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# CIVIL PROCEDURE

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# Truth in Consumer Contract Warranty and Notice Act: The New CFA

## Strategies for defending against a TCCWNA claim

New Jersey's Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"), has largely been ignored by the plaintiffs' bar since its enactment in 1982. Recently, however, TCCWNA has been used with increasing frequency by class-action plaintiffs' lawyers as a companion to the New Jersey Consumer Fraud Act (the "CFA"). N.J.S.A. 56:8-1 et seq. Although not as historically popular as the CFA, in many ways TCCWNA is a more potent and dangerous tool than the CFA, particularly when asserted in the class action context. This article discusses the remarkably broad scope of TCCWNA and details several recommendations for defending against a TCCWNA claim.

Both the CFA and TCCWNA generally apply to consumer plaintiffs on the one hand, and commercial defendants on the other. Both statutes provide for a mandatory award of attorney's fees in favor of a successful plaintiff. However, unlike the CFA, TCCWNA does not require a showing of ascertainable loss nor does it require evidence of an "unconscionable commercial practice." In fact, TCCWNA does not require any contractual privity between the plaintiff and the defendant. Finally, unlike the CFA, TCCWNA carries a minimum civil penalty of $100 per violation in lieu of actual damages, which in the class action context can effectively result in a punitive damage award.

Moreover, because the central element of a claim under TCCWNA involves a writing of one form or another, and does not involve the ascertainable loss and proximate cause proof problems typically associated with CFA claims, TCCWNA is remarkably well suited to class-action application. This is particularly true given TCCWNA's minimum statutory damage award of $100 and accompanying attorney's fees.

TCCWNA has recently become a favored arrow in plaintiffs' lawyers' quiver because of the extreme breadth of its scope. By its plain language, it applies to any contract, warranty, notice or sign that is displayed, offered, given or consummated. Thus, TCCWNA can be read to apply to mortgages, consumer contracts, auto leases, credit card agreements, bills of sale, advertisements or roadside signs, to name just a few examples. Further, TCCWNA's provisions do not require that the "aggrieved consumer" enter into a contractual relationship with the defendant. Instead, TCCWNA merely requires that the defendant offer or display the offending writing.

Virtually any writing falls within the scope of TCCWNA. For example, the statute has been used successfully to establish liability in cases involving errors in retail installment sales contracts, casino advertisements, auto leases and auto sales contracts. *United Consumer Financial Services Company v. William Carbo*, Docket No. L-3438-02, Superior Court of New Jersey, Law Division, on appeal Docket No. A-005501-06T2; *Smerling v. Harrah's Entertainment, Inc.*, 389 N.J. Super. 181 (App. Div. 2006); *Jefferson Loan Company, Inc. v. Session*, 386 N.J. Super. 520 (App. Div. 2008); *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267 (App. Div. 2007); *Rivera v. Salerno Duane, Inc.*, 2007 WL 1790723 (App. Div. June 22, 2007); *General Motors Acceptance Corp. v. Cahill*, 375 N.J. Super. 553 (App. Div. 2005). It has also recently been cited as the basis for liability in connection with retail gift cards. *Glennon v. Great American Days, Inc.*, Docket No. L-698-08 (Law Div. 2008); *Ternlund v. Shoprite Supermarkets, Inc.*, Docket No. L-10882-07 (Law Div. 2007).

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Equally broad is TCCWNA's definition of the conduct it purports to regulate. TCCWNA prohibits any writing which includes a provision that violates any "clearly established legal right of a consumer" or "responsibility of a seller" as established by state or federal law. The scope of a consumer's "legal rights" or a seller's "responsibilities" is boundless. Obviously, the "legal rights" of a consumer are defined by the vast corpus of New Jersey and Federal statutory law, including those laws specifically enacted for the protection of consumers at large.

However, TCCWNA's reference to a seller's "responsibilities," however, opens TCCWNA's scope to include statutes for which there is otherwise no private right of action. For example, New Jersey's Retail Installment Sales Act of 1960 ("RISA"), governs, among other things, the form and content of retail installment sales contracts used in New Jersey, but carries no private right of action through which a consumer can seek redress. N.J.S.A. 17:16C-1. However, because RISA imposes specific form and content requirements on sellers or sales finance companies using retail installment sales contracts, adherence to those requirements can be construed as a "responsibility of a seller" under state law. Therefore, a violation of RISA — which alone could not give rise to a private right of action to a private litigant — can effectively be used as a predicate for liability under TCCWNA, thus giving rise to an otherwise nonviable class action claim, with a minimum exposure level of $100 per contract plus fees.

New Jersey courts have thus far declined to limit the application of TCCWNA, and the paucity of both legislative history and decisional law makes TCCWNA a difficult statute against which to defend. Apart from being one of the troubling facets of the statute, the extraordinary breadth of TCCWNA may also be its greatest weakness. Although a constitutional challenge to TCCWNA has yet to be perfected, it seems that the statute is vulnerable to challenge as being void for vagueness. Any statute that fails to provide adequate and fair notice of a warning is void as vague because it deprives the reader of his or her due process rights. See *State v. Clarksburg Inn*, 375 N.J. Super. 624, 632 (App. Div. 2005).

TCCWNA may be just such a statute. The statute's prohibitions are so vaguely described that it is virtually impossible to delineate precisely the conduct that TCCWNA is intended to regulate. The statute provides monetary relief to any prospective consumer, who views any advertisement, contract, sign, or other commercial writing, that contains even something as inadvertent as a typographical error relating to font size or bold-face requirements.

TCCWNA is also subject to a due process challenge where the statute's mandatory minimum civil damage penalty of $100 is assessed on a class-wide basis, and where any given class member has suffered little or no harm. The Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive" punishment on a tortfeaser. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996) Any person that violates the provisions of TCCWNA is strictly "liable to the aggrieved consumer for a civil penalty of not less than $100 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs." N.J.S.A. 56:12-19(a). Application of TCCWNA's statutory damage provision could result in a damage award that is grossly disproportionate to any harm allegedly suffered by any consumer. Imposition of TCCWNA's statutory penalties under these circumstances could amount to a violation of a defendant's due process rights.

A statutory damage award, derived simply by multiplying the number of class members by the statutory amount and not by any showing of actual harm, can quickly reach levels that are punitive. *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2d Cir. 2003).

In addition, the certification of a TCCWNA class can be challenged under the "superiority" requirement of Rule 4:32-1(b) (3). When addressing the superiority requirement of certification, it can be argued that minor technical statutory violations forming the predicate for liability under TCCWNA do not warrant the imposition of excessive damages that could became punitive in nature if applied on a class-wide basis. See, e.g., *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371 (11th Cir. 1984).

Where a plaintiff has suffered no actual damage and seeks to maintain a class based on technical statutory violations that carry statutorily mandated penalties, which, when aggregated, will cause unwarranted financial harm to the defendant, courts will assess the propriety of class treatment through the lens of the superiority requirement. See e.g., *Parker* supra.

New Jersey's Appellate Division approved this concept in *Levine v. 9 Net Avenue, Inc.*, 2001 WL 34013297 (App. Div. June 7, 2001). In *Levine*, the Appellate Division affirmed the trial court's decision to grant defendant's affirmative motion for a declaration determining that class treatment was not warranted. *Levine* involved a putative class composed of persons allegedly aggrieved by the defendant under the Telephone Consumer Protection Act (the "TCPA") 47 U.S.C.A. § 227. Damages sought on behalf of the class consisted of $500 per consumer as provided by Section 227(b)(3). The trial court recognized that the TCPA carried an explicit private right of action through which aggrieved consumers could pursue either actual damages or statutorily mandated damages. The court further recognized that class treatment was not the "superior" method for adjudicating claims where there is an adequate private remedy and where the potential class-wide liability for the defendant was disproportionate to the extent of actual injury sustained by any one plaintiff. The Appellate Division agreed and observed that the trial court's reasoning was consistent with both developing and existing federal precedent.

The existence of TCCWNA's private right of action and statutory damages bring it within the reasoning and holding of the *Levine* case. The TCPA, like TCCWNA, carried an explicit private right of action which encourages aggrieved consumers to pursue either actual damages or

statutorily mandated damages. See also *Parker v. Time Warner Entertainment Co.*, 198 F.R.D. 374 (E.D.N.Y. 2001), vacated on other grounds, 331 F.3d 13 (2d Cir. 2003) (recognizing that failure to certify a class does not immunize potential defendants from liability where the Act in issue includes a private right of action that provides recourse to any individual who feels that his or her privacy interests have been violated).

Where technical violations of an underlying statute or regulation do not result in any actual damages to any member of a putative class, the award of TCCWNA's minimum statutory damages of $100, imposed on a class-wide basis, has the potential to catapult the total damage award to a level that is grossly disproportionate to any actual injury suffered by any class member. Such a result runs counter to the superiority principle of Rule 4:32-1(b)(3) and suggests that, in these circumstances, certification of a class under TCCWNA is improper.

Finally, TCCWNA's scope may be somewhat limited by applying principles used by New Jersey courts to curtail the creation of unintended private rights of action under the CFA. For example, in *Henderson v. Hertz Corp.*, plaintiff sued Hertz under, among other things, the CFA, claiming that Hertz was not licensed to offer and sell certain insurance products in connection with the rental of automobiles in New Jersey. 2005 WL 4127090 (App. Div. June 22, 2006), cert. den., 188 N.J. 489 (Oct. 5, 2006).

Plaintiff in *Henderson* argued that Hertz's violation of certain licensing statutes constituted violations of the CFA. In analyzing and rejecting plaintiff's arguments, the Appellate Division questioned whether plaintiff could truly have been harmed by the alleged licensing violation for which she did not have a private right of action. The court found that, even assuming that Hertz was in violation of the applicable licensing requirements, plaintiff had suffered no harm there from. The court recognized in essence that the status of Hertz's licensing was entirely irrelevant to the product purchased by plaintiff. The insurance sold by Hertz was valid and enforceable, and therefore, plaintiff received exactly what she bargained for. *Henderson* stands for the principle that a court should not create a cause of action where none exists.

As noted, TCCWNA's prohibitory language concerning the "responsibilities" of a seller opens the scope of the statute to include statutes for which the Legislature has deliberately declined to provide private rights of action. TCCWNA's language seems to allow a plaintiff to bootstrap an otherwise non-cognizable claim into a financial windfall, complete with minimum statutory damages and attorney's fees. The reasoning and holding of *Henderson* suggest that courts will not condone such a result.

The extraordinary scope of TCCWNA makes it a statute with seemingly endless application. It is particularly well suited to class actions, and suffers from none of the proof problems associated with claims made under the CFA. Neither the statute's Legislative history nor the limited decisions involving TCCWNA provide a clear roadmap for defending against these claims. The strategies spelled out in this article are based on sound, well-established precedent, and, hopefully, will help to rein in TCCWNA before it becomes New Jersey's new CFA. ■