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# "What I Did On My Summer Vacation" ... as written by the NJCFA

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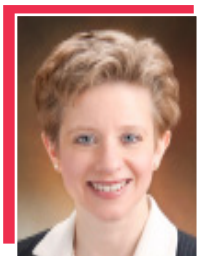

New York is the city that never sleeps, but our Consumer Fraud Act is the statute that never takes a vacation. While you were enjoying Kohr Brothers cones on the boardwalk and savoring Jersey corn this summer, the NJCFA kept busy on the dockets. So here's the cliff notes version of some highlights, if you haven't yet finished your summer reading list:

In Strand v. Kennedy Funding, 2015 WL 3476738 (App. Div. 2015), plaintiff boardwalk property owner and defendant entered a $3 million loan commitment. After the contract was signed, defendant sent plaintiff a checklist of 78 items to complete in order to receive the loan. Dismissing the NJCFA count, the trial court ruled that contract breach alone was insufficient to establish that claim. Plaintiff had offered no evidence that defendant deceived him into contracting while lacking intent to perform. The Appellate Division affirmed summary judgment for defendant: "A breach of contract is not per se unconscionable and does not alone violate the CFA . . . [P]laintiff failed to demonstrate any 'substantial aggravating circumstances' in this case [or] establish fraud within the intendment of the CFA."

In Mladenov v. Wegmans, 2015 WL 4461252 (D.N.J. July 21, 2015), plaintiffs alleged that defendant misrepresented certain bakery products as made from scratch on the premises and then charged a premium for them. Referring to Third Circuit precedent that class action ascertainability requires a reliable mechanism for determining whether putative class members fall within the class definition, the Court ordered plaintiffs to show cause why their class allegations should not be stricken, explaining: "The Court is not convinced that Plaintiffs have any way of ascertaining exactly who purchased the bread over the seven year period. Further, plaintiffs claim to have made multiple purchases of different food items over that time period. The average consumer likely does not have records of each and every time he or she purchased bakery products . . . Defendants will have no way to verify if a potential class member actually purchased their products or not." The Court also found that the potential for different customer expectations about products, based on various advertisements, created individual fact issues that defeated class certification prerequisites.

The court found similar ascertainability hurdles insurmountable in Bello v. Beam Global Spirits, 2015 WL 3613723 (D.N.J. June 9, 2015), where plaintiffs alleged that defendants misrepresented their margarita drink mix products as "all natural" when they contain sodium benzoate. Plaintiffs filed a renewed class certification motion after failing to demonstrate ascertainability on their first motion. On their second try, Plaintiffs included a declaration from a claims administrator that he could develop a reliable and feasible method to ascertain class members, with three levels of claims validation: (1) claim forms with purchase receipt ["Level 1"]; (2) sworn affidavits for customers to provide details on purchase location, amount and bottle description ["Level 2"]; or (3) "sophisticated and state-of-the-art data matching technologies that identify patterns of duplication" to eliminate multiple claims among online and paper claim submissions ["Level 3"]. However, Plaintiffs again struck out on their second certification try. Denying Plaintiffs' renewed motion, Judge Hillman explained: "Plaintiffs have not offered a suitable method by which the Court could identify class members with any reliability. [For example, Level 1] provide[s] little, if any, assistance identifying actual purchasers [and] would not necessarily prevent submission of fraudulent claims. [Level 2] fails because most claimants will likely be unable to provide the details necessary to substantiate their claims." Even assuming arguendo that Plaintiffs' ascertainability model was workable, Plaintiffs had not shown it was reliable (having only been used with approval in other class action settlements, not ongoing lawsuits).

In Motwani v. Marina District Dev., 2015 WL 3448171 (D.N.J. May 29, 2015), casino customer loyalty program members sued under the NJCFA after their "unlimited free parking" reward program vouchers compelled them to pay for parking after leaving the casino parking

lot, later re-entering, and then leaving a second time on the same day. The voucher had contained small print limiting the unlimited free parking to once per day. Dismissing defendant's motion to dismiss, the Court found plaintiffs' NJCFA allegations sufficient, noting, in particular, plaintiffs' satisfaction of the requisite "ascertainable loss" (i.e, "having to pay for parking to exit defendant's lot") and "causal nexus" (i.e., "sustain[ing] the loss due to defendant's misrepresentation") NJCFA elements.

The Castro v. Sovran Self Storage, 2015 WL 4380775 (D.N.J. July 16, 2015) Court denied defendant's motion to dismiss where plaintiff asserted NJCFA claims when he paid for "fire, smoke, explosion, windstorm and water damage" insurance on a self-storage unit, later to discover when he filed a claim for water and mold damage that the insurance covered only "accidental discharge or leakage of water as the direct result of the breaking or cracking of any part of a system or appliance containing water or steam." Citing the "low threshold for determining the existence of ascertainable loss," the Court found sufficient plaintiff's allegations that he received insurance coverage "so limited as to be meaningless, given the purpose for which he purchased it."

Now, for the lightning round: (1) The Stevenson v. Mazda Motor, 2015 WL 3487756 (D.N.J. June 2, 2015) Court granted defendant's motion to dismiss, applying this Circuit's law that "in order to show knowledge of a [product] defect, consumers cannot rely on general allegations that a manufacturer had received complaints about similar makes and models of vehicles"; (2) the Bohus v. Restaurant.com, Inc., 784 F.3d 918 (3d Cir. 2015) Court held that the NJ Supreme Court's Shelton III rule (2011 WL 10844972) – i.e., "property" under the Truth-in-Consumer Contract, Warranty, and Notice Act encompasses intangible property such as gift certificates – will apply retroactively to purchasers but will otherwise apply prospectively; and (3) the Sun Chemical v. Fike, 2015 WL 3935031 (D.N.J. June 25, 2015) Court re-confirmed that if "the core of the issue" is the danger inherent in a product, an NJCFA claim cannot avoid being subsumed under NJ's Product Liability Act merely because it is labeled as "representation-based."

And that's what the NJCFA did on its summer vacation. Class is now in session.