Westlaw Journal
COMPUTER & INTERNET
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 34, ISSUE 4 / JULY 29, 2016

EXPERT ANALYSIS

Terms Of Misuse: Class Plaintiffs Exploit Obscure New Jersey Law, Creating E-Commerce Havoc

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In the past seven months, more than 30 class-action lawsuits have been filed alleging that some companies' online terms of use violate an obscure New Jersey consumer protection statute. Any company that offers goods or services to consumers located in the state could be at risk — and now, at least one similar lawsuit has been filed outside of New Jersey.

That lawsuit, *Palomino v. Apple,* was filed in California — about 3,000 miles from the case that got the ball rolling in the U.S. District Court for the District of New Jersey.[1]

In February, consumers filed a lawsuit against TTI Floor North America Inc., a company known as Hoover. The suit alleges that the company's terms of use for hoover.com violate New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act, which prohibits, among other things, consumer contract provisions that violate a "clearly established" consumer right.[2]

The Hoover complaint seeks an award of at least $100 in civil penalties for every New Jersey consumer exposed to the website's terms of use.[3]

The list of other entities since sued under the TCCWNA include J. Crew, Saks Fifth Avenue, rental car giants Avis and Hertz, Victoria's Secret, Intuit (Turbo Tax), and the New Jersey Symphony Orchestra.[4]

In each situation, a document designed to limit a company's liability — its terms of use — may instead expose it to more liability.

Even though the plaintiffs' bar has just recently turned its focus to the TCCWNA when it comes to online terms of use, it's important to note that the statute has been in place for over 30 years. The statute's breadth along with its allowance for a private right of action and statutory penalties — $100 per "aggrieved" consumer, whether or not such consumer has suffered any damages — have made the law a magnet for class actions.

Given what's happened since the Hoover filing, companies that offer products and/or services to New Jersey consumers — regardless of whether they have a physical presence in the state — should dust off their online terms of use to address this threat before it metastasizes into an extortionate demand letter or lawsuit.

The TCCWNA prohibits consumer contract provisions that violate a "clearly established" right of a consumer, as well as any statement that any of a contract's provisions "is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable" in the state.[5]

Thus, the TCCWNA could affect a wide array of standard consumer contract provisions, including warranty disclaimers, limitations of liability, indemnification, releases and time bars on claims.

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The Hoover plaintiffs claim the limited warranty and disclaimer of liability provisions from the company's online terms of use violate the law.

According to the plaintiffs, provisions in Hoover's terms of use violate the TCCWNA by establishing "illegal conditions upon customers who visit defendant's website and/or purchase products from the site."

Plaintiffs specifically took issue with Hoover's alleged attempts to "deprive plaintiffs of their legal right to pursue a remedy for harms arising from defendants' tortious acts," "absolve defendants of their responsibility to refrain from creating an unreasonable risk of harm to consumers," and "absolve itself of its responsibility to consumers to protect against third-party criminal acts."

If Hoover's terms and conditions do not seem unusual or egregious, perhaps it is because the language (or a variation thereof) has been widely used in terms of use for years.

For example, disclaiming warranties and liability in connection with a website's or mobile app's security or performance — particularly if the company offers the item for little or no cost — is a universal and necessary provision for companies.

To make matters worse, the law is not restricted to companies formed, domiciled or located in New Jersey. Rather, any company conducting business in the state (such as Hoover, based in Ohio), is arguably subject to the TCCWNA.

Of course, the courts will need to work out whether the statute applies to an out-of-state seller with a website simply because a New Jersey-based customer accesses the website.

Given its potential jurisdictional breadth, broad applicability and creation of extensive statutory damages, the prospective reach of this law — and the attendant financial risks to businesses — are quite broad.

As more cases are filed and courts continue to interpret the statute, companies conducting business in New Jersey should evaluate their terms of use and consider taking the following steps:

- To the maximum extent possible, require users to click through and accept the terms of use or click to acknowledge they have read and agree to be bound by the terms. Absent such manifest assent, end users are more likely to argue that they did not agree to — and are not bound by — terms of use.
- Include an enforceable class-action waiver and mandatory arbitration provision in the terms of use in a so-called clickwrap agreement. Such clauses can inoculate companies against frivolous class actions.
- Do not insert overbroad consumer indemnification obligations. For example, the terms of use should not stipulate that consumers need to indemnify the company for their "use" (as opposed to their "misuse") of the website.
- Even if the company does not charge for products or services (including access to and usage of the website or mobile app), do not state that the company cannot be liable for any damages whatsoever (e.g., consequential and direct damages). Rather, restrict the limitation of liability to matters arising from breach of contract/warranty or common law tort claims. Do not attempt to extend the limitation to gross negligence, willful misconduct, fraud, or rights or causes of action arising by statute.
- Do not state that the enforceability of some limitations of liability or certain other clauses may vary from jurisdiction to jurisdiction.
- Do not attempt to abridge traditional limitations periods by inserting one-way time bars on claims.

The recent spate of lawsuits involving online terms of use and the TCCWNA may be just the beginning.

As with other causes of action — such as the recent litany of cases involving automatic renewals of consumer contracts[6] — the class-action plaintiffs' bar will test the waters to determine if it can gain sufficient traction to justify even more actions.

Whether it is this issue or the next flavor of the month, companies should periodically review their terms of use and privacy policies with their counsel to steer clear of the sharks in the water, because they are continually searching for their next opportunity to strike.

NOTES

[1] Notice of removal, *Palomino v. Apple Inc.*, No. 16-cv-3017 (N.D. Cal. June 3, 2016), 2016 WL 3136691.

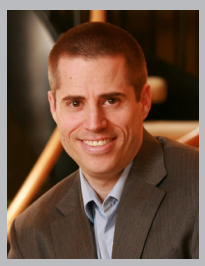
[2] Complaint, *Braden v. TTI Floor N. Am. Inc.*, No. 16-cv-743 (D.N.J. Feb. 10, 2016), 2016 WL 930602.

[3] *Id.*

[4] *See, e.g.*, *Complaint, Rubin v. Intuit Inc.*, No. 16-cv-2029 (D.N.J. Mar. 16, 2016), 2016 WL 1445959; Complaint, *Hecht v. The Hertz Corp.*, No. 16-cv-1485 (D.N.J. Mar. 16, 2016), 2016 WL 1072996.

[5] N.J. STAT. ANN. § 56:12-14.

[6] Complaint, *Kruger v. Kiwi Crate Inc.*, No. 1-13-CV-254550(Cal. Super. Ct., Santa Clara Cty. Oct. 15, 2013).



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