

Class Actions Under New Jersey Warranty Law Threaten to Turn Terms-of-Service Boilerplate Into Big Potential Risks

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Do your Terms of Service preclude litigants from claiming consequential damages or attorneys' fees? If new class action lawsuits in New Jersey are right, merely including these terms, and potentially many other disclaimers, violates New Jersey state law, and subjects you to a penalty of \$100 per sale.

This interpretation of New Jersey's 36 year-old Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14, et seq., is certainly aggressive, and quite possibly wrong. But because the theoretical damages in these cases is so high, proving the theory wrong in court would entail significant risks. The plaintiffs' bar is counting on lawsuit targets preferring to settle.

TCCWNA precludes any "seller" from "offer[ing] to any consumer . . . or enter[ing] into any written consumer contract . . . or display[ing] any written consumer warranty, notice or sign . . . which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller . . . as established by State or Federal law at the time. . . ." A warranty may state generally under TCCWNA that certain of its exclusions may not apply in some jurisdictions, without specifying which provisions or which states those may be, but "[n]o 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."

"Any person who violates [TCCWNA] shall be liable to the aggrieved consumer for a civil penalty of not less than \$100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs." Because the statute makes it unlawful merely to "display" a "notice or sign" that purports to disclaim a "clearly established legal right," the argument is that a consumer is "aggrieved" under the statute merely by virtue of having seen the "notice or sign" before making a purchase, whether or not the consumer had any problems with the purchase.

In December 2015, the Third Circuit Court of Appeals issued an unpublished, non-precedential decision reversing dismissal of a TCCWNA class action where an extended-service warranty firm's contract purported to preclude consumers from seeking attorney's in lawsuits, because New Jersey law precludes waivers of statutory rights to fee awards. That decision has added new fuel to the TCCWNA fire. New Jersey businesses are not happy, but no legislative fix has yet found any traction.

What can online retailers, and those with brick-and-mortar presence in New Jersey, do to avoid becoming the next TCCWNA defendant?

One necessary step is to examine your terms and conditions carefully and consult counsel familiar with New Jersey consumer protection law. If a particular disclaimer of liability, though unenforceable in New Jersey, is otherwise important to you, TCCWNA allows you to keep it, but only if you expressly state that the disclaimer does not apply in New Jersey. Most online retailers' terms of service already contain special notifications about consumers' rights under California's "Shine the Light" marketing law; the bite of these recent TCCWNA suits may mean it is time to include special notifications to New Jersey consumers, too.

New Jersey's TCCWNA wave also highlights the value of a well-drafted arbitration clause and inclusion of a provision requiring claims to be arbitrated individually, rather than on behalf of a class. New Jersey state courts are relatively unfriendly toward arbitration clauses, and will enforce them only if consumers received clear notice a contract contained an arbitration clause and class waiver. We have a model arbitration provision that takes account of recent court decisions, and we can help you implement the provision in ways that maximize its potential for enforceability.