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SUPREME COURT OF NEW JERSEY
Docket No. 077567

DEBRA DUGAN, ALAN FOX, and ROBERT CAMERON on behalf of themselves and all other similarly situtated, Plaintiffs-Respondents/ Cross-Appellants, v. TGI FRIDAYS, INC., CARLSON RESTAURANTS WORLDWIDE, INC., on behalf of themselves and all others similarly situated, Defendants-Appellant/ Cross-Respondents.	ON PETITION FOR CERTIFICATION TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION DOCKET NO.: A-3485-14T3 CIVIL ACTION SAT BELOW: HON. JOSEPH L. YANNOTTI, P.J.A.D. HON. MICHAEL GUADAGNO, J.A.D. HON. FRANCIS VERNOIA, J.A.D.

BRIEF OF PROPOSED AMICUS CURIAE NEW JERSEY CIVIL JUSTICE INSTITUTE

On the Brief:

Gavin J. Rooney, Esq.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Civil Justice Institute ("NJCJI") advocates for a civil justice system that treats all parties fairly. NJCJI has a strong interest in the clear, predictable, and fair application of the law and is concerned with the broader civil justice implications that cases, such as this one, may have on the professionals, sole proprietors, and businesses within this State.

Founded in 2007 as the New Jersey Lawsuit Reform Alliance, NJCJI is a bipartisan, statewide group comprised of small businesses, individuals, not-for-profit groups, and many of the State's largest business associations and professional organizations. In that capacity, NJCJI monitors New Jersey legislation to assess its impact on issues related to civil justice, offers comments on proposed amendments to New Jersey's Rules of Court, and participates as amicus curiae in matters of interest to its membership. In recent years, NJCJI has appeared as amicus curiae before the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court to be heard in important consumer and tort litigation including Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012), Allen v. V&A Bros., Inc., 208 N.J. 114 (2011), Bosland v. Warnock Dodge, Inc., 197 N.J. 543 (2009), and In re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. 167 (App. Div. 2012). NJCJI and its members believe

that a fair civil justice system resolves disputes expeditiously, without bias, and based solely upon application of the law to the facts of each case. Such a system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured individuals are compensated fairly for their losses.

The NJCJI's interest in the instant case stems from its efforts to help shape the law relating to consumer protection statutes such as the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 et seq., and to further its members' interest in the clear, predictable, and fair application of the law. NJCJI seeks leave to participate in this appeal as amicus curiae in light of the significance of this matter to their members, and submit this brief both in support of that application and on the merits.

PRELIMINARY STATEMENT

Recent years have seen an explosion in class action litigation under the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14, et seq. These cases pose substantial burdens for companies who employ standard-form contracts and notices, particularly when plaintiffs assert entitlement to $100 civil penalties for each class member even when no one has suffered any injury. Accordingly, the issue of whether and in what circumstances TCCWNA claims may be certified for class treatment is an important precedential issue for this Court to address. Indeed, here plaintiffs attempt to use TCCWNA to award $100 to all individuals who ordered a drink in a TGI Friday's restaurant when the rights of many were not adversely affected.

The Appellate Division correctly held that a class should not be certified absent evidence that all class members were exposed to the drink menu that allegedly offended TCCWNA's provisions. Only "aggrieved consumers" have standing to sue for civil penalties under TCCWNA, and consumers who have not been exposed to the allegedly offending drink menu are not aggrieved. This decision should be affirmed, particularly given the recent explosion of TCCWNA class actions in the state and federal courts of this State and the need to avoid imposing costly class

litigation on New Jersey businesses where consumers are not "aggrieved" within the meaning of the statutory text.

STATEMENT OF FACTS

NJCJI relies upon the Statement of Facts presented by Defendants-Respondents.

ARGUMENT

I. A TCCWNA CLASS SHOULD NOT BE CERTIFIED ABSENT EVIDENCE THAT, AT A MINIMUM, ALL CLASS MEMBERS WERE EXPOSED TO THE ALLEGEDLY OFFENDING CONTRACT OR NOTICE - MEANING HERE, THAT CLASS MEMBERS RECEIVED AND READ THE DOCUMENT.

A. TCCWNA's Purpose and Key Provisions

The Legislature enacted TCCWNA in 1980 because it found that "[f]ar too many consumer contracts, warranties, notices and signs contain provisions which clearly violate the rights of consumers. Even though these provisions are legally invalid or unenforceable, their very inclusion in a contract, warranty, notice or sign deceives a customer into thinking that they are enforceable, and for this reason the consumer often fails to enforce his rights." Assem. 1660 (Sponsors' Statement), 199th Leg. (N.J. May 1, 1980) (Ja134).

TCCWNA section 15 provides that a vendor may not include a provision in a contract that violates the "clearly established legal right" of the consumer. N.J.S.A. 56:12-15. Section 16, in turn, recognizes that a defendant could escape section 15 by including qualifying language such as "void where prohibited by

law." N.J.S.A. 56:12-16. Accordingly, section 16 provides that a contract or note may not "state[s]" that some of its provisions may not be enforced "in some jurisdictions" without advising whether they are enforceable in New Jersey. Ibid.

Importantly, TCCWNA allows only an "aggrieved consumer" to sue. Aggrieved consumers may recover "a civil penalty of not less than $100.00" and/or "actual damages," together with reasonable attorney's fees and court costs. N.J.S.A. 56:12-17.

Wholly absent from TCCWNA's legislative history or the statutory text, however, is any mention of the possibility that its civil penalty provisions would be married to the class action device. To the contrary, N.J.S.A. 56:12-17 contemplates individual litigation between the consumer and the seller:

> This [civil penalty] may be recoverable by the consumer in a civil action in a court of competent jurisdiction or as part of a counterclaim against the seller, lessee, creditor, lender or bailee or assignee of any of the foresaid, who aggrieved him. A consumer also shall have the right to petition the Court to terminate a contract which violates the provisions of Section 2 of this action [56:12-15] and the court in its discretion may void the contract.

Indeed, TCCWNA's civil penalty was only joined to the class action device as the statute approached its thirtieth anniversary. In 2009, the Appellate Division issued a written opinion that affirmed both the certification a TCCWNA class of consumers and the entry of summary judgment awarding each class

member a $100 civil penalty, plus attorney's fees. United Consumer Financial Services Co. v. Carbo, 410 N.J. Super. 291 (App. Div. 2009). Importantly, however, Carbo involved classwide proof that each class member had seen, reviewed, and signed an installment contract that violated the provisions of New Jersey law governing door-to-door sales.

Carbo ignited a surge of TCCWNA class actions against a variety of companies that employ standard-form customer agreements or notices (e.g., self-storage unit providers, healthclubs, and concert venues), seeking $100 or more for each class member irrespective of whether they had been injured. That surge turned into a tidal wave in 2016, with nearly 50 class actions filed against (and untold numbers of class action attorney demand letters sent to) online retailers, contending that their website terms and conditions violate TCCWNA. Seeking to capitalize on their claim that a successful TCCWNA plaintiff need not demonstrate injury caused by the defendant's actions, these actions seek $100 or more in civil penalties anytime a company has a contract or notice that a plaintiff claims violated TCCWNA sections 15 or 16 - irrespective of whether the plaintiff or any class members saw the document, were confused by the document, or were in any way injured by the document.

This wave of TCCWNA class litigation underscores the importance of carefully defining the circumstances when and whether a TCCWNA claim may be certified for class treatment.

B. Predominance in the Class Certification Analysis Requires Common Proof Establishing that All Class Members are Aggrieved Consumers.

Plaintiffs here seek to certify a class of restaurant patrons under R. 4:32-1(b)(3) which, among other things, requires the plaintiff to demonstrate that common issues of law and fact predominate over individual questions. As the Appellate Division correctly held, plaintiffs have failed to satisfy that requirement with respect to their TCCWNA claims given the absence of proof that all class members were exposed to drink menus that lacked drink pricing.

The predominance requirement is "'far more demanding'" than the commonality requirement of R. 4:32-1(a), Castro v. NYT Television, 384 N.J. Super. 601, 608 (App. Div. 2006), "because a plaintiff must show that the common issues outweigh the individual ones." Hannan v. Weichert S. Jersey, Inc., No. A-5525-05T5, 2007 WL 1468643, at *8 (N.J. Super. Ct. App. Div. May 22, 2007). To determine whether a proposed class satisfies the predominance requirement, the trial court should evaluate "the legal issues and the proof needed to establish them" and "consider the elements of the causes of action asserted by the plaintiffs and the nature of any defenses raised by the

defendants." Castro, supra, 384 N.J. Super. at 608. A class plaintiff must "demonstrate that the element of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual to its members." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008). Accordingly, a class cannot be certified if "the claims of each of the putative class members depend primarily on proofs that cannot be presented on a group basis." Castro, supra, 384 N.J. Super. at 608.

As noted, only an "aggrieved consumer" has standing to sue for civil penalties under TCCWNA. N.J.S.A. 56:12-17. This is a crucial element to the class certification analysis. As this Court has held, "[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. of Newark, N.J. v. Peep, 34 N.J. 494, 499 (1961); United Property 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).[1]

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[1] This Court is hardly alone in interpreting the word "aggrieved" as requiring some degree of concrete harm. See, e.g., Warth v. Seldin, 422 U.S. 490, 513 (1975) ("person aggrieved" under Civil Rights Act is someone with a claim of injury by discriminatory housing practices); Gelbard v. U.S., 408 U.S. 41, 60 n.18 (1972) ("aggrieved person" under federal anti-wiretap statute is "a party to any intercepted wire or oral

An individual who does not make a purchase from the defendant is not an "aggrieved" consumer. Prior courts reached this conclusion in Shah v. Am. Express Co., No. 09-0622, 2009 WL 3234594 (D.N.J. 2009), and Baker v. Inter. Nat'l Bank, No. 08-5668, 2012 WL 174956, at *9-10 (D.N.J. 2012). In Shah, the plaintiffs received solicitations that allegedly violated TCCWNA by failing to specify whether late fees applied in New Jersey. Shah, 2009 WL 3234594 at *1. They argued that, as "prospective consumers," they could assert a Section 15 claim even in the absence of any harm. The court disagreed:

> 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.

Ibid. at *3 (emphasis added). And in Baker, the court dismissed a TCCWNA claim because the plaintiff had not purchased the challenged gift card and thus was not an "aggrieved consumer." Baker, 2012 WL 174956, at *9-10. Accord Baker v. Inter. Nat.

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communication or a person against whom the interception was directed."); Goode v. City of Phila., 539 F.3d 311, 321 (3d Cir. 2008) ("aggrieved persons" 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"); see also Black's Law Dictionary (10th ed. 2014) ("aggrieved party" is "a party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment.").

Bank, No. CIV. A. 08-5668, 2012 WL 174956, at *9 (D.N.J. Jan. 19, 2012).

Similarly, an individual who is not exposed to the document that allegedly offends TCCWNA cannot be an aggrieved consumer. A TCCWNA claim requires, at a minimum, that the plaintiff have received that document. And, if the plaintiff received the document, the plaintiff must have cared enough to read it. A plaintiff who did not receive, or who did not read the document, can hardly claim to have been aggrieved by virtue of statements made in it.

There is no classwide proof of exposure to unpriced drink menus here, as the Appellate Division correctly found. Many class members here did not receive unpriced drink menus from TGI Friday's servers. These members of the putative class have no standing to sue under TCCWNA. Likewise, and as the Appellate Division also held, many class members did not review the drink menu before ordering their drinks. Indeed, it is commonplace for restaurant patrons to order drinks without reviewing a drink menu, whether the menu is left on the patron's table or not. Many patrons will order the drink they desire without regard to price. None of these members of the putative class can demonstrate that they are "aggrieved" within the meaning of the TCCWNA statute, and accordingly plaintiffs cannot establish their proofs by classwide evidence.

Given the prevalence of class TCCWNA litigation where a company employs a standard-form contract or notice, it is imperative to require classwide proof of exposure to the document. This rule is necessary to limit civil penalties to "aggrieved" consumers as the statute requires. To hold otherwise would provide an undeserved windfall to class members who are not in any way "aggrieved" -- indeed, in the present situation the $100 civil penalty award to class members who were not even exposed to a drink menu would far outstrip the value of the drinks ordered from the defendant. Such a result risks violating fundamental notions of fairness and due process. In the absence of classwide evidence of exposure here, the Appellate Division properly refused to certify a class.

II. A CLASS ACTION IS NOT A SUPERIOR FORM OF ADJUDICATION TO INDIVIDUAL PROCEEDINGS.

A class action is not a superior way to adjudicate claims by class members purchasing $5 drinks who seek $100 in civil penalties -- and particularly where, as here, a class-member-by-class-member inquiry is required to determine which consumers are "aggrieved." As noted above, TCCWNA itself contemplates individual litigation, and the civil penalty plus attorney's fees provide sufficient incentive for aggrieved consumers to pursue their claims in small claims court. Indeed, all

consumers need do is to testify before a small claims court that they actually read a drink menu that did not disclose prices.

As the Appellate Division correctly held in a Telephone Consumer Protection Act case seeking similar civil penalties, a class action is not superior in this situation because class members can secure their remedy through simplified proofs in a small claims proceeding. See Local Baking Products, Inc. v. Kosher Bagel Munch, Inc., 421 N.J. Super. 268 (App. Div. 2011). Indeed, Local Baking Products distinguished the Carbo TCCWNA decision discussed above as a "narrow ruling" that only rejected the "out-of-hand denial of class certification," and which did not provide a blanket endorsement for class certification of TCCWNA claims irrespective of particular superiority concerns. Ibid.

The same conclusion applies here to a claim for TCCWNA civil penalties arising from drink menus that could have only aggrieved those consumers actually exposed to the menus. Given the need to determine which consumers were exposed to the drink menus lacking prices, as well as the amount of the $100 civil penalty compared to the modest price of the drinks and the ability to recover attorney's fees, consumers should bring their individual claims in small claims court. That alternative provides a superior means of adjudication.

Respectfully submitted,

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