Mutual Assent in the Digital Age: Second Circuit Finds Confirmation Email Not Enough to Bind Parties

by KENNETH C. OH *on NOVEMBER 5, 2012*

The Second Circuit Court of Appeals recently added to the growing body of case law regarding what constitutes mutual assent in the digital world. It ruled that emailing a purchaser the contract terms and conditions after the consumer transaction was completed was insufficient to form a binding arbitration agreement. Key to finding a binding agreement is a finding that the consent to be bound is knowingly made.

The Facts of the Case

Brian Schnabel and his father, Edward Schnabel, were both enrolled in Great Fun, a membership program offering discounts on a wide variety of products and services, including dining and retail shopping, after making online purchases on other websites. Both contend that they did not knowingly or intentionally enroll in the program.

Trilegiant, which operated Great Fun, asserts that in the process of completing purchases from Priceline.com and Beckett.com, respectively, both Edward and Brian were presented with separate "enrollment offer" pages and entered personal information into fields on those pages, including their city and password. Their credit card information was directly transferred from the initial online retailers. After discovering that they had been paying $11.99-$14.99 per month for the membership, the Schnabels sought a full refund from Trilegiant. When the company refused, they filed a putative class-action lawsuit alleging that their membership was the result of deceptive practices. Trilegiant then moved to compel arbitration, relying on an arbitration provisions contained in its "terms and conditions," which appeared on a web page prior to enrolling and an email sent to the plaintiffs after their enrollment. The plaintiffs, meanwhile, claim that they were not made aware of the arbitration provision. Thus, the question before the court was whether the parties had indeed agreed to arbitrate.

The Court's Ruling

The Second Circuit ultimately rejected Trilegiant's assertion that the plaintiffs assented to the arbitration provision by enrolling in Great Fun, receiving the emailed terms, and then not cancelling their memberships during the free trial period. In its opinion, the court concluded that the email did not provide sufficient notice to the plaintiffs of the arbitration provision, and the plaintiffs therefore could not have assented to it solely as a result of their failure to cancel their enrollment in the defendants' service.

In reaching its decision, the court distinguished this case from numerous rulings enforcing post-purchase contract terms in shrinkwrap licenses where a consumer can be bound to terms without actually reading them. In this case, "a reasonable person would not be expected to connect an email that the recipient may not actually see until long after enrolling in a service (if ever) with the contractual relationship he or she may have with the service provider, especially where the enrollment required as little effort as it did for the plaintiffs here," the court concluded. Notably, the service provider did not argue that a hyperlink to terms and conditions on the enrollment page would have disclosed the arbitration provision, and so that argument was not available on appeal.

If you have any questions about this case or would like to ensure that your online contracts are enforceable, please contact me, Ken Oh, or the Scarinci Hollenbeck attorney with whom you work.