

Dugan/Bozzi: The New Jersey Supreme Court Provides Shelter From the TCCWNA Storm

Products Liability, Mass Torts & Consumer Class Actions Alert

10.11.2017

Related People:

Edward J. Fanning, Jr.
Gregory H. Horowitz

Last year, McCarter was the first law firm to warn of the perfect storm resulting from the organized plaintiffs' bar's vague and unconstrained interpretation of the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA" or "the Act"). (See [If You Sell Online, Your Fine Print May Put You At Risk: Wave of Lawsuits Targets Website Terms and Conditions Under the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act](#)). Soon a flood of class action lawsuits and claims brought the previously overlooked TCCWNA statute (and its unpronounceable acronym) to center stage, and litigators and consumer-facing businesses sought guidance on the parameters of this apparently limitless statute. Last week, the New Jersey Supreme Court offered some shelter from that storm with its decision in *Dugan v. TGI Friday's* and *Bozzi v. OSI Restaurant Partners, LLC*. The Court's decision, which followed extensive briefing and oral argument – including briefing and argument by McCarter as an amicus curiae for the New Jersey Business & Industry Association ("NJBIA") – provides much-needed guidance on the limits of TCCWNA in the class action context. This Alert provides an overview of the *Dugan/Bozzi* decision and highlights other business-friendly TCCWNA decisions that may help curtail this type of venturesome litigation.

The *Dugan/Bozzi* Decision

In *Dugan v. TGI Friday's* and *Bozzi v. OSI Restaurant Partners, LLC*, the Court addressed the question of whether class certification was appropriate where the plaintiffs alleged only that the defendant violated TCCWNA by failing to include drink prices on its menu. The Court's decision addressed both the requirement that a consumer be "aggrieved" and the requirement that the provision in question violates a "clearly established legal right" of a consumer. Specifically, as to the "aggrieved" requirement, the Court found that the plaintiff (or a putative class member) could have been "aggrieved" only if, at a minimum, he or she was "presented with a menu during his or her visit." The Court further determined that this issue presents an individualized inquiry, which could not be resolved by customer receipts or other documents because "the testimony of the individual claimant or another witness would be necessary to prove that the plaintiff satisfies the statute's requirements." In light of that individualized

issue, the Court held, common issues could not predominate and, therefore, class certification would be improper.

Even more significant was the Court's analysis of the "clearly established legal right" requirement. In addressing what is considered a "clearly established legal right," the Court noted that New Jersey law has not been interpreted to require that restaurant menus post the prices of drinks. Therefore, the Court concluded that the defendants' omission of drink prices from their menus did not violate a "clearly established legal right" of consumers. Notably, the Court did not define what would be considered a "clearly established" legal right and, instead, limited its inquiry to the issue of whether the "right" to preview drink prices on a menu was "clearly established." The Court's approach suggests that the issue of whether a "clearly established right" has been implicated will be decided on a case-by-case basis.

Finally, and most significantly, the Court offered its interpretation of the legislative history underlying TCCWNA, noting that the New Jersey Legislature clearly did not intend for "billion-dollar penalties" to be imposed in the absence of any injury, harm, reliance or intent. The Court's suggestion that "no-injury" TCCWNA class actions are contrary to the purpose of the statute could be a preview of the Court's long-anticipated ruling on the two questions certified by the Third Circuit in the pending *Spade v. Select Comfort Corp.* and *Wenger v. Bob's Discount Furniture LLC* appeals, namely: (1) whether a consumer who has suffered no adverse consequence as a result of an alleged TCCWNA violation can state a claim, and (2) whether a violation of a regulation, without more, can be considered a violation of a "clearly established legal right" giving rise to a TCCWNA claim. McCarter filed a motion on behalf of the NJBIA to appear as an *amicus curiae* in *Spade* and *Wenger* to address the "aggrieved consumer" requirement and to present oral argument. The New Jersey Supreme Court has granted that motion.

In any event, the Court's ruling in *Dugan/Bozzi* is a win for New Jersey businesses, providing strong bases for attacking TCCWNA class actions, both on the merits and on predominance grounds. This follows a number of federal court victories in the District of New Jersey that dismissed TCCWNA claims based on lack of standing. These decisions are a strong indication that courts are unwilling to interpret TCCWNA broadly and offer some powerful authority in support of narrowing the scope of this amorphous statute.

Legislative Action

While the judiciary has been busy interpreting the Act in its current form, the Legislature has been working to amend TCCWNA to address abuses of the Act recently experienced by the business community, implicitly acknowledging the unintended consequences of the Act's broad provisions. Specifically, the Legislature has proposed an amendment that would disallow certification of class claims alleging violations of TCCWNA in the absence of an ascertainable economic loss resulting from the alleged violation. The amendment would also require an "aggrieved consumer" whose economic loss is less than \$250 to request reimbursement from the seller in writing and to wait 35 days before filing a TCCWNA action.

These limitations, if adopted, will help curb meritless claims otherwise cognizable under the current version of the Act, providing greater protection to businesses in New Jersey and nationwide.

What Should You Do?

McCarter continues to recommend that clients be vigilant in reviewing consumer-facing literature and websites for possible TCCWNA violations. We also suggest taking a stance on these important issues by contacting your congressman or congresswoman and pledging your support for the proposed revisions to the Act. As always, McCarter attorneys are happy

to answer questions about TCCWNA claims. Please contact [David R. Kott](#), [Edward J. Fanning, Jr.](#), [Gregory H. Horowitz](#) or the McCarter attorneys with whom you normally work.