

California Choice of Law Provision Defeats Claim Under NJ Consumer Protection Law

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On Monday, a California federal judge enforced the California choice-of-law clause in Facebook's online terms of use, and on that basis refused to consider the claims of a New Jersey resident that aspects of those terms of use violated New Jersey's consumer contract disclosure law, the Truth-in-Consumer Contract, Warranty, and Notice Act ("TCCWNA"). The decision should provide some peace-of-mind to online retailers based outside New Jersey who have choice-of-law clauses in their terms of use. A note of caution is warranted, however, because the judge found it important that Facebook's contract chose California law, and "California's consumer protection laws have been recognized as among the strongest in the country."

The case is *Palomino v. Facebook, Inc.*, No. 16-cv-4230-HSG (N.D. Cal.). The plaintiffs claimed that Facebook's terms of use contained provisions purporting to "disclaim liability" for willful misconduct, and to "bar claims for personal and economic injury and punitive damages" and "for deceptive and fraudulent conduct." Whether provisions like this actually violate the TCCWNA is a matter of dispute in other cases pending in state and federal courts in New Jersey and elsewhere. Judge Haywood S. Gilliam held that he did not have to reach that question, however, because Facebook's enforceable choice-of-law clause favoring California law precluded the plaintiff, a New Jersey resident, from suing under his home state's consumer protection laws.

California's test for enforcing a choice-of-law clause, set forth by the California Supreme Court in *Washington Mut. Bank, F.A. v. Superior Court*, 24 Cal. 4th 906, 916 (2001), begins by asking whether the chosen state has a substantial relationship to the parties or their transaction or, if not, whether there is any other reasonable basis for the choice. If the answer to either question is yes, a plaintiff seeking to avoid application of the contractual choice must establish *both* "that the chosen law is contrary to a fundamental policy" of the alternative state and that the alternative state "has a materially greater interest in the determination of the particular issue." Facebook easily cleared the burden-shifting hurdle because it is headquartered in California. Plaintiffs then failed to meet their burden because they "failed to show that California's consumer protection law," which itself precludes a wide array of false and deceptive practices and "aim[s] to accomplish the same end," is "contrary to New Jersey policy." That California's law "affords different rights and remedies" is immaterial because "[c]ourts should not refrain from applying the chosen law merely because this would lead to a different result."

The decision's caveats are important, but the bottom line is that non-New Jersey choice-of-law clauses, applied by online retailers outside New Jersey, may preclude TCCWNA claims.