption changes, especially among those least likely to know of the NCI's recommendation from other sources.[46] Finally, and of great importance, the study found no evidence that consumers overreacted to health claims. There was no tendency for individuals to consume unusually large amounts of fiber cereals, nor did any of the groups that increased their fiber consumption following health claims achieve the level of consumption of the most educated consumers.[47]

A group of states has investigated health claims for foods made by various national advertisers. At least some of the states are apparently seeking to implement the NAAG resolution in these investigations. As one assistant attorney general involved in these investigations stated: “Heart attacks are way too serious to put on cereal boxes or in 30-second TV spots.”[48] This failure to understand the importance of health information in ads will harm consumers. Heart attacks are “way too serious” to prohibit information that may help consumers reduce the risk. More nutrition information in food advertising would increase the incentives for product improvement; prohibiting such information reduces the likelihood of beneficial change.

3. Mazola[49]

Finally, a recent FTC case involving Mazola illustrates some hope and some anxiety about the joint direction of the FTC and the states. The case involves two advertisements, one of which showed an uncooked and a cooked chicken leg and said “add Mazola, reduce cholesterol.” If you read the ad to compare cooked to uncooked chicken, or chicken cooked in Mazola with chicken cooked with something else, the ad is in fact true. But the FTC and the states seemed to read the ad to say that you can eat more fried chicken in total than before and still reduce your cholesterol. Commissioner Terry Calvani dissented strongly, fearing a return to the ***121** 1960s. This conclusion is too strong, but the failure to do copy testing on the ad is hard to justify. On the other hand, the case was filed jointly by the Commission and the states. The states, at least for this case, retreated from their position of prohibition on health claims. Thus, the case has its positive, as well as its negative, side.

IV. CONCLUSION

Let me conclude with a few comparisons between antitrust and consumer protection. Like antitrust, economics can inform consumer protection policy. Like antitrust, that informing function has in fact happened: consumer protection has been significantly changed over the last twenty years by economic analysis. Like antitrust, some states are a forum for a reinstitution of policies that economic analysis shows should be abandoned. But, like antitrust, the state-federal relationship has improved in a way that many of the early signs are positive—although, quite frankly, it is too early to have a complete answer to this story.

Footnotes

a1 Foundation Professor, George Mason University School of Law. The author thanks Howard Beales for his comments and assistance.

1 For a good introduction to these topics, see D. GREER, BUSINESS, GOVERNMENT, AND SOCIETY ch. 2-3 (2d ed. 1987).

2 See generally Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN.L.REV. 521, 522-31 (1981).

3 State v. The May Dep't Stores Co., 1990-2 Trade Cas. (CCH) ¶ 69,163 (Colo. Dist. Ct. June 27, 1990).

4 1969 REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 37 [hereinafter 1969 ABA REPORT].

5 Id. at 52.

6 Id.

7 Congress enacted Section 13(b) of the Federal Trade Commission Act as part of the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973).

8 The Commission's authority to seek and the district court's authority to award such relief was sustained in FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir.), cert. denied, 456 U.S. 973 (1982).

9 See, e.g., FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir.1982).

10 Id.

11 See, e.g., FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431 (11th Cir.1984) (district court has inherent equitable powers to grant ancillary monetary relief incident to its express statutory authority to issue permanent injunctions under the FTC Act); FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir.1982) (district court can freeze assets in a 13(b) action and order broad ancillary relief).

12 See, e.g., FTC v. Atlantex Assocs., 1987-2 Trade Cas. (CCH) ¶ 67,788 (S.D. Fla. 1987), aff'd, 872 F.2d 966 (11th Cir. 1989) ($12 million in consumer redress ordered); FTC v. Trans-Alaska Energy Corp., reported in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,446 (C.D. Cal. Apr. 27, 1987) ($2.1 million in consumer redress ordered); FTC v. New England Rare Coin Galleries, reported in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,431 (D.Mass. Feb. 13, 1987) (reinstitution payment required); Evans Prods Co., reported in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,372 (Bankr. S.D. Fla. June 17, 1986) (bankruptcy court required debtor to pay $2.4 million in consumer redress pursuant to an FTC claim).

13 See, e.g., FTC v. Rare Coin Galleries of Am., Inc., 1986-2 Trade Cas. (CCH) ¶ 67,338 (D.Mass. 1986).

14 Congress authorized another means for rectifying consumer injury that has proven less useful against consumer fraud. In 1975, Congress passed the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 83 Stat. 2183 et seq., which added to the FTC Act a provision by which the Commission could obtain "consumer redress," including monetary damages, for injuries caused by unfair or deceptive practices that violate FTC rules or were the subject of an FTC cease and desist order. This provision is § 19(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 57b(a)(2). To obtain redress under this section, the Commission must first commence an administrative adjudication, noting in its complaint that consumer redress may ultimately be sought. Once a final Commission order to cease and desist issues, the Commission must commence a separate proceeding in district court under § 19 seeking consumer redress. If a court of appeals has reviewed the order, the district court must give it conclusive weight. If the Commission's order has not been so reviewed, the Commission's findings are to be accepted if supported by substantial evidence. 15 U.S.C. § 57b(c)(1). If a violation of a past FTC order is involved, the Commission must show not only that the challenged practice is unfair or deceptive and subject to a final cease and desist order, but also is one that "a reasonable man would have known under the circumstances was dishonest of fraudulent." 15 U.S.C. § 57b(a)(2).

Because § 19 requires a prior Commission order or a rule violation, it is less useful than § 13 to attack consumer fraud; not surprisingly, the Commission has relied on this section less frequently than on § 13(b).

15 REPORT OF THE ABA SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, 58 ANTITRUST L.J. 43, 80 (1989) [hereinafter 1989 ABA REPORT].

16 At least one FTC Commissioner has supported expansion of FTC authority to allow direct criminal prosecution of telemarketers. Former Commissioner Terry Calvani reasoned that, until these individuals are forced to spend time in prison, no amount of redress or fines will stop them from continuing to practice their fraudulent schemes on consumers. Telemarketing Fraud: Hearing on S. 2213, S. 2326, and H.R. 4101, Before Consumer Subcomm. of the Senate Comm. on Commerce, Science and Transportation, 100th Cong., 2d Sess. 31 (1988) (statement of Federal Trade Commissioner Terry Calvani). The FTC does prosecute some cases criminally. These cases, however, involve criminal violations of court orders, not violations of consumer fraud laws themselves. See, e.g., Pedersen, reported in 5 Trade Reg. Rep. (CCH) ¶ 22,635 (C.D. Cal. Jan. 9, 1989) (ordering individual to stand trial for criminal contempt of the court-ordered asset freeze against Schoolhouse Coins and three individuals associated with it); TABB Assocs., reported in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,428 (C.D. Cal. Feb. 9, 1987) (individual pleaded guilty to criminal contempt for violation of injunction by creating a new company to continue misrepresentations that had been enjoined); Trans-Alaska Energy Corp., reported in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,296 (C.D. Cal. Oct. 8, 1985) (individuals pleaded guilty to criminal contempt charges for violation of asset freeze); Weiswasser, reported in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,253 (W.D. Wash. May 17, 1985) (individual pleaded guilty to contempt charges stemming from the violation of a preliminary injunction).

17 See 1989 ABA REPORT, supra note 15, at 167 (Appendix C, Table 1).

18 State enforcement can only supplement, not replace the FTC. State enforcement is difficult primarily because fraudulent schemes often operate across state lines. Because telemarketing fraud most often involves consumers in several states, successful prosecution involves cooperation among the involved attorneys general on a number of issues. The FTC should be able to coordinate such prosecutions. Finally, because the Commission receives complaints from all over the country, it can identify trends and detect major fraud schemes.

19 108 F.T.C. 263 (1986).

20 The Commission's conclusion was based on the theory that Orkin's conduct amounted to "unlawful conduct causing injury to consumers that is substantial, unavoidable and without countervailing benefits." 108 F.T.C. at 349. The Commission specifically found that (1) Orkin's pre-1975 contracts provided lifetime protection for treated premises for a fixed annual renewal fee and (2) while not every breach of a contract subjects the breaching party to liability under § 5, the conduct at issue in the Orkin case fell within that section. Next, the Commission considered whether the consumer injury involved in this case was substantial, not outweighed by an offsetting consumer or competitive benefit that the practice produces, and one that consumers could not reasonably have avoided. Id. at 362. Having found that each of these factors existed, the Commission found that Orkin violated § 5.

21 102 F.T.C. 1356 (1983) (consent order). The order required the respondent, among other things, to establish and maintain procedures to ensure that it will timely pay from homeowners' escrow accounts all obligations due. The company must maintain procedures to identify and correct any injury caused by its failure to pay obligations from a homeowner's escrow account when due. The company was also prohibited from misrepresenting that funds have been withdrawn from escrow or the nature of any fee or obligation imposed upon a homeowner's escrow account.

22 Ward Corp., 105 F.T.C. 250 (1985) (consent order).

23 Figgie Int'l, 107 F.T.C. 313 (1986), aff'd, 1987-1 Trade Cas. (CCH) ¶ 67,546 (4th Cir. 1987).

24 See also Baleysuit, Inc., 102 F.T.C. 1285 (1983) (consent order) (survival suit did not perform as promised).

25 Cady, Restricted Advertising and Competition: The Case of Retail Drugs (American Enterprise Institute 1976).

26 Maurizi & Kelley, Prices and Consumer Information: The Benefits from Posting Retail Gasoline Prices (American Enterprise Institute 1978).

27 See, e.g., Jacobs et al., Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (FTC Staff Report 1984).

28 1989 ABA REPORT, supra note 15, at 73 (footnote omitted).

29 Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 HARV. L.REV. 661, 687 (1977).

30 Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (Oct. 15, 1958).

31 16 C.F.R. § 233.1(a).

32 See Pitofsky, supra note 29, at 688.

33 Id. at 687.

34 General Rent-A-Car, Inc., 54 Fed. Reg. 30,106 (July 18, 1989), reported in 5 Trade Reg. Rep. (CCH) ¶ 22,656 (consent order); Alamo Rent-A-Car, Inc., 54 Fed. Reg. 25,106 (June 13, 1989), reported in 5 Trade Reg. Rep. (CCH) ¶ 22,633 (consent order); FTC v. World Travel Vacation Brokers, Inc., No. 87 C 8449 (N.D. Ill. Mar. 27, 1990) (default judgment), reported in 5 Trade Reg. Rep. ¶ 22,813; FTC v. Amy Travel Servs., Inc., No. 87 C 6776 (N.D. Ill. May 4, 1988) (permanent injunction), reported in 5 Trade Reg. Rep. (CCH) ¶ 22,546.

35 See Pitofsky, supra note 29, at 687.

36 1990-2 Trade Cas. (CCH) ¶ 69,163 (Colo. Dist. Ct. June 27, 1990).

37 Pitofsky, supra note 29, at 674.

38 16 C.F.R. § 14.15.

39 43 Fed. Reg. 23,992 (1978), suspended in part and remanded, American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980). The Prescription Drug rulemaking was ultimately terminated as moot in light of the Supreme Court's decision in Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748 (1976).

40 American Medical Ass'n, 94 F.T.C. 701 (1979); American Dental Ass'n, 94 F.T.C. 403 (1979).

41 Pitofsky, supra note 29, at 701.

42 FTC Review (1977-84), A Report Prepared by a Member of the Federal Trade Commission Together with Comments from Other Members of the Commission for the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 242 (1984).

43 National Association of Attorneys General Resolution on Health Claims in Food labelling, reprinted in NAAG Consumer Protection Rep., June/July 1988, at 3. On January 2, 1990, Attorneys General of 34 states filed comments to the FDA, again recommending a prohibition on health claims.

44 Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission, on Health Messages on Food Labels and Labeling, 1988, at 10. The Commission approved these comments, with two Commissioners dissenting. The dissenters indicated that they did not disagree with the staff's conclusion. On January 5, 1990, the Commission staff again filed comments to the FDA, taking the position it had previously. The Commission approved these comments, with one Commissioner dissenting. The FDA has now issued proposed regulations regarding health claims.

45 See 39 Fed. Reg. 39,842, 39,850 (1974). The Commission did, however, solicit comment on the staff proposal. When the Staff Report was issued at the close of the rulemaking record in 1978, the staff's recommended rule would have permitted such claims, but required a disclosure that there was controversy. This recommendation, rejected in 1981, seems anachronistic at best.

46 P. Ippolito & A. Mathios, Health Claims in Advertising and Labeling: A Study of the Cereal Market 3, 87 (FTC Bureau of Economics Staff Report Aug. 1989).

47 Moreover, consumer did not overreact by eating cereal with greater amounts of sodium and fat. The pre-existing trend toward lower sodium and fat consumption continued. Id. at 41.

48 Gibson, Kellogg Tries to Blunt the Attacks On Cereal Makers' Health Claims, Wall St. J., Aug. 31, 1989, at B4.

49 CPC International Inc., FTC Docket No. C-3321, reported in 5 Trade Reg. Rep. (CCH) ¶ 22,841 (consent order Jan. 2, 1991).

60 ANTITRLJ 103

Pricing Laws Are No Bargain for Consumers

BY ROBERT PITOFSKY, RANDAL SHAHEEN, AND AMY MUDGE

"$9.99, regularly $15.99!" "20 percent off next week only!" "$14.95 Manufacturers List Price but $11.99 here!" "Year-end sale—all products must go—50 percent off!" "Lowest prices of the year."

LOOK AND SOUND FAMILIAR? It's the substance of aggressive discount marketing. In the 1950s and 1960s, 30 percent of Federal Trade Commission challenges to advertising were related to "fictitious price claims."[1] For example, a company might continuously advertise a price as a reduction off a regular price when few, if any, sales of the product had occurred at the regular price. By the mid-1970s, however, the FTC's enthusiasm for these cases had cooled considerably. The FTC has not brought a single fictitious price case since 1979, and the last two chairs of the FTC—one presiding during a Democratic Administration and the other during a Republican Administration—have indicated that enforcement actions in this area often do more harm than good.[2]

Although the FTC and the state attorneys general have made great strides in narrowing enforcement differences over the years, "fictitious pricing" claims remains an area where enforcement practices differ dramatically. Claims such as those above can be (and often are) challenged under state law because they don't specify "off" of what, or because the product was not at a high price long enough before or after the sale to make it a real "sale." Retailers can be subject to fines and other substantial penalties from actions brought by state AGs or even district, or county attorneys.

Examining the history of FTC regulation of fictitious pricing, and why the FTC abandoned enforcement in this area, supports our view that the states should sharply curtail enforcement as well. The varied landscape of state laws and enforcement actions in this area, as well as practical issues raised in dealing with state enforcement, suggest that the states should repeal their fictitious pricing statutes and regulations and cease enforcement except in the most extreme and egregious circumstances.

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History of FTC Enforcement

Section 5 of the FTC Act authorizes the FTC to bring enforcement actions against deceptive or unfair marketing practices.[3] The FTC, in turn, has defined a "deceptive practice" as one which is (1) likely to mislead a consumer acting reasonably under the circumstances and (2) is material to the consumer's purchase decision.[4] Pursuant to its authority under Section 5, the FTC has issued numerous "Guides" that address specific marketing practices, such as environmental claims and the use of testimonials.

As noted above, pursuant to Section 5, the FTC by the 1950s had begun to bring enforcement actions against retailers allegedly engaging in deceptive pricing. By the late 1950s the FTC had concluded that the practice was serious and widespread enough that it issued first one, and then later a second Guide concerning price advertising. The FTC's "Guides Against Deceptive Pricing"[5] discuss, among other things, former price comparisons, which the Guide calls "one of the most commonly used forms of bargain advertising." The Guides state that the advertising of a "former price" is not deceptive if "the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time." The later adopted "Guide Concerning the Use of the Word 'Free' and Similar Representations,"[6] addresses a concern that retailers will overstate the bargain offered to consumers by using an inflated comparison price. The Guide states that when free merchandise is offered if a consumer purchases another product, consumers understand that they are paying "nothing more than the regular price for the article which must be purchased. "Regular" is in turn defined as the price at which the advertiser has openly and actively sold the product in the relevant trade area for a reasonably substantial period of time, i.e., a thirty-day period (except for products whose price fluctuates in which case it is the lowest price at which substantial sales were made during the previous thirty days.)

For a significant period of time the FTC vigorously rooted out what it regarded as fictitious price claims. For example, Southern States Distributing Company entered into a consent order in response to an FTC complaint alleging that its advertised reduction from $1595 to $795 for an economy pool was not genuine because no sales had been made of the economy pools at the higher price.[7]

FTC enforcement in this area, however, ended rather abruptly. The last enforcement action of which we are aware was brought in 1979 and involved the use of fictitious former selling prices for home appliances.[8] Although the fictitious pricing Guides have never been withdrawn, why did the FTC cease actively enforcing them? In a 1990 interview, then Director of Consumer Protection Barry Cutler suggested that retail pricing claims were a "hot topic" among the states and that it would not be a good use of FTC resources to "duplicate their effort."[9] However, articles by the current and one former FTC chairmen suggest there may have been more compelling reasons why the Commission abandoned enforcement of its pricing guides.

Former FTC Chairman Robert Pitofsky (one of the authors of this article), noted in a 1977 article that in some limited circumstances fictitious pricing claims cause consumer harm.[10] Consumers may be diverted from more efficient low price sellers and might make purchases that would otherwise never have been made or would have occurred at a later time. At the same time, he argued that "much alleged fictitious pricing is innocuous, either because consumers are in a position to check the validity of exaggerated claims (for example, where comparison shopping is relatively simple) or because the claims are so unlikely ("lowest price ever") or ambiguous ("10 percent off") that they will be ignored by almost all customers."[11]

Pitofsky also noted that

> a natural target for such enforcement has been discount houses, and the usual complainants have been nondiscounters who emphasize service and reliability rather than price. Aggressive enforcement against discounters that forces them to hew close to the line of accurate information may tend to dampen competitive activity. Often, "cents-off," free goods, couponing and other discount promotions are devices that assist new entrants in penetrating concentrated markets and that tend to unsettle stable and rigid pricing patterns. . . . While the same pro-competitive effects can be achieved by accurate price claims in connection with these promotions, the cost to sellers of ascertaining whether particular discount claims are accurate may deter them from making such claims at all.[12]

FTC Chairman Timothy Muris echoed these sentiments in a 1991 article, noting the "difficulties that are inherent in close regulation of allegedly deceptive pricing claims."[13] In particular, he wrote, there is the "risk that such an enforcement campaign will discourage exactly the kind of aggressive price competition that the government should seek to encourage . . . ."[14] He applauded the FTC's abandonment of fictitious price cases, noting that "consumers can hardly afford such protection."[15]

Notwithstanding the above, is it misleading for a retailer to promote an item as "on sale" for fifty-two weeks of the year? Certainly, but the goal of any regulation must be to stamp out bad practices in a way that does more good than harm. Here the FTC has apparently made the judgment, correctly in our view, that the chilling effect of deceptive pricing regulation on retailers, and the inherent subjectivity and difficulty in ascertaining compliance, have brought about more harm than good.

State Enforcement

Nearly all of the states followed the FTC's early lead and passed legislation or adopted regulations that prohibited fictitious pricing claims.[16] Today, at least forty states plus the District of Columbia have statutes or regulations relating to fictitious pricing. In some instances they mimic the FTC's fairly general Pricing Guide language relating to former price comparisons (e.g., "price at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business.") In other instances fictitious

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pricing claims are defined with mathematical precision. For example, in Massachusetts, one of several alternative tests a retailer can meet to make a "sale" claim is that a product is offered at a non-sale price for fourteen consecutive business days and then during the next 180 days the product is not offered for sale more than 45 percent of the time.[17]

Further, some states have requirements even more onerous and arguably more anti-consumer than those imposed by the FTC's Guides. In the mid-1960s the FTC amended its Pricing Guides to make clear that a retailer only had to show a bona fide attempt to sell the product at the former price. The amended Guides state that a "former price is not necessarily fictitious merely because no sales at the advertised price were made." Some states, however, still require a showing of actual sales at the former price. For example, New Jersey requires proof "of a substantial number of sales of the advertised merchandise . . . within the advertiser's trade area in the regular course of business at any time within the most recent 60 days . . . ."[18] In Missouri there is a rebuttable presumption that the former price is fictitious unless 10 percent of the product's sales occurred at the former price (or an even higher price) "during a period of time, not less than thirty days nor more than twelve months, which includes the advertisement."[19]

Unlike the FTC, the states have slowed but not abandoned enforcement of fictitious price claims. Within the past year Kay-Bee Toys was alleged to have displayed regular prices with a slash through them and then an implied discounted price. Kay-Bee paid $1.2 million to settle allegations by the Napa District Attorney[20] that it misled consumers

NRFa17

because the slashed-through price was not a price at which it had sold the product. Another $4 million was paid to settle a private class action.[21] The State of Colorado fought a lengthy court battle against the May Company for, among other things, not selling enough housewares at the regular price.[22] Levitz Furniture paid a $1.12 million fine and entered into a multi-state consent decree that required it to maintain a "regular" price for 60 percent of the time and to make 20 percent of its sales at that higher price.[23] J.C. Penney agreed to pay the state of Washington $150,000 to settle a fictitious pricing claim that it offered window blinds at 40 percent off but sold only a few at the regular price.[24] And the list goes on. Sears, Macys, Kohls, Burdines, Nordstroms, and Montgomery Ward, all have felt the sting of state fictitious pricing laws long after the FTC ceased enforcing its own pricing guides.[25]

Our neighbors to the north also continue to enforce their own deceptive pricing laws. Last year a Canadian retailer paid a $1 million fine to settle an alleged deceptive pricing case. In that case Suzy Shier was alleged to have misleadingly advertised sales prices on certain products when only 12.5 percent of its total product sales had been at the regular price and the products had been offered at the regular price only 11 percent of the time.[26]

Practical Difficulties

Continued enforcement of these laws by the states raises several practical difficulties. First, many retailers are now at least regional and often national in scope. State fictitious pricing laws often vary from state to state. For example, in Oregon the "former" price must be one that was offered to consumers in good faith within the preceding thirty days. In Washington state, however, the state attorney general has issued guidelines stating that the reference price must be one at which the goods were openly and actively offered for more than 70 percent of the prior six month period. A multi-state retailer either must create different advertisements for different states or reduce its advertising practices to the least common denominator. In the first instance the retailer's costs are raised, while in the second, consumers in states without restrictive pricing laws may be denied the benefits of more zealous discounting.

Further, many of these laws are routinely ignored, leading to problems of selective compliance and enforcement. One need only look at a copy of the Sunday *New York Times*, to recognize that many retailers are not complying with New Jersey's requirement that sale advertisements for products priced over $100 must also include the regular price. Some retailers, wishing to avoid any risk, attempt to comply with state fictitious pricing laws even though the risk of state enforcement is low. Other retailers opt to advertise prices as the marketplace demands, viewing the risk of any state enforcement action as acceptable. The playing field ought to be level, and a retailer's marketing practices should not depend upon its willingness to violate state law.

Even without these practical issues, enforcement of these state regulations usually is the wrong policy for the very reasons that led the FTC to stop enforcing its own Pricing Guides. Aggressive price discounting often is chilled. Further, many of the state laws create additional problems. As noted above, some states set out a specific number of weeks during which the product must have been offered at the non-sale price. Obviously, this is of no benefit to consumers who happen to be shopping during one of the required non-sale weeks. Further, it permits competing retailers to predict with more certainty when and if their rivals will be able to advertise a product as on sale and adjust their own pricing practices accordingly.

Some states also require not only that the product be offered for sale at the former price but that substantial sales also have been made at the former price. As a result, the more successful a retailer is at selling a product at the advertised sale price, the harder it has to work to make additional sales at the regular price. Further, for many products consumers have learned to time their purchases to coincide with sales, making it even harder for a retailer wishing to advertise a sale price to first persuade sufficient consumers to purchase the product at the regular price. In essence, the states are requiring the retailer to persuade some consumers to purchase the product at a higher price so that it can offer the product at a lower price to other consumers.

The obvious conclusion is that as long as consumers are accurately informed as to the selling price, they are in a good position to mitigate any harm from unscrupulous pricing practices by comparing the values offered by one retailer to those offered by another. Without ever leaving home, it is now possible for a consumer not only to check advertising circulars, but to check the value of the bargain being offered at competing retailers' Web sites, perhaps compare the cost at Amazon.com, and even find out what it might cost to buy the item used on eBay. At least for a substantial subset of consumers, "consumer protection" in this area is less useful than ever.

We believe it is time for the FTC to formally abandon its Pricing Guides and for the states, perhaps through the leadership of the National Association of Attorneys General, to repeal their deceptive pricing statutes and regulations. Failure to do so will continue to chill the pricing practices of discount chains and will only legitimize even more chilling consumer class actions against retailers, such as the recent case brought against Kay-Bee Toys.[27]

Repeal of these statutes, however, does not mean that retailers will be free to engage in truly outrageous pricing conduct. For example, there can be no legitimate justification for advertising a product as "on sale" every single day of the year. Section 5 of the FTC Act, as well as each state's general laws on deception and unfair trade practices, will remain available to keep such conduct in check. Consumers will benefit; unscrupulous retailers can still be held accountable. It is a bargain no state can afford to pass up. ■

[1] Timothy Muris, *Economics and Consumer Protection*, 60 ANTITRUST L.J. 103, 112 (1991).

[2] *See id.*, Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977).

[3] 15 U.S.C. § 45 *et seq.*

[4] FTC Policy Statement on Deception (Oct. 14, 1983), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

[5] 16 C.F.R. § 233 (1958).

[6] 16 C.F.R. § 251 (1971).

[7] See Southern States Distrib. Co., FTC Docket No. 8882 (1973).

[8] See Home Centers, Inc., 94 F.T.C. 1362 (1979).

[9] See *FTC Gives States Job of Policing Ad Price Claims, Capital Cities Media Inc.* (Oct. 3, 1990) (on file with authors).

[10] Pitofsky, *supra* note 2, at 687–88.

[11] *Id.*

[12] *Id.*

[13] Muris, *supra* note 1, at 113.

[14] *Id.*

[15] *Id.* at 115.

[16] However, as late as 1990, Massachusetts adopted one of the strictest and most comprehensive fictitious pricing schemes in the country. See MASS. REGS. CODE 940 § 6.04 *et seq.*

[17] MASS. REGS. CODE 940 § 6.05(3)(a)(2).

[18] N.J. ADMIN. CODE TIT. 13. § 45.A-9.6.

[19] MO. CODE REGS. ANN. 15 § 60-7.060(2).

[20] California v. Southdale Kay-Bee Toy Inc., Case No. 26-15784 (Super. Ct. Aug. 2003).

[21] DeGradi v. KB Holdings, Inc., Case No. 02 CH 15838 (Cir. Ct III 2003).

[22] Colorado v. May Dept Stores Co., 849 P.2d 802 (Colo. Ct. App. 1992).

[23] *Levitz Settles Deceptive Ads Claim—Furniture Chain to Pay $1.2 Million to Ariz., 7 States*, ARIZ. REPUBLIC, June 26, 1996.

[24] *J.C. Penney, State Resolve Suit over Window Blind Ads*, PORTLAND OREGONIAN, Jan. 7, 1993, at D13.

[25] See California v. Nordstrom, Case No. 736092 (Super. Ct. Aug. 31, 1989); Florida v. Burdines, Inc., Case No. 96-008229 (Fla. Cir. Ct. Mar. 18, 1997); *Rich Pays State $25,000 over Ads; Agency Threatens Macy's*, ATL. J & CONST., Feb. 25, 1989, at A01; *As Retailers' Sales Crop Up Everywhere, Regulators Wonder If the Price Is Right*, WALL ST. J., Feb. 15, 1990, at B1; Missouri v. Montgomery Ward & Co., Case No. 189-1244CC (Cir. Ct. Nov. 13, 1989); Kansas ex rel. Nola Foulston and Carla J. Stovall v. Kohl's Dep't Stores Inc., Case No. 006 4110 (Kan. Dist. Ct. 2000).

[26] *Misleading Discounts Can Cost You*, McMillan Binch Advertising & Marketing Bulletin (Oct. 2003), http://www.mcmillanbinch.com/upload/publication/misleading1003.pdf.

[27] See *supra* note 20.

NRFa19

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

A lawyer with Archer in Voorhees cautioned that the Appellate Division's ruling on a motion to dismiss is not the same as if there had been a trial.

March 06, 2023 at 03:42 PM

Retail

Colleen Murphy

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 that 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," Oberstaedt said. "But that [being] 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,” Oberstaedt 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 on New Jersey 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 [Consumer Fraud Act],” Considine said.

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 bar about how this is going to affect retailers in New Jersey,” Considine said. “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 boom of class action in the short term because there are a number of retailers in New Jersey that offer these fictitious sales,” Considine said. “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 markup 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 CFA and 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 their next step.

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."

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SUPREME COURT OF NEW JERSEY
APP. DIV. # A-001384-21
SUPREME COURT # 087981

CRIMINAL ACTION

Christa Robey and Maureen Reynolds, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

Sparc Group LLC,

Defendant-Petitioner.

CERTIFICATION OF SERVICE

I hereby certify that the following documents, MOTION FOR LEAVE TO APPEAR AMICUS CURIAE, BRIEF IN SUPPORT OF MOTION WITH APPENDIX were submitted and transmitted to the parties listed below in the following format:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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