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CHRISTINA ROBEY and MAUREEN REYNOLDS, on behalf of themselves and all others similarly situated, Plaintiffs-Respondents, v. SPARC GROUP, INC. Defendants-Appellants.	SUPREME COURT OF NEW JERSEY Docket No. 087981 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-001384-21-T4 Civil Action SAT BELOW: Hon. Maritza Berdote Byrne, J.A.D. Hon. Clarkson S. Fisher, Jr., J.A.D. Hon. Richard J. Geiger, J.A.D.

BRIEF AND APPENDIX OF PROPOSED AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE IN SUPPORT OF DEFENDANT SPARC GROUP, INC.

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PRELIMINARY STATEMENT

The proper interpretation of New Jersey's regulations governing "fictitious former prices" included in advertising is a matter of great interest to businesses throughout the State. In this case, the Appellate Division construed those rules in a manner contrary to their plain text, making putatively unlawful a course of conduct that the rules expressly allow, and one that happens to be a mainstream course of conduct for retailers like Defendant that position themselves as lower-cost options for quality casual clothing. This was error. Had the Appellate Division construed the regulations correctly, it should have upheld the trial court's decision to dismiss Plaintiffs' claims in their entirety.

The Appellate Division committed errors beyond its misreading of the applicable regulations. The court should have upheld the dismissal of Plaintiffs' claims under New Jersey's unique Truth-in-Consumer Contract, Warranty, and Notice Act ("TCCWNA") because such claims require alleged violations of "clearly established rights." Even if the Appellate Division construed the State's applicable regulations correctly—and it manifestly did not—its decision was the first by any court addressing those rules. Because the court's construction of these "former price" regulations was novel, it should not have considered Plaintiffs' proffered reading of the rules to constitute a "clearly established right" sufficient to serve as the basis for a TCCWNA claim.

Just as fundamentally, this Court has never held that a sign reading "50-70% off" or "Buy 1 Get 2 Free" falls anywhere near the TCCWNA's ambit. The TCCWNA and the Consumer Fraud Act ("CFA") are different statutory schemes meant to address different conduct, and they have different penalties, including a $100 statutory penalty in the TCCWNA that the Legislature did not include in the CFA. New Jersey's regulations governing advertisement of "fictitious former prices" say that breaking the rules "will be deemed to be a violation of the [CFA]," not the TCCWNA. If this Court were to hold that the TCCWNA applies to price tags and pricing signage displaying discounts, it would be hard to envision any kind of writing that one could challenge under the CFA that would not also violate the TCCWNA. The two laws should not be so conflated.

Finally, the Appellate Division erred in its treatment of the causation element of Plaintiffs' CFA claims—the requirement to prove that they suffered an "ascertainable loss" as a result of the challenged practice. Here, Plaintiffs received exactly the goods they expected at the price they agreed to pay. Speaking only for themselves, they idiosyncratically contend that *they* would not have purchased these clothing items from Defendant, or would have insisted upon paying less for them, had they known that the reference prices Defendant used in advertising discounted prices allegedly were not former prices charged for the same items in the same stores.

Because this is a putative class action, Plaintiffs presumably hope to eventually pursue their CFA claims on behalf of other patrons of Defendant's stores. For that reason, *Amici*, on behalf of other businesses in the State, submit that knowing *why* Plaintiffs ostensibly have pleaded valid CFA claims is as important as knowing *whether* they have done so. Although this case remains at the pleading stage, the Appellate Division should have addressed the "why" by tying its holding that Plaintiffs pleaded an ascertainable loss to Plaintiffs' individualized claims about their own purchasing decisions. Instead, the Appellate Division seems to have accepted a "price inflation"-type theory of ascertainable loss that this Court has rejected on multiple occasions, most recently in *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24, 55-56 (2017)—a case the Appellate Division did not cite.

Because these three issues are potentially dispositive, and because they were not addressed by the parties or taken up by the Appellate Division, *Amici* respectfully request that the Court accept this brief and allow *Amici* to participate in oral argument of the case.

STATEMENT OF INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every

region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The New Jersey Civil Justice Institute ("NJCJI") is a statewide, nonpartisan association of the state's largest businesses and professional and trade organizations. NJCJI is dedicated to improving New Jersey's civil justice system and believes that a balanced system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured people are compensated fairly for their losses. Such a system is critical to ensuring fair resolution of conflicts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt Defendant's Statements of Procedural and Factual History.

ARGUMENT

I. THE APPELLATE DIVISION'S DECISION INTERPRETED STATE REGULATIONS IN A MANNER AT ODDS WITH THEIR TEXT.

Before even reaching the question of "ascertainable loss" under the CFA, the Appellate Division should have analyzed the State's applicable regulations governing "fictitious former prices" and held that Defendant's alleged conduct did not violate those rules, negating the stated basis for Plaintiffs' CFA claims.

Defendant positions its Aéropostale brand and stores as a lower-cost retailer of high-quality casual clothing. The State's rules say expressly that reference prices *need not* be former prices charged by the same retailer for the same items. Retailers instead may use reference prices charged by *competitors* for *comparable* goods in the marketplace. The regulations also state that for goods priced under $100, as all of the clothing items at issue in this case were, a retailer need not state the basis for reference prices used in advertising. Had the Appellate Division interpreted these rules according to their plain text, it should have upheld the dismissal of Plaintiffs' claims. Instead, it erroneously addressed only one section of one rule in a vacuum and ignored the others.

Although N.J.A.C. § 13:45A-9.6(a) prohibits retailers from using "fictitious former price[s]," subsection (b) clarifies that a displayed price is not "fictitious" if *comparable* items are sold in the marketplace at that price—a condition Plaintiffs never have disputed Defendant met here.

N.J. Admin. Code § 13:45A-9.6 (emphases added):

> (a) An advertiser shall not use a fictitious former price. Use of a fictitious former price will be deemed to be a violation of the Consumer Fraud Act.
>
> (b) A former price or price range or the amount of reduction shall be deemed fictitious if it can not be substantiated, based upon proof:
>
> 1. Of a substantial number of sales of the advertised merchandise, **or comparable merchandise of like grade or quality made within the advertiser's trade area** in the regular course of business at any time within the most recent 60 days during which the advertised

> merchandise was available for sale prior to, or which were in fact made in the first 60 days during which the advertised merchandise was available for sale following the effective date of the advertisement;
>
> 2. That the advertised merchandise, **or comparable merchandise of like grade or quality**, was actively and openly offered for sale at that price within the advertiser's trade area in the regular course of business during at least 28 days of the most recent 90 days before or after the effective date of the advertisement; or
>
> 3. That the price does not exceed the supplier's cost plus the usual and customary mark-up used by the advertising merchant in the actual sale of the advertised merchandise or **comparable merchandise of like grade or quality** in the recent regular course of business.

As the added emphases in subsection (b) show, the phrase "former price" encompasses multiple forms of price comparison. Another regulation, N.J.A.C. § 13:45A-9.5(a)(2), addresses advertised *percent-off* discounts, and similarly says that offers may describe discounts relative to a "competitor's price." Just like Section 9.6(b) of its companion rule, Section 9.5(a)(2) does not require the reference price to be a prior price charged by the same seller for the same item.

For goods priced *above* $100, where the retailer is using a reference price to reflect a discount, the regulations require the retailer to state which of the permissible comparisons under Section 9.6(b) it is using. Critically for purposes of this case, however, where items are sold for *less than $100*—and Plaintiffs expressly plead that Defendant sold all of the items at issue in this case at prices well below that threshold—retailers *need not* disclose the basis for advertised discounts. That carve-out for lower-priced goods is fatal to Plaintiffs' claims.

They cannot fault Defendant for failing to say what points of comparison it was using as the reference price for advertised discounts of "50-70% Off," because New Jersey's regulations on their face do not require Defendant or other retailers in the State to include this information for goods like those at issue.

The applicable regulations are N.J.A.C. § 13:45A-9.5 and 9.8(b).

N.J. Admin. Code § 13:45A-9.5

(a) An advertiser offering merchandise for sale at a savings of a percentage or a range of percentages (such as "save 20% or 20% to 50% off") shall, in addition to complying with the provisions of N.J.A.C. 13:45A–9.2:

1. State the minimum percentage reduction as conspicuously (such as the same size print) as the maximum percentage reduction when applicable; and

2. Set forth the basis upon which the former price was established pursuant to N.J.A.C. 13:45A–9.6(b), in close proximity to the percentage reduction. In this regard, terms such as "competitor's price" or "our regular price" or words of similar import shall be used to designate the basis for the former price.

(b) Percentage-off discounts made in accordance with N.J.A.C. 13:45A–9.8 shall be exempt from the requirements of (a) above.

N.J. Admin. Code § 13:45A-9.8(b) (emphasis added)

…

(b) **An advertiser who offers a percentage-off discount is not required to disclose the basis of the percentage reduction or the regular price or price range in an advertisement pursuant to N.J.A.C. 13:45A–9.5 provided that**:

1. The retail price per unit of merchandise is **less than $100.00**; and

2. The regular price and the price after any discounts are taken are set forth on the register receipt given to the consumer at the point of sale.[1]

The Appellate Division seems to have side-stepped Section 9.8(b)'s centrality to this dispute by characterizing Defendant's alleged conduct as advertising discounts from "original" prices. *Robey v. SPARC Grp. LLC*, 474 N.J. Super. 593, 598 (App. Div. 2023) (Plaintiffs "claim that . . . Christa Robey purchased . . . a hoodie advertised as being 60% off an original price of $59.95."). Plaintiffs, however, do not and cannot allege that Defendant used the words "original price" in any Aéropostale channel—in stores or online.[2] The photographs Plaintiffs pasted into their Complaint reflect in-store displays stating just "50-70% Off," with no mention of a "regular" or "original" price. Pa17-18, 20-21. The displays were silent as to the basis for the reference prices, as N.J.A.C. § 13:45A-9.8(b) expressly permitted them to be.

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[1] None of these regulations apply to price tags. N.J.A.C. § 13:45A-9.1 expressly carves price tags out of the definition of "Advertisement"—and by reference, out of the definition of "Advertiser."

[2] Plaintiffs' allegations that Defendant used the words "regular price" on its website, Pa20, but not in the brick-and-mortar stores at issue in the Complaint, should not affect the analysis. Plaintiffs do not allege they shopped on Defendant's website, and the putative class is limited to customers of Defendant's brick-and-mortar stores. *See* Pa44. Even if website content were relevant to this case, however, the words "regular price" do not connote a retailer's own former price for the same item, and still may reflect a competitor's "regular price," as permitted by N.J.A.C. §§ 13:45A-9.5(a)(2) and 9.8(b).

The difference between an omission expressly allowed by the rules and a misstatement is critical. Section 9.8(b) states that advertisers need not "disclose the basis of" a percentage discount offer, while Section 9.6(b) requires advertisers to "substantiate[]" an advertised "former price" with "proof." The two companion regulations thus cannot be directed to the same advertising practice. Necessarily, Section 9.6 must be intended to regulate the specific practice of explicitly calling a reference price a "former price," or words to that effect, and *not* the distinct practice of advertising a percentage discount, which the regulations permit to be done without explaining the basis of the reference price. As this Court recently reaffirmed in *State v. Gomes*, 253 N.J. 6, 32 (2023), courts have an "affirmative duty to reconcile" an "overall scheme" of legislation or regulations "so as to give full effect to each constituent part." Courts must "give meaning to all words used in a statute" or regulation, to avoid treating any "as mere surplusage." *Delanoy v. Twp. of Ocean*, 245 N.J. 384, 401-02 (2021).[3]

As a result, if a store sells a pair of jeans for $25 that is comparable to jeans sold by a competitor for $50, these regulations mean the store can lawfully advertise the jeans it is selling for $25 as "50% off," without having to "disclose the basis of the percentage reduction," because the retail price-per-unit "is less

[3] Although *Gomes* and *Delanoy* dealt with statutes, the same rule of construction applies with equal force to regulations. *See, e.g.*, *Powell v. Heckler*, 789 F.2d 176, 179 (3d Cir. 1986) ("[S]tatutes and regulations should be read and construed as a whole and, wherever possible, given a harmonious, comprehensive meaning.").

than $100." N.J.A.C § 13:45A-9.8(b). And so long as the register receipt reflects the reference price and the discounted price—which Plaintiffs do not dispute here—a private plaintiff has no potential CFA claim for alleged failure to disclose the nature of the reference price.

Because Plaintiffs complain exclusively about advertised percent-off discounts for goods priced under $100, and because the applicable regulations relieve advertisers of any burden to state the basis of a reference price for percent-off discounts for such goods, the burden of pleading here should have been on Plaintiffs. Plaintiffs should not have been able successfully to shift the burden to Defendant to prove as an "affirmative defense" that competitors' prices for comparable goods justify the reference price Defendant used. Placing that burden on Defendant negates the regulations' express declaration that advertisers need not state the basis of a reference price. The Appellate Division erred by quoting N.J.A.C. § 13:45A-9.6(a)'s words "fictitious former price" without addressing how that and other applicable regulations define the term and how the rules tell retailers like Defendant what they must and what they need not disclose when using reference prices.

Amici recognize, of course, this Court's instruction that the CFA and its regulations should be "liberally construed in favor of protecting consumers." *Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 121 (2014), *quoting Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 69 (1985). Even a liberal construction,

however, cannot contravene a regulation's clear text. Here, the executive branch promulgated regulations addressing the exact situation at issue here: advertised percent-off discounts of goods sold for under $100. Plaintiffs' allegations that Defendant should have had to disclose the basis for the reference prices it uses are directly at odds with State regulations saying that Defendant *need not* do as Plaintiffs demand. This Court should correct the Appellate Division's error in not upholding the dismissal of Plaintiffs' CFA claims on that basis.

II. THE APPELLATE DIVISION SHOULD HAVE AFFIRMED THE DISMISSAL OF PLAINTIFFS' TCCWNA CLAIMS.

N.J.A.C. § 13:45A-9.6(a) states that violations of the "fictitious former price" regulations constitute violations of the CFA, not the TCCWNA. The TCCWNA, N.J.S.A. § 56:12-15, prohibits "sellers" from "enter[ing] into any written consumer contract or giv[ing] or display[ing] any written consumer warranty, notice or sign . . . which includes any provision that violates any clearly established legal right of a consumer . . . as established by State or Federal law at the time the . . . notice or sign is given or displayed." The Appellate Division reversed the trial court's dismissal of Plaintiffs' TCCWNA claims, but analyzed only whether Plaintiffs were "aggrieved consumers," a separate statutory condition. *See Robey*, 474 N.J. Super. at 601-02. *Amici* agree with Defendant that the Appellate Division erred by finding Plaintiffs to be "aggrieved consumers," but Plaintiffs' TCCWNA claims should have failed for

a more fundamental reason: Even assuming a price tag or pricing signage could ever violate the TCCWNA, the signage at issue here did not violate any "clearly established right" because no prior court had ever construed the regulations at issue at all, much less in the manner Plaintiffs urge.[4]

The most applicable regulations, N.J.S.A. §§ 13:45A-9.5(a)(2) and 9.8(b), provide that retailers need not disclose the basis for reference prices in the circumstances at issue. The interplay among those two regulations, the separate regulation Plaintiffs rely upon, N.J.S.A. §§ 13:45A-9.6(a), and the qualifier to

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[4] In a footnote, the Appellate Division stated in conclusory fashion that "Plaintiffs' allegations of illusory discounts and misleading price tags states a claim under the [TCCWNA]." *Robey*, 474 N.J. Super. at 600 n.3. The court thus seems to have accepted that pricing signage inside a store falls within the TCCWNA's ambit, but if the TCCWNA's requirements of a "provision" violating "clearly established legal rights[s]" can be construed as broadly as Plaintiffs desire, it is hard to envision any CFA violation that could not be portrayed as a TCCWNA violation, too. The TCCWNA then would become little more or less than a law adding $100 in statutory damages to every CFA claim.

This Court has not had much occasion to define what it means for a "notice" or "sign" to violate a right. *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419 (2013), involved restaurant discount certificates sold online, with detailed terms and conditions, which this Court held to be "contracts" under the TCCWNA containing allegedly unlawful provisions. This Court defined the term "contracts" to mean "writings required to complete the consumer transaction, *id.* at 438, and also held the certificates to be "notices" because they are "printed announcement[s]" that "condition[] the use of the certificates." *Id.* at 441-42. In *Dugan*, this Court assumed without deciding, that the menus omitting drink prices constituted "contracts" for TCCWNA purposes. *See Dugan*, 231 N.J. at 71-73. Beyond those two cases, which are of no help to Plaintiffs, all other reported TCCWNA precedent involved true "contracts." No precedent supports Plaintiffs view that the pricing signage at issue in this case can give rise to TCCWNA liability and its $100 in statutory damages.

that regulation contained in Section 9.6(b), is wholly untested in court. Indeed, as discussed above, the Appellate Division did not address Sections 9.5(a)(2), 9.6(b), or 9.8(b) in reaching its decision, and *Hoffman v. Macy's Inc.*, 2011 WL 6585 (N.J. Super. Ct., App. Div. June 28, 2010)— the unpublished case the trial court found persuasive on the question of whether allegedly fictitious discounts give rise to an ascertainable loss—did not discuss these regulations, either. Under no circumstances, therefore, can Defendant be said to have violated a "*clearly* established right," subjecting it to a TCCWNA claim. *See Dugan*, 231 N.J. at 73 (holding that plaintiffs had not satisfied the "clearly established" requirement because "no published opinion" supported their interpretation of the regulations on which they relied).

Plaintiffs' Complaint asserted that the "clearly established right[]" Defendant supposedly violated is contained in N.J.S.A. § 13:45A-9.4(a)(5) and (6), "which require a seller advertising a purported percentage 'off' discount and/or a price comparison to affirmatively state in writing the basis for the discount and the source of the price which is being used for comparison, including whether that price was charged by the seller or its competitors and when and where that former price was previously charged." Pa55. As noted, however, that rule applies only to items priced over $100, which the goods here were not. Plaintiffs' citation to an inapplicable regulation alone should have compelled the Appellate Division to uphold dismissal.

Had Plaintiffs instead relied on N.J.S.A. §§ 13:45A-9.5(a)(2) and 9.8(b)—the companion regulations governing advertised percent-off discounts of items sold for *less than* $100, which say expressly that advertisers do not have to disclose the basis for discounted-from reference prices—they could not even have tried to claim a "clearly established right" to such disclosures. With the regulations saying the opposite of what Plaintiffs claim, and with no case law supporting Plaintiffs' position, the Appellate Division should have upheld the trial court's dismissal of Plaintiffs' TCCWNA claims because the "right" claimed falls far short of the "clearly established" bar (and indeed, does not exist at all). *See, e.g.*, *McGarvey v. Penske Auto Grp., Inc.*, 486 F. App'x 276, 279-80 (3d Cir. 2012); *Mattson v. Aetna Life Ins. Co.*, 124 F. Supp.3d 381, 393 (D.N.J. 2015) (both dismissing TCCWNA claims after holding that "rights" serving as the alleged basis of TCCWNA claims were not "clearly established").

A federal appellate court encountered the same fatal flaw that fells Plaintiffs here in *Gerboc v. ContextLogic, Inc.*, 867 F.3d 675, 677 (6th Cir. 2017). The plaintiff in *Gerboc*, like Plaintiffs here, complained of false reference prices in the defendant's descriptions of items for sale. *See id.* Ohio law required the plaintiff to prove "either that the Ohio Attorney General had already declared the seller's practice to be deceptive or unconscionable or that an Ohio court had already determined the practice violates the [law] before the seller engaged in it." *Id.* at 680. That is the equivalent of the TCCWNA's "clearly established

legal right" requirement, and the plaintiff in *Gerboc* failed to meet it. *See id.* Accordingly, the district court dismissed the claim, and the Sixth Circuit affirmed. *See id.*

For all these reasons, the Appellate Division should have upheld the trial court's dismissal of Plaintiffs' TCCWNA claims.

III. PLAINTIFFS DID NOT ADEQUATELY PLEAD A CFA VIOLATION, BUT IF THEY DID, THE APPELLATE DIVISION FAILED TO SPECIFY WHICH OF PLAINTIFFS' ALLEGATIONS SUFFICED.

As discussed above, Plaintiffs' CFA claims fail because Defendant simply did not violate the "fictitious former price" regulations. Plaintiffs' TCCWNA claims fail because even if the Court were to agree with the Appellate Division's interpretation of these rules (which it should not), this construction would be novel, and thus not "clearly established," as the TCCWNA requires. Further, even if this Court adopts the Appellate Division's reading of the fictitious former price rules, *Amici* join Defendant's arguments that Plaintiffs' CFA claims would still fail "the requirement that plaintiff prove that he or she suffered an *ascertainable* loss as a result of the defendant's unlawful method, act, or practice." *Dugan*, 231 N.J. at 53 (emphasis added) (internal quotation marks and citations omitted). *Amici* write separately on this final point because if this Court were to disagree with Defendant and hold that Plaintiffs have cleared the ascertainable loss bar, it should be necessary for the Court to explain, as the Appellate Division did not, *why* Plaintiffs' claims sufficed.

This Court has held many times that where a merchant delivers *defective* goods to a consumer, and then fails to provide conforming goods, a customer faces little difficulty pleading ascertainable loss. *E.g.*, *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 8 (2004) (plaintiff stated a claim by alleging carpet was both damaged and smaller than promised). But that is not this case: Plaintiffs here received what they expected to receive for the price they expected to pay. This Court's discussion of *Furst* in *Dugan*—a more recent case involving facts much closer to those at issue in this case than *Furst*—demonstrates why the Appellate Division erred by relying on *Furst* without considering how this Court, in *Dugan*, rejected an attempt to plead ascertainable loss in a manner similar to that tried by Plaintiffs here. *See Dugan*, 231 N.J. at 54.

Like this case, *Dugan* involved plaintiffs who received the exact items they sought to buy. The defendant restaurants in *Dugan* omitted beverage prices from their menus, which the *Dugan* plaintiffs argued violated the CFA and the TCCWNA and caused at least some patrons to pay more for beverages than they would have if the menus listed beverage prices (*i.e.*, because they would have purchased a lower-priced beverage or ordered only tap water). *Dugan* reached this Court at the class certification stage. To support certification, the *Dugan* plaintiffs offered a market research study the defendant commissioned showing that consumers who were informed of beverage prices before their order "spent an average of $1.72 less per visit than the customers to whom the prices were

not disclosed," and argued this study should have allowed allow all patrons who ordered a drink to demonstrate an ascertainable loss. *Dugan*, 231 N.J. at 38.

This Court assumed the truth of those plaintiffs' allegations that the defendant "declined to list prices for its beverages on its menus in order to increase its revenues from beverage sales" and also that the plaintiffs "would not have ordered the beverages they ordered . . . had they been informed of the beverage prices." *Dugan*, 231 N.J. at 53-54. Nevertheless, because those plaintiffs did "not allege that they purchased defective or deficient goods"—to the contrary, "those beverages were precisely what the customers ordered"—the plaintiffs were not able to "contend that they are entitled to a refund of money spent on a worthless or deficient item." *Id.* at 54. This Court distinguished the plaintiffs' allegations in *Dugan* from those in *Furst*, noting "that plaintiffs' pricing claims [in *Dugan*] are inherently different from the CFA claims in our prior CFA class action case law," and that the nature of the claims in *Dugan* made it impossible for the *Dugan* plaintiffs to contend, as the *Furst* plaintiff did, "that they are entitled to a refund of money spent on [what *Furst* showed to be] a worthless or deficient item." *Id.*

Dugan highlighted the important differences between theories of ascertainable loss tied to what particular plaintiffs claim they would or would not have done differently when faced with different disclosures, as opposed to "price inflation theories," which attempt to prove something more akin to a

"fraud on the market" claim. In *Dugan*, the plaintiffs argued that this Court should have allowed them to apply a uniform quantum of damages across-the-board, based on the defendant's own $1.72-per-person market research estimate. But this Court rejected that "price inflation theory," holding it did "not establish ascertainable loss and causation." *Dugan*, 231 N.J. at 57, 60.

This case should not proceed beyond the pleading stage, but if it does, the parties—and, by extension, numerous other New Jersey businesses—need to understand what it was about Plaintiffs' allegations that sufficed to plead ascertainable loss. Plaintiffs appear to have pleaded that (1) *they personally* understood "50-70% Off" to mean that Defendant itself formerly sold the same items in the same stores at higher prices; (2) that sign and *their* alleged understanding of it induced *their* purchases; and (3) *they personally* would not have purchased the items, or would have insisted on paying less for them, had they known the referenced discount might have had another basis. This Court's careful treatment of the same method of pleading ascertainable loss in *Dugan* should have impelled the Appellate Division to specify the extent to which Plaintiffs' allegations about their personal beliefs and practices—like the *Dugan* plaintiffs' contentions that they personally would not have purchased drinks had they known in advance what the prices would be—informed the court's findings as to their pleading of ascertainable loss.

The Appellate Division's majority opinion did not clearly explain on what basis it held Plaintiffs to have met this element of a CFA claim. The majority opinion states that "part of the exchange of promises included defendant's offers of discounts, and plaintiffs claim they received no benefit from the discounts." *Robey*, 474 N.J. Super. at 602. The concurring opinion disagreed, stating that "the pleadings here do not indicate plaintiffs were deprived of any benefit of the bargain," and that it would be more appropriate to find ascertainable loss based on Plaintiffs' allegations that "they would not have purchased the items had they known the items had not been regularly offered at the higher list price." *Id.* at 607-08 (Berdote Byrne, J., concurring).

The concurrence's approach is more faithful to *Dugan*. Here, as in *Dugan*, Plaintiffs freely acknowledged they received what they expected. Unlike in *Dugan*, however, Plaintiffs here knew in advance exactly what they would pay for those items and paid that expected price. That difference should have caused the Appellate Division to find that Plaintiffs did not satisfy the ascertainable loss requirement at all, but even if that is incorrect, the majority opinion erred by seeming to adopt a price inflation theory. If this Court disagrees with Defendant and *Amici*, and finds Plaintiffs to have pleaded ascertainable loss, it should adopt Judge Berdote Byrne's finding that Plaintiffs did so only by virtue of their allegations that they would not have purchased the goods had Defendant provided different disclosures about the reference prices it was using—

disclosures which, it bears repeating, the applicable regulations expressly state Defendant did not need to provide. That the parties did not submit arguments on *Dugan* to the Appellate Division does not affect this Court's ability to address *Dugan*.[5]

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that the Court reverse the Appellate Division's decision below and uphold the trial court's dismissal of Plaintiffs' claims.

Respectfully submitted,

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Dated: August 22, 2023

[5] "[B]ecause an appeal is taken from a trial court's ruling rather than reasons for the ruling, [a reviewing court] may rely on grounds other than those upon which the trial court relied." *State v. Adubato*, 420 N.J. Super. 167, 176 (App. Div. 2011); *see also N.J. Div. of Child Protection and Permanency v. K.M.*, 444 N.J. Super. 325, 333-34 (App. Div. 2016) (this appellate principle is "long settled").

2011 WL 6585
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Harold M. HOFFMAN, Individually and in behalf of the class of purchasers at the Bloomingdale's one-day Las Vegas Sale of 4/18/09, Plaintiff–Appellant,
v.
MACY'S, INC., Defendant–Respondent.

Argued Feb. 3, 2010.
|
Decided June 28, 2010.

West KeySummary

1 **Antitrust and Trade Regulation** Representations About Prices; Advertising and Labeling

Consumer failed to demonstrate an ascertainable loss caused by a department store's alleged misrepresentation of a sale price under the New Jersey Consumer Fraud Act. Consumer alleged that in reliance on advertisement, he purchased an espresso machine which the department store delivered at the advertised price. The claim that the department store misrepresented the regular price of this item provided no basis for establishing an ascertainable loss. N.J.S.A. 56:8–19.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L–3926–09.

Attorneys and Law Firms

Harold M. Hoffman argued the cause pro se.

Sigrid S. Franzblau argued the cause for respondent (Riker Danzig Scherer Hyland & Perretti, LLP, attorneys; Ms. Franzblau, of counsel and on the brief).

Before Judges MESSANO and LeWINN.

Opinion

PER CURIAM.

***1** Plaintiff, Harold Hoffman, appeals from the July 17, 2009 order of the trial court dismissing his complaint against defendant, Macy's, Inc., for failure to state a claim pursuant to *Rule* 4:6–2(e). We affirm.

We summarize the operative facts from plaintiff's complaint. Macy's owns and operates a Bloomingdale's department store in Hackensack. On or about April 18, 2009, Bloomingdale's advertised a one-day special sale "at which it purportedly offered various wares to its ... customers at spectacular savings...." Specifically, in plaintiff's words, the store "promised ... that various wares could be purchased at a price below the 'regular price' ... and below the 'previous sale price' for the said relevant items. [Bloomingdale's] explained ... that the term 'previous sale price' was intended to identify the Manufacturer's Suggested Retail Price ("MSRP") for the item in question."

In reliance on this advertisement, plaintiff purchased a Nespresso model D290 automatic espresso machine for $299.99, which he was told "verbally and in writing ... [was] a price point well below its 'regular price' of $625.00 ... and well below its ... MSRP of $499.99." Plaintiff claimed that Bloomingdale's "had never previously sold" this machine "at a $625.00 price point.... Further, the MSRP ... was well below the $499.99 represented by [Bloomingdale's]."

Plaintiff's complaint sought certification as a class action, and asserted the following damages:

> Plaintiff and members of the class suffered ascertainable loss in the form of actual out of pocket loss as a result of defendants' [sic] unlawful conduct as aforesaid: the fabrication of false and misleading pricing information allocable to the items being offered for sale at the Bloomingdale's [one-

> day] [s]ale. Plaintiff and members of the class suffered a further element of ascertainable loss in that they, as consumers, received less than what was promised by defendant, i.e., various wares at a highly discounted price. Thus, the plaintiff and members of the class were injured and suffered ascertainable loss.

Plaintiff asserted five claims under the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8–1 to –20(CFA), and one claim of common law fraud.

In granting defendant's motion to dismiss, the trial judge first found that the complaint "d[id] not clearly set forth an 'unconscionable business practice.' " The judge determined that plaintiff had failed to "illustrate how the alleged misrepresentation of price violates the Consumer Fraud Act [,] ... [or] how[ ] he, or other members of the putative class, were affected by the alleged misrepresentation." Plaintiff's general statement that defendant " 'lied' and 'lured consumers into snapping up special values [,]' without providing further clarification[,] ... [did not explain] how the misrepresentation 'victimized' him or the putative class."

Additionally, the judge determined that plaintiff had failed to "show 'ascertainable loss.' " Because plaintiff did not allege the espresso coffeemaker was in some way defective and, therefore, did not function properly, the judge found that plaintiff had no claim for his "out of pocket" expenses as the measure of loss. Nor did plaintiff "factually illustrate [ ]" his claim that "he suffered an 'ascertainable loss' because he received 'less than promised'...."

***2** Finally, the judge dismissed plaintiff's common law fraud count because he found that it was not pled with the degree of specificity required by *Rule* 4:5–8(a), [1] and plaintiff had failed to "provide any damages he suffered as a result of [d]efendant's alleged fraud."

On appeal, plaintiff contends that the dismissal of his complaint under *Rule* 4:6–2(e) was in error because (1) the judge failed to accord him the benefit of every reasonable inference in weighing the claims; and (2) the complaint states causes of action under both the CFA and common law fraud. We disagree and affirm substantially for the reasons in the trial judge's decision relating to plaintiff's failure to demonstrate an ascertainable loss, a pleading deficiency that renders both his statutory and common law claims subject to dismissal under *Rule* 4:6–2(e).

We need not discuss the trial judge's findings and conclusions with respect to the "unconscionable business practice" element of plaintiff's CFA claims. Even assuming the judge incorrectly determined that plaintiff's pleadings had failed to make such a showing, we are nonetheless satisfied that dismissal of the complaint was proper due to its failure to state a viable claim for "ascertainable damages" caused by that "practice."

N.J.S.A. 56:8–19 provides that "[a]ny person who suffers any ascertainable loss of moneys or property ... as a result of the use ... by another person of any ... practice declared unlawful under this act ... may bring an action ... in any court of competent jurisdiction." The CFA thus "imposes a standard of proof in consumer fraud actions by private plaintiffs that is higher than the standard that applies to enforcement proceedings by the Attorney General.... [A] private plaintiff must show that he ... suffered an 'ascertainable loss ... as the result of' the unlawful conduct." *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 *N.J.* 464, 473, 541 A.2d 1063 (1988) (quoting *Daaleman v. Elizabethtown Gas Co.*, 77 *N.J.* 267, 271, 390 A.2d 566 (1978)).

Plaintiff relies upon *Thiedemann v. Mercedes–Benz USA, LLC*, 183 *N.J.* 234, 248, 872 A.2d 783 (2005), for the proposition that "either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle and will set the stage for establishing the measure of damages." In that case, which arose from the plaintiffs' appeal of a grant of summary judgment to defendants dismissing their complaint, the Court "focuse[d] on the enigmatic requirement of an 'ascertainable loss' and, specifically, on what a plaintiff must demonstrate in order to survive a motion for summary judgment when challenged on that issue." *Id.* at 238, 872 A.2d 783. The Court held that

> when a plaintiff fails to produce evidence from which a finder of fact could find or infer that a plaintiff suffered a *quantifiable or otherwise measurable loss* as a result of the alleged CFA unlawful practice, summary judgment should be entered in favor of defendant....
>
> ***3** [*Ibid.* (emphasis added).]

There, the plaintiffs had purchased new Mercedes Benz vehicles that had faulty fuel gauges; their dealers serviced

and, in one case even replaced, the vehicles. *Id.* at 239–42, 872 A.2d 783. The trial court, in dismissing the plaintiffs' complaint, characterized their damages claim as follows:

> None of the plaintiffs ... spent a single penny in relation to the fuel system problems they experienced. Nevertheless, plaintiffs attribute to themselves as a species of damages, an *unincurred* cost of repair extrapolated from *defendant's* internal warranty remediation efforts. Plaintiffs further assert an inchoate and unsubstantiated loss of the benefit of the bargain. Plaintiffs insist that they did not get what they bargained for and instead received an unsafe motor vehicle with a known fuel-reporting defect....
>
> Here, no rational fact finder could conclude that plaintiffs suffered an objectively ascertainable loss or damage, even under the lens of the expansively protective legislative purpose of the Consumer Fraud Act and this State's public policies affording broad protection to consumers against deceptive commercial practices.
>
> [*Id.* at 243, 872 A.2d 783 (internal quotation marks omitted).]

In affirming, the Supreme Court noted that "[t]here is little that illuminates the precise meaning that the Legislature intended in respect of the term 'ascertainable loss' in our statute." *Id.* at 248, 872 A.2d 783. The Court concluded, nonetheless, that

> [t]o raise a genuine dispute about such a fact, the plaintiff must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating that it is capable of calculation....
>
> The certainty implicit in the concept of an "ascertainable" loss is that it is quantifiable or measurable.
>
> ....
>
> The ascertainable loss requirement operates as an integral check upon the balance struck by the CFA between the consuming public and sellers of goods. The importance of maintaining that balance is obvious.
>
> [*Id.* at 248, 251, 872 A.2d 783.]

Particularly pertinent here is the Court's determination that the "[p]laintiffs 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 to satisfy the requirement of an ascertainable loss that is expressly necessary for access to the CFA remedies.* " *Id.* at 252, 872 A.2d 783 (emphasis added).[2] This is consistent with the trial judge's finding here that "[p]laintiff's lack of factual support and abundance of conclusory statements do[ ] not substantiate a cognizable claim."

We are further satisfied that plaintiff's reliance upon *Union Ink Co., Inc. v. AT & T Corp.,* 352 *N.J.Super.* 617, 801 A.2d 361 (App.Div.), *certif. denied,* 174 *N.J.* 547, 810 A.2d 66 (2002), and *Miller v. Amer. Family Publishers,* 284 *N.J.Super.* 67, 663 A.2d 643 (Ch.Div.1995), is similarly misplaced. In *Union Ink,* customers of a wireless cellular phone service sued the defendant service provider on numerous grounds including the CFA, for alleged misrepresentations in the scope and quality of the services for which they had contracted. 352 *N.J.Super.* at 625–27, 801 A.2d 361. In that context, we recognized that the "ascertainable loss" requirement "has been broadly defined as embracing more than a monetary loss. An ascertainable loss occurs when a consumer receives less than what was promised." *Id.* at 646, 801 A.2d 361. "[W]hat was promised" to the plaintiffs in *Union Ink* was a specific service "so reliable that a wireless phone could be a consumer's only phone[,]" *id.* at 645, 801 A.2d 361, an allegation which proved false and which caused the plaintiffs to lose the service for which they had paid.

***4** In *Miller,* the plaintiffs purchased magazine subscriptions from the defendant in reliance on a promise that "they would receive two things: first, a magazine subscription; and second, the ability to remain a part of defendant's sweepstakes ... and an enhanced likelihood of winning that sweepstakes." 284 *N.J.Super.* at 88, 663 A.2d 643. In their complaint brought under the CFA, the plaintiffs claimed they "received the first[,] ... [but] did not receive the second." *Ibid.* This led the trial court to conclude:

> That hypothesis seems to be a clear example of what one would normally believe the term "ascertainable loss" should encompass. If one sets out to purchase two things, and for the price paid receives only one, the conclusion seems inescapable that there has been an "ascertainable loss." Indeed, defendants [sic] submit no argument as to why that seemingly obvious conclusion should be rejected.
>
> [*Ibid.*]

Plaintiff does not cite, and we have not found, any case that ascribes an "ascertainable loss" to the situation presented

here, namely his claim that defendant "did not deliver" on its "promise[ ] of various wares at a highly discounted price." Defendant "deliver[ed]" 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."

The beneficial purpose of the CFA is "to address ... consumer complaints about fraudulent practices in the marketplace and to deter such conduct by merchants." *Thiedemann, supra,* 183 *N.J.* at 245, 872 A.2d 783. However, as noted, "the CFA private plaintiff must produce some specific proof to demonstrate a discernable loss." *Id.* at 255, 872 A.2d 783. This requirement "allow[s] advancement of the" legislative purpose. *Ibid.* We are unable to discern any loss incurred by plaintiff as a result of the conduct alleged. We are, therefore, satisfied that the trial judge properly granted defendant's motion to dismiss the CFA claims on this basis.

We briefly address plaintiff's common law fraud claim.

> To establish common-law fraud, a plaintiff must prove: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) *resulting damages.*"
>
> [*Banco Popular N.A. v. Gandi,* 184 *N.J.* 161, 172–73, 876 A.2d 253 (2005) (emphasis added) (quoting *Gennari v. Weichert Co. Realtors,* 148 *N.J.* 582, 610, 691 A.2d 350 (1997)).]

As plaintiff has failed to assert any cognizable loss or damages, his common law fraud claim was likewise properly dismissed.

Affirmed.

All Citations

Not Reported in A.2d, 2011 WL 6585

Footnotes

1 *Rule* 4:5–8(a) provides, in pertinent part: "In all allegations of ... fraud ... particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable ."

2 In a footnote, the Court acknowledged several cases in which a "benefit-of-the-bargain claim" was found to "support an ascertainable loss sufficient to allow a CFA claim to proceed to the factfinder[,]" noting that "it is the quality of the proofs that will determine a claim's viability." *Id.* at 252, n. 8, 872 A.2d 783. We incorporate that discussion here and note that the cases cited therein are all factually distinguishable to a degree that renders them inapposite to plaintiff's situation.

486 Fed.Appx. 276
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on
or after Jan. 1, 2007. See also Third Circuit LAR,
App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)
United States Court of Appeals, Third Circuit.

Sharon McGARVEY; Bryan Bechtel; Katie McGarvey, on behalf of themselves and all others similarly situated, Appellants
v.
PENSKE AUTO GROUP, INC.; United Autocare Products, Inc.; United Autocare, Inc.; Innovative Aftermarket Systems, L.P.

No. 11–2085.
|
Argued May 15, 2012.
|
Filed: July 2, 2012.

Synopsis

Background: Automobile purchasers brought a putative class action against, inter alia, an automobile dealership and a manufacturer of an anti-theft system, claiming that the limited warranty the manufacturer provided for the system was unlawful under the Magnuson Moss Warranty Act (MMWA), the New Jersey Truth–in–Consumer Contract, Warranty, and Notice Act (NJTCCA), New Jersey common law, and the New Jersey Consumer Fraud Act (CFA). The United States District Court for the District of New Jersey, Jerome B. Simandle, J., 639 F.Supp.2d 450, granted summary judgment in defendants' favor as to the MMWA and CFA claim, and, upon reconsideration, 2010 WL 1379967, dismissed the NJTCCA claim. Purchasers moved for leave to file a second amended complaint. The District Court, Simandle, J., 2011 WL 1325210, denied motion. Purchasers appealed.

Holding: The Court of Appeals, Fisher, Circuit Judge, held that limited warranty did not violate New Jersey Truth–in–Consumer Contract, Warranty, and Notice Act (NJTCCA).

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (1)

[1] **Antitrust and Trade Regulation** Motor vehicles; "lemon" laws

Consumers' legal right to be free from limited warranties tying credit reimbursement warranty benefit to the purchase of a replacement vehicle at a particular dealership was not "clearly established" under the Magnuson–Moss Warranty Act (MMWA), and thus such limited warranty did not violate New Jersey Truth–in–Consumer Contract, Warranty, and Notice Act (NJTCCA). Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, § 102(c), 15 U.S.C.A. § 2302(c); N.J.S.A. 56:12–15.

6 Cases that cite this headnote

***277** On Appeal from the United States District Court for the District of New Jersey, (D.C. No. 1–08–cv–05610), District Judge: Honorable Jerome B. Simandle.

Attorneys and Law Firms

Leonard W. Aragon, Robert B. Carey, Hagens Berman Sobol Shaprio, Phoenix, AZ, Patrick Howard, Charles J. Kocher, Simon B. Paris (Argued) Saltz, Mongeluzzi, Barrett & Bendesky, Philadelphia, PA, for Counsel for Appellants.

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Douglas A. Albritton Reed Smith, John J. Hare (Argued), Keith D. Heinold, Kevin M. McKeon Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, PA 19103 Counsel for Innovative Aftermarket Systems LP.

Before: SMITH, FISHER and GARTH, Circuit Judges.

OPINION OF THE COURT

FISHER, Circuit Judge.

**1 Sharon McGarvey, Katie McGarvey, and Bryan Bechtel (collectively, "Plaintiffs") appeal both the District Court's dismissal of their First Amended Complaint for failure to state a claim as well as its denial of their motion for leave to amend. Plaintiffs filed a putative class action in the U.S. District Court for the District of New Jersey against Penske Auto Group, Inc. ("PAG"), United Autocare Products, Inc. ("UAP"), United Autocare, Inc. ("UA"), [1] and Innovative Aftermarket Systems ("IAS") (collectively, "Defendants"), alleging the Defendants created a tying arrangement that violated federal and state laws. For the reasons stated below, we will affirm the District Court's order.

I.

We write principally for the parties, who are familiar with the factual context and legal history of this case. Therefore, we will set forth only those facts necessary to our analysis.

*278 This case involves the sale of the Ibex Anti–Theft Etch System ("Ibex System") to purchasers of automobiles. The Ibex System was manufactured by IAS, distributed to dealerships by UAP and UA, and sold by automobile dealerships owned by PAG. The Ibex was comprised of two components. First, the Ibex included an Etch Code, which was a unique serial number, placed onto the primary windows of the vehicle, that was registered for later searches if necessary. Because a vehicle's glass is one of the most valuable items for a thief to remove from a stolen vehicle for resale, the Etch Code was designed to help deter theft by making the glass unmarketable. Second, the Ibex included a Limited Warranty, which provided a credit reimbursement in the amount of $2,500, $5,000, or $7,500 if the consumer purchased a replacement vehicle after the original vehicle was stolen. The Limited Warranty contract reads, in pertinent part:

> "In the event the Ibex Anti–Theft Etch System fails to prevent the Vehicle specified in this Limited Warranty from being stolen within the Warranty Period, and such failure results in the Customer's primary insurance company declaring the Vehicle a Total Loss as a direct result of theft, we will provide the customer with a replacement vehicle, by issuing at the dealership listed in this Warranty, a credit in the name of the Customer (up to_$2,500 or_$5,000 or_ $7,500 check one) to be applied towards the purchase of the replacement vehicle. The customer is obliged to utilize the total benefit provided to replace the Vehicle specified in the Warranty and the replacement Vehicle must be of equal or greater value than the original purchase price paid for the covered Vehicle."

In November 2008, Plaintiffs filed a putative class action in the U.S. District Court for the District of New Jersey, alleging that Defendants violated the Magnuson–Moss Warranty Act ("MMWA"), 15 U.S.C. § 2302(c), the New Jersey Truth–in–Consumer Contract, Warranty, and Notice Act ("NJTCCA"), N.J. Stat. Ann. § 56:12–15, New Jersey common law, and the New Jersey Consumer Fraud Act ("CFA"), N.J. Stat. Ann. § 56:8–2. On June 29, 2009, the District Court dismissed the Plaintiffs' MMWA claim on the ground that they failed to allege actual damages as required under the statute. *McGarvey v. Penske Auto. Grp., Inc. (McGarvey I),* 639 F.Supp.2d 450, 457 (D.N.J.2009), *vacated in part by McGarvey v. Penske Auto. Grp., Inc. (McGarvey II),* No. 08–5610, 2010 WL 1379967, at *2 (D.N.J. Mar. 29, 2010). [2] But the District Court held that Plaintiffs sufficiently stated a NJTCCA claim, even in the absence of actual damages, because they were able to show that the Limited Warranty violated a clearly established legal right under the MMWA. *Id.* at 458. [3] Specifically, the Court found that the Ibex System's tying of the warranty benefit, *i.e.,* credit reimbursement, to a consumer's purchase of a replacement vehicle at a particular dealership violated a consumer's clearly established legal right *279 under the MMWA to be free from warranties that are conditioned on the consumer's use of a specific article or service. *Id.* at 463. [4] In addition, the Court held that Plaintiffs stated a claim for unjust enrichment under New Jersey common law but failed to state a claim under the CFA. *Id.* at 465–66.

**2 After *McGarvey I,* Plaintiffs filed their First Amended Complaint, maintaining the NJTCCA and common law unjust enrichment claims, while adding a claim for a declaratory judgment that the Limited Warranty contracts were void and unenforceable. Next, Defendants filed a motion for reconsideration of the District Court's June 29, 2009 order. On reconsideration, the District Court held that, contrary to its earlier holding, Plaintiffs did not allege sufficient facts to show that the Limited Warranty violated consumers' clearly established right under § 2302(c) of the MMWA and thus failed to state a claim under the NJTCCA. *McGarvey II,* 2010 WL 1379967, at *6–9.

In response to *McGarvey II,* Plaintiffs filed a motion for leave to file a Second Amended Complaint. *McGarvey v. Penske Auto. Grp., Inc. (McGarvey III),* No. 08–5610, 2011 WL 1325210, at *3 (D.N.J. Mar. 31, 2011). The District Court denied the motion on the basis that any amendment would be futile and could not state a claim under the NJTCCA, the Declaratory Judgment Act, or the common law theory of unjust enrichment. *Id.* at 1. The District Court then granted the Defendants' motion to dismiss the First Amended Complaint. *Id.* Plaintiffs filed a timely appeal.

II.

The District Court had subject matter jurisdiction under 28 U.S.C. § 1332(d). We have appellate jurisdiction under 28 U.S.C. § 1291.

"[W]e review *de novo* a district court's grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." *Ballentine v. United States,* 486 F.3d 806, 808 (3d Cir.2007) (citation omitted). At this stage, we must accept all factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Phillips v. Cnty. of Allegheny,* 515 F.3d 224, 231 (3d Cir.2008) (citation omitted).

We review the District Court's denial of a party's request for leave to file an amended complaint for abuse of discretion. *Toll Bros., Inc. v. Twp. of Readington,* 555 F.3d 131, 137 (3d Cir.2009) (citation omitted). "Under Federal Rule of Civil Procedure 15(a), leave to amend should be freely given when justice so requires[.]" *Id.* at 144 n. 10 (internal quotation marks omitted). But a district court may deny the motion if the amendment would be futile. *Phillips,* 515 F.3d at 228 (citation omitted).

III.

A.

The NJTCCA prohibits sellers from offering any written consumer warranty that "includes a provision that violates any clearly established legal right ... as established by State or Federal law at the time the offer is made[.]" N.J. Stat. Ann. § 56:12–15. Plaintiffs contend that the Defendants violated the NJTCCA by offering **280 the Limited Warranty, which contains tie-in provisions that violate their clearly established legal right under the MMWA. We disagree because Plaintiffs' right in question was not clearly established at the time the Limited Warranty was offered.

**3 When interpreting the NJTCCA, we "construe the statute as we believe the New Jersey Supreme Court would construe it." *Liberty Lincoln–Mercury, Inc. v. Ford Motor Co.,* 676 F.3d 318, 323 (3d Cir.2012). We first look to the language of the statute, and if the statute is clear and unambiguous on its face, then we enforce the statute as written. *See id.* at 323–24 (citation omitted). "If the language of the statute is ambiguous, courts may look to the statute's history, policy, purpose, and other extrinsic aids to ascertain statutory intent." *Id.* at 324. Here, the term "clearly established legal right" is not clear and unambiguous. The phrase does not indicate in what circumstances a consumer's legal right is established, nor does it define what it means for the right to be *clearly* established. Nothing in the NJTCCA defines this term or aids in giving it meaning. Thus, we look to extrinsic aides, like the statute's legislative history and State case law, which lead us to conclude that the consumers' legal right in this case was not "clearly established" under the NJTCCA. Even without defining the specific definition of "clearly established legal right," we are convinced that whether the Limited Warranty violates the MMWA, and consequently whether consumers had a right to be free from warranties like the Limited Warranty, is significantly less clear compared to the violations of rights that were previously found to be sufficient to state a NJTCCA claim.

First, the Assembly Statement in support of the NJTCCA's passage lists provisions that the Legislature considered to "clearly violate the rights of consumers." Statement, Bill No. A1660, 1981 N.J. Laws, Chapter 454, Assembly No. 1660, page 2–3 ("Assembly Statement"). [5] At the time the NJTCCA

was first introduced on May 1, 1980, these listed provisions, including a consumer's complete waiver of damages resulting from a seller's liability, infringed on rights that had been long-recognized in common law. *See, e.g., Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 115, 75 S.Ct. 629, 99 L.Ed. 911 (1955) (acknowledging "a longstanding admiralty rule, based on public policy, [that] invalidat[es] contracts releasing towers from all liability for their negligence."); *Northwest Airlines, Inc. v. Alaska Airlines, Inc.,* 351 F.2d 253, 256 (9th Cir.1965), *cert. denied,* 383 U.S. 936, 86 S.Ct. 1068, 15 L.Ed.2d 853 (1966) (holding indemnity contract provision relieving party of any damages, even in the case of its own negligence, to be unenforceable because it would be contrary to public policy).

***281** Next, the two cases in which the New Jersey Superior Court held that the plaintiffs sufficiently stated a NJTCCA claim also involved alleged wrongdoing that fell squarely within prohibited conduct under state or federal law. In *Bosland v. Warnock Dodge, Inc.;* the complaint alleged that the seller failed to itemize a documentary service fee that was included in the vehicle registration fee, when the state automotive sales practices regulation explicitly deemed it " 'unlawful' " to " 'charg[e] ... a consumer monies, or any other thing of value, in exchange for the performance of any documentary service without first itemizing the actual documentary services which is being performed[.]' " 396 N.J.Super. 267, 933 A.2d 942, 945–46 (App.2007) (quoting N.J. Admin. Code § 13:45A26B.2(a)(2)(i)). In *United Consumer Financial Services Company v. Carbo,* form contracts provided by a finance company to vacuum cleaner distributors allowed sellers to charge a fee of $20 if a check was returned for any reason, when the Retail Installment Sales Act only authorized a fee " 'if a check of the buyer is returned to the holder uncollected due to insufficient funds in the buyer's account.' " 410 N.J.Super. 280, 982 A.2d 7, 22 (App.2007) (citing N.J. Stat. Ann. § 17:16C–42(e)).

****4** In contrast, whether the Limited Warranty violates a consumer's legal right under § 2302(c) of the MMWA is significantly less clear. The critical language in the MMWA states that a warrantor shall not condition its warranty "on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name." 15 U.S.C. § 2302(c). But the statute fails to define what it means to use an article or service "in connection with such product" or specify whether "using in connection with" applies to parts or services that the consumer must pay for in the process of redeeming the warranty benefits, which is at issue here.

Other sources that typically aid in interpreting the statute are equally unhelpful. The MMWA's legislative history and Federal Trade Commission ("FTC") Guidelines suggest that the MMWA prohibits tying arrangements for articles or services that are *unrelated* to redeeming the warranty benefit.[6] However, as in cases like this one where the condition applies to parts or services that the consumer must pay for in the process of redeeming the warranty benefit, it is unclear whether the prohibition of tying arrangements applies. According to the FTC Guidelines, when a warranty covers only the replacement of parts but not the labor charges to install those parts, § 2302(c) prohibits warrantors from specifying the service or labor consumers must use to install the replacement parts. 16 C.F.R. § 700.10(b). However, the FTC's subsequent Opinion Letter suggests that in certain cases where the warrantor pays a portion of the labor cost under the warranty, it may specify the labor service to be used. Donald S. Clark, Federal Trade Commission, Nat'l Indep. Auto. Dealers Assoc. Response Letter (Dec. 31, 2002) ("Opinion Letter").

Although both parties rely heavily on the FTC's Opinion Letter to support their respective positions, the Letter ultimately fails to indicate whether the Limited Warranty ***282** violates a consumer's legal right under § 2302(c) of the MMWA. The FTC's position is that in the case of 50/50 warranties, where a warrantor pays 50% of the labor cost and 50% of the cost for parts with respect to covered repairs, warrantors are permitted to specify the labor service to be used. A tie-in provision in such cases does not violate the MMWA because the warranted repair work cannot be severed into the part that the warrantor can perform and the part that another repair shop can perform. Thus, the warranting dealer, who pays a proportion of the repair costs, "has a direct interest in providing the warranty service for which it is partly financially responsible." *Id.* The Limited Warranty here is similar in that the warrantor shares in the cost of the consumers' replacement vehicle and thus arguably has an interest in specifying the conditions of the consumers' purchase. However, unlike the warrantor's 50% payment of the repair cost under the 50/50 warranty, the warrantor's payment of the credit reimbursement here is a pre-determined, fixed amount that could remain unaffected by, and is potentially severable from, the purchase of the replacement vehicle.

**5 In the end, our analysis demonstrates that whether the Limited Warranty violates a consumer's right under § 2302(c) of the MMWA is significantly less clear than the violations of long-established common law listed in the Assembly Statement as well as the violations of law found sufficient to state a NJTCCA claim in *Bosland* and *United Consumer Financial Services Company.* Regardless of what the New Jersey Legislature specifically intended "clearly established legal right" to mean, it was not intended to include the types of right at issue here, where the violation of the right is unclear. Therefore, we hold that the consumers' right to be free from warranties like the Limited Warranty was not clearly established under the MMWA.[7] Accordingly, the District Court did not err in dismissing Plaintiffs' NJTCCA claim. For the same reason, any amendment to the complaint would have been futile in establishing the claim, so the District Court did not abuse its discretion in denying the Plaintiffs' motion for leave to amend.[8]

B.

In the District Court, Plaintiffs sought a declaratory judgment voiding the Limited Warranty contract and submitted an unjust enrichment claim under New Jersey common law, arguing that the Defendants should return to the Plaintiffs the value paid for the Ibex System. Plaintiffs presumably sought the declaratory judgment *283 voiding the contract because their unjust enrichment claim cannot stand as long as the parties' relationship is governed by an existing contract. *Kas Oriental Rugs, Inc. v. Ellman,* 394 N.J.Super. 278, 926 A.2d 387, 392 (App.2007). Because we hold that the Limited Warranty did not violate the consumer's clearly established legal right under the MMWA and thus, did not violate the NJTCCA, *see supra* Part III.A., Plaintiffs were not entitled to a declaratory judgment voiding the Limited Warranty contract. And without a declaratory judgment voiding the contract, Plaintiffs' unjust enrichment claim must also necessarily fail. Therefore, the District Court properly dismissed both claims and did not abuse its discretion in denying the motion for leave to amend.

IV.

For the reasons set forth above, we will affirm the District Court's order.

All Citations

486 Fed.Appx. 276, 2012 WL 2512011, 2012-2 Trade Cases P 78,113

Footnotes

1 Defendants submit that the party's correct name is United Autocare, LLC, not United Autocare, Inc. as named in the caption.

2 The District Court held that the statute required a showing of actual damages based on a reading of the following provision: "a consumer who is *damaged* by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter ... may bring suit for damages and other legal and equitable relief[.]" 15 U.S.C. § 2310(d)(1) (emphasis added). This portion of the District Court's opinion was not subsequently vacated.

3 The NJTCCA prohibits sellers from offering any written consumer warranty that "includes a provision that violates any clearly established legal right ... as established by State or Federal law at the time the offer is made[.]" N.J. Stat. Ann. § 56:12–15.

4 Under the MMWA, "[n]o warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name[.]" 15 U.S.C. § 2302(c).

5 "Examples of such provisions are those that deceptively claim that a seller or lessor is not responsible for any damages caused to a consumer, even when such damages are the result of the seller's or lessor's negligence. These provisions provide that the consumer assumes all risks and responsibilities, and even agrees to defend, indemnify and hold harmless the seller from all liability. Other provisions claim that a lessor has the right to cancel the consumer contract without cause and to repossess its rental equipment from the consumer's premises without liability for trespass. Still other provisions arbitrarily assert the consumer cannot cancel the contract for any cause without punitive forfeiture of deposits and payment of unfounded damages. Also, the consumer's rights to due process is often denied by deceptive provisions by which he allegedly waives his right to receive legal notices, waives process of law in the repossession of merchandise and waives his rights to retain certain property exempted by State or Federal law from a creditor's reach." Statement, Bill No. A1660, 1981 N.J. Laws, Chapter 454, Assembly No. 1660, page 2–3.

6 For example, an automobile manufacturer may not require the consumer to regularly use a certain brand of motor oil as a condition of redeeming warranty repairs. *See* H.R. Rep. 93–1107 (1974). Nor can a manufacturer require the use of specific repair services for non-warranty maintenance as a condition of redeeming warranty repairs. 16 C.F.R. § 700.(c).

7 We decline to define the precise contours of the term "clearly established legal right" because principles of comity counsel us to refrain from leading the state courts in the interpretation of state law when it is unnecessary to the resolution of the matter before us. *See Manning v. Princeton Consumer Discount Co.*, 380 F.Supp. 116, 120 (E.D.Pa.1974).

8 Even if we were to hold that the Limited Warranty violated the MMWA, this would only indicate that the consumers had a legal right to be free from such warranties. It would not necessarily mean that the right was *clearly* established under the MMWA. Interpreting the NJTCCA to apply equally to violations of a legal right and violations of a clearly established legal right would fail to give the phrase "clearly established" any meaning and render it superfluous. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) (Courts should construe statutes "so as to avoid rendering superfluous" any statutory language.). Thus, Plaintiffs must show something more than a post hoc judicial recognition of their right in order to prove that the right was clearly established. Their failure to do so would also lead us to reject their NJTCCA claim.

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