

Casino Patron Out of Luck On Her New Jersey TCCWNA Claim

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The mid-level New Jersey appellate court issued [an important decision](#) last week under the state's Truth-in-Consumer Contract and Warranty Notification Act ("TCCWNA"). The biggest TCCWNA issues, including to what extent the law applies to website terms of service and fairly standard liability disclaimers in those terms, are still awaiting decisions from U.S. District Courts. But with this new decision, we know at least two things: Only actual purchasers can bring claims under the TCCWNA — not "prospective" purchasers — and the law does not apply to coupons.

The new decision came in *Smerling v. Harrah's Entertainment, Inc.*, No. A-4937-13T3 (N.J. Super., App. Div., Sept. 9, 2016), after Harrah's offered "\$15 Birthday Cash" coupons redeemable for limited periods of time at the company's Atlantic City casino. The plaintiff attempted to redeem the coupon in the middle of the night and was told that she could not do so until the appropriate desk opened at 6:00 AM. The plaintiff brought several claims against Harrah's, including one for violating the TCCWNA. Discovery showed that of the 320,000 people to whom Harrah's sent coupons, the plaintiff was the only one who tried to redeem a coupon at off-hours. Some 80,000 people redeemed their coupons successfully, and the other 240,000 did not attempt to redeem them at all. Nevertheless, the trial court certified a TCCWNA class and ultimately granted summary judgment to the plaintiff, awarding TCCWNA statutory damages of \$100 to every person who successfully redeemed the coupon. The trial court also awarded plaintiff's counsel over \$400,000 in fees.

The Appellate Division reversed on several grounds. First, it held the plaintiff did not meet the TCCWNA's definition of "consumer" because she did not "buy, lease, borrow or bail anything." The plaintiff argued it was enough that she made the effort to drive to the casino to redeem the coupon, but the Court said that "[t]his expansive interpretation of 'buy' would render the Act's conditions for application . . . virtually meaningless." It then also held that the "Birthday Cash" coupon was not a "consumer contract," because it "did not require the payment of any cash and plaintiff did not 'buy' the offer with cash or on credit." The Court therefore reversed the summary judgment finding and vacated the class certification and fee orders.

The decision is "unpublished," so its precedential value is limited. Even so, most trial courts in the federal and state systems would find it highly persuasive, if not controlling. Free coupons are not "consumer contracts," and one who did not actually "buy" anything is not a "consumer" who can sue under the TCCWNA.

We are still awaiting decisions from federal trial judges in TCCWNA cases against major internet retailers. Those cases involve whether it violated the TCCWNA for retailers to, among other things, disclaim consequential damages for website outages and for inadvertent inaccuracies in the descriptions of items offered for sale on the websites. Motions to dismiss have been fully briefed and decisions could come at any time.