

Enforceable digital contracts

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When considering the purchase or sale of goods and/or services using the Internet and/or mobile apps, the consumer and the seller both need to be mindful of contract formation. As the volume of commerce using new technologies increases, parties need to consider the legal ramifications of contracting in the context of these new technologies.

Shrink-wrap, click-wrap, browse-wrap and online contracts are used in millions of daily transactions with the intent to create enforceable contracts. However, not all of these contracts may be enforceable. When a dispute arises around the enforceability of these digital contracts, the facts, among other factors, will be examined.

Mutual assent is one aspect of contract formation. Restatement (Second) of Contracts Section 17 states, in part, "...formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange. ..."

How that mutual assent is determined in e-commerce differs somewhat from the "brick-and-mortar" world, but is grounded in similar legal principles. One such general principle is that an offer, and all of its terms, must ordinarily precede acceptance.

Recently the 2nd U.S. Circuit Court of Appeals was presented with questions about contract formation flowing from online consumer transactions and held that certain terms of the alleged contract were unenforceable.

In *Lucy Schnabel, et al. vs. Trilegiant Corporation, et al.* (2012), the court was asked to determine if the plaintiffs were bound to arbitrate their dispute with the defendants pursuant to an arbitration provision that the defendants assert was part of a contract between the parties created through online and e-mail activities and which arbitration provision the plaintiffs assert they were not aware of at the time their contractual relationships were formed.

The plaintiffs' credit cards in *Schnabel* were, over a period of several months, charged a monthly fee for allegedly enrolling in the defendants' Great Fun discount program after the plaintiffs made purchases from a third party's website. The defendants e-mailed to the plaintiffs terms that the defendants argue were accepted by the plaintiffs' acts of continued payment of fees on their credit cards and maintenance of the opportunity to make use of Great Fun, or, stated otherwise, by their failure to cancel the service in a timely manner. However, the court concluded that the later-e-mailed terms, including the arbitration clause, were never accepted by the plaintiffs.

The court noted that a person can assent to terms even if he or she does not actually read them, but the "...offer must nonetheless make clear to a reasonable consumer both that terms are being presented

and that they can be adopted through the conduct that the offeror alleges constitute assent."

The court goes on to state, "We do not think that an unsolicited e-mail from an online consumer business puts recipients on inquiry notice of the terms enclosed in that e-mail and those terms' relationship to a service in which the recipients had already enrolled and that a failure to act affirmatively to cancel the membership will, alone, constitute assent."

The court's decision turned in large part on the issue of notice. "Therefore, in cases such as this, where the purported assent is largely passive, the contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of the term at issue. In other words, where there is no actual notice of the term, an offeree is still bound by the provision if he or she is on inquiry notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent. 'Inquiry notice is actual notice of circumstances sufficient to put a prudent man upon inquiry.' ... In making this determination, the '[c]larity and conspicuousness [of the term is] important ...'"

The court distinguished the facts of this case from the typical "shrink-wrap" scenario in which the purchaser cannot begin using the product until after being presented with the terms, whether or not the purchaser actually reads them.

The court said "the arbitration provision here was both temporally and spatially decoupled from the plaintiffs' enrollment in and use of Great Fun; the term was delivered after initial enrollment and Great Fun members such as the plaintiffs would not be forced to confront the terms while enrolling in or using the service or maintaining their memberships."

"Here, Trilegiant effectively obscured the details of the terms and conditions and the passive manner in which they could be accepted. The solicitation and enrollment pages, along with the fact that the plaintiffs were not required to re-enter their credit card information, made joining Great Fun fast and simple and made it appear —falsely— that being a member imposed virtually no burdens on the consumer besides payment."

The bottom line is that businesses and their contract drafters in the online, e-commerce and mobile app marketplace need to be mindful of the technical, business and legal context in which these digital contracts are being used to better minimize the risk of nonenforcement.