



TCCWNA Class Action Tanked by Individualized Inquiries

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New Jersey restaurant-goers alleging that TGI Friday's, Inc. (TGIF) violated state consumer protection laws by omitting drink prices from its menus will have to proceed with their claims individually after the New Jersey Appellate Division decertified their consumer class. In a decision dated March 24, 2016, the Appellate Division held that plaintiffs failed to meet the "predominance" requirement for maintaining a class action since "individualized inquiries" would be required to determine whether plaintiffs received a TGIF menu that violated the law and whether the omission of prices from the menu caused plaintiffs' damages. *Dugan v. TGI Fridays, Inc.*, No. A-3485-14T3, 2016 WL 1136486, at *4 (N.J. Super. Ct. App. Div. Mar. 24, 2016).

The decision is an important one given the recent surge in consumer class actions alleging violations of New Jersey's Consumer Fraud Act (NJCFRA), N.J.S.A. 56:8-1, *et seq.*, and Truth in Consumer Contract Warranty and Notice Act (TCCWNA), N.J.S.A., 56:12-11, *et seq.* While businesses operating in New Jersey may be familiar with typical NJCFRA claims requiring proof of reliance, causation, and an ascertainable loss, many are being blind-sided by plaintiffs' claims under the TCCWNA, which plaintiffs argue permits recovery without those proofs. The TCCWNA prohibits sellers from "offer[ing]" or "display[ing]" any written provision that "violates any clearly established legal right of a consumer or responsibility of a seller" and plaintiffs are using the broadly-worded statute to attack consumer-facing communications that contain technical violations of state or federal law, even where those violations cause plaintiffs no harm. N.J.S.A. 56:12-15. As we previously reported [here](#), class action plaintiffs are testing the bounds of the statute and seizing on the developing body of TCCWNA case law in hopes of cashing in on aggregated statutory damages and attorney's fees.

In *Dugan*, plaintiffs argued that TGIF violated the NJCFRA and TCCWNA because it: (1) "fail[ed] to list prices for beer, mixed drinks, and soft drinks on its restaurant menus; and (2) engag[ed] in an unconscionable commercial practice by charging different prices for the same beverage, depending upon where in the restaurant the beverage was served." 2016 WL 1136486, at *1. The trial court granted plaintiffs' motion for class certification and the Appellate Division reversed. Central to the court's decision to decertify the class on the TCCWNA claim was the fact that "each individual class member [would] be required to demonstrate that he or she was provided with a menu that violates the law." *Id.* at *9-10 (emphasis added). Although the plaintiffs in *Dugan* alleged that TGIF's policy instructed servers to hand *opened* menus to all patrons—thereby exposing every consumer to the alleged TCCWNA violation (*i.e.*, the "omission of prices" from the menu)—the court noted that such instructions "may not have been always followed." *Id.* at *10. ("For example, a server may have forgotten to provide the menu to a customer, or a patron may have told the server a menu was not required."). Because "[i]ndividualized inquiries would be required to determine whether each class member was handed a menu that lacked beverage pricing" potentially giving rise to liability under TCCWNA, plaintiffs failed to "establish[] that issues of fact common to the members of the class predominate over issues that only affect individual class members." *Id.* Likewise, with respect to the plaintiffs' claims for actual damages under TCCWNA, the court held that similar individualized inquiries would be necessary to determine whether each class member "sustained a loss caused by the absence of beverage pricing on TGIF's menus." *Id.*

The holding in *Dugan* that individual plaintiffs must demonstrate more than the mere existence of an allegedly offensive consumer-facing communication to succeed on TCCWNA claims is consistent



with the principle that the statute does not create any new consumer rights, rather “[t]he rights, remedies, and prohibitions conferred by the TCCWNA are ‘in addition to and cumulative of any other right, remedy or prohibition accorded by common law, Federal law or statutes of this State.’” *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 428 (N.J. 2013) (quoting N.J.S.A. 56:12–18).

What does this mean for the future of TCCWNA litigation?

Implicit in the court’s decision in *Dugan* is that plaintiffs could not prove the merits of their claims absent evidence that TGIF “provided” or “handed” the allegedly offensive menus to particular consumers. *Dugan*, 2016 WL 1136486 at *10. In other words, it was not enough for plaintiffs to prove generally that TGIF “offer[ed]” or “display[ed]” menus omitting drink prices to consumers without evidence that those menus were, in fact, delivered to particular members of the class. N.J.S.A. 56:12-15. This distinction could become key in defending TCCWNA litigation, particularly as plaintiffs seek to apply the statute in new ways—*i.e.*, to terms and conditions displayed on company websites that were never actually seen or read by consumers.

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