

# Those terms and conditions (that nobody reads) could cost N.J. retailers



Toys R Us is among the retailers recently sued over its online terms and conditions for consumers. (Dan Gleiter | Pennlive.com)



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**NEWARK** — On Dec. 24, 2015, a home furnishings company called Croscill Home sold a tealight candle holder online to an Ocean County man.

That transaction now has the company facing the threat of a class action lawsuit and the possible loss of a huge sum of money.

The consumer, Ryan Russell, earlier this year sued Croscill, alleging that the terms and conditions on its web site violate an obscure pre-Internet era New Jersey consumer law, among several other state laws.

The lawsuit, which seeks a class action against the North Carolina company, claims the legal terms spelling out the seller's and shopper's responsibilities on croscill.com improperly claim to protect Croscill from damages, including punitive damages, if a consumer somehow is harmed by the product. The language asserting protection for the company could scare off consumers who may have wanted to sue, it adds.

Russell's lawsuit cites the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act, a law passed back in the days when consumers had to go to a store or use a catalogue to shop for and buy goods.

These days, consumer protection is mostly handled by the state Consumer Fraud Act. The Truth in Consumer Act is not even mentioned on the state Division of Consumer Affairs' web page listing statutes and regulations.



### **Feds fine law firm and debt collector**

The Consumer Financial Protection Bureau is requiring the firms to stop filing suits without checking the validity of the debt first.

But the law now has seen a resurrection, and is coming up in a spate of potential class actions against big, deep-pocketed retailers and businesses such as Apple, Toys R Us, Facebook, Staples and Devils Arena Entertainment.

"We like to call them 'gotcha' statutes," said Matt Fedor of Drinker Biddle and Reath in Florham Park, which represents companies threatened with such litigation.

Russell's suit does not say he received a defective product, nor that he suffered any harm because he bought it. It doesn't suggest any dissatisfaction with the transaction. It also does not even suggest that Russell read the terms and conditions, which run the length of an in-depth magazine article in language only a lawyer could appreciate.

"We don't believe we've done anything wrong," Crosskill's Chief Executive Officer Joe Granger said. "No consumer was harmed in any way, shape or form."

But to the plaintiffs' lawyers, that doesn't matter since the law doesn't require actual damages to occur. Holding companies like Crosskill to the terms of the act is a common-sense way to protect consumers from companies that otherwise could act recklessly in the market, said attorney Gerald Clark, who filed the complaint.

The lawsuit, he said in an email, is "an important mechanism to enforce this company's responsibility to play by the same rules everyone else has to. They should not be permitted to display illegal and unfair terms and conditions that violate TCCWNA and other New Jersey laws because this tends to place New Jersey consumers at risk."

The companies' attorneys have another explanation for the lawsuits, which were filed within the past few months in federal court: money.

"These cases seem to be driven by profit motive against the backdrop of a statute enacted in the 1980s that is being exploited in a way that the New Jersey Legislature never could have intended," said Lisa Glasband, who represented Devils Arena Entertainment in the litigation filed against it.

The law permits statutory penalties of \$100 per person for consumers who shopped on the web site. It also covers "prospective consumers," so plaintiffs can sue for consumers who may use the site in the future.

For a big retailer, that could amount to "tens of millions of dollars" in penalties, said Edward J. Fanning Jr. of McCarter & English in Newark.

According to Fanning, the litigation is being filed by a few lawyers looking to generate substantial legal fees.

"This is not for one single consumer or one single transaction," he said. "They're interested in putative class actions ... to really add up those numbers to get a large attorney fee."

Fanning said "dozens" of companies have gotten "demand letters," that ask for an immediate settlement in lieu of the filing of a lawsuit. "I'm getting calls from companies regularly on this," he said earlier this year.

"It's easy to say plaintiffs' attorneys are trying to make money," replied Jeffrey Gottlieb, who represented a New Jersey woman in the complaint against Devils Arena Entertainment, which was dismissed. "Why don't they say defendants should comply with the law?"

Fred Zemel of Newark is representing individuals suing a number of businesses, all citing violations of the act. Each lawsuit seeks the statutory damages — the \$100-per-person penalty — but no damages for actual harm. Complaints filed by Zemel against the New Jersey Symphony Orchestra and Samsung Electronics were terminated in recent weeks.

The symphony did not pay anything to Zemel as part of the termination of the lawsuit, Fanning said.

Other companies that had suits filed against them include Hertz, Avis, Vita-Mix, JCrew, Saks Direct and Burlington Stores.

Zemel defends the lawsuits, saying they are a means of protecting consumers from companies that violate the law.

In the Toys R Us case, the lawsuit alleges that the terms and conditions on the Wayne-based toy company's web site purport to absolve the company from legal responsibility if it sells a defective or harmful product in violation of the act. The suit also alleges violations of other New Jersey consumer laws as well.

"We believe this suit is without merit and we intend to fight it," said Elizabeth Gaerlan, an attorney representing the toy retailer.

Marcus Rayner, president of the New Jersey Civil Justice Institute, which lobbies against "excessive" litigation, said the lawsuits are based on "trivial technicalities" that represent "the class action system at its worst."

"When this type of litigation without harm occurs in the class action scenario, the plaintiff attorneys are the only parties who benefit, and the costs of goods and services increases for everyone as a result of the money paid out to settle these claims," Rayner said.

If the plaintiffs win their lawsuits, the price could be high for overlooking contractual terms that consumers almost universally ignore. One 2014 study published in the University of Chicago Press found that **one or two individuals per 1,000 web site users opened the terms and conditions page**. Even among those, readers spent little time on the fine print, it said.

Another study from 2013 that looked at software purchasers found that the percentage of **those who looked at the licensing agreements were between 0.05 percent to 0.22 percent of buyers**.

"And the very few shoppers that do access it do not, on average, spend enough time on it to have digested more than a fraction of its content," said the study, published by the New York University School of Law.

A state legislator has proposed a measure to protect consumers or businesses from being harmed by "technical" violations of consumer law, but not the Truth-in-Consumer Contract act.

Assemblyman Reed Gusciora wants to prevent awarding of attorney's fees and other costs for technical violations of the state Consumer Fraud bill. He said he was exploring if it could be amended to include the Truth-in-Consumer Contract act, or if a new bill would be required.

Fedor and his law firm partner Michael Daly said companies need to do a careful legal review of their "consumer-facing" materials. "There's no intention to get one over on the consumer," Fedor said. "It's a technical violation of a law on the books that no one was aware of."

Companies also should check their insurance coverage to see if they're covered for settlements in such cases, Fanning added.

To Granger, the 1980 statute is a big red flag for those looking to sell in the Garden State.

"My view is the statute disadvantages companies that do business in New Jersey," Granger said, saying such litigation siphons money that could be spent on payroll.

"There are much, much bigger issues that all companies face today," he said.

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