

## TCCWNA Basics and the Constitutional Limits on Punitive Damages

*By: David R. Kott, Edward J. Fanning, Jr., Zane Riester and Elizabeth Monahan*

Over the past year, there has been a steady rise in class action lawsuits filed by plaintiffs under New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"). While the statute has been in existence for over 30 years, it has only recently become fodder for class action plaintiffs who are attracted to TCCWNA's limited elements and automatic statutory penalty.

Most troublesome is that recovery under the act, including attorney fees and costs, is apparently available without any requirement that the plaintiff establish an actual injury. In fact, plaintiffs can often obtain damages that are essentially punitive without establishing any causation or reliance whatsoever. These mandatory penalties are available to plaintiffs regardless of whether a defendant's conduct was intentional or knowing, and without any apparent consideration as to whether such a penalty is proportional to the harm alleged.

This three-part article series will explore the possibility of raising due process and equal protection challenges to TCCWNA class actions and argue that class actions brought under the statute violate the requirements of the Fourteenth Amendment's Due Process Clause as interpreted by the Supreme Court, because they automatically award a punitive penalty without individualized consideration of whether the penalty is appropriate. Moreover, the statute awards punitive damages in a manner that is arbitrary and irrational under the Equal Protection Clause. While TCCWNA has been broadly applied, imposing class action liability regardless of the knowledge or deceptive intent of the actor is essentially imposing strict liability on defendants even in the absence of any harm or injury. This was clearly not what the legislature envisioned when it enacted TCCWNA.

### **TCCWNA Basics**

The New Jersey Legislature originally passed TCCWNA due to a concern that the inclusion of illegal or unenforceable contract terms in consumer contracts led consumers to believe that they could not enforce their rights with respect to the products or services they purchased or that they did not have any remedy. Specifically, the statute provides that

No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed.  
N.J.S.A. § 56:12-15.

The manner in which the statute was drafted permits consumers to recover statutory penalties even if a party does not have any belief that they could not enforce their rights. All that is needed is violation of a "clearly established" legal right, no matter how small or insignificant. Indeed, a consumer need not be harmed in any manner to obtain the statutory penalty under TCCWNA, so long as the defendant technically violated some law, even if obscure, unrelated to any harm, or by a wholly innocent mistake. Hypothetically, something as insignificant as a typographical error – even one that did not confuse or mislead any consumers – could create a possible TCCWNA claim. Importantly, however, TCCWNA does not itself establish any substantive consumer rights, which must instead be supplied by other law.

Because TCCWNA provides for minimum statutory penalties of \$100 per violation, even where the consumer has no actual damages or injury, in the context of a class action, the statute effectively awards punitive damages. Absolutely no intentional conduct, nor any knowledge by the defendant of a violation or intent to mislead, is required to trigger a TCCWNA claim. In fact, a wholly innocent mistake – even one that is not harmful to the plaintiff or class – could trigger a TCCWNA violation. Indeed, there is no exception under TCCWNA for the good faith compliance of a seller, which is irrelevant to the award of the statutory penalties if a violation is found to exist.

## Supreme Court Precedent Addressing Constitutional Limits on Punitive Damages

As summarized above, the unforgiving application of TCCWNA in a class action can lead to absurd results that penalize innocent businesses. In the absence of any actual injury, a TCCWNA plaintiff and potential class can be awarded an extensive penalty that is essentially an award of punitive damages. As such, the Supreme Court precedent dealing with the limits on punitive damages are pertinent and provide context for determining and challenging the constitutionality of TCCWNA. A full examination of how these cases can be used in challenging TCCWNA class actions will be explored in more detail in Part Two of this series.

The Supreme Court has established that the Fourteenth Amendment limits the amount recoverable in punitive damages if the damages constitute grossly excessive punishment for a tortfeasor. *See BMW of North America v. Gore*, 116 U.S. 1589 (1996); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); *see also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 531 U.S. 923 (2001).

In the context of TCCWNA, a parallel argument could be advanced that a plaintiff who pursues the statutory penalty as a class action triggers this due process concern because the class award is grossly excessive in the absence of any harm by a defendant or injury to the class. As outlined below, the guidelines and rationales of these Supreme Court cases provide a strong argument that the penalties available in a TCCWNA class action may be unconstitutional.

In *Gore* the Supreme Court established a three-part assessment for determining whether punitive damages were constitutional: (i) the degree of reprehensibility; (ii) the disparity between the harm suffered and the damage award; and (iii) the difference between this remedy and civil penalties authorized in comparable cases. *Gore*, 517 U.S. at 573-84. The Court in *Gore* also reiterated that the Due Process Clause imposes procedural and substantive limits on punitive damages to ensure state law gives fair notice of the conduct that may be punished and the potential severity of the penalty, as well as to prevent punitive damages from effecting an arbitrary deprivation of property.

In particular, the Supreme Court in *Gore* instructed lower courts to “examine the gravity of the defendant’s conduct and the harshness of the award of punitive damages.” *Id.* at 575 (quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal*, 492 U.S. 257, 301 (1989) (O’Connor, J., concurring in part and dissenting in part)). TCCWNA statutory penalties in class actions, however, often fail to satisfy these guidelines, given the lack of any reprehensible conduct by defendants, the insufficient ratio that is often indeterminable altogether due to zero damages, and the disparity with the penalties in comparable cases.

The Supreme Court built upon this precedent in *Campbell*, a case involving a defendant-insurance company’s bad faith failure to settle a plaintiffs’ case within their policy limits. In *Campbell*, the Court held that the individualized consideration of whether punitive damages are warranted is required to prevent an arbitrary deprivation of a defendant’s property. The Court reasoned that “civil defendants are not accorded the protections afforded criminal defendants,” yet punitive damages subject civil defendants to liability that is similar to criminal penalties and that serves the same purposes as criminal penalties. *Campbell*, 538 U.S. at 409.

Ultimately, the Court held that a jury award of \$145 million in punitive damages, when the compensatory award was \$1 million, “was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of defendant.” *Id.* at 429. Further, the Court held that only the specific conduct complained of may be considered because “[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business,” and considering more than the particular conduct “creates the possibility of multiple punitive damages awards for the same conduct.” *Id.* at 423. The Court held that the Due Process Clause provides constitutional limits

in this context because the clause “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor” and that “[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.” *Id.* at 416, 429.

Thus, the court’s holding *Campbell* builds upon the instruction in *Gore* and provides a structure for analysis of the constitutionality of these types of penalties, instructing that: (1) an award of punitive damages should be analyzed under the three *Gore* guideposts; and (2) because compensatory damages make the plaintiff whole, punitive damages should be awarded only when the defendant’s conduct is so reprehensible that a further award is warranted for purposes of “punishment or deterrence.” *Id.* at 419. Several factors are considered in weighing reprehensibility, and if no factors or only one factor weighs in favor of the plaintiff, punitive damages are likely not warranted. Such factors include “whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *Id.* at 419. However, even if punitive damages are warranted, “in practice, few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process.” *Id.* at 410.

While *Gore* and *Campbell* do not create a bright-line test, these cases are instructive for analysis of the appropriateness and constitutionality of punitive damage awards in TCCWNA class actions. As will be outlined in Part Two, these cases provide a framework for multiple constitutional challenges of the statutory penalties that are available in a TCCWNA class action, even in the absence of any allegation of harm or injury. These constitutional challenges to TCCWNA class actions will be examined in detail in the next installment of this three-part series.

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## Constitutional Challenges To TCCWNA

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As Part One of this article series explained, there has been a sharp rise in class-action lawsuits filed by plaintiffs under New Jersey’s Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA). TCCWNA class actions are problematic given the fact that plaintiffs need not establish any actual injury, causation or reliance to recover damages that are basically punitive. Whether a defendant’s conduct was intentional or knowing is irrelevant under TCCWNA, and consideration of the penalty’s proportionality to the harm alleged—which is often none at all—is not required.

This installment of this three-part article series will explore the due process and equal protection challenges to TCCWNA class actions, and argue that the statute violates constitutional requirements by awarding a penalty automatically without any individualized consideration of whether the penalty is proportional or appropriate in the absence of any injury, reliance or intent. This article will also explore other constitutional challenges that call into question the appropriateness of this statute. The last part of this series will then analyze recent challenges under the Telephone Consumer Protection Act that provide a useful framework for TCCWNA challenges.

### **The Due Process Attack**

The basis of a due process challenge to a TCCWNA class action is that the statute violates the requirements of the Fourteenth Amendment’s Due Process Clause as interpreted by the Supreme Court because the statute automatically awards a penalty without individualized consideration of whether or not the penalty is appropriate. As evidenced in the analysis below, the Supreme Court case law provides support for finding the statute unconstitutional, both on its face and on an as-applied basis.

In TCCWNA class actions, plaintiffs generally do not allege that defendants have committed any wrongful or intentional conduct. Instead, plaintiffs rely on an alleged technical violation of some state or federal law. In the context of a class action, a TCCWNA punitive damages award can be extremely harsh and bear little to no connection to the defendant’s conduct. Under the Supreme Court case law, a punitive damages award comports with due process requirements only if it is related to the reprehensibility of the defendant’s conduct, proportional to the actual harm suffered by the consumer, and in line with other penalties imposed for comparable conduct. The mandatory statutory penalty provision of TCCWNA presents a constitutional issue given the punitive nature of the statutory damages imposed by the inflexible calculus that the statute creates, which forecloses the ability of courts and juries to weigh the factors that should be considered.

Applying the *Gore* factors, which were outlined in detail in part one, a plaintiff bringing a TCCWNA claim for statutory damages typically alleges no reprehensibility on the part of defendants, as no such reprehensibility is required under the statute. Thus, there is no consideration of the defendant’s intent to mislead or engage in any intentional conduct. Contrary to *Gore* and *Campbell*, this imposes an award that is punitive in nature without regard to whether the defendant’s conduct was knowing or intentional or whether the damages are proportional to the harm alleged.

Second, a statutory penalty, as opposed to actual damages, clearly exceeds a single-digit ratio between punitive and compensatory damages when a penalty arises from a violation with no actual damages. *See Campbell*, 538 U.S. at 410. Arguably, the second guidepost cannot even be applied as the Supreme Court directed because there are *no compensatory damages* to which a punitive award can be compared. *Gore* and *Campbell* direct courts to determine proportionality based on a comparison of punitive and compensatory damages, which is impossible under TCCWNA. This second guidepost is critical for due process analysis because it prevents punishing arbitrarily by ensuring that a penalty “be reasonably predicable in its severity” and bear a “reasonable relationship” to compensatory damages. *Gore*, 517 U.S. at 580; *see also Campbell*, 538 U.S. at 426 (“courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the

plaintiff and to the general damages recovered”). Plaintiffs in TCCWNA cases virtually never have *any* actual damages, and any attempt to measure damages by some manufactured concept of “harm” not quantified in an actual compensatory award contradicts the Supreme Court’s findings on the constitutionality of these types of awards.

Finally, civil penalties in comparable cases where TCCWNA is unavailable would be extremely low, as compared to the potentially enormous class penalty available under TCCWNA. *See Campbell*, 408 U.S. at 428. The New Jersey Consumer Fraud Act (CFA), for example, does not contain a statutory penalty option, and instead requires ascertainable loss for recovery. N.J.S.A. 56:8-1 et seq. Thus, if a plaintiff asserted the same claims under the CFA that he did under TCCWNA in a case with no actual harm alleged, there would be no basis for recovery. Thus, this third factor of *Gore* also fails in the context of these TCCWNA claims.

Based on the foregoing, a TCCWNA award in the absence of concrete damages and intentional conduct is inconsistent with due process guarantees due to the automatic nature of the award without any consideration of the factors outlined by the court in *Gore* and *Campbell*. The vague standards for awarding TCCWNA statutory penalties also results in disparate outcomes among similar defendants accused of similar conduct. Moreover, such awards may also be inconsistent with equal protection guarantees, as outlined in the next section.

### **Equal Protection Attack**

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated equally. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). TCCWNA does not affect a fundamental right or a suspect or quasi-suspect class, so the standard for analysis would be whether TCCWNA is rationally related to a legitimate government purpose. *See Romer v. Evans*, 517 U.S. 620, 621 (1996).

The equal protection issue arises because TCCWNA subjects similarly situated individuals to dissimilar treatment based upon the claim asserted. Thus, defendants alleged to have committed consumer fraud would be treated differently under TCCWNA, the CFA and common law fraud. For example, under the CFA, if a claim is based on omissions of fact, a showing of intent is required, which is not the case for TCCWNA. A claim for common law fraud requires knowledge or belief of the falsity of a material misrepresentation of a presently existing or past fact, with an intention that the other person rely on it, resulting in damages because the other person does reasonably rely on it. *See Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997). Thus, common law fraud—and in certain cases the CFA—requires intent, in contrast to TCCWNA.

Therefore, whether the claim is brought under TCCWNA, the CFA or common law fraud determines the treatment of a defendant, which is not rationally related to any legitimate purpose. Defendants who did not intend to commit fraud can be treated in the same manner as those who did intend to do so under TCCWNA, and the statute awards punitive damages in a manner that is arbitrary and irrational under the Equal Protection Clause.

### **Other Constitutional Issues**

Even if it could be argued that a constitutionally valid standard under the Fourteenth Amendment governing the imposition of punitive damages exists, the statute should be void for vagueness. There are no realistic limits imposed on the amount of punitive damages which may be awarded and no required relationship between the actual damages sustained and the amount of punitive damages that may be awarded. Thus, there is a potential argument that TCCWNA should be void for vagueness under the Due Process Clause as well. The “void for vagueness” doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *Federal Communications Commission v. Fox Television Stations*, 132 S. Ct. 2307 (2012). TCCWNA provides no real guidelines and certainly does not tell defendants what is required of them to the extent they would need to avoid violating TCCWNA.

Beyond the issues detailed above, the application of these statutory penalties can create further constitutional problems. The purpose of punitive damages is punishment and deterrence, and there are not adequate procedural safeguards in place to protect defendants who are sued for mere technical violations of TCCWNA against self-incrimination or to protect the

rights of defendants to proof beyond a reasonable doubt. Further, the threat of an award of unlimited punitive damages chills a defendant's ability to exercise his right to access to the courts, in violation of the constitution. This demonstrates the extensiveness of the potential constitutional problems that TCCWNA poses, which extends even beyond the arguments made here.

In sum, the punitive penalties available in TCCWNA class actions call into question the statute's constitutionality on numerous fronts. The Due Process Clause, Equal Protection Clause and various other constitutional challenges must be considered to prevent the unfettered use of this statute to achieve unconstitutional results. As will be explained in the final part of this series, there is precedent for limiting the use of statutory penalties in an inappropriate manner, and the Telephone Consumer Protection Act could operate as a model for application of appropriate limits in the context of TCCWNA class actions.

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## Analogy of TCCWNA to the Telephone Consumer Protection Act

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This final part of the three-part article series exploring the constitutionality of the New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA) provides a framework for consideration of these constitutional challenges to help achieve appropriate results in TCCWNA cases moving forward. Part One of this series explored the basics of the statute, and the Supreme Court precedent analyzing the constitutional limits on punitive damages, which is appropriate in the TCCWNA context given the punitive nature of the statutory penalties in the absence of injury, reliance or intent. Part Two then analyzed the constitutional challenges, namely under the Fourteenth Amendment's Due Process and Equal Protection Clauses, due to the ability to obtain the statutory penalty award without any harm or individualized consideration of the appropriateness of the penalty.

This third and final installment will analyze recent challenges under the Telephone Consumer Protection Act (TCPA), which provides a framework for analysis of TCCWNA challenges. The similarity between the statutes demonstrates the precedent for application of these challenges in a similar context, and the necessity of bringing these constitutional issues to the forefront. As this series has made clear, the unfettered use of TCCWNA by class action plaintiffs has the capability of achieving absurd results that were clearly not intended by the legislature. The constitutional challenges to TCCWNA, mirror those raised in TCPA litigation, and would help insure that the statute is applied fairly and in keeping with core constitutional principles.

In an analysis drawing upon similar issues to those discussed in this article, California federal courts have questioned whether aggregating minimum statutory fines on a class level is permissible under California Penal Code Section 632. The court in *Cohorst v. BRE Properties*, 3:10-CV-2666-JM-BGS (S.D. Cal., Nov. 14, 2011); 10-CV-2666 JM-BGS (S.D. Cal. Jan. 18, 2012), held that the \$5,000 penalty per call was unconstitutionally excessive and disproportionate under both the federal and state constitutions. The court in *Hannabury v. Hilton Grand Vacation Co.*, No. 14-cv-6126 (W.D.N.Y. Mar. 25, 2016), found TCPA damages to be "disproportion-al" to actual damages, suggesting that a constitutional argument in the context of TCPA statutory penalties on a class-wide basis could have some weight.

Given the similarity between TCPA and TCCWNA, TCCWNA statutory penalties in the absence of any consideration of harm, excessiveness or intent should likewise be considered disproportionate and unconstitutional if properly challenged. The foundation of a due process challenge in this context is that a statute violates the Due Process Clause because it awards a penalty automatically, without individually considering whether the penalty is appropriate. Such is the case in the context of a TCCWNA violation, especially given the fact that no misleading conduct or knowledge by the seller is required.

Under TCCWNA, if there is a violation of any clearly established legal right—even in the absence of any injury or harm whatsoever—there is a statutory penalty available. The disparity between the harm suffered (none) and the damage award (\$100 per violation per class member) is high, and the degree of reprehensibility can be none at all since the seller need not be reprehensible in any way. *See Gore*, 517 U.S. at 560. Thus, a single-

ratio would be exceeded in cases without any actual injury—in fact, in the absence of actual damages there is no way the court can apply a ratio at all. *See Campbell*, 538 U.S. at 410. In most TCCWNA class actions there has been no injury whatsoever, and the only claim is based on a technical violation of the statute. Awards on this basis, where there is no harm, injury, intent or reliance violates Supreme Court precedent and constitutes an unconstitutional award of punitive damages.

In sum, the use of TCCWNA to obtain statutory penalties in the absence of any harm or intentional conduct is unconstitutional and not the intended purpose of the statute. TCCWNA permits the statutory recovery of penalties without any individualized consideration of harm or intent, nor any analysis of proportionality. As part one explored, there are important Supreme Court cases that have established constitutional limits on punitive damages that must be followed in this context. Part two demonstrated that TCCWNA class actions fail to meet the constitutional requirements, and discussed challenges to the statute based on the Fourteenth Amendment and other constitutional requirements. Lastly, this third part analogized TCCWNA and the TCPA to illuminate the similarities between the two statutes and suggest that TCCWNA is unconstitutional.

This three-part series merely touches upon the multitude of potential bases for finding TCCWNA unconstitutional due to the imposition of punitive measures without regard to intent or proportionality. If plaintiffs are permitted to misuse the statute to attain punitive statutory fines without any harm whatsoever and even for a wholly innocent mistake, the constitutional rights of defendants will be encumbered, and the courts will be burdened with meritless claims with absolutely no harm or injury even asserted, let alone proven. This is clearly not what the legislature intended in passing TCCWNA, and the unfettered use of the statute in class action likely fails to pass constitutional muster. This series has explored many of the constitutional challenges that arise in the context of this nearly limitless statute, which must be addressed to prevent the inappropriate use of this statute to achieve unfair, improper, and unconstitutional results.

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