Supreme Court of New Jersey
Docket No: 61,927

RHONDA BOSLAND, Respondent, v. WARNOCK DODGE, INC., d/b/a WARNOCK DODGE/CHRYSLER/JEEP, Petitioner.	On Petition for Certification from a Final Judgment of the Superior Court of New Jersey, Appellate Division Docket No. A-1369-06T5 Sat Below: Hon. Harvey Weissbard, P.J.A.D. Hon. Susan L. Reisner. J.A.D. Hon. Linda Baxter, J.A.D. Hon. John J. Harper, J.S.C. Docket No. MRS-L-844-06

BRIEF OF AMICUS CURIAE NEW JERSEY LAWSUIT REFORM ALLIANCE (NJLRA) SUPPORTING PETITIONER

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TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

STATEMENT OF NJLRA'S INTEREST IN THE CASE

The New Jersey Lawsuit Reform Alliance (NJLRA) is a statewide, bipartisan group of individuals, businesses and organizations dedicated to improving the state's civil justice system in an effort to make the state a more attractive place to live and do business. Membership in the NJLRA is comprised of dozens of leading New Jersey employers in the healthcare, manufacturing and other industries, professional associations, individual citizens, and not-for-profits, including the New Jersey Chamber of Commerce, the New Jersey Business and Industry Association, and the HealthCare Institute of New Jersey. NJLRA's members share a concern for a number of disturbing trends that demonstrate the need for reform to stop lawsuit abuse.

NJLRA believes that a balanced civil justice system fosters public trust and motivates professionals, sole proprietors and businesses to provide safe and reliable products and services, while ensuring that truly injured people are compensated fairly for their losses. Such a system is critical to ensuring fair and open courts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

This case is of particular interest to NJLRA's members because the question on Certification to this Court, i.e., "whether an attempt to obtain redress is an essential element of a claim under the Consumer Fraud Act," 2008 N.J. Lexis 140 (Feb. 4, 2008), implicates the scope of the private right of action afforded under the Act. This Court has refused to abrogate the requirement of an ascertainable loss for a private suit and has

declined to ignore the statutory distinction between CFA actions brought by the Attorney General and private plaintiffs. Permitting a lawsuit like this to proceed, however, without any effort to obtain redress for a de minimis overcharge, will accomplish precisely that which this Court has sought to avoid.

Simply stated, the Appellate Division's conclusion that an ascertainable loss can be demonstrated merely by paying for a product or service which is allegedly higher than it should have been, is inconsistent with this Court's most recent pronouncements defining both the contours of the requirement of an ascertainable loss and the limited nature of the private right of action under the CFA. Where a consumer has the clear opportunity to seek redress for an alleged overcharge, yet chooses to file a class action lawsuit in lieu of requesting a ($20) refund which would have made her whole, it is inconceivable that the consumer would have suffered the type of "actual loss" envisioned by this Court in its seminal decision in Thiedemann v. Mercedes-Benz USA. Indeed, in the posture the Appellate Division has left this case, there is no distinction at all between a private right of action and an Attorney General proceeding, as the mere regulatory violation, rather than any "actual loss," forms the basis of the action.

To the extent that a private right of action under the CFA could be predicated, as here, on a consumer's failure to act, the statutory requirements of the CFA would be eroded, the legislative goals of the CFA would not be accomplished, and an

extraordinary burden would be placed on an already overtaxed court system. NJLRA respectfully submits that the legislature did not intend for the CFA to relieve consumers of the basic covenant to seek redress and provide an opportunity for a cure before seeking redress in the courts, efforts that are an essential part of a consumer society.

NJLRA believes that merchants and others accused of consumer fraud should be given the opportunity to remedy their alleged misconduct before having to face the harsh remedies of the CFA, particularly where the claim involves a regulatory violation. This Court's prior decisions, particularly Thiedemann, have already implicitly recognized that the mere payment for a product or service does not suffice to create a private right of action. Some attempt to obtain redress be must made, without satisfaction, to establish an actual ascertainable loss as a result of a violation of the Act. The question then is not, as articulated by Plaintiff, whether the Appellate Division's opinion in Feinberg v. Red Bank Volvo, 331 N.J. Super. 506 (App. Div. 2000) impermissibly created a "fourth element" to the private rights of action, but rather, whether an opportunity to cure is a necessary component of the ascertainable loss and causation requirements. The answer to this question is an unequivocal yes.

LEGAL ARGUMENT

MERELY STATING A REGULATORY VIOLATION -- HERE, AN ALLEGED OVERCHARGE -- WITHOUT PLEADING ANY FACTS SHOWING AN ATTEMPT TO OBTAIN REDRESS, IS INSUFFICIENT TO ENTITLE A PRIVATE CITIZEN TO DAMAGES UNDER THE CFA.

A. An Attempt To Obtain Redress Is A Component Of The Ascertainable Loss And Causal Nexus Requirements Under The Act.

The question on Certification to this Court, i.e., "whether an attempt to obtain redress is an essential element of a claim under the Consumer Fraud Act," 2008 N.J. Lexis 140 (Feb. 4, 2008), is best answered by critically analyzing this Court's own decisions defining the scope of the private right of action under the Act and the CFA's ascertainable loss "standing" requirement. Guided by those precedents, the NJLRA respectfully submits that where, as here, a consumer has a clear opportunity to obtain redress for an alleged violation in the form of a refund which would make her whole and yet fails to act accordingly, the violation of the Act itself cannot alone establish an ascertainable loss.

Notably, this Court has consistently refused to ignore the statutory distinction between a private right of action under the CFA and an Attorney General enforcement proceeding. Thiedemann v. Mercedes-Benz USA, 183 N.J. 234, 244 (2005) citing Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464 (1988); Weinberg v. Sprint Corp., 173 N.J. 233 (2002). The Thiedemann Court observed that "[a]s a prerequisite to the right to bring a private action, a plaintiff must be able to demonstrate that he

or she suffered an ascertainable loss...as a result of the unlawful conduct." Thiedemann, 183 N.J. at 246 (internal quotations omitted).

In defining the contours of what it termed the "enigmatic requirement of an ascertainable loss," the Thiedemann Court emphasized that "actual loss" is required in order "[t]o give effect to the legislative language describing the requisite loss for private standing under the CFA, and to be consistent with Weinberg."[1] Thiedemann, 183 N.J. at 248. Thus, requiring that "a private CFA plaintiff demonstrate a real and measurable loss of property or moneys to have standing to pursue a CFA action" ensures that the statutory distinction remains steadfast. See id. at 255, 249-51. Recognition of the distinction is important here because it demonstrates that merely pleading a regulatory violation, even a potentially quantifiable overcharge, does not establish the type of "actual loss" envisioned by Thiedemann.

It is well established that "[s]imply showing a violation of the CFA ... is insufficient to entitle a private citizen to damages under the Act" as "t[h]e CFA affords a private cause of action under *limited circumstances*." Dabush v. Mercedes-Benz

[1] In Weinberg v. Sprint Corp., 173 N.J. 233, 250-51 (2002), the Supreme Court refused to eviscerate the statutory distinction between CFA actions that may be brought by individuals who actually experience a loss as a result of a consumer fraud violation, and the broader category of actions that may be brought by the Attorney General where there is no ascertainable loss but there exists an industry practice that the State seeks to curtail. See Thiedemann, 183 N.J. at 250; Weinberg, 173 N.J. at 237.

USA, 378 N.J. Super. 105, 114, 116 (App. Div. 2005)(quoting Weinberg, 173 N.J. at 237) certif. denied, 185 N.J. 265 (2005)(emphasis added); New Jersey Citizen Action v. Schering Plough Corp., 367 N.J. Super. 8, 12 (App. Div. 2003), certif. den. 178 N.J. 249 (2003). There must be "actual harm." Cannon v. Cherry Hill Toyota, Inc., 161 F.Supp.2d 362, 373 (D.N.J. 2001). A properly pled "ascertainable loss" is an "actual loss" that is not "hypothetical or illusory" but "quantifiable and measurable" and "capable of calculation . . . within a reasonable degree of certainty." Thiedemann, 183 N.J. at 248; see also Cox v. Sears Roebuck & Co., 138 N.J. 2, 22 (1994).

In Thiedemann, car owners brought a class action suit against the manufacturer, alleging that defective fuel gauges in their cars amounted to a violation of the CFA. 183 N.J. at 238-39. The Thiedemann Court rejected the various loss theories proffered as theoretical or hypothetical, finding that although the plaintiffs may have been inconvenienced by the fuel gauge defect, the problems caused did not result in any out-of-pocket loss or other "real and measurable loss" to plaintiffs because all repairs were performed under warranty. Id. 251-54. The Court also rejected as "simply unreasonable" the contention that the payment of $57 for the gas used during the technician's efforts to diagnose a vehicle problem constituted a "loss" that could support a CFA claim in this setting. Id. at 253. The critical lesson of Thiedemann then is that no "actual loss" is suffered for CFA purposes where a consumer seeks redress, in

that case pursuant to a warranty, and his problem is rectified without cost.[2]

The Appellate Division's decision in Perkins v. DaimlerChrysler Corp., 383 N.J. Super. 99 (App. Div. 2006) is also instructive. In Perkins, the plaintiff filed a putative class action lawsuit under the CFA alleging that her five-year old Jeep contained a "less durable exhaust manifold than defendant should have incorporated, a fact which defendant did not disclose when the vehicle was purchased." Id. at 105. Since the claimed defect never manifested itself in plaintiff's vehicle and the vehicle outperformed the warranty, the court found that dismissal was required by Thiedemann. Id. at 112. Importantly, the Perkins court explained:

> **The logic of this holding is demonstrated by a consideration of what would have occurred if plaintiff had complained of the manifold exhaust prior to the expiration of the warranty period.** In that case, should it have been determined that the manifold exhaust was defective and the warranty program required that it be replaced at defendant's sole cost and expense, and defendant so complied, then plaintiff would have no viable cause of action because she would have incurred no ascertainable loss, as Thiedemann instructs.

[2] As further evidence of an implicit remediation component, Thiedemann noted that the CFA had to be read in a manner that is consistent with New Jersey's Lemon Law Act, which allows a car manufacturer three opportunities to cure before remedies attach. "The CFA and the Lemon Law would be in conflict if the CFA were to accept as proof of an ascertainable loss the occurrence of a defect in an automobile, even when the defect is addressed by the manufacturer or dealer at no cost to the purchaser pursuant to the warranty program." 183 N.J. at 255.

Id.(emphasis added); see also Duffy v. Samsung Electronics America, Inc., 2007 U.S. Dist. Lexis 14792, at *19-20 (D.N.J. March 2, 2007).

A similar question must be asked here: what would have occurred if plaintiff had complained of the alleged overcharge and the defendant had refunded her the alleged overage? Undeniably, Thiedemann instructs that if the defendant had refunded plaintiff the alleged $20 overcharge, the plaintiff would not have incurred an ascertainable loss. Thus, the theory below that Plaintiff suffered an "ascertainable loss" at the moment of purchase (in the amount of the $20 alleged overcharge), is the same type of "theoretical" or "hypothetical" loss theory that this Court rejected in Thiedemann. Moreover, as noted above, Thiedemann even rejected the notion that the $57 spent on gas as part of the effort to seek redress for the fuel gauge defect could be a sufficient loss to support a CFA claim. Thiedemann, 183 N.J. at 242 n.4, 253. Certainly, then, the alleged $20 price differential, without more, and specifically, without any attempt to obtain redress, at best is only a "theoretical" loss which cannot support a CFA claim.

That the Thiedemann, Perkins and Duffy cases involved purchases of products with warranties does not alter the fundamental analysis as to whether the consumer suffered an "actual loss." Indeed, there would be no logical justification for requiring consumers who purchased a warranted product to seek redress (through the product warranty) as part of the

"ascertainable loss" calculus, but not doing the same for consumers, like Plaintiff, who purchased a "service" (particularly where obtaining redress would make the consumer whole, completely eliminate any actual loss, and defeat the purpose of having to file a lawsuit in the first place).

It cannot be overlooked that Plaintiff here alleges that she suffered an "ascertainable loss" merely because the price charged for the registration and/or documentary service fee was higher than it should have been as a result of Defendant's regulatory violation. However, equating the alleged overcharge at the moment of purchase with an "ascertainable loss" would further eviscerate the private party standing requirement of the CFA. Indeed, CFA standing would then be conferred upon anyone who purchased a product or service, at an allegedly unfair price, without regard to any actual loss. Clearly, though, the CFA affords a private right of action only to those who suffer an actual, ascertainable loss as a result of an unlawful practice, not simply to those who purchase products, without more.

Based predominantly on Thiedemann's rationale, various courts have rejected analogous loss theories predicated upon the mere purchase of a product, without demonstrating that the purchase caused a specific actual loss. See, e.g., Parker v. Howmedica Osteonics Corp., 2008 U.S. Dist. LEXIS 2570, * 8 (D.N.J. Jan. 14, 2008) (No. 07-02400) (purchase price of allegedly defective hip implant was not an ascertainable loss);

Jorge v. Toyota Motor Insurance Services, Inc., 2006 WL 2129026, * 3-5 (App. Div. Aug 01, 2006) (No. A-4926-04T2) (purchase of vehicle service contract, without more, was insufficient to establish an ascertainable loss); Franulovic v. Coca Cola Co., 2007 U.S. Dist. LEXIS 79732, *19, 23-24 (D.N.J. Oct. 25, 2007) (No. 07-539) (dismissing CFA claim where the only specific allegation was that the plaintiff purchased the subject beverage and the plaintiff "actually received a beverage for her money, and she has not alleged how the purchase of that beverage constituted a specific loss"). Most recently, in Romano v. Galaxy Toyota, __ N.J. Super. ___ (App. Div. Mar 28, 2008), 2008 N.J. Super. LEXIS 71, * 18 (No. A-0251-06T3), the Appellate Division affirmed the trial court's finding that plaintiff failed to provide proof of an ascertainable loss, stating that "plaintiff's ascertainable loss for CFA purposes cannot be the purchase price she paid for the automobile."

Moreover, Plaintiff here cannot establish that the regulatory violation *caused her loss* unless some effort was attempted to seek redress. This Court has explained that the CFA "essentially replaced reliance, an element of proof traditional to any fraud claim, with the requirement that plaintiff prove an ascertainable loss." International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 389 (2007). To the extent the "loss" here is attributable to plaintiff's failure to simply ask for a

refund of the alleged overcharge, she has not sufficiently pled an ascertainable loss or causation under the Act.

In Int'l Union v. Merck & Co., the plaintiff sought to establish ascertainable loss by proving that the price charged for Vioxx was higher than it should have been as a result of defendant's fraudulent marketing campaign. 192 N.J. at 392. This Court rejected plaintiff's planned "fraud on the market" approach to proving ascertainable loss by establishing "a price effect in place of a demonstration of an ascertainable loss or in place of a causal nexus between defendant's acts and the claimed damages." Id.

Here, Plaintiff's theory -- that the price charged for the documentary service fee was higher than it should have been -- essentially seeks to establish a price differential in place of a demonstration of an ascertainable loss or in place of a causal nexus. The notion that a price differential alone does not satisfy the requirement of an actual, ascertainable loss is entirely consistent with this Court's rejection, in Int'l Union, of a "price inflation theory" or "fraud on the market" approach to ascertainable loss and causation. Thus, Plaintiff's theory of ascertainable loss here should fare no better than the fraud on the market theory rejected in Int'l Union.

In Feinberg v. Red Bank Volvo, the Appellate Division appropriately recognized that a consumer's prior demand to the alleged wrongdoer to be made whole, and an opportunity for the alleged wrongdoer to make the consumer whole, is part of the

overall calculus in determining whether a plaintiff has stated an ascertainable loss as a result of some unlawful conduct. Feinberg, then, is entirely consistent with Thiedemann and its progeny.

B. A Determination That An Attempt To Obtain Redress Is A Necessary Component Of The Ascertainable Loss And Causal Nexus Requirements Is Consistent With The Policies Underlying The CFA

In recent years, New Jersey's courts have become clogged with individual and class action lawsuits involving disputes that were eminently resolvable. The resulting burden on New Jersey courts and its citizens is untenable. Eviscerating the CFA's requirements of "ascertainable loss" and causation to exclude the components of a demand to be made whole and an opportunity to cure would not only be contrary to well established precedent, it would serve neither the consumer nor retailer. Indeed, such a ruling would have the potential of opening the floodgates of CFA class action litigation in New Jersey, ultimately resulting in higher costs for goods and services in New Jersey, with the only real beneficiaries being the class action lawyers.

By amending the CFA in 1971 to afford consumers a right of action, the New Jersey legislature sought to balance the "consumer society" by affording private citizens access to courts and remedies for fraudulent business practices. Recognizing that balance, the Thiedemann Court held found "the ascertainable loss requirement operates as an integral check

upon the balance struck by the CFA between the consuming public and sellers of goods." Thiedemann, 183 N.J. at 251. The legislature did not intend, however, for that access to be unfettered. By requiring an "ascertainable loss" as a prerequisite to recovery, the legislature asked the courts of New Jersey to serve as gatekeepers. This was a reasonable expectation, and one the Appellate Division fulfilled in Feinberg by recognizing the importance of a demand to be made whole as a component of ascertainable loss. This Court did the same in Thiedemann, and should reaffirm here.

Permitting a CFA lawsuit to proceed, and thus subjecting a defendant to the harsh treble damages and attorneys fees provisions of the Act, where a consumer could have been made whole simply by taking ordinary steps to seek redress from the alleged wrongdoer, changes the balance between consumers and retailers in a way that the legislature never intended, leaving us with a system wherein the courts, rather than citizens, become the first arbiters of all disputes. Although the legislature intended to open the door to private citizens, it did not intend to tip the balance so far in favor of the consumer as to relieve the consumer of any responsibility to obtain satisfaction.

The NJLRA, on behalf of its numerous corporate, not-for-profit and individual member citizens, therefore, respectfully urges this Court to reverse the holding of the Appellate Division and reinstate the holding of the Law Division that a

demand to be made whole and opportunity to cure are essential components of the “ascertainable loss” and causal nexus requirements under the CFA.

CONCLUSION

For all of the reasons set forth herein, the NJLRA respectfully submits that this Court should reverse the decision of the Appellate Division, and reaffirm that ascertainable loss and causal nexus requirements of the CFA include as a component a demand by the consumer to be made whole and an opportunity to be made whole.

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Dated: May 6, 2008

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