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NJ Supreme Court Provides One-Two Punch to Certification of TCCWNA Claims; Are TCCWNA Class Actions Out For Count?

SUMMARY

In consolidated appeals, the Supreme Court of New Jersey reversed class certification of two class actions asserting violations of the Truth-in-Consumer Contract, Warranty and Notice Act (“TCCWNA”).^[i] Both sets of plaintiffs claimed that two restaurant chains, TGI Fridays, Inc. and Carrabba’s Italian Grill (operated by defendant OSI Restaurant Partners, LLC), priced or failed to disclose the prices of drinks in violation of TCCWNA. The plaintiffs in *Dugan v. TGI Fridays, Inc.* claimed TGI Fridays violated TCCWNA by failing to disclose beverage prices on its menu. In *Bozzi v. OSI Restaurant Partners, LLC*, the plaintiff alleged he was charged different amounts for the same drinks during one visit.

The Supreme Court’s decision that neither putative class should have been certified creates a very steep certification hill for future putative TCCWNA classes. First, the Court held that there is no liability under TCCWNA when a defendant does not give a plaintiff a specific required writing or notice. Accordingly, the Court held that individual testimony by an alleged aggrieved party that he or she actually received a menu is required to establish a TCCWNA violation and resulting harm. Second, the Court was doubtful that the legislature intended to impose what would amount to a billion dollar penalty on a restaurant that failed to disclose drink prices on its menu, which is what would happen if TCCWNA’s \$100 civil penalty was aggregated for a plaintiffs’ class numbering in the millions. Clearly, the Court made a policy determination leaving it up to the New Jersey legislature to craft new language in TCCWNA if that is actually its intent.

^[i] *Dugan v. TGI Fridays, Inc.*, No. A-92-15, ___ N.J. ___ (Oct. 4, 2017); *Bozzi v. OSI Restaurant Partners, LLC*, No. A-93-15, ___ N.J. ___ (Oct. 4, 2017).

The Court, however, declined to expressly address the amici curiae's argument that plaintiffs' classes should never be certified under TCCWNA. But its holding that establishing "aggrieved customer" status requires an individualized inquiry (that is, *testimony* that each would-be class member was actually offered a required writing) creates a challenge for putative TCCWNA classes in this factual context. The Court's doubt that TCCWNA was designed to impose large civil penalties in a class action also calls into question whether a TCCWNA class should ever be certified.

Claims under TCCWNA are not gone completely, but class certification in the future is certainly down and the referee's count is at "8."

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