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## A Website User's Assent to Arbitration Terms Is Required

An arbitration clause “buried” in an online “Service Agreement” was not enforceable because a consumer was not given reasonable notice that using a website constituted assent to an agreement containing an arbitration clause. *Sgouros v. TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016).

In *Sgouros*, a customer purchased a “credit score” from a credit reporting agency’s website. When the customer attempted to purchase a car, he discovered that the credit score he had purchased was 100 points higher than the credit score used by the car dealership. When the customer filed suit, the credit reporting agency moved to compel arbitration based on an arbitration clause that could be found in an agreement that the customer purportedly agreed to when he used the website.

Applying Illinois law, the Seventh Circuit held that the relevant question involved a “reasonable communicativeness” test. According to the court, this test asks (a) whether the web pages presented to the consumer adequately communicated all of the terms and conditions of the agreement; and (b) whether the consumer received reasonable notice of the terms. *Id.* at 1034.

To answer the question it posed, the court examined the format of the website. The court noted that the customer had to complete three steps to obtain a credit report. The first step required the customer to provide identifying information and answer “Yes” or “No” regarding tips and news about the service. Upon clicking one of those buttons, the customer was brought to the second step. Step 2 required the customer to create a user name and password and submit his credit card information.

A “Service Agreement” was located in a scrollable window at the bottom of the screen for the second step. To view the Service Agreement, the customer had to click on the box and scroll down. There was no requirement to do so. The Service Agreement contained a hyperlink to a “printable version.” The arbitration clause at issue was located on the eighth page of the 10-page “printable version” of the Service Agreement.

Above a button stating “I Accept & Continue to Step 3” and beneath the scrollable service agreement window was a statement that read:

You understand by clicking on the ‘I Accept & Continue to Step 3’ button below, you are providing ‘written instructions to TransUnion Interactive, Inc. authorizing TransUnion Interactive, Inc. to obtain information from your personal credit profile from Experian, Equifax and/or TransUnion. You authorize TransUnion Interactive, Inc. to obtain such information solely to confirm your identity and display your credit data to you. *Id.* at 1033.

The Seventh Circuit found that the website would not reasonably inform the consumer that he was agreeing to be bound by the Service Agreement. Indeed, according to the court, the website actively misled the customer:

But what cinches the case for *Sgouros* is the fact that TransUnion’s site actively misleads the customer. The block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his personal information. It says nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement.

*Id.* at 1035. As a result, the court refused to enforce the arbitration clause in the Service Agreement.

### Practice Pointer

Companies who want their websites to bind customers to contracts should design their websites so that it is clear to their customers that they are entering into a contract when they “click” through the website. A court might not be convinced that a customer assented to an arbitration agreement if it is “buried” in an online service agreement and the website was less than clear that the customer was entering into an agreement by “clicking” through the website.

**Keywords:** alternative dispute resolution, adr, litigation, scroll, arbitration agreement, click-through, clickwrap, service agreement

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