

Insights: Alerts

Recent Ruling Creates Potential Liability For Use of Common Contractual Terms

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Contracts containing uniform terms and conditions are a common feature of modern commercial life. Consumers are oftentimes required to agree to such contracts in order to buy a good or service, and the contracts typically contain provisions that benefit the business/seller and limit the legal remedies available to the consumer/buyer. While the law generally favors freedom of contract and supports the enforceability of uniform terms and conditions, a recent case applying New Jersey law shows that a business could be exposed to liability – including as a class action defendant – for simply including certain types of limiting clauses in consumer contracts.

In *Johnson v. Wynn's Extended Care, Inc.*, No. 15-1343, 2015 WL 8781374 (3d Cir. Dec. 15, 2015), the Third Circuit Court of Appeals ruled that a consumer has a valid cause of action against a business where its service contract simply contains a provision waiving attorneys' fees and splitting costs. That case was filed by a New Jersey resident (Ms. Johnson) who got into a dispute with an auto repair shop, which refused to authorize repairs to her car under a "Used Vehicle Service Contract" between the parties. Ms. Johnson proceeded to file a putative class action lawsuit against the auto repair shop, alleging that the service contract violated the New Jersey Truth in Consumer Contract Warranty and Notice Act ("TCCWNA") because it waived attorneys' fees and required the parties to split costs. The New Jersey federal district court dismissed the claim and Ms. Johnson appealed.

The sole question addressed by the Third Circuit was whether the fee waiver/cost splitting provision violated the TCCWNA. The Third Circuit ruled in Ms. Johnson's favor, concluding she had a valid claim against the auto repair shop. To state a claim under the TCCWNA, all she needed to allege was that "the service contract presented to her by [the auto repair shop] 'include[d] any provision that violates any clearly established legal right of a consumer ... as established by State or Federal law.' The Third Circuit relied on the case *Delta Funding Corp. v. Harris*, 189 N.J. 28, 912 A.2d 104, 114 (N.J. 2006), in which the New Jersey Supreme Court held that contractual provisions preventing the recovery of attorneys' fees and costs – when those fees and costs are mandated by statute – are unconscionable. Because both the TCCWNA and another New Jersey statute (the New Jersey Consumer Fraud Act) mandate the recovery of attorneys' fees and costs by the prevailing party, the Third Circuit concluded that the service contract violated the TCCWNA because the contract violated "a clearly established legal right under New Jersey law."

The *Johnson* decision creates a legal issue for any company with a consumer-facing business model that utilizes contracts including standard provisions, such as a provision precluding the recovery of attorneys' fees. Based on the reasoning of *Johnson*, a plaintiff who purchases a service from a defendant, even one who is fully satisfied with the good or service they receive, could still advance a claim under the TCCWNA if the contract under which the good or service was provided contains a provision that violates New Jersey law. Moreover, the risk is heightened in light of the exposure to class action litigation. Since the violation is the simple inclusion of the allegedly improper contract provision, a class action could potentially be filed on behalf of any consumer in the United States who was a party to the allegedly illegal contract.

Just this year at least five new putative class actions alleging similar violations of the TCCWNA were filed in New Jersey federal court. See *Reifer v. Samsung Elecs. Am., Inc.*, No. 2:16-cv-01943-SDW-LDW (D.N.J. Apr. 7, 2016); *Rubin v. Intuit, Inc.*, No. 3:16-cv-02029-FLW-LHG (D.N.J. Apr. 12, 2016); *Schleifer v. Avis Rent A Car Sys., LLC*, No. 2:16-cv-02090-WJM-MF (D.N.J. Apr. 15, 2016); *Rubin v. J Crew Group, Inc.*, No. 3:16-cv-02167-FLW-LHG (D.N.J. Apr. 19, 2016); *Rubin v. Saks Direct Inc.*, No. 3:16-cv-02197-PGS-LHG (D.N.J. Apr. 19, 2016). Another such case was filed in federal district court in California. See *Silkowski v. Apple Inc.*, No. 5:16-cv-02338-PSG (N.D. Cal. Apr. 28, 2016). The only injury claimed in these cases is the inclusion of contractual provisions, such as limitation of liability provisions and indemnification provisions, that allegedly violate the TCCWNA. Moreover, all but one of the cases were brought by the same attorney, and three of them seek the certification of nationwide classes.

The idea that a plaintiff, happy with the good or service purchased from a defendant, can haul off to court and file a putative nationwide class action based simply on the inclusion of a contractual term seems to fly in the face of federal standing jurisprudence. Other federal courts faced with a similar issue have held that the inclusion of a contract provision that violates applicable state law is not enough, absent some other injury, to provide a plaintiff with legal standing to bring a claim. See, e.g., *Wendt v. 24 Hour Fitness USA, Inc.*, No. 3:13-CV-04910-K, 2015 WL 1344819, *6 (N.D. Tex. Mar. 24, 2015) ("Assuming without deciding that Plaintiffs' contracts are void because they violate the Health Spa Act, Plaintiffs must still allege injury in order to have standing to sue."); *Sokoloff v. Town Sports Int'l, Inc.*, 6 A.D. 3d 185, 186 (N.Y. App. Div. 2004) ("[P]laintiff claims that the contract violates General Business Law § 624 by making the initiation fee paid under the contract nonrefundable and violates General Business law § 623(3) by limiting defendant's liability for personal injury or property loss, and that such statutory violations entitle her to return of the membership fees she has already paid. Such claims impermissibly sets forth deception as both act and injury." (internal quotation omitted)). One potential difference between these cases and the *Johnson* case, however, is that the TCCWNA specifically authorizes a consumer to recover a statutory minimum of \$100 per violation, as well as attorneys' fees and costs. N.J.S.A. 56:12-17.

A drafting approach that might address this issue is a "void where prohibited" approach, where the standard terms and conditions recite that the contractual waivers will not apply in specific legal contexts where the waivers are unenforceable. It remains to be seen from the caselaw, however, whether standard contractual

language can be crafted that will eliminate or reduce liability for these sorts of claims.

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