NOTES

Berman v. Freedom Financial Network, LLC: Manifesting Assent in a Web-Based World

I. OVERVIEW

With the ever-increasing market for Internet advertisements and sales, a consumer's personal information is today's most valuable form of currency. Companies that obtain this information often require that users agree to certain terms and conditions, but how must the company present such terms and conditions online? Today, what constitutes a contractual assent is still being debated in the courts.

Freedom Financial Network, LLC (Freedom) hired Fluent, Inc. (Fluent), a digital marketing company, to conduct a telemarketing campaign, marketing Freedom's debt relief services to consumers who had entered their personal information on Fluent's websites.[1] Stephanie Hernandez and Erica Russell were two consumers among the "hundreds of thousands" that received unsolicited phone calls and text messages regarding Freedom's campaign.[2] Hernandez and Russell filed a class action suit on behalf of consumers that received the calls and texts, alleging that their phone numbers were used without their consent.[3]

Freedom and Fluent moved to compel arbitration, arguing that both plaintiffs had agreed to terms and conditions that were hyperlinked on the page by clicking "continue."[4] The district court denied their motion, finding that "the content and design of the webpages did not conspicuously indicate to users that, by clicking on the 'continue' button, they were agreeing to Fluent's terms and conditions."[5] Subsequently,

1. Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 853-54 (9th Cir. 2022).
2. *Id.* at 854.
3. *Id.*
4. *Id.* The terms and conditions included, among other things, a mandatory arbitration clause.
5. *Id.*

Freedom and Fluent appealed the denial.[6] The United States Court of Appeals for the Ninth Circuit *held* that the design and content of the defendant's webpages did not adequately call attention to the hyperlinked terms and conditions so as to provide users with reasonably conspicuous notice, nor that by clicking "continue," the users were agreeing to be bound by those terms. *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849 (9th Cir. 2022).

II. BACKGROUND

Under the Federal Arbitration Act (FAA), a "written provision . . . to settle [a contractual dispute] by arbitration . . . shall be valid, irrevocable, and enforceable . . . ."[7] In deciding whether to compel arbitration, a court's role is to "determin[e] whether a valid arbitration agreement exists . . . ."[8] Then, the court must determine "whether the agreement encompasses the dispute at issue."[9] A finding of an affirmative to both inquiries requires the court to "enforce the agreement."[10]

When examining whether a valid arbitration agreement exists, it is important to first consider how a valid, enforceable contract is created. Under traditional common law, the parties to a contract must, among other things, manifest their mutual assent to the terms contained within an agreement.[11] Though manifestation may be demonstrated in a variety of ways, "[t]he conduct of a party is not effective as a manifestation of his assent unless he *intends* to engage in the conduct and *knows* or has reason to know that the other party may infer from his conduct that he assents."[12]

However, these traditional common law principles have required reconfiguration to accommodate the unexplored situations that arise

6. *Id.* at 855. Defendants Freedom and Fluent additionally filed a motion for reconsideration asserting that Plaintiffs' deposition testimony, taken months before, was material to the motion to compel, but the district court denied this motion as well. The appeal challenged both denials, but the court gave much more attention to the motion to compel arbitration.

7. 9 U.S.C. § 2.

8. Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004).

9. *Lifescan*, 363 F.3d at 1012.

10. *Id.*

11. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 (9th Cir. 2014) (applying New York law); *see also* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29 (2d Cir. 2002) (applying California law); *Lifescan*, 363 F.3d at 1012, the Ninth Circuit has explained that while state law should be applied by federal courts to decide whether a valid and enforceable contract exists, applying either New York or California law would yield the same result because the state's laws are so similar.

12. Restatement (Second) of Contracts § 19(2) (1981) (emphasis added); *see Specht*, 306 F.3d at 29.

through online contracting.[13] While courts continue to apply traditional contract rules for online agreements, manifestation of mutual assent remains "essential if electronic bargaining is to have integrity and credibility."[14] Further, courts have identified different types of online agreements that are defined by the way in which a user manifests their assent to a website's terms.[15] These identified agreements include "Clickwrap"[16] and "Browsewrap"[17] agreements.

Comparing Clickwrap to Browsewrap agreements, Clickwrap agreements are generally considered enforceable because the user received notice of the terms being offered and assented to them by having to actually acknowledge the terms and clicking "I agree."[18] By contrast, courts are much more hesitant to enforce Browsewrap agreements because there is no affirmative action required by the user to agree to the website's terms, leaving room for the possibility of a user being bound by terms without even knowing such terms existed.[19]

Browsewrap agreements, thus, have been frequently examined by courts to determine the validity of such agreements.[20] Here, the courts have used fact-intensive inquiries to probe the circumstances surrounding a Browsewrap agreement.[21] First, courts have conducted a more objective inquiry, examining the conspicuousness of the notice itself.[22] Second, courts have performed a more subjective inquiry, analyzing a user's understanding of their "assent" to the notice itself.[23]

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13. Courts have concluded that the required elements of a valid and enforceable online agreement are (1) "[r]easonably conspicuous notice of the existence of contract terms," and (2) "unambiguous manifestation of assent to those terms . . . ." *Specht*, 306 F.3d at 35.

14. *Id.*; *see also* Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.").

15. Sellers v. JustAnswer LLC, 289 Cal. Rptr. 3d 1, 15 (Cal. Ct. App. 2021).

16. Clickwrap agreements require Internet users to "click on an 'I agree' box after being presented with a list of terms and conditions of use . . . ." *Nguyen*, 763 F.3d at 1175-76.

17. Browsewrap agreements do not feature an express terms and condition assent provision, rather, users are presented with a "notice" that indicates mere usage of the site means "the user is agreeing to and is bound by the site's terms of service." *Nguyen*, 763 F.3d at 1176 (quoting Fjeta v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (E.D.N.Y. 2012)).

18. *See* Meyer v. Uber Tech., Inc., 868 F.3d 66, 75 (2d Cir. 2017).

19. *Id.*

20. *See, e.g.*, *id.* at 77-80; Cullinane v. Uber Technologies, Inc., 893 F.3d 53, 61-62 (1st Cir. 2018).

21. *Specht*, 306 F.3d at 30-31.

22. *Nguyen*, 763 F.3d at 1177 ("Whether a user has inquiry notice of a [B]rowsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage.").

23. *Specht*, 306 F.3d at 28.

First, looking to the more objective inquiry, in *Nguyen v. Barnes & Noble, Inc.*, the Ninth Circuit stated that "the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice of a [B]rowsewrap agreement."[24] Here, the Court agreed with the defendant's argument that, while including the hyperlink on every page of the site was sufficiently conspicuous, the conspicuousness and proximity of the hyperlink to relevant buttons users would click on was, by itself, "not enough to give rise to constructive notice . . . ."[25]

Similarly, in *Sellers v. JustAnswer LLC*, the California Court of Appeal for the Fourth District considered location and stylistic design as contributing factors in finding that a notice was not conspicuous.[26] Ultimately, the Court reasoned that although the hyperlink was underlined, "it [was] not set apart in any other way that may draw the attention of the consumer, such as with blue text or capital letters."[27]

Second, looking to the more subjective inquiry, unambiguous manifestation of assent requires evidence that a user took action to indicate an affirmative agreement to be bound by the website's terms.[28] In *Meyer v. Uber Technologies, Inc.*, the Second Circuit held that, because the notice had already been deemed reasonably conspicuous and explicitly stated that registering an account with Uber meant agreeing to their terms, the act of registering an account constituted a user's

24. *Nguyen*, 763 F.3d at 1177. Notably, Barnes & Noble's hyperlink, featuring a green font color that was underlined, was located at the bottom of every webpage alongside other similarly styled hyperlinks, *id.* at 1174. Further, the Terms and Conditions hyperlink was in close proximity to the "Proceed with Checkout" button, which a user would have to click to continue any online transaction, *id.* at 1178.

25. *Id.* at 1178. The Ninth Circuit also discussed other textual notices' details that could be used to enforce Browsewrap agreements, *see id.* at 1177. For example, the court noted explicit textual notices and notices that are not buried in small font that is hard to read (i.e., conspicuous) as sufficient notice, *id.*; *see e.g.*, Cairo, Inc. v. Crossmedia Servs., Inc., No. 04-04825, 2005 WL 756610 at *2, *4-5 (N.D. Cal. Apr. 1, 2005) ("By continuing past this page and/or using this site, you agree to abide by the *Terms of Use* . . . .") (internal quotation marks omitted).

26. Sellers v. JustAnswer LLC, 289 Cal. Rptr. 3d 1, 30 (Cal. Ct. App. 2021). In *Sellers*, the notice's textual provision was substantially smaller than the rest of the page and appeared in a white font color against a dark background, *id.* at 6-7. However, the court noted that "the font is so small that the contrast is not sufficient to make the text apparent" and the text was located outside "where the consumer's attention would necessarily be focused," *id.* at 29.

27. *Id.*

28. Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 (2d Cir. 2002) ("California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.").

unambiguous assent.[29] Considering what actions would show "unambiguous" assent, the court noted that users were required to click a "register" button to create an account and allow for continued use of the site.[30] The court explained that while express manifestation of assent is not required, there still must be "evidence that the offeree knew or should have known of the terms and understood that acceptance of the benefit would be construed by the offeror as an agreement to be bound."[31]

III. COURT'S DECISION

In the noted case, the Ninth Circuit followed the framework developed by *Nguyen*, *Sellers*, and *Meyer* to analyze whether Fluent's online Browsewrap agreements were valid and enforceable.[32] First, the court analyzed whether the plaintiffs were provided with a reasonably conspicuous notice of the websites' hyperlinked terms and conditions.[33] The plaintiffs argued that they were not provided with reasonably conspicuous notice, noting that the website's design and layout did not sufficiently call the user's attention to the existence of the hyperlinked terms and the hyperlink itself was not distinguishable from its surrounding text where a user would recognize it as a hyperlink at all.[34] Second, the court examined whether the plaintiffs demonstrated an unambiguous manifestation of assent to Fluent's hyperlinked terms.[35] The plaintiffs argued that they did not unambiguously manifest their assent to be bound by Fluent's terms because Fluent's websites failed to adequately communicate that "by clicking on the 'continue' button, [users] were agreeing to be bound by those terms."[36] Because the websites did not provide users with reasonably conspicuous notice and the plaintiffs did not unambiguously manifest their assent to be bound to the defendant's terms, the Ninth Circuit held that the Browsewrap agreement was not enforceable.[37]

First, the Ninth Circuit held that users lacked reasonably conspicuous notice of the hyperlinked terms and conditions, identifying

29. 868 F.3d 66, 79-80 (2d Cir. 2017).

30. *Meyer*, 868 F.3d at 71, 79.

31. *Id.* at 79-80 (citations omitted) ("A reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not.").

32. Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022).

33. *Id.* at 856-57.

34. *Id.* at 858.

35. *Id.* at 857-58.

36. *Id.* at 858.

37. *Id.*

two primary rationales for its holding: (1) the notice's stylistic format; and (2) how "readily apparent" the notice is to the user.

Addressing the notice's stylistic format, the court described the textual notice on Fluent's websites as "the antithesis of conspicuous," because rather than direct the user's attention to its existence, "the design and content of these webpages draw the user's attention away from the most important part of the page."[38] The font used was so tiny that it was "barely legible to the naked eye," and the text was deemphasized by the contrast of its size compared to everything else that was displayed on the page, including pictures, different colored graphics, and messages in bigger, bold font.[39] Additionally, the court explained that it was fair for users to assume that important information, like a binding contractual agreement, would be displayed in an obvious way rather than hidden among other fine print.[40]

Looking to how "readily apparent" the notice was to the user, the court reasoned that the hyperlinks here were not distinguished from the text surrounding it where a reasonable user would recognize that it was a hyperlink at all.[41] The "[c]ustomary design elements" that would have alerted users of the hyperlink's existence "include the use of a contrasting font color (typically blue) and the use of all capital letters . . . ."[42] Because both websites' hyperlinks had no contrasting features apart from being underlined, the court held that they were not conspicuous enough to put a reasonable user on notice of their existence.[43]

Second, the Ninth Circuit held that the plaintiffs did not demonstrate an unambiguous manifestation of their assent to the terms and conditions by clicking the large, green "continue" button.[44] The court held that such an action could signal manifestation "only if the user is explicitly advised that the act of clicking will constitute assent to the terms and conditions of an agreement."[45] Users that are not adequately given notice of a website's terms cannot manifest their assent because they are presumably

38. *Id.* at 856-57 ("[T]o be conspicuous in this context, a notice must be displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it.").

39. *Id.*

40. *Id.* at 856.

41. *Id.* at 857.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

unaware that any action they take (like clicking "continue") would bind them to an agreement they do not know exists.[46]

The court acknowledged that the websites' textual notices were in close proximity to the "continue" buttons, but, like *Nguyen*, proximity alone is not enough to satisfy conspicuous notice.[47] The textual notices here "did not indicate to the user what action would constitute assent to those terms and conditions."[48] Additionally, the text of the button itself gave no indication that by clicking it, consumers would be legally bound to the site's terms.[49] Because the textual notices on both websites were not reasonably conspicuous and failed to inform the plaintiffs that "by clicking on the 'continue' button they would be bound by the terms and conditions," they did not unambiguously manifest their assent to the websites' terms.[50]

The concurring opinion in this case disagreed with the majority on which state law should be applied, but ultimately came to the same conclusion that the websites did not provide users with reasonably conspicuous notice and the plaintiffs did not unambiguously manifest their assent by clicking the "continue" button.[51] The concurrence also reasoned that the terms and conditions here should have been classified as "Sign-In Wrap" agreements instead of Browsewrap agreements "because of the sites' notices that consumers agree to those provisions."[52]

IV. ANALYSIS

The Ninth Circuit's holding in the noted case aligned with previous decisions regarding online agreements where attention to detail was crucial in determining notice and assent.[53] One notable development in the analysis of Browsewrap agreements is the shift in focus to whether the hyperlink itself was distinguishable as a hyperlink.[54] Courts base this

46. *See id*.

47. *Id*. at 858; Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2004).

48. *Berman*, 30 F.4th at 858 (Notice on both websites stating "I understand and agree to the *Terms and Conditions* . . . .").

49. *Id*.

50. *Id*.

51. *See id*. at 870 (Baker, J., concurring).

52. *Id*. at 868; *see* Sellers v. JustAnswer LLC, 289 Cal. Rptr. 3d 1, 15 (Cal. Ct. App. 2021) (internal citations omitted) ("'*Sign-in-wrap'* agreements are those in which a user signs up to use an internet product or service, and the sign-up screen states that acceptance of a separate agreement is required before the user can access the service.").

53. *See* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014); Meyer v. Uber Tech., Inc., 868 F.3d 66, 78 (2d Cir. 2017).

54. *Berman*, 30 F.4th at 857; *Nguyen*, 763 F.3d at 1177-78.

analysis on what a reasonably prudent Internet user assumes a hyperlink to look like (i.e., blue font and underlined).[55] From this, it is clear that courts adapt their analyses based on trends that develop over time online. While this adaptation is inevitable given the evolving nature of the Internet, it begs the question: what will be expected of the reasonably prudent user in the coming years?

As the Internet continues to integrate itself into the lives of everyday people, the reasonable user must reflect this prominence. While courts have made it abundantly clear that the traditional elements of contract law will always be required for online agreements, the details and nuances of notice and assent will be ever-changing to keep up with the Internet.[56] Today, the reasonably prudent user is expected to know that blue, underlined text indicates a hyperlink, but what developments in the online world will users be expected to know down the road?

With a web-based world that is evolving every second, one thing is concrete: courts will continue to ground Internet agreements in the long-standing principles of contract law and a user's manifestation of assent will always be required.

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55. *Nguyen*, 763 F.3d at 1177; *Berman*, 30 F.4th at 857 ("Because our inquiry notice standard demands conspicuousness tailored to the reasonably prudent Internet user, not to the expert user, the design of the hyperlinks must put such a user on notice of their existence.").

56. *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002).

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