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Clickwrap Arbitration Agreement Upheld

Increasingly the enforceability of clickwrap agreements—agreements entered into when an online consumer clicks a box accepting the terms of a contract before being allowed to further utilize a website—is the subject of litigation. Recently, in *Whitt v. Prosper Funding LLC*, the Southern District of New York ruled that an arbitration provision in a clickwrap agreement was assented to by the consumer, not unconscionable and otherwise enforceable. No. 1:15-cv-136-GHW, 2015 WL 4254062, at * 8 (S.D.N.Y. July 14, 2015).

Whitt, the plaintiff, a deaf man, applied for a loan through the defendant Prosper Funding LLC's website. After doing so, and in order to confirm his identity for purposes of the loan application, the plaintiff called the defendant using a Video Relay Service—a service that allows deaf individuals to communicate by telephone using a sign language interpreter. The defendant refused to accept these calls and required the plaintiff to provide additional proof of his identity—something that was not required of hearing customers. Meanwhile, the defendant suspended the plaintiff's account.

The plaintiff sued in federal court alleging the defendant violated the ADA and related state statutes. The loan application agreement allowed the parties to choose to resolve any claim through binding arbitration administered by the AAA or JAMS. *Id.* at *2. The defendant elected to arbitrate the dispute and moved to dismiss the plaintiff's complaint and compel arbitration through JAMS.

Whitt argued that the arbitration provision was unenforceable because: (a) he never assented to it; and (b) even if he had assented, the costs of arbitration prevented him from vindicating his statutory rights, therefore, enforcement of the provision would be unconscionable. The court rejected both arguments.

Under New York law, parties seeking to enforce arbitration provisions must prove, by a preponderance of the evidence, that a valid arbitration agreement exists. *Id.* at *4. Clicking a box acknowledging awareness of, and agreement to, the terms of a contract suffices to create a contract under New York law. *Id.* Because the defendant demonstrated that a valid arbitration agreement existed, the burden shifted to the plaintiff to prove that the claims were unsuitable for arbitration. *Id.* at *3 citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

The plaintiff first argued that he was not constructively aware of the agreement's terms—which were available only through a hyperlink—and, therefore, never assented to them. The court disagreed. It found that when completing the loan application the plaintiff clicked on a box stating, in bold text, "**Clicking the box below constitutes your acceptance of . . . the borrower registration agreement.**" *Id.* at *4. Clicking the box was sufficient to show assent. Further, the hyperlink to the agreement was conspicuous. The court cited several cases holding that online consumers are constructively aware of an agreement's terms if they are available through a conspicuous hyperlink. *Id.* at *5. Thus, the court concluded, the plaintiff assented to the agreement's arbitration provision.

The plaintiff next argued that the provision was unconscionable because the prohibitive costs of arbitration precluded the plaintiff from effectively vindicating his federal statutory rights. *Id.* at *6. The court rejected this argument, too.

Although the plaintiff demonstrated that he was impoverished, he did not submit any evidence of the likely costs of an arbitration. *Id.* at 7. The court refused to speculate as to these costs. *Id.* Moreover, the JAMS standards in consumer actions would cap the plaintiff's costs at \$250.00; the defendant would bear all remaining arbitration costs. Thus, the fees the plaintiff would incur in an arbitration were comparable to proceeding in court. Moreover, under the agreement, the defendant agreed to pay up to \$1,000 for the plaintiff's arbitration costs. So it was unlikely that the plaintiff would incur any fees whatsoever.

Yet, assuming *arguendo* that the plaintiff had to pay something to arbitrate his claim, the parties' agreement shifted fees to the defendant if the plaintiff prevailed. And, if the plaintiff lost, he would not be responsible for the defendant's fees. In other words, the only conceivable way the plaintiff would pay arbitration costs were if he lost in the arbitration. Clearly, the plaintiff would not concede that point just to defeat the defendant's motion to dismiss. After rejecting both of the plaintiff's challenges to the clickwrap agreement, the court compelled the parties to arbitrate.

Clickwrap agreements are becoming the norm in online transactions. This case is part of a growing body of law finding that the simple act of clicking a box will create a binding agreement—including an agreement to arbitrate. This case also demonstrates that clickwrap arbitration provisions are not unconscionable where a consumer's arbitration costs will be minimal.

Keywords: alternative dispute resolution, litigation, clickwrap, unconscionable, cost prohibitive, compel arbitration, agreement to arbitrate, constructive knowledge, hyperlink, arbitration costs

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