THE NEW JERSEY SUPREME COURT DEALS A SIGNIFICANT BLOW TO TCCWNA CLAIMS

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Complex Commercial Litigation and Disputes and Product Liability Alert

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The New Jersey Supreme Court has spoken: a plaintiff suing for a violation of New Jersey's Truth in Consumer Contract Warranty and Notice Act (TCCWNA) must have suffered an actual injury - but not necessarily a monetary one - to bring a claim. TCCWNA has been dealt a significant blow, but it is unlikely a complete knock out for consumers. [1]

Under TCCWNA, any seller that violates the statute is "liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both." [2] A violation can occur by providing a consumer a contract, warranty, or other writing containing a provision that "violates any clearly established legal right of a consumer." [3] In 2016, the New Jersey Supreme Court accepted the Third Circuit Court of Appeal's certification of two questions in *Spade v. Select Comfort Corporation* and *Wenger v. Bob's Discount Furniture*: (1) whether a violation of a regulation promulgated under the New Jersey Consumer Fraud Act can, on its own, constitute a violation of a "clearly established legal right" under TCCWNA, and (2) what the scope and meaning of the phrase "aggrieved consumer" is under TCCWNA. [4]

In *Spade and Wenger*, the plaintiffs entered into furniture sales contracts that they alleged violated New Jersey's Furniture Delivery Regulations, which contain certain rules about timely furniture delivery and language that must be included in every furniture sales contract. [5] Although the plaintiffs received their furniture deliveries on time, they contended that the terms of their respective sales contracts violated TCCWNA because they allegedly did not comply with the Furniture Delivery Regulations. [6] The District of New Jersey dismissed both complaints and held that plaintiffs were not "aggrieved consumer[s]" under TCCWNA because they were not affected by the alleged violations and, thus, could not state a claim for relief. [7]

On appeal, the plaintiffs disputed the district court's determination that they were required to establish actual harm in order to recover under TCCWNA. The defendants argued that because the furniture was delivered on time, there was no violation of a clearly established right even if the terms of use did not comply with the Furniture Delivery Regulations. In attempting to address these issues, the Third Circuit found that "jurisprudence interpreting the TCCWNA is sparse." [8] In particular, the Third Circuit noted that there is currently no statute or controlling New Jersey state appellate decision defining "aggrieved consumer" under TCCWNA. [9] The Third Circuit also found that there is no guiding precedent as to whether plaintiffs may seek relief under 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. [10] The Third Circuit thus certified two questions to the New Jersey Supreme Court:

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1. Does a violation of the Furniture Delivery Regulations alone constitute a violation of a clearly established right or responsibility of the seller under the TCCWNA and thus provide a basis for relief under the TCCWNA?
2. 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? [11]

On April 16, 2018, the New Jersey Supreme Court answered the questions and ruled that a "consumer who receives a contract that includes language prohibited by [the Furniture Delivery Regulations], but who suffers no monetary or other harm as a result of that noncompliance, is not an 'aggrieved consumer' entitled to a remedy under the TCCWNA."

Looking to the language of the statute, the Court found that a plaintiff pursuing a claim for violation of TCCWNA must establish four elements: (1) the defendant was a "seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid," (2) the defendant "offered or entered into a 'written consumer contract or [gave] or display[ed] any written consumer warranty, notice or sign,'" (3) the writing contains a provision that "violates a clearly established legal right of a consumer or responsibility of a 'seller, lessor, creditor, lender or bailee' as established by State or Federal law," and (4) "the plaintiff is an 'aggrieved consumer.'" [13]

With respect to the first certified question, the Court found that a violation of a state regulation can constitute a "violation of a clearly established right," and, accordingly, a violation of the Furniture Delivery Regulations could be actionable under TCCWNA. [14] However, that alone is not enough. The Court answered the second certified question - whether an individual who suffers no harm can be an "aggrieved consumer," with a resounding "no." [15] The Court again looked to the language of the statute and found that, in the provision of TCCWNA that defines the statutory violation, "consumer" is not modified by "aggrieved." [16] Thus, TCCWNA bars certain conduct aimed at a "consumer." [17] However, in TCCWNA's remedial provision, the term "consumer" is modified by "aggrieved," meaning that only an "aggrieved consumer" is entitled to a remedy under the statute. [18] By using the term "aggrieved" in one section of the statute and omitting it in another, the legislature intended "consumer" to have a different meaning than "aggrieved consumer." [19] Accordingly, the Court held that "an 'aggrieved consumer' is a consumer who has been harmed by a violation of [TCCWNA]." [20]

The Court did not end its analysis there, however, and further found that "harm" is not "limited to injury compensable by monetary damages." [21] The Court gave the example of a late furniture delivery where the buyer would have sought a refund if not for the "no refund" language (prohibited by the Furniture Delivery Regulations) in a contract and was left without furniture for a family gathering. [22] The individual did not suffer monetary damages but was still harmed by the violation of clearly established New Jersey law and would have an actionable TCCWNA claim. [23] If that consumer's furniture had been delivered on time, however, he or she would not have an actionable claim despite the prohibited language. [24]

The New Jersey Supreme Court has delivered much-needed guidance on whether a plaintiff must have suffered harm separate and apart from the violation of a clearly established right. Now, courts and parties will undoubtedly litigate over the next question - determining the type of harm that can constitute non-monetary harm such that an individual is an "aggrieved consumer." TCCWNA may be down, but it is not out.

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Notes

[1] For additional information about the TCCWNA, see K&L Gates' prior client alerts: New Jersey Supreme Court Rejects Class Certification of TCCWNA Claims in Drink Price Actions; 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" and the Rise in Consumer Class Actions; 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] N.J.S.A. § 56:12-17.

[3] N.J.S.A. § 56:12-15.

[4] *Spade and Wenger* were consolidated by the district court then dismissed, and the plaintiffs subsequently appealed the dismissals to the Third Circuit. *Spade v. Select Comfort Corp*., No. 16-1558, Petition for Certification of Question of State Law (3d Cir. Nov. 23, 2016) ("Pet.").

[5] N.J.A.C. § 13:45A-5.

[6] The *Wenger* contract failed to set forth provisions in ten-point bold face type, as allegedly required by the Furniture Delivery Regulations, N.J.A.C. § 13:45A-5.2-3, and included provisions that limited plaintiffs' right to a refund if the furniture was not delivered by the promised delivery date, allegedly contrary to N.J.A.C. § 13:45A-5.1.

The contract in *Spade* did not contain the following provisions that must be included in every furniture sale contract in ten-point bold face type: "The merchandise you have ordered is promised for delivery to you on or before (insert date or length of time agreed upon)," N.J.A.C. § 13.45A-5.2; and "If the merchandise ordered by you is not delivered by the promised delivery date, (insert name of seller) must offer you the choice of (1) canceling your order with a prompt, full refund of any payments you have made, or (2) accepting delivery at a specific later date," N.J.A.C. § 13.45A-5.3. Pet. at 7.

[7] Pet. at 5.

[8] Pet. at 10.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Spade v. Select Comfort Corp*. (A-57-16) (078611), at 4.

[13] *Id.* at 15.

[14] *Id.* at 4.

[15] *Id.*

[16] *Id.* at 22.

[17] *Id.* at 22-23

[18] *Id.* at 23.

[19] *Id.*

[20] *Id.* at 25.

[21] *Id.*

[22] *Id.* at 26

[23] *Id.*

[24] *Id*. at 26-27.

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