

## CLASS ACTIONS INVOLVING NEW JERSEY'S OBSCURE WARRANTY NOTICE ACT

>> Best Dealer Practices

DESPITE BEING nearly 40 years old, New Jersey's Truth in Consumer Contract

Warranty and Notice Act ("TCCWNA") has only recently been used as a basis for numerous class action lawsuits against national retailers and car dealers.

### What is the TCCWNA?

Unlike New Jersey's Consumer Fraud Act, under the TCCWNA consumers do not need to show:

- Any actual damages.
- That they bought anything from sellers.
- That there is any unconscionable commercial practice to prevail on TCCWNA claims.

Alleged violations of the Act generally fall into two categories. First, the TCCWNA prohibits the inclusion of unenforceable terms on websites or in contracts that pertain to the retail sale

of goods and services. For example, websites or contracts that contain provisions that virtually bar all contract or negligence claims may subject your business to a TCCWNA claim.

Second, the TCCWNA provides it is permissible to include phrases such as, "exclusions may not apply in some jurisdictions." However, consumer contracts, notices or signs must state which provisions are unenforceable or inapplicable within the State of New Jersey. Failure to do so is a violation of the Act.

Successful litigants under the TCCWNA are able to recover \$100 for each violation plus attorneys' fees. Since individual claims only have nuisance value, TCCWNA claims really only have value if brought as part of a class action lawsuit.

### Recent Cases Involving Online National Retailers

In the last several months, Advance Auto Parts, Walmart, Johnson & Murphy, J. Crew, Vitamix and others have been sued in federal court in New Jersey in class actions alleging their websites' terms and conditions improperly attempt to absolve them of responsibility over the products they sell. The suits typically allege New Jersey law prohibits these types of exculpatory clauses (because they undermine the purpose of the laws to protect consumers). They seek to recover hundreds of thousands to millions of dollars often without any proof that a single person suffered damages.

### Cases Involving Car Dealers and the TCCWNA

There a number of substantially similar lawsuits currently on appeal concerning the same contractual provision set forth in a Retail Buyer's Order Form used by many new and used car dealers in this state. The Buyers Order form contains the following provision concerning the payment of sales and use tax:

"The price of the motor vehicle as specified on the face of this Order includes reimbursement for certain Federal Excise taxes, but does not include sales taxes and use taxes (Federal, State or Local) or other taxes unless expressly stated. A customer assumes and agrees to pay, unless prohibited by law, any such sales, use or occupational taxes imposed on or applicable to the transaction covered by this order, regardless of which party may have primary tax liability."

Plaintiffs alleged the language violated the TCCWNA provision on the grounds that it suggests the payment of taxes are or may be void, unenforceable, or inapplicable but failed to explain the applicable law in New Jersey. The trial courts have found the challenged provision accurately and unambiguously informs New Jersey consumers of their obligations to pay taxes under current New Jersey tax structure. Furthermore the inclusion of the flexible language of "unless prohibited by law" does not violate the TCCWNA.

These cases are currently under appeal. The businesses community is anxious for any appellate court ruling that restricts interpretation of the TCCWNA and possibly



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## BRIDGESTONE RECALLS TIRES FOR TREADS

>> Tread May Separate

**BRIDGESTONE/FIRESTONE** North America Tire (Bridgestone) is recalling 32 Firestone FR710 tires, size 205/65R16, and Champion Fuel Fighter tires, sizes 205/65R15 and 205/70R15, manufactured March 27 to April 9.

These replacement passenger car tires may have been manufactured with inconsistent rubber coverage over the steel plies. As a result, the tread may separate. A tread separation increases the risk of a crash.

Bridgestone will notify the owners who purchased the tires, and dealers will replace the tires, free of charge. The manufacturer has not yet provided a notification schedule. 🚗



## If it is important

for a retailer to maintain the provision on their website or contracts, the retailer should expressly state the disclaimer does not apply in New Jersey.

slows the stream of future litigation involving the TCCWNA.

### Dealer Best Practices

Whether it is your online advertising or your physical documents used at your on-site locations, there are pre-emptive steps dealers can take to avoid becoming the target of a TCCWNA class action lawsuit.

It is important to have a well-drafted arbitration clause in the terms and conditions on your business' website and in your contracts or Retail Buyers' Orders. These provisions are valid, binding and enforceable and provide protection, provided that: (1) they clearly state the consumer gives up their right to a jury trial; and (2) the arbitration clause states unambiguously the consumer may not serve as a class member or a class action representative. (If the consumer can't participate in a class or serve as a class representative, the claim has nuisance value only.)

Arbitration clauses have generally been held enforceable. However, they are under attack in recent New Jersey cases and on a national level from the Consumer Financial Protection Bureau, which seeks to propose new regulations limiting their use in consumer contracts.

The New Jersey Supreme Court has held arbitration provisions must state clearly that all claims are subject to arbitration, and that the consumer gives up their right to file a lawsuit. Courts have also held that if such provisions are "buried" in a consumer contract, they may not be enforceable.

Another easy step to protect a retailer is to review any provisions that contain a disclaimer of liability that is unenforceable in New Jersey. If it is important for a retailer to maintain the provision on their website or contracts, the retailer should expressly state the disclaimer does not apply in New Jersey. Finally, best practices are to have your entire website disclaimer language and existing contracts undergo a thorough review for compliance with all existing federal and state obligations. 🚗

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