

NEW JERSEY SUPREME COURT TO CONSIDER KEY TCCWNA ISSUES

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Product Liability Alert

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New Jersey's Truth in Consumer Contract Warranty and Notice Act (TCCWNA), which sat largely unnoticed in the decades following its 1980 enactment until the recent surge in putative class action filings, is now before the New Jersey Supreme Court.^[1] The Court accepted the Third Circuit Court of Appeal's certification in *Spade v. Select Comfort Corp.* and *Wenger v. Bob's Discount Furniture* of two questions: (1) the meaning of the phrase "aggrieved consumer" under TCCWNA, and (2) 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.^[2] The Court will also be ruling on the propriety of class certification in two other TCCWNA cases: *Dugan v. TGI Friday's, Inc.*^[3] and *Bozzi v. OSI Restaurant Partners, LLC.*^[4]

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."^[5] In *Spade* and *Wenger*, the plaintiffs entered into furniture sales contracts that they alleged violated the Furniture Delivery Regulations, which contain certain rules about timely furniture delivery and language that must be included in every furniture sales contract.^[6] 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.^[7] 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.^[8] In reaching its decision, the district court relied on the definition of "aggrieved consumer" set forth in the unpublished New Jersey state trial court decision in *Cameron v. Monkey Joe's Big Nut Co.* that an "aggrieved consumer" is "one suffering from the effect of a violation of the act."^[9]

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 also 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."^[10] In particular, the Third Circuit noted that there is currently no statute or controlling New Jersey state appellate decision defining "aggrieved consumer" under TCCWNA.^[11] 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.^[12] The Third Circuit thus certified two questions to the New Jersey Supreme Court:

(1) 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? (2) Does a violation of the Furniture Delivery Regulation 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?[13]

On the same day the New Jersey Supreme Court agreed to answer these questions, it heard oral arguments in *Dugan v. TGI Friday's, Inc.*^[14] and *Bozzi v. OSI Restaurant Partners, LLC.*^[15] In *Dugan* and *Bozzi*, the Court will decide whether class certification is appropriate where plaintiffs allege that restaurants violated the Consumer Fraud Act and TCCWNA by failing to print drink prices on their menus. In *Dugan*, the Appellate Division decertified a class, finding that the customers failed to establish that common issues of fact predominated over individual factual issues.^[16] In *Bozzi*, however, after the trial court certified a class of customers of Carrabba's Italian Grill, the Appellate Division refused to consider the defendant's interlocutory appeal.^[17] The Supreme Court granted leave to appeal in both cases and is expected to provide much-needed guidance on the certification of class actions based on alleged TCCWNA violations.

Whatever the outcome, the New Jersey Supreme Court's decisions on these key TCCWNA issues will have a significant impact on the numerous pending TCCWNA actions and on whether plaintiffs' attorneys will continue to bring these actions in the future.

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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"](#); [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] *Spade* and *Wenger* were consolidated on appeal. *Spade v. Select Comfort Corp.*, No. 16-1558, Petition for Certification of Question of State Law (3d Cir. Nov. 23, 2016) ("Pet.").

[3] 135 A.3d 1003, 1014 (N.J. Super. Ct. App. Div. 2016), *petition for leave to appeal granted*, A-92-15, No. 077567 (N.J. July 26, 2016).

[4] No. L-001324-11 (N.J. Super. Ct. Law Div. Dec. 16, 2011), *petition for leave to appeal granted*, A-92-15, No. 077556 (N.J. July 26, 2016).

[5] N.J.S.A. § 56:12-17.

[6] N.J.A.C. § 13:45A-5.

[7] 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.

[8] Pet. at 5.

[9] No. BUR-L-2201-07, 2008 WL 6084192, at *6 (N.J. Super. Ct. Law Div. Aug. 4, 2008).

[10] Pet. at 10.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 5

[14] 135 A.3d 1003, 1014 (N.J. Super. Ct. App. Div. 2016), *petition for leave to appeal granted*, A-92-15, No. 077567 (N.J. July 26, 2016).

[15] No. L-001324-11 (N.J. Super. Ct. Law Div. Dec. 16, 2011), *petition for leave to appeal granted*, A-92-15, No. 077556 (N.J. July 26, 2016).

[16] 135 A.3d at 1014.

[17] No. L-001324-11 (N.J. Super. Ct. Law Div. Dec. 16, 2011).

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