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New Jersey's Truth in Consumer Contract Law Given Additional Clarity in New Ruling

In rejecting certification of two classes due to lack of predominance, the New Jersey Supreme Court held in *Dugan v. TGI Fridays, Inc.*[1] that the Truth in Consumer Contract, Warranty and Notice Act (TCCWNA) does not apply when a defendant fails to provide a consumer with a required writing, such as a written price disclosure, because the act by its terms addresses the content of consumer contracts, warranties, notices and signs. A claimant who did not receive a purportedly required document therefore is not an "aggrieved consumer." Moreover, failing to include beverage prices in a restaurant menu did not violate a "clearly established legal right" or "responsibility," despite a statute requiring point-of-sale disclosure of the price for retail merchandise, such as through a tag or sign. Taking a practical approach, the court noted that the price disclosure statute has not been held to require such disclosure and in practice many food-service businesses in the state do not list drink prices in menus. In sum, the court found nothing in the legislative history of TCCWNA suggesting an intent to "impose billion-dollar penalties on restaurants that serve unpriced food and beverages to customers."

An explosion of class action litigation in New Jersey targeting standardized consumer contracts has focused attention on a decades-old, consumer protection statute known as the TCCWNA.[2] The law prohibits sellers and others from including any provision that violates "any clearly established legal right of a consumer or responsibility of a seller" in a written consumer contract, warranty, notice or sign. Violators can be liable to an "aggrieved consumer" for a civil penalty of "not less than $100" or actual damages, together with an award of attorneys' fees and costs. In recent actions under the TCCWNA, plaintiffs have challenged provisions in auto leases, website terms of use, car rental agreements, casino promotions, furniture sales contracts, storage unit agreements and even restaurant menus.

Much of the controversy surrounding the TCCWNA has centered on the constitutional standing of individuals or classes to assert claims where a statutory violation is unaccompanied by injury in fact. Relying on the U.S. Supreme Court's decision in *Spokeo v. Robins*,[3] a number of courts have concluded that such claimants lack standing to pursue claims in federal court under Article III of the U.S. Constitution.[4] Additionally, courts have struggled with the questions of who is an "aggrieved consumer" and what is needed to constitute a "clearly established" legal right or responsibility, because the TCCWNA defines neither phrase. Earlier this year, the U.S. Court of Appeals for the Third Circuit in *Spade v. Select Comfort*[5] certified these questions directly to the New Jersey Supreme Court in the context of class claims based on the alleged failure of furniture sellers to include in their contracts certain language required by state furniture delivery regulations. Although it has yet to answer the certified questions, the New Jersey Supreme Court provided useful guidance on the meaning of "aggrieved consumer" and how to determine whether an "established legal right or responsibility" is implicated.

The *Dugan* opinion resolves two cases, consolidated for purposes of appeal. In each case, customers complained that the defendant restaurants they patronized failed to include drink prices in their menus. According to plaintiffs, this omission in a consumer "notice" violated the restaurants' clearly established responsibility to post prices on merchandise as specified in a

1973 law.[6] The absence of disclosed prices, plaintiffs contended, caused class members to pay more for their drinks and deprived them of "their legitimate expectation of an objectively reasonable price."

In both cases, the trial courts certified classes under the New Jersey Consumer Fraud Act (NJCFA) and the TCCWNA.[7] The Supreme Court first addressed the propriety of certification of the NJCFA claims. In the *Dugan* case, the court found that certification was improper where plaintiff's proffer of common evidence of damages and causation was premised upon a "fraud on the market" theory. The court also reversed certification of the NJCFA claim in the other portion of the consolidated appeal, *Bozzi v. OSI Restaurant Partners, LLC,* and remanded for certification of a narrowed class composed of customers who were charged different prices for the same drink on the same visit. These rulings, particularly rejection of a fraud on the market approach to damages and causation, are significant in their own right. The court's treatment of the TCCWNA claims, however, will have a more immediate impact given the number of pending cases and the reigning uncertainty in this area of the law as evidenced by the Third Circuit's request for guidance.

In its decision, a 5-1 majority of the New Jersey Supreme Court held that certification of a class of TCCWNA claimants was inappropriate in both appeals because the plaintiffs could not satisfy the predominance factor under Rule 4:32-1(b)(3). That inquiry requires a determination of whether questions of law and fact common to members of the class predominate over any questions affecting only individual members. In resolving this issue, courts employ a rigorous analysis that involves looking beyond the pleadings to examine the substantive legal claims.

Applying that standard to the case before it, the court held that individual questions predominated with respect to the issue of whether the class members were "aggrieved consumers." It first determined that the TCCWNA "does not apply when a defendant fails to provide the consumer with a required writing." In order to succeed on the claim, therefore, plaintiff would have to prove that class members, at a minimum, were actually provided the menu that allegedly violated the act. Plaintiffs' only evidence to support such uniformity were training documents that instructed servers to hand menus to customers. That evidence was simply not enough in the court's view:

> Even if we accept plaintiff's theory of liability under the TCCWNA, the testimony of the individual claimant or another witness would be necessary to prove that the plaintiff satisfies the statute's requirements and is thus an "aggrieved customer."

The court went on to reject plaintiff's suggestion that a process could be employed, post-verdict, to determine in each individual's case whether they were provided with the menu. The court reasoned that such a process would be an inappropriate forum to determine an element that is essential to liability under the TCCWNA.

Turning to the "clearly established" legal right or responsibility element, the court similarly recognized the potential for disparate results for different members of the class. In support of their claim, plaintiffs cited to a statute that generally prohibits the sale of merchandise without disclosure of the total selling price on a tag, label or sign. The court rejected the contention that this statute created a "clearly established" right or responsibility, noting that in the several decades of its existence, there has never been any case that held this statute applicable to a restaurant or other food service business. Instead, the court recognized the common practice of many food service businesses in New Jersey of offering food and drinks to customers without designating in writing the prices for the items. The court summed up its commonsense approach to interpreting the TCCWNA with the following observation:

> Nothing in the legislative history of the TCCWNA, which focuses on sellers' inclusion of legally invalid or unenforceable provisions in consumer contracts, suggests that when the Legislature

> enacted the statute, it intended to impose billion-dollar penalties on restaurants that serve unpriced food and beverages to customers.

The import of *Dugan* will likely be greatest when the court decides the questions that the Third Circuit certified in *Spade.* The court may, consistent with *Dugan,* offer a narrow perspective on what it means to be an "aggrieved customer." Clearly, those who did not receive the written contract will be excluded. And, perhaps, the same logic will foreclose the status to a customer in a future case who receives the writing, but who never reads it.[8] Such a holding would create additional hurdles to those seeking class certification since, in many cases, there would likely be inconsistent proofs as to whether class members actually read their agreements, website terms of use or posted signage.

Additionally, the court's embrace of marketplace reality seen in its analysis of the "clearly established" element will guide future courts in how they treat this issue. By eschewing an overly broad application of a somewhat vaguely worded statute in favor of implementing the legislature's true intent to impose an "obligation on sellers to acknowledge clearly established consumer rights," the decision should discourage lower courts from finding "clearly established" legal rights that are not firmly entrenched in the law or consumers' realistic expectations.

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[1] 2017 N.J. Lexis 975 (October 4, 2017).

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

[3] 578 U.S. ___, 136 S. Ct. 1540 (2016).

[4] *See, e.g., Rubin v. J. Crew Grp., Inc.*, 2017 U.S. Dist. Lexis 46389, at *21-22 (D.N.J. Mar. 29, 2017); *Hecht v. Hertz Corp.*, 2016 U.S. Dist. Lexis 145589 (D.N.J. Oct. 20, 2016); *Candelario v. RIP Curl, Inc.*, 2016 U.S. Dist. Lexis 163019 (C.D. Cal. Sept. 7, 2016).

[5] *Spade v. Select Comfort*, No. 16-1558, *Wenger v. Bob's Discount Furniture, LLC*, No. 16-1572 (3d Cir. *petition for cert. of question of state law filed* Nov. 18, 2016).

[6] N.J.S.A. 56:8-2.5.

[7] The class certification order was subsequently reversed in the *Dugan* matter by the Appellate Division. The defendant's motion for leave to appeal in the companion matter was denied by the Appellate Division, but granted by the Supreme Court.

[8] One issue the court did not address was the extent to which a TCCWNA claim could ever be based on a mere omission. The Third Circuit, in predicting how the New Jersey Supreme Court would rule, has previously held that the failure to include language in a writing cannot form the basis for a claim. *Watkins v. DinEquity, Inc.,* 591 Fed. Appx. 132 (3d Cir. 2014) (holding that failure to include beverage prices in a menu was not actionable because the TCCWNA only proscribes the *inclusion* of terms that violate consumers' rights).

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