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**CONSUMER****TERMS AND CONDITIONS**

Businesses affected by a new wave of consumer class actions targeting the Terms of Use appearing on websites should pay close attention to a case currently pending in the District of New Jersey, attorneys Ana Tagvoryan and John Wixted say. *Braden v. TTI Floor North America* is significant, and may be the first time that challenges to an expansive interpretation of New Jersey's Truth in Consumer Contract, Warranty and Notice Act are being addressed by a court, the authors say.

**Increased Wave of Consumer Class Actions Targets Consumer Websites**

BY ANA TAGVORYAN AND JOHN WIXTED

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**B**usinesses affected by a new wave of consumer class actions targeting the Terms of Use of websites should pay close attention to a case currently pending in the District of New Jersey. *Braden v. TTI Floor North America, Inc.*, 3:16-cv-00743 (D.N.J. February 10, 2016), is one of several actions in which plaintiffs are seeking millions of dollars in damages, attorneys' fees, and other costs based upon a relatively obscure 1981 New Jersey statute known as the Truth in Consumer Contract, Warranty and Notice Act, N.J.S.A. § 56:12-14, *et seq.* ("TCCWNA").

The Complaint in *Braden* alleges that the defendant markets and sells various floor care products through its website, [www.hoover.com](http://www.hoover.com), and that the rights of those (including the plaintiffs) who purchase such products are governed by the website's "Terms and Conditions." Among other things, the plaintiffs allege that the Terms and Conditions contain unlawful provisions which deprive the plaintiffs of a remedy for the defendant's tortious acts; absolve the defendant of liability for the manufacture or sale of unsafe products; and relieve the defendant of any responsibility to protect consumers from "third-party criminal hackers." According to the Complaint, these violations give rise to a cause of action under the TCCWNA.

The TCCWNA prohibits sellers of consumer goods and services from including in a written consumer contract, warranty, notice or sign any provision that vio-

lates a “clearly established legal right of a consumer.” N.J.S.A. § 56:12-15. In addition, if a seller’s contract, notice, or sign states generally that a particular provision is or may be void, unenforceable, or inapplicable in some jurisdictions, the TCCWNA requires the seller to specify whether or not the provision is void, unenforceable, or inapplicable in New Jersey. N.J.S.A. § 56:12-16.

Seizing upon the broad and somewhat vague language of this statute, plaintiffs’ attorneys have sought to exploit common provisions in the Terms of Use of a business’s website to lay the groundwork for potentially significant consumer class actions. Plaintiffs have alleged, for example, that common limitation of liability provisions in a website’s Terms of Use—which purport to release the website owner for damages associated with the use of the website—violate the TCCWNA by unlawfully depriving users of a cause of action against the website owner for its own negligence.

The allure of targeting such Terms of Use appears to derive from the substantial number of visitors to the websites of popular consumer brands—visitors who may constitute class members entitled to relief under TCCWNA’s statutory remedy, which provides that “[a]ny person who violates the provisions of this act shall be liable to the aggrieved consumer for 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.” N.J.S.A. § 56:12-17.

In an effort to include the greatest number of potential class members within the ambit of this provision, plaintiffs’ attorneys have advocated an interpretation of the TCCWNA that does not require their clients to show that they were actually injured by the violation at issue. In *Braden*, for example, the plaintiff’s claim is premised upon allegations that she and her fellow class members purchased products through a website that contained Terms and Conditions that violated the TCCWNA. Notably, there is no allegation that the defendant attempted to enforce any of the allegedly unlawful provisions in the Terms and Conditions, or that the plaintiff was in any way harmed by the defendant or its products.

*Braden* is significant because it may be the first time that challenges to this expansive interpretation of the TCCWNA are addressed by a court. For example, the TCCWNA provides that those who violate the statute are liable to “the aggrieved consumer” for the aforementioned civil penalty of \$100.00 and/or actual damages. The word “aggrieved,” however, is not defined in the statute, and the precise meaning of the term does not appear to have been addressed in any governing de-

cisional law. In its motion to dismiss filed on April 15, 2016, the defendant in *Braden* argued for an interpretation of the phrase “aggrieved consumer” that would require the plaintiff to allege at least some injury or damage in order to have standing under the TCCWNA. If this position is adopted by the court, it would bar claims by those who had simply been “exposed” to allegedly unlawful Terms of Use, thereby significantly limiting the number of potential class members for these actions.

The motion to dismiss filed in *Braden* also raises the fundamental question of whether a website’s Terms of Use actually fall within the scope of the TCCWNA. Specifically, the defendant contends that the Terms of Use on its website merely governs how the website itself may be used by the visitor, and does not relate to the actual purchase of consumer goods or services. Given the TCCWNA’s definition of “consumer,” this distinction may be significant. Specifically, a “consumer” under the statute is “any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes.” N.J.S.A. § 56:12-15. If a website’s Terms of Use apply only to use of that website—and if there are separate terms, warranties, and obligations that apply to purchases made—there would likely be no exposure under the TCCWNA, since visitors who do not pay for the mere use of a website could not be described as “consumers” under the definition above.

On May 16, 2016, the plaintiff filed a brief in opposition to the defendant’s motion to dismiss, and the defendant filed a reply brief on May 31, 2016. The motion remains pending before the court. Given the significant threshold issues of standing raised by that motion, the District of New Jersey’s decision may play a key role in the future viability of this class action trend, and could provide a crucial roadmap for businesses seeking to shield their own Terms of Use from similar claims under the TCCWNA.

Since the complaint in *Braden* was filed on February 10, 2016, at least six other class action complaints premised upon alleged TCCWNA violations contained in website Terms of Use/Terms and Conditions have been filed in New Jersey and California. See *Russell v. Croscill Home, LLC*, 3:16-cv-01190 (D.N.J. March 2, 2016); *Hite v. Lush Cosmetics, LLC*, 1:16-cv-01533 (D.N.J. March 18, 2016); *Candelario v. Vita-Mix Corp.*, 3:16-cv-02260 (D.N.J. April 21, 2016); *Russell v. Advance Auto Parts, Inc.*, 3:16-cv-02685 (D.N.J. May 12, 2016); *Candelario v. Whirlpool Corp.*, 3:16-cv-02810 (D.N.J. May 18, 2016); and *Candelario v. Rip Curl, Inc.*, 8:16-cv-00963 (C.D. Cal. May 25, 2016).