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New Jersey Supreme Court Clarifies Scope of TCCWNA

Agency regulations provide a “clearly established legal right” under New Jersey’s Truth-in-Consumer Contract, Warranty and Notice Act (“TCCWNA”), but a consumer must suffer an adverse consequence from the regulatory violation to sue under TCCWNA.

The Third Circuit certified to the New Jersey Supreme Court two questions about the interplay between New Jersey’s furniture delivery regulations and the State’s TCCWNA. In *Spade v. Select Comfort Corp.*, — A.3d —, 2018 WL 1790394 (N.J. Apr. 16, 2018), the Court answered. In so doing, it expanded the reach of TCCWNA, which is intended to “prevent deceptive practices in consumer contracts.” *Id.* at *7. The Act prohibits merchants from offering and entering into written contracts with consumers that include “any provision that violates any clearly established right of a consumer or responsibility of a seller... as established by State or Federal law at the time the offer is made or the consumer contract is signed.” *Id.*

Spade concerns two sets of plaintiffs. According to the pleadings, David and Katrina Spade purchased furniture from Select Comfort. The sales contract stated that the sale of certain products was “final” and that for certain products, “[n]o returns will be accepted.” *Id.* at *4. The Spades’ furniture was delivered on time and in

conformity with the contract, but the Spades alleged in a putative class action that this language violated N.J.A.C. 13:45A-5.3(c), which holds unlawful any sales agreement “that contains any terms, such as ‘all sales final,’ ‘no cancellations’ or ‘no refunds’ ... Any contract or sales agreement which contains such a provision shall be null and void and unenforceable.” *Id.* at *4-5. The Spades also alleged that the sales contract did not contain the boldface language mandated by N.J.A.C. 13:45A-5.2(a), that “**The merchandise you have ordered is promised for delivery to you on or before** (insert date or length of time agreed upon).” *Id.* at *4.

In a sister class action, which was consolidated with *Spade*, Christopher Wenger and Eileen Muller (the “Wengers”) alleged that when they ordered furniture from Bob’s Discount Furniture, the sales contract failed to conform with N.J.A.C. 13:45A-5.3(a), which requires merchants to provide notice that if furniture is not delivered by the promised delivery date, the merchant must offer the customer the option to cancel the order

with a prompt, full refund. The Wengers also alleged that the contract failed to comply with various other regulations that required certain language to be present in the contract in “ten-point bold face type.” The Wengers’ furniture, too, was delivered on time. *Id.* at *5.

The United States District Court for the District of New Jersey, No. 3:15-CV-01826 (Sheridan, J.), dismissed both actions, holding that in order to be an “aggrieved consumer” entitled to relief under TCCWNA, the plaintiff would be required to demonstrate that they “suffer[ed] the effects of a violation” of the subject regulations. *Id.* at *6. Judge Sheridan held that because the regulations alleged by the plaintiffs served to “foster timely delivery of conforming furniture,” and the defendants delivered furniture to both sets of plaintiffs on time, the Court found that none of the plaintiffs was aggrieved for purposes of TCCWNA. *Id.* On appeal, No. 16-01558, the Third Circuit certified two questions to the Supreme Court of New Jersey: (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?; and (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?

As to the first question, the Supreme Court determined 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” under TCCWNA. *Id.* at *8. “Moreover, accepting regulations as a source of law in the application of [TCCWNA’s] ‘clearly established’ standard furthers the TCCWNA’s consumer-protection objectives.” *Id.* at *9. The Court also acknowledged that its prior decisions, including the recent *Dugan v. TGI Friday’s* opinion, impliedly recognized TCCWNA claims based on regulatory violations. For these reasons, the Court answered the Third Circuit’s first question in the affirmative and held that a “furniture seller’s inclusion in a consumer sales contract of language prohibited by [the Furniture Delivery Regulations] may alone constitute a violation of a ‘clearly established legal

right of a consumer or responsibility of a seller’ under [TCCWNA], and thus may provide a basis for relief under the TCCWNA.” *Id.*

Turning to the second question, the Court recognized that the TCCWNA does not specifically define what makes a consumer an “aggrieved consumer.” Unlike the Third Circuit’s first question, no prior New Jersey Supreme Court case law addresses the issue, meaning that what makes a customer “aggrieved” was an issue of first impression for the Court.

The plaintiffs asserted an expansive definition of “aggrieved consumer,” arguing that any consumer who is offered or enters into a contract that violates the furniture delivery regulations is aggrieved, even if there is no concomitant harm. Relying on the plain language of the statute, the Court rejected this notion and reasoned that if “‘aggrieved consumer’ were construed to mean nothing more than a ‘consumer’ to whom a contract or other writing is offered...the term ‘aggrieved’ would indeed be superfluous. We interpret that word so as to give it significance; it distinguishes consumers who have suffered harm because of a violation of [TCCWNA] from those who have merely been exposed to unlawful language in a contract or writing, to no effect.” *Id.* at *10. In addition, the Court found that according to legal and lay dictionaries from the time when TCCWNA was enacted, “the term ‘aggrieved consumer’ denotes a consumer who has suffered some form of harm as a result of the defendant’s conduct.” *Id.* at *11.

Recognizing that TCCWNA allows for civil penalties or an award of actual damages, the court did not limit the requisite “harm” to injuries compensable by monetary damages. Accordingly, the Court concluded that a consumer may be “aggrieved” if he “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 damages award.” *Id.* The Court also elaborated that “if a consumer has entered into a sales contract that violated N.J.A.C. 13:45A-5.3, but his or her furniture was delivered conforming and on schedule, and he or she has incurred no monetary damages or adverse consequences, that consumer has suffered no harm... [and] is not an ‘aggrieved customer’” under

TCCWNA. *Id.* It also advised that if a seller fails to deliver furniture on time and the consumer would have sought a refund had the unlawful “no refund” language not been included in the contract, that consumer may be an “aggrieved consumer” under TCCWNA.

The legal community may expect two trends in light of the holdings in *Spade*. First, there may be a wave of new TCCWNA claims brought on the basis of a technical violation of some agency regulation. Second, TCCWNA claims may face early dismissal if they fail to allege harm or some adverse consequence as a result of the allegedly unlawful conduct. Regardless, there is no doubt the decision in *Spade* will significantly impact both pending and future TCCWNA claims. The state and federal courts of New Jersey will likely be called upon immediately by defendants to determine if TCCWNA claims made on the basis of agency regulations state a claim upon which relief may be granted.

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