

## Unconscionable Commercial Practice

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In an opinion analyzing what constitutes an “unconscionable commercial practice” under the New Jersey Consumer Fraud Act (“NJCA”), the United States District Court for the District of New Jersey recently dismissed a putative class action brought under the Act and New Jersey common law regarding defendant Novartis AG’s pricing of its Excedrin Migraine product. In *Yingst v. Novartis AG*, 2-13-cv-07919, District Judge Claire Cecchi determined that Novartis’ pricing of the product, while strategic, was not illegal under the NJCA, and therefore dismissed Plaintiff’s claims.

Plaintiff Kerri Yingst alleged that Novartis sells Excedrin Migraine and a pharmacologically equivalent product, Excedrin Extra Strength, at different wholesale prices which in turn caused Yingst and other consumers to pay a premium for Excedrin Migraine, despite the fact that the two products consisted of “identical ingredients in identical quantities.” Compl. ¶121. Yingst alleged that at the time she purchased Excedrin Migraine, she believed that because Excedrin Migraine was sold at a higher price, it was a more effective product for migraine relief. Novartis moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the court granted the motion.

As Judge Cecchi explains, New Jersey’s strong Consumer Fraud Act provides that a plaintiff is entitled to treble damages, reasonable attorneys’ fees, and reasonable costs if she proves that the defendant engaged in an unlawful practice that caused an ascertainable loss. In this case, Plaintiff did not argue that Novartis committed any affirmative act of deception, fraud, false pretense, false promise, or misrepresentation, and did not argue that Novartis knowingly concealed, suppressed or omitted any material fact with intent to induce reliance. Instead, Plaintiff contended that Novartis engaged in an “unconscionable commercial practice” within the meaning of the NJCA by using the U.S. Food & Drug Administration (“FDA”)’s requirement that Excedrin Migraine and Excedrin Extra Strength have

separate packaging as a means to extract a premium from consumers while providing no extra benefits. The New Jersey Consumer Fraud Act does not define the phrase “unconscionable commercial practice.” However, Judge Cecchi noted that the New Jersey Supreme Court has defined the term as an act lacking good faith, honesty in fact and observance of fair dealing. Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417, 429 (N.J. 1995) (citing Meshinsky v. Nichols Yacht Sales, Inc., 541 A.2d 1063, 1066 (N.J. 1988)). As with the broader Act, New Jersey case law provides that the phrase “unconscionable commercial practice” should be interpreted liberally to effectuate the Act’s public purpose.

In the case at hand, Judge Cecchi noted that there was no dispute that both Excedrin Migraine and Excedrin Extra Strength were properly labeled and contained no misinformation regarding the medications. Therefore, because Plaintiff had conceded that there was no dishonesty by Novartis, Judge Cecchi determined that its pricing of Excedrin Migraine was not an act that lacked good faith or honesty in fact. Further, Judge Cecchi found that Plaintiff could not establish that Novartis’ pricing of Excedrin Migraine lacked fair dealing; Plaintiff did not cite any cases, and the Court was aware of none, in which an “unconscionable commercial practice” was found under the Act based solely upon disparate pricing of substantively identical products manufactured by the same defendant. Although the dearth of case law was not itself fatal to Plaintiff’s claim, the fact that Plaintiff paid, at most, \$1.05 more for a 300-count package of Excedrin Migraine than for a 300-count package of Excedrin Extra Strength was a “minor detriment” that did not “rise to the level of unfair dealing.” While Novartis’ creation of a pricing structure in which migraine sufferers paid a higher price for pills pharmacologically identical to Excedrin Extra Strength in order to obtain the directions and warnings mandated by the FDA was “strategic,” Judge Cecchi held that such behavior was not proscribed by the NJCFA and dismissed Plaintiff’s NJCFA claim.[1] As Judge Cecchi’s opinion demonstrates, slight price differentials in otherwise identical products, absent any evidence of misrepresentation or misinformation, are “within the bounds of reasonableness and concomitantly outside the ambit of the NJCFA.”

[1] Judge Cecchi also dismissed Plaintiff’s unjust enrichment claim. In New Jersey, a constructive or quasi-contract is a vehicle by which a plaintiff may enforce a public duty to prevent unjust enrichment or unconscionable benefit. To state a claim for unjust enrichment, the plaintiff must allege (1) at plaintiff’s expense (2) the defendant received benefit (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it. Judge Cecchi again noted that Plaintiff did not allege any misrepresentation or misinformation by Novartis, and also did not allege that Excedrin Migraine failed to relieve her ailment or that Excedrin Extra Strength performed better than Excedrin Migraine; Plaintiff “deliberately purchased the higher-priced product and received exactly what she paid for.” See Def.’s Reply p. 6. Therefore, the Court found nothing “unjust” about Plaintiff’s transaction, and granted Novartis’ motion to dismiss with respect to Plaintiff’s unjust enrichment claim.