NO HARM, NO FOUL: LACK OF CONCRETE INJURY DOOMS TWO SEPARATE ACTIONS BASED ON THE TRUTH IN CONSUMER CONTRACT WARRANTY AND NOTICE ACT

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Product Liability Alert

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Federal courts in New Jersey have begun to weigh on the application of the Truth in Consumer Contract Warranty and Notice Act ("TCCWNA") in cases based on websites' terms and conditions when the plaintiff has not alleged any injury other than the existence of the terms and conditions themselves.[1] Recent decisions from the U.S. District Court for the District of New Jersey in *Russell v. Croscill Home, LLC*, and *Hecht v. Hertz Corp.* provide guidance on two emerging issues—Article III standing under *Spokeo v. Robins*[2] and the definition of an aggrieved consumer under TCCWNA—and hold that such cases should be dismissed for failure to allege an injury.

In *Russell v. Croscill Home, LLC*,[3] the plaintiff filed a putative class action alleging that the terms and conditions on the defendant's website violated TCCWNA. The plaintiff did not allege that the product he purchased (a tea-light holder) was defective, that he was injured, or that he had even read the terms and conditions.[4] The court granted the defendant's motion to dismiss the complaint, finding the plaintiff had no standing under *Spokeo v. Robins*, and, regardless, had failed to state a claim under TCCWNA because he was not an aggrieved consumer.[5] As to standing, the court found that even if the terms and conditions violated TCCWNA the existence of the terms and conditions alone was insufficient to confer standing because "Congress cannot erase Article III standing requirements by statutorily granting the right to sue [to] a plaintiff who would not otherwise have standing."[6] Thus, because the plaintiff failed to allege a concrete injury, he did not have standing to sue.[7] The court also found that, even if the plaintiff had standing to sue, he failed to state a claim under TCCWNA because he was not "aggrieved."[8] TCCWNA does not define "aggrieved," but the court adopted the *Black's Law Dictionary* definition, which defines aggrieved as "one entitled to a remedy, especially a party who's personal, pecuniary or property rights have been adversely affected by another person's action."[9] Because the plaintiff had not alleged any losses stemming from the terms and conditions on the defendant's website, he was not "aggrieved" and thus could not state a claim.[10]

As in *Russell*, the plaintiff in *Hecht v. Hertz Corp.* alleged that terms and conditions on the defendant's website violated TCCWNA.[11] Specifically, the plaintiff alleged that the terms and conditions failed to specify whether certain terms apply in New Jersey and whether certain terms and conditions were unenforceable under New Jersey law.[12] Examining the plaintiff's complaint, the court found that the plaintiff did not allege a concrete harm as required by *Spokeo v. Robins* and did not have Article III standing to pursue his TCCWNA claim.[13] Because the complaint only alleged procedural violations and no concrete harm suffered by the plaintiff, the court found

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that the complaint "present[ed] the quintessential 'bare procedural harm, divorced from any concrete harm' which cannot 'satisfy the injury-in-fact requirement of Article III.'"[14]

The issues of whether a plaintiff has standing under *Spokeo v. Robins* and whether he or she is an "aggrieved" consumer are critical in determining the viability of the spate of pending (and potentially forthcoming) TCCWNA suits based on websites' terms and conditions. The recent decisions in *Russell* and *Hecht* provide much-needed guidance on whether TCCWNA claims should move forward when the plaintiffs do not allege any concrete harm based on allegedly problematic terms and conditions found on websites. The message, so far, is clear: the existence of the terms and conditions alone is not enough to support a TCCWNA claim.

Notes:

[1] For additional information about TCCWNA, see K&L Gates' prior client alerts: The New Jersey Truth-In-Consumer Contract Warranty and Notice Act: What You Need to Know About "TCCWNA" and The New Jersey Appellate Division Confirms that TCCWNA Applies Only to "Consumers".

[2] 136 S. Ct. 1540 (2016).

[3] 3:16-cv-1190(PGS) (D.N.J. Oct. 11, 2016) (Transcript of Decision). On October 21, 2016, the plaintiff in *Russell* filed a notice of appeal with the Third Circuit Court of Appeals.

[4] *Id.* at 4.

[5] *Id.* at 8, 9.

[6] *Id.* at 7 (citing *Spokeo*, 136 S. Ct. at 1547–48).

[7] *Id.*

[8] *Id.* at 8.

[9] *Id.* at 9.

[10] *Id.*

[11] 2016 WL 6139911, at *2 (D.N.J. Oct. 20, 2016).

[12] *Id.*

[13] *Id.* at *3.

[14] *Id.* at *4 (quoting *Spokeo*, 136 S. Ct. at 1459–50).

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