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Seventh Circuit sends Menards in-store pickup fees suit to arbitration

by Stephanie N. Bedard

In September 2024, the Seventh Circuit affirmed the grant of a motion to compel arbitration in a proposed class action claiming that Wisconsin-based retailer Menards used a "deceptive bait-and-switch scheme" to charge undisclosed pickup service fees. *Domer v. Menard, Inc.*,--- F.4th ---, No. 23-2672, 2024 WL 4022955 (7th Cir. Sept. 3, 2024).

The named plaintiff, Pilar Domar, placed an online order for in-store pickup for a can of paint. 2024 WL 4022955, at *1. She selected an option to have a Menards employee locate the item and place it at the pickup counter. *Id.* After she selected the in-store pickup option, the checkout page included a summary of the transaction, including a line-item for "Processing Fees," which included the pickup service fee. *Id.* The same checkout page also included the following note:

> **Please note**: Gift cards may be used as a tender for any merchandise portion of your order and cannot be applied to purchase of another gift card. Applied gift card tenders will be used first towards your purchase and the remaining balance applied to your entered credit card. By submitting your order you accept our Terms of Order.

Id. at*2. Directly below this note, there were two green hyperlinks to Menards' return policy and its "Terms of Order Information," which opened to a text box containing the following arbitration clause in a larger font than the surrounding text:

> **READ THIS CONTRACT CAREFULLY** . . . Purchaser agrees that any and all controversies or claims arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration administered by the American Arbitration Association under its applicable Consumer or Commercial Arbitration Rules. Purchaser agrees that all arbitrators selected shall be attorneys. This provision shall supersede any contrary rule or provision of the forum state. YOUR PURCHASE OF THE PRODUCT ON THIS CONTRACT CONSTITUTES YOUR AGREEMENT TO ALL TERMS AND CONDITIONS STATED ABOVE.

Id. After completing her online purchase and then picking up her can of paint using the in-store pickup option, Domar initiated a putative class action, alleging that Menards had artificially deflated its prices in advertising material and then recouped the difference using the allegedly hidden pickup service fee. *Id.* Domar brought three claims for (1) violation of the Indiana Deceptive Consumer Sales Act; (2) violation of the Wisconsin Deceptive Trade Practices Act; and (3) unjust enrichment. *Id.*

Menards moved to compel arbitration under the Federal Arbitration Act ("FAA") based on the arbitration clause in the Terms of Order. *Id.* The district court granted the motion and sent the claims to arbitration, finding that Domar had fair and adequate notice and that her claims fell within the scope of the "expansive" arbitration clause. *Id.* at *3. Domar then appealed.

After "compliment[ing] the district court for its good work in this case," the Seventh Circuit affirmed the arbitrability of Domar's claims. *Id.* at *12.

First, the Seventh Circuit found that Menards had provided reasonably conspicuous notice of Terms of Order based on the "uncluttered presentation" of the website: (1) the page was "streamlined, well-spaced, and internally consistent"; (2) there was "ample white space"; (3) the page was "organized into just a few neat boxes and columns"; and (4) the few hyperlinks on the page, including the Terms of Order, were bolded. *Id.* at *5.

Second, the Seventh Circuit found that the bolded "Please note" prompt directing the user to the Terms of Order was sufficiently clear. *Id.* at *6.

Third, the court found that the green hyperlinks to the Terms of Order were readable and distinct from the surrounding text. *Id.* at *6-7.

Fourth, the Seventh Circuit found that the disclosure was spacially placed on the page in a reasonably conspicuous manner. *Id.* at *7.

Fifth, the court found that the disclosure was "temporally connected" to the order because it appeared on the same page where the order would be placed. *Id.* at *8.

Explaining that "reasonable consumers understand there will be terms and conditions associated with using a website," the Seventh Circuit affirmed that Domer had sufficiently assented to the Terms of Order by clicking the "SUBMIT ORDER" button. *Id.* at *8-9.

Though Domer tried to characterize her pricing misrepresentation claims as tort claims that preceded the formation of (and thus did not arise from) the arbitration agreement, the Seventh Circuit disagreed, finding that the only harms Domer alleged were "rooted in" and related to the arbitration contract. *Id.* at *10.

Judge Hamilton concurred in the judgment but wrote separately to critique the reasonably conspicuous notice test, which he noted could lead to inconsistent results and is difficult for judges to apply without specialized knowledge. *Id.* at *12-21.

Judge Hamilton instead advocated that parties should engage user-interface design experts to help judges (and juries) determine whether fair notice had been provided:

> Rather than debating among ourselves our impressions about font size and color, the placement of hyperlinks, and the choice between click-wrap and browse-wrap agreements, we should start treating these issues about user-interface design as questions of fact. We should invite sufficiently motivated parties to test alternative designs and to conduct discovery into merchants' actual design choices. If judges will not do so, then legislators and/or consumer-protection agencies should consider stepping in with more specific disclosure requirements and regulatory safe harbors.

Id. at *19.

Takeaways: While arbitration provisions in consumer contracts are common, customers often do not read the fine print. Judge Hamilton's concurrence advocates for a new approach to determining assent to terms of use in online contracts. The *Domer* case also involves a procedural context—appellate affirmance of an order compelling arbitration and dismissing the action—that will be unlikely to occur in the future because of the Supreme Court's recent holding that a court must "stay" litigation pending arbitration where, as with Menards here, a party sought a stay of litigation pending arbitration. *Smith v. Spizzirri*, 601 U.S. 472, 478 (2024); *see Domer v. Menard, Inc.*, 684 F. Supp. 3d 871, 879 (W.D. Wis. 2023) (noting that "Menards asked the court to stay rather than dismiss the case, but this court's general practice is to dismiss the case if all of the claims are arbitrable").