



June 2016

Website Terms of Use Spawn Wave of Lawsuits Against Online Retailers Under New Jersey's Truth-in-Consumer Contract Warranty and Notice Act

Although New Jersey's Truth-in-Consumer Contract Warranty and Notice Act (TCCWNA) was enacted over 30 years ago, there has been a dramatic spike in the statute's popularity amongst plaintiff's attorneys in recent months – leading to dozens of lawsuits, class actions, and threats of lawsuits against online retailers of every ilk.

TCCWNA is a broad consumer protection statute that prohibits retailers from entering into written consumer contracts and/or giving or displaying written consumer notices, warranties, or signs that include any provisions “that violate any clearly established legal right of a consumer.” Recent claims have focused on “limitation of liability” and “indemnification” provisions contained in retailers' website Terms of Use. While these provisions may not necessarily violate a “clearly established legal right,” some New Jersey courts have found TCCWNA liability based on such provisions in certain circumstances. For example, New Jersey courts have held that provisions in consumer contracts for the rental and use of personal storage facilities could not disclaim liability for personal injuries or damage to personal property as a result of the well-established duty, under New Jersey law, to maintain a safe business premises for invitees. This rationale has not yet been extended to online retailers' Terms of Use, however.

Importantly, because TCCWNA provides for statutory damages in the amount of \$100 per violation, online retailers – particularly those with thousands of New Jersey customers – are facing significant potential class action exposure. The good news for online retailers is that TCCWNA is a unique New Jersey statute, so potential liability should be limited to only New Jersey consumers – but that may be little consolation for companies with large internet sales that are blindsided with multimillion dollar claims for multiple violations on behalf of large classes of New Jersey consumers.

Some online retailers are taking a stand and defending against the TCCWNA claims arguing, among other things, that (i) their “limitation of liability” and “indemnification” clauses do not violate a “clearly established legal right,” and (ii) claimants who suffered no injury lack standing to pursue their claims. Because the lawsuits are so recent, the courts will take some time to weigh in on these defenses. In the meantime, while the law applying TCCWNA to online Terms of Use is

developing, all companies with an online presence should consult with counsel to proactively evaluate their website Terms of Use in order to avoid New Jersey TCCWNA violations to the extent possible and minimize the risk of class action suits.

Greenberg Traurig's New Jersey Class Actions Group has experience in evaluating online Terms of Use for TCCWNA compliance, counseling companies on threatened claims, litigating TCCWNA issues, and successfully facilitating multiple settlements of threatened class actions at an early stage.

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