

FILED  
8/17/2022 3:44 PM  
IRIS Y. MARTINEZ  
CIRCUIT CLERK  
COOK COUNTY, IL  
2022CH08071  
Calendar, 7  
19126444

---

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

---

LISABETH GANSBERG., on behalf of herself )  
and all others similarly situated, )

Plaintiff, )

v. )

THE KROGER CO., )  
an Ohio Corporation doing business in Illinois; )

Defendant. )

2022CH08071

No. \_\_\_\_\_

CLASS ACTION AND  
INDIVIDUAL COMPLAINT

---

**CLASS ACTION AND INDIVIDUAL COMPLAINT**

1. This is a class action brought by Plaintiff LISABETH GANSBERG ("Plaintiff" or "Gansberg"), against THE KROGER CO. ("Defendant" or Kroger") for overcharging customers by ringing up their items at prices higher than the prices represented for the items on the grocery store shelves. While this practice is unscrupulous and harmful to consumers under any circumstances, it is particularly egregious in light of the strain put on many family's budgets by current inflation which significantly increased grocery prices. Simply put, Defendant is ripping-off consumers by promising to sell them groceries at low prices and then charging them more for those items when they check-out. The Complaint asserts claims for Breach of Contract and violations of the Illinois Consumer Fraud Act and Illinois Uniform Deceptive Trade Practices Act. Plaintiff seeks certification of a class of Illinois consumers who were overcharged at Kroger

Brand stores throughout Illinois, and seeks recovery of damages (i.e., the overcharges) for the members of the class and injunctive relief prohibiting Kroger from continuing its wrongful conduct.

### **JURISDICTION AND VENUE**

2. This court has jurisdiction over this litigation and the parties under Illinois Code of Civil Procedure, 735 ILCS 5/2-209(a)(1)(transacting business in Illinois), 5/2-209(a)(2) (tortious acts in Illinois), 5/2-209(a)(3)(owning real estate in Illinois), 5/2-209(a)(7)(making or performing contract or promise in Illinois) and 5/2-209(b)(4)(corporation doing business in Illinois).

3. Venue is proper in Cook County, Illinois, under 735 ILCS 5/2-101 and 735 ICLS 102(a) as the conduct giving rise to the complaint (Plaintiff's purchases) occurred in Cook County and by operating grocery stores in Cook County, Defendant is deemed a resident of Cook County.

### **PARTIES**

4. Plaintiff is an individual who, at all relevant times, has resided in Northbrook, Illinois.

5. Defendant the Kroger Co. is an Ohio Corporation with its principal office located in Cincinnati, Ohio. According to Kroger's website ([www.thekrogerco.com](http://www.thekrogerco.com)) and most recent 10-K filing with the SEC, Kroger was founded in 1883 and incorporated in 1902 and is one of the world's largest retailers based on sales revenue. As of January 29, 2022 Kroger

operated 2,726 supermarkets under 28 “banner” (i.e., brand) names in 35 states and the District of Columbia. As the 10-K explains, their “stores operate under a variety of banners that have strong local ties and brand recognition.” (10-K for fiscal year ended Jan. 29, 2022 at p.3). Kroger operates 104 retail stores in Illinois. (<https://www.thekrogerco.com/wp-content/uploads/2022/01/Kroger-FactSheet-Illinois.pdf>, visited 7/25/2022).

### **BACKGROUND FACTS**

6. For several years Mrs. Gansberg has purchased groceries from Kroger stores. She frequently shops at the Mariano’s store located at 784 Skokie Blvd., Northbrook, Illinois and also shops at other locations in the Chicagoland area.

7. At the checkout register, Mariano’s frequently charges, or attempts to charge, her more for certain grocery items than the price for the product stated on the shelf – i.e., the “advertised price” as used herein.

8. Often, Mrs. Gansberg would catch the overcharge and attempt to convince the store to charge the correct price. This would invoke a variety of responses from the Kroger’s employees. Sometimes, Plaintiff’s challenging the price would be met with reluctance or refusal to correct the price. On at least four occasions, the store refused to refund the overcharge until Plaintiff went back to the isle where the product was and took a picture of the price to document the overcharge. In any event, it consistently took a minimum of 30

minutes to an hour to get the price corrected or the overcharge refunded. After pointing out an overcharge to the cashier and going through a long process to convince the cashier of the error (holding up a line of customers), Mrs. Gansberg would then be sent to a customer service agent. Over three to four months, Mrs. Gansberg spent several hours working with the store manager, the regional manager and the corporate Director of Strategic Brand Development (Amanda Puck) to resolve the overcharging problem.

9. Despite repeatedly bringing these overcharges to the store's attention, asking Defendant to stop this practice and charge the correct amount for groceries, and working with Defendant's employees and management to resolve this problem, Defendant continues to routinely charge more for various groceries than their advertised price.

10. Defendant has actual knowledge of the *facts* underlying the breach of contract – i.e., for every grocery product Defendant knows the price it advertised and the price it actually charged customers.

11. On July 3, 2022, Mrs. Gansberg purchased 1.34 lbs. of Northwest Red Cherries. The cherries were regularly \$4.99 / lb. with an advertised discount of \$3 / lb., making the price (stated on the shelf) "\$1.99 lb. with card & digital coupon" valid June 29 through July 5, 2022. (Exhibit-1 [display price]).

12. When Plaintiff checked-out, the store charged her \$6.69 (\$4.99 / lb) for the cherries, rather than the advertised price of \$1.99 / lb., which

would have been \$2.67 – an overcharge of 150%. (Exhibit-1 [receipt]). At checkout, Mrs. Gansberg tendered her rewards card and the digital coupon. Defendant simply overcharged for the product by charging the full price, rather than the advertised discount price. (Exhibit-1 [receipt and digital coupon]). For purposes of the class allegations, Plaintiff shall refer to this practice as a “False Discount Price.”

13. On July 10, 2022, shopping at the same Mariano’s store, Mrs. Gansberg purchased five Slim Jim Sticks, with advertised price of 92¢ per stick. (Exhibit-2 [display price]).

14. The store, however, charged her \$1.79 per stick; \$8.95 total instead of \$4.60 she should have been charged – an overcharge of 48%. For purposes of the class allegations, Plaintiff refers to this practice as a “False Regular Price”

15. As shown by Exhibits 1 and 2, the overcharges are not the results of a scanner error (misidentifying the bar code). Rather, the scanner correctly identifies the grocery item, but the store charges the wrong price for the item. On information and belief, this is caused by the human error of Kroger employees who input incorrect pricing information into the computer check-out system.

16. Plaintiff’s investigation has confirmed that these practices occur frequently and harm other customers at this Mariano’s store and other Kroger brand stores in Illinois.

## CLASS ALLEGATIONS

17. Pursuant to 735 ILCS 5/2-801 *et seq.*, Plaintiff seeks certification of a class consisting of all persons who paid more for a product than the advertised price, and a subclass consisting of all persons who paid a “False Discount Price,” at any Kroger Brand store in Illinois from August 17, 2018 through the date a class is certified. Excluded from the class and subclass are Defendants, and their officers, employees, counsel and agents.

18. The class is so numerous that joinder of all members is impracticable. While the exact number and identities of the class members are currently unknown to Plaintiff, on information and belief there are, at least, tens of thousands of members of the class.

19. Questions of law or fact exist arising from Defendant’s conduct. Such questions are common to all class members and predominate over any questions affecting only individual members of the class. The predominating questions of law or fact common to the class include:

- (a) Whether Defendant charged Plaintiff and class members prices in excess of its advertised prices for grocery items;
- (b) Whether there were contracts between Plaintiff and the class members and Defendant;
- (c) When the contracts between a Plaintiff and class members and a Defendant are entered into and the terms of those contracts;
- (d) Whether Defendant intended to overcharge for certain items or merely made a mistake of fact causing the scanned items to ring up at higher prices than advertised;

- (e) Whether Defendant's charging a price higher than the advertised price for certain grocery items constitutes mutual mistake of fact or scrivener's error;
- (f) Whether Defendant's conduct constitutes a breach of contract;
- (g) Whether Defendant's conduct violated Section 2 of the Illinois Uniform Deceptive Trade Practices Act;
- (h) Whether Defendant's ongoing violations of Section 2 of the Illinois Uniform Deceptive Trade Practices Act are likely to damage Plaintiff and the class members;
- (i) Whether Defendant's conduct violated constitutes a *per se* violation of the Illinois Consumer Fraud Act by violating Section 2 of the Illinois Uniform Deceptive Trade Practices Act;
- (j) Whether, independent of the Illinois Uniform Deceptive Trade Practices Act, Defendant's conduct violated the Illinois Consumer Fraud Act.
- (k) Whether, Defendant's conduct has damaged Plaintiff and the class members and, if so, the amounts of any damages owed to Plaintiff and members of the class.
- (l) Whether Defendant should be enjoined, under the Illinois Uniform Deceptive Trade Practices Act, from charging in excess of the advertised prices for its grocery items.

20. Plaintiff will fairly and adequately protect and pursue the interests of the members of the class. Plaintiff's counsel has vast experience in class action cases and has previously been certified as lead class counsel in multiple class actions, including one of the largest consumer class actions in the United States. Plaintiff understands the nature of the claims herein, her role in these proceedings, has no disqualifying conditions, and will vigorously represent the interests of the class.

21. This class action is an appropriate method for the fair and efficient adjudication of the claims involved. The damages sustained by each class member are expected to average in the hundreds of dollars a year. Thus, the size of the recovery is not expected to be substantial enough for any

one class member to incur the costs and expenses of this litigation. In addition, individualized litigation would present the potential for inconsistent or contradictory judgments and would greatly increase the delay and expense to all parties and the court system in multiple trials of identical factual issues and would burden the court would duplicative litigation.

**COUNT I  
BREACH OF CONTRACT  
(On Behalf of Plaintiff and the Class)**

22. Plaintiff realleges the foregoing allegations.

23. Defendant offered, and continues to offer, grocery items for sale to Plaintiff and members of the class at advertised prices listed on the shelf immediately in front of each grocery item.

24. Every grocery item has a Stock Keeping Unit (“SKU”) number (also represented by a bar code). When an item is scanned at check out, the SKU number identifies the item, and the pricing information is automatically applied as set by Defendant.

25. From time to time, Defendant will offer certain items for sale at discounted prices to “Rewards” members and may offer additional discounts via a “digital coupon.”

26. The “Rewards” program is a customer loyalty program (which also benefits Defendant in numerous ways). The “Rewards” membership spans the Kroger Brand stores. When a customer presents his or her

“Rewards” member number at check-out, any “Rewards” discounts on specific items should be automatically applied based on the items SKU number.

27. The Digital Coupons can be downloaded instantly (e.g., while shopping) to a Kroger app on a smartphone. Once downloaded the app automatically links the Digital Coupon to the customer’s “Rewards” membership. Thus, when a customer presents his or her “Rewards” membership at check-out, any Digital Coupons he or she has clipped should be automatically applied to the corresponding grocery items.

28. By selecting grocery items from Defendant’s store shelves, presenting them at the check-out register, and tendering payment (and where applicable tendering a Rewards Number and/or Digital Coupon), Plaintiff and the class members accepted Defendant’s offer to purchase grocery products offered for sale by Defendant at the advertised prices.

29. Defendant’s offers to sell grocery products at advertised prices and Plaintiff and the class members acceptance of those offers formed contracts between the parties. The contract is entered into at the time Plaintiff or a class member tenders payment to the cashier, at which time Plaintiff and the class members acquire a possessory right in the selected and paid for grocery items. Defendant never has a claim of right to payment by Plaintiff or the class member, as there is not contract nor any legal obligation for Plaintiff or a class member to purchase the groceries – i.e., at any time

prior to tendering payment a customer can decide not to purchase any or all grocery items.

30. It is impossible or impractical for customers to memorize every price and discount for each item they purchase. Rather customers rely on Defendant's honesty and integrity to ring up the items at the advertised prices. Further, customers are not given an itemized statement (i.e., receipt) for their grocery items until after their purchase is complete and they have already tendered payment. Accordingly, many overcharges go undetected by Plaintiff and members of the class.

31. Defendant breached these contracts by charging Plaintiff and the class members more than the advertised prices. Plaintiff and the class members did not agree to pay in excess of the advertised prices; rather, Defendant unilaterally charged the increased prices. The overcharges were either intentional by Defendant or a mutual mistake of fact similar to a scrivener's error.

32. Accordingly, Plaintiff and the other members of the class have incurred monetary damages in the amounts Defendant charged them for grocery items in excess of their advertised prices.

**COUNT II**  
**Illinois Consumer Fraud Act**  
**(On Behalf of Plaintiff and the Class and Subclass)**

33. Plaintiff realleges the foregoing allegations.

34. At all relevant times there was in full force and effect the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 *et seq.* (the “Consumer Fraud Act” or “CFA”).

35. Section 2 of the Consumer Fraud Act, 815 ICLS 505/2 provides:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the “Uniform Deceptive Trade Practices Act”, approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act. (bold added)

36. Section 2 of the Uniform Deceptive Trade Practices Act (“UDTP”), 815 ILCS 510/2), in turn, provides:

(a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:

....

(9)

(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

37. The aforementioned violations of Section 2 of the UDTPA constitute *per se* violations of the Consumer Fraud Act and do not require any

showing of Defendant's intent or any showing of Plaintiff and the class members' reliance.

38. Plaintiff brings the claims for violation §2(a)(12) of the UDTPA on behalf of the entire class and the claims for violation of §2(11) of the UDTPA on behalf of the False Discount Price subclass.

39. Plaintiff and the class members are "consumers" withing the meaning of the CFA, 815 ILCS 505/1(e).

40. The grocery items fall withing the scope of the CFA, 815 ILCS 505/1 (b).

41. By charging more than the advertised prices for grocery items, Defendants violated Sections 2(a)(11) (for the False Discount subclass) and 2(a)(12) of the UDTPA. Thus, Defendant committed *per se* violations of the CFA.

42. As previously explained, Defendant's overcharges create a likelihood of confusion or misunderstanding for Plaintiff and all members of the class as they believe they are paying the advertised prices for their grocery items. Indeed, when Plaintiff has caught the overcharges and brought them to Defendant's attention, on some occasions its employees explained the overcharge was a misunderstanding or mistake or indicated there was confusion on Defendant's own part about the proper pricing.

43. As to members of the False Discount Subclass, Defendant has violated §2(a)(12) of the UDTPA by making false or misleading statements of

fact concerning the existence of, or amounts of price reductions, by charging them more than the advertised discount price.

44. Plaintiff and the class members have been significantly damaged by, and Defendants have profited from, Defendants' violations of the Consumer Fraud Act. On information and belief, Defendant's False Discount Price and False Regular Price practices cause significant damages aggregate damages to Illinois consumers.

45. Defendants' conduct continues to violate §2 of the UDTPA and therefor constitutes a *per se* violation of the CFA.

**COUNT III**  
**ILLINOIS UNIFORM DECEPTIVE TRADE PRACTICES ACT**  
**(On Behalf of Plaintiff and the Class)**

46. Plaintiff realleges the foregoing allegations.

47. Section 3 of the Illinois Deceptive Trade Practices Act, 815 ILCS 5/10-3, provides, in relevant part:

A person likely to be damaged by a deceptive trade practice of another may be granted injunctive relief upon terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.

Costs or attorneys' fees or both may be assessed against a defendant only if the court finds that he has willfully engaged in a deceptive trade practice.

48. As previously set forth in Count II, Defendant's conduct violates Sections 2(a)(11) and (12) of the UDTPA.

49. Plaintiff brings the claims for violation §2(a)(12) of the UDTPA on behalf of the entire class and the claims for violation of §2(11) of the UDTPA on behalf of the False Discount Price subclass

50. Plaintiff and the class members are likely to be damaged by Defendant's ongoing conduct. Defendant still frequently overcharges for grocery items purchased by Plaintiff. Plaintiff had brought this to the attention of Defendant's employees many times, but the conduct continues and damages Plaintiff and class members at Defendant's stores throughout Illinois.

51. Defendant's stores – e.g., the Mariano's where Plaintiff frequently shops – regularly offer discounts on certain grocery items making them less expensive than shopping at competitors. Thus, Defendant cannot assert that Plaintiff and class members can merely shop at a different store to avoid damages, as they will end paying more (and thus be harmed) for certain items than if Defendant was enjoined to sell the items at the advertised prices.

52. Given that Plaintiff (and other class members) have repeatedly brought these overcharges to Defendant's attention, and Defendant continues its practice of overcharging, Defendant's conduct is intentional.

53. Accordingly, injunctive relief and attorney's fees are appropriate under the UDTPA.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff and the class pray for the following relief:

- A. an order certifying the case as a class action, as set forth herein, with Plaintiff as class representative and its counsel as lead class counsel for the class and the subclass;
- B. a declaration that Defendant's conduct violates the laws as alleged herein;
- C. under Counts I and II an award of damages to Plaintiff and each member of the class and/or subclass, as appropriate, for any amounts Defendant charged them in excess of the advertised price for any and all groceries they purchased during the class period;
- D. under Count III an injunction prohibiting Defendant from charging in excess of its advertised prices for grocery items;
- E. an award of attorneys' fees to class counsel based on the fee shirting provision of the UDTPA and/or the common fund/benefit doctrine and/or upon any other applicable statute, common law or equitable doctrine;
- F. an order awarding Plaintiff and the class costs and expenses against Defendant;
- G. granting such other or further relief as the Court may hold just and appropriate under the circumstances.

Dated: August 17, 2022

s/Robert J. Stein  
one of Plaintiff's Attorneys

Robert J. Stein III  
Anthony S. DiVincenzo  
DiVINCENZO SCHOENFIELD STEIN  
22 West Washington Street, Suite 1500  
Chicago, IL 60602  
312-334-4800  
rob@dss.law  
adivincenzo@dsschicagolaw.com  
Attorney Code 39591