

September 2016

*Practice Groups:**Product Liability**Complex Commercial  
Litigation and  
Disputes*

## The New Jersey Appellate Division Confirms that TCCWNA Applies Only to “Consumers”

By Loly Garcia Tor, Patrick J. Perrone, and Erica S. Mekles

In the wake of a flood of consumer class-action lawsuits under the New Jersey Truth-In-Consumer Contract Warranty and Notice Act (“TCCWNA”),<sup>1</sup> the New Jersey Appellate Division recently put the brakes on plaintiffs’ lawyers in at least one respect: to bring a claim for violation of TCCWNA, a plaintiff must be a consumer who made a purchase for cash or on credit.

*Smerling v. Harrah’s Entertainment, Inc.* involved a \$15 promotional offer that the plaintiff received from Harrah’s Casino for use on either August 1 or August 10, 2003, at Harrah’s Casino in Atlantic City.<sup>2</sup> Plaintiff attempted to redeem the offer between midnight and 12:30 am on August 10, 2003, but was told that she could not redeem the offer until the Total Rewards Center opened for business later that morning.<sup>3</sup> The plaintiff never redeemed the offer and later filed a putative class-action lawsuit against Harrah’s based on alleged violations of the New Jersey Consumer Fraud Act (“CFA”) and TCCWNA.<sup>4</sup> The trial court certified a damages class based on the alleged TCCWNA violations.<sup>5</sup> The trial court granted summary judgment in favor of the class and judgment was entered in the amount of \$100 per person for each member of “the certified Birthday Cash TCCWNA damages Class.”<sup>6</sup>

Harrah’s Casino appealed the trial court’s summary judgment order, arguing that TCCWNA does not apply because the plaintiff was not a “consumer” and the promotional offer was not a “consumer contract” under TCCWNA.<sup>7</sup> The Appellate Division agreed. It began by looking at the plain meaning of TCCWNA.<sup>8</sup> TCCWNA states that the “target of the prohibition” must be a “seller, lessor, creditor, lender or bailee [acting] in the course of his business,” and the party to be protected must be a “consumer or prospective consumer.”<sup>9</sup> The conduct itself has two elements: (1) the seller must “offer” or “enter into any written consumer contract” or “give or display any written consumer warranty, notice or sign;” and

<sup>1</sup> For additional information about TCCWNA, see *The New Jersey Truth-In-Consumer Contract Warranty and Notice Act: What You Need to Know About “TCCWNA” and the Rise in Consumer Class Actions*, by Loly Garcia Tor and Patrick J. Perrone, <http://www.klgates.com/the-new-jersey-truth-in-consumer-contract-warranty-and-notice-act-what-you-need-to-know-about-tccwna-and-the-rise-in-consumer-class-actions-05-10-2016/>, May 10, 2016.

<sup>2</sup> 2016 WL 4717997, at \*1 (App. Div. Sept. 9, 2016).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* The plaintiff had also asserted a breach of contract claim, but the claim was dismissed with prejudice by consent.

<sup>5</sup> The trial court declined to certify a CFA damages class because there was no evidence that any other member suffered an ascertainable loss. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*3.

<sup>9</sup> *Id.* (citing *N.J.S.A.* 56:12-15).

## The New Jersey Appellate Division Confirms that TCCWNA Applies Only to “Consumers”

(2) the writing must include a provision that “violates any clearly established legal right of a consumer.”<sup>10</sup>

Under the statute, “consumer” is defined as “any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes.”<sup>11</sup> Harrah’s Casino argued that the plaintiff was not a consumer under TCCWNA because she did not buy, lease, borrow, or bail anything.<sup>12</sup> The trial court found that the term “consumer” should be construed liberally, explaining that the plaintiff “bought the coupon by traveling to Harrah’s to redeem it.”<sup>13</sup> The trial court reasoned that the mere “expenditure of the effort” to redeem the offer was sufficient to qualify the plaintiff as a “consumer.”<sup>14</sup> The Appellate Division disagreed. It found that under the trial court’s interpretation, TCCWNA’s conditions for application—that an individual must buy, lease, borrow, or bail any money, property, or service—would be rendered meaningless.<sup>15</sup> The Appellate Division also pointed to the use of the term “consumer contract” in the statute, which the New Jersey Supreme Court had previously concluded must be defined as a contract in which an individual purchases real or personal property for cash or on credit.<sup>16</sup> With respect to the plaintiff, the offer did not require any payment and the plaintiff did not purchase anything.<sup>17</sup> Thus, because the plaintiff was not a “consumer” and the offer was not a “consumer contract,” the Appellate Division found that TCCWNA did not apply and reversed the grant of summary judgment.<sup>18</sup>

While the stream of putative class actions under TCCWNA does not appear to be abating, the decision in *Smerling* reaffirms a significant roadblock to plaintiffs: a plaintiff must actually buy something to bring a claim. With additional cases pending before the New Jersey state and federal courts, we can expect further guidance on TCCWNA’s scope and application in the near future.

---

### Authors:

#### Loly Garcia Tor

loly.tor@klgates.com  
+1.973.848.4026

#### Patrick J. Perrone

patrick.perrone@klgates.com  
+1.973.848.4034

#### Erica S. Mekles

erica.mekles@klgates.com  
+1.973.848.4019

---

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*4 (citing *N.J.S.A.* 56:12-15).

<sup>12</sup> *Id.* at \*4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (citing *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 438 (2013), *N.J.S.A.* 56:12-1).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

## The New Jersey Appellate Division Confirms that TCCWNA Applies Only to “Consumers”

### K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Munich Newark New York Orange County Palo Alto Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Francisco São Paulo Seattle Seoul Shanghai Singapore Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates comprises approximately 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit [www.klgates.com](http://www.klgates.com).

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

© 2016 K&L Gates LLP. All Rights Reserved.