THE NEW JERSEY TRUTH-IN-CONSUMER CONTRACT WARRANTY AND NOTICE ACT: WHAT YOU NEED TO KNOW ABOUT "TCCWNA" AND THE RISE IN CONSUMER CLASS ACTIONS

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Product Liability Alert

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Businesses with consumer products should be aware of the rise in class action filings based on the New Jersey Truth-In-Consumer Contract Warranty and Notice Act ("TCCWNA"). Although the statute has been in place since 1981, it was relatively dormant for decades and only recently became a favorite of plaintiffs' attorneys. In the past five months, more than a dozen putative class actions have been filed based on alleged TCCWNA violations in the District of New Jersey alone.[1] This alert provides an overview of key points of which businesses should be aware.

WHAT IS TCCWNA?

TCCWNA was enacted to address a perceived trend in consumer contracts, warranties, notices, and signs to include "provisions which clearly violate the rights of consumers."[2] The Legislature posited that even though such provisions were unenforceable, they "deceive[d] a consumer into thinking that they are enforceable," resulting in consumers failing to enforce their rights.[3] In an attempt to put an end to this practice, TCCWNA established liability when a contract or other writing by a "seller, lessor, creditor, lender or bailee" violates a consumer's already-established legal right:

> No seller, lessor, creditor, lender or bailee 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 after the effective date of this act 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.[4]

The key feature of TCCWNA that seems to be most attractive to class action plaintiffs' attorneys is the ability to recover damages of $100 per violation *without the need to establish actual injury*, as well as the ability to recover actual damages, attorneys' fees, and costs.[5]

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TCCWNA does not establish any new rights or responsibilities but instead "bolsters rights and responsibilities established by other laws."[6] Stated differently, a defendant will only be liable under TCCWNA if it is violating some other established right such as, for example, the New Jersey Consumer Fraud Act.

Whether a particular provision violates TCCWNA will depend on the language of the specific provision and whether the plaintiff can establish that the provision violates his or her already-established rights. The following are examples of the types of provisions that, at the very least, state a claim for violation of TCCWNA, allowing a plaintiff to survive a motion to dismiss:

- Provision in automobile service contract waiving the consumer's right to attorneys' fees and requiring the consumer to split the costs of litigation.[7]
- Provision in rental agreement for storage space releasing the storage company from liability "for any personal injuries or property damage sustained by Customer and/or Customer's guests while on" the company's property and requiring the customer to indemnify the company for "any and all manner of claims for damages or lost property or personal injury."[8]
- Statement in telephone sales pitches by independent energy supply companies that their rates "would be 'competitively priced' . . . 'every month'" because statement was actionable under the Consumer Fraud Act based on allegations that companies knew statement was false.[9]

However, courts are also willing to dispose of TCCWNA claims at the motion to dismiss stage, where the allegedly objectionable provisions do not actually violate any established legal right. For example, courts have found that the following provisions do not violate TCCWNA, based on the plaintiffs' failure to establish that the terms violate an established right:

- In contract with fitness center, provision that "[i]n no event shall [fitness center] be liable for any special, incidental or consequential damages."[10]
- In agreement relating to purchase of security system, limitation of liability provision that limited the seller's liability to $1,000 or twelve times the monthly service fee for any harm or damage caused by the seller under any legal theory.[11]

CATCH-ALL INVALIDITY PROVISIONS

In addition to prohibiting invalid and unenforceable provisions, TCCWNA also prohibits the use of catch-all invalidity provisions, which state generally that some provisions of the contract, notice, or sign may be void, inapplicable, or unenforceable:

> 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.[12]

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This means that a consumer contract, notice, or sign that has a catch-all provision stating — "expressly or implicitly" — that its provisions may be void, unenforceable, or inapplicable must "clearly identify which provisions are void, inapplicable, or unenforceable in New Jersey."[13] An important caveat is that this provision applies only if the contract, notice, or sign *is being used in multiple jurisdictions*.[14] If the contract, notice, or sign is used only in New Jersey, then this provision of TCCWNA does not apply.[15]

Courts also distinguish between blanket invalidity provisions, which violate TCCWNA when used in multiple jurisdictions, and savings language that represents an attempt to conform to New Jersey law, which does not violate TCCWNA. The following are examples of savings provisions that courts have found *do not* violate TCCWNA:

- Consumer "releases and holds [fitness center] harmless from all liability . . . to the fullest extent permitted by law."[16]
- Storage company "may sell the Personal Property . . . at public or private sale in the manner permitted by applicable law."[17]
- "To the extent permitted by law, Owner and Occupant each waives its right to trial by jury in any proceeding . . . ."[18]

PLAINTIFFS' CURRENT TARGETS

The current wave of class action filings[19] are targeted at a wide-range of retailers that sell their products to consumers online. Plaintiffs have filed suit against clothing retailers, care rental companies, home goods retailers, cosmetic companies, and toy stores, among others. The complaints focus on terms and conditions that disclaim liability for negligence or for selling unsafe products, limit or disclaim damages, shorten statutes of limitations, and disclaim liability for the failure to prevent third-party criminal conduct, e.g., hackers. The complaints also allege claims for allegedly invalid catch-all provisions.

Plaintiffs' counsel purport to bring the actions on behalf of putative classes consisting of New Jersey consumers. Out-of-state plaintiffs may also try to assert claims for TCCWNA violations. The sole fact that the plaintiff is not a New Jersey resident will likely be insufficient to defeat a TCCWNA claim.[20] However, the court should engage in a choice of law analysis to determine whether New Jersey law or the law of the plaintiff's state of residence applies to the plaintiff's TCCWNA claim, thus potentially limiting TCCWNA's application.[21]

CONCLUSION

This alert touches upon only some of the issues that consumer-facing businesses should be aware of with respect to TCCWNA. Businesses that do business in New Jersey — including any business that sells products online to New Jersey residents — should review the terms and conditions in their agreements and on their websites to limit their potential liability under TCCWNA and avoid being the target of a putative class action.

Notes:

[1] Suits have also been filed in other jurisdictions. In April 2016, a New Jersey resident filed a putative class action complaint in the Northern District of California against Apple asserting only a claim for violation of TCCWNA. *See Silkowski v. Apple Inc.*, 5:16-cv-02338 (N.D. Cal.).

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[2] Sponsors' Statement, *Statement to Assembly Bill No. 1660* (May 1, 1980).

[3] *Id.*

[4] *N.J.S.A.* 56:12–15.

[5] *N.J.S.A.* 56:12–17.

[6] *Kendall v. Cubesmart L.P.*, No. 15-6098-FLW-LHG, 2016 WL 1597245, at *3 (D.N.J. Apr. 21, 2016).

[7] *Johnson v. Wynn's Extended Care, Inc.*, --- Fed. App'x ---, 2015 WL 8781374, at *1 (D.N.J. Dec. 15, 2015).

[8] *Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204, 216–17 (D.N.J. 2015).

[9] *Vitale v. U.S. Gas & Electric, Inc.*, 2016 WL 1060807, at *3–4 (D.N.J. Mar. 16, 2016).

[10] *Sauro v. L.A. Fitness Int'l, LLC*, No. 12-3682(JBS/AMD), 2013 WL 978807, at *5–6 (D.N.J. Feb. 13, 2013). In the fitness center agreement, this language appeared in all capital letters. *See id.* at *2.

[11] *Venditto v. Vivint, Inc.*, No. 14-4357(JLL)(JAD), 2014 WL 5702901, at *9–10 (D.N.J. Nov. 5, 2014).

[12] *N.J.S.A.* 56:12–16.

[13] *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 427 (2013).

[14] *Kendall*, 2016 WL 1597245 at *9.

[15] *Id.*

[16] *Sauro*, 2013 WL 978807, at *9.

[17] *Kendall*, 2016 WL 1597245, at *10.

[18] *Id.*

[19] New Jersey state and federal courts have both granted and denied certification of class actions based on alleged violations of TCCWNA. *See Dugan v. TGI Fridays, Inc.*, 2016 WL 11136486 (Mar. 24, 2016) (denying motion for class certification); *Mladenov v. Wegmans Food Markets, Inc.*, 124 F. Supp. 3d 360 (D.N.J. 2015) (denying motion for class certification); *Martinez-Santiago v. Pub. Storage*, 312 F.R.D. 380 (D.N.J. 2015) (certifying TCCWNA class); *Korrow v. Aaron's Inc.*, 10-6317(MAS)(LHG), 2013 WL 5811496 (D.N.J. July 13, 2013) (certifying TCCWNA class).

[20] *Miller v. Samsung Elecs. Am., Inc.*, No. 14-4076, 2015 WL 3965608, at *3–4 (D.N.J. June 29, 2015) (rejecting defendant's argument that plaintiff did not have standing to assert claim for violation of TCCWNA solely because plaintiff did not reside in New Jersey).

[21] In undertaking such an analysis, the District Court for the District of New Jersey found that Florida law applied to a Florida resident's TCCWNA claim, thereby dismissing the TCCWNA claim because it exists only under New Jersey law. *Id.* at *11–12.

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