

## McCarter & English Examining A Suddenly Popular Statute Tied To Online Terms and Conditions

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Edward J. Fanning, Jr.

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According to McCarter & English, the firm has developed a task force to address an uptick in claims regarding the Truth-in-Consumer Contract, Warranty and Notice Act.

"We've seen a real uptick in those recently," said Edward Fanning, partner at the firm. "It appears that the organized plaintiffs bar has found and dusted off a very old New Jersey statute written before there was an Internet and, until recently, it was very rarely used."

The TCCWNA was enacted over 30 years ago, but has largely been ignored until the recent discovery of its potential as a vehicle for broad class action claims.

The original intent of the act was to protect consumers from hidden terms in written documents that would clearly violate a legal right of a consumer.

"Plaintiffs have taken that and tried to shoehorn it into things like the terms and conditions that you see on any number of business websites," Fanning said. "Because of the way the statute is being manipulated by the plaintiffs' attorneys, it's being used in a way that's potentially going to negatively impact all businesses."

Fanning said it's the vague, generalized language of these online terms and conditions that leaves companies most vulnerable to legal action.

"One of the primary issues is lack of specificity," he said. "These terms of use on a website are intended in a way that they can be applied broadly; they're written in a way that tends to be nonspecific and arguably open to different interpretations."

"It's those openings that provide plaintiffs' attorneys an opportunity to interpret those terms in a way that says it's violating some right that's established under New Jersey law."

Fanning suggests businesses review their terms and conditions to make sure they're both specific and in compliance.

He also suggests another tactic in conjunction:

"Understand your adversary, what motivates them, and where they're coming from in terms of a well-funded and organized adversary who is out there scouring consumer communications and websites for precisely these kinds of opportunities," he said. "Consider whether this is really a consumer who is complaining

about the conduct of your business or whether it's a lawyer who's looking for an opportunity."