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Seventh Circuit: disputed issues of fact require a trial on the issue of whether an account user received notice of an agreement to arbitrate putative class claims against PayPal

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Takeaway: We have written many articles about the implementation of arbitration agreements and class action waivers as mechanisms to reduce exposure to class action litigation. One of the most effective means of implementing such provisions is through "click-wrap" user agreements, where a customer is required to click "I agree" to terms and conditions and thereby generate affirmative evidence of contractual assent to an arbitration agreement. Businesses that rely on an electronic transmission and opt-out model, however, can face challenges in proving that a customer agreed to arbitrate. These challenges were demonstrated in *Kass v. PayPal, Inc.*, 75 F.4th 693 (7th Cir. 2023), where the Seventh Circuit ruled – after an arbitration had been completed and an arbitral award was issued in favor of PayPal – that the issue of whether the customer had agreed to arbitrate in the first instance was not an issue that could be resolved as a matter of law but instead had to be tried.

When PayPal customer Terry Kass initially created her PayPal account in 2004, she accepted PayPal's then-existing User Agreement, which included an arbitration agreement that was not mandatory. *Id.* at 696. That User Agreement, however, provided it could be amended based on the subsequent delivery of electronic notices to PayPal's customers. In 2012, PayPal sought to amend its User Agreement by adding a mandatory arbitration clause and electronically transmitting that amended User Agreement to its customers, which gave its customers the ability to opt-out of the arbitration clause. *Id.*

In 2017, Ms. Kass and a charity to which she attempted to donate filed a putative class action against PayPal in the Northern District of Illinois, alleging that PayPal misapplied and otherwise misused funds paid by Ms. Kass through PayPal's charitable giving fund. *Id.* at 696-97. She invoked jurisdiction under the Class Action Fairness Act and asserted claims for unjust enrichment, an accounting, and violations of the District of Columbia Consumer Protection Procedures Act. *Id.* at 697.

PayPal moved to compel arbitration, asserting that Ms. Kass was bound by the mandatory arbitration provision implemented back in 2012. In support of this motion, PayPal submitted declarations from a paralegal specialist and attorney, asserting (among other things) that "[Ms. Kass] *would have been* within the group of U.S. PayPal account holders" to whom to 2012 "amendment e-mail" was sent. *Id*. at 697 (emphasis in original). Ms. Kass responded with a sworn declaration of her own, denying that she had ever received or known about the 2012 amendment.

But the district court ruled that it was undisputed that Ms. Kass accepted the 2012 User Agreement – including the mandatory arbitration provision – and compelled arbitration. In its ruling, the district court relied on "the mailbox rule," which creates a rebuttable presumption that an e-mail has been properly

received, further ruling that Ms. Kass's "conclusory statement" that she did not receive the amended agreement did not rebut that presumption. *Id.* at 697-98.

Under the terms of the Federal Arbitration Act, Ms. Kass could not appeal the district court's decision to compel arbitration immediately, and thus she had no choice but to participate in the arbitration and await a post-award confirmation judgment before she could appeal the order compelling arbitration. The arbitrator ruled in PayPal's favor on Ms. Kass's (and the charity's) claims and PayPal then moved to confirm the arbitrator's award, which the district court granted. Ms. Kass appealed the judgment to the Seventh Circuit. *Id.* at 698.

Analyzing the issue under Illinois state contract law, a Seventh Circuit panel reversed the district court. The Court of Appeals ruled that the district court improperly applied the mailbox rule as *conclusively* establishing that Ms. Kass had received the 2012 amended User Agreement, when in fact the mailbox rule only triggered a presumption of fact that Ms. Kass had received and agreed to it – a presumption that could be rebutted by Ms. Kass's denial of receipt. *Id.* at 700-05. The panel further faulted the district court's ruling that Ms. Kass's "conclusory" denial of receipt of the 2012 e-mail did not create a disputed issue of material fact. According to the panel, there was nothing conclusory about her denial of receipt, and that denial created an issue of fact requiring a trial on the issue of whether Ms. Kass agreed to arbitrate her claims against PayPal. *Id.* at 704-05.

Accordingly, the panel vacated the district court's judgment confirming the arbitration award and remanded for a trial on the issue of contract formation. *Id.* at 705.