KILPATRICK TOWNSEND

September 29, 2020

Internet terms and conditions: Second Circuit declines to enforce arbitration agreement accessible through browsewrap hyperlink

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Takeaway: We have recently written about the challenges involved in enforcing "browsewrap" contracts. *See Internet terms of use: Ninth Circuit enforces arbitration agreement accessible through browsewrap hyperlink* (August 31, 2020). The Second Circuit recently addressed this issue in declining to enforce browsewrap terms and conditions containing an arbitration agreement. The decisions in this area show that a hyperlink must be reasonably conspicuous to put a consumer on the requisite inquiry notice to render terms and conditions enforceable.

In *Arnaud v. Doctor's Associates Inc* ., ___ F. App'x ___, No. 19-3057-cv, 2020 WL 5523507, at *1 (2d Cir. Sept. 15, 2020), Luis Arnaud entered his phone number on a promotional page of Subway's website and clicked a box labeled "I'M IN" to receive a free Subway sandwich the next time he purchased a 32-ounce drink. The promotional page included a hyperlink to terms and conditions that included an arbitration agreement.

After Subway allegedly sent Mr. Arnaud an unsolicited text message, he filed a putative class action against Subway alleging violations of the Telephone Consumer Protection Act. Subway moved to compel arbitration, but the district court denied the motion. Subway appealed, but the Second Circuit affirmed.

Analyzing the issue under New York contract law, the panel observed a retailer need not show actual *notice* of terms and conditions. Rather, a consumer will be bound by terms and conditions "if he is on inquiry notice of them and assents to them through conduct that a reasonable person would understand to constitute assent." 2020 WL 5523507, at *2 (citation omitted). In the context of internet contracts, inquiry notice turns on whether the "design and content" of a promotional page made the existence of terms and conditions "reasonably conspicuous." *Id*. (citation omitted).

According to the district court, "the Subway webpage was relatively cluttered, did not use a conspicuous size or font for the terms and conditions link, and did not provide language informing the user that by clicking 'I'M IN' the user was agreeing to anything other than the receipt of a coupon, the user would not have been on inquiry notice of the arbitration provision." *Id*.

The panel agreed the design of Subway's promotional page did not put Mr. Arnaud on inquiry notice of the terms and affirmed district court's ruling, stating: "A reasonable user would not find the terms and conditions link contained on the page to be conspicuous, since the link was at the bottom of the page, in relatively small font,

and was introduced by no language other than the shorthand 'T & Cs.' A reasonable user would therefore not recognize that by clicking 'I'M IN' he agreed to be bound by those terms and conditions." *Id*.

As we noted in our August 31 article, the best option in terms of binding consumers to internet-based contracts remains "clickwrap," where a consumer must click "I agree" after being presented with the text of or a direct and conspicuous link to the terms and conditions. The *Arnaud* decision against demonstrates a business should implement clickwrap whenever feasible to maximize the likelihood of enforcing Internet terms and conditions.