NJ Supreme Court Holds Technical Violations of Consumer Protection Regulations Do Not Satisfy TCCWNA's "Aggrieved Consumer" Requirement

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Porzio Class Action Update

Addressing an issue of first impression, the New Jersey Supreme Court has held that purely technical violations of consumer protection regulations, without monetary or other harm because of that non-compliance, do not satisfy the "aggrieved consumer" requirement of the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14 et. seq. In *Spade v. Select Comfort Corp. et. als.* (consolidated with *Wenger v. Bob's Discount Furniture, LLC.*), A-57-16 (078611)(April 16, 2018), the Court addressed two questions certified by the U.S. Court of Appeals for the Third Circuit in putative class actions alleging violation of the state Furniture Delivery Regulations, N.J.A.C. 13:45A-5.1 et. seq. (the "Regulations"). The Regulations impose delivery and notice requirements in contracts for the sale of household furniture, prescribe specific language that must appear in the contract or sales documents, and prohibit statements that sales are final, cannot be cancelled or are not subject to refunds. *Id.* at 5-7. The furniture was timely delivered as ordered to both plaintiffs, but they alleged that the sales contracts contained non-conforming language and omitted certain terms required by the Regulations. *Id.* at 7-9.

Following the district court's dismissal of both complaints, plaintiffs appealed to the Third Circuit, which certified two questions to the New Jersey Supreme Court: 1) whether a consumer who receives a non-conforming contract under the Regulations, "but has not suffered any adverse consequences," is an "aggrieved consumer" under TCCWNA , and 2) whether violating a regulation "alone constitute[s] a violation of a clearly established right or responsibility of the seller under the TCCWNA and thus provides a basis for relief." *Id.* at 42.

"Aggrieved Consumers" Must Suffer "Adverse Consequences"

On the "aggrieved consumer" question, the Court noted that TCCWNA does not specifically define what makes a consumer "aggrieved," and that its prior cases had not squarely addressed the issue. *Id.* at 21. The Court turned to the plain language of the Act. It noted that in defining the conduct barred by TCCWNA, the Legislature "chose expansive language to describe the consumers and potential consumers" subject to its protection. *Id.* 22-23.[1] However, in the remedial provision, the legislature chose "a more precise term: 'aggrieved consumer.'" *Id*. at 24. The Court rejected plaintiffs' argument that an "aggrieved consumer" should be construed to mean nothing more than a "consumer" to whom an offending contract is offered, given or displayed, because it would render the term "aggrieved" superfluous. Relying on plain language definitions, the Court concluded that "'aggrieved consumer' denotes a consumer who has suffered some form of harm as a

result of the defendant's conduct." *Id.* at 24. The Court, however, did not "view that harm to be limited to injury compensable by monetary damages." *Id.* at 25. Noting TCCWNA permits recovery of a civil penalty of not less than $100 or actual damages, the Court held that a consumer may be "aggrieved" where he or she "has suffered harm as a result of the defendant's inclusion of prohibited language in a contract or other writing even if that harm is not a basis for a damage award." *Id.* at 25-26. The Court concluded that "[i]n the absence of evidence that a consumer suffered adverse consequences as a result of the defendant's regulatory violation, a consumer is not an 'aggrieved consumer' for purposes of the TCCWNA." *Id.* at 26.

Violations of Consumer Regulations Can Implicate "Clearly Established Rights"

On the regulation question, applying principals of statutory construction, and its prior TCCWNA jurisprudence, the Court rejected defendants' contention that administrative regulations cannot give rise to a "clearly established" legal right or responsibility within the meaning of TCCWNA. *Id.* at 13-20. Noting that plaintiffs alleged that defendants had included in their sales documents language constituting affirmative misrepresentations regarding the availability of a refund contrary to the Regulations, the Court observed that "[n]othing in either the TCCWNA's plain language or its legislative history suggests that the inclusion of language in a contract or other writing that violates a regulation cannot be the basis for a claim [thereunder]. .. ." *Id.* at 17.[2] The Court found that accepting regulations as a source of "clearly established" rights under TCCWNA would advance the Act's consumer-protection objectives, including the imposition of "'strict liability.'" *Id.* at 18. The Court's earlier TCCWNA cases, including the recent decision in *Dugan v. TGI Fridays, Inc.,* 231 N.J. 24 (2017), supported its conclusion that regulations can serve as the source of a consumer's "clearly established legal right" or "responsibility of a seller" under TCCWNA. *Id.* at 19.[3]

Key Takeaways of the *Spade* Decision

Spade reaffirms that mere technical violations of consumer protection regulations may satisfy the "clearly established rights" requirement of TCCWNA, but absent evidence of some harm, cannot alone meet the "aggrieved consumer" prong of the Act. The Court left open whether omissions of regulatory disclosures in consumer contracts violate "clearly established rights," and what type of non-monetary harm will suffice. The opinion contains hypotheticals suggesting allegations a consumer was deterred from exercising a regulatory right because of misleading or unlawful language in a contract, *might* satisfy TCCWNA's "aggrieved consumer" requirement. Whether intangible non-monetary harm such as lost opportunities, delay, inconvenience, or defeated expectations opens a new wave of TCCWNA class actions remains to be seen. Companies doing business in New Jersey should ensure that their consumer contracts and related documentation comply with New Jersey and federal law and do not trigger TCCWNA claims.

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[1] TCCWNA defines a "consumer" as "an individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes." N.J.S.A. 56:12-15.

[2] The Court did not reach the issue of whether the omission of a provision required by a consumer protection law would violate TCCWNA.

[3]Dugan held that the determination of whether a legal right or responsibility existing at the relevant time is case specific.