NEW JERSEY SUPREME COURT REJECTS CLASS CERTIFICATION OF TCCWNA CLAIMS IN DRINK PRICE ACTIONS

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U.S. Product Liability Alert

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Amidst the significant increase in consumer class action litigation under New Jersey's Truth in Consumer Contract Warranty and Notice Act ("TCCWNA" or the "Act"),[1] the New Jersey Supreme Court ruled that TCCWNA claims could not be certified due to a lack of predominance while leaving other TCCWNA issues to be decided another day.[2]

In *Dugan v. TGI Friday's*, the Court addressed two consolidated appeals (*Dugan* and *Bozzi v. OSI Restaurant Partners, LLC*), in which the plaintiffs alleged that the defendant restaurant operators failed to properly disclose the prices charged to customers for beverages.[3] In *Dugan*, the plaintiffs claimed that TGI Friday's violated TCCWNA by listing certain beverages on its menus without listing the prices of those beverages. In *Bozzi v. OSI Restaurant Partners, LLC*, OSI allegedly increased the price charged for the same beverage in the course of a customer's single visit without disclosing any drink prices. Both putative class actions demanded relief under TCCWNA, and in both cases the trial courts certified the putative classes. In *Dugan*, the Appellate Division decertified the class, finding that the customers failed to establish that common issues of fact predominated over individual factual issues. In *Bozzi*, however, the Appellate Division refused to consider the defendant's interlocutory appeal of the order certifying the class.

With respect to the TCCWNA claims, the New Jersey Supreme Court ruled that the plaintiffs in both actions failed to satisfy the predominance requirement of R. 4:32-1, New Jersey's rule governing class certification, and thus reversed the trial courts' class certification determinations. Both sets of consumers alleged that the restaurant operators violated the plaintiffs' clearly established rights by omitting beverage prices from their menus, allegedly in violation of TCCWNA. The plaintiffs argued the omission violated the restaurants' clearly established legal responsibility to "plainly mark" the drink prices in the location where the beverages were offered for sale under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2.5.

The Court found, however, that neither putative class had satisfied the predominance requirement, finding individualized issues existed as to the requirements that the plaintiffs be "aggrieved consumers" and the defendants violate a "clearly established legal right" or "responsibility." In analyzing the "aggrieved consumer" requirement, the Court found that "at a minimum, a claimant must prove that he or she was presented with a menu during his or her visit" because a TCCWNA violation cannot be based on a failure to give the consumer information. This individualized inquiry required "testimony of the individual claimant . . . to prove that the plaintiff satisfies the statute's requirements" and the question could not simply "be resolved by customer receipts or other

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documents." The Court thus concluded that class certification was inappropriate because individualized questions would predominate over common issues.

The Court also found a risk of similarly disparate results for individual class members in assessing whether the defendant restaurants violated a "clearly established legal right" or "responsibility." The Court noted that no New Jersey law has been interpreted as prohibiting restaurants from offering food or beverages to customers without listing the item prices on their menu and, in fact, many restaurants and food service businesses do offer food and beverages without designated prices.

In closing its TCCWNA analysis, the Court noted that nothing in the legislative history of the TCCWNA suggests that the New Jersey Legislature intended it be used to "impose billion-dollar penalties on restaurants that serve unpriced food and beverages to customers."

While the *Dugan* decision gives some guidance on the certification of TCCWNA-based classes, key issues remain to be decided: whether a consumer who has suffered no adverse consequences is an "aggrieved consumer" and what it means to violate a "clearly established legal right" or "responsibility." The New Jersey Supreme Court is set to answer these questions as certified to it by the Third Circuit Court of Appeals in its forthcoming decision in *Spade v. Select Comfort Corp.*[4] That decision, combined with the ruling in *Dugan*, hopefully will provide consumers and businesses alike with more clarity as to the reach of the TCCWNA.

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[1] For additional information about the TCCWNA, see K&L Gates' prior client alerts: New Jersey Supreme Court to Consider Key TCCWNA Issues, The New Jersey Truth-In-Consumer Contract Warranty and Notice Act: What You Need to Know About "TCCWNA"; The New Jersey Appellate Division Confirms that TCCWNA Applies Only to "Consumers"; and No Harm, No Foul: Lack of Concrete Injury Dooms Two Separate Actions Based on the Truth in Consumer Contract Warranty and Notice Act.

[2] The Court held that one narrowly-defined New Jersey Consumer Fraud Act ("CFA") claim satisfied the requirements for certification. The Court found that Bozzi's CFA claim based on "price-shifting" - changing the price of a drink during the same visit - satisfied the requirements for class certification. The Court found that Dugan's CFA claim, which was based on a "price-inflation" theory, did not state a claim for violation of the CFA.

[3] *Dugan* (A-92-15), was consolidated with *Bozzi v. OSI Restaurant Partners, LLC* (A-93-15), on appeal.

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

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