

To: New Jersey Law Revision Commission
From: Mark J. Leszczyszak and Chelsea Perdue
Re: The Truth-in-Consumer Contract, Warranty and Notice Act and Online Certificates/Coupons
Date: October 6, 2014

MEMORANDUM

This potential project arises from the U.S. Court of Appeals for the Third Circuit's submission of legal questions for certification to the New Jersey Supreme Court, stemming from the 2013 opinion in *Shelton v. Restaurant.com*.¹ In *Shelton*, the Supreme Court of New Jersey addressed several issues of legislative interpretation concerning the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA").² The decision interpreted the statute, holding that the TCCWNA applied to both tangible and intangible property, and that coupons purchased online fell within the scope of the Act.³

The facts giving rise to *Shelton v. Restaurant.com* began with a class of plaintiffs buying restaurant coupons from a website, Restaurant.com.⁴ That website acted as a means for consumers to purchase coupons for use at local restaurants.⁵ Once the consumer paid for the coupon, the website provided customers with a link whereby to print it out.⁶ Each restaurant could impose customized limitations on the use of coupons, such as restricting use of the coupon to weekdays or food items only.⁷ Every member of the class of plaintiffs certified in *Shelton* had one of the following conditions imposed on their coupons: (1) an expiration date of less than twenty-four months from the date of purchase, (2) a provision that a specific clause is void where prohibited by law without any specific reference to New Jersey law, or (3) a clause that the coupon is void where prohibited by law without any specific reference to New Jersey law.⁸

The TCCWNA was enacted in 1981, before the prevalence of online coupon purchases, for the purpose of "prevent[ing] deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts."⁹ The TCCWNA provides:

No seller ... shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or

¹ *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 423 (2013).

² *Ibid.*

³ *Id.* at 424.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Id.* at 425.

⁹ *Id.* at 427–28 (citing *Kent Motor Cars, Inc. v. Reynolds & Reynolds Co.*, 207 N.J. 428, 457 (2011)).

display any written consumer warranty, notice or sign ... 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.¹⁰

In addition, all provisions requiring a consumer to waive their rights under the Act are void, and the contract must clearly provide which provisions are void in New Jersey.¹¹ Damages provided by the TCCWNA include reasonable attorney's fees and court costs, and either a civil penalty of not less than one hundred dollars, actual damages, or both, at the consumer's election.¹²

The District Court for the District of New Jersey ruled in favor of the defendant, holding the coupons procured online did not fall within the scope of the TCCWNA.¹³ Plaintiffs appealed the decision to the United States Court of Appeals for the Third Circuit in 2011.¹⁴ After the filing of the appeal, the Third Circuit certified two questions for disposition to the New Jersey Supreme Court: (1) "Does the TCCWNA apply to both tangible and intangible property, or is its scope limited to only tangible property?" (2) "Does the purchase of a gift certificate, which is issued by a third-party internet vendor and is contingent ... qualify as a transaction for 'property ... which is primarily for personal, family or household purposes' so as to come within the definition of a 'consumer contract' under section 15 of the TCCWNA?"¹⁵

The Court addressed three different issues. First, it analyzed whether the coupons constitute "property" under the TCCWNA.¹⁶ Next, it considered whether, if they were "property," the coupons were "primarily, for personal, family or household purposes."¹⁷ Finally, the question of whether the sale of coupons by the website is a "written consumer contract" within the meaning of the statute was addressed.¹⁸

The New Jersey Supreme Court determined that the TCCWNA applies to both tangible and intangible property, and that online coupons constitute consumer contracts within the meaning of the statute.¹⁹

¹⁰ *N.J.S.* 56:12-15 (1981).

¹¹ *N.J.S.* 56:12-16.

¹² *N.J.S.* 56:12-17.

¹³ *Shelton v. Restaurant.com Inc.*, No. 10-0824 (JAP), 2010 WL 2384923 (D.N.J. June 15, 2010) *aff'd in part and vacated in part*, 543 F. App'x 168 (3d Cir. 2013).

¹⁴ *Shelton v. Restaurant.com, Inc.*, No. 10-2980, 2011 WL 10844972 (3d Cir. May 17, 2011) *certified question answered*, 214 N.J. 419, 70 A.3d 544 (2013).

¹⁵ *Id.* at 4.

¹⁶ *N.J.S.* 56:12-14 to -18.

¹⁷ *N.J.S.* 56:12-15.

¹⁸ *N.J.S.* 56:12-15 (1981).

¹⁹ *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 424 (2013).

As to the first issue, the Court held that coupons procured online constitute “property” within the meaning of the TCCWNA.²⁰ Although the TCCWNA does not define “property,” a different statute containing generally applicable definitions, *N.J.S.* 1:1-2, defines the term as including both real and personal property, and defines “personal property” as including both tangible and intangible items.²¹ The Court reasoned that since the TCCWNA does not explicitly exclude intangible property or personal property from its scope, the Legislature intended to include all forms of “property” as contemplated by *N.J.S.* 1:1-2.²² Therefore, the definition of “property” within the TCCWNA is granted a “broad interpretation” because of its remedial, not punitive, purpose.²³ The Court explained that, when read *in pari materia* with the New Jersey Consumer Fraud Act and the New Jersey Gift Certificate Statute, the Court is led to the “inexorable conclusion” that the TCCWNA encompasses tangible and intangible property.²⁴ The Court then proceeded with an analysis of the legislative history of the TCCWNA, concluding inclusion of personal, and therefore intangible, property was not repugnant to the purpose of the Act.²⁵

The Court also held that the coupons satisfy the requirements of *N.J.S.* 56:12-15 in qualifying as “property ... which is primarily for personal, family or household purposes.”²⁶ Though Restaurant.com argued that the sale of the coupons did not fall within the scope of the TCCWNA because they were “no more than an intangible, inchoate, and contingent right to a discount from another,” the Court reasoned that the “very nature” of the coupons satisfied the criteria.²⁷ It considered the nature of dining out and concluded that it was one of life’s “quintessential personal, family, or household pursuits.”²⁸ Therefore, the plaintiffs’ claims fell within the scope of the TCCWNA.²⁹

Finally, the Court sifted through the legislative history of the TCCWNA and held that the coupons issued by Restaurant.com were “written consumer contract[s]” within the meaning of the Act.³⁰ Though the TCCWNA does not expressly define “consumer contract,” the Court relied on the Plain Language Act definition: “[A] written agreement in which an individual ... [p]urchases real or personal property ... for cash or on credit and the ... property ... [is] obtained for personal, family or household purposes.”³¹ There is no “express directive” in the TCCWNA not to incorporate any provisions of the Plain Language Act, so the Court also read these

²⁰ Shelton v. Restaurant.com, Inc., 214 N.J. 419, 430–31 (2013).

²¹ *Id.* at 430.

²² *Id.* at 430–31.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Id.* at 431–34.

²⁶ *Id.* at 436.

²⁷ *Ibid.*

²⁸ *Id.* at 437.

²⁹ *Ibid.* See also Korrow v. Aaron's Inc., CIV.A. 10-6317 MAS, 2013 WL 5811496 (D.N.J. July 31, 2013).

³⁰ *Id.* at 437–38.

³¹ *N.J.S.* 56:12-1 (1980).

provisions *in pari materia*.³² The defendant’s argument that the coupons were not contracts, since they were not in writing, was rejected because of the Uniform Electronic Transactions Act (“UETA”).³³ The UETA provides that a contract cannot be denied legal effect “solely because an electronic record was used in its formation.”³⁴ The Court also rejected the argument that the involvement of a third-party negated a consumer contract relationship.³⁵ As Restaurant.com was not merely a “Good Samaritan” broker between restaurants and consumers, it would be treated as “any other purveyor of goods and services for use by the consumer.”³⁶

In a decision rife with legislative history analysis and statutory construction, the Court held that coupons procured electronically fell within the scope of the TCCWNA, in part because the Legislature enacted the statute “to permit customers to know the full terms and conditions of the offer made to them by a seller.”³⁷ The opinion closes with the following:

The certificates or coupons at issue are the product of commercial ventures enabled by technology that developed after the Legislature adopted the TCCWNA. We do not know whether the Legislature specifically envisioned certificates or coupons like the ones Restaurant.com offers and meant to impose a \$100 penalty per occurrence in such cases. The statute as drafted, however, covers the certificates in question. The Legislature remains free to change the law should it so choose.³⁸

Staff seeks Commission authorization to begin a project addressing the TCCWNA provisions at issue in *Shelton*. This project would seek to clarify the language of the statute in keeping with the guidance provided by the New Jersey Supreme Court and obtain comments in an effort to effectuate the legislative intent identified by the Court.

³² *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 439 (2013).

³³ *Ibid.*

³⁴ *N.J.S. 12A:12-7(b)* (2001).

³⁵ *Shelton*, 214 N.J. at 439.

³⁶ *Id.* at 439–40.

³⁷ *Id.* at 442–43.

³⁸ *Id.* at 443.