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If You Sell Online, Your Fine Print May Put You At Risk:

Wave of Lawsuits Targets Website Terms and Conditions Under the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act (“TCCWNA”)

Nearly every business involved in online commerce or advertising includes disclaimers, limitations of liability, and other terms on its website’s Terms and Conditions or Rules of Use. Those Terms and Conditions are designed to reduce the risk of lawsuits by imposing acceptable use obligations, limiting warranties, and disclaiming certain liabilities related to the use and material posted on business websites. McCarter has been retained by several clients who have recently received claims and lawsuits alleging that their Terms and Conditions violate New Jersey’s arcane Truth-in-Consumer Contract, Warranty and Notice Act (“TCCWNA”).

The TCCWNA has been on the books for over 30 years but has largely been ignored. Its (mis)use as a potential vehicle for broad class action claims has only just been realized. Over the past few years, the organized plaintiffs’ bar has increasingly relied on TCCWNA as a purported basis for class actions because of its vagueness and broad scope. Plaintiffs’ lawyers allege TCCWNA provides standing to consumers who have suffered no injury or loss, and do not take into account businesses’ good faith efforts to comply.

The asserted scope of TCCWNA, coupled with its sometimes liberal interpretation by courts, makes it a serious threat to businesses of every size and type that have broad disclaimers and warranty limitations in their website Terms and Conditions. Understanding TCCWNA and its broad application will help your business better avoid becoming a target of a TCCWNA-based claim. Should you become a target, we have identified below certain issues to consider to try to avoid these potentially costly class action claims as well as strategies for defending TCCWNA litigation if it is filed against your company.

Overview of TCCWNA

New Jersey consumer protection statutes have long been recognized as among the toughest in the nation. While most businesses are familiar with lawsuits involving the New Jersey Consumer Fraud Act (“CFA”), many are unaware of potential allegations regarding violations of the TCCWNA. Unlike the CFA and most other consumer protection laws, the plaintiffs’ bar often asserts that TCCWNA does not require a showing of ascertainable loss or any damages from the consumer. They also contend TCCWNA actions need no evidence of an

“unconscionable commercial practice” or contractual privity between the plaintiff and the defendant.

In short, they assert that the act imposes statutory penalties for mere technical violations of New Jersey and federal laws and regulations affecting consumer rights. Among other things, they increasingly allege that TCCWNA purportedly prohibits: (i) any provision by which the consumer waives his TCCWNA rights; (ii) any indemnification provision; and (iii) consumer contracts stating that some terms or provisions are void, unenforceable, or inapplicable in some jurisdictions – without specifying whether they are barred in New Jersey.

Plaintiffs often rely on New Jersey court decisions involving TCCWNA that have found that a wide variety of writings shown to a prospective consumer can be a “notice” giving rise to an action. This includes menus, print media, and direct mail advertisements. As a result, any company that markets its goods on a website that includes Terms and Conditions is a potential target for a TCCWNA-based class action. If your Terms and Conditions include broad exculpatory or indemnity clauses, you may eventually be subject to a TCCWNA claim or lawsuit.

What to do if you are sued under TCCWNA?

The first step in defending a TCCWNA claim is understanding who is on the other side. Plaintiffs’ firms often do not practice law in the traditional sense. They often are in the business of investigating and manufacturing claims. This is especially true in cases involving alleged TCCWNA violations related to Terms and Conditions on corporate websites. Therefore, responding to such claims requires skilled class action litigation counsel who understand your adversaries and what is motivating them. Next, evaluate possible exit strategies. There are many avenues to attack TCCWNA claims, including, but not limited to, pre-answer motions to dismiss and motions to strike the class claims. Early pre-class settlement is also an option for reducing media attention, especially if the proposed changes to the Terms and Conditions are modest and can be done without significant impact to the underlying business.

Does your insurance cover a TCCWNA claim?

Businesses also should consider the scope of their insurance as well as the notice requirements in their

policies when initially responding to a TCCWNA claim. This should be done immediately upon receipt of the initial notice and well before any resulting lawsuit. The commercial policy forms that may broadly respond to alleged “wrongful acts” against entities have strict notice provisions and often are written on a “claims made and reported” basis. Under those policy forms, it is imperative that timely notice be provided to the potentially implicated carriers within the policy period in which the initial notice of such a claim was received.

Liability carriers will compare the underlying allegations and prayer for relief with “the four corners” of the policy to assess whether there are any arguable obligations to fund defense and indemnity costs under the insuring agreements. The scope of the factual allegations underlying the TCCWNA claims and the type of relief sought vary – the initial coverage position of the carrier will likely be case-specific and dependent on the language in the applicable policies. In some cases, a carrier may be asked to look beyond the initial pleading to assess if the gravamen of the underlying claim is potentially covered and eligible for defense funding.

Even if your carrier asserts that indemnification coverage for a potential adverse TCCWNA judgment is not available, your company still may be able to secure defense funding from certain carriers. Under certain policy forms, if some of the alleged claims, damages, or penalties are purportedly excluded, you may still be eligible to receive defense funding or reimbursement if the underlying allegations have not been fully adjudicated against your company and/or are otherwise proven to be groundless. Even when an underlying plaintiffs’ lawyer limits the requested relief to any statutory damages that may be available under TCCWNA, you should examine the policy language to determine your coverage options. Insurers may not conduct the type of initial review required by corporate policyholders seeking liability coverage for TCCWNA and/or similar underlying claims. McCarter’s Insurance Coverage group can provide counseling and advocacy services to commercial policyholders dealing with TCCWNA claims.

Review your Terms and Conditions

E-commerce counsel should regularly review your Terms and Conditions and other web-based advertising and social media campaigns. It also helps to have a litigator familiar with TCCWNA class actions review your labels and advertising. McCarter lawyers can evaluate the likelihood you will be sued for use of

various Terms and Conditions and advise on how to improve your Terms and Conditions so they are less likely to draw the attention of plaintiffs’ firms. Your Terms and Conditions should accurately reflect your current products and offerings and any updates in the law. Regularly revising your website’s Terms and Conditions also makes it more difficult for plaintiffs’ lawyers to argue that a nationwide class has been equally exposed to the same terms for an extended period of time.

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McCarter lawyers on the Class Action and Insurance Coverage teams are happy to answer questions about TCCWNA claims. Please contact David R. Kott (dkott@mccarter.com); Edward J. Fanning, Jr. (efanning@mccarter.com); Gregory H. Horowitz (ghorowitz@mccarter.com); Zane C. Riester (zriester@mccarter.com); or the McCarter attorneys with whom you normally work.