

Ding Dong, TCCWNA Class Actions Are Dead.

April 16, 2018

Today, the New Jersey Supreme Court issued a much-anticipated [decision](#) construing New Jersey's Truth-in-Consumer Contract, Warranty, and Notice Act ("TCCWNA"). The decision affirmed that one who has not suffered actual harm from an allegedly unlawful provision in a contract or notice is not "aggrieved" and therefore cannot sue under the TCCWNA. Importantly, the Court held that the harm need not necessarily be monetary, but it does have to exist. This unanimous decision should bring an end to the recent wave of speculative class action lawsuits asserting TCCWNA claims based, for example, on standard provisions in online Terms of Service.

The TCCWNA, as discussed in prior posts [here](#) and [here](#), imposes a steep \$100-per-violation penalty whenever a "contract" or "notice" contains a term that violates "clearly established" New Jersey or federal law. If a contract or notice says that some of its terms may not apply in "some states," without specifically identifying provisions that are unlawful and thus inapplicable in New Jersey, the same \$100 penalty attaches. In a landmark [decision](#) last October, the New Jersey Supreme Court curtailed the circumstances in which TCCWNA claims can be pursued on behalf of a class by holding that the statute's requirement that a consumer must be "aggrieved" requires proof that every putative class member at least was "presented with" the offending notice (in that case a restaurant menu). The court also put real teeth in the requirement that the "right" a notice supposedly violates must be "clearly established."

The October decision did not address other important TCCWNA issues, including whether one can be an "aggrieved consumer" without having suffered any actual harm. Just after oral argument in the October-decided case, however the Supreme Court accepted a certified question from the Third Circuit Court of Appeals as to whether one without damages can sue under the TCCWNA.

In *Spade v. Select Comfort Corp.*, the plaintiffs purchased an allegedly faulty adjustable bed and received a refund after the defendant could not fix it. The plaintiffs nevertheless sued the seller under the TCCWNA, contending that its contract failed to conform to New Jersey regulations for selling household furniture regarding delivery timing. A district judge dismissed those claims, finding the consumers were not "aggrieved" because they received their refund and because their claim against the seller had nothing to do with delivery timing.

In *Wenger v. Bob's Discount Furniture LLC*, the plaintiffs ordered goods from the defendant and received them without complaint, but still sued under the TCCWNA based on allegedly unlawful aspects of the customer agreement, including font size, the company's refund policy, and several of the contract's other provisions. The same district judge dismissed those claims, too, on essentially the same basis, and both cases found their way to the Third Circuit.

On November 23, 2016, the Third Circuit asked the New Jersey Supreme Court to decide whether (1) a consumer who receives a non-conforming contract, but who has not suffered any adverse consequences, is "aggrieved" and therefore can sue under the TCCWNA; and (2) a contract provision

that violates the state's Furniture Delivery Regulations satisfies the "clearly established right" provision of the TCCWNA. That is what led to today's decision.

The Supreme Court answered the first question by holding that contracts containing provisions at odds with regulations do violate the TCCWNA. That aspect of today's ruling cannot be ignored. Among other things, it means that the New Jersey Attorney General's Office absolutely can pursue businesses for TCCWNA violations if they include such unlawful provisions.

The Court very clearly and strongly held, however, that consumers cannot sue unless they are "aggrieved." The plaintiffs tried to define "aggrieved" to mean anyone who is offered or enters into a contract containing an offending term, but the Court held that such an expansive interpretation would effectively write the word "aggrieved" out of the statute. The term "aggrieved consumer," the Court held, must "denote[] a consumer who has suffered some form of harm as a result of the defendant's conduct."

Although there is much for the business community to celebrate in today's decision, attention must be paid to the last section of the Court's opinion, beginning with "[w]e do not, however, view [cognizable] harm to be limited to injury compensable by monetary damages." TCCWNA, the Court held, "contemplates that a consumer may be entitled to a remedy notwithstanding the absence of proof of monetary damages." This might include, for example, someone who received a late delivery and was dissuaded from seeking a refund because an unlawful provision told her she could not do so. Allegations like this would seem to be highly individualized, however, and therefore not proper subjects for class actions.

Wenger and *Spade* now return to the Third Circuit, which presumably will uphold the district court's dismissals. A cascade of dismissals of other suits then should follow.