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Retailer Risks When Enforcing E-Commerce Terms Of Use

By Cecilia Oh, Jessica Yeshman and Faheem Fazili
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Fueled by the COVID-19 variants and rapid advances in technology, the use of retail websites and mobile applications to make online purchases has continued experienced rapid growth,

Those consumers who were accustomed to shopping in brick-and-mortar establishments before the pandemic discovered the convenience and unlimited array of choices made possible through e-commerce.

Even as pandemic restrictions began to ease, many consumers continued to shop from the comfort of their own living rooms, having overcome the initial friction associated with first-time purchases through a particular e-commerce site.

Revenue from retail e-commerce in the U.S. alone was estimated at roughly $768 billion in 2021 and is forecast to exceed $1.3 trillion by 2025.[1]

The growth of e-commerce comes with myriad risks for retailers. Five key areas are among those bearing notice.

The first such risk area is class actions arising from data breaches.

Take, for example, the Nov. 4, 2021, Barr v. Drizly[2] decision. The U.S. District Court for the District of Massachusetts approved a $7.1 million class action settlement for consumers whose personal information may have been affected by a data breach at alcohol delivery services.

Also, take, for example, the July 19, 2021, McCreary v. Filters Fast LLC[3] decision. The U.S. District Court for the Western District of North Carolina dismissed Filters Fast LLC's motion to dismiss filed against a proposed data breach class action.

Alleged violations of consumer privacy rights comprise a second risk area.

Also take, for example the Oct. 21, 2021, In re: Zoom Video Communications Inc. Privacy Litigation,[4] in which the U.S. District Court for the Northern District of California granted preliminary approval to Zoom users' $85 million settlement of privacy and data security claims.

A third area concerns Title III of the Americans with Disabilities Act.

Take, for example, the 2017 Mendizabal v. Nike Inc.[5] decision in U.S. District Court for the Southern

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District of New York concerning Nike and several other prominent businesses in 2017 due to a lack of website accessibility for low-vision users.

A fourth area of risk involves the Telephone Consumer Protection Act. In the 2021 Facebook v. Duguid[6] decision, the U.S. Supreme Court signaled that the lack of a viable automatic telephone dialing system claim could be determined from the pleadings alone.

Also take, for example, the Sept. 9, 2021, LaGuardia v. Designer Brands Inc.[7] decision in which the U.S. District Court for the District of Ohio denied a motion to dismiss a class action alleging Designer Brands Inc. and DSW Shoe Warehouse Inc. violated the TCPA by sending unwanted, automated spam and text messages.

The final area of risk involves Section 1 of the Sherman Antitrust Act.

Take, for example, the October 2021 Thompson v. 1 800-Contacts[8] decision, in which the U.S. District Court for the District of Utah granted final approval to a $15.1 million settlement of claims that the contact-lens retailer worked with rivals to keep search engine users from finding cheaper contact lens options.

Some of these risks, and retailers' associated liability and exposure created by such risks, can be mitigated by putting into place binding and enforceable contracts with users of e-commerce websites and mobile applications in the form of online terms of use. This article examines two significant areas of exposure for online retailers related to the enforceability of online terms of use.

1. Terms of use must be affirmatively accepted by users.

In the U.S., the creation of enforceable online terms of use requires, among other things, the affirmative manifestation of assent from the user. Terms of use presented in the form of a clickwrap agreement have replaced earlier forms of electronic contracting.

The defining feature of clickwrap agreements is that users affirmatively manifest their acceptance of the terms of use by clicking "I agree" or checking a box next to an attestation acknowledging acceptance of the terms of use. Currently, clickwrap agreements represent the most prevalent form of wrap agreement, and have become the gold standard for agreeing to terms of use in connection with e-commerce transactions.

More recently, however, some retailers have shifted to a relatively new form of electronic contracting, referred to as the sign-in wrap agreement. The key characteristic of the sign-in wrap is the use of a dual-purpose button — e.g., a button to complete purchase or sign-in — to both accept the terms of use and perform a separate function, such as signing into the user's account or completing a purchase.

This shift represents retailers' strong desire to reduce friction in the customer experience by requiring fewer clicks to complete a particular transaction. Generally, sign-in wrap agreements will be enforced only if:

- A reasonably prudent user would be on notice of the existence and contents of the terms of use; and

- The user proceeds to click on the dual-purpose button with the intention of being bound to such terms of use.

Whether a sign-in process satisfies the first prong requires a fact-specific analysis of the particular details of the process — e.g., placement of the attestation, font size and color, proximity of the terms of use, among others.

When presenting terms of use in the form of a sign-in wrap agreement, retailers should be aware that less friction in the acceptance process generally results in more risk that the sign-in wrap will not be enforceable against the user.

To mitigate enforceability risks associated with the sign-in wrap style of acceptance, retailers should consider each of the following questions in the context of their acceptance process:

- Is the attestation of acceptance clear and conspicuous, relative to the rest of the page?
- Is the attestation positioned in close proximity to the dual-purpose button?
- Does the attestation include a hyperlink to the terms of use?
- Is the hyperlink visually distinct from the rest of the attestation?
- Are users required to re-accept the terms of use upon each amendment?

Of course, a strong sign-in process is meaningless unless it is part of an appropriate, risk-based electronic signature process that includes systems and procedures to manage version control, user authentication and record retention.

When designing and implementing any terms of use acceptance process for e-commerce sites, retailers should facilitate close coordination between the application development teams and legal counsel to ensure that a positive user experience is harmonized with the relevant contract formation requirements.

2. Not all binding arbitration and class action waiver provisions are actually binding.

The benefits of including binding arbitration and class action waiver provisions in terms of use are compelling to many online retailers. Individual arbitration sessions are generally less costly than litigation and are concluded more quickly and efficiently than litigation.

Moreover, arbitration proceedings are confidential, such that retailers may avoid the negative publicity and potential reputational harm that may be associated with litigation, the threat of which may induce retailers to quickly settle even frivolous claims spearheaded by plaintiffs firms.

However, several factors may affect whether courts will enforce binding arbitration and class action waiver provisions in terms of use. This section discusses best practices designed to ensure that binding

arbitration and class action waiver provisions are enforceable against consumers in disputes with retailers, which are governed by terms of use.

The Federal Arbitration Act was enacted by Congress in 1925. The FAA gives a party to an arbitration agreement the right to ask the court to compel arbitration as long as the claim falls within the scope of arbitration.

The FAA preempts inconsistent state laws and applies regardless of whether the lawsuit is filed in a state or federal court, as long as the claim involves interstate commerce.[9]

In a series of watershed decisions, the U.S. Supreme Court confirmed the validity and enforceability of binding arbitration and class action waiver provisions in terms of use. These decisions, along with several lower courts' decisions that followed, highlight certain features of binding arbitration and class action waiver provisions, the presence of which are more likely to result in enforceability of these provisions in a retailer's terms of use.

These best practices include the following:

- Include a class action waiver within the arbitration agreement rather than as a standalone provision in the terms of use to ensure FAA preemption applies.
- Include clear and conspicuous language that puts the consumer on notice that the terms of use include a binding arbitration and class action waiver provision.
- Hold arbitration proceedings in a convenient location for the consumer.
- Consider language that helps the consumer offset the financial burden of arbitration by offering to pay for the costs of arbitration and/or their reasonable attorney fees.
- Consider providing for a limited opt-out right if exercised within a reasonable period following acceptance of the arbitration agreement.

These specific issues are part of the overall contracting considerations with respect to terms of use. When creating or reviewing terms of use, online retailers should give close consideration to how terms of use and binding arbitration and class action waiver provisions are presented to consumers to ensure that each will be enforceable against the consumer in the event of a dispute.

Finally, once terms of use are posted, online retailers should continue to periodically update their terms of use to conform to changes in law.

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Notes

1. https://www.statista.com/outlook/digital-markets.

2. See, e.g., Barr v. Drizly, 2021 U.S. Dist. LEXIS 217158 (D. Mass. Nov. 4, 2021).

3. McCreary v. Filters Fast, LLC, 3:20-cv-595-FDW-DCK (W.D.N.C. July 19, 2021).

4. See, e.g., In re: Zoom Video Communications, Inc. Privacy Litigation, Case No. 5:20-CV-02155-LHK (N.D. Cal. Oct. 21, 2021).

5. See, e.g., Mendizabal v. Nike, Inc. Case No. 1:17-cv-09498 (S.D.N.Y. 2017).

6. See, e.g., Facebook v. Duguid, 141 S.Ct. 1163 (2021).

7. LaGuardia v. Designer Brands, Inc., No. 2:20-cv-2311 (S.D. Ohio Sept. 9, 2021).

8. See, e.g., Thompson v. 1-800 Contacts, Inc., Case No. 2:16-cv-01183 (D. Utah 2018).

9. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

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