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TCCWNA Violates the Dormant Commerce Clause

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The "commerce clause" of the United States Constitution gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Constitution, Art. 1, Sec. 8, Cl. 3. The commerce clause operates both to grant authority to Congress, and to restrict the regulatory authority of the states. Implicit in the commerce clause is the "dormant" commerce clause, which prohibits states from passing legislation that discriminates against or excessively burdens interstate commerce. The dormant commerce clause prevents protectionist state policies that favor state citizens or businesses at the expense of non-citizens that conduct business within that state. The New Jersey Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14, et seq. is one such state law that violates the dormant commerce clause (among other clauses).

TCCWNA was enacted to protect consumers from being deceived into believing that they lack rights based on unenforceable language in consumer contracts, notices or signs. Specifically, TCCWNA Section 15 prohibits retailers from offering or displaying a written warranty, notice or sign "that violates any clearly established legal right of a consumer" under state or federal law. And Section 16 prevents retailers from including language in consumer contracts, warranties, notices or signs that waives a consumer's rights under TCCWNA or that states that certain provisions may be void, unenforceable, or inapplicable in "some jurisdictions" without stating whether they are void, unenforceable, or inapplicable in New Jersey.

Although TCCWNA was enacted over 30 years ago, there has been a recent flood of class actions filed, largely in the context of website terms and conditions governing the use of websites. While TCCWNA is a New Jersey statute, most of these cases have been filed against non-New Jersey companies, demonstrating that all companies that do business on the Internet, no matter how large or how small, are potentially subject to TCCWNA. It is in this context that constitutional issues regarding the commerce clause arise.

There are two tests used to evaluate dormant commerce clause cases. If a law discriminates against out-of-state commerce on its face or in its effect, the law receives very rigorous review; if a law burdens interstate commerce in a nondiscriminatory way, a balancing test is applied. Under the strict test, the government must prove that the law serves a legitimate local purpose and that the purpose cannot be adequately served by reasonable, nondiscriminatory, alternative means. This standard of reasonable, nondiscriminatory, alternative means is often described as virtually per se invalidity because the standard is so difficult to satisfy. Under the balancing test based largely on Pike v. Bruce Church , 397 U.S. 137, 142 (1970) , the burden on interstate commerce is weighed against the local benefits.

In the case of TCCWNA, the statute violates the dormant commerce clause under *both* tests because: (1) extrinsic evidence shows a discriminatory effect on out-of-state commerce; and (2) the burden TCCWNA imposes is excessive in relation to its value as a local interest. This article will examine how TCCWNA violates the dormant commerce clause under each of these tests in turn, and will demonstrate the statute's unconstitutionality.

Violation Under the Strict Test

TCCWNA meets the requirements of the strict dormant commerce clause test because although it is not discriminatory on its face, extrinsic evidence shows a discriminatory effect on out-of-state commerce. There are two types of discrimination that justify applying the strict test: (1) when the state or local law discriminates against out-of-state commerce on its face, see, e.g. , Dean Milk and C & A Carbone v. Clarkstown , 511 U.S. 383 (1994); *Hughes v. Oklahoma and Philadelphia v. New Jersey , 441 U.S. 322 (1979); or (2) when the state or local law is not discriminatory on its face but extrinsic evidence shows a discriminatory effect on out-of-state commerce, see, e.g. , Hunt v. Washington State Apple Advertising Commission , 432 U.S. 333 (1977); Bacchus Imports v. Dias , 468 U.S. 263 (1984). In these types of cases, the burden of proof falls upon the state or locality to demonstrate a legitimate objective that cannot be accomplished by alternative means.*

The Supreme Court's decision in *Hunt* is particularly helpful when examining possible constitutional challenges to TCCWNA. In *Hunt*, Washington State growers challenged a North Carolina Board of Agriculture regulation that required all apples shipped into North Carolina in closed containers to display the USDA grade or nothing at all. Washington had higher standards than the USDA, and challenged the regulation as an unreasonable burden upon interstate commerce, while North Carolina stated it was a valid exercise

of its police powers to create "uniformity" to protect its citizens from "fraud and deception." The Supreme Court held that the North Carolina regulation, while facially neutral, had a discriminatory effect on the Washington State growers and shielded local growers from the same burden because the regulation removed the competitive advantage Washington apples had from stricter standards of inspection. Thus, the court held the regulation to be an unconstitutional exercise of the state's power over interstate commerce.

Although TCCWNA is facially neutral, it has the effect of burdening interstate sales and discriminating against such sales, like in *Hunt*. Because TCCWNA applies even to non-New Jersey companies, interstate commerce is burdened by the statute. While New Jersey companies may be familiar with the law and able to shield themselves from violations, out-of-state companies are unreasonably burdened by the broad requirements under TCCWNA. Moreover, there are non-discriminatory alternatives to TCCWNA that protect the state interests the statute is intended to protect. The New Jersey Consumer Fraud Act (CFA) already operates to protect consumers who have an ascertainable loss from "any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation" in connection with the sale of goods, services or real estate. *See* N.J.S.A. §§56:8-1 – 56:8-184.

This is a very broad statute that effectively protects consumers, especially because the term "sale" also includes "offers" and "attempts" to sell, rent or distribute goods or services, and because consumer fraud includes affirmative misrepresentations, knowing omissions, and violations of a specific consumer protection. Consumers can also bring claims under common law fraud by alleging: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Gennari v. Weichert Co. Realtors , 148 N.J. 582, 610 (1997); accord Kuzian v. Electrolux Home Prods. , 937 F. Supp. 2d 599, 614-15 (D.N.J. 2013). These alternatives are not only available to consumers, but effectively protect the consumer interests that TCCWNA was intended to protect, without the disastrous consequences that TCCWNA's recent usage has demonstrated through its unconstitutional application that violates the dormant commerce clause.*

Violation Under the Balancing Test

TCCWNA is an unconstitutional statute under each dormant commerce clause test, including the balancing test outlined in *Pike*. Under the *Pike* balancing test: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church , 397 U.S. 137, 142 (1970). Therefore, the burden on interstate commerce must not be excessive as related to local interests to survive the balancing test. Here, TCCWNA cannot meet these requirements. TCCWNA is the type of law that while facially neutral, has the effect of discriminating against foreign operators in violation of the dormant commerce clause.*

Under TCCWNA, companies face burdens that are excessive as compared to any local benefits in New Jersey. The far reach of TCCWNA means that companies could conceivably be required to state the applicable law for every state in the country separately. This burdensome requirement is similar to one that has been found unconstitutional in the context of other state statutes. In Healy v. Beer Institute, 491 U.S. 324, 336 (1989), the court held "the practical effect of the statute must be valuated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." Here, the consequences of TCCWNA, if similar versions of the statute were to be adopted in other states, would be monstrous. If all companies had to list every state or federal law distinction in every type of consumer contract, notice or sign, for every state with this type of legislation, the burden would eviscerate any small benefit to consumers of having more information about their consumer rights. All such consumer contracts, notices, or signs, would lose any practical purpose because they would be so inundated with laws specific to various states that they would lose all benefit and purpose.

Adding insult to injury, in the recent past, TCCWNA has been used outside of its originally intended purview, to attack website terms and conditions, most often on websites where products and/or services are available for sale. TCCWNA was passed before the Internet existed, and certainly before its effect on interstate commerce could be understood. The Internet has become a commonplace, if not almost necessary, means of interstate commerce and sales of products and services. TCCWNA—if applied on a basis as broad as some plaintiffs counsel are espousing—could operate to demolish the ability of companies to sell on the Internet without facing TCCWNA lawsuits. Courts have found the commerce clause to apply to the Internet, and here, the dormant commerce clause should operate to declare TCCWNA unconstitutional because of the burden it imposes. *See, e.g., Am. Libraries Ass'n v. Pataki , 969 F. Supp. 160, 167 (S.D.N.Y. 1997) ("the Internet fits easily within the parameters of interests traditionally protected by the Commerce Clause"); Consol. Cigar Corp. v. Reilly , 218 F.3d 30, 56 (1st Cir. 2000). The burden on interstate commerce, particularly in the context of the Internet, is vast and potentially devastating. Even in traditional commerce situations, the result of TCCWNA applied on a broad basis is excessively burdensome, and the addition of its application to the Internet makes it clearly unconstitutional.*

Further, any small benefit to consumers—to clarify any slight confusion over which provisions apply or do not apply in New Jersey—pales in comparison to this immense burden imposed on interstate commerce. To limit the ability of companies to sell on the Internet for fear of violating this obscure New Jersey law, especially when these types of claim are largely brought on a class basis, is not necessary to protect consumers and is clearly unconstitutional.

Conclusion

The dormant commerce clause is intended to ensure that state statutes do not limit interstate commerce in an unconstitutional manner. TCCWNA is a statute that does just that. Both under the strict test and the balancing test, TCCWNA cannot meet the constitutional requirements of the dormant commerce clause. Not only is TCCWNA being abused in ways that were not intended by the New Jersey legislature, but it is denying constitutional rights under the commerce clause. The careful balance between federal and state power—which has been delicately crafted since the passage of the Constitution—is threatened by this obscure New Jersey statute which neither protects consumers nor benefits New Jersey as a whole.

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