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RECENT CASES PROVIDE RECIPE FOR RESOLVING CONSUMER CLASS ACTIONS THROUGH ARBITRATION

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Recent court decisions confirm the possibility of mandatory arbitration as a viable option for retailers frustrated with the rising costs of litigation, and the inability to recover their attorneys' fees, for frivolous class action lawsuits.

As I reported in a recent Law360 article, the clear benefits of arbitration to retailers include:

- its barrier to class action claims;
- its rational approach to damages;
- the mainstreamed, and therefore less costly, discovery process;
- the extremely narrow right of appeal;
- the neutralization of jury nullification; and
- of course, the availability of fee awards where an arbitrator deems a claim frivolous.

All of that, plus the reduced risk of media coverage, should serve as major disincentive for a frivolator seeking to score big bucks.

However, whether a consumer plaintiff can be required to waive the right to trial and submit to arbitration depends on whether he or she has agreed to do so in a binding contract with the retailer. All of this comes one step closer to plausibility with a recent New York district court decision, *Andersen v. Walmart Stores Inc. et al.*, No. 16-6488, W.D. N.Y., involving an attorney who purchased a Dell laptop computer at his local Walmart store.

The information card promised "up to 8 hours of battery life," but the plaintiff argued that the actual battery life was more like three hours. He sued, in a putative class action, for fraud and related causes of action. He turned down an offer to return the laptop, demanding instead a seven-figure settlement.

Walmart and Dell filed motions to dismiss, raising several arguments, but primarily identifying the arbitration provision that pops up on the screen the first time a user logs on to the laptop. Before a user can proceed, they are required to accept or reject the arbitration provision.

Rejecting the plaintiff's claim that the arbitration clause is invalid because it conflicted with New York state law, the court concluded that even if the underlying contract was induced by fraud, as alleged by the plaintiff, the knowing acceptance of the arbitration provision was binding. Denied a jury, a class action or inflated damages, the plaintiff declined to proceed in arbitration and the matter was over.

Second Circuit Enforces Click-Through Arbitration Agreement

Another recent decision provides guidelines for making click-through arbitration agreements more likely to be enforced. In *Meyer v. Uber Technologies, Inc.,* No. 16-2750 (2d Cir. 2017), the Second Circuit Court of Appeals reversed a lower court's decision denying arbitration. In that case, an Uber rider brought a putative class action against the ride-sharing company for alleged price fixing. The company filed a motion to compel arbitration based on the "Terms of Service" that every Uber customer accepts when they press "accept" while paying for the service.

The district court denied the motion, finding the arbitration provision to be so obscure and inconspicuous that its acceptance could hardly be considered an "unambiguous manifest assent to the terms." The Second Circuit reversed and compelled arbitration. The court confirmed that "Courts around the country have recognized that an electronic 'click' can suffice to signify the acceptance of a contract and that there is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement."

The Court gave great weight to the fact that the "checkout" section requires the user to affirmatively sign up for the service. It provides, in clear, unambiguous language,e that "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY."

The text provides a hyperlink to those policies and appear right next to the buttons for registration. The entire screen is visible at once, and there are no confusing or oppressive terms to obscure the fact there are terms and conditions that come with registration. The font is a different color (the court would have liked to also see bold capital letters) and the hyperlinks are set out from the rest of the text.

The court concluded that a "reasonably prudent smartphone user" would have understood that there were important terms and conditions to the transaction and easily could and should have reviewed them in advance to make an informed decision about whether to proceed.

Based on these facts, the Second Circuit reversed the district court and held the plaintiff had "unambiguously manifested his asset to Uber's terms of Service" as a matter of law.

Ingredients for Enforceable Arbitration Agreements

Although hardly universally dispositive or bulletproof, from these cases emerge the ingredients for a new recipe for resolving consumer class action lawsuits through arbitration.

- First, most retailing has moved, and will continue to move, online. A clear, concise and prominent arbitration provision can be introduced immediately before any online purchase, requiring the consumer to acknowledge that he read the terms and voluntarily agrees thereto.
- The language cannot be buried in terms of service or hidden three clicks away from checkout. But, if presented properly, every indication is that the arbitration agreement would be binding for most online purchases.
- Brick and mortar purchases present different challenges but may be surmountable. California courts have given some direction: "If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto." *Com. Factors Corp. v. Kurtzman Bros.*, 131 Cal.App.2d 133, 136 (1955).
- Any retailer with its own credit card should require a clear arbitration clause — separate and distinct from the other terms of use — which must be independently signed by the customer before the card can be used. Where other credit cards are used at checkout, a separate signature line — in addition to the general authorization — should confirm the consumer's acceptance of mandatory arbitration.
- If no signature is required (chip cards), a separate question should pop up disclosing the arbitration agreement (even in short form, referencing a longer version on the receipt), and requiring the customer to affirmatively click "yes" before check out.
- Finally, every receipt should include bold and capitalized language about arbitration, offering a return window for any customer who does not consent to arbitration. The failure to return the merchandise within that window may constitute acceptance of the provision. Generally, courts have upheld policies that are set forth on receipts (like return policies). *Holt v. Macy's Retail Holdings Inc.*, 719 F. Supp.2d 903 (W.D. Tenn., 2010).

I have counseled retailers about various methodologies to implement an arbitration program that complies with the FAA and state law. To be sure, it is too early to conclude that the procedure will survive judicial scrutiny or effectively reduce frivolous claims. However, with no other viable solutions on the horizon, a patchwork remedy, built upon sound legal principles, judicial precedent, logic and early successes is surely worth serious consideration.

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