

Legal Update

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WHAT DOES THAT CLICK MEAN? A ROADMAP FOR ENFORCEABILITY OF ONLINE CONTRACT TERMS

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Companies selling products and services online often want those sales subject to certain terms and conditions like those that regularly govern offline sales – warranties and disclaimers, limitations of liability and arbitration clauses to name a few. But when the transaction occurs online, there is no paper document provided to the customer for review. So how can companies ensure that their preferred terms and conditions are enforceable in court? The Seventh Circuit Court of Appeals has rendered an opinion on this issue in [Sgouros v. TransUnion Corp.](#)

The plaintiff Gary Sgouros purchased a “credit score package” from TransUnion online. Sgouros attempted to purchase a car with the credit score he received. But when the dealership pulled his credit score, it was 100 points lower than the score TransUnion’s report indicated. Sgouros brought a putative class action against TransUnion in the United States District Court for the Northern District of Illinois for violation of state and federal consumer protection laws. TransUnion responded with motions to compel arbitration on an individual (as opposed to class action) basis due to a contract it claimed Sgouros entered into online when he purchased the credit score package. The district court denied the [motions](#), and TransUnion appealed. The Seventh Circuit affirmed. In its decision, the Seventh Circuit detailed where TransUnion’s terms were lacking and provided a roadmap that companies can use to improve the likelihood that terms and conditions of an online purchase will be enforceable.

TransUnion’s Process and What the Court Found Problematic

To obtain TransUnion’s credit score package, Sgouros had to complete three steps. First, he had to provide personal information and indicate whether he wanted to receive other offers from TransUnion. Second, Sgouros had to create a user name and password, and supply a credit card number and billing address. Below the boxes to fill in that information, TransUnion provided a scroll window with the words “Service Agreement” at the top and 2 ½ lines of text visible below that. Below the right side of the scroll window was a small font hyperlink to a “Printable Version.” Below that, in bold text, TransUnion stated:

You understand that 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.

Sgouros clicked “I Accept & Continue to Step 3,” and completed the process. The arbitration clause at issue was contained on page 8 of the printable version of the Service Agreement and was referenced briefly on the first page as well, but neither of those was initially visible in the scroll box.

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After noting that various courts have ruled that a “click” can signify acceptance of a contract, the court wrote that to determine if a contract was formed by Sgouros’ clicking, it would consider “whether the web pages presented to the consumer adequately communicate all the terms and conditions of the agreement, and whether the circumstances support the assumption that the purchaser received reasonable notice of those terms.” Applying Illinois contract law, the court noted that:

- TransUnion did not ensure that Sgouros saw the relevant language before he agreed;
- the web page contained no clear statement that Sgouros’ purchase was subject to “any terms and conditions of sale” (emphasis in original);
- the scroll box did not indicate what the “Service Agreement” related to; and
- the hyperlink to the full “Service Agreement” was labeled only as “Printable Version”.

But what the court stated “clinched” the case was that TransUnion’s site “actively misleads the customer.” The court found that the bold text below the scroll box containing the Service Agreement stated that clicking “I Agree & Continue to Step 3” only authorized TransUnion to obtain Sgouros’ personal information and said nothing about agreeing to contractual terms. The court said whatever notice may have existed due to the scroll box or otherwise was undone by the bolded text stating that a click only meant authorization for TransUnion to obtain personal information.

What Can Work?

Based on the court’s opinion, there are steps companies can take to improve the likelihood that online contracts their customers accept via click will be enforced. These steps include:

- providing a clear hyperlink on each relevant page indicating it contains terms covering the purchase;
- stating that the purchase is subject to terms and conditions that can be found at the hyperlink;
- stating further that clicking a box will subject the purchaser to the terms and conditions;
- providing clear directions or prompts telling the purchaser to read the terms and conditions; and
- putting the agreement, a scroll box, or a hyperlink to the agreement next to an “I Agree” button and indicating that that button refers to the agreement.

The court also noted that “[t]here are undoubtedly other ways as well to accomplish the goal” of providing notice of the terms and conditions on a purchase. The methods that are best for your company will, of course, depend on its situation and should be discussed with your legal advisors.

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