

## Publications

### *Client Alert: Online Retailers Beware in New Jersey: New Lawsuits under the New Jersey Truth-In-Consumer Contract, Warranty and Notice Act Target Online Businesses*

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In the ever-expanding world of e-commerce, businesses often create terms, conditions, notices, policies, or other disclaimers on their websites that apply to consumers across the country. Due to the interstate nature of e-commerce, businesses typically seek to protect themselves from the nuanced differences in state law by including limitations on liability and “void where prohibited” language in these provisions. Retailers beware, however, as a recent trend in class action lawsuits arising out of a unique New Jersey law are attempting to use the very language intended to protect online businesses as the basis for claims under New Jersey’s Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA).

The TCCWNA generally provides that sellers may not offer to any consumer or prospective consumer any written contract, or give or display any written notice or sign, that violates “any clearly established legal right of a consumer or responsibility of a seller[.]”<sup>[i]</sup> Capitalizing on this language, several lawsuits recently filed in New Jersey federal court have sought to expand liability under the statute to notices, disclaimers, and/or terms of use listed on sellers’ websites that allegedly fail to state how such terms or notices affect New Jersey residents where the language may conflict with New Jersey law.<sup>[ii]</sup> Accordingly, online businesses and retailers should be aware of TCCWNA’s provisions—and review their own notices or terms of use carefully—to avoid potential claims.

#### TCCWNA Provisions

Although these recent cases represent the newest permutation of TCCWNA claims, the statute itself is hardly new. The general purpose of the TCCWNA, which went into effect on October 16, 1980, is “to prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts.”<sup>[iii]</sup> However, the language of the TCCWNA is not limited to consumer contracts—it also applies to any written consumer warranty, notice, or sign.

The TCCWNA provides, in relevant part:

*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 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 . . . as established by State or Federal law at the time the offer is made . . . or the . . . notice or sign is given or displayed.<sup>[iv]</sup>*

Further, sellers may not avoid liability under the act through general “catch all” disclaimers in any contract, notice, or sign. Rather, sellers wishing to avoid liability under the act must state with specificity which statements are void, unenforceable, or inapplicable within the State of New Jersey:

*. . . No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey; provided, however, that this shall not apply to warranties.<sup>[v]</sup>*

Any person who violates the statute shall be liable to an aggrieved consumer for not less than \$100, actual damages, or both at the consumer’s election, in addition to reasonable attorneys’ fees and costs.<sup>[vi]</sup> Notably, plaintiffs have argued, and some courts have agreed, that the statute does not require plaintiffs to show actual, ascertainable loss or damages.

Federal and New Jersey courts have applied the statute broadly, and have held that language in a contract or notice that attempts to limit a party’s liability or waive a clearly established legal right in contravention of New Jersey law may subject a party to liability under the TCCWNA, including, without limitation, clauses relating to:

- Attorneys’ fees;<sup>[vii]</sup>
- Limitations of liability or other exculpatory provisions;<sup>[viii]</sup>
- Indemnification provisions;<sup>[ix]</sup> and
- Severability.<sup>[x]</sup>

Notably, in 2013, the New Jersey Supreme Court held that the statute can apply to “terms and conditions” found on commercial websites in connection with the purchase of merchandise or gift certificates.<sup>[xi]</sup>

## What Can Retailers and Online Businesses Do?

Any business engaging in e-commerce that sells to New Jersey residents should carefully review any terms, conditions, notices, policies, or other disclaimers on their website, with the assistance of counsel, to ensure that such notices do not violate TCCWNA or, at minimum, includes specific language identifying those provisions that do not apply to New Jersey customers.

If you have any questions about the TCCWNA, please contact: John L. Landolfi (614.464.8390), Christopher C. Wager (614.464.6417), or Steven A. Chang (614.464.6384).

[i] N.J.S.A. 56:12-15.

[ii] See e.g., *Darla Braden v. TTI Floor North Am. Inc. d/b/a Hoover*, No. 3:16-cv-00743 (D.N.J. Feb. 10, 2016); *Russell v. Croscill Home LLC*, No. 16-cv-01190 (D.N.J. Mar. 2, 2016); *Hecht v. The Hertz Corporation*, No. 2:2016-cv-01485 (D.N.J. Mar. 16, 2016).

[iii] *Kent Motor Cars, Inc. v. Reynolds & Reynolds Co.*, 207 N.J. 428, 457, 25 A.3d 1027 (2011).

[iv] N.J.S.A. 56:12-15.

[v] N.J.S.A. 56:12-16. See also *Kendall v. CubeSmart, L.P.*, No. 15-6098, 2016 U.S. Dist. LEXIS 53668 (D.N.J. Apr. 21, 2016) (“In other words, a contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract or notice may be void, inapplicable, or unenforceable in some states.”) (citation omitted).

[vi] N.J.S.A. 56:12-17.

[vii] *Johnson v. Wynn’s Extended Care, Inc.*, No. 15-1343, 2015 U.S. App. LEXIS 21682 (3d Cir. Dec. 15, 2015).

[viii] See, e.g., *Martinez-Santiago v. Public Storage*, 38 F. Supp. 3d 500, 511 (D.N.J. 2014).

[ix] *Id.* (where the indemnification provision could be construed as permitting a party to indemnify against losses resulting from his/her own negligence)

[x] *Id.* (only to the extent that a severability clause fails to list the specific provisions of a contract or notice that are unenforceable under New Jersey law).

[xi] *Shelton v. Restaurant.com, Inc.*, 214 N.J. 418, 443 (N.J. 2013) (holding that certificates purchased on Restaurant.com “can be considered ‘consumer contracts’ and the standard terms provided on the certificates can be considered ‘notices’ subject to TCCWNA”).