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Click-Wrap Agreement Found Not to be an Unenforceable Adhesion Contract

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On August 30, 2002, the U.S. District Court for the Northern District of California's decision in *Comb v. PayPal, Inc.* created serious concerns that a click-wrap agreement presented to a consumer would not be enforced if the consumer did not have an opportunity to negotiate the terms of that agreement and if some of those terms were deemed to be unconscionable. See our September 26, 2002 Internet Alert. On January 16, 2003, the U.S. District Court for the Northern District of Illinois took a more deferential approach to click-wrap agreements in *DeJohn v. .TV Corporation International*.

David DeJohn tried to purchase six domain names from .TV Corporation, the administrator of the .tv top level domain name, by submitting applications through Register.com, a domain name registrar. In order to submit these applications, DeJohn was required to enter into an online click-wrap agreement with Register.com. The terms of that agreement could be viewed through a hyperlink directly above the box in which DeJohn clicked his acceptance of that agreement. Among other things, the terms included: (i) an acknowledgement that Register.com could not guarantee registration or renewal; (ii) a choice of New York law as the governing law of the agreement; (iii) a clause requiring all suits to be brought in New York; and (iv) an acceptance of .TV Corporation's separate agreement, with its own choice of California law and a clause requiring suits to be brought in Los Angeles.

.TV Corporation rejected all but one of DeJohn's applications because the price listed by Register.com did not meet .TV Corporation's requirements. Register.com then notified DeJohn and refunded fees paid under the rejected applications. DeJohn then sued .TV Corporation, Register.com and VeriSign, the parent company of .TV Corporation, arguing among other things that Register.com's click-wrap agreement was not enforceable because: (i) its text is not displayed unless the applicant clicks on the hyperlink; and (ii) it is an unconscionable adhesion contract that did not result from arm's length bargaining and was an inherently unfair boilerplate agreement.

The court in *DeJohn* disagreed with each of these arguments, reasoning that DeJohn had an opportunity to review the terms by clicking on the hyperlink. According to the court, DeJohn's claim that he did not read those terms was irrelevant because, absent fraud (which was not alleged),

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"failure to read a contract is not a get out of jail free card."

The court went on to find that, under New York law, an adhesion contract exists only where (i) the drafter uses high pressure tactics or deceptive language in the contract; and (ii) the inequality of bargaining power between the parties results in significant unfairness to the weaker party. However, DeJohn did not allege that Register.com used high-pressure tactics or deceptive language to induce him to click his assent to click-wrap agreement. Instead, he argued merely that Register.com's superior bargaining power left him no choice but to agree. The court found that "it is the unfair use of, not the mere existence of, unequal bargaining power that is determinative." DeJohn always had the option to reject the contract and obtain domain name registration services elsewhere.

In contrast, in the *PayPal* case, PayPal asserted that its shrink-wrap agreement was not procedurally unconscionable because it did not concern essential items, such as food or clothing, and because the consumer plaintiffs had alternative sources for the services provided by PayPal. While the DeJohn court found such an ability to obtain services from an alternative source to be significant, the PayPal court did not, concluding that when consumers are involved, the availability of alternative sources is not sufficient to prevent it from finding procedural unconscionability under California law. Procedural unconscionability must be shown, along with substantive unconscionability, for a click-wrap agreement to be deemed an unenforceable adhesion contract.

Finding Register.com's click-wrap agreement to be enforceable, the Illinois court also enforced the choice of New York as the exclusive forum to resolve disputes. The court noted that such a clause could not be avoided unless DeJohn showed that he would be deprived his day in court as the result of "grave inconvenience or unfairness of the selected forum" and that, absent this and other factors, a forum selection clause is presumptively valid. Curiously, DeJohn never argued that going to New York to resolve his dispute would be inconvenient or fundamentally unfair. Similar arguments in *Williams v. America Online, Inc.* (see our April 9, 2001 Internet Alert) and *PayPal* (see our September 26, 2002 Internet Alert) resulted in consumers avoiding forum selection clauses and instead being allowed to pursue litigation in their home jurisdictions.

DeJohn also argued that .TV Corporation violated the Illinois Consumer Fraud and Deceptive Practices Act. The court rejected that argument, finding that DeJohn intended to purchase domain names for resale, and was thus not a "consumer" protected by that statute. Perhaps this explains DeJohn's failure to allege that traveling to New York to resolve disputes would not be inconvenient or fundamentally unfair.

How does one reconcile the seeming inconsistent results between the *PayPal* and *DeJohn* decisions? Perhaps the lesson to be learned is that a click-wrap agreement with reasonable terms (such as the one in *DeJohn*) is more likely to be enforced, even where there was no opportunity to negotiate its terms, but a click-wrap agreement with unconscionable terms (as in *PayPal*) may so offend the court that it is more likely to find an adhesion contract which is both procedurally and substantively unconscionable, and therefore enforceable. Then again, perhaps these cases may show that courts will tend to be more protective of consumers than purchasers-for-resale. Or, perhaps these cases show that California courts may find a shrink-wrap agreement to be an

adhesion contract in situations where courts in Illinois and other states may not. We will probably have to wait for additional cases and greater agreement among the different U.S. circuits before we can determine which, if any, of these lessons prove to be correct. In the interim, companies relying on click-wrap agreements would be well advised to remove blatantly unreasonable terms and conditions from those agreements, particularly when dealing with consumers, and instead use even-handed terms comparable to those used by similarly situated companies in their respective industries.

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