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Unilaterally Amended Arbitration Clauses Permissible in Illinois

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The dispute in Miracle-Pond v. Shutterfly, Inc., No. 19 cv 04722, 2020 U.S. Dist. LEXIS 86083 (N.D. Ill. May 15, 2020)stems from allegations by Plaintiffs Vernita Miracle-Pond (a Shutterfly account holder) and Samantha Paraf (who does not own a Shutterfly account) that Shutterfly (a photo publishing service) unlawfully stored biometric data from its facial-recognition technology. Plaintiffs, in their June 2019 filing on behalf of themselves and similarly situated Shutterfly users, claim that Shutterfly violated the Illinois Biometric Information Privacy Act ("BIPA") "by using facial-recognition technology to extract biometric identifiers for 'tagging' individuals and by 'selling, leasing, trading, or otherwise profiting from Plaintiffs' … biometric identifiers and/or biometric information.'"

Plaintiff Required to Arbitrate

Last Friday, U.S. District Judge Mary Rowland said that Plaintiff Miracle-Pond must arbitrate her claims even though Shutterfly unilaterally amended its arbitration clause after Plaintiff sued (only Ms. Miracle-Pond had a Shutterfly account subjecting her to Shutterfly's arbitration agreement). Judge Rowland noted that Shutterfly added an arbitration clause to its Terms of Use in 2015 and has continuously included one in every update since. Accordingly, Judge Rowland held that Plaintiff Miracle-Pond's allegations should be held to Shutterfly's 2015 arbitration clause because the Terms of Use Plaintiff Miracle-Pond agreed to when she signed up for Shutterfly in 2014 included a provisions that allowed Shutterfly to revise its Terms of Use from "time to time."

Specifically, three months after the initial lawsuit was filed, Shutterfly sent an email to all of its users, which notified those users that the Shutterfly Terms of Use had been updated. In part, the email pertinently stated, "[w]e also updated our Terms of Use to clarify your legal rights in the event of a dispute and how disputes will be resolved in arbitration." The email went on to say, "[i]f you do not contact us to close your account by October 1, 2019 … you accept these updated terms." As of October 2, 2019, Plaintiff Miracle-Pond's account remained open.

Discussion

Here, the Court was asked to decide two motions: (1) Shutterfly's motion to compel arbitration and (2) the Plaintiffs' motion for curative measures regarding the September 2019 email.

The Court began its discussion by analyzing whether Plaintiff Miracle-Pond agreed to the Terms of Use when she created a Shutterfly account. In making this assessment, the Court noted that the relevant inquiry for contract formation via the internet encompasses the following fact-intensive inquiries:

1. Whether the web pages presented to the consumer adequately communicate all the terms and conditions of the agreement; and,

2. Whether the circumstances support the assumption that the purchaser receives reasonable notice of those terms.

When signing up for her Shutterfly account in 2014, Plaintiff Miracle-Pond was directed to a Shutterfly webpage that included an “Accept” button, which listed a notification that read, “[b]y tapping ‘Accept,’ you agree to use … Shutterfly … in accordance with Shutterfly’s Terms of Use.” The notification went on to state that in order to “view a copy of the Terms of Use … tap the ‘View Terms of Use’ button below.” Plaintiff Miracle-Pond would not have been able to sign up for Shutterfly’s services without clicking on the ‘Accept’ button. The Court proceeded to find that Shutterfly’s agreement was “clearly a valid clickwrap agreement and [Plaintiff] Miracle-Pond agreed to be bound by Shutterfly’s Terms of Use.” However, Plaintiff Miracle-Pond went on to argue that even if a contract was formed between the parties, there is no valid agreement to arbitrate for the following three reasons:

1. Arbitration clauses subject to unilateral modification are illusory,

2. Miracle-Pond could not have assented to the arbitration provision because Shutterfly failed to provide notice of the 2015 modification, and

3. Arbitration clauses that apply retroactively are unenforceable.

In rejecting Plaintiff Miracle-Pond’s first arguments, the Court found that Shutterfly’s Terms of Use included a valid change-in-terms provision, which informed users “Shutterfly had the right to unilaterally modify its terms, the modified terms would be posted on Shutterfly’s website, and that continued use of Shutterfly’s products constitutes acceptance of the modified terms.” After Shutterfly posted this amendment in 2015, Plaintiff Miracle-Pond subsequently placed four orders for products and continued to use her Shutterfly account through 2019.

In rejecting Plaintiff Miracle-Pond’s second argument, it was noted that Illinois courts have long rejected the argument that notice of an amendment is required to create mutual assent to the amended contract. In fact, Illinois courts have found the opposite to be true. Specifically, the Illinois Supreme Court explained that in a situation where a “service agreement … expressly reserve[s] the right” of the drafter “to unilaterally modify the terms and conditions of the agreement, at any time, without notice,” and the customer has “accepted this condition,” the modification to the agreement ends only when the agreement is terminated and no longer in effect. The Court thus reiterated that it is undisputed that Shutterfly posted the modified Terms of Use to its website in 2015 and Plaintiff Miracle-Pond indicated her acceptance of the Terms of Use by continuing to use her Shutterfly account and Shutterfly products through 2019.

As for Plaintiff Miracle-Pond’s third argument, the premise of the argument was that Plaintiff “did not

agree to arbitration before she filed this lawsuit in June 2019, and that the September 2019 email was an attempt to retroactively force her into arbitration." Nevertheless, the Court found that Plaintiff is bound by the 2015 modification. In other words, by continuing to use Shutterfly products after the 2015 notice, Plaintiff "agreed that her continued use of Shutterfly's services would communicate her assent to the most recent version of the Terms and Use posted online at the time of her use."

Accordingly, the Court granted Shutterfly's motion to compel arbitration for Plaintiff Miracle-Pond and stayed the litigation for all remaining claims (including Plaintiff Paraf's claims) pending the outcome of the arbitration. As for the curative measures claim, Judge Mary Rowland denied the motion due to a lack of persuasive authority on behalf of the Plaintiffs and remarked, "[t]he Court has not and will not rely on the 2019 email to find that any putative class members agreed to arbitrate. Indeed, Shutterfly conceded that the Court need not rely on the 2019 email for that purposes. No remedial measures are necessary."

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