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# Appellate Division Confirms That A Plaintiff Cannot Recover Benefit Of The Bargain Damages Under The New Jersey Uniform Securities Law And Can Only Recover For An Actual Financial Loss

**The New Jersey Uniform Securities Law ("NJUSL") imposes civil liability on any person who:**

> Offers, sells or purchases a security by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), or
>
> Offers, sells or purchases a security by employing any device, scheme or artifice to defraud....

N.J.S.A. 49:3-71(a)(2),(3) (2010). To recover damages for a violation of N.J.S.A. 49:3-71(a)(2) or (3), "the person who bought the security ... shall sustain the burden of proof that the seller ... knew of the untruth or omission and intended to deceive the buyer ... and that **the buyer ... has suffered a financial detriment**. N.J.S.A. 49:3-71(b)(1) (2010) (emphasis added). The NJUSL does not define the term "financial detriment." In *Lipkowitz v. Hamilton Surgery Center, LLC*, 2010 N.J. Super. LEXIS 152 (App. Div. August 4, 2010), however, the Appellate Division confirmed that the import of the term "financial detriment" is that a plaintiff must prove that he "suffered an actual financial loss." As a consequence, the Court concluded, damages based on a benefit of the bargain theory cannot be recovered for a violation of N.J.S.A. 49:3-71(a)(2) or (3). *Lipkowitz*, 2010 N.J. Super. LEXIS at *13.

In *Lipkowitz*, Plaintiffs each invested $69,750 in Defendant Hamilton Surgery Center, LLC, an ambulatory surgery center ("ASC") at which Plaintiffs (who are ophthalmologists) performed retinal surgeries. *Lipkowitz*, 2010 N.J. Super. LEXIS at *2-4. Defendant's governing board subsequently voted to discontinue the performance of retinal surgeries because such surgeries were not profitable and the Medicare procedures in connection with such surgeries were completed at a financial loss. *Id.* at *3. Plaintiffs thereafter failed to submit annual eligibility affirmation statements confirming that at least one-third of Plaintiffs' medical practice income from all sources was derived from their performance of procedures and that at least one-third of those procedures were performed at the ASC. *Id.* at *4. As a consequence, Defendant exercised its right under the parties' Operating Agreement to repurchase Plaintiffs' membership units in the ASC. *Id.* at *5. Defendant calculated the repurchase price in accordance with the formula set forth in the Operating Agreement, issuing each of the Plaintiffs checks in the amount of $185,031. *Id.* Combined with an earlier distribution that Defendant had made, Plaintiffs each made a $136,656 profit on their investment in the ASC. *Id.*

Plaintiffs filed suit alleging *inter alia* a claim for violation of N.J.S.A. 49:3-71. The trial court granted Defendants summary judgment on the NJUSL claim, holding that Plaintiffs had not

suffered a "financial detriment" for purposes of N.J.S.A. 49:3-71(b)(1) because they had made "nearly a 165 percent return on their investment." *Id*. at *6. The Appellate Division affirmed the grant of summary judgment in favor of Defendants, holding that Plaintiffs had not suffered a financial detriment because of the nearly $137,000 profit that they each had made on their investment in the ASC. Relying on the plain language of the statute, the Appellate Division found that "the term 'financial detriment' suggests that [plaintiffs] must establish that they suffered an actual financial loss or harm." *Id*. at *10. That was clearly not the case here, the Court concluded, as Plaintiffs "experienced an actual financial gain of nearly $137,000 each." *Id*. The court found further that "an overall reading of the [NJUSL] indicates a legislative intent to place investors in the same position they were in before making the investments, not a preference of giving them the benefit of their bargains." *Id*. at *10. The Appellate Division also observed that other provisions contained in N.J.S.A. 49:3-71, specifically N.J.S.A. 49:3-71(c) and (g), "indicate the Legislature's intent to place investors back in the original status quo position, not to use a benefit of the bargain calculation for damages." *Id*. at 11. Since the Plaintiffs did not actually suffer an "actual financial loss" but rather made a profit, the Appellate Division affirmed the dismissal of the NJUSL claim. *Id*. at *13.

*Lipkowitz* is clearly a significant decision because it expressly forecloses any argument that a plaintiff can recover benefit of the bargain damages for violation of the NJUSL. As a result, a plaintiff suing for violation of N.J.S.A. 49:3-71(a)(2) or (3) is now limited to recovering his net out of pocket loss (if any). By extension, *Lipkowitz* would also seem to bar a plaintiff from recovering well-managed account portfolio damages for violation of the statute; that theory is clearly a form of benefit of the bargain damages which the Appellate Division has confirmed cannot be recovered. ■

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