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Internet contracts – beyond clickwrap and browsewrap

by James F. Bogan III

Takeaway: Technology advances. Business processes evolve. Internet transactions become increasingly ubiquitous. Contract formation, however, remains an old-fashioned concept. An internet consumer must, at a minimum, be on inquiry notice of terms to be bound by them. In terms of contract formation, courts have typically divided Internet contracts into two categories: (1) "clickwrap," where a consumer must click "I agree" after being presented with terms to proceed, and (2) "browsewrap," where the consumer has the option of accessing terms by hyperlink but need not do so before proceeding with the transaction. While courts typically enforce "clickwrap" agreements, the enforceability of "browsewrap" usually depends on conspicuousness. *See Internet terms of use: Ninth Circuit enforces arbitration agreement accessible through browsewrap hyperlink* (August 31, 2020). In a recent case, *Berman v. Freedom Financial Network, LLC*, --- F.4th ----, No. 20-16900, 2022 WL 1010531 (9th Cir. Apr. 5, 2022), a panel of the Ninth Circuit found the Internet contract at issue unenforceable browsewrap, because the contractual terms – including an arbitration provision and class action waiver – were not conspicuous enough to a reasonable consumer.

In a concurring opinion, M. Miller Baker, an International Trade Judge sitting by designation, delved into California law to discuss four types of internet contracts and their enforceability under California law. *See* 2022 WL 1010531, at *8 (Baker, J., concurring). Judge Baker based his analysis on two internet contract formation cases by the California Court of Appeal, *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855, 200 Cal. Rptr. 3d 117 (2d Dist. 2016), and *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 289 Cal. Rptr. 3d 1 (4th Dist. 2021), *petition for review filed,* No. S273056 (Cal. Feb. 8, 2022). The *Sellers* decision in turn relied upon a "scholarly opinion" by Judge Jack B. Weinstein in another internet contract case, *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 394–401 (E.D.N.Y. 2015).

According to Judge Baker, the most ironclad internet contracts involve "clickwrap" and "scrollwrap" agreements. "A 'clickwrap' agreement is one in which an internet user accepts a website's terms of use by clicking an 'I agree' or 'I accept' button, with a link to the agreement readily available. A 'scrollwrap' agreement is like a 'clickwrap,' but the user is presented with the agreement and must physically scroll to the bottom of it to find the 'I agree' or 'I accept' button." 2022 WL 1010531, at *12 (quoting *Sellers*, 289 Cal. Rptr. 3d at 15). According to Judge Baker, "clickwrap and scrollwrap agreements are presumptively enforceable" under California law. *Id*. at *14.

"Browsewrap" agreements sit at the other end of the spectrum. "A 'browsewrap' agreement is one in which an internet user accepts a website's terms of use merely by browsing the site." *Id*. at *12 (quoting *Sellers*, 289 Cal. Rptr. 3d at 15). According to Judge Baker, "browsewrap agreements are unenforceable per se" under California law. *Id*. at *14.

"Sign-in wraps" occupy the "gray zone" in between. *Id*. at *14. "'Sign-in wrap' agreements are those in which a user signs up to use an internet product or service, and the sign-up screen states that acceptance of a separate agreement is required before the user can access the service. While a link to

the separate agreement is provided, users are not required to indicate that they have read the agreement's terms before signing up." *Id*. at *12 (quoting *Sellers*, 289 Cal. Rptr. 3d at 15). According to Judge Baker, the "enforceability [of sign-in wraps] requires conspicuous textual notice that completing a transaction or registration signifies consent to the site's terms and conditions. Whether such notice is sufficiently conspicuous will turn on the transactional context, the notice's size relative to other text on the site, the notice's proximity to the relevant button or box the user must click to complete the transaction or register for the service, and whether the notice's hyperlinks are readily identifiable." *Id*. at *14.

Categorizing the internet contract at issue as a "sign-in wrap," Judge Baker agreed with the majority that the contract was unenforceable because (among other reasons) the website notice of contractual terms were "insufficiently conspicuous" and "confusingly placed" on the website. *Id*. at *15-16.