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NJ Consumer Law Still Unsettled After Restaurant Patrons' Case Is Tossed

After the Supreme Court threw out restaurant patrons' claims in a closely watched case under the Truth in Consumer Contract, Warranty and...

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After the Supreme Court threw out restaurant patrons' claims in a closely watched case under the Truth in Consumer Contract, Warranty and Notice Act, the legal climate for suits under the [consumer protection law](#) still appears unsettled.

The [court said](#) Oct. 4 in *Dugan v. TGI Friday's* and *Bozzi v. OSI Restaurant Partners* that restaurant patrons cannot recover under the TCCWNA for establishments' failure to list alcoholic beverage prices on the menu. Some observers think the court's ruling will be a significant factor in other pending TCCWNA cases but others say the ruling's focus on restaurants will limit its applicability in other types of business transactions.

The justices, in a 5-1 decision, said the plaintiffs in both cases failed to meet the predominance standard required for certification of their TCCWNA claims because the requirement that a plaintiff be an "aggrieved consumer" gives rise to individual questions concerning the plaintiff's interaction with the restaurant's server. Such questions would predominate over common issues because each plaintiff would need to show that he was presented with a menu to meet the aggrieved consumer requirement, the court said.

In addition, the court said the question of whether the restaurants violated a clearly established legal right under the TCCWNA could lead to disparate results for various members of the class. The Consumer Fraud Act has never been invoked to require prices of all food and beverage items to be listed on a restaurant menu, the court said. The plaintiffs in *Dugan* claimed that a 2011 Appellate Division decision in their case established for TCCWNA purposes that the CFA applied to restaurant menus. But if the court adopted that reasoning, it would not apply equally to all members of the *Dugan* plaintiffs' class, which was defined as all persons who visited TGI Friday's restaurants in New Jersey after 2004, the justices said.

In the *TGI Friday's* case, the court rejected class certification on both CFA and TCCWNA claims. In *OSI Restaurant Partners*, the court denied certification of a TCCWNA class but ordered the certification of a CFA class, although on narrower terms than were granted by the Law Division.

Defendants in the *TGI Friday's* case operate 34 restaurants in New Jersey. In the *OSI Restaurants* case, defendants operate restaurants under the names Carrabba's, Outback Steakhouse, Bonefish Grill, Fleming's Prime Steakhouse and Wine Bar and Cheeseburger in Paradise.

Damages against TGI Friday's could have reached \$1 billion if plaintiffs proved that each of the 13 million restaurant visits by class members gave rise to a TCCWNA violation, the court said. Enacted in 1981, TCCWNA has been the basis of numerous consumer protection suits in recent months. Providing \$100 in damages per aggrieved party, the act has often been used to bring suits over e-commerce terms of service, among other things. The act bars contract language that violates any clearly established right of consumers, but some lawyers have criticized it as vague and overly broad.

"I think they've provided a lot of guidance," said Alida Kass, president of the New Jersey Civil Justice Institute, a group that has sought reform of the TCCWNA. "You have courts looking to the New Jersey Supreme Court for guidance and I

think that is what they've provided here. They've begun providing some meaningful guidance as to how this statute should be interpreted. That's really helpful to litigants on both sides. It should provide more information about what cases are worth," she said.

Kass cites a group of four [TCCWNA cases](#) which were argued before the Appellate Division in March concerning auto leasing disputes. Presiding Appellate Division Judge Jack Sabatino, in a Sept. 1 letter to counsel in those cases, said that in light of the TGI Friday's and OSI Restaurants appeals, which were then pending, the auto leasing cases would not be decided in the present term. Instead, they will be recalendared and rebriefed in the 2017-18 court term.

The court's decision clarified the meaning of what is a clearly established right and who is an aggrieved consumer under the TCCWNA, said Kass. She thinks the ruling will make it harder for plaintiffs to obtain settlements for weak cases.

"Our interest has always been, you don't want to see these egregious cases being brought. When you look at the statute, there's a good and plausible purpose behind it. but the thing is there's no indication [the act's authors] wanted to create this inordinate penalty on companies and businesses," she said.

Peter Gallagher, a business litigator at Porzio, Bromberg & Newman in Morristown, said the justices' reference to a potential \$1 billion penalty against TGI Friday's was "an interesting approach. I'm sure defendants will seize on that and talk about the impact" if penalties are imposed in other cases.

Gallagher said the ruling "clarified the statute to a greater degree than we had before" and was "a good decision for companies that are troubled by TCCWNA." He also said the decision would have the impact of clarifying who is an aggrieved consumer "to a greater degree than we had before."

But Gallagher said the novel issue in the case of whether plaintiffs were handed a menu when visiting the defendants' restaurants limits the impact of the decision in the *TGI Friday's* and *OSI Restaurant* cases.

Gallagher said he thinks another pair of TCCWNA cases soon to be argued at the Supreme Court will have broader impact: *Spade v. Select Comfort* and *Wenger v. Bob's Discount Furniture*. In those cases, the court accepted certification from the U.S. Court of Appeals for the Third Circuit on two questions: the meaning of the phrase “aggrieved consumer” under the TCCWNA and whether a violation of a regulation promulgated under the CFA can, on its own, constitute a violation of a clearly established legal right under the TCCWNA. Those cases would not be limited by the restaurant-related fact pattern of the two cases decided last week, Gallagher said.

Bruce Greenberg, of Lite DePalma Greenberg in Newark said the upcoming *Select Comfort* and *Bob's Discount Furniture* cases will have a major impact on TCCWNA litigation. He is a co-author of an amicus brief supporting the plaintiffs in those cases on behalf of the Consumers League of New Jersey. As for the decision in the *TGI Friday's* and *OSI Restaurant* cases, he said, “the discussion about who is an aggrieved consumer is unique to the facts of restaurant cases. I don't think the court's analysis on that limited issue has much transferability.”