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CASES NOTED

CONSUMER CLASS ACTIONS UNDER THE NEW JERSEY CONSUMER FRAUD ACT

The defendant, Romain, was engaged in the installment sale of educational books and related materials in New Jersey.¹ The price of the materials was roughly two and one-half times the reasonable market price, and the buyers had been deceived as to the value of the books by the defendant's sales personnel. The Attorney General of New Jersey brought a class action suit, pursuant to the New Jersey Consumer Fraud Act² to enjoin the defendant from further engaging in deceptive practices and to seek restorative relief for the benefit of the entire class of consumers who had purchased the defendant's material on the ground that the sales were unconscionable.³ The lower court granted the injunction but limited restorative relief to the twenty-four consumers who testified at the trial. The state was prohibited from maintaining a class action on behalf of all similarly situated buyers on the ground that unconscionability was not included in the Consumer Fraud Act and, therefore, was essentially a

1. The defendant's "educational package" included the following books:

- (1) Questions Children Ask (1 Vol.)
- (2) Child Horizons (4 Vols.)
- (3) New Achievement Library (5 Vols.)
- (4) High School Subjects Self-Taught (4 Vols.)
- (5) Science Library (1 Vol.)
- (6) Play-Way French and Spanish Records
- (7) Tell Time Flash Card Kit

Most of the sales were made to low-income families.

2. N.J. REV. STAT. § 56:8 (Supp. 1971). The pertinent sections are: N.J. REV. STAT. § 56:8-2 which provides in part:

The act, use or employment by any person of any deception, fraud, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. . . .

and N.J. REV. STAT. § 56:8-8 (Supp. 1971) which provides in part:

Whenever it shall appear to the Attorney General that a person has engaged in, is engaging in or is about to engage in any practice declared to be unlawful by this act he may seek and obtain in an action in the Superior Court an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof or an order appointing a receiver, or both after appropriate notice to such person. . . . The court may make such orders or judgments as may be necessary to prevent the use or employment by a person of any prohibited practices, or which may be necessary to restore to any person in interest any moneys or property, real or personal which may have been acquired by means of any practice herein declared to be unlawful.

3. The attorney general also sought to have civil penalties assessed against the defendant for violation of the Act as provided by N.J. REV. STAT. § 56:8-13, -14 (Supp. 1971), and he sought an order restraining the defendant from doing business in New Jersey until his trade name was registered pursuant to N.J. REV. STAT. § 56:1-12 (Supp. 1971). The superior court granted both requests for relief, and neither became an issue on appeal.

matter of private, not public, concern.⁴ On appeal, the New Jersey Supreme Court, *held*, affirmed and modified: Where price unconscionability renders a sales contract invalid as to all consumers who execute it, the attorney general is entitled to a judgment under the New Jersey Consumer Fraud Act for the benefit of the entire class of such persons and not merely for the benefit of those consumers who testified at the trial. *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971).

Today, the low-income consumer is confronted with the dilemma of whether to purchase goods enjoyed by the rest of society or to live without them. Most of the nation's poor, despite the financial odds, choose to purchase the goods.⁵ The result is that the poor are forced to rely upon credit terms which merchants in ghetto areas are prepared to offer.⁶ Unfortunately, unscrupulous merchants are often the only ones who will offer credit to the poor, making them easy prey for unethical, deceptive, and unconscionable sales practices.⁷

Unfortunately, the low-income consumer finds little protection in the courts.⁸ Private suits are uneconomical, and often, court costs and attorney's fees far exceed the limited recovery realized by the consumer should he win the suit.⁹ For the poor, the high cost of justice makes it "virtually impossible . . . to induce an attorney to litigate the issue."¹⁰ Moreover, individual court actions do little to change the deceptive business practices faced by the poor in the market place.¹¹ Therefore, "[t]he number of consumers having no redress . . . constitute the vast majority."¹²

In confronting a large-scale sales campaign in New Jersey ghetto areas, the court attempted to solve the problems faced by the low-income consumer in obtaining relief from unethical and unconscionable sales practices. By acknowledging the attorney general's power to bring suit to enjoin unethical and unconscionable sales practices, and by allowing him to seek relief for the entire class of defrauded consumers, the court took a major step forward in expanding consumer protection.

4. *Kugler v. Romain*, 110 N.J. Super. 470, 266 A.2d 144 (Ch. Div. 1970). The trial court held that only the twenty-four consumers who had testified at trial were entitled to relief, even though hundreds of persons had signed the sales contracts.

5. Sturdivant, *Better Deal for Ghetto Shoppers*, 46 HARV. BUS. REV. 130 (1968).

6. D. CAPLOVITZ, *THE POOR PAY MORE* (1963). See Dunn, *Credit Where Credit is Due*, 25 U. MIAMI L. REV. 279 (1971).

7. See, e.g., THE REPORT OF THE ADVISORY COMMISSION ON CIVIL DISORDERS, 274 (1968), where it was noted that "[s]ignificant grievances concerning unfair commercial practices affecting Negro consumers were found in 11 of the 20 cities studied by the Commission."

8. See, e.g., Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U.L. REV. 115 (1969).

9. See Tydings, *The Private Bar—Untapped Reservoir of Consumer Power*, 45 N.D. LAWYER 478 (1970).

10. Travers and Landers, *The Consumer Class Action*, 18 U. KAN. L. REV. 811, 813 (1970).

11. See Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970).

12. Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 409 (1966). This was part of the findings of a field research study done by members of the University of Pennsylvania Law School.

Recognition of an attorney general's power to seek a civil remedy to protect the public is not a new concept. For many years courts have been amenable to actions by state attorney generals to enjoin the practices of usury,¹³ since those practices have been considered a public nuisance, and therefore, subject to suits for injunctions by public officers.¹⁴

More recently, there has been a trend toward suits initiated by state attorney generals to prevent deceptive and unconscionable sales practices.¹⁵ In *Lefkowitz v. I.T.M., Inc.*,¹⁶ a New York court held that the state's attorney general had the right and duty¹⁷ to seek an injunction against a corporation conducting a referral-type sales program.¹⁸ Under that scheme, the merchant induced the consumer to sign a sales contract (in this case, for various household appliances) by promising the consumer that he could satisfy his debt by obtaining new customers for the merchant. As a practical matter such a plan was doomed to failure, since most customers could never earn enough commissions to pay for the goods. The court held that the failure of the merchant to disclose that probability was both fraudulent and unconscionable. The court indicated that as a matter of public policy the attorney general was the proper party to bring the action:

It is difficult to conceive of a more deliberately fraudulent and maliciously dishonest pattern of doing business with the public. They gorged themselves on their ill-gotten gains from highly credulous consumers. . . . None has the right to earn his livelihood in this fashion. *The attorney general not only had the right, but the most imperative duty to bring this action.*¹⁹

13. See Annot., 83 A.L.R.2d 848 (1962) and the authorities cited therein.

14. See, e.g., *Larson v. Patterson*, 266 Ala. 589, 97 So.2d 776 (1957).

15. State legislatures have recognized a need to protect the consumer by granting their attorney generals the power to initiate civil suits against unethical merchants. See, e.g., ALASKA STAT. § 45.50.470 (1962); ILL. STAT. ANN. ch. 121½, § 263 (Smith-Hurd 1971); N.M. STAT. ANN. § 49-15 (Supp. 1971); N.Y. EXEC. LAW § 63-12 (McKinney Supp. 1971).

16. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

17. The New York attorney general's power stems from N.Y. EXEC. LAW § 63-12 (McKinney Supp. 1971), which reads in part:

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney-general may apply . . . to the supreme court of the state of New York . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, *directing restitution* and, in an appropriate case, cancelling any certificate filed under and by virtue of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contract provisions.

(emphasis added).

18. See Annot., 14 A.L.R.3d 1420 (1967) and the authorities cited therein for an analysis of how courts treat referral-type sales schemes.

19. *Lefkowitz v. I.T.M., Inc.*, 52 Misc. 2d 39, 52, 275 N.Y.S.2d 303, 319 (Sup. Ct. 1966) (emphasis added).

In the instant case, the New Jersey court employed the *Lefkowitz* reasoning when it held that the attorney general had both the "general statutory and common law authority to act in matters affecting the public welfare,"²⁰ and therefore, had the power to bring a suit under the Consumer Fraud Act. The court also indicated awareness of the plight of the low-income consumer who had to rely upon a private remedy when it noted that

there is a tremendous need to find a simple, inexpensive, solution which will accomplish the greatest possible good for the greatest possible number of consumers who have common problems and complaints vis-à-vis the seller.²¹

The second significant aspect of the instant case, allowing the attorney general to seek relief for the *entire class* of consumers who had signed one of the defendant's contracts, has received less judicial favor both in the federal and the state courts. In the federal courts, the class action as a means of providing relief for consumers is effectually nonexistent. Most consumers who are cheated by deceptive or unconscionable practices have relatively small claims against a merchant, often less than \$200.²² In order to litigate a claim in a federal district court, the plaintiff must meet the \$10,000 jurisdictional requirement.²³ Therefore, the only possible means of granting access to a federal court would be to "lump" together the claims of all members of the class in order to meet the requirement. However, in *Snyder v. Harris*,²⁴ a class action by stockholders, the United States Supreme Court held that the various claims in a class action may not be aggregated to provide the necessary jurisdictional amount. The *Snyder* decision, therefore, has "effectively precluded recourse to the federal courts in consumer class actions."²⁵ However, the decision was an unpopular one among many members of Congress, and there are now bills pending before Congress which may change or eliminate the jurisdic-

20. *Kugler v. Romain*, 58 N.J. 522, 538, 279 A.2d 640, 649 (1971). The court relied upon an earlier New Jersey Supreme Court decision, *O'Regan v. Schermerhorn*, 25 N.J. Misc. 1, 50 A.2d 10 (1946), which held:

At common law, as the chief accredited legal adviser of the state, [the attorney general] may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interest may from time to time require. . . . He is invested with a broad discretion in determining what matters may be of interest to the public generally.

Id. at 8, 50 A.2d at 15. The court also cited N.J. REV. STAT. § 52:17A-4(h) (Supp. 1971), which gave the attorney general the power to "enforce the provisions of the Constitution and all other laws of the State, as well as perform all the duties conferred and imposed by law upon the Attorney General."

21. *Kugler v. Romain*, 58 N.J. 522, 538, 279 A.2d 640, 649 (1971).

22. Eckhardt, *Consumer Class Actions*, 45 N.D. LAWYER 663 (1970).

23. 28 U.S.C. § 1332(a) (1970).

24. 394 U.S. 332 (1969); noted in 24 U. MIAMI L. REV. 173 (1969). See also Annot., 3 A.L.R. FED. 372 (1970).

25. Tydings, *The Private Bar—Untapped Reservoir of Consumer Power*, 45 N.D. LAWYER 478, 483 (1970).

tional requirements in consumer class action suits in the federal district courts.²⁶

Where a class action satisfies the jurisdictional amount requirements of the federal court, or is begun in a state court, a heavy burden is upon the representatives of the class to establish a community of interest and right of recovery based upon the same essential facts.²⁷

Most consumer actions fail on this count.²⁸ When a group of consumers is defrauded by a common merchant, there is the additional problem of establishing that the same misrepresentations were made to all members of the class and that all members relied upon the same misrepresentations. Justice Lehman, in *Brenner v. Title Guaranty Co.*,²⁹ disallowed a class action for the fraudulent sale of shares in a bond, noting that "[u]pon such sales the representations . . . made by the seller and relied on by the buyer may have been different in each case."³⁰ In most jurisdictions, this requirement of reliance upon identical representations has meant that consumer class actions for fraud cannot be maintained.³¹

The first significant break-through for consumer class actions came in California in the case of *Daar v. Yellow Cab Co.*³² In *Daar*, the California Supreme Court allowed an individual plaintiff, representing himself and other taxicab riders, to recover overcharges by the defendant taxicab company. Although neither fraud nor unconscionability were involved, the decision served to lay the foundation for a subsequent California case, *Vasquez v. Superior Court*,³³ where thirty-seven plaintiffs brought suit on behalf of themselves and others who had purchased and contracted for food and food freezers from the defendant. The plaintiffs contended that the *same* representations were used to induce all of the buyers to sign the contracts because all of the defendant's sales personnel were using a common sales pitch.³⁴ The California Supreme Court granted a writ of mandamus compelling the trial court to vacate its holding

26. See, e.g., S. 1980, 91st Cong., 1st Sess. (1969), a bill introduced by former Senator Tydings which would eliminate the jurisdictional amount and diversity of citizenship requirements in all consumer class actions. See also S. 984, 92d Cong., 1st Sess. (1971) (introduced by Senator Magnuson); S. 1378, 92d Cong., 1st Sess. (1971) (introduced by Senator Bayh); H.R. 5630, 92d Cong., 1st Sess. (1971) (introduced by Congressman Eckhardt).

27. *Davies v. Columbia Gas & Elec. Corp.*, 151 Ohio St. 417, 86 N.E.2d 603 (1949).

28. See Annot., 114 A.L.R. 1015 (1938) and authorities cited therein.

29. 276 N.Y. 230, 11 N.E.2d 890 (1937).

30. *Id.* at 238, 11 N.E.2d at 893-94.

31. See, e.g., *Freeman v. State-wide Carpet Distrib., Inc.*, 365 Mich. 313, 112 N.W.2d 439 (1961); *Spear v. H.V. Greene*, 246 Mass. 259, 140 N.E. 795 (1923). But see *Onofrio v. Playboy Club*, 20 App. Div. 2d 3, 244 N.Y.S.2d 485 (Sup. Ct. 1963).

Where written rather than oral misrepresentations (or nondisclosures) are made, proof of a common misrepresentation is easier to demonstrate. See, e.g., *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968); *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968); *Fischer v. Klutz*, 41 F.R.D. 377 (S.D.N.Y. 1966).

32. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) [hereinafter cited as *Daar*].

33. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) [hereinafter cited as *Vasquez*].

34. The defendant represented that the food sold would last the buyer seven months and that it cost less than what the buyer was spending in retail stores.

that a "class action for fraud could not be maintained by consumers. . . ."³⁵ The court observed that many unwary, low-income consumers were being duped by unscrupulous sellers, and that there was little protection to the consumer from state laws or individual litigation. Thus, a class action was thought to be the best method the low-income consumer could use to protect his rights. Moreover, the court suggested that the class action remedy would have "a therapeutic effect upon those sellers who indulge in fraudulent practices."³⁶

Vasquez was the first instance where a court recognized both the futility of seeking legal protection from unethical merchants by the low-income consumer and the efficacy of the consumer class action. Unfortunately, the case did not go far enough; it held only that a consumer class action for fraud *could* be maintained. Thus, while the *Kugler* court was able to adopt the public policy considerations of *Vasquez*, it was still faced with the more substantial problem of finding a misrepresentation common to all members of the class.³⁷ The court was also confronted with the lower court ruling that a remedy for unconscionability was a private remedy since it was not found in the Consumer Fraud Act.

The illegal element common to all of the contracts in *Kugler* was the exorbitant price, which, under the Uniform Commercial Code section 2-302 is one of the factors which may render a one-sided agreement unconscionable.³⁸ Therefore, the common misrepresentation was held to be the deception regarding the value of the books. To fit the concept of unconscionability into the Consumer Fraud Act, Justice Francis compared that concept with fraud and held:

The standard of conduct contemplated by the unconscionable clause is good faith, honesty in fact and observance of fair dealing. . . . In such a context, a material departure from the standard puts a badge of fraud on the transaction and *here the concept of fraud and unconscionability are interchangeable.*³⁹

35. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 806, 484 P.2d 964, 967, 94 Cal. Rptr. 796, 799 (1971).

36. *Id.* at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800.

37. The question of reliance is not an issue since the consumer fraud was perpetrated by the exorbitant price, which all of the consumers had to accept if they signed the contract.

38. UNIFORM COMMERCIAL CODE § 2-302(1) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

39. *Kugler v. Romain*, 58 N.J. 522, 544, 279 A.2d 640, 652 (1971) (emphasis added). The court relied in part upon an earlier New Jersey case, *Riverside Trust Co. v. Collins*, 114 N.J. Eq. 157, 161, 168 A. 377, 378 (Ct. Err. & App. 1933), which defined fraud as "all acts, omissions, and concealments which involve a breach of legal or equitable duty, truth or confidence justly reposed and injurious to another or by which an undue or unnecessary advantage is taken of another." (emphasis added) See also *Hume v. U.S.*, 132 U.S. 406 (1889), in which the Supreme Court held that an attempt to enforce an unconscionable contract on the government would be similar to a fraud on the United States.

Therefore, the court was able to find an illegal element in the transactions common to all members of the class, the price, and by equating unconscionability with fraud, was able to find a basis on which the attorney general could litigate under the Consumer Fraud Act.

The *Kugler* decision offers a viable solution to the problems confronted by the low-income consumer in states which have a consumer fraud act.

RICHARD D. ROSEN

LIABILITY OF A PHARMACIST FOR NEGLIGENTLY DISPENSING ORAL CONTRACEPTIVES

Mr. and Mrs. Troppi sued their pharmacist, Mr. Scarf, alleging his negligence in supplying tranquilizers in place of prescribed oral contraceptives which resulted in an unwanted eighth child.¹ The following damages were sought: (1) Mrs. Troppi's lost wages; (2) medical and hospital expenses; (3) pain and anxiety of pregnancy and childbirth; and (4) the economic costs of rearing an eighth child. The trial court granted defendant's motion for summary judgment on the grounds that whatever damage plaintiffs suffered was more than offset by the benefit of having a healthy child.² On appeal, the Michigan Court of Appeals *held*, reversed and remanded: The application of the benefit rule does not, as a matter of law, prevent recovery for the expenses of rearing an unwanted child. Moreover, the parents of such a child are not required to place the child for adoption in mitigation of damages. *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

Although a pharmacist's liability for negligently providing the wrong drug has long been recognized,³ no appellate court has expressly ruled on the question of whether that liability extends to the consequences of negligently dispensing oral contraceptives.⁴ The question faced by the Michigan Court of Appeals was not whether Scarf was liable for his negligence, but whether the damages sought by the Troppis were compensable under established principles of tort law.⁵ A court would only be

1. After a miscarriage ended her eighth pregnancy, Mr. and Mrs. Troppi consulted their physician and decided to limit the size of their family. The physician prescribed an oral contraceptive, Norinyl.

2. The trial court applied what is commonly known as the benefit rule. *See* RESTATEMENT OF TORTS § 920 (1939).

3. *See, e.g.,* *Brown v. Marshall*, 47 Mich. 576, 11 N.W. 392 (1882). *See also* *Hoder v. Sayet*, 196 So.2d 205 (Fla. 3d Dist. 1967) (sale of blood).

4. A jury in Los Angeles has awarded a California family \$42,000 to support a six-year-old son born as a result of negligence by a defendant drug company in supplying sleeping pills instead of prescribed oral contraceptives. The case is not officially reported. *See* *Miami Herald*, Nov. 26, 1971, § A, at 16, col. 1.

5. The Michigan court is careful to note throughout its opinion that it is relying on common law principles.