

NJ High Court Will Bring Welcome Clarity To Consumer Law

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In the last few years, there has been a well-documented surge of class action lawsuits against businesses operating in New Jersey, alleging violations of the state's Truth-in-Consumer Contract, Warranty, and Notice Act (TCCWNA). The statute's provisions for a statutory penalty of \$100 per violation, or actual damages, or both, plus reasonable attorneys' fees and costs, have made TCCWNA a particularly attractive vehicle for the plaintiffs class action bar.

Indeed, the statute's facially broad language, coupled with some creative theories by plaintiffs lawyers, have resulted in a flood of putative TCCWNA class action claims making their way through both the federal and New Jersey state court systems in the recent past.

Now, the New Jersey Supreme Court is poised to consider the scope and application of two major provisions of the TCCWNA statute, which should provide much-needed guidance to both litigants and courts that are confronting TCCWNA claims with ever-increasing frequency.

Specifically, in *Wenger v. Bob's Discount Furniture* and *Spade v. Select Comfort Corp.*, the New Jersey Supreme Court on April 4, 2017 announced that it has agreed to answer two certified questions of state law – one concerning the meaning of the phrase “aggrieved consumer” under Section 17 of the TCCWNA statute, and another concerning whether the violation of a regulation promulgated under the New Jersey Consumer Fraud Act (CFA) can, by itself, constitute the violation of a “clearly established legal right” as set forth under TCCWNA Section 15.

The Supreme Court's answers to these two questions will be critical in shaping the future of a significant number of TCCWNA lawsuits.

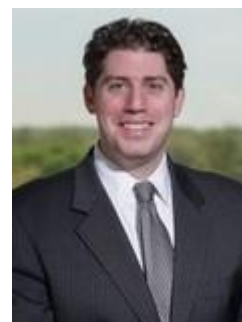
Overview of Relevant TCCWNA Provisions

In total, TCCWNA has four provisions:

In Section 15, the statute prohibits sellers, in the course of their business, from “offer[ing]” or “enter[ing] into any written consumer contract” or from “giv[ing] or display[ing] any written consumer warranty, notice or sign which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller ... as established by State or Federal law” at the time the offer is made, the



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consumer contract is signed, or the warranty, notice or sign is given or displayed. N.J.S.A. 56:12-15.

Under Section 16, TCCWNA (1) prohibits any provision in a consumer contract requiring a consumer to waive his or her rights under the act, and (2) provides that a contract or notice must clearly identify which provisions are void, inapplicable or unenforceable in New Jersey. N.J.S.A. 56:12-16.

Section 17 provides that any person who violates the TCCWNA statute shall be liable to an “aggrieved consumer” for a civil penalty not less than \$100, actual damages, or both at the election of the consumer, in addition to reasonable attorney’s fees and court costs. N.J.S.A. 56:12-17.

Finally, Section 18 states that the rights, remedies and prohibitions conferred by TCCWNA are “in addition to and cumulative of any other right, remedy or prohibition accorded by common law, Federal law or statutes of [New Jersey].” N.J.S.A. 56:12-18.

Despite being on the books since 1981, TCCWNA has only been aggressively utilized by the plaintiffs bar during the last few years. As a result, judicial authority interpreting the statute has only recently begun to develop in both the New Jersey state and federal courts.

The New Jersey Supreme Court, in particular, has spoken on the contours of the statute only sparingly. Indeed, the last time that the state’s high court engaged in review and analysis of any of TCCWNA’s elements was its decision in *Shelton v. Restaurant.com*, 214 N.J. 419 (2013), in which the court considered certain elements of Section 15 of the statute — specifically, whether electronic restaurant coupons constituted “property” that was “primarily for personal, family or household purposes” and whether the defendant’s sale of such coupons was a “written consumer contract,” warranty, notice or sign.

The court also recently heard oral argument in the so-called “drink price” cases, in which the court is considering whether claims involving the non-disclosure of drink prices on restaurant menus are amenable to class-wide treatment under TCCWNA. However, the court has never had occasion to consider — until now — the meaning of “aggrieved consumer” in Section 17 or the contours of the “clearly established legal right” element in Section 15 of TCCWNA.

The New Jersey Supreme Court’s Consideration of Wenger and Spade

The path of Wenger and Spade to the New Jersey Supreme Court, interestingly, was the same as that of the Shelton case from 2013 — a federal district court decision, appealed to the Third Circuit, and the Third Circuit’s subsequent petition to the New Jersey Supreme Court for the certification of questions of New Jersey state law.

Both Wenger and Spade involved alleged violations by the defendant of the New Jersey Delivery of Household Furniture and Furnishings Regulations, N.J. Admin. Code § 13:45A-5 (Furniture Delivery Regulations), which contain certain rules about timely delivery of furniture and require certain language to be included in ten-point type on furniture contracts or sales documents.

In both cases, the consumers’ furniture was timely delivered, but the language of the contracts allegedly did not fully comply with the Furniture Delivery Regulations. The federal district court, finding that the plaintiffs suffered no impact from the defendants’ violation of the Furniture Delivery Regulations, held that the plaintiffs were not “aggrieved” under Section 17 of TCCWNA, and therefore dismissed both claims.

After the cases were consolidated for appeal, the Third Circuit raised two questions not previously determined by the lower court:

(1) 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?

and

(2) Does a violation of the Furniture Delivery Regulations, without an underlying CFA violation, constitute a violation of a “clearly established” right of a consumer or responsibility of a seller under the TCCWNA and thus provides a basis for relief under the TCCWNA?

As to the “aggrieved consumer” language in TCCWNA Section 17, the Third Circuit observed that the district court had adopted the definition of “aggrieved consumer” — as “one suffering from the effect of a violation of the act” — from an unpublished 2008 state trial court decision. There is, however, no statute or controlling New Jersey state court appellate decision defining “aggrieved consumer” under the TCCWNA.

With respect to the “clearly established legal right” element under Section 15, the Third Circuit noted the defendants’ argument that plaintiffs had failed to plead a direct violation of the CFA and were relying solely upon a violation of the Furniture Delivery Regulations. The panel noted that there was no case addressing whether plaintiffs may seek relief under the TCCWNA based on a claim that a regulation alone, such as the Furniture Delivery Regulations, embodies a “clearly established” right or responsibility of the seller, or whether a plaintiff must also show a violation of the CFA.

Thus, the state's high court is poised to provide clarity to two provisions in the TCCWNA statute that, for its entire 35 year history, have never been examined by the court.

Conclusion

Practitioners in the TCCWNA area will be eagerly anticipating the New Jersey Supreme Court’s decision in the Wenger and Spade cases later this year for important guidance as to both the “aggrieved consumer” and “clearly established legal right” elements of the statute.

If the court agrees that the Wenger and Spade plaintiffs are not “aggrieved consumers” and that the defendant furniture companies did not violate any “clearly established legal right” of a consumer or responsibility of a seller, then businesses will have some important new weapons in their arsenal to defend against TCCWNA claims.

If, however, the court finds that the plaintiffs were “aggrieved” and suffered a violation of a “clearly established” legal right — despite receiving timely delivery of their furniture and not suffering any actual harm — then the repercussions for companies doing business in New Jersey will be significant.

Regardless of how the court rules in Wenger and Spade, however, companies that do business in New Jersey, including online business, will want to remain vigilant by continually reviewing their contracts, warranties, signs, notices, advertisements, delivery invoices and other “consumer-facing” documents — including online terms and conditions, privacy policies and other notices — to ensure compliance with relevant law.

Companies will also want to remain aware of New Jersey's consumer statutes, and consistently take steps to mitigate their exposure to potential TCCWNA claims that plaintiffs may bring.

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