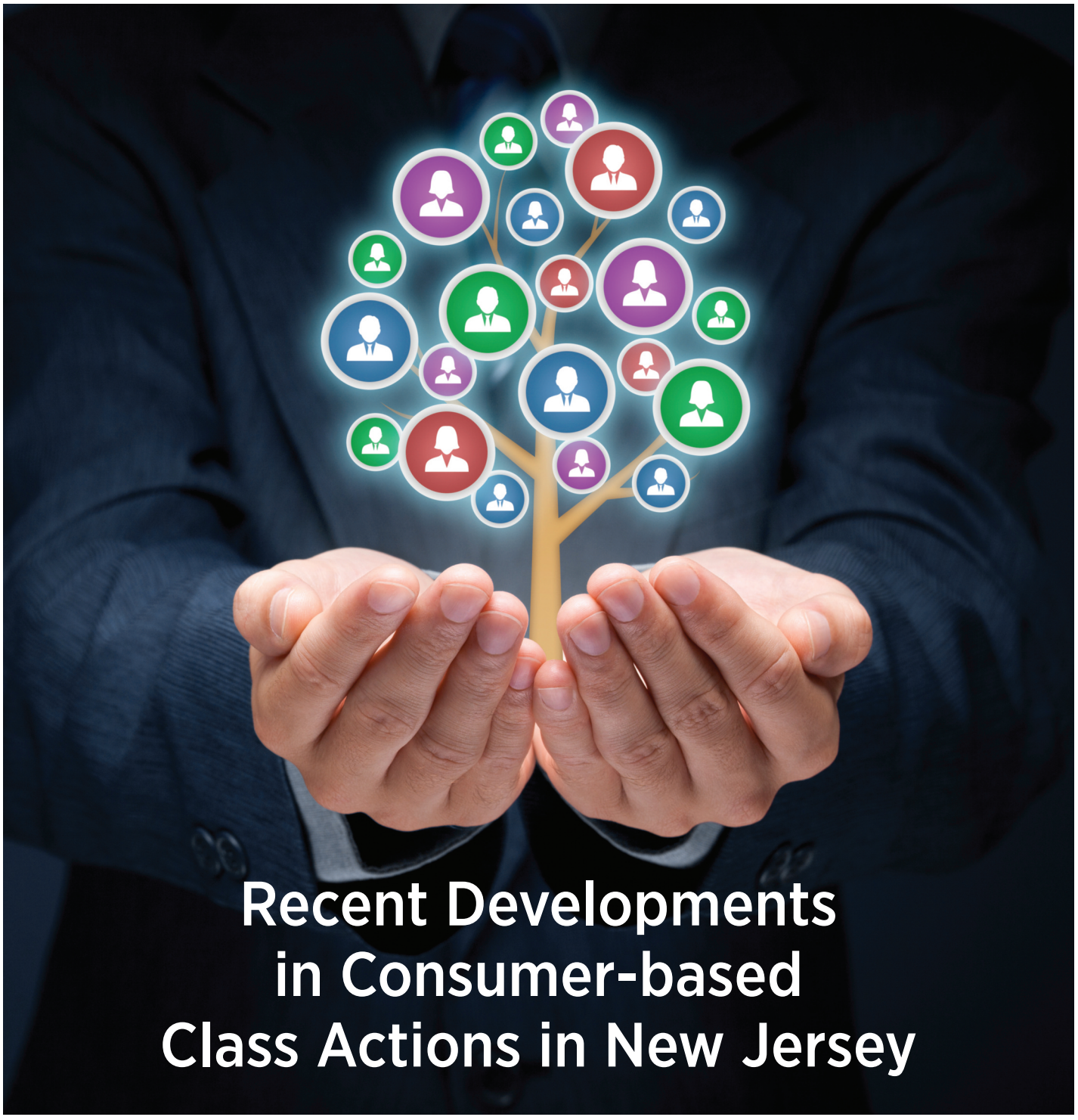

# Recent Developments in Consumer-based Class Actions in New Jersey

**by David Kistler and Michael Iannucci**

Courts in New Jersey continue to see an increasing number of putative consumer-based class action lawsuits filed under the state's Consumer Fraud Act (CFA) and Truth-in-Consumer Contract, Warranty, and Notice Act (TCCWNA). The recent influx of such cases has resulted in important decisions being made by New Jersey courts.

In *Morcom v. LG Electronics USA, Inc.*, District Judge Claire C. Cecchi recently addressed whether claims under the CFA and TCCWNA can be asserted by non-New Jersey residents in a putative class action.[1] In deciding a motion to dismiss under

Fed. R. Civ. P. 12(b)(6), the court answered this question in the negative, dismissing the CFA and TCCWNA claims asserted by a class representative from the state of Washington while allowing the same claims asserted by a New Jersey class representative to proceed.

The plaintiffs alleged that LG washing machines suffered from imbalance defects that caused a load of laundry to take several hours to complete. The two class representatives reside in and purchased their respective washing machines in different states. Steve Morcom resides in and purchased his LG washing machine at a Best Buy in Washington, while the other class representative, David McGeown, resides in and purchased his LG washing machine at a Best Buy in New Jersey. The amended class action complaint that was the subject of the motion to dismiss asserted a number of claims, including CFA and TCCWNA claims on behalf of both Morcom and McGeown.

In analyzing the CFA claim asserted by Morcom, Judge Cecchi noted that the elements of a Washington Unfair Business Practices Act (WUBPA) claim and the elements of a CFA claim differed, thus requiring a choice of law analysis.[2] Applying the Restatement (Second) of the Conflict of Laws § 148, Judge Cecchi found that Washington (as opposed to New Jersey) law should apply to Morcom because LG's alleged fraudulent omission took place in Washington and Morcom purchased the washing machine in Washington.[3] Therefore, no other state had a more significant relationship to the event. "Because Morcom cannot bring a NJCFA claim when the most significant relationship test points to Washington law instead," Judge Cecchi dismissed Morcom's CFA claim.[4] Applying this same analysis, Judge Cecchi likewise dismissed Morcom's TCCWNA claim.[5]

In contrast, Judge Cecchi allowed McGeown's CFA claim to proceed, finding that he adequately pled unlawful conduct by LG, an ascertainable loss, and a causal relationship between the unlawful conduct and ascertainable loss.[6] McGeown alleged that the unlawful conduct was LG's knowing, material omission that "TrueBalance Technology" was not working properly, leading to the defects. LG had issued a service bulletin to its retailers describing the imbalance defects the month before McGeown purchased his washing machine. However, it did not disclose these defects to the consuming public. This was a material omission, which caused McGeown an ascertainable loss because the washing machine was worth less than he was expecting and he incurred out-of-pocket repair and replacement costs.[7]

The *Morcom* decision is significant in that it limits the size of any putative class to those individuals who, unlike Morcom, can satisfy the "most significant relationship" test for purposes of New Jersey choice of law analysis. At a minimum, *Morcom* further strengthens the argument of defendants in these putative CFA and TCCWNA class actions that any class must be limited to those individuals who either reside in or purchased products in New Jersey.

In *Mendez v. Avis Budget Group, Inc. and Highway Toll Administration LLC*, Chief Judge Jose L. Linares granted the plaintiffs' renewed motion for class certification, certifying a nationwide class of approximately 18 million members, and also certifying Florida and New Jersey sub-classes.[8] The New Jersey subclass included CFA and unjust enrichment claims.

Here, the plaintiff alleged that Avis improperly charged drivers who rented cars for an electronic toll-payment service (e-Toll) and, specifically, that the rental agreement with Avis did not specify that customers would be automatically enrolled as e-Toll subscribers and charged a "convenience fee" of $2.50 per day and up to $10 a week for the service, irrespective of whether they actually paid for the tolls incurred.

The court granted certification of a nationwide class, as well as the New Jersey and Florida sub-classes, holding that common questions of fact and law predominated over any questions of law or fact affecting only individual members of the class. Specifically, the court found the plaintiff and the class alleged that the defendants engaged in unlawful conduct by failing to provide the necessary e-Toll disclosures such that each person was apprised of those costs and that the non-disclosure/inadequate disclosure by the defendants resulted in concrete and ascertainable loss, "albeit [a] *de minimis*" one.[9]

In granting class certification, the court made several other noteworthy findings, including:

- Finding that Mendez's experience did not need to mirror that of the class he is representing[10]
- Rejecting defendants' arguments that every customer's experience is unique and that the disclosures are different[11]
- Finding that Mendez was an adequate class representative, even though he previously spent years working for the plaintiff's class counsel's law firm[12]

New Jersey's federal courts are not the only ones addressing class certification and substantive issues on the CFA and TCCWNA. Indeed, the Supreme Court of New Jersey issued its much anticipated decisions in *Dugan v. TGI Friday's*, *Inc.* and *Bozzi v. OSI Restaurant Partners, LLC,* which struck a seismic blow to the plaintiff's class action bar.[13] The cases ultimately challenged whether it was a CFA and TCCWNA violation for restaurants to not post drink prices on their menus, and, if so, whether the Court could certify a class of consumers who claim they overpaid for drinks because

of the omission.

In *Dugan*, the Supreme Court held that the class could not be certified under the CFA or TCCWNA because individual issues predominated and the plaintiffs' theory of causation and damages—alleging "price inflation"—was not recognized under the CFA.[14] In *Bozzi*, a companion case, the Supreme Court narrowly limited the class to include only consumers who were charged a different price for the same beverage during the same sitting.[15]

In addition to the Court's rejection of the CFA class, perhaps more significantly, the Supreme Court issued a deathblow to TCCWNA claims. The Court's decision, which followed extensive briefing, *amicus curie* participation and a lengthy oral argument, provided much-needed guidance on TCCWNA's limitations in the class action context.

At the outset, the Court opined on 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.[16] This holding may signal how the Court may decide other TCCWNA "no injury" class actions pending before it.

In addition to its opinion on the legislative history behind TCCWNA, the Court addressed the question of whether class certification was appropriate where a plaintiff alleges 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, both requirements for plaintiffs to set forth a TCCWNA claim.[17] With respect to whether plaintiffs were aggrieved, the Court held that a customer could only be aggrieved if he or she was "presented with a menu during his or her visit."[18] That inquiry is an individual issue that predominates over common issues.

The Court also determined 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.[19]

## Conclusion

Decisions by New Jersey state and federal courts in 2017 shed a bright light on class action and consumer fraud jurisprudence. The year 2018 looks to be a similarly important year, as the New Jersey Supreme Court tackles head-on whether an injury is required under TCCWNA. In addition, a putative class action alleging CFA and TCCWNA violations arising from allegedly false advertising "compare at" prices is pending in the state trial court.[20] The plaintiffs allege that the defendants violated the New Jersey CFA and TCCWNA by deceiving customers into paying a price for an item under the guise that they were receiving a substantial discount when, in fact, there is no real discount.

While these types of cases have been filed across the country, with differing results, no New Jersey federal or state court has issued any published decision about whether this practice violates the CFA or TCCWNA.[21] ⚖

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## Endnotes

1. *Morcom v. LG Electronics USA, Inc.*, Civil Action No. 16-4833 (D.N.J. Nov. 30, 2017).
2. *Id.* at 24-25.
3. *Id.* at 10 and 25.
4. *Id.* at 25.
5. *Id.* at 28-29.
6. *Id.* at 25-28.
7. *Id.*
8. *Mendez v. Avis Budget Group, Inc.*, Civil Action No. 11-6537 (D.N.J. Nov. 16, 2017).
9. *Id.* at 12.
10. *Id.* at 12-13.
11. *Id.*
12. *Id.* at 13-14.
13. *Dugan v. TGI Friday's, Inc.*, 231 N.J. 24 (2017).
14. *Id.* at 57.
15. *Id.* at 66.
16. *Id.* at 74.
17. *Id.* at 36
18. *Id.* at 71-72.
19. *Id.* at 74.
20. *Anderson v. Burlington Stores, Inc.*, Docket No. CAM-L-2582-17 (June 25, 2017).
21. *Compare Max Gerboc v. Contextlogic, Inc.*, No. 16-4737 (6th Cir. 2016) (affirming dismissal of complaint); *Mulder v. Kohl's Dep't Stores*, No. 16-1238 (1st Cir. July 26, 2017) (same) *with Branca v. Nordstrom, Inc.*, Case No. 14-cv-2062 (S.D. Cal. Oct. 9, 2015) (order denying motion to dismiss).