CLIENT ALERTS & INSIGHTS

Don’t Hide Your Hyperlinks: (Successfully) Using Arbitration Agreements to Avoid Class Litigation

JULY 18, 2023

Authors: David M. Krueger

In the ever-evolving landscape of TCPA litigation, the recent case of Hooper v. Jerry Insurance Agency, LLC, No. 22-cv-04232, 2023 U.S. Dist. LEXIS 105247 (N.D. Cal. June 1, 2023) provides a noteworthy exploration of contract formation and the enforceability of arbitration agreements entered online.

The plaintiff, Shannon Hooper, alleged that Jerry Insurance Agency, LLC (Jerry), a digital insurance agency, sent her unwanted text messages in violation of the Telephone Consumer Protection Act (TCPA) and the Florida Telephone Solicitation Act (FTSA), and she sought to represent putative classes.

Jerry moved to compel arbitration on the basis that Hooper had signed an arbitration agreement online as part of the process of requesting insurance quotes. The court's analysis hinged on two key elements of contract formation: actual or constructive notice of the agreement and mutual assent. Jerry's website had provided reasonably conspicuous notice of the Terms of Use containing the arbitration provision. The "Terms of Use" hyperlink appeared in bright pink font, contrasting with the surrounding gray font, which the court found sufficient to set apart the hyperlink from the rest of the text.

The court also found that Hooper unambiguously manifested her assent to the Terms of Use. The language on Jerry's website explicitly informed customers of the legal significance of providing a phone number and choosing to continue on the site. Despite Hooper's argument that Jerry procured her assent by misrepresenting that her phone number would be used for identity verification purposes and to provide custom quotes, the court held that Hooper's failure to read the Terms of Use did not support voiding the contract. The court granted Jerry's motion to compel arbitration of Hooper's claims on an individual basis and stayed the case pending arbitration.

This case serves as a reminder of the importance of clear and conspicuous notice in online agreements and the enforceability of arbitration agreements. Specifically, in online agreements, a number of courts have denied enforcing arbitration provisions when hyperlinks to such provisions, whether in a Terms of Use or otherwise, are “obscured” in a way that a user would not readily identify the hyperlink-for example, having the hyperlink be in the same font color as the rest of the non-hyperlink text.

Having established contract formation, the court then turned to the enforceability of the arbitration agreement. Hooper argued that the arbitration agreement was unenforceable because it prevented her from seeking public injunctive relief in violation of the *McGill* rule (a California-specific rule). However, the court found that the *McGill* rule did not apply as none of the statutes at issue in the *McGill* case were at issue in this case.

As we navigate the complexities of TCPA litigation, this case underscores the need for businesses to ensure their online agreements are clear, conspicuous, and legally sound. When in doubt, consult with your legal counsel to ensure your practices align with the evolving legal landscape. Stay informed, stay compliant, and navigate the TCPA regulations with confidence.

For more information on this topic, contact David M. Krueger at dkrueger@beneschlaw.com or 216.363.4683.