

IN PRACTICE

INTERNET LAW

Does Clicking 'I Agree' Create a Binding Contract?

Refining the 'fair and forthright' standard for online consumer agreements

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As consumers continue to buy more and more products over the Internet, courts are being presented with opportunities to examine the validity of online agreements.

For example, on May 13, the Appellate Division decided *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super. 596 (App. Div. 2011), holding that the forum-selection clause contained on the defendant's website did not meet the "fair and forthright" standard, and was therefore presumptively unenforceable. The court in *Hoffman* foreshadowed the likelihood of growth of this area of the law, stating: "[C]onsumers are increasingly purchasing products and services over the Internet. As those Internet transactions have become more prevalent, so too have legal disputes proliferated over the contractual rights created in cyberspace between buyers and sellers."

Prior to *Hoffman*, courts in several jurisdictions, including New Jersey, had decided cases involving the validity of

online agreements. The New Jersey Appellate Division first dealt with this issue in *Caspi v. Microsoft Network*, 323 N.J. Super. 118 (App. Div. 1999). In *Caspi*, the plaintiffs, members of the defendant's Internet service, filed suit claiming, among other things, consumer fraud. The defendant moved to dismiss the complaint for lack of jurisdiction, claiming that the suit could only be brought in the state of Washington, as per a forum-selection clause found in the membership agreement plaintiffs allegedly agreed to when they clicked through the website.

The court in *Caspi* looked at the circumstances under which the plaintiffs were presented the online agreement. Before becoming a member of the defendant's service, a prospective subscriber was prompted to view a membership agreement containing the forum-selection clause. The membership agreement appeared on the webpage next to blocks providing the choices *I Agree* and *I Don't Agree*. Registration could proceed only after the potential subscriber had assented to the membership agreement by clicking on *I Agree*.

In determining the enforceability of the forum-selection clause, the court in *Caspi* applied a "fair and forthright" standard. The court stated that, "[i]f a forum selection clause is clear in its purport and has been presented to the party to be bound in a *fair and forthright*



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fashion, no consumer fraud policies or principles have been violated." (Emphasis added.) The court found that the contractual terms were presented in a fair and forthright manner as the plaintiffs "were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement." The court therefore upheld the enforceability of the online contractual terms, including the forum-selection clause.

The Second Circuit Court of Appeals dealt with a similar dispute in *Specht v. Netscape Commun. Corp.*, 306 F.3d 17 (2d Cir. N.Y. 2002). In *Specht*, the plaintiffs brought suit in the Southern District of New York against the defendant, a provider of computer software programs. The defendant moved to compel arbitration, arguing that the plaintiffs' claims were subject to an arbitration provision contained in a contract the plaintiffs had allegedly accepted when they downloaded the program.

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The court in *Specht* applied California law, which, similar to New Jersey law, required reasonable notice of the online contract as a prerequisite to its enforceability. Unlike the contractual provisions in *Caspi*, however, the provisions in *Specht* were located in a “submerged” portion of the webpage. The submerged portion could not be seen by the consumer unless he or she scrolled down the webpage, beyond the material that initially filled the screen. The court in *Specht* found that the submerging of the contract terms did not meet the standard of reasonable notice. The court stated, “a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.” The arbitration provision was therefore found unenforceable.

More recently, the Eastern District of Pennsylvania dealt with the enforceability of an online agreement in *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007). In *Feldman*, the plaintiff sued Google regarding its AdWords service. This service allowed a customer, after signing up for an account, to advertise his or her business on Google. Google sought to transfer the case to California, citing a forum-selection clause in the online agreement they claimed the plaintiff agreed to when signing up for AdWords.

In determining whether the forum-selection clause was valid, the court looked at whether the plaintiff was given “reasonable notice” of the online contract. Unlike the defendant in *Specht*, Google had taken several steps to ensure that its online contract was prominently displayed. Toward the top of the page displaying the contract, a notice stated, “Carefully read the following terms and conditions. If you agree with these terms, indicate your assent below.” Additionally, a link to a printer-friendly version of the contract was offered at the top of the contract window. At the bottom of the webpage, viewable without scrolling down, was a box with the words: *Yes, I agree to the above terms and conditions*. If the customer did not click on that phrase, and instead tried to click the *Continue* button at the bottom of the webpage, the customer could not activate the account.

The court in *Feldman* found that the manner in which Google displayed its online contract was reasonable. The court distinguished Google’s online contract from the online contract in *Specht*, pointing specifically to the fact that Google’s customers had to take affirmative action when agreeing to the contract terms. The court stated:

Unlike the impermissible agreement in *Specht* the user here had to take affirmative action and click the “Yes, I agree to the above terms and conditions” button in order to proceed to the next step. . . If the user did not agree to all of the terms, he could not have activated his account, placed ads, or incurred charges.

The court therefore upheld the enforceability of the forum-selection clause.

It was to the above three cases — *Caspi*, *Specht* and *Feldman* — that the Appellate Division referred in recently deciding whether the online agreement in *Hoffman* was “fair and forthright.” In *Hoffman*, the plaintiff, a purchaser of product from defendant’s website, sued the defendant in New Jersey state court, claiming that the defendant had, among other things, violated the New Jersey Consumer Fraud Act. The defendant moved to dismiss the complaint claiming, inter alia, that the plaintiff was precluded from suing in New Jersey because of a forum-selection clause contained within a disclaimer on the defendant’s website. The trial court agreed with the defendant, dismissing the complaint, and the plaintiff appealed.

The Appellate Division overturned the trial court, holding that the placement of the disclaimer on defendant’s webpage failed to meet the *Caspi* “fair and forthright” standard and, as such, the forum-selection clause contained therein was presumptively invalid. The Appellate Division found that defendant’s “submerging” of the forum-selection clause — deemed impermissible in *Specht* — was likewise not “fair and forthright.” Specifically, the defendant placed the disclaimer in a position on the website where it was possible for the plaintiff to make

his entire purchase without ever seeing the disclaimer if he did not scroll down the page. Furthermore, once the plaintiff added an item to his online “shopping cart,” the site would skip ahead to a new page that did not contain the disclaimer. The Appellate Division highlighted these points, stating that “the forum-selection clause was unreasonably masked from the view of the prospective purchasers because of its circuitous mode of presentation.” The court ruled that the forum-selection clause was presumptively invalid and reinstated the complaint.

In light of *Hoffman* and the line of cases preceding it, companies that sell products directly to consumers over the Internet should review and, where necessary, revise their website layouts, to ensure that they are conforming to the now further-defined “fair and forthright” standard. Even though the cases cited above all involve forum-selection clauses, the practical application of the decision is not necessarily so limited.

In order to ensure that their online agreements will be enforceable, companies can take some or all of the following steps:

- Ensure that the contract provisions are not “submerged” (i.e., the online contract is visible without the customer having to scroll down the page).
- If scrolling is necessary to see all of the terms and conditions, have customers take an affirmative step to show their assent to the agreement, such as clicking a button stating, “Yes, I agree to the above terms and conditions” (agreement button).
- Only allow customers to make a purchase after they have clicked an agreement button, whether scrolling is necessary or not.
- Require users to scroll down through the entire terms and conditions before being allowed to click on an agreement button.
- Have users who click on anything other than the agreement button, directed back to the terms and conditions before being allowed to “check-out.”
- Provide a link to a printer-friendly version of the contract. ■