

Omitted Drink Prices Flouted Consumer Law, NJ Justices Told

By Jeannie O'Sullivan

Law360, New York (April 4, 2017, 9:15 PM EDT) -- Restaurant patrons who allege TGI Friday's and Carrabba's Italian Grill violated state consumer protection laws by omitting drink prices from their menus made a case for class certification during oral arguments before the New Jersey Supreme Court on Tuesday, reasoning that all of the allegedly affected customers incurred the same harm by overpaying for their libations.

The high court's review comes in response to separate rulings handed down in March by the state's Appellate Division, one overturning class certification granted to plaintiffs in the TGI Friday's Inc.'s case, and another, rejecting Carrabba's Italian Grill operator OSI Restaurant Partners LLC's appeal of the class certification granted to plaintiffs in their case.

Both cases contend that withholding of beverage pricing ran afoul of the New Jersey's Consumer Fraud Act and Truth-in-Consumer Contract, Warranty and Notice Act, known as TCCWNA. In addition to withholding the prices, TGI Friday's is also accused of charging different pricing in different dining areas of the restaurants.

The ascertainable loss, a requirement of class certification, incurred by the patrons was the difference between the fair market, or "good faith" price of the drinks, and the price they were charged, or the "bad faith" price, said attorney Sander D. Friedman of the Law Office of Sander D. Friedman LLC, who represents the plaintiffs in both suits.

"If you have knowledge that buying a mojito is \$9 and buying a margarita is \$8, you can now make an informed decision," Friedman told the justices sitting in Trenton. "All we have to find out is, what was the good faith price of that mojito?"

In the TGI Friday's case, the appellate panel reversed a trial court decision granting certification after finding there were too many individual issues to allow the case to proceed as a class action. Friedman implored the justices to look to the court's 2007 decision in *Iliadis v. Walmart*, in which employees won class certification in a lawsuit alleging the company altered time cards and deprived employees of breaks. The instant case has "all the same factors" that led the court to uphold certification in *Iliadis*, Friedman said.

In OSI's case, the company wants the Supreme Court to remand the case to the Appellate Division for a decision consistent with the appellate ruling in the TGI Friday's lawsuit.

Ernest Bozzi, the lead plaintiff in the suit against OSI, was “cheated by a cheater,” said his attorney, Donald M. Doherty Jr.

“There was no reason to not put a price on a menu,” Doherty told the justices, calling the omission of the prices “insidious.”

As for ascertaining the class, Friedman said the TGI Friday’s rewards program records can provide the names of proposed class members. Doherty said he has receipts reflecting different prices charged at different times.

The TGI Friday’s alleged “price gouging” scheme evolved from market research in which the restaurant placed priced menus in some restaurants and nonpriced menus in others, and discovered that customers pay an average of \$1.72 less for their bill when the prices are listed, according to Friedman.

“We never would have uncovered the scheme if this were an individual case about a couple of hundred dollars,” Friedman said, adding that class certification is necessary for the “safe harbor” of the consumers.

The vulnerability of the customers was underscored by attorney David McMillan of Legal Services of New Jersey, an amicus supporting the plaintiffs.

“Low-income consumers have a particularized need for both for the [consumer] protections available and the class action mechanism to fulfill its historical mission” to protect them, McMillin said.

The consumers also drew amicus support from the Seton Hall Law School Center for Social Justice and the New Jersey Association For Justice.

Seton Hall professor Jonathan Romberg noted that when consumers don’t have the information of the price on the menu, “they act differently.”

New Jersey Association for Justice’s lawyer, Michael A. Galpern of the Locks Law Firm, said that the Appellate Division’s decision overturning class certification in the TGI Friday’s case gave very little deference to the trial court under the abuse of discretion standard and didn’t address the responsibility of the seller.

“The plaintiffs have no remedy and the defendant has an enormous windfall based on illegal conduct,” Galpern said.

But Stephen M. Orlofsky of Blank Rome LLP, representing the restaurants, maintains the plaintiffs don’t meet the criteria of class certification under Rule 23 of the Federal Rules of Civil Procedure.

The fact that Bozzi continues to patronize OSI Restaurants impacts his credibility and the sincerity of the claim, according to Orlofsky. Addressing Dugan, Orlofsky noted she provided contradictory certifications and testimony — a contention Friedman disputed — and said she testified that she never reviewed the menu at the bar and didn’t read the drink portion of the menu at the table, so therefore had no expectation of the prices.

“Plaintiffs must prove the omission of the price of the menu to establish causation,” Orlofsky said.

The legislative intent of TCCNWA itself came under fire during the arguments. The statute has been criticized by defense attorneys for its low burden of proof for plaintiffs, who needn't show damages or that a business intended to violate the statute.

"There's a real dispute as to the plaintiffs bar and defense bar as to what 'aggrieved' means," said McCarter & English LLP Partner David R. Kott, representing the amicus New Jersey Business & Industry Association in support of the restaurants.

There would be "nothing fair" about the certification of this class, in which the plaintiffs are "only suing for the statutory penalty" of \$100, Kott said. He contends that TCCWNA suits harm both small business owners and large corporations alike.

Seeming swayed by Kott's argument, Justice Barry T. Albin said, "It doesn't seem the legislature considered the vastly different circumstances that could arise under this statute."

Justice Anne M. Patterson also questioned the law, asking at one point whether every single person who entered a restaurant where drink menus with no prices were displayed should receive \$100. She also asked if someone who didn't care about the drink prices would be a member of the affected class.

Friedman answered that a consumer is a victim whenever he or she is met with activities that violate consumer laws.

"If I was walking down the street and I got punched in the face and I kind of liked it, it's still an assault," he said.

The plaintiffs in the TGI Friday's case are represented by Sander D. Friedman and Wesley Hanna of the Law Office of Sander D. Friedman LLC.

TGI Friday's is represented by Stephen M. Orlofsky and David C. Kistler of Blank Rome LLP, and Jeffrey L. O'Hara and Matthew S. Schultz of LeClairRyan.

The plaintiffs in the OSI case are represented by Sander D. Friedman of the Law Office of Sander D. Friedman LLC and Donald M. Doherty Jr.

OSI Restaurant Partners, LLC is represented by Norman W. Briggs and Adrienne Chapman of the Briggs Law Office LLC and Stephen M. Orlofsky, David C. Kistler and Michael A. Iannucci of Blank Rome LLP.

The cases are Debra Dugan et al. v. TGI Friday's Inc. et al., case number 077567, and Ernest Bozzi v. OSI Restaurant Partners, LLC, case number 077556, both in the New Jersey Supreme Court.

--Additional reporting by Bill Wichert. Editing by Pamela Wilkinson.