

Zappos and It's Effect On "Browsewrap" Agreements

Article By:

John Krieger

Kade Miller

Karl F. Rutledge

Key Takeaways For An Enforceable Terms of Use Agreement

In light of the recent Nevada federal district court decision *In re Zappos.com, Inc., Customer Data Security Breach Litigation*, companies should review and update their implementation of browsewrap agreements to ensure users are bound to its terms. MDL No. ??2357, 2012 WL 4466660 (D.Nev. Sept. 27, 2012).

A browsewrap agreement refers to the online Terms of Use agreement that binds a web user merely by his continued browsing of the site, even when he is not aware of it. Any somewhat experienced web user is no stranger to the Terms of Use link that leads to the browsewrap agreement. Yet, the users tend to ignore the link's existence, and rarely think of it as a "contract" with any practical effects. In Zappos, the court questioned the browsewrap agreement's validity particularly because of this tendency among web users. The court ruled the arbitration clause in Zappos' browsewrap Terms of Use was unenforceable because the users did not agree to it and Zappos had the right to modify the terms at any time.

Background of the Case

Founded in 1999, Zappos.com is a subsidiary of Amazon.com and one of the nation's biggest online retailers for footwear and apparel. Currently headquartered in Henderson, Nevada, the company has more than 24 million customer accounts. In mid-January 2012, its computer system experienced a security breach in which hackers attempted to access the company's customer accounts and personal information.

After Zappos notified its customers about the incident, customers from across the country filed lawsuits against Zappos, seeking relief for damages arising from the breach. The cases were transferred to and consolidated in Nevada. Zappos then sought to enforce the arbitration clause contained in its Terms of Use, which would stay the litigation in federal court and compel the case for arbitration. The court denied Zappos' motion on two grounds: there was no valid agreement to

arbitrate due to the lack of assent by the plaintiffs and the contract was unenforceable because it reserved to Zappos the right to modify the terms at any time and without notice to its users.

Lessons Learned from the Browsewrap

Mutual Assent Must Be Clear

Arbitration provisions are a matter of contract law, and the traditional elements of a contract must be met even though Zappos' Terms of Use was presented in electronic, browsewrap form on the website. An essential element of contract formation is mutual assent by the parties to the contract, which the court found was missing in this case as there was no evidence of the plaintiffs' assent.

The court compared the browsewrap agreement with another popular form of online terms of use agreement, the "clickwrap" agreement. Clickwrap agreements require users to take affirmative actions, such as clicking on an "I Accept" button, to expressly manifest their assent to the terms and conditions.

Since Zappos' browsewrap agreement did not require its users to take similar affirmative action to show their assent to the terms and conditions, there was no direct evidence showing that the plaintiffs consented to or even had actual knowledge of the agreement, including the arbitration clause.

Link It Front and Center

Furthermore, the court found Zappos' Terms of Use hyperlink was inconspicuous and thus did not provide reasonable notice to its users. The link was a) "buried" in the middle or bottom of each page and became visible when a user scrolls down, b) appeared "in the same size, font, and color as most other non-significant links," and c) the website did not "direct a user to the Terms of Use when creating an account, logging in to an existing account, or making a purchase." The court concluded that under ordinary circumstances, users would have no reason to click on the link.

Unilateral Right to Modify or Terminate Won't Work

Another problem with Zappos' browsewrap agreement was that it was illusory and thus unenforceable. In the agreement, the company "retain[ed] the unilateral, unrestricted right to terminate the arbitration agreement" and had "no obligation to receive consent from, or even notify, the other parties to the contract." Users would unsuspectingly agree to the changes by continuing to use the site. Under this provision, Zappos could seek to enforce the arbitration clause, as it did here, or not enforce it by modifying the clause without notice to its users when it was no longer in its interest to arbitrate. In either circumstance, the users would still be bound to the agreement.

Implications for Companies

As a result of this decision, companies should carefully reassess the display and content of the online terms of use they adopt to ensure their enforceability. In a narrow sense, the decision means an arbitration clause in a browsewrap agreement similar to Zappos' may be deemed unenforceable. More broadly, this decision threatens the validity and enforceability of other terms and conditions contained in a browsewrap agreement, which may deprive the company of the agreement's protection and favorable terms.

Clickwrap agreements seem to provide the solution to Zappos' problem. The court suggested a clickwrap agreement could obtain a user's assent to the terms and conditions. A company may implement the clickwrap agreement through account registration or purchase check-out, tailored to the nature of the company's business and user interaction. The system may require a user to click "I Accept" to secure the user's assent to be bound by the agreement before he can proceed further on the website.

On the other hand, the court did not conclude that browsewrap agreements are never enforceable. Other courts have held that browsewrap agreements are generally enforceable. Enforceability largely depends on how the company presents the link and terms to the users such that the users would have reasonable notice of the information. Accordingly, a browsewrap agreement may be enforceable if the hyperlink is conspicuously located and displayed.

In addition, companies should communicate and secure a user's assent to any modification when the user has previously accepted the terms and conditions. The user may consent through another clickwrap agreement showing the modified terms. With a browsewrap agreement, notice of the changes should, at the minimum, be conspicuously displayed on the webpage.

What This Means

The *Zappos* decision reflects a change in the public policy on web activities, and users who do not affirmatively agree to the online Terms of Use may no longer be bound. Consumers are increasingly turning to the web for goods and services. In reaction, courts are beginning to look closer into the transactions and resulting issues that occur online. In this process, courts are testing and requiring new standards for these Terms of Use agreements. Companies should be aware of the court's evolving attitude towards the different types of agreements. You are encouraged to seek legal guidance to properly adapt your implementation of Terms of Use agreements. Failure to update your Terms of Use agreements may leave you exposed to unfavorable terms that the Terms of Use is designed to prevent.

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