Gary W. Sgouros v. TransUnion Corp., Trans Union LLC and TransUnion Interactive, Inc.

Case No. 15-1371 (7th Cir. 25 March 2016)

The US Court of Appeals for the Seventh Circuit recently shed light on the enforceability of online terms and the limitations of 'clicking through.'

Almost every website has terms of service that apply to a user's experience in accessing products or services, which often include terms to limit the scope of the website owner's legal responsibility for the operation and activities of the site. While website owners strive to offer a user-friendly experience, in the event of a dispute, they rely on the enforceability of the terms of service. So, what steps should be taken to bolster enforceability? The Court of Appeals for the Seventh Circuit, in *Sgouros v. TransUnion*[1], recently shed light on the question.

Sgouros' experience

In 2013, Gary Sgouros purchased a credit report package for $39.99 on TransUnion's website[2]. To complete the purchase, Sgouros had to take the following steps:

- Click a 'Click Here' button on the homepage under the heading 'Get Your Credit Score & Report';
- Input his contact and payment information and reply 'Yes' or 'No' in response to prompts about receiving email from TransUnion and its partners and verifying his billing address; and
- Click on an 'I Accept & Continue to Step 3' button located below the following paragraph: 'You understand that by clicking on the "I Accept & Continue to Step 3" button below, you are providing "written instructions" to TransUnion Interactive, Inc. authorizing TransUnion Interactive, Inc. to obtain information from your personal credit profile from Experian, Equifax and/or TransUnion. You authorize TransUnion Interactive, Inc. to obtain such information solely to confirm your identity and display your credit data to you.'[3]

Also on the page with the 'Step 3' button was a scroll window, inside of which the words 'Service Agreement' appeared at the top. Only the first two or three lines of the Service Agreement were visible in the window, but underneath the window was a small link entitled 'Printable Version.'[4]

Sgouros received his TransUnion credit rating and tried to use it to negotiate a favourable loan rate at a car dealership. However, the rating Sgouros received was 100 points higher than the rating pulled by the dealership, so Sgouros decided to file a class action lawsuit in federal court in Illinois against TransUnion[5] for violation of various state and federal consumer protection laws, including the Fair Credit Reporting Act[6] and the Illinois Consumer Fraud and Deceptive Business Practices Act[7].

TransUnion's motion

TransUnion moved to dismiss the complaint and compel Sgouros to arbitrate his claims based on a clause contained in its online Service Agreement. TransUnion asserted that Sgouros agreed to the clause by clicking on the 'Step 3' button. Sgouros argued that he did not assent to the Service Agreement, but merely to the authorisation paragraph, quoted in the last bullet, above.

In considering TransUnion's motion, the trial court determined "whether the parties have agreed to arbitrate the dispute in question."[8] Next, in assessing whether there was mutual assent between Sgouros and TransUnion, the trial court analysed prior case law addressing online 'clickwrap' and 'browsewrap' agreements. The court summarised the difference between the two: "A 'clickwrap' agreement is formed when website users click a button that indicates that users 'agree or accept' to terms of an agreement upon viewing its terms posted on the website [whereby] users (i) had reasonable notice of the terms of a clickwrap agreement and (ii) manifested assent to the agreement [...] a browsewrap agreement is an agreement where users are bound to its terms by merely navigating or using a website [...] the validity of a browsewrap contract hinges on whether a website provided reasonable notice of the terms of the contract."[9]

The trial court concluded that the TransUnion Service Agreement failed to meet the threshold for a valid clickwrap agreement as the layout of the page on which the Service Agreement window appears "did not provide reasonable notice that a users' click would constitute assent to the terms in the Window."[10] The court ruled that the Service Agreement was not a valid browsewrap agreement as "it did not provide sufficient constructive notice to users that they are being bound by the terms in the Window by using the website."[11] The court denied TransUnion's motion and TransUnion appealed to the Seventh Circuit Court of Appeals.

Seventh Circuit's Decision

The appellate court undertook a *de novo* review of the trial court's opinion. The court addressed the question of whether agreement to arbitrate between Sgouros and TransUnion was formed under Illinois law and drew an analogy from contract formation for cruise ship tickets: "Illinois courts have applied 'two-part 'reasonable communicativeness' test,' under which they ask '(1) whether the physical characteristics of the ticket reasonably communicate the existence of the terms and conditions at issue' and '(2) whether the circumstances surrounding the passenger's purchase and subsequent retention of the tickets permitted the passenger to become meaningfully informed of its contractual terms.'"[12] Applying this test, the

court posed whether the TransUnion webpages "adequately communicate all the terms and conditions" of the Service Agreement and "whether the circumstances support the assumption that a [user] receives reasonable notice of those terms."[13] The Court looked at whether a reasonable person in Sgouros' shoes would have realised that he/she was agreeing to the terms of the Service Agreement by clicking the 'Step 3' button[14].

The court discussed the case of *Hubbert v. Dell Corp.*[15] where Dell's online terms of service, including an arbitration clause, were held to be enforceable against an online purchaser. Each page of the Dell website contained a link labeled 'Terms and Conditions of Sale' and the online order form included a statement 'All sales are subject to Dell's Terms and Conditions of Sale.'[16] In distinguishing *Hubbert*, the Seventh Circuit stated: "In *Hubbert*, Dell ensured that the purchaser would see the critical language before signifying her agreement. TransUnion did not. Indeed, the web pages on which Sgouros completed his purchase contained no clear statement that his purchase was subject to any terms and conditions of sale. The scroll box contained the visible words 'Service Agreement' but said nothing about what the agreement regulated. The hyperlinked version of the Service Agreement was not labeled 'Terms of Use' or 'Purchase' or 'Service Agreement,' but rather just 'Printable Version.'"[17]

The court found TransUnion's webpage to be misleading by telling users that clicking the Step 3 button constituted authorisation for TransUnion to obtain personal information but saying nothing about contractual terms: "No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement."[18]

The Seventh Circuit then looked at cases from other jurisdictions[19] and concluded that "no court has suggested that the presence of a scrollable window containing buried terms and conditions of purchase or use is, in itself, sufficient for the creation of a binding contract."[20] The appellate Court found that the structure of TransUnion's webpage "distracted" a purchaser from the Service Agreement by stating that clicking the Step 3 button served an unrelated purpose, i.e., authorising TransUnion to obtain the purchaser's personal information[21].

The Court rejected TransUnion's argument, based on two Seventh Circuit decisions[22], that Sgouros' mere use of the site was sufficient to constitute his acceptance of the Service Agreement. The Court held that TransUnion's website "did not contain any requirement that Sgouros agree to abide by any terms and conditions, nor did it warn the user that by completing a purchase he would be bound by the terms."[23] The appellate Court affirmed the denial of TransUnion's motion and returned the case to the trial court[24].

Terms of use

In light of the decision in *Sgouros*, what can a website owner do to strengthen the enforceability of online terms? The court proffered the following suggestions, while acknowledging that there are other ways to accomplish this goal[25]:

- place the agreement directly above an 'I Accept' button;
- place a scroll box containing the agreement next to an 'I Accept' button that unambiguously pertains to that agreement; and
- place a labeled hyperlink to the agreement next to an 'I Accept' button that unambiguously pertains to that agreement.

Was the Seventh Circuit being strict because TransUnion was trying to enforce an arbitration clause as opposed to some other, less impactful term from its Service Agreement? Perhaps. For cautious website owners, the lesson to be learned is that buried terms are less likely to be enforced absent: (a) clear notice to the user that he or she is agreeing to be bound by the terms and (b) a conspicuous window or link whereby the user can access the terms.

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1. http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D03-25/C:15-1371:J:Wood:aut:T:fnOp:N:1726817:S:0
2. https://www.transunion.com
3. 7th Circuit Opinion at pp. 4-5.
4. Ibid. at p. 5. The TransUnion Service Agreement can be found here https://membership.tui.transunion.com/tucm/support.page?panel=terms
5. Sgouros v. TransUnion Corp., et al, No. 14 C 1850 (N. D. Ill.), complaint filed 14 March 2014.
6. 15 U.S.C. § 1681g(f)(7)(A).
7. 815 ILCS 505/1 § 2.
8. Sgouros v. TransUnion Corp., No. 14 C 1850 (N. D. Ill. Feb. 5, 2015)('Trial Court Order') at p.5, citing Granite Rock Co. v. Int'l Broth. Of Teamsters, 130 S. Ct. 2847, 2855 (2010).
9. Trial Court Order at pp. 7 and 10-11.
10. Ibid. at p. 10.
11. Ibid. at p. 13.
12. 7th Circuit Opinion at p. 9, citing Walter v. Carnival Cruise Lines, Inc., 889 N.E.2d 687, 694 (Ill. Ct. App. 2008).
13. 7th Circuit Opinion at p. 9.
14. Ibid.
15. Hubbert v. Dell Corp., 835 N.E.2d 113 (Ill. Ct. App. 2005).
16. 7th Circuit Opinion at p. 10.
17. Ibid.
18. Ibid. at p. 11.
19. Decisions from federal district courts in California and Missouri and the Ninth Circuit Court of Appeals. Ibid.
20. Ibid.
21. Ibid. at p. 12.
22. Treiber & Straub, Inc. v. U.P.S., Inc., 474 F.3d 379 (7th Cir. 2007) and Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002).
23. 7th Circuit Opinion at p. 12.
24. Ibid. at p. 13.
25. Ibid.