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Survey of Enforceability of Consumer Electronic Acceptance: A Practitioner's Guide to Designing Online Arbitration Agreements and Defending Them in Court – Part I

By Elie Salamon

As businesses continue to face unprecedented challenges navigating the global pandemic and depressed consumer spending and demand, companies are looking for cost-saving measures across the board to stay afloat and to maintain corporate profits. Litigation costs can consume a significant percentage of corporate revenue, particularly as litigation expenses continue to rise disproportionately in the United States relative to foreign jurisdictions.

The burdens attendant with discovery in litigation are typically shouldered largely by corporate defendants, and cost-shifting is seldom ordered by courts as a means of leveling these inequities. A 2010 survey of Fortune 200 companies found that, while in-house litigation costs generally remained flat between 2000 and 2008, average annual outside litigation costs nearly doubled in the eight-year period that followed from $66 million to nearly $115 million,[1] and that the average percentage of litigation costs as a percentage of total revenue ballooned by 78 percent from 0.62 percent to 0.89 percent.[2]

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Class Action Litigation

Class action litigation is to partially blame for increased corporate spending on legal bills, with such spending reaching unprecedented levels.[3] A recent survey found that companies collectively spent nearly $2.7 billion defending class actions in 2019 alone, which accounted for 11.6 percent of the $22.75 billion market for legal services in litigation.[4] The upward trend in corporate spending in this area is expected to continue as more than 500 new class action matters stemming from the emergence of the global pandemic were filed in the United States already by the end of May 2020.[5]

With the threat of litigation and company exposure constantly looming over corporate America, businesses may perceive outside litigation costs as unavoidable and part of the cost of doing business in the United

States. But as companies have sought creative solutions to maintain expanding legal defense bills, many have shifted to adding arbitration agreements with binding class action waivers to the sale of goods and use of services to consumers to flatten company annual litigation defense spending by providing a more efficient and cost-effective forum to resolve consumer disputes. These agreements require consumers to bring any claim arising out of their purchase or use of a product or service in arbitration rather than in court, and prevent consumers from bringing such claims as part of a class or consolidated action.

Arbitration

Arbitration may not be the spiciest topic, but an arbitration clause can be a powerful tool in a company's litigation defense arsenal to provide greater certainty and security regarding the costs and risks associated with litigation, which are generally circumscribed in arbitration proceedings. It is common knowledge that the civil class action system in the United States is rife with abuses. While courts have gotten better about policing abuses, the plaintiffs' bar continues to take advantage of the class action device by bringing cases that have little or no intrinsic merit as putative class actions and using the mere threat of possible certification and the costs of proceeding up until the class certification decision as leverage to extract recoveries vastly out of proportion to the merits of the claim, and often inuring nearly entirely to counsel.

Arbitration is an excellent tool for countering such abuse and neutralizing the advantages the class action bar seeks to derive from it, by drawing the focus back to efficient resolution of actual disputes, which will tend to make marginal cases look far less attractive to plaintiffs' counsel to pursue when the merits of the case have to stand on their own two feet.

Consumer arbitration agreements are by no means a new sensation, and have long been enclosed with contracts and terms of use inside the packaging of consumer goods, or even delivered to consumers later in the mail. Courts have routinely applied state law principles of contract formation to enforce the use of such "shrinkwrap" agreements because they put customers on notice that, by using the product, they are agreeing to certain contractual terms, which include agreements to arbitrate any dispute that arises between the parties. In the new internet age and with more than 275 million smartphone users in the United States,[6] brick and mortar stores have moved online and web-based merchants have emerged.

As consumer-company interactions have moved online, so too have companies' terms of use and arbitration agreements, which are presented to users as the new corollary of the shrinkwrap agreement: on the user's phone or computer at the time of purchase, account registration, and/or account sign-in. But "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[7]

Courts have thus continued to apply the standard rule of contract formation that when a business offers a good or service subject to stated terms, and a consumer decides to take or use that good or service with knowledge of the terms of the offer, the consumer's taking or use constitutes acceptance of the terms, which become binding on the customer.[8]

Web-Based Arbitration Agreements

The enforceability of arbitration agreements is governed by the Federal Arbitration Act, which requires courts to compel arbitration of any dispute if (1) a valid agreement to arbitrate exists, and (2) the dispute falls within the scope of that agreement. Thus, before an agreement to arbitrate can be enforced, a court must first determine whether such agreement exists between the parties, which turns on principles of state contract law.

The two most common types of web-based contracts are: (1) a "clickwrap" or "clickthrough" agreement, by which a user is presented with a list of terms and conditions on their computer or phone and is required to expressly manifest their assent to those terms and conditions by clicking on a box that says "I agree"; and (2) a "browsewrap" agreement, where a company's terms and conditions of use are posted on a webpage or app via a hyperlink at the bottom of a screen but require no affirmative action by the user to agree to the terms of contract other than the consumer's use of the company's service.

The touchstone of contract formation under any of these agreements is mutual manifestation of assent, or meeting of the minds, which turns on whether the user was on actual or constructive notice that an agreement exists and whether they received a reasonable opportunity to review the terms of that agreement and to consent.[9] Clickwrap or clickthrough agreements are therefore more frequently upheld because the user has affirmatively assented to the terms of the agreement by clicking "I agree."[10]

Thus, courts have "been more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement – that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website."[11] But mere classification of a web-based contract as a clickwrap agreement or a

browsewrap agreement, however, does not necessarily determine the contract's enforceability; and courts have looked to "the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design" in assessing whether a reasonably prudent user would be on inquiry notice of the terms of the agreement.[12]

It is the rare case where a company is able to establish that a consumer had actual notice of the arbitration agreement. Therefore, the vast majority of cases litigated in court turn on whether the user was on inquiry notice of the terms of the agreement. As arbitration agreements have become more prominent in the internet consumer marketplace, the plaintiffs' bar has developed more creative strategies for avoiding arbitration so that they can continue to pursue their claims in court. A judicial finding that a company's website or app interface failed to put a reasonable consumer on notice of the arbitration agreement can have devastating consequences for a business for its legal defense budget and litigation exposure, particularly if the matter involves a class action, which would have been stopped in its tracks had the company's arbitration agreement and binding class waiver stood up in court. An adverse finding can also open up the floodgates for copycat cases, further driving up a company's legal defense spend.

Best Practices for Designing Arbitration Agreements

Because the adequacy of notice is driven by the particular facts of each case and is dependent on state law, there is no black and white standard that governs contract formation in this area. Best practices therefore must be guided by examining recent caselaw, imagery of corporate website and app presentations of arbitration agreements, and how those businesses' agreements have fared when tested in court. To name just a few, these best practices for optimizing the likelihood of ensuring that an arbitration agreement withstands scrutiny in court include the following:

- Include a clear prompt to the user directly above or below a button that will allow the user to make their purchase or continue to use the website, app, or service. The clear prompt should appear to the user on the same screen as the button without requiring the user to scroll to see the button. That prompt should direct the user to read the terms and conditions, and advise the user that clicking the adjacent button will manifest the user's agreement to, and acceptance of, the company's terms and conditions.
    - In the prompt, consider expressly mentioning that the terms and conditions include an arbitration agreement.

- The prompt should be in a font that stands out from the surrounding text, which can be achieved by using larger, darker, bolded, and different colored typeface. Toward that end, avoid cluttering the page with numerous hyperlinks and text. To the extent other terms or phrases on the page are hyperlinked, ensure that all other such hyperlinks are blue and underlined and presented in a similar manner to the hyperlinked terms that includes the arbitration agreement. Also use a solid background, preferably white for the webpage or app interface presenting the agreement.

- In the prompt, hyperlink the relevant terms and conditions that contain the arbitration provision so that the user can click on the hyperlink to redirect them to the applicable terms. Color the hyperlinked terms and conditions phrase blue and underline the hyperlink.
    - To the extent the registration, sign-in, or purchase interface on the app and/or website includes a series of multiple steps and pages, include a hyperlink to the terms on each successive page.

- Require the user to check a box to indicate that they read, understand, and agree to the hyperlinked terms and conditions before the user can complete their registration, use, or purchase. Also require the user to actually click on the hyperlinked terms and conditions, which will present the terms to the user and require the user to actually review and scroll through the terms before they can proceed further with their registration or purchase.

- In the initial screen of the terms and conditions document to which a user is directed after clicking on the hyperlinked terms and conditions, expressly mention the arbitration agreement in the document's table of contents. Hyperlink the arbitration agreement in the table of contents so that the user does not need to scroll through the lengthy terms to locate the arbitration provision.

- Establish an internal corporate process by which a user's access and acceptance is captured and stored for future litigation use in the event of a contractual dispute. These internal records should capture

the time and date stamp of the user's acceptance of the terms and be capable of substantiating each user's click throughout the registration or purchase process, including providing copies of the specific electronic interface presented to a user on the company's website or app and the particular version of the terms to which the user agreed.

An arbitration agreement can withstand judicial review without exemplifying each of the features identified above. But the more of these qualities embodied by a company's arbitration agreement, the greater the probability that your agreement will stand up in court. But even more critical than the cases a business might win or lose litigating the enforceability of its arbitration agreements are the cases that never materialize. A company that models its agreement by incorporating a larger number of best practice elements into its design is more likely to keep a lurking plaintiffs' lawyer at bay and incentivize them to pursue their next case against a different company or competitor that either does not use arbitration agreements or whose agreement is not as air tight.

Of course, this is easier said than done, as there is an undeniable tension that arises for businesses, who, on the one hand, strive to design their agreements so that they are sufficiently conspicuous to provide consumers with adequate notice of the agreement and pass judicial muster; while on the other hand, have a legitimate business interest in preserving a sleek and consumer-appealing design and user-friendly experience without overwhelming customers with numerous warnings and legal jargon by cramming as much information as possible onto the screen. The pursuit of these dual and often competing interests is like walking a tight rope for in-house counsel and business marketing teams. The challenge is striking the right balance that can substantially satisfy both groups' interests.

Defending Arbitration Agreements in Court

In addition to the design and presentation of an arbitration agreement, it is equally important for company in-house lawyers and outside counsel to carefully study the pitfalls of corporate defendants who have litigated disputes concerning the enforceability of their arbitration agreements. A company can design the perfect arbitration agreement and user interface, but a few simple missteps litigating the enforceability of the agreement in court, such as the submission of an incomplete motion, the presentation of an inadequate evidentiary record, or the use of imprecise language in a supporting company declaration can undermine the agreement's viability and have the same consequence to a business as if it had failed to design an adequate agreement in the first instance.

Beyond studying the caselaw and understanding the strengths and weaknesses of the agreement in question, attorneys defending a company's arbitration agreement in court should incorporate the following elements into any motion to compel arbitration:

- Carefully select the company declarant you will use to substantiate and authenticate the company's agreement. The declarant should be someone who has personal knowledge of the arbitration agreement and its presentation to users, as well as the company's internal policies and business records.

- The declaration should provide a basis for the declarant's personal knowledge of the agreement, including the declarant's experience and review of business records.

- Attach a copy of the actual arbitration agreement entered into with the plaintiff. That submission should include screenshots of each step of the agreement process on both the company's website and phone app that would have been presented to the plaintiff on the date of their purchase, sign-in, and/or registration. The submission should also include a copy of the full terms applicable to the plaintiff that were in effect at the time of purchase, sign-in, and/or registration, and that would have been displayed to the plaintiff had they clicked on the hyperlinked terms during the contract formation process.

- The declarant should use firm and unequivocal language that makes clear that the statements being made describe the particular agreement formation process the plaintiff embarked on, and that the supporting documentation submitted displays what the plaintiff was presented with on the date in question. Avoid cryptic and ambiguous language like "substantially similar" or "materially identical" that does not identify for the court the supposed differences between the submission and what plaintiff was presented with.

- The declaration should include an unequivocal statement that the user could not have completed their purchase or registration or used the service without checking the "I agree" box and/or by tapping the relevant button(s) on the screen.

Caselaw

With these best practices in mind, the next parts of this article will survey recent decisions over the past year or so across all jurisdictions involving the enforceability of consumer electronic acceptance of arbitration agreements that bear out these best practices in action. The summaries are focused principally on the question of contract formation, that is, whether the consumer had notice of the arbitration agreement and manifested their agreement to it, and the arguments plaintiffs have invoked in an effort to evade a finding of mutual assent to arbitrate any disputes.

A review of the fact-intensive decisions to be summarized among 23 jurisdictions and applying the disparate laws of 13 different states confirms that courts are generally adhering to the U.S. Supreme Court's admonition to the lower courts that the Federal Arbitration Act "establishes a liberal federal policy favoring arbitration agreements,"[13] which must be placed "on an equal footing with other contracts, and enforce them according to their terms."[14]

Approximately 74 percent of the agreements that were scrutinized by courts over roughly the past year were found to provide a reasonable user inquiry notice and were enforced. But a closer review of the cases reveals the costs imposed on corporate defendants that fail to strike the right balance between design appeal and conspicuousness of their arbitration agreement. As will be seen, courts can be overly demanding and raise the enforcement bar for companies, even when an arbitration agreement might reasonably appear as comporting with preexisting judicial precedent in all relevant respects.

Indeed, roughly 36 percent of the agreements were either rejected or had to endure some form of appellate risk in order to obtain a dismissal, and thus those corporate defendants faced additional litigation expense and risk that could have been avoided with an improved arbitration agreement design that followed best practices and avoided common litigation tactical pitfalls.

Understanding the features that courts have found strengthen and weaken notice of an agreement to arbitrate will help inform company best practices in designing their agreements.

Moreover, an awareness of the arguments plaintiffs have invoked in prior cases in an effort to defeat contract formation and how such arguments have been treated by courts should further inform motions to compel and preempt potential plaintiff rebuttal arguments that could be made in opposition to the motion. Accordingly, the next parts of this article are intended to serve as a resource for both in-house counsel designing the agreements and outside counsel moving to enforce their terms in court.

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As noted above, future parts of this article, which will appear in upcoming issues of *The Computer & Internet Lawyer*, will explore recent caselaw examining online consumer arbitration agreements.

Notes

1. Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* 7 (May 10-11, 2010), *available at https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf*.
2. *Id.* at 10.
3. Carlton Fields, *2020 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 11 (2020), *available at https://mcusercontent.com/0c82d1e732eec64ff4cb3d4b7/files/16898313-4e0c-460a-a9f0-88f4d6d840ad/2020_Class_Action_Survey.pdf*.
4. *Id.* at 10.
5. *Id.* at 3.
6. *Number of smartphone users in the United States from 2018 to 2024 (in millions)*, statista (Apr. 21, 2020), *https://www.statista.com/statistics/201182/forecast-of-smartphone-users-in-the-us/*.
7. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).
8. *Id.*
9. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014).
10. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017).
11. *Nguyen*, 763 F.3d at 1176.
12. *Id.* at 1177.
13. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (internal quotation marks omitted).
14. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted).

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