Co. cannot enforce online forum clause

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An Internet company could not enforce a forum selection clause in an online terms-of-service agreement that customers purportedly assented to by registering with the company's site, the Appeals Court has found.

The company, Yahoo!, Inc., had sought to enforce the clause — which stated that all disputes would be subjected to California jurisdiction — in order to block a lawsuit brought in Massachusetts by the administrators of a customer's estate.

The contract in question was a "browsewrap" agreement, under which the terms and conditions for the site's use could be accessed by clicking on a hyperlink at the bottom of the home screen. Many other sites employ a "clickwrap" agreement in which terms are displayed on the user's screen; the user must signify his assent by clicking an "I accept" button.

The plaintiff estate administrators argued that the browsewrap agreement was unenforceable because the company could not show that its terms were reasonably communicated and accepted.

The Appeals Court agreed, reversing a Probate & Family Court judge's dismissal of the plaintiffs' action.

"Although forum selection clauses have almost uniformly been enforced in clickwrap agreements, we have found no case where such a clause has been enforced in a browsewrap agreement," Judge Gabrielle R. Wolohojian wrote for the court. "Here, the record does not establish that [the agreement's terms] were displayed (in whole or part) to [the user] or that the terms were accepted by clicking 'I accept' or by taking some similar action. As a result, the record does not reflect that the terms of any agreement were reasonably communicated or that they were accepted."

The 22-page decision is *Ajemian, et al. v. Yahoo!, Inc.,* Lawyers Weekly No. 11-057-13. The full text of the ruling can be found by clicking here.

'Teaching tool'

Plaintiffs' counsel Robert L. Kirby Jr. of Pierce & Mandell in Boston said the ruling is a "teaching tool" for electronic commerce providers.

"The court distinguishes between clickwrap and browsewrap agreements, favoring clickwrap agreements where there's evidence that the terms were displayed specifically to the users versus being available by link or otherwise," Kirby said.

Kirby's co-counsel and partner, Thomas E. Kenney, added that, going forward, attorneys representing Internet companies will want to insure that there is a clear record of their subscribers assenting to the terms of their service agreements.

"This can be outcome-determinative if there's a dispute," he said.

Kevin J. O'Connor, co-chairman of the Boston Bar Association's Antitrust and Business Litigation Committee, said the decision reaffirms that the same principles that historically have governed contract interpretation and enforcement apply to Internet transactions.

"The law is exactly the same as it's always been, but it's just being applied in a new context," the Hinckley, Allen & Snyder attorney said.

In terms of practical implications, O'Connor said, courts tend to interpret online agreements narrowly, which means it is critical for businesses relying on such agreements to draft them in clear, reader-friendly terms.

"This case in particular epitomizes how less can be more when drafting a contract," O'Connor said, noting that the agreement was 10 single-spaced pages when printed out as an exhibit. "It's hard to fathom that all 10 pages were necessary to achieve the contractual ends of Yahoo, so the effort to pack in an enormous volume of terms backfired."

Marc J. Zwillinger of ZwillGen in Washington, D.C., represented Yahoo. He declined to comment.

Browsewrap agreement

Plaintiffs Marianne and Robert Ajemian are co-administrators of the estate of their brother, John.

In late 2002, Robert opened a Yahoo email account for John.

According to Yahoo, all subscribers were bound by a terms-of-service agreement, or TOS, and privacy policy that they could review via a hyperlink on Yahoo's homepage prior to registering with the site.

Though Robert did not dispute that, he claimed he had no recollection of seeing or reading the agreement at the time he opened the account.

John was struck and killed by a motor vehicle on Aug. 10, 2006. Shortly after his death, Robert and Marianne sought access to the account in order to obtain email addresses of John's friends so that they could inform them of his death and memorial service.

After being named administrators of the estate, the plaintiffs sought emails from John's account to help identify and locate assets and to administer John's estate.

According to the plaintiffs, Yahoo initially agreed to turn over the requested information as long as the plaintiffs produced a copy of John's birth and death certificates. But the company ultimately refused to produce the information, citing federal law that it interpreted to prohibit any disclosure of John's emails.

In September 2007, the plaintiffs filed an action in Probate Court seeking an order that Yahoo produce subscriber and email header information for the account. The plaintiffs did not ask the court to order that Yahoo produce the emails themselves, since Yahoo had previously agreed that it would comply with any order that did not require it to disclose such material. The court issued the order.

After Yahoo produced the required information, the plaintiffs renewed their request for the contents of the email account. When the parties could not reach agreement, the plaintiffs filed another declaratory action in Probate Court.

Yahoo moved to dismiss, citing a forum selection clause in its terms-of-service agreement requiring that the suit be brought in California. The company also contended that the suit was barred by a one-year limitations period in the agreement.

Judge John D. Casey dismissed the case without prejudice, finding that the forum selection clause was enforceable, and thus California courts should determine whether the suit was time-barred and whether the estate had a right to obtain the emails.

The plaintiffs appealed.

Yahoo's burden

Wolohojian said the courts have not "had occasion to consider the enforceability of forum selection and limitations clauses in online agreements. We have, however considered the enforceability of such provisions in traditional paper contracts."

In those cases, the judge said, such clauses are enforceable if they have been "reasonably communicated and accepted" and if — considering all circumstances — it is reasonable to enforce the provision in question.

"We see no reason to apply different legal principles simply because a forum selection or limitations clause is contained in an online contract, the judge wrote.

Accordingly, it was Yahoo's burden to demonstrate that the clauses at issue were reasonably communicated and accepted, the judge said.

The court found that Yahoo failed to meet that burden.

First, Yahoo's contention that the provisions of the TOS were available to any potential subscriber to

review prior to submitting registration data was insufficient to establish that the forum selection provision or the limitations provision was reasonably communicated, Wolohojian said.

"We do not know, and cannot infer, that the provisions of the 2002 TOS were displayed on the user's computer screen (in whole or in part)," she said. "It is equally likely … that the user was expected to follow a link to see the terms of the agreement. If that was the case, the record would need to contain information concerning the language that was used to notify users that the terms of their arrangement with [Yahoo] could be found by following the link, how prominently displayed the link was, and any other information that would bear on the reasonableness of communicating the 2002 TOS via a link."

As to whether the terms were reasonably accepted, "[t]here is a complete failure of the record in this regard," she said, pointing out that Yahoo submitted no material that established whether or how John or Robert manifested their assent.

Wolohojian further noted that forum selection clauses found in "clickwrap" agreements, in which users must assent to terms displayed on the screen by clicking an "I accept" button, almost universally have been enforced.

But for the browsewrap agreement like the one in *Ajemian*, "the record does not reflect that the terms of any agreement were reasonably communicated or that they were accepted," she said.

And even if Yahoo had reasonably communicated the terms of the TOS when the account was opened, it still would not be reasonable to enforce the forum selection or limitations clauses against John's estate administrators, since they were not signatories to the contract, Wolohojian stated.

Accordingly, the court concluded, the case should be remanded to the Probate Court for a determination on the merits.

CASE: *Ajemian, et al. v. Yahoo!, Inc.,* Lawyers Weekly No. 11-057-13

COURT: Appeals Court

ISSUE: Could an Internet company enforce a forum selection clause in an online terms-of-service agreement that customers purportedly agreed to by registering with the company's site?

DECISION: No, because the company failed to show that the terms of the "browsewrap" agreement, which were accessible via a hyperlink on the company's homepage, were reasonably communicated and assented to

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