



## Courts view Forum/Venue Selection Clauses in online user agreements presumed valid

In recent news, different courts within the United States were presented with questions regarding whether or not forum/venue selection clauses contained in online user agreements were valid. The courts took different paths to achieve similar results, largely holding that such clauses are presumed valid in the absence of evidence showing a miscarriage of justice.

In *Davis v. Avvo*, a case that appeared before the Middle District Court of Florida in Tampa earlier this year, the court upheld a forum selection clause contained in Avvo's online user agreement against the protests of Plaintiff Larry Davis, Jr. The traditional rule in determining the validity of forum selection clauses under federal law is that forum selection clauses are presumed to be valid, unless the party challenging the clause can show that enforcement would be unreasonable under the circumstances. In this case, Davis asserted that it was unreasonable to enforce the clause because he was forced to sign the user agreement in order to fix incorrect information on the Avvo website. The court took an opposing view, and held that there was no evidence to suggest that Davis was forced to sign the agreement; that he did so voluntarily, and did so knowing that there were other alternatives that he could have taken that would have fixed the incorrect the information. Therefore, the court upheld the forum selection clause and the case transferred to the proper forum.

In *Fushav. Delta*, the District Court of Maryland held that a venue selection clause contained in a "click-the-box" agreement between Plaintiff Fusha and Airtrade, an online travel agency and ticket broker, was valid. Fusha, in an attempt to travel to a relative's wedding in Albania, used a website owned by Airtrade to purchase her tickets. Before she was able to purchase her tickets to Albania, Fusha was required to agree to the terms and conditions of Airtrade's website by clicking the "accept terms and conditions" box on the website. Fusha acknowledged that she checked the "accept" box, but maintained that she never read the agreement, or had any idea that actions against Airtrade could only be brought in California. Unfortunately for Fusha, courts have routinely held that failure to read the terms of an agreement does not excuse a bound party from performance. In addition, Fusha was not able to prove that enforcement of the clause would be unreasonable, unfair or unjust. As a result, the court held that the venue selection clause was valid, and dismissed the case.

In a more technical case dealing with the Federal Rules of Civil Procedure, the court further affirmed the presumed validity of forum selection clauses contained in online agreements. The United States Court of Appeals for the Second Circuit held in *TradeComet.com LLC v. Google Inc.*, that "a district court is not

required to enforce a forum selection clause only by transferring a case pursuant to § 1404(a) when that clause specifies that suit may be brought in an alternative federal forum. Rather, in such circumstances, a defendant may seek to enforce a forum selection clause under Rule 12(b).” In essence the ruling gives a court the discretion to dismiss a case pursuant to Rule 12(b) even if it has an alternative course of action to transfer the case to the appropriate forum under § 1404(a). The court rationalized its ruling under the auspices that if claim is brought in the improper forum, it may be dismissed pursuant to Rule 12(b) based on judicial discretion, and no new precedent can deprive the courts of this power. In such cases, a Plaintiff would be required to spend time and resources to re-file in the appropriate forum, making litigation that much more costly and difficult.

In an accompanying Summary Order, the court in *TradeComet.com LLC v. Google Inc.*, found that Google’s forum selection clause was not unreasonable or against public policy, citing a “special interest in limiting the fora in which [a party] potentially could be subject to suit.” In this case the court, through the Summary Order, held that Google has this special interest because it provides its services to millions of users, and to hold the forum selection as invalid would potentially expose Google to millions of claims in thousands of different forums, thus creating an unreasonably high cost of litigation.

What must be taken from these cases is that a party seeking to invalidate a forum selection clause contained in an online user agreement, must be able to show that enforcement of a forum or venue selection clause must be unreasonable under the circumstances or would go against public policy. Absent such a showing, courts have shown a tendency to favor upholding the forum or venue selection clause at the expense of the challenging party.