

News & Types: Commercial, Competition & Trade Update

Ninth Circuit Allows Online Shoppers to Ignore Arbitration Agreement

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Practices: Litigation

In several earlier updates, we reported on Seventh Circuit cases striking down arbitration agreements in both the consumer and commercial contexts. A recent Ninth Circuit case helps to establish standards for the enforcement of arbitration clauses in online website terms and conditions for federal courts on the West Coast. (*Nguyen v. Barnes & Noble, Inc.*, No. 12-56628 (9th Cir. Aug. 18, 2014).) In *Nguyen*, the Ninth Circuit ruled that a browsewrap arbitration agreement did not bind consumers who had made purchases without actual or constructive notice of the agreement.

The *Nguyen* case concerned a putative class action filed by a consumer who responded to Barnes & Noble's advertisement of a "fire sale" of Hewlett-Packard touchpads (products originally intended to compete with Apple's iPad) by ordering two units, only to be later informed that Barnes & Noble had sold all of its available inventory before the order could be filled. Before the class action could get underway, Barnes & Noble requested that the court enforce the arbitration agreement contained in Barnes & Noble's Terms of Use for its website. *Nguyen* responded by arguing that he had not been aware of the arbitration and agreement and could not be bound by it.

The *Nguyen* court reiterated the basic rule of contract that a term is only binding between the parties when there is a "mutual manifestation of assent." This requires both parties to know of the term and agree to be bound by it. Courts across the country have found that "clickwrap" agreements on websites are binding. For a "clickwrap" agreement, the user must show agreement to terms stated on the screen by clicking "accept." However, in the *Nguyen* case, the arbitration provision was part of a "browsewrap" agreement. This meant that Barnes & Noble's website had only a hyperlink, stating "Terms of Use." Barnes & Noble did not force users of its website to confront a screen or dialogue box stating its terms or requiring agreement with its terms to continue using the website.

The Ninth Circuit conceded that even if Barnes & Noble's Terms of Use were not a "clickwrap" agreement, they could be imposed on consumers. If there were evidence that *Nguyen* had seen the agreement, this actual notice could be sufficient to bind him to the agreement. Or, if Barnes & Noble's website had required *Nguyen* to "agree" to the Terms of Use, even without forcing *Nguyen* to read them, the arbitration agreement probably would have been enforceable. If Barnes & Noble's website had explicitly stated, in a place that clearly would have been seen by any casual viewer that "use of this website constitutes consent to" Barnes & Noble's Terms of Use, *Nguyen* probably would have been put on inquiry notice of the terms.

Ultimately, the Ninth Circuit concluded that mere proximity and conspicuousness of a hyperlink stating "Terms of Use," without more, is not sufficient to put a consumer on notice of Barnes & Noble's Terms of Use. The court briefly noted that some courts have enforced "browsewrap" agreements between corporations, as opposed to individuals. However, since Nguyen concerned consumers' claims against a retailer, the Ninth Circuit found that the arbitration agreement did not apply because there was no evidence that Nguyen was aware of the arbitration agreement or put on notice that he should read it.

The Ninth Circuit's opinion in Nguyen provides excellent guidance to businesses selling products online by demonstrating the risks in deciding not to use "clickwrap" terms and conditions. While some retailers prefer not to annoy customers using their websites, the more conspicuous one's terms and conditions, the more likely the courts will enforce them. Many terms of use state that "use of this website constitutes consent to these terms." However, if a consumer has not been shown that statement or put on notice that he or she should read it, the courts are unlikely to enforce it.