It's a Wrap – Gogo in-Flight Wi-Fi Case Signals Possible End to How Companies Display Internet Contracts

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WHILE IN today's digital age online terms of use and privacy policies are ubiquitous, a recent decision from the United States District Court for the Eastern District of New York has called into question their validity in certain forms. In April, the venerable Judge Jack Weinstein ruled that consumers pursuing a Gogo in-flight Internet class action lawsuit against Gogo LLC would be allowed to pursue claims that the company tricked these consumers into signing up for automatic monthly renewals of Wi-Fi connections they purchased during domestic flights. The ruling invalidated Gogo's mandatory arbitration and waiver of venue provisions, forcing Gogo to defend the putative class action in a court of the consumers' choosing. More importantly, however, the decision—a clear win for consumer protection—is notable for recognizing the realities of how Internet terms are viewed and understood by consumers—apparently, not very seriously or effectively.

Why Online Contract Design And Formation Matters

Gogo is one of the largest airline Wi-Fi providers, dominating this niche market. The Gogo in-flight Internet class action, entitled *Berkson, et al. v. Gogo, LLC*, Case No. 14-CV-1199 (USDC EDNY), arises from claims instituted by Plaintiffs Adam Berkson and Kerry Welsh in 2014. Plaintiffs allege that the defendant, Gogo, misled them and a putative class of similarly-situated consumers, who signed up for in-flight Wi-fi service through Gogo's website. Plaintiffs further allege that the website led them to believe that they were signing up for a one-month sub-

scription. Gogo, on the other hand, claims that its site clearly provides for automatic renewal, as well as mandatory arbitration and choice of venue provisions. In their lawsuit, Plaintiffs allege breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violations of consumer protection statutes. In response, Gogo filed a motion to transfer venue to the Northern District of Illinois, compel arbitration and dismiss for lack of standing.

In an 83-page memorandum and order of the case, Judge Weinstein denied all three parts of Gogo's motion. Weinstein agreed with the plaintiffs that they were not given effective notice that would have prompted a reasonable person to inquire further. Weinstein said that the case raised important policy questions, including: "[H]ow should courts deal with hybrid versions of 'browsewrap' and 'clickwrap' electronic contracts of adhesion (referred to in this memorandum as 'sign-in wraps') that do not provide internet users with a compelling reason to examine terms favoring defendants?"

In the case of plaintiff Welsh, the terms of use were part of the account creation process for the Wi-Fi service where, in addition to required information, such as name and email address, Welsh was presented with a clickwrap-type of agreement with an unmarked check box stating, "I agree with the Terms of Use." Whether Welsh clicked on this box is contested, but what is not contested is that there was no asterisk next to the box indicating it was required to be clicked prior to creating the account.

Plaintiff Berkson, on the other hand, was presented with more of a hybridwrap-type of agreement. As part of the account creation process, Berkson was presented with normal sized text stating, "By clicking 'NEXT' I agree to the terms of use and privacy policy." In Berkson's case, there was no requirement that Berkson actually read or see the terms of use, although they were hyperlinked and available for inspection. Additionally, after account creation, there was a sign-in process where Berkson was presented with the words "By clicking 'Sign In' I agree to the terms of use and privacy policy," just above the "Sign In" button in much larger font. There is no dispute that Berkson clicked on the "Sign In" button on the website, which indicated that he was agreeing to the company's terms of use.

In rejecting the enforceability of the Gogo terms of use for both plaintiffs, Judge Weinstein emphasized that website design and contract presentation matter in determining contract formation. Before assessing the validity and enforceability of the contracts in question, Judge Weinstein engaged in a veritable treatise on the current state and validity of online contracts in their various permutations, including those taking the following form: (1) browsewrap; (2) clickwrap; (3) scrollwrap; and (4) sign-in wrap. He explained that a "browsewrap" agreement is one in which the online host dictates that assent is given merely by using the site. "Clickwrap" refers to the assent process by which a user must click "I agree," but not necessarily view the contract to which he or she is assenting. "Scrollwrap" requires user to physically scroll through an internet agreement and click on a separate "I agree" button in order to assent to the terms and conditions of the host website. And, "sign-in wrap" couples assent to the terms of a website with signing up for use of the site's services.

Judge Weinstein closely examined and dissected the Gogo website design, including the home page, sign-in and purchase process, and the placement and conspicuousness of the terms of use, determining that, in the instant case, the "sign-in wrap" was the form used by Gogo. He called it a "questionable form of Internet contracting" and noted that it is better to have "hard-edged rules of adhesion," because they reduce litigation costs. Judge Weinstein concluded that, under the circumstances of the present case, "the average internet user would not have been informed … that he was binding himself to a sign-in wrap" and that the wrap contract thus

"does not support the venue and arbitration clauses relied upon by defendants."

The Downside Of Invalid Online Contract Formation

Judge Weinstein's ruling will move this Gogo in-flight Internet class action lawsuit forward, and a court hearing for class certification will took place on July 9 (not yet decided when this article went to press). Had Judge Weinstein found Gogo's sign-in process to be enforceable, Gogo's arbitration clause would likely have disallowed class certification. In 2011, the United States Supreme Court, in *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011), ruled that the Federal Arbitration Act of 1925 preempts state laws that prohibits contracts from disallowing class-wide arbitration. As a result, businesses that include arbitration agreements with class action waivers can require consumers to bring claims only in individual arbitrations, rather than in court as part of a class action. The decision was a real game-changer for class action litigation and would have had a material impact in the *Berkson* case had Judge Weinstein deemed the Gogo in-flight Wi-Fi agreement a valid contract in the first instance.

But Judge Weinstein's ruling recognized the burden that wrap contracts place on consumers:

"It is not unreasonable to assume that there is a difference between paper and electronic contracting …. In the absence of contrary proof, it can be assumed that the burden should be on the offeror to impress upon the offeree—*i.e.,* the importance of the details of the binding contract being entered into …. The burden should include the duty to explain the relevance of the critical terms governing the offeree's substantive rights contained in the contract."

In other words, Judge Weinstein's ruling recognized the reality of online contract formation—nobody really reads wrap contract terms. His decision casts serious doubt on the validity of online forms, forcing companies (and their counsel) to re-examine the enforceability of their online, device or mobile applications' terms and conditions.

Roadmap For Online Contract Formation

Using Judge Weinstein's opinion as a roadmap, companies should question whether their website designs are sufficient to place consumers on notice of the important contract provisions. As Judge Weinstein noted: "The starting point of analysis must be the method through which an electronic contract of adhesion is formed. The inquiry does not begin, as defendants argue, with the content of the provisions themselves." Some general principles of contract formation emerge from Judge Weinstein's 83-page memorandum and opinion:

- "Terms of Use" *will not* be enforced where there is no evidence that the website user had notice of the agreement.
- "Terms of Use" *will not* be enforced where a website's terms are buried in distracting links or not placed prominently in close proximity to where a consumer is likely to read them.

These principles are also very much in line with the Federal Trade Commission's disclosure guidelines, which require material terms and conditions to be displayed clearly and conspicuously regardless of the medium of display—i.e. mobile devices.

Thus, in the context of online contract formation, companies and their counsel should abide by the following general guidelines:

1. When possible, companies should use scrollwrap agreements, giving users a "realistic opportunity," as Judge Weinstein noted, to review the terms, scroll through them and affirmatively assent by clicking an "I Agree" button. Disclose the scrollwrap terms often throughout the sign-up process

such that the consumer will be forced to see them.

2. If scrollwrap agreements are not possible, companies should use a clickwrap or hybridwrap method, sufficiently conspicuous to place the consumer on inquiry notice of the terms of use. Bold and prominent wording should be used to alert the consumer to IMPORTANT TERMS that should be reviewed **before** clicking "I Agree" or "I Accept."

3. If using hyperlinks, making sure those links are clear and conspicuous and not overshadowed by creatives or other language in the sign-up process.

4. And, regardless of what type of wrap contract you use, ensure that the online terms are drafted clearly and concisely, with important substantive provisions (i.e. waiver of legal rights) being placed at the beginning of the contract such that they cannot be missed.

Judge Weinstein's opinion should serve as an eye opener for companies that are using online agreements similar to Gogo's, particularly those that lock customers in to recurring payments or long-term subscriptions. Following the above guidelines — for both current and future terms of use policies — will go a long way towards helping companies avoid finding themselves in Gogo's unenviable position.

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