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NJ Supreme Court Answers Questions, Limits TCCWNA Claim to Require Actual Harm

When faced with a novel issue of New Jersey law, the U.S. Court of Appeals for the Third Circuit has the ability to refer the question to the New Jersey Supreme Court. Last week, the New Jersey Supreme Court answered two certified questions of law from the Third Circuit regarding the Truth in Consumer Contract, Warranty and Notice Act (TCCWNA).^[1] The TCCWNA prohibits sellers from offering or entering into contracts that include any provision violating a "clearly established legal right" of the consumer. This decades-old consumer protection law has recently spawned a rash of class action litigation. In *Spade v. Select Comfort*,^[2] the court held that "clearly established legal rights" can arise from agency regulations, such as rules the Division of Consumer Affairs adopted to regulate the delivery of household furniture. More significantly, however, the court also held that, in order to maintain a claim, an "aggrieved consumer" must have suffered an adverse consequence beyond simply receiving a document that violates the law. The court's pronouncement may well foreclose purported class actions under the TCCWNA where the lead plaintiffs cannot identify concrete damages—monetary or otherwise.

The New Jersey Legislature enacted TCCWNA in 1981 to protect consumers from merchants that include contract terms in customer agreements, posted notices and even restaurant menus that violate a "clearly established legal right of a consumer or responsibility of a seller." The statute also prohibits clauses stating that some provisions may be "void where prohibited" without specifying which provisions are not void, unenforceable or inapplicable within the state of New Jersey. The statute grants a private cause of action to an "aggrieved consumer" to recover "a civil penalty of not less than \$100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs."

Litigation involving the TCCWNA was sporadic until recent years, when a flood of class actions appeared within New Jersey and in other jurisdictions against New Jersey-based corporate defendants. The relative dearth of older cases corresponded to limited precedents and several uncertainties over the contours of claims under the statute. Defendants challenged the viability of claims in which the class representative could identify no concrete harm other than having received a legally defective contract. Defendants argued, among other things, that the statutory requirement that a claimant be "aggrieved" precluded actions in which there was no monetary or other harm caused by the improper contractual language. The defendants asserted that very argument in the two matters^[3] the Third Circuit certified to the New Jersey Supreme Court.

The plaintiffs in the two cases were consumers who purchased furniture from defendant-retailers. The New Jersey Furniture Delivery Regulations^[4] require that sellers' standardized sales and delivery forms include a promised delivery date and inform the consumer of his or her options if the seller failed to deliver by that date. The regulation also prohibits certain language—for example, clauses indicating "all sales final" or "no cancellations." The contracts at issue violated one or more of the regulations. The sellers delivered the furniture on time, however, and the plaintiffs did not identify any adverse consequences from receiving the improper forms. After the plaintiffs filed purported class actions in state court, the defendants removed the cases to federal district court, where they were consolidated and dismissed on motion. On appeal,

the Third Circuit elected to petition the New Jersey Supreme Court, pursuant to N.J. Court Rule 2:12A-1, to answer two certified questions in light of the lack of controlling state authority.

The Third Circuit first asked whether a violation of an agency regulation like the Furniture Delivery Regulations could constitute a violation of a clearly established right or responsibility of the seller, and thus provide a basis for relief under the TCCWNA. The New Jersey Supreme Court answered this question in the affirmative. It reasoned that nothing in the statute or its legislative history suggested that "clearly established legal rights" excluded consumer rights adopted in administrative regulations. Moreover, the court found that the inclusion of regulations as a source of law in the application of the TCCWNA's "clearly established" standard furthers the statute's consumer protection objectives. This holding is not altogether surprising, given the specialized nature of the regulation and the likelihood that sellers in a regulated industry would be familiar with the requirements governing their conduct.

The second question the Third Circuit posed in *Spade* will likely have a greater impact on TCCWNA cases. The court asked whether a customer who receives a noncompliant contract could be considered an "aggrieved consumer" even if no other adverse consequences were suffered. In other words, can an action be maintained if the claimants suffered no actual harm? The New Jersey Supreme Court answered this question in the negative. The court noted the lack of a specific statutory definition of the term "aggrieved consumer" but instead found "ample evidence" of the Legislature's intent in the TCCWNA's plain language. In particular, the court reasoned that the more precise term "aggrieved consumer" found in the remedial section of the act was not superfluous, but was intended to signal something more than just the unmodified term "consumer." The court wrote:

We interpret that word so as to give it significance; it distinguishes consumers who have suffered harm because of a violation of N.J.S.A. 56:12-15 from those who have merely been exposed to unlawful language in a contract or writing, to no effect.^[5]

Only those actually suffering harm, whether monetary or other types of harm,^[6] can thus succeed on a TCCWNA claim.

The New Jersey Supreme Court's responses to the certified questions in *Spade* provide much needed clarity to TCCWNA matters. In many cases, including those in the underlying lawsuits, plaintiffs can identify no harm to support a claim. While allegations of harm may be identifiable in individual cases, the requirement is likely to discourage class actions, where the presence of such individual questions would weigh heavily against class certification.

^[1] N.J.S.A. 56:12-14 to 18.

^[2] 2018 N.J. Lexis 483 (Apr. 16, 2018).

^[3] The appeal before the Third Circuit included two similar lawsuits that were consolidated in the district court.

^[4] N.J.A.C. 12:45A-5.2 et seq.

^[5] *Spade*, *supra*, 2018 N.J. Lexis at *30.

^[6] By way of example, the New Jersey Supreme Court posited that a consumer who does not have furniture in time for a planned family gathering may be aggrieved, even if such harm is not compensable by damages.

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