

**DORMANT NO LONGER: NEW JERSEY’S TRUTH IN
CONSUMER CONTRACT, WARRANTY, AND NOTICE ACT
VIOLATES THE DORMANT COMMERCE CLAUSE**

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I. INTRODUCTION	378
II. HISTORY OF THE TCCWNA AND THE DORMANT COMMERCE CLAUSE	385
A. <i>The TCCWNA</i>	385
i. The Legislative History of the TCCWNA	385
ii. The Text of the TCCWNA	386
B. <i>The Dormant Commerce Clause</i>	389
III. BALANCED OR UNBALANCED? WHY THE TCCWNA FAILS <i>PIKE</i>	390
A. <i>Consumer Protection is a Legitimate State Interest</i>	391
B. <i>The Burdens the TCCWNA Places upon Nation-wide Sellers is Clearly Excessive in Relation to the Benefits New Jersey Consumers Receive</i>	391
i. Potential Inconsistent Regulation is a Burden that is Clearly Excessive	391
ii. The Nature of New Jersey’s Interest, Consumer’s Knowledge of Their Existing Rights, Does Not Overcome the Excessive Burden Placed Upon Sellers Engaging in Interstate Commerce	396
C. <i>New Jersey’s Interest in Raising Consumer Rights Awareness Could Be Promoted in a Manner Less Impactful on Interstate Commerce</i>	397
IV. CONCLUSION.....	399

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I. INTRODUCTION

New Jersey has some of the United States' strongest consumer protection laws.¹ One of the most lauded by consumer advocates is the Consumer Fraud Act (CFA).² When the CFA was enacted in 1960, it was intended to be "one of the strongest consumer protection laws in the nation."³ To maintain its position, the CFA has had an uninterrupted history "of constant expansion of consumer protection."⁴ One such manifestation was another New Jersey consumer protection statute, the New Jersey Truth-In-Consumer-Contract Warranty and Notice Act ("TCCWNA").⁵

Enacted in 1981 by the New Jersey State Legislature, the TCCWNA was signed into law in 1982 by Governor Brendan Byrne.⁶ The governor's signing statement indicated that the TCCWNA was enacted to help "strengthen[] provisions of the [CFA]."⁷ The TCCWNA does not create any new consumer rights.⁸ Instead, the TCCWNA has two main goals: prevention and ensuring consumers are aware about their existing rights. First, the TCCWNA focuses on prevention by prohibiting businesses from using terms in their consumer contracts, warranties, signs, and notices that include "provision[s] that violate[] any clearly established legal right of a consumer."⁹ Those "clearly established legal right[s]" include rights established under other consumer protection

¹ See *Pro v. Hertz Equip. Rental Corp.*, No. 06-CV-3830, 2008 U.S. Dist. LEXIS 100181, at *13-14 (D.N.J. Dec. 11, 2008) ("New Jersey law is one of the most protective consumer fraud laws in the United States.").

² The CFA safeguards consumers by making it an unlawful practice for sellers of merchandise or real estate to engage in "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of [such] merchandise or real estate[.]" N.J. STAT. ANN. § 56:8-2 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

³ *Homa v. Am. Express Co.*, 558 F.3d 225, 232 (3d Cir. 2009) (citing *Huffmaster v. Robinson*, 534 A.2d 435, 437-38 (N.J. Super. Ct. Law Div. 1986) (internal quotation marks omitted)).

⁴ *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 364 (N.J. 1997).

⁵ See N.J. STAT. ANN. § 56:12-18 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

⁶ *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 427 (2013); *The Truth About TCCWNA*, N.J. CIVIL JUST. INST. (Nov. 5, 2016), <http://www.civiljusticenj.org/issues/the-truth-about-tccwna/>. The New Jersey Civil Justice Institute advocates for a civil justice system that treats all parties fairly and discourages lawsuit abuse. *Id.*

⁷ Statement from Brendan Byrne, Governor of New Jersey, on the Signing of Assembly Bill No. 1660 (Jan. 11, 1982).

⁸ See § 56:12-18.

⁹ N.J. STAT. ANN. § 56:12-15 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

statutes, such as the CFA.¹⁰ Second, the TCCWNA focuses on promoting consumer awareness by requiring sellers who conduct their business inside and outside of New Jersey to clearly specify in their contracts, signs and notices which provisions are “void, inapplicable, or unenforceable in New Jersey.”¹¹ This means that sellers are forbidden from using “void where prohibited” clauses in their contracts, signs, and notices.¹²

The most notable difference between the TCCWNA and New Jersey’s CFA is that the TCCWNA provides a private right of action for consumers and prospective consumers *without having to establish an actual injury*.¹³ To state a claim under the CFA, a plaintiff must allege: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant’s unlawful conduct and the [p]laintiffs’ ascertainable loss.¹⁴ Alternatively the TCCWNA contains no ascertainable loss requirement, which necessitates that any type of damage suffered must be quantifiable or measurable.¹⁵ Therefore, to succeed on a TCCWNA claim, a plaintiff does not need to show that the inclusion of an invalid provision or a “void where prohibited” clause in a contract, sign, or notice caused him or her to suffer a financial loss or injury of any kind.¹⁶ This lack of an ascertainable loss requirement lowers the bar for plaintiff’s attorneys to bring and succeed on TCCWNA claims compared to actions filed under the CFA.

After the TCCWNA was signed into law in 1982, it remained dormant for many years.¹⁷ In fact, the statute was not mentioned in a written opinion until 1997.¹⁸ The TCCWNA gained prominence in 2009

¹⁰ See *id.* “Clearly established legal rights” can include both those contained in New Jersey and federal consumer protection statutes. *Id.*

¹¹ *Shelton*, 70 A.3d at 549.

¹² *Kendall v. CubeSmart L.P.*, No. 15-6098, 2016 U.S. Dist. LEXIS 53668, at *27 (D.N.J. Apr. 21, 2016).

¹³ See *United Consumer Fin. Servs. Co. v. Carbo*, 982 A.2d 7, 15 (N.J. Super. Ct. App. Div. 2009). The court held that, even though “[t]here [was] no evidence that any consumer was dissatisfied with the . . . purchase[,] attempted to exercise and was denied the right to rescind or was charged a fee for submitting a check or other instrument for payment that was subsequently dishonored[,]” the consumers still had a private right to action under the TCCWNA.

¹⁴ *Frederico v. Home Depot*, 507 F.3d 188, 202 (3d Cir. 2007) (citing *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 465 (N.J. 1994)).

¹⁵ See *Thiedemann v. Mercedes-Benz, USA, LLC*, 872 A.2d 783, 793 (N.J. 2005).

¹⁶ N.J. STAT. ANN. § 56:12-15 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

¹⁷ *The Truth About TCCWNA*, *supra* note 6 (“[TCCWNA] lay dormant for many years . . .”).

¹⁸ See *Alloway v. General Marine Indus., L.P.*, 695 A.2d 264, 274 (N.J. 1997).

when the New Jersey Appellate Division applied the statute to class action lawsuits. That year, the Appellate Division held in *United Consumer Financial Services Co. v. Carbo* that proof of ascertainable loss was not necessary in order for a plaintiff to bring a class action under TCCWNA.¹⁹ The plaintiff class in *Carbo* consisted of 16,845 consumers who had purchased “Kirby” vacuum cleaners.²⁰ The class members brought a claim that the “notices of cancellation” contained in the vacuum’s retail contract violated New Jersey’s Retail Installment Sales Act.²¹ There was no evidence presented at trial that any consumer was “dissatisfied with the Kirby purchased, attempted to exercise and was denied the right to rescind or was charged a fee for submitting a check or other instrument for payment that was subsequently dishonored.”²² Despite any ascertainable loss, the TCCWNA violation required United Consumer Financial Services Company to pay all 16,845 class members a statutory penalty of \$100 each, totaling \$1,684,500, plus attorneys’ fees and court costs.²³

Ultimately, the *Carbo* decision not only expanded the reach of the TCCWNA, but opened the door for other plaintiffs to bring class actions. The effects of *Carbo* are evident in the number of TCCWNA cases that followed the decision. The frequency of TCCWNA cases rose from only two to three per year to dozens being decided each year.²⁴

However, the TCCWNA’s application to online commerce is arguably a more significant expansion of the statute. In 2013, the Supreme Court of New Jersey decided in *Shelton v. Restaurant.com, Inc.* that online coupons were considered “property” under the TCCWNA. Therefore, an online coupon’s terms and conditions could not contain a provision that violated an established consumer right or contain a “void where prohibited” clause.²⁵ *Shelton*’s holding opened the floodgates for e-commerce-based TCCWNA class actions with plaintiffs, many times the same ones, preying upon unsuspecting nation-wide retailer’s online

¹⁹ *United Consumer Fin. Servs. Co. v. Carbo*, 982 A.2d 7, 30 (N.J. App. Div. 2009).

²⁰ *Id.* at 14.

²¹ *Id.*

²² *Id.* at 15.

²³ *Id.* at 24-25. *See also* N.J. STAT. ANN. § 56:12-17 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24) (“[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 . . . together with reasonable attorney’s fees and court costs”).

²⁴ *See The Truth About TCCWNA*, *supra* note 6. The chart on the New Jersey Civil Justice Institute’s webpage titled “TCCWNA Decisions” demonstrates the rapid increase of TCCWNA claims after 2009.

²⁵ *Shelton v. Restaurant.com, Inc.*, 70 A.3d 544, 555 (N.J. 2013). Under the TCCWNA, a consumer is “any individual who buys, leases, borrows, or bails any money, *property* or service which is primarily for personal, family or household purposes.” *Id.* (emphasis added).

terms and conditions.²⁶

Plaintiffs are targeting online terms and conditions through TCCWNA's section 16.²⁷ Section 16 requires a consumer contract,

²⁶ Alan Brahamsha is the named plaintiff in three TCCWNA actions against Redbox Automated Retail LLC, Supercell Oy, and Starbucks Corporation. Anne Bucher, *Starbucks, Redbox Class Actions Say Contracts Don't Comply With NJ Law*, TOP CLASS ACTIONS (Sept. 17, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/345453-starbucks-redbox-class-actions-say-contracts-dont-comply-nj-law/>; Paul Tassin, *Clash of Clans Class Action Says Terms of Service Violates N.J. Law*, TOP CLASS ACTIONS (Nov. 15, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/349409-clash-of-clans-class-action-says-terms-of-service-violates-n-j-law/>. Aaron Rubin, Fay Rubin, and/or Fruma Rubin are the named plaintiffs in TCCWNA lawsuits filed against Inuit Inc., Saks Direct Inc., and J Crew Group, Inc. Paul Tassin, *Intuit Class Action Claims TurboTax Violates N.J. Consumer Laws*, TOP CLASS ACTIONS (Apr. 14, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/332835-intuit-class-action-claims-turbotax-violates-n-j-consumer-laws/>; Tamara Burns, *Saks Class Action Claims Website Terms Violate State Law*, TOP CLASS ACTIONS (Apr. 29, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/334028-saks-website-terms-conditions-violate-state-law-class-action-lawsuit-claims/>; Christina Davis, *J.Crew Class Action Alleges Website Terms Illegal*, TOP CLASS ACTIONS (May 4, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/334462-j-crew-class-action-alleges-website-terms-illegal/>. Ryan Russell is the named plaintiff against Advance Auto Parts Inc., Clawfoot Supply LLC, and Croscill Home. Paul Tassin, *Advance Auto Parts Class Action Says Website Terms Illegal*, TOP CLASS ACTIONS (May 16, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/335407-advance-auto-parts-class-action-says-website-terms-illegal/>; Tim Darragh, *Those Terms and Conditions (That Noone Reads) Could Cost NJ Retailers*, NEW JERSEY REAL TIME NEWS (Aug. 18, 2016, 9:55 AM), http://www.nj.com/news/index.ssf/2016/08/those_terms_and_conditions_that_nobody_reads_could.html. Darla Braden is a plaintiff in cases against Staples and TTI Floor North America. Robert Boumis, *Staples Class Action Say Website's Terms of Service Illegal*, TOP CLASS ACTIONS (July 1, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/339130-staples-class-action-says-website-terms-of-service-illegal/>; Anne Bucher, *Hoover Faces Class Action Lawsuit Over "Unfair" Terms and Conditions*, TOP CLASS ACTIONS (Feb. 16, 2015), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/328221-hoover-faces-class-action-lawsuit-over-unfair-terms-conditions/>. Lucia Candelario is the named plaintiff against Vita-Mix Corporation and Whirlpool Corporation. Tamara Burns, *Whirlpool Class Action Alleges Website Illegal Terms of Use*, TOP CLASS ACTIONS (May 23, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/336001-whirlpool-class-action-alleges-website-illegal-terms-use/>. Norris Hite is the named plaintiff against Lush Cosmetics and The Finish Line Inc. Ashley Milano, *Lush Cosmetics Class Action Says Website's "Terms of Use" Illegal*, TOP CLASS ACTIONS (Mar. 23, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/331043-lush-cosmetics-class-action-says-website-terms-of-use-illegal/>; Daniel Fisher, *Creative Lawyers Give New Meaning To The Term "Warranty Claim"*, FORBES (June 3, 2016, 11:41 AM), <https://www.forbes.com/sites/danielfisher/2016/06/03/never-mind-defective-products-now-lawyers-are-suing-over-the-warranty/2/#13a26d1e4f36>. Bronwyn Nahas is the named plaintiff against Hatworld Inc. and L Brands Inc. Ashley Milano, *HatWorld, Poptropica Class Action Lawsuits Filed Over Website Terms*, TOP CLASS ACTIONS (May 2, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/334194-hatworld-poptropica-class-action-lawsuits-filed-over-website-terms/>; Michael Kakuk, *Victoria's Secret Class Action Alleges Website Terms Illegal*, TOP CLASS ACTIONS (Apr. 20, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/333225-victorias-secret-class-action-alleges-website-terms-illegal/>.

²⁷ N.J. STAT. ANN. § 56:12-16 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-

notice, or sign to “clearly identify which provisions are void, inapplicable, or unenforceable in New Jersey.”²⁸ Therefore, if a seller’s website’s terms and conditions uses a “void where prohibited” clause and fails to specify which provisions are void, inapplicable, or unenforceable in New Jersey, that seller is in violation of the TCCWNA.²⁹

Section 16 and the lack of an ascertainable loss requirement is why TCCWNA class actions can be financially treacherous for businesses. To succeed in a TCCWNA claim, plaintiffs do not need to show that a “void where prohibited clause” harmed them, only that it was present in the contract, notice, or sign. This light burden of proof can be extremely costly for businesses engaging in e-commerce since thousands, or even millions, of customers or potential customers can be exposed to a website’s terms and conditions.³⁰

In 2016, at least a dozen cases were filed, which claimed that website terms and conditions violated the TCCWNA, including suits against Apple, Advanced Auto Parts, Bed, Bath & Beyond, Burlington Coat Factory, Sony, Toys ‘R’ Us, Wyndham, and Victoria’s Secret.³¹ As a

330, 340 and J.R. No. 24).

²⁸ *Shelton*, 70 A.3d at 549.

²⁹ *Id.*

³⁰ *See, e.g.*, Defendant’s Notice of Removal at 1, *Huhn v. Facebook Inc.*, No. 2:16cv03681 (D.N.J. filed June 22, 2016) (discussing the Plaintiffs’ proposed class consists of over four million Facebook users in New Jersey with statutory damages for a TCCWNA claim at \$100 per person; meaning Facebook could have to pay over \$400 million in punitive damages, plus attorney’s fees for the “void where prohibited” clause in Facebook’s terms and conditions).

³¹ *See* *Silkowski v. Apple Inc.*, No 5:16cv02338 (N.D. Cal. filed Apr. 28, 2016). *See* Paul Tassin, *Apple Class Action Alleges ID Agreement Violates N.J. Law*, TOP CLASS ACTIONS (May 3, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/334348-apple-class-action-alleges-id-agreement-violates-nj-law/>; *Russell v. Advance Auto Parts Inc.*, No. 3:16cv02685 (D.N.J. filed May 12, 2016). *See* Paul Tassin, *Advance Auto Parts Class Action Says Website Terms Illegal*, TOP CLASS ACTIONS (May 16, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/335407-advance-auto-parts-class-action-says-website-terms-illegal/>; *Sweeney v. Bed Bath & Beyond LLC*, No. 2:16-cv01927 (D.N.J. filed Apr. 6, 2016). *See* Paul Tassin, *Bed Bath and Beyond Lawsuit Shouldn’t Be Dismissed, Class Says*, TOP CLASS ACTIONS (July 13, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/339862-bed-bath-beyond-lawsuit-shouldnt-dismissed-class-says/>; *Martinez v. Burlington on Stores Inc.*, No. 1:16cv02064 (D.N.J. filed Apr. 13, 2016). *See* Tamara Burns, *Burlington Coat Factory Class Action Targets Website’s Terms*, TOP CLASS ACTIONS (Apr. 18, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/333001-burlington-coat-factory-class-action-targets-websites-terms/>; *Farrell et al. v. Sony Corp. et al.*, No. 2:16cv04391 (D.N.J. filed July , 2016); *Roldan v. Toys R US Inc.*, No. 2:16cv01929 (D.N.J. filed Apr. 6, 2016). *Anne Bucher, Torys R Us, Bed Bath and Beyond Class Actions Filed Over Website Terms*, TOP CLASS ACTIONS (Apr. 11, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/332489-toys-r-us-bed-bath-beyond-class-actions-filed-over-website-terms/>. *See* *Luca v. Wyndham Worldwide Corp. et al.*, No. 2:16cv00746, (W.D. Pa. filed June 6, 2016). *See* Tamara Burns, *Wyndham Class Action Lawsuit Claims ‘Resort Fees’ Are Illegal*, TOP CLASS ACTIONS (June 8, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit->

result, businesses engaging in e-commerce are seeking relief from TCCWNA class actions in federal court by challenging the law on Article III standing grounds.³²

In federal courts, businesses are seeking dismissal through Article III standing arguments based on the Supreme Court's recent ruling in *Spokeo, Inc. v. Robins*, which raised the bar for standing requirements.³³ *Spokeo's* website listed personal information about individuals such as how to contact them, their current marital status, and occupation.³⁴ Robins, without alleging harm or imminent harm, claimed that *Spokeo* violated the Fair Credit Reporting Act (FCRA) because the information the company published about him was false.³⁵ The complaint was dismissed for lack of subject matter jurisdiction.³⁶ Robins amended his complaint and stated the false information *Spokeo* posted about him harmed his future employment opportunities.³⁷ The complaint was dismissed again for failure to state an injury in fact.³⁸

Robins appealed and asserted that he had an injury that would qualify him for standing under Article III of the United States Constitution.³⁹ The Ninth Circuit reversed the District Court's holding and *Spokeo* was granted a writ of certiorari by the United States Supreme Court.⁴⁰ The Supreme Court held that Congress or any state legislative body could not eliminate standing requirements by "statutorily granting the right to sue to a plaintiff who would not otherwise have standing."⁴¹

news/337307-wyndham-class-action-lawsuit-claims-resort-fees-illegal/; Nahas v. L Brands, Inc., No. 2:16cv02107 (D.N.J. filed Apr. 15, 2016). See Michael Kakuk, *Victoria's Secret Class Action Alleges Website Terms Illegal*, TOP CLASS ACTIONS (Apr. 20, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/333225-victorias-secret-class-action-alleges-website-terms-illegal/>. See Guzman v. Devils Arena Entertainment, No. 2:16cv01984 (D.N.J. filed Apr. 8, 2016); Rubin v. Intuit Inc., No. 3:16cv02029 (D.N.J. filed Apr. 12, 2016). See Paul Tassin, *Intuit Class Action Claims TurboTax Violates N.J. Consumer Laws*, TOP CLASS ACTIONS (Apr. 14, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/332835-intuit-class-action-claims-turbotax-violates-n-j-consumer-laws/>; Hite et al. v. Lush Cosmetics LLC, No. 1:16cv01533 (D.N.J. Mar. 18, 2016). See Ashley Milano, *Lush Cosmetics Class Action Says Website's "Terms of Use" Illegal*, TOP CLASS ACTIONS (Mar. 23, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/331043-lush-cosmetics-class-action-says-website-terms-of-use-illegal/>.

³² See, e.g., Hecht v. Hertz Corp., No. 2:16-cv-01485, 2016 U.S. Dist. LEXIS 145589, at *6 (D.N.J. Oct. 20, 2016).

³³ *Spokeo Inc. v. Robbin*, 136 S. Ct. 1540, 1547-48 (2016).

³⁴ *Id.* at 1544.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1554.

³⁸ *Id.* at 1544.

³⁹ *Spokeo Inc.*, 136 S. Ct. at 1546.

⁴⁰ *Id.*

⁴¹ *Id.*

Ultimately, the Court opined that to achieve standing for an injury in fact, a plaintiff needs to show that the injury caused “concrete and particularized harm.”⁴² Concrete injuries are those that are real and not abstract.⁴³ Particularized harm can be shown if an injury affects “the plaintiff in a personal and individual way.”⁴⁴

These new standards conflict with the TCCWNA because the statute does not require ascertainable loss in order to bring a claim.⁴⁵ For example, the plaintiff in *Hecht v. Hertz*, a recent New Jersey District Court case, alleged that the defendant violated TCCWNA because its website’s terms and conditions did not state whether New Jersey was a jurisdiction where certain exceptions applied.⁴⁶ The court dismissed the complaint, noting that the plaintiff “[did] not allege that he even viewed (let alone relied upon to his detriment) either of these sections of Hertz’s website.”⁴⁷ Additionally, the court explained that the plaintiff’s arguments only presented “bare procedural harm, divorced from any concrete harm,” which cannot “satisfy the injury-in-fact requirement of Article III.”⁴⁸ The *Hertz* holding has gained significant traction in federal courts. In recent months, numerous TCCWNA claims were dismissed for failing to meet the requirements of *Spokeo*.⁴⁹ These dismissals may lead to more plaintiffs filing TCCWNA claims in state court.

Besides not meeting Article III standing requirements, another reason the TCCWNA is constitutionally deficient is because the statute imposes an excessive burden upon interstate commerce. Recently, the TCCWNA was challenged for the first time as a violation of the Dormant Commerce Clause.⁵⁰ In April 2016, a TCCWNA class action was brought against the technology giant, Apple, for its “to the extent not prohibited by law” clause contained in its iTunes terms and conditions.⁵¹

⁴² *Id.* at 1549.

⁴³ *Id.* at 1548.

⁴⁴ *Id.*

⁴⁵ N.J. STAT. ANN. § 56:12-15 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

⁴⁶ *Hecht v. Hertz Corp.*, No. 2:16-cv-01485, 2016 U.S. Dist. LEXIS 145589, at *4 (D.N.J. Oct. 20, 2016).

⁴⁷ *Id.*

⁴⁸ *Id.* at *10.

⁴⁹ See *Rubin v. J. Crew Group, Inc.*, No.16-2167, 2017 U.S. Dist. LEXIS 46389, at 22 (D.N.J. Mar. 29, 2017); *Hite v. Lush Internet Inc.*, 244 F. Supp. 3d 444, 455 (D.N.J. 2017); *Russell v. Croscill Home, LLC*, No. 16cv1190, 2016 U.S. Dist. LEXIS 159787, slip op. at 1 (D.N.J. Oct. 11, 2016); *Candelario v. Rip Curl, Inc.*, No. 16cv00963, 2016 U.S. Dist. LEXIS 163019, *8 (C.D. Cal. Sept. 7, 2016) (dismissing complaint alleging a TCCWNA violation of website terms and conditions because the plaintiff lacked Article III standing under *Spokeo*).

⁵⁰ *Silkowski v. Apple Inc.*, No. 3:16cv2338, 3:14-15 (N.D. Cal. filed Sept. 1, 2016). Tassin, *supra* note 31.

⁵¹ *Id.*

The potential class of New Jersey iTunes users could be in the millions.⁵² In response, Apple argued in a July 2016 motion-to-dismiss in *Silkowski v. Apple Inc.* that “extending the TCCWNA to Internet services imposes an excessive burden on interstate commerce,”⁵³ violating the Dormant Commerce Clause. As of publication, the District Court of Northern California has not ruled on the motion.

Nevertheless, this Note argues that the TCCWNA violates the Dormant Commerce Clause because the TCCWNA’s Section 16 fails the *Pike v. Bruce Church* balancing test.⁵⁴ The balancing test states: “[w]here a 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.”⁵⁵ This Note asserts that the burden placed upon sellers with a nation-wide reach is excessive in relation to the benefit of consumers’ knowledge of their existing rights.

II. HISTORY OF THE TCCWNA AND THE DORMANT COMMERCE CLAUSE

A. *The TCCWNA*

i. The Legislative History of the TCCWNA

The legislative history of the TCCWNA is limited. It was originally introduced to the New Jersey Senate on May 1, 1980 as Bill No. 1660.⁵⁶ Assemblyman Byron Baer’s Sponsor’s Statement reads:

Far too many consumer contracts, warranties, notices and signs contain provisions [that] 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.⁵⁷

The Sponsor’s Statement highlights that “the proposed legislation [TCCWNA] did not recognize any new consumer rights but merely imposed an obligation on sellers to acknowledge clearly established consumer rights and provided remedies for posting or inserting

⁵² Nina Ulloa, *iTunes Has 800 Million Accounts... And 800 Million Credit Card Numbers...*, DIGITAL MUSIC NEWS (Apr. 24, 2014), <https://www.digitalmusicnews.com/2014/04/24/itunes800m/>; see also *New Jersey Population*, WORLD POPULATION REV., <http://worldpopulationreview.com/states/new-jersey-population/> (last visited May 10, 2018).

⁵³ *Silkowski v. Apple Inc.*, No 5:16cv02338 (N.D. Cal. filed Apr. 28, 2016).

⁵⁴ See N.J. STAT. ANN. § 56:12-16 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24); see also *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

⁵⁵ *Id.*

⁵⁶ *Shelton v. Restaurant.com, Inc.*, 70 A.3d 544, 552 (N.J. 2013).

⁵⁷ Assem. B. 1660, 199 Leg., 1st Sess. (N.J. 1980).

provisions contrary to law.”⁵⁸ These “clearly established consumer rights” include those in the CFA and other New Jersey and federal laws.⁵⁹ The Sponsor’s statement additionally demonstrates that the Legislature hoped to prevent consumer deception and give consumers another option to assert their rights against businesses from which they purchased products or services.

As the bill moved through the New Jersey State Legislature, the remedies portion of the TCCWNA was amended. The original bill contained the phrase “civil damages” in Section 4, line 3, but the final bill replaced that phrase with “civil penalty.”⁶⁰ The statement by the Commerce, Industry & Professions Committee accompanying the new version of the bill reads

Section 4, as amended by the committee, provides that a business which violates the provisions of this bill would be liable to the aggrieved consumer for a civil penalty of not less than \$100 if the consumer was not injured by such a violation and for a civil penalty and actual damages if he was injured by such a violation.⁶¹

It is clear from the amendment that the New Jersey State Legislature wanted to favor consumers by including a statutory penalty in order to deter and punish offending sellers.

After the remedies section was amended, the TCCWNA was enacted by the New Jersey State Legislature in 1981.⁶² A short time later, the bill was signed into law by Governor Byrne on January 11, 1982.⁶³ In his signing statement, the governor reinforced the notion that the TCCWNA was not enacted to create any new consumer rights or seller responsibilities, but instead to bolster the CFA rights and those established in other laws.⁶⁴

ii. The Text of the TCCWNA

TCCWNA, N.J.S.A. 56:12-15 states:

No seller . . . shall in the course of his business offer to any

⁵⁸ *Shelton*, 70 A.3d at 552. See N.J. STAT. ANN. § 56:12-15 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24). See also § 56:12-16 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

⁵⁹ § 56:12-15.

⁶⁰ See Assemb. B. 1660, 199 Leg., 1st Sess. (N.J. 1980); see also N.J. STAT. ANN. § 56:17-18 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

⁶¹ Assemb. B. 1660, 199 Leg., 1st Sess. (N.J. 1980).

⁶² *Shelton*, 70 A.2d. at 549.

⁶³ Statement from Brendan Byrne, Governor of New Jersey, on the Signing of Assembly Bill No. 1660 (Jan. 11, 1982).

⁶⁴ See *id.* (stating that the TCCWNA’s purpose was to help “strengthen[] provisions of the [CFA].”).

2018]

DORMANT NO LONGER

387

consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign . . . 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.⁶⁵

In short, these sections of the statute create no new rights for consumers. Instead, Sections 12-15 bar businesses from including terms in consumer contracts, offers, or notices that violate “clearly established rights.”⁶⁶ A court decides whether a clearly established right is violated by “assess[ing] whether the CFA or another consumer protection statute or regulation clearly prohibited the contractual provision or other practice that is the basis for the TCCWNA claim.”⁶⁷

TCCWNA’s Section 16 prohibits any provision in a consumer contract that requires a consumer to waive his or her rights under the Act.⁶⁸ Section 16 contains a specification requirement that calls for a seller’s contracts, notices, or signs to clearly identify “which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey.”⁶⁹ This clause forbids blanket invalidity provisions in contracts, notice, or signs.⁷⁰ These provisions are called “savings language” and examples of such language include: “where permitted by law,” “maximum amount allowed by law,” or “unless prohibited by law.”⁷¹ Therefore, if a seller seeks to comply with Section 16, it needs to modify its contracts and notices to remove blanket invalidity provisions.

Furthermore, Section 16’s specification requirement applies only when a consumer contract, notice, or sign “is or may be used in multiple jurisdictions.”⁷² If a consumer contract, notice, or sign is created only for

⁶⁵ § 56:12-15.

⁶⁶ *Id.*

⁶⁷ *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24, 69 (2017). *See, e.g.*, *Mladenov v. Wegmans Food Mkts. Inc.*, 124 F. Supp. 3d 360, 380 (D.N.J. 2015) (holding that plaintiffs who failed to state viable claims under CFA or federal food labeling regulation established no violation of “clearly established legal right” under TCCWNA); *United Consumer Fin. Servs. Co. v. Carbo*, 410 N.J. Super. 280, 305 (N.J. Super. Ct. App. Div. 2009) (applying TCCWNA based on violation of “clearly established” right under Retail Installment Sales Act, N.J. STAT. ANN. § 17:16C-50).

⁶⁸ N.J. STAT. ANN. § 56:12-16 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Kendall v. CubeSmart L.P.*, No. 15-6098, 2016 U.S. Dist. LEXIS 53668, at *27 (D.N.J. Apr. 21, 2016).

⁷² *Id.*; *see also* *Walters v. Dream Cars Nat’l, LLC*, No. BER-L-9571-14, 2016 N.J. Super. Unpub. LEXIS 498, at *16 (N.J. Super. Ct. Law Div. Mar. 7, 2016) (“[I]f a consumer contract

use in New Jersey and controlled by New Jersey law, the specification requirement in Section 16 does not apply.⁷³ The court in *Kendall* stated that it would be “redundant” to explain which provisions may or may not be enforceable under New Jersey law, and that “when the contract, notice, or sign is a New Jersey-specific document, the savings language ‘merely operates as a severability clause, protecting the remainder of the contract should some portion of it be declared void or unenforceable.’”⁷⁴

In addition to clarifying Section 16’s application, the *Kendall* court created three requirements that a plaintiff must meet in order state a claim under the clause. For a Section 16 violation under the TCCWNA, a plaintiff must allege the following:

- (1) The existence of consumer contract, notice, or sign that is or may be used in multiple jurisdictions;
- (2) which states, either expressly or implicitly, that any of its provisions may be void, unenforceable, or inapplicable in some jurisdictions;
- and, (3) that the consumer contract, notice or sign fails to specify which provisions are or are not void, unenforceable, or inapplicable in New Jersey.⁷⁵

If a plaintiff fails to satisfy all three requirements, the TCCWNA claim under Section 16 fails.

The final sections of the TCCWNA are 17 and 18, which describe the remedies available to consumers who had their rights violated under the statute: “Any person, who violates the provisions of the statute shall be liable to an aggrieved consumer for a civil penalty not less than \$100, actual damages, or both at the election of the consumer, in addition to reasonable attorneys’ fees and court costs.”⁷⁶ The remedies are plaintiff friendly, especially for those who choose to bring a TCCWNA claim as a class action.⁷⁷ Unfortunately, for defendants, these claims can be costly, especially in a class action with a proposed class of consumers or potential consumers in the thousands or millions.⁷⁸

is or may be used in multiple jurisdictions and expressly states that any of its provisions are or may be void, unenforceable, or inapplicable in certain of those jurisdictions, the contract must specify how these provisions are void, unenforceable, or inapplicable in New Jersey.”)

⁷³ *Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204, 213 (D.N.J. 2015) (holding that the defendant’s rental agreement only applied to New Jersey so there was no indication that the provision at issue contemplated the contract’s application in multiple jurisdictions such that its enforceability in New Jersey must be clarified).

⁷⁴ *Id.* (quoting *Castro*, 114 F. Supp. 3d at 213).

⁷⁵ *Kendall*, 2016 U.S. Dist. LEXIS 53668, at *28.

⁷⁶ N.J. STAT. ANN. § 56:12-17 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

⁷⁷ David F. Katz & Elizabeth K. Hinson, *Plaintiffs Target Online Retailers’ Website Terms & Conditions in Consumer Class Actions Brought under New Jersey Consumer Protection Law*, LEXOLOGY, <http://www.lexology.com/library/detail.aspx?g=b68f5f68-ea83-43b6-9c86-74a6f8ea83a2> (last visited May 10, 2018).

⁷⁸ *Alloway v. General Marine Indus., L.P.*, 695 A.2d 264 (N.J. 1997).

B. The Dormant Commerce Clause

The United States Constitution's Commerce Clause allows Congress "to regulate commerce with foreign Nations, and among the several States."⁷⁹ The Commerce Clause both grants "regulatory power to Congress" and "denies the States the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce."⁸⁰ This denial of state power or "negative" application of the Commerce Clause is called the Dormant Commerce Clause.⁸¹ The purpose of the Dormant Commerce Clause is to "create an area of trade free from interference by the States," and to prevent States from "jeopardizing the welfare of the Nation as a whole" by "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear."⁸²

There are two theoretical justifications for the Dormant Commerce Clause. The primary justification is grounded in economic efficiency. The Dormant Commerce Clause safeguards free trade among the states, which secures the associated economic benefits.⁸³ The secondary justification is that the clause protects out-of-state actors who are burdened by a state's regulation but lack a voice in the political process of the state imposing the burden.⁸⁴

Under the Dormant Commerce Clause, a state statute may discriminate against interstate commerce in two ways: facially or in its practical effect.⁸⁵ First, a state statute facially discriminates when there is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. . . ."⁸⁶ This form of

⁷⁹ U.S. CONST. art. I, § 8, cl. 8.

⁸⁰ *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).

⁸¹ *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1791 (2015) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)).

⁸² *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (internal quotation marks omitted); *see also Jefferson Lines, Inc.*, 514 U.S. at 180.

⁸³ *See, e.g., H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988); Daniel A. Garber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1406 (1994); Donald H. Reagan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

⁸⁴ *See, e.g., South Carolina v. Barnwell Brothers*, 303 U.S. 177, 185 n. 2 (1938); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 n. 2 (1945); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 205-06 (1980); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 439 (1982).

⁸⁵ *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996).

⁸⁶ *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). *See also Am. Trucking Ass'ns v. Mich. PSC*, 545 U.S. 429, 433 (2005); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992).

discrimination will be subject to “strict scrutiny” by the courts and is likely to be found invalid *per se*.⁸⁷

Second, a state statute may discriminate in its practical effect even “if a statute regulates evenhandedly and only indirectly affects interstate commerce.”⁸⁸ In this instance of discrimination, the standards for scrutiny are less rigorous, and a court is more likely to defer to the judgment of a state’s legislature.⁸⁹

To determine whether discrimination exists, courts will apply the balancing test established in *Pike v. Bruce Church*: “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 about the putative local benefits.”⁹⁰ If there is no legitimate local purpose, the statute will not be deemed constitutional.⁹¹ Conversely, if there is a legitimate local purpose, an acceptable degree of burden a state places on interstate commerce will depend on “the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”⁹²

III. BALANCED OR UNBALANCED? WHY THE TCCWNA FAILS *PIKE*

This section analyzes whether the TCCWNA’s Section 16 violates the dormant Commerce Clause by failing the *Pike* balancing test.⁹³ Since the TCCWNA regulates even-handedly, Part A explores whether the TCCWNA serves a legitimate New Jersey state interest.⁹⁴ Part B addresses whether the burden imposed by the TCCWNA on interstate commerce is clearly excessive in relation to the nature of the benefit it provides New Jersey. Part C examines whether New Jersey’s interests

⁸⁷ See, e.g., *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute *without further inquiry*.”) (emphasis added); *North Dakota v. Heydinger*, 825 F.3d 912, 919 (8th Cir. 2016).

⁸⁸ *Env’tl. Tech. Council*, 98 F.3d at 785.

⁸⁹ *Brown-Forman Distillers Corp.*, 476 U.S. at 579. The court examined whether the State’s interest being promoted by the statute was legitimate, rather than striking the statute down without inquiry. *Id.*

⁹⁰ *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See N.J. STAT. ANN. § 56:12-16 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24); see also *Pike*, 397 U.S. at 142.

⁹⁴ See N.J. STAT. ANN. § 56:12-18 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24) (the TCCWNA contains no language that discriminates against out-of-state sellers).

2018]

DORMANT NO LONGER

391

“could be promoted as well with a lesser impact on interstate activities.”⁹⁵

A. Consumer Protection is a Legitimate State Interest

The United States Supreme Court and other federal courts have repeatedly asserted the importance of consumer protection.⁹⁶ Court decisions from across the United States have established that state governments possess a legitimate interest in safeguarding its citizens against dangerous products, fraud, deceptive advertising, and unfair business practices that can cause harm.⁹⁷ Therefore, New Jersey has a legitimate state interest in protecting its consumers, which it may seek to serve by enacting the TCCWNA.

The TCCWNA’s sponsor statement demonstrates that the New Jersey Legislature hoped that, by enacting the statute, it would prevent consumer deception and give consumers a legal course of action to assert their rights against businesses from whom they purchased products or services.⁹⁸ Preventing consumer deception or consumer fraud is one of the foundations of consumer protection law. Since this is an interest that has been upheld as legitimate by courts in the past, the nature of the state interest the TCCWNA seeks to protect is legitimate and fulfills the first factor established by *Pike*.⁹⁹

B. The Burdens the TCCWNA Places upon Nation-wide Sellers is Clearly Excessive in Relation to the Benefits New Jersey Consumers Receive

After determining whether a statute serves a legitimate State interest, the next step in the *Pike* balancing test is to see if the burden the statute places on interstate commerce is clearly excessive in relation to putative local benefits.¹⁰⁰

i. Potential Inconsistent Regulation is a Burden that is Clearly

⁹⁵ *Id.*

⁹⁶ *See, e.g.,* *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 349 (“States possess ‘broad powers’ to protect local purchasers from fraud and deception”); *Clark v. Citizens of Humanity, LLC*, 97 F. Supp. 3d 1199, 1206 (S.D. Cal. 2015) (“[T]here is a legitimate state interest in combating deceptive advertising”).

⁹⁷ *See Penn Nat’l Mut. Cas. Ins. Co. v. Trane, U.S., Inc.*, No. 15-cv-2320, 2015 U.S. Dist. LEXIS 170731, at *3 (D.N.J. Dec. 21, 2015) (“New Jersey has a strong interest in deterring the manufacture and distribution of defective products from this State.”); *see also Hunt*, 432 U.S. at 349; *Monster Bev. Corp. v. Herrera*, EDCV 13-00786-VAP, 2013 U.S. Dist. LEXIS 189315, at *18 (C.D. Cal Dec. 16, 2013) (“The state has an important interest in protecting consumers from unfair and deceptive business practices.”)

⁹⁸ *Supra* note 31.

⁹⁹ *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

¹⁰⁰ *Id.*

Excessive

State laws have been invalidated under the dormant Commerce Clause even when they appear to have been “genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation.”¹⁰¹ National uniformity in regulation is important because a person or business might be subject to “haphazard, uncoordinated, and even outright inconsistent regulation” by a State and therefore, an actor, even those acting in good faith, might not realize it is violating a statute.¹⁰²

Courts determine whether an undermining of “national uniformity in regulation” is taking place by evaluating the practical effect of the statute.¹⁰³ Courts do this by considering the consequences of the statute itself and how it may interact with the legitimate regulatory regimes of other states.¹⁰⁴ Courts consider what could occur if not one, but many, if not all, states adopted similar legislation.¹⁰⁵ Courts perform this task because they want to protect against inconsistent legislation arising from the protrusion of one state regulatory regime into another state’s jurisdiction.¹⁰⁶

On its face, the TCCWNA is a nondiscriminatory statute. Even though only five out of the thirty TCCWNA class action lawsuits addressing online retailer’s terms and conditions have been filed against companies that are headquartered in New Jersey, the statute does not target out-of-state sellers, nor benefit in-state sellers over them.¹⁰⁷ All

¹⁰¹ *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). *See also* *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-27 (1959) (conflict in state laws governing truck mud flaps); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 763-64 (1945) (train lengths). *See also* *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987) (“This Court’s recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations”); LEA BRILMAYER, *CONFLICT OF LAWS* § 3.2.3 (2d ed. 1995) (discussing Court’s review of conflicting state laws under the dormant Commerce Clause).

¹⁰² *Am. Libr. Assoc. v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997). The District Court prohibited the intentional use of the Internet “to initiate or engage” in certain pornographic communications deemed to be “harmful to minors.” *Id.*

¹⁰³ *Gen. Motors Corp.*, 519 U.S. at 297. *See also* *CTS Corp.*, 481 U.S. at 88-89.

¹⁰⁴ *Id.*

¹⁰⁵ *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

¹⁰⁶ *Id.*

¹⁰⁷ *See* *Sweeney v. Bed Bath & Beyond LLC*, No. 2:16-cv-01927 (D.N.J. filed Apr. 6, 2016); *see also* *Martinez v. Burlington Stores Inc.*, No. 1:16-cv-02064 (D.N.J. filed Apr. 13, 2016); *Roldan v. Toys R US, Inc.*, No. 2:16-cv-01929 (D.N.J. filed Apr. 6, 2016); *Luca v. Wyndham Worldwide Corp. et al.*, No. 2:16-cv-00746, (W.D. Pa. filed June 6, 2016); *Guzman*

sellers are treated equally under the TCCWNA.¹⁰⁸

Since the TCCWNA is facially non-discriminatory, the practical effect, which includes an analysis of the consequences of the statute and its potential interactions with other States' statutes, must be evaluated next. TCCWNA's Section 16 requires that if a seller operates in other jurisdictions besides New Jersey, its "contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract or notice may be void, inapplicable, or unenforceable in some states."¹⁰⁹ Instead, the contract or notice must specifically state what exact provisions are void, inapplicable, or unenforceable in New Jersey.¹¹⁰

The consequence is that a website's terms and conditions can no longer be generalized. To comply with the TCCWNA, an online retailer must adjust its terms and conditions to provide for the specific provisions that are "void, inapplicable, or enforceable" every time it sells a product to a New Jersey consumer.¹¹¹

The TCCWNA's potential interactions with other States' statutes could be quite costly and burdensome for online retailers engaging in interstate commerce. An online retailer would have to make sure it is complying with the TCCWNA's requirements, while also undertaking a separate analysis of every States' laws to confirm that no statute similar

v. Devils Arena Ent., No. number 2:16-cv-01984 (D.N.J. filed Apr. 8, 2016). *Contra* Murphy v. Wal-Mart.com USA, LLC, No. 2:16-CV-02629-ES-JAD (D.N.J. filed May 10, 2016) (defendant headquartered in Arkansas); Patterson et. al v. Forever 21 Inc., No. number 3:16-cv-05087-MAS-LHG (D.N.J. filed Nov. 8, 2016) (defendant headquartered in California); Shelton v. Restaurant.com, Inc., 214 N.J. 419, 427, 70 A.3d 544, 549, (N.J. 2013) (defendant headquartered in Illinois); Huhn v. Facebook Inc., No. 2:16-cv-03681 (D.N.J. filed June 22, 2016) (defendant headquartered in California); Braden v. TTI Floor North America Inc., No. 3:16-cv-00742 (D.N.J. filed in Feb. 2016) (defendant headquartered in Ohio); Rubin v. Intuit Inc., No. 3:16-cv-02029 (D.N.J. filed Apr. 12, 2016) (defendant headquartered in California); Hite et al. v. Lush Cosmetics LLC, No. 1:16-cv-01533 (D.N.J. Mar. 18, 2016) (defendant headquartered in Vancouver, Canada); Farrell et al. v. Sony Corp. of Am. et al., No. 2:16-cv-04391 (D.N.J. filed July 20, 2016) (defendant headquartered in New York); Silkowski v. Apple Inc., No 5:16-cv-02338 (N.D.Cal. filed Apr. 28, 2016) (defendant headquartered in California); Russell v. Advance Auto Parts Inc., No. 3:16-cv-02685 (D.N.J. filed May 12, 2016) (defendant headquartered in Virginia); Braden, et al. v. Staples Inc., Case No. 3:16-cv-03848 (D.N.J. filed July 1, 2016) (defendant headquartered in Massachusetts); *Rubin v. Saks Direct Inc.*, No. 3:16-CV-02197-PGS-LHG (D.N.J. filed Feb. 2016) (defendant headquartered in New York);

¹⁰⁸ See N.J. STAT. ANN. § 56:12-18 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24) (nowhere in the TCCWNA does it target business's outside of the state of New Jersey).

¹⁰⁹ *Shelton*, 214 N.J. at 427-28.

¹¹⁰ See N.J. STAT. ANN. § 56:12-16 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

¹¹¹ See § 56:12-18.

to the TCCWNA already exist.¹¹² If similar statutes do exist, online retailers could be faced with “multi-million dollar claims where no harm has or may ever occur.”¹¹³

After conducting a nation-wide analysis and potentially incurring thousands of dollars in legal costs, an online retailer would then have to adjust its terms and conditions to comply with each state. A company could accomplish this goal two ways. The first is by purchasing geographical identification software and then using that software to tailor a website’s terms and conditions for that specific consumer’s location.¹¹⁴ Geographical identification software is used to correctly ascertain the locations of its online consumers. Unfortunately, this software is not only costly, but it can also be evaded by consumers.¹¹⁵

One way geographical identification software can be evaded is through cellphone applications. Consumers who purchase products on their cellphones can install applications or “apps” such as “Fake GPS” and “Location Mockup” to hide their current locations.¹¹⁶ These apps are easy to use and inexpensive.¹¹⁷ To hide her location, a user only has to turn off her phone’s GPS and location services, and then use the app to manually specify what location she wants to pretend to be in.¹¹⁸ Once a new location is set, geographical identification software will not be able

¹¹² See Motion to Dismiss at 12:7-9, *Silkowski v. Apple Inc.*, No 5:16-cv-02338 (N.D.Cal. filed Apr. 28, 2016).

¹¹³ *Id.*

¹¹⁴ PUBLIC POLICY DIVISION, SOFTWARE & IND. INFO. ASS’N, *GEOLOCATION TOOLS AND GEOGRAPHICAL MARKET SEGMENTATION 2* (2014), https://www.ftc.gov/system/files/documents/public_comments/2014/04/00010-89273.pdf (“Websites and online content providers often use technical means to ascertain the geographical location of potential visitors. They do this for a variety of socially beneficial purposes, including localizing content, fighting online fraud and complying with local laws and regulations.”).

¹¹⁵ See, e.g., Janet Smith, *Agilent Technologies’ New Geolocation Software Maps Emitter Location Using RF Sensor Networks*, AGILENT (May 1, 2009), <http://www.agilent.com/about/newsroom/presrel/2009/01may-em09081.html> (“Pricing for a complete geolocation system, including sensors and required software, starts at less than \$150,000. The Agilent N6841A RF Sensor is available now with deliveries in June. Pricing starts at \$13,351.”); KEYSIGHT TECH., *KEYSIGHT N6854A GEOLOCATION SYSTEM - CONFIGURATION GUIDE 8* (2016) <http://literature.cdn.keysight.com/litweb/pdf/5991-2939EN.pdf> (stating that Key Sight’s geolocation software costs \$1,500 for one year and \$3,000 for two years).

¹¹⁶ See Darien Graham-Smith, *How to: Surf the Web from a Fake Location*, PC & TECH AUTH. (Jul. 21, 2014, 12:47PM), <http://www.pcauthority.com.au/Feature/390138,how-to-surf-the-web-from-a-fake-location.aspx>.

¹¹⁷ *Id.* After searching the iPhone’s “App Store” for location hiding apps, the most expensive app was \$5.00. However, most of the apps were either free, \$0.99, or \$2.99. On Android, location hiding apps were all free. See <https://play.google.com/store/apps/similar?id=com.hide.me&hl=en> (last visited May 10, 2018).

¹¹⁸ *Id.*

to identify where a consumer is shopping from.¹¹⁹

Consumers using computers have a variety of options to hide their whereabouts from geolocation software as well. Consumers can use a proxy server to route internet traffic through an international channel, usually encrypting a consumer's data en route.¹²⁰ A proxy server provides a user with a virtual private network (VPN) service, which allows subscribers to attain an Internet Protocol address or IP address from any location a VPN service provides.¹²¹ Consumers can also use Domain Name System or DNS segmentation, which allows a user to change his location, or TOR, which is a network that allows anonymous browsing, to hide his true location.¹²²

The second way a company could comply with the requirements of the TCCWNA and potential statutes like it is by making a single terms and conditions that would encompass all the requirements in each of the fifty states. This could create terms and conditions that are so lengthy and convoluted, consumers would be less willing to read them and might have trouble understanding which rights are guaranteed by their individual states. This would run directly contrary to the original intention of the TCCWNA, which was to prevent consumer deception and raise awareness about consumer rights.¹²³

Therefore, if other states adopted statutes similar to the TCCWNA, it would be financially disastrous for online retailers. Online retailers would be forced to incur significant legal costs and compliance fees to combat a statute that does not require plaintiffs to demonstrate harm. Unfortunately, even if these online retailers did put in a good faith effort to comply, consumers could still skirt terms and conditions specifically tailored to their states or be overwhelmed by a website's terms and conditions that encompasses all the legal nuances of each individual state. This is why national uniformity is essential to prevent online retailers from being exposed to "haphazard, uncoordinated, and even outright inconsistent regulation" that could potentially cost them millions of dollars, but to also protect consumers by making sure they are fully aware of their rights.¹²⁴

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*; see also *What is a VPN?*, WHATISMYIP.COM, <https://www.whatismyip.com/what-is-a-vpn/> (last visited May 10, 2018).

¹²² Graham-Smith, *supra* note 116.

¹²³ Assem. B. 1660, 199 Leg., 1st Sess. (N.J. 1980).

¹²⁴ *Am. Libr. Assoc. v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997) (prohibiting the intentional use of the Internet "to initiate or engage" in certain pornographic communications deemed to be "harmful to minors").

ii. The Nature of New Jersey's Interest, Consumer's Knowledge of Their Existing Rights, Does Not Overcome the Excessive Burden Placed Upon Sellers Engaging in Interstate Commerce

Once a court determines that there is a legitimate state interest, an acceptable degree of burden a state places on interstate commerce will depend on the nature of the state's interest.¹²⁵ Under the TCCWNA's Section 16, the nature of New Jersey's interest is knowledge. By enacting the statute, New Jersey sought to protect its consumers and prospective consumer's knowledge of their existing rights. It hoped that by preventing sellers from using clauses such as "void where prohibited" more, New Jersey consumers would be aware of their rights and ultimately enforce them if need be.¹²⁶

However, the TCCWNA's means do not arguably achieve its end. Under the TCCWNA's Section 16, if a seller is using a contract, notice, or sign in multiple jurisdictions, it must specify which provisions contained within are or are not enforceable in New Jersey.¹²⁷ Alternatively, if a consumer contract, notice, or sign is created only for use in New Jersey and controlled by New Jersey law, the specification requirement in Section 16 does not apply.¹²⁸ The specification requirement makes a website's terms and conditions, which are already incredibly lengthy and convoluted, even more difficult to read and understand for New Jersey current and prospective consumers.

Currently, because of the length and legalese contained within these agreements, it takes an average internet user about forty minutes to read the terms and conditions related to the different services that he or she may use throughout a single day.¹²⁹ That means a user could realistically spend ten days a year reading websites' terms and conditions.

However, this data assumes that users actually read a website's terms and conditions. Researchers in a 2016 study presented students with a terms and conditions agreement to read and review, and out of the 543 students only twenty five percent even looked at them before accepting.¹³⁰ Additionally, on average, those students who did look at

¹²⁵ *Id.*

¹²⁶ Assem. B. 1660, 199 Leg., 1st Sess. (N.J. 1980).

¹²⁷ *See supra* note 73.

¹²⁸ *See supra* note 75.

¹²⁹ Shankar Vedantam, *Do You Read Terms Of Service Contracts? Not Many Do, Research Shows*, HIDDEN BRAIN (Aug. 23, 2016), <http://npr.org/2016/08/23/491024846/do-you-read-terms-of-service-contracts-not-many-do-research-shows>.

¹³⁰ JONATHAN A. OBAR & ANNE OELDORF-HIRSCH, *THE BIGGEST LIE ON THE INTERNET: IGNORING THE PRIVACY POLICIES AND TERMS OF SERVICE POLICIES OF SOCIAL NETWORKING SERVICES* 7, 15 (2016).

the agreement did so for only about one minute.¹³¹ Since terms and conditions are usually thousands of words long and over ten pages, to fully read an agreement would take much more than one minute.¹³² One such illustration of this point is Apple's iTunes terms and conditions. The iTunes agreement currently contains 6,701 words and is sixteen pages long.¹³³ A recent study found that it took 193 minutes to read through iTunes' entire terms and conditions.¹³⁴ Thus, reading the agreement for one minute would only create for a consumer a minimal understanding of his or her rights.

Since there is evidence that very few people look or read a website's terms and conditions, New Jersey's interest in promoting consumer awareness about legally established rights is not being adequately achieved by the TCCWNA. Furthermore, putting New Jersey specific provisions into a contract, notice, or advertisement with a multi-state reach is most likely not raising consumer awareness. In fact, by including these additional provisions in a website's terms and conditions, it increases the agreements length and makes it even more likely that a consumer or prospective consumer would agree to the terms without reading them. Therefore, since Section 16 of the TCCWNA is counterintuitive to its own interest, the burden it creates upon interstate commerce through potential inconsistent regulation should be deemed by courts as clearly excessive under the *Pike* balancing test.¹³⁵

*C. New Jersey's Interest in Raising Consumer Rights Awareness
Could Be Promoted in a Manner Less Impactful on Interstate
Commerce*

Access to information and openness to procedures is important to establish consumer autonomy, and New Jersey has a legitimate interest to ensure that its consumers are aware of their rights.¹³⁶ However, there

¹³¹ *Id.* at 16.

¹³² See, e.g., *Terms and Conditions*, TARGET, <http://www.target.com/c/terms-conditions/-/N-4sr71> (last visited May 10, 2018) (8,447 words and eighteen pages long); *Terms of Use*, WALMART, http://help.walmart.com/app/answers/detail/a_id/8/~/-walmart.com-terms-of-use (last visited May 10, 2018) (6,503 words and sixteen pages long); *Macy's Terms and Conditions of Purchase Orders*, MACY'S, <https://www.macysnet.com/mdocweb/documents.aspx?id=1741> (last visited May 10, 2018) (9,419 words and twenty pages long).

¹³³ See *Apple Media Services Terms and Conditions*, APPLE, <https://www.apple.com/legal/internet-services/itunes/us/terms.html> (last visited May 10, 2018).

¹³⁴ Rick Noack, *How Long Would It Take To Read the Terms of Your Smartphone Apps? These Norwegians Tried It Out*, WASH. POST (May, 28, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/05/28/how-long-would-it-take-to-read-the-terms-of-your-smartphone-apps-these-norwegians-tried-it-out/?utm_term=.cd12d2fd266a.

¹³⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹³⁶ See *supra* Section III.B.2.

are other means that are less impactful on interstate commerce to achieve the same goal.

First, the TCCWNA could be amended to prohibit consumers or prospective consumers from using it TCCWNA to bring class action claims. This leaves sellers vulnerable to millions of dollars in civil penalties and attorney's fees that could be financially devastating and potentially could raise the cost of services or products for smaller companies.¹³⁷ Therefore, if consumers were barred from bringing TCCWNA class actions, sellers with a nationwide reach would not have to incur high legal costs if a judgment was found against them for terms and conditions that did not even contain a provision harming consumers.¹³⁸

Second, the TCCWNA could be amended to require ascertainable loss to bring a claim. Currently, consumers are not experiencing an economic consequence when a "void where prohibited" provision is included in a website's terms and conditions.¹³⁹ This is evident in the amount of TCCWNA claims that are currently being dismissed in federal courts for failing to meet the heightened standing requirements introduced by the United States Supreme Court in *Spokeo v. Robinson*.¹⁴⁰ Under *Spokeo*, plaintiffs need to show "injury in fact" and the injury needs to demonstrate "concrete and particularized harm."¹⁴¹ Since plaintiffs are not alleging any economic damages, their injury is not concrete.¹⁴² Thus, New Jersey is not protecting consumers through the TCCWNA because plaintiffs bringing claims under the statute are not being harmed.¹⁴³ Overall, amending the TCCWNA to include an ascertainable loss requirement would further New Jersey's goals of protecting consumers from deceptive practices without burdening sellers engaging in interstate commerce.

Finally, if New Jersey lawmakers are concerned about protecting consumer's knowledge of their existing rights, they could enact a statute

¹³⁷ *Id.*

¹³⁸ *See supra* Section III.B.1.

¹³⁹ *See* N.J. STAT. ANN. § 56:12-16 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

¹⁴⁰ *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 *as revised* (2016); *see also* Russell v. Croscill Home, No. 16-cv-1190, 2016 U.S. Dist. LEXIS 159787, at *1 (D.N.J. Oct. 11, 2016) (dismissed for failure to demonstrate a "concrete and particularized harm"); Hecht v. Hertz, No. 16-cv-1485, 2016 U.S. Dist. LEXIS 145589, at *10-11 (D.N.J. Oct. 20, 2016) (dismissed); Candelario v. Rip Curl, No. 16-cv-00963, 2016 U.S. Dist. LEXIS 163019, at *8 (C.D. Cal. Sept. 7, 2016) (dismissed).

¹⁴¹ *Spokeo, Inc.*, 136 S. Ct. at 1549.

¹⁴² *Id.* at 1548.

¹⁴³ *United Consumer Fin. Servs. Co. v. Carbo*, 982 A.2d 7, 30 (N.J. Super. Ct. App. Div. 2009).

that regulates the formation of terms and conditions in order to make them more consumer friendly. Currently, terms and conditions are not being read by consumers or prospective consumers because of their length and convoluted language.¹⁴⁴ If sellers were required to simplify their terms and conditions, it may encourage more consumers to read and take advantage of their rights, which aligns better with the New Jersey legislature's original intentions.

IV. CONCLUSION

When the TCCWNA was enacted in 1982, the New Jersey legislature did not envision what effects the statute would have on e-commerce.¹⁴⁵ Currently, plaintiffs, many times the same ones, are taking advantage of unsuspecting out-of-state sellers who conduct business online.¹⁴⁶ Federal courts have attempted to intervene by dismissing TCCWNA claims for not meeting Article III standing requirements under *Spokeo*.¹⁴⁷ However, the TCCWNA also violates the dormant Commerce Clause because the statute discriminates against interstate commerce through its practical effect.

A court can come to this conclusion by applying the balancing test established in *Pike v. Bruce Church*.¹⁴⁸ The test states: "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."¹⁴⁹ The degree of burden on interstate commerce that will be tolerated depends on the nature of the local interest involved and if there was a way for a state to achieve the same goals with a lesser impact on interstate commerce.¹⁵⁰

For the TCCWNA, the local public interest, consumer protection, is legitimate.¹⁵¹ However, the nature of the interest, raising consumer awareness about pre-existing rights, is defeated by the TCCWNA itself.¹⁵² Section 16 of the TCCWNA requires a seller who operates in multiple jurisdictions to clearly specify in its consumer contracts, notices,

¹⁴⁴ Vedantam, *supra* note 129.

¹⁴⁵ Peter H. Lewis, *Attention Shoppers: Internet Is Open*, N.Y. TIMES (Aug. 12, 1994), <http://www.nytimes.com/1994/08/12/business/attention-shoppers-internet-is-open.html>.

¹⁴⁶ *Supra* note 27.

¹⁴⁷ *Supra* note 43-44.

¹⁴⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *See supra* Section III.A.

¹⁵² *See supra* Section III.B.2.

or advertisements which provisions may or may not be void.¹⁵³ However, studies show that consumers and prospective consumers either do not look at a website's terms and conditions or, if they do, only read them for as little as one minute.¹⁵⁴ Some terms and conditions, such as Apple's iTunes, require over three hours of reading.¹⁵⁵ Therefore, requiring sellers to specify provisions for New Jersey consumers only lengthens these terms and conditions that consumers are already ignoring because of their size and convoluted language.¹⁵⁶ If there is no legitimate local purpose, the statute will not be deemed constitutional.¹⁵⁷

Additionally, sellers who engage in commerce in multiple jurisdictions have the burden of navigating inconsistent regulation, something the United States Supreme Court has not tolerated in the past.¹⁵⁸ Because of the TCCWNA's burdens, sellers may need to incur great legal costs in order to comply with similar laws across the United States that may have different standards for their consumers' terms and conditions.¹⁵⁹ Finally, New Jersey's interests could be protected with a lesser impact on interstate commerce if it did not allow class actions and required ascertainable loss under the statute, or if it enacted a statute requiring terms and conditions to be more consumer friendly in order to promote awareness of pre-existing rights.¹⁶⁰ For all of these reasons, the TCCWNA fails the *Pike* balancing test and violates the dormant Commerce Clause.¹⁶¹

¹⁵³ See N.J. STAT. ANN. § 56:12-16 (Westlaw through L.2017, c. 317, 319-321, 323, 325, 328-330, 340 and J.R. No. 24).

¹⁵⁴ OBAR & OELDORF-HIRSCH, *supra* note 130, at 16.

¹⁵⁵ *Apple Media Services Terms and Conditions*, *supra* note 132.

¹⁵⁶ OBAR & OELDORF-HIRSCH, *supra* note 130, at 15-16.

¹⁵⁷ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁵⁸ See *Am. Libr. Ass'n v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997).

¹⁵⁹ See *supra* Section III.B.

¹⁶⁰ See *supra* Section III.C.

¹⁶¹ *Pike*, 397 U.S. at 142.