

New Jersey’s Supreme Court Weighs In On Proper Measure of Damages under the Consumer Fraud Act and Interrelationship Between “Ascertainable Loss” and “Damages”

By Kevin J. O’Connor*

In my prior articles I’ve covered the extensive developments with the New Jersey courts applying the New Jersey Consumer Fraud Act (“CFA”) in any number of circumstances beyond the strict consumer context in which it was initially adopted. Opinions on this subject are mixed, with some arguing that the law is being expanded to provide greater protection to those who need it, and others arguing that these cases are setting dangerous precedents that deter businesses from expanding in this State.

In D’Agostino v. Maldonado, 2013 WL 5476857 (Oct. 3, 2013), the New Jersey Supreme Court weighed in on whether the CFA could be triggered by a complex real estate deal between a purported “mortgage foreclosure rescue” service and owners of a residential apartment complex (plaintiffs lived in one of the units). The Court also articulated some guidance on the ascertainable loss requirement when the trial court has granted rescission and restitution.

In D’Agostino, plaintiffs—owners of a multi-unit residential complex--ran into significant financial trouble. They called the number on a sign stating “I buy houses” and ultimately signed a series of complicated documents with Ricardo Maldonado. The net effect of the transaction, according to the Court, was to transfer title to a property having a value in excess of \$400,000 to Maldonado, for just \$10. Plaintiffs sued for restitution, rescission, treble damages under the CFA and attorneys’ fees.

In her October 3, 2013 decision writing for the Court in D’Agostino, Justice Patterson ruled that even though the transaction in question was a complicated financial and realty transaction that was tailored for plaintiffs’ specific financial situation, it still fell within the scope of the CFA and was in the nature of a service offered to the public at large.

The second, significant part of her decision was to rule that the (albeit temporary) loss of equity in the property was itself an ascertainable loss from which to calculate a trebled damage award. In other words, regardless of the fact that the trial court had rescinded the transaction and put the plaintiffs back to where they were before the transaction, the Court sanctioned a damage model that permitted trebling of the “lost equity” in the property (with some adjustments), even though the loss was temporary:

“In short, the existence of ascertainable loss resulting from a defendant's CFA violation should be determined on the basis of the plaintiffs' position following the defendant's unlawful commercial practice, not after a judicial remedy has been imposed restoring plaintiffs' property pursuant to the CFA. Accordingly, we reverse the Appellate Division's determination that plaintiffs failed to demonstrate ascertainable loss.”

D’Agostino makes clear that the New Jersey courts will continue to recognize a broad definition of the word “consumer” to let the CFA come into play and impose treble damages and attorneys’ fees in broad circumstances. In the mortgage rescue context, there is also now the Foreclosure Rescue Fraud Prevention Act, N.J.S.A. 46:10B-53 to -68, which imposes its own set of requirements, and grants its own remedies deemed non-exclusive to the CFA. The Court’s recognition of an ascertainable loss to include the loss in equity in the underlying residential

property—even a temporary loss--opens perpetrators of mortgage scams up to significant potential liability.

*This blog is maintained by Kevin J. O'Connor, Esq. The views expressed herein are those of the author and not necessarily those of the law firm Peckar & Abramson, PC.