Published on *The National Law Review* https://natlawreview.com

Notice of Terms via Buried Link within a Post-Sale Email Unenforceable

Article By:

Jeffrey D. Neuburger

In Starke v. SquareTrade, Inc., No. 17-2474, 2019 WL 149628 (2d Cir. Jan. 10, 2019), the Second Circuit affirmed a ruling that denied a web service's motion to compel arbitration, finding that the user did not have reasonable notice of the arbitration provision contained in the terms and conditions that were communicated via a hyperlink in a post-sale email.

File this latest opinion declining to enforce a service's terms under Crowded Interface, Unclear Prompts, and Muddled Process.

While the court recognized that a party has a duty to read a contract, it stressed that this does not morph into a duty to "ferret out contract provisions when they are contained in inconspicuous hyperlinks," particularly where, as in this case, the user was presented with multiple documents, each containing different sets of terms. This dispute was reminiscent of a Second Circuit case we wrote about in 2012, where the court held that a buy now-agree later process did not provide sufficient notice to consumers of an arbitration provision contained in the post-sale terms.

The bad news for e-commerce entities is that another appeals court has invalidated an electronic contracting process; the good news is that the decision in *Starke* clearly outlines what this court looks for when analyzing online contracts and lays out a checklist of sorts of how companies might fashion enforceable contracting processes.

In *Starke*, the defendant SquareTrade, Inc. ("SquareTrade") sells protection plans for consumer products. Plaintiff purchased a 2-year protection plan on Amazon for a CD player he bought at another retailer. Months later, the CD player required replacement. Plaintiff made a claim for coverage under the protection plan. SquareTrade denied the claim, informing plaintiff that, as per the terms on the purchase page, since the CD player had not been purchased through Amazon, it was not covered. Plaintiff then brought state law consumer protection claims against SquareTrade. In response, SquareTrade moved to compel arbitration, arguing that plaintiff had reasonable notice of the post-sale terms because the Amazon purchase page notified him that he would receive his "Service Contract" via email, the email he received contained a hyperlink to the post-sale terms and plaintiff manifested assent by failing to return the protection plan within the allowable 30-day window.

The details of the contracting process truly drive the ruling in this case.

The initial purchase page contained some pertinent information about the protection plan, including a block of text towards the top stating that plaintiff's "Service Contract" would be delivered to him from SquareTrade via email within 24 hours of purchase. [see below screenshot from the top half of the Amazon webpage on which Starke purchased the Protection Plan]:

As plaintiff scrolled down the purchase page, he encountered the heading: "Product information." [See below screenshot]. Under that heading was a small hyperlink labeled "Warranty [pdf]" (which opened to a two-page document titled "Terms & Conditions"). However, these so-called Pre-Sale terms did not contain an arbitration provision; in fact, SquareTrade relied on a different set of terms sent post-sale in its attempt to compel arbitration. Also relevant, slightly above the "Product information" was another heading entitled, "Things to know," which warned customers that "SquareTrade Protection Plans are only valid for new products *purchased at Amazon* within the last 30 days."

After his purchase, plaintiff received the promised email from SquareTrade

[see below screenshot of the email]

The subject line of the email informed plaintiff that the “Contract is Enclosed” and the body of the email contained several prompts and text, including, most importantly, a hyperlink in the bottom left corner, labeled “Terms & Conditions,” that linked to the post-sale terms that contained the arbitration clause. However, nothing in the body of the email referred to arbitration, and there was no notice that referred to any attachments (in fact, as noted by the court, the second sentence of the email stated “You’re all set!”).

After examining the contracting process, the district court refused to compel arbitration and held that SquareTrade failed to establish an enforceable agreement with the plaintiff. The Second Circuit affirmed and ruled that plaintiff did not have reasonable notice of the arbitration provision in the post-sale terms for several reasons.

According to the court, SquareTrade never directed plaintiff’s attention to the hyperlink at issue and its prior communications stated that he would receive a “Service Contract” via email (as opposed to a hyperlink to the terms). Moreover, the court pointed out that the layout of the post-sale email diverted plaintiff’s attention from the “inconspicuously placed” hyperlink.

> “The interface here is cluttered with diverse text, displayed in multiple colors, sizes and fonts, and features various buttons and promotional advertisements that distract the reader from the relevant hyperlink.”

> “So long as the purchaser’s attention is adequately directed to a conspicuous hyperlink that is clearly identified as containing contractual terms to which the customer manifests assent by completing the transaction or retaining the product or service, a hyperlink can be an effective device for specifying contract terms.”

The court even questioned, in dicta, why SquareTrade informed users of the terms via email when “it could have done so in several more conspicuous ways” (such as by displaying the terms in the body of the email, attaching the terms to the email or displaying a link to the terms at the top of the email in a bigger font with notice to the user).

Final Thoughts

Online contracting cases often turn on whether the contract terms were presented to the offeree in a clear and conspicuous way, and courts will look to the design and content of the relevant interface to

determine if the contract terms were presented to the user in a way that would put her on inquiry notice of such terms. The *Starke* opinion reiterates the more broad principle that there exists a judicial skepticism on the efficacy of agree now – terms later contracting involving consumers where the transaction is not the classic software shrinkwrap situation.

Interestingly, in analyzing the instant case, the Second Circuit looked to its prior opinion in the Meyer case, where it found a mobile contracting process enforceable, in enunciating several important considerations that site owners should consider when fashioning its checkout or registration processes. Its reasoning reads like a checklist:

- The payment screen where the terms are presented to the user should be uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account and a simple call to action (e.g., By creating a _____ account, you agree to the _____ Terms and Conditions…").

- The text, including the hyperlinks to the terms, should appear directly below (i.e., "spatially coupled" with) the registration button. Of course, if the terms are displayed post-sale, as in *Starke*, this cannot occur but can be achieved with other conspicuous disclosures to the user.

- If possible, the entire screen should be visible at once, so that the user does not need to scroll beyond what was immediately visible to find notice of the terms.

- The register button should be "temporally coupled" with the hyperlink to the terms, that is, the consumer is notified of the terms at the time of sale. Again, if the terms are presented post-sale, the user should ideally be given appropriate disclosures about the availability of the terms and relevance to the transaction.

- The call to action language should be a clear prompt undiluted by superfluous text, with text that directs the users to read the terms and signals that their purchase or registration is subject to contractual terms.

National Law Review, Volumess IX, Number 30