



Business Website Terms and Conditions Receiving Increased Scrutiny Under New Jersey's Consumer-Friendly TCCWNA Statute

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Over the last few years, it has not gone unnoticed that plaintiffs' attorneys have begun to file more and more class-action lawsuits against businesses operating in New Jersey, alleging violations of the state's Truth-in-Consumer Contract, Warranty, and Notice Act ("TCCWNA"). Generally speaking, these lawsuits assert violations of TCCWNA due to the inclusion of certain language in consumer contracts, invoices or other notices, which language is alleged to violate some consumer right. What is noteworthy about TCCWNA is that it allows consumers to allege violations of the Act by asserting that a particular provision or clause runs afoul of some entirely separate aspect of New Jersey or federal law, and, therefore, violates TCCWNA's prohibition on contract language that violates a "clearly established legal right" of a consumer. The fact that TCCWNA provides for a statutory penalty of \$100 per violation, or actual damages, or both, plus reasonable attorneys' fees and costs, has made it a particularly attractive vehicle for putative class actions in the recent past.

Although these lawsuits have been met with varying degrees of success in State and federal courts in New Jersey, the plaintiffs' bar continues to seek to capitalize on TCCWNA's facially broad language, as there has been a surge in recent litigation brought under the Act, with more than a dozen putative class-action lawsuits filed in the New Jersey State and federal courts in just the last few weeks alone.

What is new about these more recent lawsuits is that the alleged TCCWNA violation in virtually all of them relates to the inclusion of certain language in the "terms and conditions" found on the defendant company's website. Notably, many of these allegedly offensive "terms and conditions" are standard provisions found on many (if not all) websites – disclaimers of warranties, limitations of remedies, and language relating to the use of material posted on

the company's website.

These lawsuits are typically brought on behalf of a putative class of New Jersey customers that purchased products or services via a company's website and, therefore, were offered or agreed to the "terms and conditions." Thus, these lawsuits should serve as a cautionary tale to not only those businesses with locations in New Jersey, but also any businesses who sell to New Jersey consumers via their websites. Significantly, this could encompass nearly any company doing business on a national scale in the United States, which business includes sales in New Jersey.

A recent report from the New Jersey Civil Justice Institute ("NJCJI") traces the rise in e-commerce-related TCCWNA lawsuits to the New Jersey Supreme Court's decision in the 2013 case of *Shelton v. Restaurant.com*. Since that time, according to the NJCJI, the number of TCCWNA cases targeting the online retailing operations of business has "ballooned."

What the Recent TCCWNA Lawsuits Allege

The recent TCCWNA lawsuits allege a number of common violations – namely, that businesses have incorporated in their websites' "terms and conditions" or "terms of use" certain language that purportedly violate, for example, the New Jersey Punitive Damages Act (by allegedly preventing a customer from seeking to recover punitive damages), the New Jersey Uniform Commercial Code (by allegedly limiting a customer's right to seek certain remedies available thereunder), the New Jersey Consumer Fraud Act (by allegedly failing to protect against the dissemination of customers' personal information), and/or the New Jersey Products Liability Act (by allegedly preventing consumers from asserting certain product liability claims).

According to plaintiffs, these violations, in turn, give rise to a violation of TCCWNA. Notably, much of the contract language that allegedly runs afoul of the aforementioned statutory provisions is boilerplate language that is commonly used by businesses. In addition, the language is often accompanied by a standard carve-out acknowledging that the limitation of the customer's remedy is intended to apply "to the extent permitted by law," or "to the fullest extent permissible under applicable law," to name a few.

Significantly, several of these recent lawsuits have sought to take advantage of TCCWNA's broad scope by asserting claims on behalf of putative classes of New Jersey residents who have purchased goods via the defendant company's website, even where the company itself is not headquartered or located in New Jersey.

What Can Businesses Do To Avoid Getting Entangled in the TCCWNA Web?

There appears to be no end in sight to these recent lawsuits, with numerous cases having been filed in just the last couple of months alone. In addition, the potential targets of such lawsuits are potentially unlimited, as TCCWNA

claims could, in theory, be asserted against any business that sells to customers in New Jersey via an online website. Therefore, any companies doing business in New Jersey – including those who merely generate Internet sales in New Jersey – need to be aware of TCCWNA and how it may impact the standard terms and conditions that companies post on their websites.

Companies should carefully review not only their standard form contracts, delivery invoices, and other notices and materials that they present to consumers, but also their website terms and conditions, with New Jersey law in mind. Specific consideration should be given to any provisions or clauses by which a business seeks to have a consumer waive or limit certain rights, as businesses will want to confirm that any such waiver or limitation is consistent with New Jersey law. Indeed, the recent spate of TCCWNA lawsuits is a good reminder that companies should remain aware of New Jersey's consumer statutes, and consistently take steps to mitigate their exposure to such claims.

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Riker Danzig successfully defended Lumber Liquidators, Inc. against a TCCWNA lawsuit last year, prevailing on a motion to dismiss in the Law Division, Middlesex County, which ruling is presently on appeal at the New Jersey Superior Court, Appellate Division. The Firm also presently represents Nature's Way Products, LLC and Whole Foods in another pending TCCWNA putative class action lawsuit, in which the plaintiffs allege that Nature's Way and Whole Foods made certain misrepresentations to consumers in their labeling, marketing and sale of vitamins.

If your company has questions concerning whether any of its website terms and conditions, contracts, delivery invoices, or other materials presented to consumers may be amenable to a TCCWNA challenge – or if you have been presented with a demand letter or named in a lawsuit alleging TCCWNA violations – please contact [Brian O'Donnell](#), [Michael O'Mullan](#) or [Jeffrey Beyer](#), who would be happy to provide additional information.

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