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Litigation at Your (Terms of) Service

More than 20 lawsuits filed last year claimed that corporate websites violated New Jersey's consumer protection laws

By Wilfred Coronato / McCarter & English, LLP

The year was 1981. "The People's Court," "Hill Street Blues" and "Dynasty" all premiered on network television. The price of a first-class stamp rose from 15 to 18 cents. New York City's Metropolitan Transportation Authority introduced a spiffy brass token with a "Y" cutout in it to cover the 75-cent ride. And New Jersey enacted a statute – the Truth-In-Consumer Contract, Warranty & Notice Act (TCCWNA) – designed to prohibit deceptive terms in consumer contracts, warranties, notices and signs.

Much has changed over the last 36 years. And a lot of those changes are attributable to the internet. Television shows can be streamed and watched on demand. Electronic mail has all but supplanted hand-delivered stamped envelopes. MetroCard swipes pay for the $2.75 transit fare. And the TCCWNA, which was designed to cover hard-copy consumer contracts, is now being applied to the terms of use (TOU) of online sellers' websites.

Lawyers representing consumers are using this pre-internet statute as the basis for putative class actions alleging that TOU provisions violate the act, entitling any consumer who had visited those websites to a statutory civil penalty of $100, plus fees for the plaintiff's attorneys and court costs.

Last year, more than 20 such lawsuits were filed in or removed to federal district court in New Jersey. In most, motions to dismiss have been filed. Defendants have won the vast majority of motions decided thus far, but many remain undecided, and those decisions are not expected until the latter half of this year.

The reason: Decisions in many of the remaining cases have been stayed by court order or joint stipulation pending a decision from the U.S. Court of Appeals for the Third Circuit in *Russell v. Croscill Home.* Some of the stays also reference two other appeals pending in the Third Circuit: *Wenger v. Bob's Discount Furniture* and *Spade v. Select Comfort.*

The decisions pending at the Third Circuit – and at the New Jersey Supreme Court, to which the federal appellate court has certified two questions – will inform the decisions in the cases stayed in the District of New Jersey, and will largely determine whether plaintiffs abandon or attempt to amend their TCCWNA complaints.

TCCWNA contains two sections that prohibit certain provisions in consumer contracts and other covered writings. The first – Section 15 – prohibits the use of provisions in any written consumer contract or written consumer warranty, notice or sign that "violates any clearly established legal right of a consumer or responsibility of a seller … as established by state or federal law." The prohibited conduct applies to any "seller, lessor, creditor, lender or bailee," and, therefore, potentially applies to a wide range of consumer industries, such as retailers, banks, hotel chains, car rental companies, etc. "Consumer" is defined in the act as "any individual who buys, leases, borrows or bails any money, property or service which is primarily for personal, family or household purposes."

> ***Pre-internet laws have been used to bring class actions over companies' online terms of service.***

Section 16 prohibits any consumer contract, warranty, notice or sign from containing any provision by which the consumer waives his rights under the act, and prohibits any consumer contract, notice or sign from stating 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." For violations of the act, an "aggrieved consumer" can recover a civil penalty of $100 or actual damages or both, together with reasonable attorney fees and court costs.

My firm, McCarter & English, is amicus counsel on behalf of the New Jersey Defense Association before the Third Circuit in *Russell* and on behalf of the New Jersey Business & Industry Association in *Spade* and *Wenger*. I'm going to discuss what's at stake in the pending appeals, what online sellers of products and services can expect for the balance of this year, and what they should consider doing to avoid being named a defendant in one of these class action lawsuits.

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Russell v. Croscill Home

At issue in *Russell* is whether the plaintiff meets the injury-in-fact requirement of Article III standing under the United States Supreme Court's decision in *Spokeo v. Robins,* and whether the plaintiff is an "aggrieved consumer" under TCCWNA.

In *Russell*, the plaintiff ordered a tea-light holder through the defendant's website. According to the plaintiff's complaint, the website's TOU violated TCCWNA by including allegedly illegal exculpatory provisions and limiting various remedies. The plaintiff alleged that these provisions violated Section 15 of the act. As noted by the district court, the complaint lacked any allegations that the product was defective, or that any of the provisions of the TOU were invoked by the defendant, or that the plaintiff even read the TOU or was in any way injured. However, the plaintiff claimed that he and each member of the proposed class were entitled to the statutory civil penalty afforded to an "aggrieved consumer."

In granting the defendant's motion to dismiss, the district court focused on standing and whether the plaintiff was an "aggrieved consumer." On the first issue, the district court cited *Spokeo* and held that the plaintiff did not meet the injury-in-fact requirement, as the plaintiff had sustained no concrete injury. Also relying on *Spokeo*, the district court held that a "concrete injury must be de facto, that is, it must actually exist" and "a plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right."

Using similar reasoning, the district court also held that the plaintiff was not an "aggrieved consumer" under TCCWNA. Adopting the definition of "aggrieved party" in Black's Law Dictionary as "one entitled to a remedy, especially a party who's [sic] personal, pecuniary or property rights have been adversely affected by another person's action," the district court held that the plaintiff did not match the definition because he had not alleged any losses stemming from the terms and conditions of the defendant's website.

Briefing on the plaintiff's appeal to the Third Circuit in *Russell* has been completed, and on June 13 the court stayed the appeal pending the New Jersey Supreme Court's answer to certified questions in *Spade* and *Wenger*. (An appeal of a dismissal of a TCCWNA claim on *Spokeo* grounds is also currently pending in the Ninth Circuit.)

Wenger and *Spade*

Neither of these cases involves an online TOU. However, each case may provide clarification of the term "aggrieved consumer" and what constitutes a violation of a "clearly established legal right of a consumer or responsibility of a seller."

In *Wenger* and *Spade*, plaintiffs brought claims for statutory damages under TCCWNA predicated on alleged violations of New Jersey's Delivery of Household Furniture and Furnishings Regulations. The Furniture Delivery Regulations include rules about timely delivery and language that must be included in a furniture sales contact. In both cases, the furniture was timely delivered, but the contracts allegedly did not fully comply with the regulations.

The district court ruled in both cases that the plaintiffs failed to allege a cause of action under TCCWNA because they were not "aggrieved." The district court reasoned that "both defendants provided delivery dates and timely delivered the merchandise, and in *Spade*, the plaintiff received a refund for defective furniture." Therefore, the defendants' actions were in accordance with the spirit of the regulations, even if they may not have met the written requirements.

On appeal, the Third Circuit has in each case certified two questions to the New Jersey Supreme Court: "(1) Is a consumer who receives a contract that does not comply with the Furniture Delivery Regulations, but has not suffered any adverse consequences from the noncompliance, an 'aggrieved consumer' under the TCCWNA? (2) Does a violation of the Furniture Delivery Regulations alone constitute a violation of a clearly established right or responsibility of the seller under the TCCWNA and thus provide a basis for relief under the TCCWNA?" Answers to these questions will inform the decision on appeal in *Russell* and the other cases stayed in the District of New Jersey.

The Bottom Line

If the Third Circuit affirms in *Russell*, *Wenger* and *Spade*, some plaintiffs in the stayed cases with pending motions may abandon their claims. Other plaintiffs, on the other hand, may try to amend their complaints to meet whatever the Third Circuit may say is required to withstand a motion to dismiss.

If the Third Circuit rules in favor of the plaintiffs, viable defenses remain to defeat these claims. The district court will have to consider other arguments raised in these motions that are not the subject of the pending appeals, including whether the TOU provisions at issue violate a "clearly established legal right of a consumer or responsibility of a seller" or, in cases alleging a Section 16 violation, whether the TOU contains a prohibited geographic qualifier or a choice-of-law provision that requires application of the law of a state other than New Jersey that bars application of the TCCWNA. (See, e.g., *Palomino v. Facebook* [N.D. Cal. Jan. 9, 2017], granting motion to dismiss the TCCWNA claim on the ground that California choice-of-law clause in Facebook's online TOU was enforceable.)

Even if the pending cases can overcome motions to dismiss, the question remains as to whether these cases are appropriate for class certification. That question may be informed by two more cases pending before the New Jersey Supreme Court: *Dugan v. TGI Friday's* and *Bozzi v. OSI Restaurant Partners*. In both cases, the court will decide whether class certification is appropriate where plaintiffs allege that defendant violated the Consumer Fraud Act and the TCCWNA by failing to include drink prices on its menu. (McCarter & English also appeared and argued as amicus counsel on behalf of the New Jersey Business & Industry Association before the New Jersey Supreme Court in *Dugan* and *Bozzi*.)

Online sellers can expect fewer new case filings than in 2016, at least until these pending appeals are decided. If you are an online seller who has not yet been sued, you may want to consider reviewing and revising your website's TOU now to minimize your risk of being a defendant in a class action lawsuit – and maximize your defenses if you are.