

# “What keeps you up at night?”

## Attorney's fees and costs must be awarded under NJCFA if claimant defeats defendant's summary judgment motion

By Francis X. Riley, III and George Tenreiro

### SUMMARY

A recent Appellate Division decision held that a Consumer Fraud Act claim can result in counsel fees even if the plaintiff is ultimately unsuccessful on the merits. Once the plaintiff establishes a CFA violation and a bona fide claim of ascertainable loss survives summary judgment, a defendant's liability for counsel fees and costs is effectively triggered.

### WHAT HAPPENED

On October 13, 2011, the Appellate Division ruled in an unpublished opinion that a plaintiff who defeated a motion for summary judgment by demonstrating a bona fide claim of "ascertainable loss" based on a regulatory violation of the New Jersey Consumer Fraud Act ("CFA") is entitled to attorneys' fees and costs despite the defendant succeeding on a motion for involuntary dismissal at trial. The defendant tried to argue that the failure of the issue to go to the jury precluded an award of counsel fees. The Appellate Division, however, determined that a past decision by the New Jersey Supreme Court required an opposite conclusion.

### WHAT IS THE IMPORT OF THE PEREZ DECISION?

In *Perez*, the Appellate Division makes clear that prevailing on a CFA claim at trial is not enough. Specifically, it affirms that a plaintiff who establishes a CFA violation and a bona fide claim of ascertainable loss sufficient to survive summary judgment will be entitled to counsel fees even if the defendant does not establish an ascertainable loss at trial. Thus, *Perez* affirms the expansive reach of the already broad CFA and cautions against analyzing CFA claims on liability purposes only. *Perez* reinforces that principals and their companies should carefully evaluate CFA claims to determine whether plaintiff has established a *prima facie* CFA claim that will survive summary judgment to evaluate whether a defendant will be responsible to pay legal fees under the CFA.

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**ANALYSIS**

In *Perez v. Professionally Green, LLC*, the plaintiffs, a couple, sued a defendant swimming pool contractor alleging a faulty installation of a pool that had been completed behind schedule. Before trial, the plaintiffs moved for summary judgment seeking a ruling that defendant violated the CFA based on a regulatory violation and that the plaintiffs suffered an ascertainable loss caused by the violation. The defendant contractor opposed the motion on grounds that plaintiffs had failed to establish a *prima facie* showing that they suffered an ascertainable loss caused by a regulatory violation of the CFA. Alternatively, the defendant argued that a trier of fact had to determine the ascertainable loss issue.

The trial court granted plaintiff's motion in part and found that defendant's failure to include start and end dates in the relevant agreements equated to a *per se* violation of the CFA because the Act required service contracts to "clearly and accurately set forth" the "dates or time period on or within which the work is to begin and be completed" by a contractor. The court decided that the issue of ascertainable loss was to be determined at trial.

The trial judge indicated that plaintiff would be entitled to treble damages and counsel fees if a jury found the temporary loss of use of the pool amounted to an ascertainable loss. At the close of plaintiffs' case, however, defendant successfully moved for involuntary dismissal by arguing that plaintiffs had failed to establish they suffered an ascertainable loss caused by a violation of the CFA by failing to include start and end dates in the subject contracts.

Plaintiffs filed a post-trial motion for counsel fees relying on *Weinberg v. Sprint Corp.* In *Weinberg*, the New Jersey Supreme Court stated that counsel fees and costs are recoverable when a plaintiff is able to establish a bona fide claim of ascertainable loss that raises a genuine issue of fact even if the plaintiff ultimately loses on his damage claim but is able to establish an unlawful practice under the CFA. The trial court rejected plaintiffs' application for counsel fees by instead relying on *Pron v. Carlton Pools, Inc.*, a published Appellate Division opinion that held that a plaintiff may not recover attorneys' fees and costs when the defendant prevails on a motion for involuntary dismissal at the

conclusion of plaintiff's case because the defendant is not required to present a defense to the CFA claim and the trier of fact is not called upon to decide whether a loss was proven.

The Appellate Division reversed. It found *Weinberg* controlling and *Pron* distinguishable. Unlike the plaintiffs in *Perez* and *Weinberg*, the plaintiff in *Pron* had not filed or faced a summary judgment motion. In *Perez*, the plaintiffs established a regulatory violation as a matter of law and a bona fide claim of ascertainable loss sufficient to survive summary judgment. The Appellate Division refused to read *Weinberg* as requiring a CFA plaintiff to "overcome the double hurdle of surviving both summary judgment and a motion for involuntary dismissal to demonstrate a bona fide claim of ascertainable loss."

In light of *Perez*, companies should be mindful that a CFA claim can result in counsel fees even if Plaintiff is ultimately unsuccessful on the merits, including a situation where a defendant prevails on a motion for involuntary dismissal. Once plaintiff establishes a CFA violation and a bona fide claim of ascertainable loss survives summary judgment, a defendant's liability for counsel fees and costs is effectively triggered.

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