

COLUMNS

## Examine your terms and conditions: New Jersey sees a flood of class-action lawsuits

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Marketers, it is important to dust off your company's terms and conditions. This year has seen a sharp spike in consumer lawsuits alleging violations of New Jersey's awkwardly named Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14, et seq. (the "TCCWNA").

The most recently filed lawsuits, many seeking class-action status, highlight potential risks of doing business in New Jersey, particularly business governed by online agreements, such as terms and conditions.

### Circuit breaks

The latest wave of TCCWNA filings seems attributable to a December 2015 Third Circuit decision which allowed a plaintiff to proceed with a lawsuit against an attempt to disclaim attorneys' fees as part of online terms and conditions.

The Third Circuit held that the TCCWNA covered a term that purported to waive a prevailing party's right to collect attorneys' fees.

In the wake of that ruling, plaintiffs are now suing over a myriad of provisions in online terms and conditions that, in their view, violate some provision of New Jersey or federal law.

Likely further fueling the wave of TCCWNA litigation is that under this statute, a plaintiff need not allege any injury or ascertainable loss to survive a motion to dismiss, as is required under New Jersey's Consumer Fraud Act and other consumer protection statutes.

Although a similar issue is presently pending before the United States Supreme Court, TCCWNA plaintiffs argue that since no actual damages are required, a TCCWNA plaintiff need only allege that he or she was provided with (or possibly even shown) a warranty, contract or notice pertaining to personal, family or household merchandise which includes language that violates a "clearly defined" right under New Jersey or federal law.

The TCCWNA's generous remedy also makes it attractive to plaintiffs, providing for a civil penalty of up to \$100 per violation, actual damages, or both at the consumer's election, in addition to reasonable attorneys' fees and court costs. N.J.S.A. 56:12-17. A consumer also has the right to petition a court to terminate any contract which violates the provisions of N.J.S.A. 56:12-15.

Thus, the TCCWNA provides a remedy that is very expansive in a class action and a broader release from the entirety of the applicable contract, not just the offending contract provision.

Coming to terms

Online terms and conditions are generally drafted to apply across state and even national lines, thus subjecting consumers to a variety of different laws.

Generally, the enforceability of these terms is addressed by the drafter through the use of a severability clause providing that if a provision is not enforceable in a particular jurisdiction, it will be enforced to the maximum extent permitted by law or severed from the agreement without affecting the remainder of the contract.

However, traditional severability clauses were ruled ineffective under the TCCWNA.

IN LIGHT OF this new and rapidly developing class-action trend in New Jersey, and New Jersey's avowed hospitality towards consumer protection lawsuits, businesses should carefully review their existing terms and conditions with the specific goal of compliance with New Jersey law.

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