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Second Circuit rules that "account update" mailed by bank failed to bind customer to arbitration agreement/class action waiver

by James F. Bogan III

Takeaway: We have written many articles about how businesses seek to enter enforceable arbitration agreements containing class action waivers with their customers, whether through "browsewrap" or "clickwrap" agreements or by other efforts to "amend" or "modify" earlier customer agreements. These mechanisms usually do not require the customer to actually read the contractual terms. This issue is governed by state contract law, and where a customer does not actually read a contract – and thereby does not have "actual notice" of terms and conditions – a customer is nevertheless bound by terms if the customer is on *inquiry notice* of the terms and assents to them through conduct that a reasonable person would understand to constitute assent. In a recent case, *Lipsett v. Popular Bank*, No. 22-3193-cv, 2024 WL 111247 (2d Cir. Jan. 10, 2024), a Second Circuit panel recently found that a bank's effort to impose such terms and conditions by mailing an "update" to a customer was insufficient to establish contractual assent.

In 2022, Frankie Lipsett filed a putative class action against Popular Bank in the Southern District of New York, asserting claims arising out of a banking relationship he had maintained with the bank beginning in 2004. Popular Bank moved to compel arbitration, asserting that account updates delivered to Mr. Lipsett over the ensuing years imposed terms and conditions that included a compulsory arbitration clause and class action waiver. The district court denied Popular Bank's motion, focusing on the bank's failure to give Mr. Lipsett an opportunity to opt out of the arbitration agreement. The Second Circuit affirmed the court's order denying arbitration, but not on the ground relied on by the district court. Rather, the Court of Appeals affirmed "on the sole basis that Lipsett did not receive sufficiently clear notice that he was bound by the arbitration provision at issue in this case, as required under New York law." *Lipsett*, 2024 WL 111247, at *1 (also citing the "right for any reason" rule supporting affirmance of an underlying judgment).

Of the multiple updates purportedly sent to Mr. Lipsett over the years, Popular Bank conceded at oral argument that it had only mailed him a 2013-14 Agreement accompanied by a notice letter. Accordingly, the panel focused on this limited set of documents in analyzing whether Mr. Lipsett agreed to the arbitration clause and class action waiver.

The panel laid out the basic legal requirements: (1) "[t]he party seeking to compel arbitration bears the initial burden of demonstrating the existence of an agreement to arbitrate"; (2) "a contract requires a meeting of the minds and a manifestation of mutual assent"; (3) a "manifestation of mutual assent must be sufficiently definite to assure that the parties are truly in agreement with respect to all material terms"; (4) "[w]here the requested assent is largely passive, courts focus on whether the terms were

‘reasonably communicated to the user’”; (5) where an offeree does not read a contract and does not have “actual notice of certain contract terms, he is nevertheless bound by such terms if he is on inquiry notice of them and assents to them through conduct that a reasonable person would understand to constitute assent”; and (6) inquiry notice “turns on whether the contract terms were presented to the offeree in a clear and conspicuous way” considering the “totality of the circumstances.” *Id*. at *1-2 (citations omitted).

Applying these rules of contract formation, the panel ruled that Mr. Lipsett did not agree to arbitrate, for three reasons.

First, the notice letter stated, in misleading fashion, that there “continues to be a Mandatory Arbitration Provision,” even though there was no evidence that Mr. Lipsett had ever agreed to arbitrate before. According to the panel, “[t]his statement signals to a reasonable customer like Lipsett, who was not previously informed of the arbitration provision or consented to arbitration and therefore not bound by any previous iteration of the arbitration provision, that it does not apply to him and that his agreement with the Bank remained effectively unchanged.” *Id*. at *2.

Second, the notice letter “fail[ed] to clearly notify Lipsett about the terms on which he could accept or decline the arbitration provision.” *Id*.

Third, the notice letter was ambiguous as to “whether the 2013–14 Agreement was an entirely ‘new’ deposit agreement or merely one that amended Lipsett’s prior agreements,” creating confusion on the part of a reasonable customer as to which of the opt-out provisions set out in the documents would apply. *Id.*

The panel concluded: “In sum, the specific language of the 2013-14 materials does not permit existing accountholders like Lipsett to clearly understand their options for rejecting arbitration. Under the totality of the circumstances contained in this record, therefore, we conclude that Lipsett has not assented to mandatory arbitration under New York law.” *Id*.