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Beware What You Click On: Website Arbitration Clauses

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In a recent U.S. Eastern District decision, the court (Weinstein, J.) compelled arbitration of a dispute based on language contained in the "terms of use" on an Internet access provider's website. The language contained an operative arbitration clause that the court found binding on the plaintiffs. Plaintiffs claimed the clause was not apparent to them and therefore they never provided any consent to arbitrate.

'Gogo'

The facts in *Salameno v. Gogo*, 16-CV-0487, NYLJ 1202762386338, at *1 (EDNY July 7, 2016) are straightforward. Gogo is in the business of providing Internet use on airplanes. To take advantage of Gogo's services, a customer must purchase a subscription plan or Internet pass, which can be used on more than 2,000 commercial aircraft on more than 10 air carriers. Plaintiffs were repeat Gogo customers who utilized Gogo's Internet service over a period of months or years. Plaintiff's complaint alleged (on behalf of themselves and others), that Gogo had violated consumer protection statutes, and asserted claims for contract breach, fraud, promissory estoppel and unjust enrichment. Gogo, among other relief, moved to compel arbitration.

The court granted the motion to compel, holding that "The company's terms of use bind plaintiffs. Sophisticated business travelers who repeatedly purchased and used Gogo's product can be assumed to have been aware of the arbitration clause where they repeatedly ordered the service."

The court made this finding in the absence of any proof that the customers, dissatisfied Gogo users, had any actual knowledge of the clause. The court's "assumed to have been aware" standard is a slippery slope. Not only because one can make assumptions about a number of things when visiting a website, but also since the general public has little or no experience with contractual waivers created by clicking on a merchant's website. Along with familiar warnings such as "buyer beware," online customers affected by the practice of inserting "hidden" terms and conditions, should be cautioned to "click at your peril." While individuals may be generally aware of privacy settings when visiting websites such as Facebook, together with the consequences of posting material on social media, their legal sophistication, at best, is assumed.

The digital realm, due to its speed and efficiencies, has made people less wary of the way business is now being conducted in cyberspace; this, in turn, can lead to a loss of bargaining power in web-based consumer transactions. A consumer who makes an Internet purchase should read the terms of use, which oftentimes are located at the bottom of a provider's website in small type. Such terms may be binding assuming there is knowledge and consent.

The takeaway from *Gogo* is that information roughly equivalent to what might be contained in a written contract may now be found in the terms of service clauses (or similarly named terms and conditions clauses), and clicking ahead and therefore signing on without looking over or agreeing to the service terms, can be a foolish if not reckless choice.

Findings and Lessons

Gogo, reflective of the way business is conducted in cyberspace, is instructive for a number of reasons.

Contract. First, the court clearly indicated that a contract was at the heart of this case, even though the customer never "signed" the terms of use. Thus, the Gogo court emphasized that "plaintiffs' claims center on the terms of their contractual relationship with Gogo, and the service the company was to provide pursuant to those terms. The contract itself—here the terms of use—is 'integral' to the complaint and may be considered on a motion to dismiss." The court was willing to receive and consider a host of transaction-related documents outside the well-pleaded complaint to determine the nature of the parties' relationship and the actual information conveyed to the user/customer through the website interactions, which it deemed all "integral to plaintiffs' claims."

Thus, the court found that several exhibits Gogo submitted in its moving papers, namely a declaration including the picture of the Gogo account creation page on its website and two versions of the company's terms of use, and a second declaration attaching a copy of an email submitted to a customer that confirms the purchase of the Gogo service, were appropriate on a motion principally to dismiss and compel arbitration. The court ordered the parties to provide to the court another document consisting of a "webpage screenshot of the webpage plaintiffs would have seen when signing into their existing accounts." All of these documents were considered in determining whether there was an offer to contract, which the court found.

Sophisticated Users. Second, the Gogo court emphasized that plaintiffs were repeat, if not extensive, users of the Internet service which required them to sign up in a "two-step process"—each user was required to create a

Gogo account on its website which includes the user's name, email address and password creation. Critically, "[t]he user must then accept Gogo's privacy and cookie policy and terms of use." After the account is created, activation requires purchase of a pass or subscription with different options to choose from.

A number of Gogo's service purchase screens alerted the user to the following statement: "By clicking the button below, you understand and agree to these terms and Gogo's privacy & cookie policy and terms of use." After a pass or subscription is bought, the user receives a link to Gogo's terms of use. "Each time a purchaser returned to Gogo's website to sign-in his or her account, the user would encounter a page with text that reads 'By clicking "Sign In" I agree to the terms of use and privacy policy. The phrase 'terms of use' was hyperlinked, enabling the user to access and review them prior to signing in."

One of the plaintiffs purchased Gogo's Internet service on at least three occasions; another made purchases "approximately once per month for approximately three years" while a third plaintiff paid for the service over 500 times. As the court makes clear, plaintiffs "purchased and used Gogo's product many…times" and were "repeatedly warned that by using Gogo's product they were agreeing to the terms of use, and they were repeatedly presented with a hyperlink to those terms."

As such, as frequent fliers and users of Internet service, plaintiffs were not found to be "unsophisticated lay Internet users." "In today's technologically driven society, it is reasonable to charge experienced users—as plaintiffs appear to be—with knowledge of how hyperlinks work and, by extension, how to access the terms of use they were—repeatedly—being told they were consenting to when they signed in to Gogo's website." A single or only occasional and unsophisticated user of the service, as suggested by the decision, might not be bound by the terms of use.

Mutual Manifestation of Assent. Third, the court reviewed the arbitration and forum selection clauses although contained in a hyperlinked terms-of-use provision under a traditional consent analysis. "'Mutual manifestation of assent' is the 'touchstone' of a binding contract. A 'transaction' even if created online, 'in order to be a contract, requires a manifestation of agreement between the parties' as to its terms." [citations omitted]. "In today's electronic world, online retailers often offer their services pursuant to terms of use shown on the computer used to order a product or services. Manifestation of assent to a website's terms of use may be demonstrated in different ways. Some websites require assent by checking of a box or clicking of a button—this is known as a 'clickwrap agreement.'" (citation omitted).

The court indicated that in other situations, websites acquire a user's consent when he or she signs into an account—the practice is known as "sign-in-wrap agreement." These sign-in agreements are generally found enforceable when there exists "an effective opportunity to access terms and conditions." Sign-in-wrap agreements have been found enforceable in three circumstances: (1) where the hyperlinked terms and condition are "next to the only button that will allow the user to continue use of the website"; (2) where the user "signed up to the website with a clickwrap agreement and was presented with hyperlinks to the 'terms of use' on subsequent visits;" and (3) "where notice of the hyperlinked 'terms and conditions' is present on multiple successive webpages of the site" citing *Berkson v. Gogo*, 97 FSupp3d 359, 388, 397, 399, 400-01 (EDNY 2015), and quoting *Specht v. Netscape*, 306 F3d 17, 29-30 (2d Cir. 2002) .

Adequate Notice. Fourth, the touchstone of the Gogo decision is whether the website and its provider had "repeatedly given adequate notice of the terms and conditions," which the court found, including that the terms included an arbitration agreement and that the arbitrable claims were within the scope of the arbitration clause. The court found the purchase product for Gogo to constitute both a clickwrap agreement ("the terms of use were hyperlinked so that plaintiffs could review the terms before making their purchase") and a sign-in wrap agreement. In addition to confirming the purchase, the user/plaintiffs were provided with an email that also contained a hyperlink to Gogo's terms of use. The court concluded that "[s]imilar combinations of clickwrap and sign-in-wrap agreements are enforceable."

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