THE
NATIONAL LAW REVIEW

Beware Scrollable Window: Seventh Circuit Strikes Down Internet Contract

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- Communications, Media & Internet
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- 7th Circuit (incl. bankruptcy)

Wednesday, March 30, 2016

If you're like us—and most others, we'll venture to guess—you've never read all the terms and conditions of the iTunes end-user license agreement.

We doubt that it's a scintillating read, but, regardless, most consumers don't slog through these contractual tomes because they have better things to do.

Apple and others in the world of e-commerce know this, but they need to rely on some form of contract for their services, so the struggle begins to create a binding contract (where a purchaser "receives reasonable notice of those terms") when the purchaser doesn't devote the time or attention to reading the essential terms.

The *Seventh Circuit*'s recent decision in ***Sgouros v. TransUnion Corp.***, No. 15-1371 (7th Cir. March 25, 2016), decided under *Illinois* law, is a cautionary tale for those that operate in this digital realm. The court declined to enforce an arbitration provision because that term was buried at the bottom of a scrollable window (and not immediately visible on the page), with no prompt directing the user to scroll to the bottom. Chief Judge Diane Wood wrote for the court, in an instructive opinion that included screenshots from TransUnion's webpage.

Sgouros purchased a “credit score” package from TransUnion, and he later brought suit, alleging that TransUnion had provided him with a number that was erroneously high and thus useless to him in his negotiations with a car dealer. TransUnion filed a motion to compel arbitration, which the district court denied.

The crux of the dispute concerned the webpage for “Step 2” in Sgouros’s purchase, which asked him for an account username and password and for his credit-card information. See slip op. at 4. Below these fields were two bubbles to answer whether a user’s home address was the same as the user’s billing address (“yes” or “no”), and below that was a scrollable window in which only the first two-and-a-half lines of a “Service Agreement” were visible. Had he read to page 8 of the 10-page agreement, Sgouros would have found the arbitration clause. Below the scrollable window was a hyperlink to a printable version of the agreement and a bold-faced paragraph memorializing an “authorization” to obtain credit information. Rounding out the bottom of the page was a button labeled “I Accept & Continue to Step 3.”

The Seventh Circuit held that the “layout and the language of the site” did not provide the user with “reasonable notice that a click” would manifest assent to arbitrate.

It found the following problems:

- The arbitration clause was not visible in the window.
- The site did not call the user’s attention to the arbitration provision in any other way.
- The site did not require the user to scroll to the bottom of the window or to first click on the scroll box.
- It was not clear that the purchase “was subject to any terms and conditions of sale.”
- The term “Service Agreement” said nothing “about what the agreement regulated.”
- The hyperlinked version of the agreement was labeled only “Printable Version”—not “Terms of Use” or “Purchase” or even “Service Agreement.”
- The bold-faced paragraph was merely an authorization, and the button labeled “I Accept” actually misled the consumer to thinking that this was an acceptance of only the authorization’s 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.”

The Seventh Circuit explained that the result might have been different had TransUnion “plac[ed] the agreement, or a scroll box containing the agreement, or a clearly labeled hyperlink to the agreement, next to an ‘I Accept’ button that unambiguously pertains to that agreement.”

The scrollable window is not, the Seventh Circuit held, “in itself, sufficient for the creation of a binding contract.”