

Client Alert

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New Jersey Supreme Court Clarifies Truth-in-Consumer Contract, Warranty and Notice Act

On Monday, the New Jersey Supreme Court decided two questions certified to it by the Third Circuit, clarifying longstanding ambiguities in TCCWNA jurisprudence that contributed to a wave of class action lawsuits filed under the statute over the past few years.

Background on TCCWNA

TCCWNA has caused much consternation for retailers and other businesses for several years, in part due to its extremely broad scope and seeming ambiguity. It is a New Jersey state law that prohibits consumer contracts, warranties, notices and signs from including “any provision that violates any clearly established legal right of a consumer or responsibility of a seller” N.J. Stat. Ann. § 56:12-15. It also prohibits consumer documents from waiving a consumer’s rights under TCCWNA and prohibits a consumer contract, notice or sign from stating “that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey” N.J. Stat. Ann. § 56:12-16. On top of all of that, TCCWNA allows “aggrieved consumers” to recover “\$100.00 or [] actual damages, or both at the election of the consumer, together with reasonable attorney’s fees and court costs.” N.J. Stat. Ann. § 56:12-17. It is no wonder that the statute became a darling of the plaintiffs’ bar, and there was a huge spike in TCCWNA class actions a few years ago, when plaintiffs started targeting retailers’ website terms of use under the statute.

After the *Spokeo v. Robins* decision by the Supreme Court of the United States in May of 2016, TCCWNA defendants gained some success in US district courts. Several cases were dismissed for lack of Article III standing. See e.g., *Rubin v. J. Crew Grp., Inc.*, No. CV 16-2167 (FLW), 2017 WL 1170854, at *7 (D.N.J. Mar. 29, 2017) (finding that a TCCWNA plaintiff bringing suit against a retailer for language in the retailer’s website terms of use lacked Article III standing). But the threat of state court actions still loomed, because although TCCWNA limits the availability of private actions to “aggrieved consumers,” it does not define the term. N.J. Stat. Ann. § 56:12-17.

Then, in October of 2017, the New Jersey Supreme Court decided *Dugan v. TGI Fridays, Inc.*, which appeared to be the first strike across the bow of rampant TCCWNA class action lawsuits. In *Dugan*, a case involving prices on a drink menu, the New Jersey Supreme Court found that “a claimant who does not, at a minimum, prove that he or she received a menu cannot satisfy the elements of the TCCWNA and is not an ‘aggrieved consumer,’ ” and therefore held that the plaintiffs failed to demonstrate predominance. 171 A.3d 620, 649 (N.J. 2017). The holding was tied to the facts of the case, however, and it was not readily applicable to other contexts, including to website terms of use. The New Jersey Supreme Court still did not have the opportunity to truly weigh in on the definition of an “aggrieved consumer”—until now.

The Recent New Jersey Supreme Court Decision: *Spade v. Select Comfort*

The cases involved in the recent decision are two putative class actions that are currently before the Third Circuit on appeal: *Spade v. Select Comfort* and *Wegner v. Bob’s Discount Furniture*. Both involve

plaintiffs who purchased furniture from retail stores and received sales documents that plaintiffs allege do not comply with New Jersey state regulations promulgated under the New Jersey Consumer Fraud Act. Both actions were removed from state court to the US District Court for the District of New Jersey, which consolidated the cases and dismissed them because the plaintiffs did not allege they were “aggrieved consumers,” i.e., consumers that “suffer[ed] the effects of a violation” of the regulations. See *Spade v. Select Comfort Corp.*, No. 078611, 2018 WL 1790394, at *6 (N.J. Apr. 16, 2018). The plaintiffs appealed.

The Third Circuit certified two questions of New Jersey law to the New Jersey Supreme Court last year, which the court accepted. Those questions, as stated by the court in its recent opinion, are:

1. Does a violation of the Furniture Delivery Regulations alone constitute a violation of a clearly established right or responsibility of the seller under the TCCWNA and thus provides a basis for relief under the TCCWNA?
2. Is a consumer who receives a contract that does not comply with the Furniture Delivery Regulations, but has not suffered any adverse consequences from the noncompliance, an “aggrieved consumer” under the TCCWNA?

Id. at *3. Argument before the New Jersey Supreme Court on these questions occurred in November 2017. In the interim, lower courts have stayed multiple TCCWNA class action lawsuits, awaiting the court’s decision.

They no longer have to wait. The New Jersey Supreme Court finally defined an “aggrieved consumer” as one “who has been harmed by a violation of N.J.S.A. 56:12–15.” *Id.* at *10. The court gave the example of a consumer whose furniture was not timely delivered, but who was deterred from seeking a refund by a sales document that included language stating “no refunds,” contrary to New Jersey state regulations—it stated that this consumer may be aggrieved. *Id.* at *11. This ruling will ripple down through the cases currently stayed and raises the likelihood that plaintiffs will think twice before filing a bare bones TCCWNA complaint in the future. *Spade* has continued the trend from *Dugan* and struck yet another blow against the hordes of TCCWNA class action lawsuits piling up for the past few years.

The Future of TCCWNA

Though retailers may breathe a sigh of relief that some of TCCWNA’s ambiguities have been clarified, the *Spade* opinion still has its limits. With respect to its “aggrieved consumer” decision, the New Jersey Supreme Court was careful to state that monetary damages are not required for a TCCWNA claim, looking to TCCWNA’s \$100 civil penalty provision as an indication that the legislature contemplated that the statute could remedy harms that were not easily quantifiable. Now, when assessing consumer documents, retailers should maintain caution where language could result in harm to a consumer and assess what types of actual harm a consumer could suffer from a violation. TCCWNA is not “dead”: but it is now definitive that consumers must show harm to have standing under the statute.

Also, the New Jersey Supreme Court decided the first certified question, whether a violation of a state regulation could provide the basis for a TCCWNA claim, in the affirmative. *Spade v. Select Comfort Corp.*, No. 078611, 2018 WL 1790394, at *9 (N.J. Apr. 16, 2018). It rightly noted that requirements pertaining to the form or content of consumer contracts, warranties, notices and signs are often found in regulations rather than statutes. *Id.* And because *Spade* involved affirmative violations of state regulations, the New Jersey Supreme Court declined to decide whether an *omission* of a provision required by a state regulation could form the basis of a TCCWNA claim. Post-*Spade*, retailers should continue to be wary of the requirements of New Jersey state regulations.

The New Jersey State Legislature has also been considering proposed legislation to amend the TCCWNA. (In fact, a recent supplement to the law as it pertains to motor vehicle manufacturers, sellers and lessors became effective as of April 16, 2018, the same day as the *Spade* opinion. See N.J. Stat. Ann. § 56:12-

16.1.) Time will tell whether the legislature will continue to pursue changing the language of the statute after *Spade*. Retailers should remain abreast of these developments, especially because TCCWNA's \$100 civil penalty provision will remain attractive to New Jersey plaintiffs.

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