

MORE ON **CLASS ACTION** **COMMERCIAL/FINANCIAL**

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# Your company's online "terms of use" may be the target of a class action

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**C**OMPANIES THAT MAINTAIN AN ONLINE presence typically include "terms of use" to govern the public's access to their websites and limit potential liability. In what is swiftly becoming the class action "flavor of the day," aggressive plaintiffs' lawyers are filing complaints alleging that such website terms of use violate an obscure New Jersey consumer protection statute, the Truth-in-Consumer Contract, Notice and Warranty Act ("TCCWNA"). In the first few months of 2016, more than twenty-five companies have been sued in TCCWNA class actions challenging their websites' terms of use—including clothing retailers (Saks Fifth Avenue, J. Crew, Victoria's Secret), automobile manufacturers (Ferrari and Nissan North America), tax preparation services (Jackson Hewitt Tax Service and Intuit, the maker of TurboTax), and purveyors of consumer goods (Hoover, Toys R Us, and Bed Bath and Beyond). Many more companies have received demand letters from plaintiff's lawyers seeking nuisance value settlements as the price of avoiding litigation.

These class actions seek significant damages: \$100 for each New Jersey customer allegedly exposed to the terms of use on the defendant's website over the prior six years, plus the class' legal fees to prosecute the claim. Importantly, however, companies can avoid or mitigate their risk of being sued by a careful review of their terms of use.

## **What is TCCWNA?**

New Jersey enacted TCCWNA in 1981 to prohibit companies from including provisions in their consumer contracts and notices that violate the legal rights of consumers. The New Jersey Legislature felt that such provisions, while unenforceable in court, could nevertheless mislead

consumers and dissuade them from asserting their rights vis-à-vis companies from whom they purchased products or services.

TCCWNA has two operative provisions: sections 15 and 16. Section 15 bars a seller from including in a consumer contract or notice a provision that violates a consumer's "clearly established" legal rights. Section 16 recognizes that many contracts state that the enforceability of certain provisions may vary by state (e.g., "void where prohibited by law"). Except in the case of warranties, section 16 requires sellers including such qualifying language in their contracts to also state whether such provisions are enforceable in New Jersey. If a contract or notice violates either sections 15 or 16, TCCWNA allows "aggrieved" consumers to sue for "minimum" civil penalties of \$100, even in the absence of compensable injury.

TCCWNA largely sat forgotten on the statute books until a decade ago, when plaintiffs' lawyers married its civil penalty provision to the class action device to multiply the \$100 penalty by each consumer who saw or signed the challenged notice or contract. TCCWNA has thereby joined other statutes

that provide fertile soil for class actions – such as the Telephone Consumer Protection Act, the Fair and Accurate Credit Transaction Act, and the Fair Credit Reporting Act, which similarly impose civil penalties for receipt of "junk" faxes, unwanted robocalls, and certain kinds of privacy violations, even in the absence of any compensable injury.

### **What is this new wave of TCCWNA class actions?**

TCCWNA class actions initially focused on sales physically made in New Jersey, either through door-to-door sales calls or at brick-and-mortar stores located in the State. Many of these cases were inspired by the successful result achieved by the plaintiff in *United Consumer Financial Services Company v. Carbo*, 410 N.J. Super. 280 (App. Div. 2009), where a New Jersey appellate court affirmed a judgment awarding \$100 to each of 16,845 class members who signed contracts for the installment sale of vacuum cleaners (\$1,685,000 in total) and directed the trial court to consider an additional award of nearly \$1,000,000 in attorney's fees and costs. Similar TCCWNA class actions were then filed against businesses that employ

standard-form contracts signed by thousands of customers – such as self-storage unit providers, health clubs, and rental car companies. Many of these cases resulted in class settlements and lucrative fees for class counsel, and thereby served to encourage further filings.

The current wave of TCCWNA class actions expands beyond contracts or notices physically provided in New Jersey and focuses instead on Internet commerce. These new complaints contend that TCCWNA governs any online agreement, terms of use, or other document that a consumer might review or access from a device located in New Jersey.

### **What can my company do to avoid becoming the target of one of these "terms of use" class actions?**

This third wave of TCCWNA class actions remains in the early stage, and the courts have yet to rule on certain threshold issues – such as whether TCCWNA even applies to the terms of use posted on a website by a company located outside of New Jersey, or whether someone who simply visits a webpage is an "aggrieved" consumer with standing to sue. Rather than funding litigation to find out

the answer to those and similar questions, however, companies can mitigate the risk of being sued in these TCCWNA class actions by modifying their online terms of use to avoid arguable TCCWNA violations.

TCCWNA plaintiffs typically contend that the following provisions either violate a consumer's "clearly established right" under section 15 or suggest that enforceability varies by jurisdiction, in violation of section 16:

**1. Broad limitation-of-liability provisions.** The most common TCCWNA claim is a contention that the seller overreached in purporting to exculpate itself from all liabilities to the consumer or website user – including claims for products sold through the website, claims for reckless or intentional wrongdoing, or claims allowed by consumer protection statutes (such as the New Jersey Consumer Fraud Act).

**2. Provisions waiving claims for punitive damages or product liability.** TCCWNA plaintiffs challenge provisions that waive the user's right to seek punitive damages, which they say violates public policy

and the New Jersey Punitive Damages Act. Similarly, plaintiffs challenge provisions that, they say, limit the company's liability for defective or unsafe products, which plaintiffs contend is unenforceable under the New Jersey Product Liability Act.

**3. Provisions limiting available damages.** Plaintiffs argue that broadly worded provisions seeking to limit the website provider's liability for incidental, consequential, indirect, or direct damages run afoul of TCCWNA because they purport to limit a consumer's ability to recover such damages under consumer protection statutes (such as the Consumer Fraud Act).

**4. Provisions requiring the user to indemnify the website provider from third-party claims.** Website terms of use commonly require the user to indemnify against any third-party claims resulting from the consumer's "use of the site." TCCWNA plaintiffs contend that such provisions are invalid because indemnity requires some culpable conduct and consumers cannot be held to a strict liability standard for indemnity obligations.

**5. Provisions which might suggest jurisdictional differences in enforcement.**

TCCWNA plaintiffs commonly challenge phrases such as "void where prohibited law," "except where prohibited by law," "to the fullest extent allowed by law," "as permitted by law," or "unless prohibited by law." Plaintiffs contend that any such provisions violate TCCWNA section 16.

Companies with an online presence should consider carefully reviewing these and other provisions in their terms of use, to make sure that their provisions are enforceable and phrased in a way that avoids any arguable TCCWNA violation. While the courts may ultimately rule that TCCWNA does not apply to online terms of use offered by a website provider located in a state other than New Jersey, a compliance review of the terms of use can help a company avoid the expense of defending a TCCWNA class action.

**Mr. Rooney** chairs the Class Action Group at Lowenstein Sandler LLP, and has defended many companies sued in class actions brought under the New Jersey Truth-in-Consumer Contract, Notice and Warranty Act.