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Revamping the Right to Be Informed: Protecting Consumers Under New Jersey's Truth-In-Consumer Contract, Warranty, and Notice Act*

Jessica Guarino

University of Arkansas, Fayetteville

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Revamping The Right To Be Informed: Protecting Consumers Under New Jersey's Truth-In-Consumer Contract, Warranty And Notice Act*

I. INTRODUCTION

Prior to the 1960s, “courts were notorious for their insensitivity to consumer interests, while legislatures did little in the way of offering the consumer comprehensive protection against business fraud.”¹ However, the tide of legislation began to turn in the 1960s as a movement for greater consumer protections finally reached the ears of an individual with a powerful voice: President John F. Kennedy.

On March 16, 1962, President Kennedy delivered a special message to Congress declaring a Bill of Consumer Rights.² He delineated consumer interests that required protection to further the well-being of individuals and families: the right to safety, the right to be informed, the right to choose, and the right to be heard.³ His comment that the “march of technology . . . has increased the difficulties of the consumer” was referencing the now practically archaic technology of the 1960s.⁴ However, his statement that these technological

* J.D. Candidate, 2019, University of Arkansas School of Law. The author sincerely thanks Professor Mary Beth Matthews for her insight and constant guidance, without which this Comment would not have come to fruition.

1. 1 HOWARD J. ALPERIN & RONALD F. CHASE, CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION § 101 (1986); Jack E. Karns, *State Regulation of Deceptive Trade Practices Under Little FTC Acts: Should Federal Standards Control?*, 94 DICK. L. REV. 373, 374 (1990).

2. President John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest (Mar. 15, 1962), *reprinted in* AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-protecting-the-consumer-interest> [<https://perma.cc/7L69-74JL>] (last visited Nov. 15, 2018).

3. *Id.*

4. *Id.*

progressions “[have] outmoded many of the old laws and regulations and made new legislation necessary”⁵ aptly describes the issue fueling legislation involving New Jersey’s Truth-in-Consumer Contract, Warranty and Notice Act⁶ (“TCCWNA”) in the face of online terms and conditions. Specifically, the TCCWNA is written in a way that does not adequately protect consumers’ rights in light of technological advancements like online contracting and online terms and conditions.

Perhaps the most germane of the consumer rights mentioned—the “right to be informed”—is defined as “the right . . . to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts [the consumer] needs to make an informed choice.”⁷ The enumerated disdain for fraudulent, deceitful, and misleading information, while certainly not a new sentiment, was representative of the movement toward greater consumer protection in the 1960s that sparked the enactment of a number of statutes punishing exactly such practices.⁸ President Kennedy’s desire that his “recommendations and requests . . . alert every agency and branch of government to the needs of our consumers” was certainly heard.⁹

The most notable federal legislation to arise in response to the pressures of the 1960s consumer protection movement were the Uniform Deceptive Trade Practices Act of 1962,¹⁰ the Truth in Lending Act of 1968,¹¹ the Uniform Consumer Sales Practice

5. *Id.*

6. N.J. STAT. ANN. § 56:12-14 to -18 (West 2018).

7. Kennedy, *supra* note 3.

8. See Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 521 (1980).

9. Kennedy, *supra* note 3.

10. ALPERIN & CHASE, *supra* note 2 (“[T]he Act was designed to modernize the common law action for unfair competition. As such, the Act covers only practices relating to misleading trade identifications and false and deceptive advertising and, realistically speaking, is directed to businessmen aggrieved by the acts of their competitors, although its terms do not preclude consumers from using its remedies.”). Due to the act only providing an injunction rather than money damages, consumers had little incentive to sue. *Id.*

11. Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. § 1601-1693r (2012)).

Act of 1970,¹² the National Consumer Act of 1970,¹³ and amendments to the Federal Trade Commission Act.¹⁴ In addition to federal legislation, many states followed suit in enacting their own versions of consumer protection statutes¹⁵ modeled after one or more of the 1960s and 1970s federal statutes.¹⁶ By 1981, every state had enacted some form of a consumer protection statute “for the express purpose of providing consumers with a broad-based protection from business fraud and deception.”¹⁷ While many of the statutes did not substantially deviate from federal models, some states, like New Jersey, were more creative in crafting their legislation.

New Jersey chose not only to enact a Consumer Fraud Act in 1960,¹⁸ which mirrored many other federal and state consumer protection statutes, but also to pass the Truth-in-Consumer Contract, Warranty and Notice Act in 1981.¹⁹ Unlike the Consumer Fraud Act and other state and federal consumer

12. ALPERIN & CHASE, *supra* note 2, § 104 (1986) (“This Act was drafted for the benefit of consumers, its heart being a prohibition against ‘deceptive’ or ‘unconscionable’ acts or practices by any seller or supplier who regularly engages in consumer transactions The Act contains provisions for administrative enforcement by a state agency which would have the power to make rules and to obtain restitution for consumers, as well as provisions for private actions to be brought by consumers for declaratory and injunctive relief and for monetary damages”).

13. *Id.* § 105 (“[T]he National Consumer Act classifies the specified practices as ‘unfair or deceptive acts or practices’ and contains a true ‘catch-all’ category. This provision makes it unlawful for a merchant to engage ‘in any act or practice which is unfair or deceptive to the consumer.’ . . . [A] consumer who is induced to participate in a transaction as a result of a merchant’s unlawful sales practices may recover from him actual and punitive damages, or 30% of the transaction total, or \$300, whichever is greater.”).

14. *Id.* § 101 (namely, the Magnuson-Moss Warranty Act, which “expanded F.T.C. jurisdiction to ‘unfair or deceptive acts or practices in *or affecting* commerce.’ The 1975 amendment, unquestionably a response to two celebrated reports condemning the Commission for producing a bureaucratic maze and ignoring the needs of lower income people frequently victimized by all sorts of business fraud, allows the Commission to regulate unfair or deceptive acts or practices ‘which, while local in character, nevertheless have an adverse impact upon interstate commerce.’”) (emphasis in original).

15. See DEE PRIGDEN & RICHARD ALDERMAN, CONSUMER PROTECTION AND THE LAW, app. 3A at 171-74 (2017-2018 ed. 2017).

16. ALPERIN & CHASE, *supra* note 2, § 102 (“The model acts [federal legislation] unquestionably provided assistance and encouragement to the states to adopt modern and strong consumer protection laws.”).

17. *Id.*

18. N.J. STAT. ANN. § 56:8-2 (West 2018).

19. N.J. STAT. ANN. §§ 56:12-14 to -18.

protection statutes, the TCCWNA was exceptionally broad in its scope.²⁰ Despite the breadth of the 1981 statute and its consequent power to hold sellers and businesses accountable, it went largely unnoticed until the mid-2000s when litigation concerning the statute was first filed.²¹ Such litigation dramatically increased in frequency around 2015.²²

The new litigation filed concerning the TCCWNA primarily focuses on online terms and conditions presented to consumers, such as Apple's iTunes "Terms and Conditions" which, allegedly, contain provisions that violate the consumer's rights and seller's responsibilities in a manner that is deceptive to the consumer.²³ Given that the statute was written and enacted in the 1980s, it is unlikely that the legislature considered the applicability of the statute in the light of the now prevalent online terms and conditions offered to consumers. However, the sentiment of ensuring that consumers have access to reliable/accurate information, are informed of their rights, and can enforce those rights remains a crucial concern. The TCCWNA contains vague and broad language that is undefined by the legislature and muddies the already complex world of enforcing online agreements between sellers and consumers, frustrating these interests.²⁴

It is debatable whether further definition of the terminology will even be sufficient to address and resolve the problems posed regarding enforceability of online terms and

20. N.J. STAT. ANN. § 56:12-15 (requiring no proof of damages, applicable to "prospective" consumers and including merely the offering of a sign, notice, or contract, rather than focusing on advertising and having a narrow applicable scope with strict requirements like the Consumer Fraud Act).

21. Shelton v. Restaurant.com, Inc., 70 A.3d 544, 550 (N.J. 2013).

22. Michael P. Daly et al., *Courts Continue Crackdown on New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act*, DRINKERBIDDLE (Apr. 12, 2017), <http://www.drinkerbiddle.com/insights/publications/2017/04/courts-continue-crackdown> [<https://perma.cc/J4M6-4CAX>].

23. Plaintiff's Memorandum of Points in Opposition to Defendant's Motion to Dismiss at 7-11, *Silkowski v. Apple, Inc.*, No. 3:16-cv-02338-JD (N.D. Cal. Sept. 29, 2016).

24. Kymerly Kochis et al., *Legal Alert: Hit 'em Where They Ain't – TCCWNA Class Actions Target Broad Range of Consumer-Facing Practices*, LEXOLOGY (Jan. 5, 2017), <https://www.lexology.com/library/detail.aspx?g=533efee6-480d-483a-ac7f-91a2b4c7245f> [<https://perma.cc/L9VM-LDQE>].

conditions. While the TCCWNA expresses views about which individuals should be increasingly concerned in an era of pervasive technology that infiltrates nearly every aspect of one's life,²⁵ the statute does not efficiently operate to achieve its stated goals. As President Kennedy suggested in the 1960s, new legislation is likely necessary to protect consumers in a manner that still addresses technological developments and allows business to operate in the largely online world of the 2010's.

Part I of this article lays out the history of the enactment of the TCCWNA as well as the requirements for bringing a claim under the statute. This section includes detailed information about what is covered under the statute and the issues the New Jersey courts are currently facing in defining the vague terminology not addressed by the New Jersey legislature in its enactment of the TCCWNA.

Part II of this article addresses other existing state consumer protection statutes, categorizing them according to the levels of protection afforded to consumers. This section includes an analysis of the effectiveness of the various statutes' implementation, measured by the inclusion and exclusion of various provisions that tend to either strengthen or weaken consumer protection.

Finally, Part III of this article compares the TCCWNA with other state statutes and argues that it is an inappropriate method of addressing consumer protection and business concerns. This article also argues that the New Jersey legislature needs to conduct a significant overhaul of the statute—if not completely rewrite it—to properly address the online world of consumer transactions, namely the presentation of online terms and conditions and compliance with the statute by sellers, and makes suggestions as to specific revisions.

25. N.J. STAT. ANN. § 58:12-15 (West 2018).

PART I: BACKGROUND AND PROBLEMS SURROUNDING THE TCCWNA

Part I will discuss New Jersey's attempts to protect consumers in their transactions, and provide a background of the various statutes that enforce consumer protection as well as how they interact with one another. This section will focus primarily on the TCCWNA²⁶ and the New Jersey Consumer Protection Act.²⁷

A. THE TCCWNA

In 1981, the New Jersey legislature enacted the TCCWNA, which states:

No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any *written consumer contract or give or display any written consumer warranty, notice or sign* after the effective date of this act *which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller*, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed. Consumer means any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes. The provisions of this act shall not apply to residential leases or to the sale of real estate, whether improved or not, or to the construction of new homes subject to "The New Home Warranty and Builders' Registration Act," P.L.1977, c. 467 (C. 46:3B-1 et seq.).²⁸

Critically, the act further provides:

No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the

26. N.J. STAT. ANN. §§ 56:12-14 to -18

27. N.J. STAT. ANN. §§ 56:8-1 to -210.

28. N.J. STAT. ANN. § 56:12-15 (emphasis added).

consumer waives his rights under this act. Any such provision shall be null and void. *No consumer contract, notice or sign shall state 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*; provided, however, that this shall not apply to warranties.²⁹

Any seller found in violation of the TCCWNA is liable to the “aggrieved consumer” for a variety of damages, including a “civil penalty of not less than \$100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney’s fees and court costs.”³⁰ The TCCWNA concludes by noting that the rights and remedies available are “in addition to and cumulative of any other right, remedy or prohibition accorded by common law, Federal law or statutes of this State, and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.”³¹

B. REASONS FOR ENACTING

The legislative history and supporting documentation regarding the enactment of the TCCWNA is lacking. An examination of the cultural and political climate surrounding its enactment is necessary to understand the motives behind the passage of such a bill. Due to the vague nature of the statute, courts have struggled to ascertain such motives and apply the statute in a manner that would be consistent with legislative

29. N.J. STAT. ANN. § 56:12-16 (emphasis added).

30. N.J. STAT. ANN. § 56:12-17 (West 2018). Courts regularly apply \$100 as the penalty under the TCCWNA, but note that the text of the statute still permits awarding higher damages if the facts of the particular case warrant such. *Bovgirya v. Am. Honda Motor Co.*, Civ. No. 2:17-cv-06248, 2018 WL 3954855, at *5 (D.N.J. Aug. 16, 2018).

31. N.J. STAT. ANN. § 56:12-18 (West 2018).

intent.³² The statement accompanying the bill in 1980 begins with the compelling declaration:

Far too many consumer contracts, warranties, notices and signs contain provisions which clearly violate the rights of consumers. Even though these provisions are legally invalid or unenforceable, *their very inclusion in a contract, warranty, notice or sign deceives a consumer into thinking that they are enforceable and for this reason the consumer often fails to enforce his rights.*³³

Given this language, it is clear that the legislature's intent in enacting the TCCWNA was aimed at "the misleading effect such a provision may have on a potential plaintiff prior to litigation, discouraging otherwise viable suits by falsely suggesting the law precludes them."³⁴ The language addressing misleading provisions is likely reflective of the larger consumer protection movement that began in the 1960s that also spurred the enactment of the New Jersey Consumer Fraud Act, which targeted similar problems by way of a narrower scope.³⁵ The Governor, in his signing statement, "described the bill [TCCWNA] as 'strengthening provisions of the [CFA].'"³⁶ Additionally, and notably, consideration of the TCCWNA was "contemporaneous with . . . the Federal Trade [Commission's promulgation of] regulations to effectuate the Magnuson-Moss Act."³⁷ This context suggests that the New Jersey Legislature and Congress "shared some of the same concerns" in regards to consumer protection, despite the fact that the TCCWNA was enacted nearly ten years after the Consumer Fraud Act.³⁸

32. See, e.g., *Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204, 217 (D.N.J. 2015) (struggling to ascertain what precisely is a "clearly established right" under TCCWNA).

33. Statement, N.J.S.A. 56:12-14, -18, Assem. Bill. No. A1660 (1981) [hereinafter "Statement"] (emphasis added).

34. *Castro*, 114 F. Supp. 3d at 216.

35. N.J. STAT. ANN. §§ 56:8-1 to -210 (West 2018).

36. *Shelton v. Restaurant.com, Inc.*, 70 A.3d 544, 552 (N.J. 2013) (quoting Governor Brendan Byrne, Statement on Signing Assembly Bill No. 1660 (Jan. 11, 1982)).

37. *Shelton*, 70 A.3d at 552. The Magnuson-Moss Warranty Act "mandates specific disclosures of warranties of consumer products costing more than \$5." *Id.*; 15 U.S.C. § 2302(e) (2012).

38. *Shelton*, 70 A.3d at 553.

As the courts have applied the TCCWNA to various factual scenarios, they have attempted to determine the intent of the legislature regarding the scope and application of the TCCWNA. Several courts have concluded that the New Jersey legislature intended for the TCCWNA to be applied in a broad manner.³⁹ The TCCWNA covers only the inclusion of legal provisions and not the omission of legal provisions,⁴⁰ and as such is intended to bolster the already existing rights of consumers rather than create new substantive rights that a consumer can enforce or that sellers can violate.⁴¹ The TCCWNA serves an alternative purpose to that of truth-in-lending and truth-in-leasing laws because, “by its terms, it encompasses a wider variety of transactions” and also seeks to “prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts.”⁴²

The relative lack of legislative history or references to outside cultural or political events that may have spurred the enactment of the TCCWNA when New Jersey already had a state consumer protection statute leaves the question of the act’s applicability and scope open for argument. That leeway is even more significant in a world where technology is constantly creating new ways in which consumers interact with sellers and enter into binding online agreements.⁴³ The technological realm is where most of the litigation surrounding the TCCWNA currently focuses.⁴⁴

C. ELEMENTS OF A TCCNWA CLAIM

To bring a TCCWNA claim, a plaintiff must show:

39. See, e.g., *Smerling v. Harrah’s Entm’t, Inc.*, No. A-4937-13T3, 2016 WL 4717997, at *4 (N.J. Super. Ct. Sept. 9, 2016) (quoting trial court’s holding that TCCWNA should be “construed liberally” in favor of consumers).

40. *Watkins v. DineEquity, Inc.*, 591 Fed. App’x. 132, 135 (3d Cir. 2014) (unpublished).

41. *Mladenov v. Wegman’s Food Mkts., Inc.*, 124 F. Supp. 3d 360, 380 (D.N.J. 2015).

42. *Shelton*, 70 A.3d at 549.

43. See Nancy S. Kim, *Contract’s Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1333 (2011).

44. See *infra* Part I.D.

1. The plaintiff is a consumer;
2. The defendant is a seller;
3. The seller offers a consumer contract or gives or displays any written notice, or sign; and
4. That contract, notice or sign includes a provision that violates any legal right of a consumer or responsibility of a seller.⁴⁵

1. Plaintiff is a Consumer

According to the TCCWNA, a consumer is defined as “any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family, or household purposes.”⁴⁶ A plaintiff may also be a bailee, which requires only that the plaintiff fulfill the elements of bailment.⁴⁷

2. Defendant is a Seller

Currently neither the statute, legislature, or the courts define what requirements must be met for the defendant to be a seller. However, by reference to the definition of the consumer, it is safe to assume that a seller—for the purposes of the TCCWNA—is an individual or business entity that makes available to a consumer any money, property, or service primarily for personal, family, or household purposes.⁴⁸ According to this definition, any number of individuals or business entities will fall under the reach of the TCCWNA.

3. Consumer Contract

The text of the statute defines a consumer contract as:

45. *Watkins*, 591 Fed. App’x. at 135.

46. N.J. STAT. ANN. § 56:12-15 (West 2018).

47. *Mattson v. Aetna Life Ins., Co.*, 124 F. Supp. 3d 381, 393 (D.N.J. 2015) (defining bailment as the “delivery of personal property by one person to another in trust for a specific purpose, acceptance of such delivery, and express or implied agreement to carry out the trust and return the property to the bailor”).

48. *Shelton v. Restaurant.com, Inc.*, 70 A.3d 544, 550 (N.J. 2013).

a written agreement in which an individual: (a) leases or licenses real or personal property; (b) obtains credit; (c) obtains insurance coverage, except insurance coverage contained in policies subject to the ‘Life and Health Insurance Policy Language Simplification Act’; (d) borrows money; (e) purchases real or personal property; (f) contracts for services including professional services; or (g) enters into a service contract.⁴⁹

The TCCWNA applies to both tangible and intangible property.⁵⁰ However, the TCCWNA expressly excludes transactions involving the lease or sale of real property.⁵¹ Beyond a standard written agreement, even a mere written notice or sign is covered by the act.⁵² Even something as nominal as a restaurant menu may be considered a written agreement for the purposes of the TCCWNA.⁵³ Courts have held that dining out and pursuing entertainment are quintessential personal, family, or household pursuits, meaning that restaurant certificates issued from an internet business will qualify as property under the TCCWNA.⁵⁴

4. *Violation of Consumer’s Legal Right or Seller’s Responsibility*

The issue of what constitutes a legal right of a consumer or a seller’s responsibility is the most complicated and most litigated element of a TCCWNA claim.⁵⁵ Courts have not been able to devise a comprehensive definition and have often differed

49. N.J. STAT. ANN. § 56:12-1 (West 2018) (internal citation omitted).

50. *Shelton*, 70 A.3d at 555.

51. *Id.* at 551.

52. N.J. STAT. ANN. § 56:12-15 (West 2018); *Bohus v. Restaurant.com, Inc.*, 784 F.3d 918, 922-23 (3d Cir. 2015) (quoting *Shelton*, 70 A.3d at 549, 558-59). However, sales receipts do not count as either contracts or notices for purposes of the TCCWNA. *Barile v. Gf-Passaic Foods, LLC*, No. A-4706-16T1, 2018 WL 3945769, at *4 (N.J. Super. Ct. App. Div. Aug. 17, 2018) (unpublished).

53. *Watkins v. DineEquity, Inc.*, 591 Fed. App’x. 132, 133, 141 (3d Cir. 2014) (unpublished); *Dugan v. TGI Fridays, Inc.* 171 A.3d 620, 648 (N.J. 2017).

54. *Shelton v. Restaurant.com, Inc.*, 70 A.3d 544, 555 (N.J. 2013).

55. Brian O’Donnell & Jeffrey Baker, *NJ High Court Will Bring Welcome Clarity to Consumer Law*, LAW 360 (Apr. 14, 2017, 12:55 PM), <https://www.law360.com/articles/913381/nj-high-court-will-bring-welcome-clarity-to-consumer-law> [<https://perma.cc/L859-EL2K>].

in their conclusions. This precise issue was recently addressed by the New Jersey Supreme Court in answer to two questions certified to it by the Third Circuit: what constitutes an “aggrieved consumer” and what rights of consumers are “clearly established legal rights.”⁵⁶ In *Spade v. Select Comfort Corp.*, the New Jersey Supreme Court found that a “seller’s inclusion in a consumer sales contract or agreement of language prohibited by N.J.A.C. 13:45-A-5.3(c) may alone constitute a violation of a ‘clearly established legal right . . . ‘ under N.J.S.A. 56:12-15, and thus may provide a basis for relief under the TCCWNA” and that TCCWNA requires “a consumer to show that he or she has suffered harm, even if that harm does not warrant an award or damages . . . in order for that consumer to constitute an ‘aggrieved consumer’ for purposes of the TCCWNA.”⁵⁷ Lower courts have also attempted to clarify both terms, but have not done so in a way that substantially advanced the existing understanding of the phrases.⁵⁸

a. Aggrieved Consumer

The TCCWNA does not require the plaintiff to prove any actual damages.⁵⁹ However, this component of the statute has presented a significant issue for plaintiffs, especially in federal court. In order for an Article III court to have jurisdiction, the United States Supreme Court held in *Spokeo, Inc. v. Robins* that “the injury-in-fact requirement requires a plaintiff to allege an injury that is both ‘concrete and particularized.’”⁶⁰ In light of the *Spokeo* ruling, New Jersey courts have held the plaintiff need not allege damages, but the plaintiff still must show that she is “aggrieved.”⁶¹ For now, the standard seems to be—in federal

56. See generally *Spade v. Select Comfort Corp.*, 181 A.3d 969 (2018); O’Donnell & Baker, *supra* note 56.

57. *Spade*, 181 A.3d at 978, 981.

58. *Dugan*, 171 A.3d at 647.

59. See N.J. STAT. ANN. § 56:12-17 (West 2018).

60. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1545 (2016) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)) (emphasis deleted).

61. Transcript of Opinion on Motion to Dismiss at 6, *Russell v. Croscill Home, LLC*, 2016 WL 6571287 (D.N.J. Oct. 11, 2016) (No. 16-cv-1190 (PGS)).

court—that bare procedural violations are not sufficient to make a TCCWNA claim.⁶³ This means that the mere inclusion of harmful language that violates consumer rights may be insufficient to state a claim despite the clear language of the statute indicating that the mere inclusion of such phrases itself constitutes the harm.⁶² At least in state court, the New Jersey Supreme Court has decided—somewhat confusingly—that some amount of harm must be shown, even if that harm cannot warrant an award of damages, in order for a plaintiff be an aggrieved consumer entitled to recovery under the TCCWNA.⁶³ If this interpretation persists, many consumers may be unable to enforce their rights as contemplated by the legislature.

b. Clearly Established Legal Right or Responsibility

More information is available concerning what clearly established legal rights will suffice to establish a TCCWNA claim, but the scope of this terminology is the primary issue that the New Jersey Supreme Court attempted to answer in the *Spade* case.⁶⁴ However, the New Jersey Supreme Court did not directly define clearly established legal rights in a manner that can provide guidance for future cases—it merely stated that “the TCCWNA [recognizes] an affirmative violation of N.J.A.C. 13:45A–5.3(c), by virtue of the inclusion of language prohibited by that regulation in a contract of sale or sale order for the delivery of household furniture, to constitute a violation of a ‘clearly established legal right’”⁶⁵ Currently, New Jersey courts have determined, and not helpfully so, that deciding whether a seller

⁶³ *Hite v. Lush Internet, Inc.*, 244 F. Supp. 3d 444, 454-55 (D.N.J. 2017), *appeal docketed*, No. 17-1907 (3d Cir. Apr. 21, 2017).

⁶² In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 638 (3rd Cir. 2017); *Hite*, 244 F. Supp. 3d at 455; *see also* *Rubin v. J. Crew Grp., Inc.*, No. 16-2167(FLW), 2017 WL 1170854, at *1-3 (D.N.J. Mar. 29, 2017); Statement, *supra* note 34, at 2-3. *See* *Wright v. Bank of Am.*, No. A-2358-15T3, 2018 WL 4779028, at *2 (N.J. super. Ct. App. Div. Oct. 4, 2018) for further discussion of tension surrounding the definition of an “aggrieved consumer.”

⁶³ *See supra* note 58 and accompanying text.

⁶⁴ *Spade v. Select Comfort Corp.*, 181 A.3d 969, 981 (2018).

⁶⁵ *Id.*

has violated a clearly established responsibility of their own or legal right of a consumer will be a case-specific inquiry that will result in differing outcomes based on the “timing of the offer, contract, or warranty.”⁶⁶ The statement accompanying the TCCWNA bill provides examples of provisions that violate clearly established legal rights of consumers, including:

[T]hose [provisions] that deceptively claim that a seller or lessor is not responsible for any damages caused to a consumer, even when such damages are the result of the seller’s or lessor’s negligence. These provisions provide that the *consumer assumes all risks and responsibilities, and even agrees to defend, indemnify and hold harmless the seller from all liability*. Other provisions claim that a *lessor has the right to cancel the consumer contract without cause and to repossess its rental equipment from the consumer’s premises without liability for trespass*. Still other provisions arbitrarily assert the *consumer cannot cancel the contract for any cause without punitive forfeiture of deposits and payment of unfounded damages*. Also, the consumer’s rights to due process is often denied by deceptive provisions by which he allegedly waives his right to receive legal notices, waives process of law in the repossession of merchandise and waives his right to retain certain property exempted by State or Federal law from a creditor’s reach.⁶⁷

In addition to the provisions named in the statement accompanying the bill, the New Jersey courts have noted several other statutes enforcing consumer rights potentially qualifying as “clearly established legal rights” for the purposes of the TCCWNA. These statutes include the Retail Installment Sales Act (“RISA”),⁶⁸ the Magnuson-Moss Warranty Act (“MMWA”),⁶⁹ the New Jersey Consumer Fraud Act,⁷⁰ the

66. Dugan v. TGI Fridays, Inc. 171 A.3d 620, 647 (N.J. 2017).

67. Statement, *supra* note 34, at 2-3 (emphasis added).

68. United Consumer Fin. Servs. Co. v. Carbo, 982 A.2d 7, 23 (N.J. Super. Ct. App. Div. 2009).

69. Shelton v. Restaurant.com, Inc., 70 A.3d 544, 553 (N.J. 2013).

70. Martinez-Santiago v. Pub. Storage, 38 F. Supp. 3d 500, 505 (D.N.J. 2014) (ruling that plaintiff stated a claim for TCCWNA violation where a contract impermissibly shortened the Consumer Fraud Act’s statute of limitations).

Products Liability Act,⁷¹ the Punitive Damages Act,⁷² the Uniform Commercial Code,⁷³ the Nursing Home Act,⁷⁴ the New Jersey Gift Certificate Statute,⁷⁵ the Fair Debt Collection Practices Act,⁷⁶ and New Jersey Statutes sections 2A:44-189, which pertain to rental agreements with limits upon the value of stored property and the remedies that accompany it.⁷⁷ The voluntary waiver of a legal right does not constitute a violation under the TCCWNA.⁷⁸

This element of a TCCWNA claim appears to be the biggest barrier for consumers, especially when seeking to pursue class actions. The trend of New Jersey courts is to deny the TCCWNA claims by refusing to certify the class⁷⁹ or dismiss the case primarily on policy grounds that the scope of the TCCWNA will result in penalties against the businesses that are exorbitant.⁸⁰

D. Online Terms and Conditions and the TCCWNA

The primary focus of recent litigation under the TCCWNA concerns online terms and conditions or terms of service offered by sellers to consumers before they make their

71. See generally *Hite v. Lush Internet, Inc.*, 244 F. Supp. 3d 444 (D.N.J. 2017) *appeal docketed*, No. 17-1907 (3d Cir. Apr. 21, 2017); Transcript of Opinion on Motion to Dismiss, *supra* note 62.

72. *Hite*, 244 F. Supp. 3d at 447; Transcript of Opinion on Motion to Dismiss, *supra* note 62.

73. *Id.*

74. *Manahawkin Convalescent v. O'Neill*, 43 A.3d 1197, 1199 (N.J. Super. Ct. App. Div. 2012).

75. *Shelton v. Restaurant.com, Inc.*, 70 A.3d 544, 547 (N.J. 2013).

76. *Chulsky v. Hudson Law Offs. P.C.*, 777 F. Supp. 2d 811, 813 (D.N.J. 2011).

77. *Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204, 211 (D.N.J. 2015).

78. *Salvadori v. Option One Mortg. Corp.*, 420 F. Supp. 2d 349, 355 (D.N.J. 2006).

79. *Dugan v. TGI Fridays, Inc.* 171 A.3d 620, 640, 643 (N.J. 2017) (failing to meet the predominance requirement because of the different individualized harm that may result from TCCWNA violations); see also *Mellet v. Aquasid, LLC*, 171 A.3d 207, 208-09 (N.J. Super. Ct. App. Div. 2017).

80. *Rubin v. J. Crew Grp., Inc.*, No. 16-2167(FLW), 2017 WL 1170854, at *21-22 (D.N.J. Mar. 29, 2017); *Dugan*, 171 A.3d at 650 (“Nothing in the legislative history of the TCCWNA, which focuses on sellers’ inclusion of legally invalid or unenforceable provisions in consumer contracts, suggests that when the Legislature enacted the statute, it intended to impose billion-dollar penalties on restaurants that serve unpriced food and beverages to customers.”).

purchases.⁸¹ These cases have outlined a few helpful boundaries in determining the scope of the TCCWNA in the 2000s. While a few companies have attempted to comply with the TCCWNA, it is uncertain at this time whether these terms and conditions will actually be enforced by the courts as there have been no rulings that state what precisely is required of sellers to comply with the TCCWNA.⁸²

As for arbitration clauses, it is questionable whether these will violate the TCCWNA, and their enforceability will likely depend on how the arbitration clauses are phrased.⁸³ Regarding jurisdictional limitations, courts have held that contractual provisions that “purport only to be coextensive of the laws of the state, or merely state that they are permitted to the maximum amount or extent as permitted by state law, do not violate a clearly

81. See, e.g., *Hite v. Lush Internet, Inc.*, 244 F. Supp. 3d 444 (D.N.J. 2017).

82. See *Terms of Use*, STANLEY BLACK & DECKER, <http://www.stanleyblackanddecker.com/terms-use> [https://perma.cc/UZ39-A9TD] (last visited Nov. 15, 2018) (“LEGAL NOTICE FOR NEW JERSEY RESIDENTS . . . the following provisions of these Terms shall not be applicable to New Jersey residents: (1) in the Disclaimer of Warranties and Limitation of Liability section, (a) the provision limiting our liability for any loss or damage is not applicable to New Jersey residents to the extent we were negligent or have breached our obligation to you, and (b) the provision concerning the exclusion or limitation of certain damages is not applicable to New Jersey residents with respect to punitive damages, loss of data, and loss of or damage to property; (2) in the Comments, Communications and Other Content section, the provision concerning the indemnification by you is not applicable to New Jersey residents unless you were negligent or have breached these Terms; and (3) in the Disputes section, (a) the provisions which limit the time within which claims against us must be brought, and (b) the provision concerning the exclusion or limitation of certain damages is not applicable to New Jersey residents with respect to punitive damages, loss of data, and loss of or damage to property.”); *Terms and Conditions*, STANLEY ENGINEERED FASTENING, <http://www.infastech.com/en/Services/Legals/Terms-and-Conditions> [https://perma.cc/C6P6-KGQR] (last visited Nov. 15, 2018); *Terms and Conditions*, STANTT, <https://stantt.com/pages/terms-and-conditions> [https://perma.cc/EZF8-GBBY] (last visited Nov. 15, 2018).

83. See *Salvadori v. Option One Mortg. Corp.*, 420 F. Supp. 2d 349, 355 (D.N.J. 2006) (holding that an arbitration agreement did not violate any clearly established legal right, and thus could not form the basis of a TCCWNA claim); *Atalese v. U.S. Legal Servs. Group*, 99 A.3d 306, 315 (N.J. 2014) (holding that that an arbitration clause was unenforceable because the clause needed to state in clear and unambiguous terms that the plaintiff is waiving her right to seek relief in court for a breach of her statutory rights). The plaintiff in *Atalese* asserted that the arbitration clause violated the TCCWNA. *Id.* However, the court has not yet decided the issue as the case was remanded and the court has made no subsequent decision as of now. *Id.*

established right.”⁸⁴ Courts have also held that phrases such as “where permitted by law” or “unless prohibited by law” are not in violation of the TCCWNA because they do not represent an attempt by the seller to “deceive the Plaintiff or obscure his rights, responsibilities, or remedies.”⁸⁵

In defining what jurisdictional statements violate the TCCWNA, courts have held that a clause does not trigger the TCCWNA’s Section 16⁸⁶ where the “language merely represents an ‘attempt by the drafter to conform to New Jersey laws,’” but that “where the savings provision could be interpreted to imply that some terms of the contract may be unenforceable in some jurisdictions,” courts have held that Section 16 is triggered.⁸⁷ While a provision does not need to “unequivocally express that some provisions may be unenforceable to trigger the specification requirement of Section 16,” sellers need to be cognizant of the appropriate terminology and careful in crafting their terms and conditions.⁸⁸ Some courts have found that terms may implicitly comply with or violate the TCCWNA’s Section 16 even in the absence of specific language addressing the topic.⁸⁹ “In other words, a contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the

84. *Walters v. Dream Cars Nat’l, L.L.C.*, 2016 N.J. Super. Unpub. LEXIS 498 (N.J. Super. Ct. 2016) (“The TCCWNA is not triggered merely because a consumer, unfamiliar with New Jersey law, cannot discern with certainty how far a provision extends . . . [A provision’s] language might give an inattentive reader the wrong impression about the law, if the reader skips over . . . limiting phrases’, such as ‘to the fullest extent permitted by law’ or ‘as is permitted by law’, however, that is not grounds for a Section 15 violation.”) (alteration in original).

85. *Id.* at *2, *7.

86. “No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the consumer waives his rights under this act. Any such provision shall be null and void. No consumer contract, notice or sign shall state 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; provided, however, that this shall not apply to warranties.” N.J. STAT. ANN. 56:12-16 (West 2018).

87. *Kendall v. Cubesmart L.P.*, No. 15-6098(FLW)(LHG), 2016 WL 1597245, at *9 (D. N.J. April 21, 2016) (quoting *Martina v. LA Fitness Int’l, LLC*, No. 12-2063, 2012 WL 3822093, at *4 (D. N.J. Sept. 4, 2012)).

88. *Id.*

89. *Id.*

contract or notice may be void, inapplicable, or unenforceable in some states.”⁹⁰

E. Illustrative Case: *Rubin v. J. Crew Group*

Rubin provides valuable guidance in the line of recent TCCWNA litigation because it represents the typical claims consumers assert against sellers’ online terms and conditions.⁹¹ The case also highlights the problem of defining what constitutes an “aggrieved consumer.” In *Rubin*, the consumer-plaintiff brought a putative class action in federal court against the online clothing retailer J. Crew.⁹² The focus of the suit concerned two provisions in J. Crew’s online terms and conditions offered in order to complete a sale, specifically the limitation of liability clause⁹³ and an indemnification clause⁹⁴ that allegedly violated the TCCWNA by “obscur[ing] the effects of its disclaimers on New Jersey [consumers].”⁹⁵ The plaintiff alleged that the terms and conditions prevented the consumer “from (1) ‘seeking

90. Shelton v. Restaurant.com, Inc., 70 A.3d 544, 549 (N.J. 2013).

91. *Rubin v. J. Crew Group, Inc.*, No. 16-2167(FLW), 2017 WL 1170854, at *1 (D. N.J. March 29, 2017).

92. *Id.*

93. *Id.* at *1-2 (“IN NO EVENT SHALL J.CREW . . . BE LIABLE TO YOU FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES, LOSSES OR CAUSES OF ACTION (WHETHER IN CONTRACT OR TORT, INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE OR OTHERWISE) ARISING FROM OR IN ANY WAY RELATED TO THE USE OF, OR THE INABILITY TO USE, OR THE PERFORMANCE OF THE SITE OR THE CONTENT AND MATERIALS OR FUNCTIONALITY ON OR ACCESSED THROUGH THE SITE, INCLUDING, WITHOUT LIMITATION, LOSS OF REVENUE, OR ANTICIPATED PROFITS, OR LOST BUSINESS, DATA OR SALES OR ANY OTHER TYPE OF DAMAGE, TANGIBLE OR INTANGIBLE IN NATURE, EVEN IF J.CREW OR ITS REPRESENTATIVE OR SUCH INDIVIDUAL HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SOME JURISDICTIONS DO NOT ALLOW THIS LIMITATION OR EXCLUSION OF LIABILITY, SO SOME OF THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU.”).

94. *Id.* (“You agree to defend, indemnify and hold J.Crew . . . harmless from any and all claims, liabilities, damages, costs and expenses, including reasonable attorneys’ fees, in any way arising from, related to or in connection with your use of the Site, your violation of the Terms or the posting or transmission of any materials on or through the Site by you, including, but not limited to, any third-party claim that any information or materials you provide infringes any third-party proprietary right.”).

95. *Id.* at *3.

punitive damage awards for damage incurred’; (2) ‘seeking redress for violations of their internet commerce rights’; and (3) ‘pursuing any damages, including treble and statutory damages, attorney’s fees and costs for any illegal actions engaged in by Defendant on its website.’”⁹⁶ Finally, the plaintiff alleged that the inclusion of the provision “SOME JURISDICTIONS DO NOT ALLOW THIS LIMITATION OR EXCLUSION OF LIABILITY, SO SOME OF THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU” violated Section 16 of the TCCWNA.⁹⁷

The court dismissed plaintiff’s claim based on *Spokeo*,⁹⁸ which requires that “a plaintiff must claim the invasion of a concrete and particularized legally protected interest resulting in harm that is actual or imminent, not conjectural or hypothetical.”⁹⁹ The court stated that “[p]laintiff seems to suggest that language, *e.g.*, Terms and Conditions on the Website, that violates a statute is actionable, because its mere presence causes injury—regardless of whether she has seen it, read it, or suffered the effects of it. This is exactly the type of non-particularized and hypothetical injury against which *Spokeo* cautioned.”¹⁰⁰ Based on this reasoning, the plaintiff did not meet the requirement for Article III standing.¹⁰¹ However, because the court dismissed the case based on Article III standing, it never reached the question of whether the plaintiff was an aggrieved consumer under the TCCWNA, nor how that would interact with the *Spokeo* standing requirements.¹⁰² Delivering a final punch, the court stated:

The Court is aware that there are numerous class actions filed in this district based upon similar TCCWNA violations alleged in this case . . . the passage of the Act is not intended, however, for litigation-seeking plaintiffs and/or their counsel

96. *Rubin*, 2017 WL 1170854, at *2.

97. *Id.*

98. *Id.* at *3–5.

99. *Id.* at *2 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

100. *Id.* at *7.

101. *Rubin*, 2017 WL 1170854, at *7.

102. *Id.* at *8.

to troll the internet to find potential violations under the TCCWNA without any underlying harm.¹⁰³

However, this interpretation seems to be contradictory to the plain language of the statute, which claims that the *mere inclusion* of such provisions violates the TCCWNA.¹⁰⁴

PART II: THE STRENGTHS AND WEAKNESSES OF STATE CONSUMER PROTECTION STATUTES

To provide guidance for the New Jersey courts regarding how best to interpret the TCCWNA and to the New Jersey legislature regarding potential amendment of the statute to accommodate consumer protection needs in the age of technology, a review of existing consumer protection statutes, the levels of protection they afford, and their effectiveness in enforcing consumer protection would be helpful. This section will outline those factors that contribute to a strong consumer protection statute,¹⁰⁵ those factors that lead to a weak consumer protection statute,¹⁰⁶ and provide an example of a California statute that arguably exemplifies an almost ideal level of protection and supports the need for modification of the TCCWNA.¹⁰⁷ This article will then apply this analysis to the TCCWNA in order to determine the areas in which the statute could be improved.

A. CLASSIFICATION OF CONSUMER PROTECTION STATUTES

To classify consumer protection statutes according to the level of protection they afford to consumers, a framework of analysis would be helpful. In reviewing consumer protection statutes, specifically state versions of the Uniform Deceptive Acts

103. *Id.*

104. Statement, *supra* note 34.

105. See *infra* Part II.A.

106. See *infra* Part II.A.

107. See *infra* Part II.B.

or Practices, several factors contribute to bolstering consumer rights. But despite their intent to protect consumers, many states' consumer protection statutes unfortunately are not effective in practice for several reasons discussed below.

Strong state consumer protection statutes generally include provisions that allow consumers to enforce their rights with ease against businesses that attempt to mislead or otherwise dissuade consumers from suing. The factors and provisions include:

- “[B]road, general prohibitions against both deceptive conduct and unfair conduct”;
- The absence of a requirement that the consumer prove the seller acted willfully or with knowledge of the deceptive conduct;
- Provisions that grant a consumer with a private right of action against a business;
- Provisions that allow for the granting of rule-making authority to state agencies;
- Provisions that apply to a number of industries, without many exceptions;
- Provisions that make available a number of remedies (restitution, civil penalties, and/or equitable relief);
- Provisions that allow recovery of punitive damages and attorney’s fees; and
- Provisions that allow class actions.¹⁰⁸

While no one state consumer protection statute contains all of these factors, the more factors a statute includes, the more likely it is that the statute is effective in its goal of consumer protection. Many strong state consumer protection statutes substantially mirror the Federal Trade Commission Act.¹⁰⁹

Conversely, weak state consumer statutes contain provisions that lead to the prevention of consumer litigation

108. See Federal Trade Commission Act of 1914, 15 U.S.C. § 45 (2006); CAROLYN L. CARTER, NAT’L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE UNITED STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 10–12, 14–19, 22–23 (2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf [<https://perma.cc/4L43-2J3B>].

109. See CARTER, *supra* note 110, at 11.

against sellers for deceptive practices. The factors and provisions that weak state consumer protection statutes contain include:

- A short and specific list of acts that will constitute deceptive conduct for purposes of the statute;
- The requirement that the consumer prove the seller acted willfully or with knowledge of the deceptive conduct;
- Provisions that prevent a consumer himself from bringing litigation against the seller; do not grant rulemaking authorities to state agencies;
- Provisions that make exceptions to the statute for numerous industries, rendering the statute unenforceable against the majority of sellers;
- Provisions that substantially limit the remedies available to the consumer;
- Provisions that erect “special barriers” to litigation against the consumer, such as a requirement of prior notice to the seller or business;
- The absence of a provision permitting recovery of attorney’s fees or punitive damages;
- Provisions that place the burden of paying the seller’s attorney’s fees on the consumer;
- Provisions that bar class action litigation;
- Provisions that require proof of a negative public impact; and
- Provisions that require proof of the consumer’s reliance on the deceptive conduct.¹¹⁰

An additional consideration in classifying state consumer protection statutes as either strong or weak is the scope of conduct the statutes purport to regulate. While all state consumer protection statutes target deceptive practices generally, the states vary in whether the statutes protect against unconscionable, unfair, or both unfair *and* unconscionable conduct.¹¹¹ A majority of state consumer protection statutes regulate only unfair conduct.¹¹² Regulating unfair conduct results in relatively strong consumer protection statutes because the “unfairness doctrine” allows for states to develop their definition of the term “by the

110. *Id.* at 5, 7.

111. *See* PRIDGEN & ALDERMAN, *supra* note 16, at app. 3B.

112. *Id.* Twenty-seven states regulate unfair conduct. *Id.*

gradual process of inclusion and exclusion, through which they may ‘discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.’”¹¹³ Therefore, “even lawful acts may be scrutinized in consumers’ actions”¹¹⁴ A significant minority of states either do not specifically target unfair or unconscionable conduct or only regulate unconscionable conduct.¹¹⁵ Finally, ten states and the District of Columbia regulate both unconscionable and unfair conduct under the same consumer protection statute.¹¹⁶

B. STRONG CONSUMER PROTECTION STATUTES—CALIFORNIA CIVIL CODE § 1770

The California Legal Remedies Act is incredibly broad in its scope and application, and it represents one of the strongest consumer protection statutes among the fifty states.¹¹⁷ The statute, in relevant part, provides:

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful . . .

.¹¹⁸

In looking at the factors that make a strong consumer protection statute, California’s statute represents the inclusion of nearly all the factors.¹¹⁹ California’s consumer protection statute contains a specific list of acts that will constitute deceptive and unfair conduct; the list is extensive and enumerates over twenty-five separate actions that fall under the scope of the act.¹²⁰

113. See Leaffer & Lipson, *supra* note 9, at 536 (internal quotations omitted).

114. *Id.* at 537.

115. PRIDGEN & ALDERMAN, *supra* note 16, at app. 3B. Five states do not specifically target unfair or unsociable conduct (Minnesota, New York, North Dakota, South Dakota, and Virginia). *Id.* Six states regulate only unconscionable conduct (Alabama, Arkansas, Kansas, New Jersey, Texas, and Utah). *Id.*

116. *Id.*

117. CARTER, *supra* note 110, at 24.

118. CAL. CIV. CODE § 1770(a)(14) (West 2018).

119. See CAL. CIV. CODE § 1770(a)(14).

120. See CAL. CIV. CODE § 1770 (West 2018).

Additionally, any conduct not covered by this section of the act is covered by California's Unfair Competition Law, which "broadly prohibits unlawful, unfair, or fraudulent business practices and deceptive advertising."¹²¹ Furthermore, California's Unlawful Acts and Practices statute does not require that the consumer prove the seller acted willfully, but only with a tendency to deceive.¹²² It provides a consumer or the attorney general with the power to sue the seller even in the form of a class action,¹²³ does not limit the industries that may be sued (other than excluding advertising mediums),¹²⁴ and allows for the recovery of a variety of damages and relief (including restitution and punitive damages).¹²⁵

While the California Legal Remedies Act is demonstrative of a robust consumer protection statute, it contains a barrier that may make it difficult for consumers to bring litigation against sellers. Namely, the act requires the consumer to provide the seller with notice "thirty days or more prior to the commencement of [the] action," with a "[d]emand that the person correct, repair, replace, or otherwise rectify" the infringement of the consumer's rights.¹²⁶ Adding these requirements for bringing a suit may dissuade some consumers from enforcing their rights.¹²⁷

121. CARTER, *supra* note 110, at 24; CAL. BUS. & PROF. CODE § 17200 (West 2018).

122. CAL CIV. CODE § 1770(a).

123. CAL CIV. CODE § 1752 (West 2018).

124. CAL CIV. CODE § 1755 (West 2018).

125. CAL CIV. CODE § 1780 (West 2018).

126. CAL CIV. CODE § 1782(a)(2) (West 2018).

127. For an example of a weak state consumer protection statute, *see* COLO. REV. STAT. §§ 6-1-105, -109 (West 2018), which, beyond providing very limited options for recovering damages and what constitutes unfair or deceptive practices, also requires consumers to show that the deceptive conduct "significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property." *Henson v. Bank of Am.*, 935 F. Supp. 2d 1128, 1142 (D. Colo. 2013) (quoting *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003)).

PART III: DRAFTING EFFECTIVE CONSUMER PROTECTION STATUTES

A. ANALYZING THE TCCWNA

The TCCWNA represents one of the strongest and most pervasive consumer protection statutes—at least in regard to its plain language. While the statute does not directly address unconscionable and unfair conduct,¹²⁸ the language of the statute’s legislative history suggests that it applies broadly to all deceptive conduct.¹²⁹ The TCCWNA does not require the consumer to show that the seller was aware that its conduct was deceptive.¹³⁰ Instead, the TCCWNA states that the mere inclusion of deceptive terms constitutes a violation of the act.¹³¹ The statute allows the consumer a private right of action and is broadly applicable to all sellers, lessors, creditors, and bailees.¹³² Additionally, the remedies available under the TCCWNA are extensive, including a civil penalty, actual damages, attorney’s fees, and court costs, all of which are “in addition to and cumulative of any other . . . remedy . . . accorded by common law, Federal law or statutes of this State”¹³³ Furthermore, the TCCWNA does not list specific illegal conduct.

While the TCCWNA is among the stronger consumer protection statutes, it is still subject to some limitations that are significant weaknesses. First, the TCCWNA explicitly states that it does *not* create new substantive rights.¹³⁴ Secondly, the TCCWNA’s only stated goal is to target deceptive conduct rather

128. This is presumably the case because the New Jersey Consumer Fraud Act covers unconscionable conduct, and the TCCWNA was created as an extension of the CFA in order to fill in the gaps the CFA left in consumer protection. Statement, *supra* note 34; N.J. STAT. ANN. § 56:8-2 (1967).

129. *Smerling v. Harrah’s Entm’t, Inc.*, No. A-4937-13T3, 2016 WL 4717997, at *3 (N.J. Super. Ct. Sept. 9, 2016).

130. N.J. STAT. ANN. §§ 56:12-15, -16 (West 2018).

131. Statement, *supra* note 34.

132. N.J. STAT. ANN. § 56:12-17.

133. N.J. STAT. ANN. § 56:12-18.

134. N.J. STAT. ANN. § 56:12-18.

than unfair, unconscionable, or conduct that does a disservice to consumers.¹³⁵

B. FUNCTIONAL CONSUMER PROTECTION STATUTES

In order for state consumer protection statutes to be effective, particularly in regard to online terms, two requirements must be met. First, sellers must comply with statutory requirements. Second, consumers must read and comprehend the contract terms. Regarding the first, one noted scholar, Professor Whitford of the University of Wisconsin, has provided a framework for encouraging sellers to fulfill the first requirement. With regard to the second, several psychological studies provide guidance for drafting terms designed to fulfill the requirement that terms be read and comprehended by consumers.¹³⁶

1. *Whitford Framework for Encouraging Seller Compliance*

The Whitford framework hypothesizes a set of factors that induce sellers to comply with consumer protection laws.¹³⁷ The framework assumes that sellers utilize cost-benefit analyses when determining whether they will comply with a consumer protection statute.¹³⁸ The cost-benefit analysis considers economic harm that may directly result from non-compliance as well as

135. See Statement, *supra* note 34.

136. This article will not address the second requirement focusing on the consumer's role in effectuating consumer protection statutes and instead will focus on how best to motivate seller compliance. This might be done via the implementation of model disclosure forms and clauses issued by the New Jersey legislature similar to those issued by the Consumer Financial Protection Bureau and Federal Reserve Board for Regulation Z. See Regulation Z, 12 C.F.R. § 1026 apps. G, H (2018).

137. Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 58 ARIZ. L. REV. 33, 36 (2016).

138. *Id.*

reputational damage and cognitive dissonance.¹³⁹ Whitford's framework consists of three conclusions.

First, "that more specific statutes would produce greater compliance [because] . . . vague standards create unworkable precedent and allow companies to give themselves the benefit of the doubt regarding the legality of their practices, thereby minimizing the reputational and psychological costs of noncompliance."¹⁴⁰ Creating more specific standards and including a statement of purpose provides "concrete commands to engender compliance."¹⁴¹

Second, sellers consider costs in both their direct (costs of legal compliance) and indirect (revenue lost via compliance with laws) capacities, meaning that statutes must ensure that the costs of compliance do not dis-incentivize sellers from abiding by consumer protection laws.¹⁴²

Third, legislatures need to pay particular attention to remedies¹⁴³ when drafting consumer protection statutes because "penalties for violating consumer protection laws [are] not high enough to compensate for the fact that so few consumers [sue]."¹⁴⁴ Because the traditional route of remedies are not an effective method of remedying harm to consumers,¹⁴⁵ Whitford suggests that public enforcement is the "only viable alternative," meaning that administrative agencies—rather than consumers—are the most likely actors to produce seller compliance.¹⁴⁶ Even though public enforcement has the best chance at inducing compliance, Whitford notes that "the effectiveness of public

139. *Id.*

140. *Id.* at 37.

141. *Id.* at 45.

142. Braucher & Littwin, *supra* note 139, at 36-37.

143. *Id.* at 37.

144. *Id.* One proposed solution to the compensation issue is "effective private enforcement" under UDAP statutes that "can be expected to eliminate the gap between the inherent limitations on FTC efforts and the needs of aggrieved consumers," which "thus [offer] the best deterrent against wrongdoing in the marketplace." Leaffer & Lipson, *supra* note 6, at 521, 555.

145. Remedies in consumer protection actions, especially actual damages, can be difficult to calculate, especially where the damage is merely the presentation or inclusion of deceptive terms. Leaffer & Lipson, *supra* note 9, at 546-47.

146. Braucher & Littwin, *supra* note 139, at 48.

enforcement will depend in large part on the agency's commitment to legal compliance."¹⁴⁷

2. *An Effective Framework*

As indicated, therefore, incentivizing sellers to comply with consumer protection statutes and encouraging consumers to read contract terms seems to be the best approach for drafting effective consumer protection statutes. Taking the strengths and weaknesses of existing consumer protection statutes¹⁴⁸ into consideration is essential to this endeavor as well. Thus, the following factors are critical in ensuring an effective consumer protection statute.

First, the New Jersey legislature should draft a specifically worded statute that applies broadly to unfair, unconscionable, and deceptive trade practices. It is important to note that "broadly" does not mean "vaguely" in this context. A statute may have a broad scope while still containing specific language detailing which practices are unlawful. For example, a good consumer protection statute will contain:

- A statement providing that unconscionable, unfair¹⁴⁹, and deceptive conduct is unlawful,¹⁵⁰ and
- A comprehensive itemized list of specific unlawful, unfair, and deceptive conduct, with a provision that holds any unlisted conduct that amounts to unconscionable or unfair conduct is unlawful.¹⁵¹

147. *Id.*

148. See *supra* Part II.A..

149. Regulating unfair conduct may be the most important aspect of a consumer protection statute to effectuate the broadest protection, as an innumerable amount of practices may fall under its scope. Regulating unfair conduct may come in the form of stating that "(1) [whether an act,] without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers." Leaffer & Lipson, *supra* note 9, at 537.

150. *Id.*

151. *Id.* at 535.

This will provide broad protection to consumers while still providing clear guidelines to the seller. Additionally, and importantly, consumer protection statutes should meet the standard applied by the FTC. That is, deceptive trade practices “need only have a potential to create deception in the minds of consumers or business competitors” rather than require that the consumer be “actually deceived.”¹⁵² This standard protects the consumer from the actualization of the harm.¹⁵³ While the potential for sellers to find loopholes will always exist, this method affords consumers the most protection while holding the seller accountable.

Second, the legislature should lower barriers to consumer suits and impose stricter penalties on sellers who do not comply.¹⁵⁴ The consumer protection statute should permit a private right of action, allow for punitive and higher civil damages rather than capping the remedies available or amount recoverable,¹⁵⁵ and permit class actions. Companies will thus have greater incentives to comply. This approach permits consumers to enforce their rights with minimal hassle. The breakdown of barriers to litigation should also increase the cost of noncompliance, further incentivizing compliance. The legislature should also seek to broaden the remedies available to consumers *and* administrative agencies (allowing equitable, injunctive, and civil penalties).¹⁵⁶

3. *General Redrafting Suggestions for TCCWNA*

In rewriting the TCCWNA or drafting consumer protection legislation specifically designed to address online terms and conditions, the New Jersey legislature should

152. Karns, *supra* note 2, at 382.

153. *Id.*

154. Leaffer & Lipson, *supra* note 6, at 547 (“In . . . cases in which proof of the extent of a consumer’s loss is difficult, the courts’ use of reasonable inferences in connection with minimum damages provisions will make consumer actions feasible.”).

155. *Id.* at 532.

156. Braucher & Littwin, *supra* note 139, at 48; Leaffer & Lipson, *supra* note 9, at 523-24.

implement strong provisions preventing sellers from continuing their deceptive practices, as well as ensure that consumers actually engage with online terms. Rather than seeking to limit consumer protection by increasing barriers to litigation—as does one bill recently proposed to amend the TCCWNA¹⁵⁷—the New Jersey legislature should remember that both the federal government—via the FTC Act—and all states endorse greater consumer protection.¹⁵⁸

Amending the TCCWNA or constructing a new statute, while harsh on businesses, will also benefit sellers by allowing them to clearly understand what is required of them to comply with the statute. The failure to set forth specifications as to compliance in the TCCWNA as it stands reduces the incentive for businesses to amend their terms and conditions so that New Jersey residents are aware of their rights. If the businesses attempt to comply, but do so inadequately, they still suffer the same penalties as those that make no attempt at compliance.¹⁵⁹

4. *Suggested Amendment*

In order to effectuate the strong consumer protection power that the New Jersey legislature originally intended, the following amendments to the TCCWNA are suggested in italics:

New Jersey Truth-in-Consumer Contract, Warranty and Notice Act

No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that violates any clearly established legal right of

157. Proposed Bill 2016 Bill N.J. A.B. 4121, if passed, will require “ascertainable economic loss” in order to achieve class certification, which fundamentally conflicts with the TCCWNA’s statement that the mere inclusion of such deceptive terms is what constitutes the harm, and will put into place a procedural system in which the consumer will need to first request reimbursement from the seller, effectively erecting a new and difficult barrier to consumer protection. Gen. Assemb. 4121, 217th Leg., 1st Ann. Sess. (N.J. 2016).

158. Karns, *supra* note 2, at 375.

159. Braucher & Littwin, *supra* note 139, at 59-60

a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed. *Any contract, warranty, notice or sign that is displayed on a seller's website or other online location shall be covered by this act. The mere inclusion in a contract, warranty, notice or sign of these terms is sufficient for a consumer to bring a cause of action under this act, even absent other harm.*

A seller violates a clearly established legal right or fails to fulfill their responsibility as a seller—and will be considered either unfair methods of competition, unfair or deceptive acts or practices, or unconscionable—when any of the following occurs:

- a) Passing off goods or services as those of another;*
- b) Misrepresenting the source, sponsorship, approval, or certification of goods or services;*
- c) Misrepresenting the affiliation, connection, or association with, or certification by, another;*
- d) Using deceptive representations or designations of geographic origin in connection with goods or services;*
- e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;*
- f) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand;*
- g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;*
- h) Disparaging the goods, services, or business of another by false or misleading representation of fact;*
- i) Advertising goods or services with intent not to sell them as advertised;*
- j) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity;*
- k) Advertising furniture without clearly indicating that it is unassembled if that is the case;*

- l)Advertising the price of unassembled furniture without clearly indicating that the assembled price of that furniture if the same furniture is available assembled from the seller;*
- m)Making false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions;*
- n)Representing that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law;*
- o)Representing that a part, placement, or repair service is needed when it is not;*
- p)Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not;*
- q)Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction;*
- r)Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer;*
- s)Inserting an unconscionable provision in the contract;*
- t)Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (i) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (ii) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product.¹⁶⁰*

Consumer means any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes. The provisions of this act shall not apply to residential leases or to the sale of real estate, whether improved or not, or to the construction of new homes subject to “The New Home Warranty and

160. CAL CIV. CODE § 1770 (West 2018).

Builders' Registration Act," P.L.1977, c. 467 (C. 46:3B-1 et seq.).¹⁶¹

No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the consumer waives his rights under this act. Any such provision shall be null and void. No consumer contract, notice or sign shall state 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; provided, however, that this shall not apply to warranties.¹⁶² *Examples of such provisions include provisions which provide that the consumer assumes all risk and responsibilities, and even agrees to defend, indemnify and hold harmless the seller from all liability. Other provisions claim that a lessor has the right to cancel the consumer contract without cause and to repossess its rental equipment from the consumer's premises without liability for trespass. Still other provisions arbitrarily assert the consumer cannot cancel the contract for any cause without punitive forfeiture of deposits and payment of unfounded damages. Also, the consumer's rights to due process is often denied by deceptive provision by which he allegedly waives his right to receive legal notices, waives process of law in the repossession of merchandise and waives his right to retain certain property exempted by State or Federal law from a creditor's reach.*¹⁶³

Any person who violates the provisions of this act shall be liable to the aggrieved consumer for:

- a)Actual damages, but in no case shall the total award of damages in a class action be no less than one thousand dollars (\$1000);*
- b)An order enjoining the methods, acts, or practices;*
- c)Restitution of property;*
- d)Punitive damages;*

161. N.J. STAT. ANN. § 56:12-15 (West 2018).

162. N.J. STAT. ANN. § 56:12-16.

163. Statement, *supra* note 34, at 2-3.

*e)Any other relief the court deems proper.*¹⁶⁴

This may be recoverable by the consumer in a civil action in a court of competent jurisdiction or as part of a counterclaim by the consumer against the seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid, who aggrieved him. A consumer also shall have the right to petition the court to terminate a contract which violates the provisions of section 2 of this act and the court in its discretion may void the contract. *Nothing in this act shall limit any other statutory or common law rights of the Attorney General or any other person to bring class actions. Nothing in this act shall be construed so as to deprive a consumer of any statutory or common law right to bring a class action in common law or a violation of another statute without resort to this act.*¹⁶⁵

CONCLUSION

While it is appropriate to consider the rights of sellers, state legislatures should seek to promote only that business which respects and upholds the rights of consumers. In the words of James Madison, “If men were angels, no government would be necessary.”¹⁶⁶ But because sellers cannot always be trusted to keep the consumer’s best interest in mind, comprehensive and powerful consumer protection statutes are necessary to force compliance. Consumers also play an important role in effective and efficient consumer protection, as the only reason sellers drafting appropriate contract terms matters is if consumers read and enforce the rights within those contracts. The New Jersey legislature was correct in its creation of a broad consumer protection statute like the TCCWNA, but just as the technology

164. CAL CIV. CODE § 1780 (West 2018).

165. CAL CIV. CODE § 1752 (West 2018).

166. THE FEDERALIST NO. 51 (James Madison).

of consumer transactions has evolved, the alteration of such consumer protection statutes is necessary to ensure that the legislative intent lives on in the new world full of online and electronic consumer transactions.

JESSICA GUARINO