GREGORY R. DUKE, Plaintiff-Appellant, -v- ALL AMERICAN FORD, INC. d/b/a ALL AMERICAN FORD, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APP. DIV. NO.: A-000795-15-T3 ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT, LAW DIVISION – BERGEN COUNTY CIVIL ACTION DOCKET NO.: BER-L-3010-15 Sat Below: Hon. Robert C. Wilson, J.S.C.

BRIEF AND APPENDIX OF AMICUS CURIAE THE NEW JERSEY CIVIL JUSTICE INSTITUTE IN SUPPORT OF DEFENDANT ALL AMERICAN FORD, INC.

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STATEMENT OF INTEREST

The New Jersey Civil Justice Institute ("NJCJI") is a nonprofit, nonpartisan group whose members include individuals, small businesses, business associations, and professional organizations that are dedicated to improving New Jersey's civil justice system. Its mission is to advocate for the rational and predictable application of New Jersey law, which is critical to ensuring the fair resolution of conflicts, attracting and retaining jobs, and fostering economic growth. To that end, it comments on proposed legislation and amendments to court rules and appears as amicus curiae in important appellate proceedings.[1]

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Because NJCJI is a nonparty that has no firsthand knowledge of the facts and has appeared to make purely legal arguments, it relies on Defendant's statement of the case.

[1] See, e.g., McCarrell v. Hoffman-La Roche, Inc., No. 076524 (N.J. 2015); Morgan v. Sanford Brown Inst., No. 075074(N.J. 2015); DeMarco v. Stoddard, No. 073949 (N.J. 2015); Lippman v. Ethicon, Inc., No. 073324 (N.J. 2015); Atalese v. U.S. Legal Servs. Grp., L.P., No. 072314 (N.J. 2014); Wadeer v. N.J. Mfrs. Ins. Co., No. 072010 (N.J. 2015); Kendall v. Hoffman-La Roche, Inc., No. 066802 (N.J. 2012); Allen v. V&A Bros., Inc., No. 066568 (N.J. 2011); Blessing v. Johnson & Johnson, No. 65714 (N.J. 2011); Voss v. Tranquilino, No. 066153 (N.J. 2011); Lee v. Carter-Reed, No. A-38-09 (N.J. 2010); Bosland v. Warnock Dodge, Inc., No. A-97-07 (N.J. 2009); Kaufman v. Lumber Liquidators, No. A-3278-14T1 (App. Div. 2015); In re Pelvic Mesh/Gynecare Litig., No. A-5685-10T4 (App. Div. 2012); Briest v. Wyeth, No. MID-L-1045-06 (Law Div. 2007); Korrow v. Aaron's Inc., No. 10-6317 (D.N.J. 2014).

PRELIMINARY STATEMENT

Plaintiff claims that everyone in the State of New Jersey who ever received a contract that uses a variation of the phrase "unless prohibited by law" is owed $100. They need not have read the contract, they need not have been confused by the contract, and nothing in the contract need in fact be "prohibited by law." Plaintiff appears to concede that this might not comport with any sense of "fairness" or sound "policy." See Pb10 ("[F]airness, policy, Defendant's state of mind, or Plaintiff's subjective interpretation of the language are irrelevant because the statute's words are clear."); see also Pb23 ("This Court has enforced statutory penalties . . . regardless of any equitable consideration."). Indeed, his reading of TCCWNA would expose countless small businesses and local employers to potentially ruinous liability despite having caused no harm to anyone. But the "plain language of the statute" does not require that inequity. Pb10. On the contrary, according to the text, a violation occurs only if a contract actually "states" that a provision "is or may be void, unenforceable or inapplicable in some jurisdictions . . . ." N.J.S.A. 56:12-16. The text further limits the private right of action to an "aggrieved consumer." N.J.S.A. 56:12-17. Neither of those requirements is met in cases like this one.

ARGUMENT

I. SECTION 17 OF TCCWNA CREATES A PRIVATE RIGHT OF ACTION ONLY IF THE DEFENDANT HAS VIOLATED "THE PROVISIONS OF THIS ACT" AND THE PLAINTIFF IS ALSO AN "AGGRIEVED CONSUMER"

The trial court observed that Plaintiff's interpretation of TCCWNA would allow him to recover "despite suffering no harm or deprivation of rights." Ja290. Plaintiff dismisses the trial court's concern over such expansive liability, arguing that "liability under Section 16 . . . stems ipso facto from the occurrence of the conditions referenced in the plain language of the statute." Pb10. The statute says otherwise, however.

TCCWNA has five sections: Section 14, which is its title; Sections 15 and 16, which are the two operative provisions that regulate the contents of certain consumer contracts, warranties, notices, and signs; Section 17, which creates a limited private right of action; and Section 18, which states that Section 17's private right of action does not limit other rights of action. The language of Section 17 is critical because it limits the private right of action to circumstances where a defendant has "violate[d] the provisions of this act" and where the plaintiff has also been "aggrieved" by that violation:

> Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00. . . .
>
> [N.J.S.A. 56:12-17 (emphasis added).]

The plain language of Section 17 indicates that the Legislature intended to limit the private remedy to a specific category of consumers – namely, those who have been "aggrieved." That terms is commonly used and understood as meaning "[i]njured in respect of one's rights, relations, or position; injuriously affected by someone's action, wronged; having a grievance (*at)*." See Oxford English Dictionary, available at http://www.oxforddictionaries.com/definition/english/aggrieved (last visited Mar. 30, 2016). Indeed, the New Jersey courts have consistently understood the term as entailing some measure of concrete, particularized harm. Decades before TCCWNA was enacted, the New Jersey Supreme Court explained that "[i]t is the general rule that to be aggrieved a party must have a personal or pecuniary interest or property right adversely affected. . . ." Howard Sav. Inst. v. Peep, 34 N.J. 494, 499 (1961); see also Ex parte Van Winkle, 3 N.J. 348, 361-62 (1950) ("aggrieved person" who can take chancery appeal includes only those "whose personal or pecuniary interests or property rights, have been injuriously affected"); United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 41-42 (App. Div. 2001) ("aggrieved person" under Fair Housing Act must have been or is about to be injured by discriminatory housing practice).[2]

[2] New Jersey is not alone in its interpretation of the word "aggrieved." See, e.g., Warth v. Seldin, 422 U.S. 490, 513, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) ("person aggrieved" under

And this Court has applied the same meaning to another statute that, like TCCWNA, "does not define who is an aggrieved person." Advanced Dev. Grp. LLC v. Bd. of Adjustments of N. Bergen, Nos. A-4576-12T2, A-1275-13T2 (App. Div. June 5, 2015) (slip op. at 12) (per curiam) (Aa12a). The Legislature is presumed to be aware of how courts have interpreted terms in other statutes, and is entitled to rely on consistency in that interpretation. See, e.g., In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010) ("The Legislature is presumed to be familiar with its own enactments, with judicial declarations relating to them, and to have passed or preserved cognate laws with the intention that they be construed to serve a useful and consistent purpose."). See Miah v. Ahmed, 179 N.J. 511, 520 (2004); N.J.S.A. 1:1-1.

That reading of aggrieved is supported by Shah v. American Express Co., No. 09-0622, 2009 WL 3234594 (D.N.J. 2009)(Aa109a). In Shah, the plaintiffs claimed that solicitations violated

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Civil Rights Act is someone with claim of injury by discriminatory practice); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208, 95 S. Ct. 2197, 2212, 45 L. Ed. 2d 343 (1972) (same); Gelbard v. United States, 408 U.S. 41, 60 n.18, 93 S. Ct. 364, 366, 34 L. Ed. 2d 415 (1972) ("aggrieved person" under anti-wiretap act is "a party to any intercepted wire or oral communication or a person against whom the interception was directed" (citation omitted)); Goode v. City of Philadelphia, 539 F.3d 311, 321 (3d Cir. 2008) ("aggrieved person[s]" under tax code meant persons who were "detrimentally harmed"); Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 741 (3d Cir. 1995) ("person aggrieved" by bankruptcy must have been "directly affected").

TCCWNA by failing to specify whether fees applied in New Jersey. Id. at *1. They argued that, as "prospective consumers," they could assert a Section 15 claim even in they were not aggrieved. The court disagreed and dismissed their claims, explaining the difference between Sections 15 and 16 (which regulate conduct) and Section 17 (which creates liability):

> The plain language of TCCWNA only grants a remedy to aggrieved consumers. . . . TCCWNA creates a violation where a creditor in the course of its business offers a consumer or prospective consumer any notice which violates any federal or state law provisions. However, liability under TCCWNA only attaches for the creditor when there are actual "aggrieved" consumers.
>
> [Id. at *3 (emphasis added)(Aa111a).]

Similarly, in Baker v. Inter National Bank, No. 08-5668, 2012 WL 174956 (D.N.J. 2012) (Aa26a), the court dismissed a TCCWNA claim because the plaintiff had not purchased the challenged gift card and thus was not an "aggrieved consumer." Id. at *9-10 (Aa33a). It follows that a violation of Section 15 or Section 16 does not necessarily give rise to liability.[3]

[3] Plaintiff cites Bohus v. Restaurant.com, Inc., 784 F.3d 918 (3d Cir. 2015) for the proposition that TCCWNA allows a recovery in the absence of economic injury. See Pb7. Notably, however, the court addressed "the equities" and "significant financial impact on [the defendant] and other potential defendants" by limiting retroactive damages to the named plaintiffs. Bohus, supra, 784 F.3d at 930. Plaintiff also cites McGarvey v. Penske Automotive Group, 639 F. Supp. 2d 450 (D.N.J. 2009) and Barrows v. Chase Manhattan Mortgage Corp., 465 F. Supp. 2d 347 (D.N.J. 2006) for this proposition. Pb7. But Barrows is dicta and McGarvey simply cites it without analysis. While it is true that some courts have said that an economic injury is not essential to a TCCWNA claim, they have not addressed the interpretation of the "aggrieved consumer" requirement. Cf. Shelton v.

Indeed, the interpretation proposed by plaintiffs in these cases would interpret "aggrieved" right out of the statute. TCCWNA uses the term "consumer" in Sections 15 and 16 when regulating conduct and uses the narrower term "aggrieved consumer" in Section 17 when creating a private right of action. It could have said that "any person who violates the provisions of this act shall be liable to the [] consumer" or "be liable," period. But it does not. It follows that the word "aggrieved" must mean something. See, e.g., Twp. of Pemberton v. Berardi, 378 N.J. Super. 430, 446 (App. Div. 2005) ("[T]he basic tenets of statutory construction require that the words of a statute must be read so as to give meaning and effect to every provision."); see also Walters v. Dream Cars Nat'l, LLC, No. BER-L-9571-14 (Law Div. Mar. 8, 2016) (slip op. at 11) (Da11a) ("In spite of TCCWNA's expansive protections, the Legislature intended that TCCWNA only target those vendors that engage in a *deceptive* practice and sought to only punish those vendors that in fact deceived the consumer, causing harm to the consumer."). And it must mean something more than "a consumer who alleges that the defendant violated the provisions of the act," as the fact of a violation is already built into that sentence. See

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Restaurant.com, Inc., 214 N.J. 419, 426 (2013); United Consumer Fin. Servs. Co. v. Carbo, 410 N.J. Super. 280 (App. Div. 2009); Bosland v. Warnock Dodge, Inc., 396 N.J. Super. 267 (App. Div. 2007), aff'd, 197 N.J. 543 (2009).

N.J.S.A. 56:12-17 ("Any person who violates the provisions of this act shall be liable. . . ."). That reading would render the word "aggrieved" superfluous.

Regulating the treatment of "consumers" but only creating a private right of action for "aggrieved consumers" makes sense. Indeed, it is common to regulate conduct but limit remedies in private actions. For example, while the Consumer Fraud Act regulates the treatment of "consumers" generally, only those with an "ascertainable loss" have a right of action for damages. See N.J.S.A. 56:8-19. And while the Plain Language Act regulates the treatment of "part[ies] to the contract," only those who have been "substantively confused about the rights, obligations or remedies of the contract" have a right of action. See N.J.S.A. 56:12-3. To allow every recipient of every notice that had some variation of the common phrase "unless prohibited by law" to recover $100 without regard to whether they had read it, whether they had been confused by it, and whether anything in it was in fact "prohibited by law," would create a statutory scheme vastly out of scale with the underlying "harm." Cf. Twp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999) ("[I]t is axiomatic that a statute will not be construed to lead to absurd results." (citation omitted)).

In fact, Plaintiff's interpretation is not only absurd but also contrary to the maxim de minimus non curat lex, which means

"the law does not concern itself with trifles." That rule is "part of the established background of legal principles against which all enactments are adopted. . . ." Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231, 112 S. Ct. 2447, 2457, 120 L. Ed. 2d 174 (1992) (citation omitted); see also Aire Enters., Inc. v. Warren Cty., No. A-00355-12T1 (App. Div. Oct. 27, 2014) (slip op. at 21 n.2) (per curiam) (calling maxim "comfortably part of New Jersey's jurisprudence" (citation omitted)) (Aa21a). As the New Jersey Supreme Court has held, "[t]he purpose of the TCCWNA is to prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts." Kent Motor Cars, Inc. v. Reynolds & Reynolds Co., 207 N.J. 428, 457 (2011); Dugan v. TGI Fridays, Inc., No. A-3485-14T3, ___ N.J. Super. ___ (App. Div. Mar. 24, 2016) (slip op. at 22) (Aa55a). That purpose presupposes both deception and illegality. Section 17 should not be read as creating a right of action in the admitted absence of either.

Finally, adopting Plaintiff's interpretation would be not only unsound as a matter of statutory construction but also unwise as a matter of public policy. Allowing this kind of claim to proceed would expose countless small businesses and local employers to potentially annihilating aggregate liability simply because they used innocuous, ubiquitous contractual provisions

that had a variation of the phrase "unless prohibited by law" – an attractive notion for anyone interested in filing class action lawsuits, but not for anyone interested in providing or paying for goods and services in New Jersey.[4]

II. Section 16 of TCCWNA Is Not Triggered By Standard Phrases Such As "Unless Prohibited By Law" Because They Do Not Necessarily "State" That A Provision "Is Or May Be Void, Unenforceable Or Inapplicable In Some Jurisdictions"

Section 16 of TCCWNA is not triggered unless a contract "state[s] that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions" such that it should have stated "which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey. . . ." N.J.S.A. 56:12-16 (emphasis added). The operative word in Section 16 is "state," the primary meaning of which is to "express something definitely or clearly in speech or writing."[5] Phrases like "unless prohibited by law" or "to the extent permitted by law" do not trigger Section 16 because they do not

[4] Unfortunately this is not speculation; in the last two months alone class actions like this one have been filed against sellers or lessors of wine, cosmetics, furniture, automobiles, home goods, and vacuums, and have been threatened against many others. See Cannon v. Asburn Corp., No. 16-01452 (D.N.J.); Hite v. Lush Cosmetics LLC, No. 16-1533 (D.N.J.); Annecharico v. Raymour & Flanigan, No. OCN-L-441-16 (Law Div.); Hecht v. Hertz, No. 16-1485 (D.N.J.); Romeo v. Nissan N. Am., Inc., No. 16-1623 (D.N.J.); Russell v. Croscill Home LLC, No. 16-1190 (D.N.J.); Braden v. TTI Floor N. Am. Inc., No. 16-0743 (D.N.J.).

[5] See, e.g., Oxford English Dictionary, available at http://www.oxforddictionaries.com/definition/english/state (last visited Mar. 30, 2016); see also http://dictionary.reference.com/browse/state ("to declare definitely or specifically") (same).

necessarily and exclusively "state" that a provision "is or may be void, unenforceable or inapplicable in some jurisdictions. . . ." N.J.S.A. 56:12-16. Indeed, they do not reference any "jurisdictions," let alone "state" anything, definitively or otherwise, about the law of any "jurisdictions." This simply is not the sort of jurisdictional language that Section 16 was meant to address.[6]

Plaintiff assumes that any passing references to the "law" necessarily and exclusively refers to the law applied in various "jurisdictions." But a more natural and plausible reading of phrases like "unless prohibited by law" and "to the extent permitted by law" is that they signal that the law to be applied may depend on the circumstances, i.e., that they are situational

[6] See, e.g., Shelton, supra, 214 N.J. at 427-28 ("[A] contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract or notice may be void, inapplicable, or unenforceable in some states.") (emphasis added); Walters, supra, (slip op. at 10) (explaining that Section 16 is not triggered unless contract "expressly states that any of its provisions are or may be void, unenforceable, or inapplicable in certain of those jurisdictions") (emphasis added) (Da10a); id. at 9 ("[I]t is apparent that the Legislature was concerned with jurisdictional differences and how such differences may deceive consumers or obscure their rights, responsibilities, or remedies under New Jersey law.")(Da9a); Martinez-Santiago v. Public Storage, 38 F. Supp. 3d 500, 511 (D.N.J. 2014) (describing TCCWNA's "magic words" as words that "plainly communicate[]" that a provision is unenforceable in "some jurisdictions"); Venditto v. Vivint, Inc., No. 14-4357, 2014 WL 5702901, at *8-9 (D.N.J. Nov. 5, 2014) (permitting claim challenging this language: "Some states do not allow . . . the exclusion or the limitation of consequential or incidental damages, so the above . . . exclusions may not apply to you.") (Aa118a); id. at *22 (dismissing claim challenging this language: "We May Impose A Late Charge On All Payments More Than Ten (10) Days Past Due In The Maximum Amount Permitted By State Law." (emphasis added)).

rather than jurisdictional. For example, although limitations of liability are generally enforced in New Jersey, they are not if doing so would be contrary to public policy. See Marbro, Inc. v. Borough of Tinton Falls, 297 N.J. Super. 411, 417 (Law Div. 1996) ("Our courts have traditionally upheld contractual limitations of liability."); Hojnowski v. Vans Skate Park, 187 N.J. 323, 333 (2006) ("[C]ourts have not hesitated to strike limited liability clauses that are unconscionable or in violation of public policy."). Stating that a provision will be enforced "unless prohibited by law" simply signals that the parties understand that it is lawful, recognize that it may not be absolute, and agree that it is to be applied broadly and enforced in marginal cases.

That is exactly the conclusion that a number of courts have recently reached. In Greenberg v. Mahwah Sales & Service, Inc., No. BER-L-6105-15 (Law Div. Jan. 8, 2016) (slip op.) (Ja310a), the plaintiffs claimed that their contract violated TCCWNA because it contained a sales and use tax provision that included the phrase "unless prohibited by law" without stating whether the provision was legal in New Jersey. The defendant moved to dismiss, arguing that the provision does not state that enforceability varies by state. The court agreed:

> [T]he Vehicle Orders cannot violate the statute as a matter of law because the contractual language contained therein does not declaratively or impliedly

> state that the sales tax provisions are or may be void, enforceable [sic] or inapplicable in a particular jurisdiction, without specifying enforceability in New Jersey. . . . The Supreme Court acknowledged that TCCWNA applies when a provision's enforceability varies by state and its enforceability in New Jersey is vague. That is obviously not the instant situation.
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> [Id. at 8-10 (internal citation omitted)(Ja317a-19a.]

Similarly, a court recently rejected a plaintiff's claims that contractual provisions containing the phrases "where permitted by law," "the maximum amount allowed by law," "the maximum amount permitted by law" and "unless prohibited by law" violated TCCWNA. See Walters, supra, (slip op. at 3). The court explained that the phrases targeted in that case simply did not "declaratively or impliedly state that [the provisions] are or may be void, enforceable [sic] or inapplicable in a particular jurisdiction, without specifying enforceability in New Jersey." Id. at 12-21.

Finally, in Kaufman v. Lumber Liquidators, Inc., No. MID-L-5358-14 (Law Div. Feb. 20, 2015), the plaintiffs claimed that the defendants had violated TCCWNA because certain invoices contained a limitation of liability that used the phrase "except as specifically prohibited by law" without stating whether it was enforceable in New Jersey. The defendants moved to dismiss, arguing that its limitation of liability was not misleading and did not refer to other jurisdictions. The court agreed:

> The defendant's warranty clause does not state that it is unenforceable or void in certain jurisdictions, while failing to include whether it is inapplicable in New Jersey. Instead, it simply provides a limitation of remedy to the fullest extent permitted . . . by law. This Court has not been persuaded by the plaintiffs' argument that this clause runs afoul of N.J.S.A. 56:12-16 by creating ambiguity as to whether certain warranty provisions apply in New Jersey.
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> [Tr. of Oral Argument at 41, Kaufman v. Lumber Liquidators, No. MID-L-5358-14 (Law Div. Feb. 20, 2015) (Aa99a).]

It follows that in cases like this Section 16 is not even triggered, let alone violated.

To impose liability here would expand the scope of the statute beyond anything that could have been intended, and would cast doubt on standard contract provisions that are both ubiquitous and useful. Phrases like "unless prohibited by law" and "to the extent permitted by law" are consumer-friendly because they signal that provisions may not be absolute. See, e.g., Sauro v. L.A. Fitness Int'l, LLC, No. 12-3682, 2013 WL 978807, at *9 (D.N.J. Feb. 13, 2013)("[T]he Agreement's language might give an inattentive reader the wrong impression about the law, if the reader skips over the limiting phrases 'to the fullest extent permitted by law' and 'as is permitted by law.'" (emphasis added)) (Aa108a). As the court in Sauro explained, "[t]hese phrases clearly signal that the waiver is not absolute and is only as comprehensive as is permitted by law." Id. at *7 (Aa106a).

Phrases such as these provide contract drafters with a means to anticipate the impact of future, unknown variables, which is especially important in long-term contracts. It would be impractical if not impossible to draft a consumer contract that describes every scenario in which a provision could conceivably be deemed unenforceable. It makes sense to alert consumers that a provision is not absolute, and it makes no sense at all to prevent businesses from doing so. Accord Walters, supra, (slip op. at 8) ("Nowhere in the statutory text or the legislative history is the requirement of the seller to explain every nuance of New Jersey law.").

Expanding TCCWNA to cover common phrases that render consumer contracts concise and sufficiently flexible to accommodate the expansion of consumers' rights would necessarily require sellers to describe every potentially applicable nuance of New Jersey law in consumer contracts. Indeed, if Plaintiff's interpretation is correct, then anything less would expose small businesses to ruinous liability. The significant likelihood of confusion that would result from such voluminous descriptions, and the resulting need to constantly update such contracts, cannot be what the Legislature intended. Walters, supra, (slip op. at 20) ("N.J.S.A. § 56:12-16 did not obligate [the defendant], the 'seller', to provide a dissertation of all legal holdings throughout the nation when New Jersey law controls.").

CONCLUSION

For the foregoing reasons, and those stated by Defendant, the order below should be affirmed.

Respectfully submitted,

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