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E-Tailer Beware: The Seventh Circuit Clarifies the Framework for Enforceability of Digital E-Commerce Agreements

By Daniel H. Shulman and Krishna Akarapu

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Does your company have website terms of use, or e-commerce terms?

If so, it's important to know whether those terms are enforceable.

In *Domer v. Menard, Inc.*, Domer wanted to recover a $1.40 pickup service fee for a can of paint she bought on the Menards' website. In her suit, Domer alleged that Menards had not disclosed the pickup service fee and used the fee to manipulate its prices, and had it been disclosed, she would not have purchased the product. Menards argued that the case should be dismissed because Domer entered into an enforceable arbitration agreement when she accepted the Menards Terms of Order at checkout. For Menards, the question was a critical one—if its Terms of Order applied, then the class action would leave the court and head to arbitration.

The Seventh Circuit gave the parties an in-depth analysis of online agreements, providing specific guidelines for what makes an online agreement enforceable. In brief, (1) the website must make the terms "reasonably conspicuous," and (2) the customer must take some action to unambiguously manifest assent. On the question of conspicuousness, the Court identified five factors (no one is dispositive): "(1) the simplicity of the screen; (2) the clarity of the disclosure; (3) the size and coloring of the disclosure's font; (4) the spatial placement of the hyperlink; and (5) the temporal relationship to the user's action." If, after applying those factors, the agreement is reasonably conspicuous, then clicking "Submit Order" can be sufficient to show assent. Although the Court said that Wisconsin contract law applied, the Court noted that there was nothing unique about Wisconsin law that would govern the analysis. The Court's opinion is written as a broad statement of contract principles, citing at various points to other circuit decisions for support. Therefore, the case is likely highly instructive regardless of where the parties are situated.

On the first factor, "Simplicity of the Screen," the Seventh Circuit noted that the Menards page is "streamlined, well-spaced, and internally consistent" and that the Terms of Order were reasonably conspicuous in an "uncluttered presentation." Specifically, the Seventh Circuit noted that "there is ample white space; nearly all the text and images on the screen are pertinent to the checkout process; …the page is organized into just a few neat boxes and columns… the page is not littered with dozens of hyperlinks… the page has consistent color and typeface, and only a few items [on the page] are presented in bold type." Therefore, the Terms of Order are "likely to catch a user's attention."

On the second factor, "Clarity of the Disclosure," the Court considered whether the Terms of Order are "displayed directly to the user" or instead are brought up when the user clicks a hyperlink. In such instances, courts require a "clear prompt directing the user to read them." The hyperlink must be "readily apparent" and "offset from the other text" (*i.e.*, one that is "bold, capitalized, or conspicuous in light of the whole webpage"). The Court found that the Menards disclosure provides such a prompt. The prompt, in bold font against the "clean, white background," put the user on notice to read through the end of it. The prompt must also put the user on notice of contractual terms. A prompt that does not say anything about contractual terms is not enough to enforce a contract between the company and the consumer. For instance, a prompt that only informs the purchaser that "clicking on the box constitutes his authorization for the company to obtain his personal information" and does not state anything about contractual terms is not enough to bind the consumer to any terms.

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Considering the third factor, "Size and Coloring of the Disclosure's Font," the Court looked to whether the design of the hyperlink directs users to click and view any linked terms which is an "indication that the terms are links and not static text." The hyperlink on the Menards webpage was in a "bright, green color which contrasted with the black text of the disclosure immediately above it." Such a design put a reasonable user on notice that the text is not static text but a hyperlink to linked terms that they would be agreeing to when submitting an order. Domer claimed that the text of the disclosure was "impermissibly small," but the Seventh Circuit found that the website still provided reasonably conspicuous notice because the font was the same size as the surrounding text and "more [was] not required." In contrast, a notice is not reasonably conspicuous when the notice is printed in "tiny gray font" that is "considerably smaller than the font used in the surrounding elements."

For the fourth factor, "Spatial Placement of the Hyperlink," the Court stated that the "text advising users of terms should be spatially coupled with the act deemed to manifest assent to those terms." Put very simply, there should not be too much distance between the purchase button and the disclosure. Domer argued that the disclosure was not spatially close to the "submit order" button on the Menards webpage because it was near the bottom of the screen, but the Court disagreed because the hyperlinks were placed directly below the payment information box. The Court stated that notice is reasonable when the user "can see the disclosure and click the hyperlink while viewing the rest of the checkout information and does not need to scroll far, if at all, to read them."

Finally, the Court considered "Temporal Relationship to the User's Action." The Court found important that the user must encounter the disclosure on the same page where the order is placed, leaving "no discrepancy between the necessary act (clicking the 'SUBMIT ORDER' button) and the disclosure requiring assent."

After finding the agreement reasonably conspicuous, clicking "Submit Order" was sufficient to show assent.

The case had a notable concurrence with pointed analysis and examples of how behind the times contract law is for these kinds of agreements. Noting that the "duty to read" makes sense in a negotiated transaction between sophisticated parties, the concurrence questioned that standard in digital contracts, citing a study that only two to three consumers per thousand actually read online terms. The concurrence cited to one study showing that a consumer could read Shakespeare's *Macbeth* in the time it took to read a popular software terms of use, and another study estimating it would take the equivalent of 76 eight-hour workdays to read all the digital privacy policies to which users are subject, at a cost of "$1 trillion, with a 't'" a year in lost productivity. The concurrence further noted that consumers likely wouldn't understand the online terms, even if they read them, citing a study that 99.6% of digital contracts on popular websites and application were written at a reading level above that of the average adult—in some cases "more difficult to read and understand than Immanuel Kant's notoriously dense *Critique of Pure Reason*." Ultimately, the concurrence advocated for a more fact-intensive approach to the issue of conspicuousness rather than the majority's approach (advocated by the parties) to treat the question in the present case as a matter of law.

Nearly every company has an internet presence, and many allow ordering of goods and services through their website. Companies may have vital interests in ensuring those transactions are governed by specific terms, like the present case where the enforceability was the difference between an arbitration for $1.40 or a class action seeking over $5 million in damages. The Court's five-factor analysis provides an essential roadmap for such companies.

If you have website or e-commerce terms of use, and see the value in having those evaluated, please reach out to **Daniel H. Shulman** at dshulman@vedderprice.com, **Krishna Akarapu** at kakarapu@vedderprice.com or the Vedder Price attorney with whom you normally work.

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