



Two New Jersey District Courts Dismiss TCCWNA Cases On Spokeo Grounds and Address What It Means To Be An “Aggrieved Consumer” Under the TCCWNA

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In recent months, federal and state courts in New Jersey have been faced with numerous motions to dismiss class action complaints alleging that online retailers’ website terms and conditions violate New Jersey’s Truth-in-Consumer Contract, Warranty, and Notice Act (“TCCWNA”). Citing the U.S. Supreme Court’s decision in *Spokeo v. Robins*, 136 S.Ct. 1540 (2016), two New Jersey District Courts recently dismissed plaintiffs’ class action complaints in TCCWNA website cases on the basis that plaintiffs lacked standing where their TCCWNA claims did not allege “injuries-in-fact” as required by Article III of the Constitution. But with at least one of those cases already headed to the Third Circuit, it remains to be seen how these decisions will impact the TCCWNA landscape—will they stem the tide of TCCWNA class actions, or merely divert them to state court?

By way of background, the TCCWNA is a consumer protection statute that prohibits sellers from “offer[ing] to any consumer or prospective consumer or enter[ing] into any written consumer contract or giv[ing] or display[ing] any written consumer warranty, notice or sign” that “violates any clearly established legal right of a consumer.” N.J.S.A. 56:12-15. The Act also provides that “[n]o consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey; provided, however, that this shall not apply to warranties.” N.J.S.A. § 56:12-16. The damages provision of the Act provides that “any person who violates the provisions of this Act shall be liable to the *aggrieved consumer* for a civil penalty of not less than \$100, or actual damages or both, at the election of the consumer, together with reasonable attorney fees and costs.” N.J.S.A. § 56:12-17 (emphasis added).

In *Spokeo v. Robins*, the Supreme Court recently zeroed in on the “injury-in-fact” requirement, which requires that a plaintiff allege an injury that is both “concrete” and “particularized” in order to have standing in federal court. 136 S.Ct. 1540 (2016). What makes *Spokeo* significant in the context of TCCWNA is that most—if not all—of the pending TCCWNA cases fail to allege that the plaintiffs suffered any injury at all. Rather, plaintiffs assert procedural violations of TCCWNA, premised on the claim that they merely visited a company’s website containing terms and conditions, and that those terms and conditions included provisions that allegedly violated the TCCWNA. In many cases, plaintiffs do not even allege that they viewed the terms and conditions, knew that the terms existed at the time they visited the site, that the violative provisions were ever enforced against them, or that there was anything wrong with the products or services purchased from those websites. To combat these allegations, many defendants in recent TCCWNA website cases have touted *Spokeo* to argue that these bare procedural violations cannot establish an “injury-in-fact” because plaintiffs cannot demonstrate that they suffered “an invasion of a legally protected interest that is . . . actual or imminent, not conjectural or hypothetical.” *Id.* at 1548. As discussed below, at least some courts have begun to agree with the defendants. See *Russell v. Croscill Home, LLC*, No. 16-cv-1190 (D.N.J. Oct. 11, 2016); *Hecht v. The Hertz Corporation*, No. 16-cv-1485 (D.N.J. Oct. 20, 2016); *Candelario v. Rip Curl, Inc.*, No. 16-cv-00963 (C.D. Cal. Sept. 7, 2016) (dismissing complaint alleging a TCCWNA violation of website terms and conditions because the plaintiff lacked Article III standing under *Spokeo*).

In *Russell v. Croscill Home, LLC*, the plaintiff brought a putative class action, alleging that certain of the defendant’s website terms violated the TCCWNA. Specifically, those online provisions



allegedly: (1) barred plaintiffs from asserting any cause of action against the defendant; (2) deprived individuals of their rights under the New Jersey Products Liability Act; (3) barred plaintiff from asserting punitive damages in violation of the New Jersey Punitive Damages Act; and (4) denied consumers their rights and remedies under the UCC for economic harm and/or harm to property. The plaintiff did not allege that his online purchase was defective in any way or that the allegedly unlawful terms were invoked by the defendant. As the court noted, “the complaint lacks any allegation that plaintiff read the terms and conditions or that plaintiffs were injured in any way.” (Hr’g Tr. at 4:5-7.) Applying *Spokeo*, the court held that “it appears that there was no concrete injury sustained by plaintiff” as required under *Spokeo* and that, as a result, the plaintiff “[had] no standing to sue . . .” (Hr’g Tr. at 8:11-20.) Addressing plaintiff’s TCCWNA claim, the court “reason[ed] the same way as it did under *Spokeo*”, holding that plaintiff “has not demonstrated that he’s ‘aggrieved’ under TCCWNA.” (Hr’g Tr. at 8:21-25.) Although the TCCWNA does not define what it means to be an “aggrieved” consumer entitling someone to relief, the court looked to Black’s law Dictionary, which defines “aggrieved” as “one entitled to a remedy, especially a party who’s personal, pecuniary or property rights have been adversely affected by another person’s action.” (Hr’g Tr. at 9:9-13.) Therefore, the court held, because the plaintiff failed to establish any loss resulting from defendant’s website terms, he was not “aggrieved” under the TCCWNA. (Hr’g Tr. at 9:7-23.) Plaintiff promptly filed a Notice of Appeal.

Similarly, in *Hecht v. The Hertz Corporation*, the plaintiff brought a putative class action alleging that Hertz violated the TCCWNA because its online terms and conditions did not specify whether certain of those terms were applicable to New Jersey consumers or whether those same terms were unenforceable under New Jersey law. See No. 16-cv-01485, Dkt. 31 at *1; see also N.J.S.A § 56:12-16. For example, the plaintiff argued that Hertz’s online terms failed to specify whether New Jersey is one of the jurisdictions where an exception applies to the terms’ provision that “price, rate and availability of products or services are subject to change without notice.” *Id.* at *1-2. Plaintiff maintained that his alleged injury was that he was “kept in the dark” regarding the applicability of certain provisions in New Jersey. *Id.* at *5. However, as in *Croskill*, the court noted that the plaintiff failed to allege “that he even viewed (let alone, relied upon to his detriment) either of the[] sections of [Hertz’s] website” and that “it is hard to imagine what concrete harm [p]laintiff suffered, even if he was ‘kept in the dark.’” *Id.* Because the complaint only alleged procedural violations and no concrete harm suffered by the plaintiff, the court found that the complaint “present[ed] the quintessential ‘bare procedural harm, divorced from any concrete harm’ which cannot ‘satisfy the injury-in-fact requirement of Article III.’” *Id.*

With several motions to dismiss still pending in TCCWNA website cases, it is likely that other courts soon will address the intersection of *Spokeo* and the TCCWNA. It will be important to see whether those courts follow the lead of the *Hertz* and *Croskill* decisions, or reach different conclusions on what constitutes an “injury-in-fact” and “aggrieved” consumer in the TCCWNA context. Those decisions likely will help to build a body of caselaw that will shape the landscape for future TCCWNA claims and, importantly, give much-needed guidance to online retailers doing business in New Jersey.

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