



MEMORANDUM

TO: Members of the Assembly Consumer Affairs Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: Assembly Bill 4097
DATE: February 5, 2015

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose A-4097.**

This bill would prohibit many of the provisions commonly found in consumer contract arbitration agreements, including forum selection, class action waivers, jury trial waivers, and agreements to limit the scope of discovery. The prohibitions would be enforced via the Truth in Consumer Contract Warranty and Notification Act (TCCWNA), which provides for a fine of \$100 per violation.

Our first concern is with what is being prohibited. Some of these prohibitions are not controversial, in fact waivers of consumer protection laws, and contractual agreements not to contact law enforcement agencies to report a consumer complaint are already unenforceable.

But many of the provisions that would be prohibited by this bill are core elements of arbitration, an efficient and cost effective alternative dispute mechanism that benefits both retailer and consumer.

Arbitration is important because the cost of litigation often vastly exceeds the value of the underlying dispute. Mandating that all consumer disputes be litigated with full discovery, jury trial, and all other procedural protections does not benefit the consumer if the resulting mechanism is so expensive that it is not cost-effective to use it.

Making elements of arbitration a violation of TCCWNA is also in conflict with federal law.

As the US Supreme Court wrote in *AT&T Mobility v. Concepcion*, "the principal purpose of the [Federal Arbitration Act] is to ensure that private arbitration agreements are enforced according to their terms." As a result, states are precluded from adopting rules "that disfavor arbitration." In fact the Court specifically cited rules against jury waivers and limitations on discovery as examples of what would be illegitimate attempts to thwart the FAA. Prohibiting arbitration provisions in consumer contracts, and enforcing the prohibition with a \$100 fine, would likely be considered "disfavoring" arbitration.

Finally, we have serious concerns with the underlying structure of TCCWNA itself.

There are three elements of TCCWNA which work together synergistically to create significant problems. First, there is no requirement under TCCWNA that there be any injury. Second, there is no requirement of culpable conduct, or intent to do wrong. A retailer can be held responsible for a provision in a contract or warranty provided by the manufacturer, if the retailer passes along the document with the offending provision.

The third and most critical element is the class action device. The statutory penalty based on no culpable conduct and creating no injury is subject to aggregation as a class action. If the statutory penalty were limited to providing an incentive to individual consumers to bring claims, and thereby put a business on notice that a particular document was out of compliance, it might function as an appropriate regulatory mechanism. But when the statutory penalties are aggregated as a class action, businesses are ambushed by massive potential liabilities in circumstances where there has been no culpable conduct and no actual injury.

Not all claims for statutory penalties can be certified as a class – with respect to some statutes, individuals alone are eligible to collect their penalties. However, so long as the class action device remains available for TCCWNA penalties, expanding the circumstances in which those penalties would apply would present a significant risk to New Jersey businesses.

As a result of these concerns, we respectfully ask the committee hold the bill.