

# Clarity Coming Soon About What New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA") Actually Requires

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Remember that wave of class actions under New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. § 56:12-14 *et seq.*, that hit New Jersey courts earlier this year, claiming that website terms of use contained unlawful provisions? The motion to dismiss briefing is well underway, and online merchants should soon have some clarity about what the TCCWNA actually requires.

The TCCWNA, a 1981 New Jersey statute now having its moment in the spotlight after a recent Third Circuit decision called attention to it, bars businesses from including terms in consumer contracts or "notices" that are unenforceable because they violate "clearly established rights." It also precludes use of statements that contractual disclaimers may be void in "some states," without specifying exactly which are void in New Jersey. "Aggrieved consumers," whatever that means, can sue for \$100 each, making the statute very attractive to the class action bar.

Defendants in these cases have hit back with powerful, but different, motions to dismiss. The motions soon will be fully briefed, and courts then will wrestle with questions like these:

*Can TCCWNA claims be forced into individual (non-class) arbitration?* At least one TCCWNA defendant is relying on an arbitration agreement in its terms of use, which has a class action waiver. The agreement also has a California choice of law clause, which the defendant contends precludes New Jersey consumers from pursuing TCCWNA claims at all. The plaintiff is challenging application of the arbitration agreement on several grounds.

*What does "aggrieved consumer" mean?* None of the recent TCCWNA defendants actually sought to enforce website terms of use to the plaintiffs' detriment. The plaintiffs do not contend that the defendants ever have argued for the aggressive construction of their terms of use that the plaintiffs contend might violate "clearly established rights." Some plaintiffs do not even allege that they ever *read* the terms of use they are challenging. So, are they "aggrieved consumers" within the statute's meaning? Every defendant is asking its court to address that issue.

*Is Spokeo available as a defense?* Some defendants are arguing that their plaintiffs, in addition to not being "aggrieved," did not suffer a "concrete and particularized injury" sufficient to confer Article III standing under the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The plaintiffs respond that their injury is "informational," in that the TCCWNA entitled them

to receive “clean” contracts or notices, which the defendants denied them.

*Are website terms of use “consumer contracts” under the TCCWNA?* The TCCWNA applies only to what the statute terms “consumer contracts,” defined as “written agreement[s] in which an individual purchases real or personal property.” If a website’s terms of use only govern use of the website, and not “purchases,” are they cognizable under the TCCWNA at all? The plaintiffs confronting this argument so far have tried to claim that the website terms of use actually *do* govern purchases. That is another dispute courts will have to untangle.

*Can non-New Jersey residents sue New Jersey-based companies under the TCCWNA?* The plaintiff suing one New Jersey-based defendant lives in and made his online purchases from Connecticut. Will that court rule that New Jersey-headquartered corporations face potential *nationwide* liability under the TCCWNA?

*Are forum choice provisions enforceable?* One judge already has transferred a TCCWNA case to California pursuant to the defendant’s forum selection clause.

Before year-end, we should have clarity on all or most of these issues. Until then, online merchants remain well advised to carefully scrub their website terms of use. Prior cases decided under the TCCWNA have ruled, for example, that a liability disclaimer beginning with “to the fullest extent provided by law” does not violate the statute. It should be possible, therefore, to retain relatively broad-gauge liability disclaimers without running a TCCWNA risk, even in the current uncertain climate.