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Court Decision Highlights Importance of Post-Purchase Terms and Conditions

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In its recent decision in *DeFontes v. Dell, Inc.*, No. 2004-137, 2009 R.I. LEXIS 142 (R.I. Dec. 14, 2009), the Supreme Court of Rhode Island held that an arbitration clause, contained in terms and conditions provided to customers following purchase, was unenforceable because the customers were not given the opportunity to reject the terms and conditions by returning the purchased goods. This case serves as an important alert to companies that seek to impose terms and conditions on their customers through any form of post-purchase documentation, such as "shrinkwrap" agreements, order confirmations, invoices, or product packaging.

The *DeFontes* plaintiffs brought suit against Dell, individually and on behalf of a class of similarly situated persons, alleging that Dell's collection of taxes on certain service contracts purchased with Dell computers violated Rhode Island's Deceptive Trade Practices Act. Dell sought to compel arbitration pursuant to an arbitration clause contained in the "Terms and Conditions Agreement" that was provided to the plaintiffs with their order confirmations and in the packaging for the computers. Dell argued that the plaintiffs had consented to the Terms and Conditions Agreement by accepting delivery of the computer equipment. The plaintiffs countered that the Terms and Conditions Agreement was provided only after the plaintiffs had already purchased the computers and, therefore, was not part of their contract with Dell.

The court noted that the Seventh Circuit's landmark decisions in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), are the leading cases on shrinkwrap agreements and other forms of contract where a vendor delivers a product that includes additional terms and conditions. In *Hill*, the Seventh Circuit held that "[p]ractical considerations support allowing vendors to enclose the full legal terms with their products" and that, under Section 2-204 of the Uniform Commercial Code ("U.C.C."), "a vendor, as master of the offer, may invite acceptance by conduct . . . [and] [a] buyer may accept by performing the acts the vendor proposes to treat as acceptance." 105 F.3d at 1149. Accordingly, the Seventh Circuit held, a consumer can accept and be bound by terms and conditions packaged with a product if the consumer is given the opportunity to reject the terms and conditions by returning the product and chooses not to do so.

The *DeFontes* court also noted, however, that there is another line of cases that runs contrary to

theSeventh Circuit's analysis in *ProCD* and *Hill*. For example, in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991), the Third Circuit applied the "battle of the forms" analysis of U.C.C. Section 2-207 to a vendor's license agreement attached to packaging. The *Step-Saver* court found that U.C.C. Section 2-207 "establishes a legal rule that proceeding with a contract after receiving a writing that purports to define the terms of the parties' contract is not sufficient to establish the parties'consent to the terms of the writing to the extent that the terms of the writing either add to, or differ from, the terms detailed in the parties' earlier writings or discussions." 939 F.2d at 99. Accordingly, the court held that the plaintiff in *Step-Saver* was not bound by any terms of the vendor's "box-top" license agreement to which he did not expressly agree.

In reviewing these two lines of cases, the *DeFontes* court concluded that "the *ProCD* line of cases is better reasoned and more consistent with contemporary consumer transactions." 2009 R.I. LEXIS 142, at *28. The court continued,

> It is simply unreasonable to expect a seller to apprise a consumer of every term and condition at the moment he or she makes a purchase. A modern consumer neither expects nor desires to wade through such minutia, particularly when making a purchase over the phone, where full disclosure of the terms would border on the sadistic. Nor do we believe that, after placing a telephone order for a computer, a reasonable consumer would believe that he or she has entered into a fully consummated agreement.

Id. This reasoning was, of course, highly favorable to Dell and consistent with Dell's position that the arbitration clause contained in its Terms and Conditions Agreement provided to the plaintiffs after they placed their order should be considered part of the plaintiffs' contracts with Dell. Indeed, the Terms and Conditions Agreement even included language stating that "[b]y accepting delivery of the computer systems, related products, and/or services and support, and/or other products described on that invoice[,] You ('Customer') agrees to be bound by and accepts those terms and conditions." *Id.* at 30. Thus, Dell had, as described in *Hill*, identified the acts that would constitute acceptance of the terms and conditions, and the plaintiffs had performed those acts. Despite all of that, however, the court ultimately held that the plaintiffs were not bound by the arbitration clause contained in the Terms and Conditions Agreement.

The court reached this conclusion based on an often-overlooked aspect of the *ProCD* analysis, namely, the requirement that customers have the opportunity to reject the vendor's terms and conditions by returning the goods. According to the court, the language in the Terms and Conditions Agreement regarding acceptance "certainly informed plaintiffs that defendants intended to bind them to heretofore undisclosed terms and conditions, but it did not advise them of the period beyond which they will have indicated their assent to those terms." *Id.* This, the court determined, "raises the specter that they were unaware of both their power to reject and the method with which to do so." *Id.* at 34. Because the court was "not persuaded that a reasonably prudent offeree would understand that by keeping the Dell computer he or she was agreeing to be bound by the terms and conditions agreement and retained, for a specified time, the power to reject the terms by returning the product," the court held that the arbitration clause could not be enforced against the plaintiffs. *Id*. at 36.

The lessons of *DeFontes* are two fold. First, while the *ProCD* analysis may be the majority view, *DeFontes* shows that courts may nonetheless take into account the *Step-Saver* line of cases and, although the *DeFontes* court ultimately decided to follow *ProCD*, another court could take a different path. Thus, using any form of post-purchase terms and conditions entails at least some risk that a court will apply the *Step-Saver* analysis to hold that such terms are unenforceable unless expressly accepted by the customer. Second, even assuming that the *ProCD* analysis will be applied, companies should take steps to ensure that any post-purchase terms and conditions comply with *ProCD*'s requirements. Specifically, to reduce the risk of unenforceability, such terms and conditions should clearly state: (a) the manner in which the customer will be deemed to have accepted the terms and conditions (e.g., by installing or using software, opening the packaging, keeping the goods for a specified number of days, and so forth), and (b) that the customer has the right to reject the terms and conditions and the manner in which such rejection can be effectuated (e.g., by returning the goods or ceasing use of the services within a specified period of time, giving notice of termination, or through some other mechanism).