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Amazon.com's website and consent to arbitration—an important decision about a business model that particularly fits a pandemic

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During the recent COVID-19 pandemic, online shopping became a more important part of daily life, leading not only to more transactions with existing customers but more new customers for major e-retailers. The largest of them in the United States, Amazon.com, Inc. (Amazon.com), even had to put new customers for certain food deliveries on, in effect, a waitlist.[1]

At the end of last week, the United States Court of Appeals for the Second Circuit upheld much of a key element in Amazon's online business model: its arbitration clause. Despite a complicated procedural background, the decision is important both as a matter of arbitration law and as a matter of class action defense. This is because the Court of Appeals held that evidence of plaintiff's *subsequent* use of the Amazon.com website after learning that the website included an arbitration clause meant he had to arbitrate his *prior* claim against the company.[2]

Overview and the first District Court decision

In early 2013, plaintiff Dean Nicosia made two purchases of the weight loss product "1 Day Diet" through his wife's account on Amazon.com.[3] In November 2013, the United States Food and Drug Administration (FDA) issued a public warning about one of the ingredients in 1 Day Diet, sibutramine, a Schedule IV controlled substance, only available by prescription, that had been linked to serious heart events.[4]

[1] *See* Amazon's blog post, "New ways we're getting groceries to people during the COVID-19 crisis" (last visited June 8, 2020).

[2] *See Nicosia v. Amazon.com Inc.*, No. 19-1833, 2020 U.S. App. LEXIS 17567 (2d Cir. June 4, 2020).

[3] *See Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 257 (E.D.N.Y. 2019).

[4] *Id.* at 261.

Mr. Nicosia sued Amazon.com, alleging that it should have done more to prevent the sale on its website of a product containing an illegal drug.[5] The company responded with a motion to compel arbitration and dismiss or, in the alternative, stay the proceedings based on the arbitration clause in its online terms and conditions.[6] District Judge Sandra L. Townes granted the motion and dismissed the case in 2015, holding that plaintiff had agreed to be bound by those terms and conditions.[7]

The Second Circuit's first decision

Mr. Nicosia appealed to the Second Circuit. Not persuaded that the record showed that he had agreed to the arbitration clause just by checking out from Amazon.com's checkout page containing a link to the company's terms and conditions of use, the Court of Appeals reversed and remanded for a determination (which it indicated would be a jury question) as to whether plaintiff had received reasonable notice of the terms and conditions containing the agreement to arbitrate.[8]

The second and third District Court decisions

On remand, a new trial court judge, District Judge I. Leo Glasser, on *de novo* review of a report and recommendation of Magistrate Judge Lois Bloom,[9] granted a new motion by the company to compel arbitration and dismiss the case.[10] While they reached the same conclusions on the motion, the theories used by Judge Glass and Magistrate Judge Bloom were somewhat different.

Magistrate Judge Bloom focused on the theory that plaintiff had assented to arbitration by purchasing from the Amazon.com checkout page, which contained a link to terms and conditions of use, which in turn contained an arbitration clause, as well as other links and information items.[11] As noted above, the Second Circuit, in its first *Nicosia* opinion, had created a problem for this theory by deciding that "reasonable minds could disagree" whether the checkout page "provided reasonably conspicuous notice" of the terms and conditions.[12] Without such level of notice, the Second Circuit believed that a user could not be bound to those terms and conditions—and particularly the arbitration clause they contained. In what had promised to be a potentially burdensome process for assessing online contracts in the arbitration context, the Court of Appeals had also indicated that "the reasonableness of notice" would be a question of fact to be resolved by a jury.[13]

Undeterred by the Second Circuit's language, Magistrate Judge Bloom found an elegant exit from this potential procedural quagmire. She concluded that Mr. Nicosia now had actual notice of the relevant terms and conditions of use because, following the original motion to compel arbitration by Amazon.com (in which it had pointed out that its checkout page contained notice of those

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[5] Id.

[6] *Id.* at 262.

[7] *Id.* at 278-79.

[8] *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 237-38 & n.6 (2d Cir. 2016).

[9] *see Nicosia v. Amazon.com, Inc.*, 14-cv-4513, 2017 U.S. Dist. LEXIS 133701 (E.D.N.Y. Aug. 18, 2017)

[10] *See Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254 (E.D.N.Y. June 14, 2019).

[11] *See Nicosia*, 2017 U.S. Dist. LEXIS 133701, at *25-26.

[12] *Nicosia*, 834 F.3d at 237-38.

[13] *Id.* at 238 & n. 6.

terms and condition), he had purchased further items from the company using that same checkout page.[14] Thus, issues such as where the link to the terms and conditions sat on the page did not require review by a jury for reasonableness.[15] As a result, Mr. Nicosia, having agreed to the terms and conditions of use, was bound to arbitrate as they provided—including arbitrating his present claim.

Judge Glasser's equally thorough opinion took a different path to try to avoid the jury trial problem on the issue of the reasonableness of notice. Instead of focusing on the notice provided at the checkout page, he held that plaintiff was bound to the Amazon.com terms and conditions of use, including the arbitration clause, because he was buying through his wife's Amazon.com account, and she had affirmatively agreed to the terms and conditions—and future changes to them, which included the arbitration clause—when she set up that account.[16] By using his wife's account, plaintiff was, at the least, estopped from denying the arbitration clause to which his wife had agreed.[17] As the Second Circuit later put it, Judge Glasser granted Amazon.com's new motion "based on a combination of agency principles and equitable estoppel theories."[18]

Judge Glasser also provided a thoughtful, substantive due process coda to his decision. Indirectly criticizing the Second Circuit's first opinion, Judge Glasser noted that

> the rule that the "existence" of additional contract terms must be made "reasonably conspicuous" is, this Court submits, largely a superfluity. . . . is there any question that reasonably prudent internet users know that there are terms and conditions attached when they log onto Facebook, order merchandise on Amazon, or hail a ride on Uber? They know this, not because a loud, brightly-colored notice . . . but because it would be difficult to exist in our technological society without some generalized awareness of the fact. . . .
>
> [M]ost consumers will not read the terms and conditions, no matter how prominently the notice is displayed, and those that do will usually not understand them. Among those that both read and understand the terms of use, most will proceed with the transaction anyway . . . .
>
> This Court suggests that . . . rather than scrutinizing hybridwrap agreements for contract formation issues, courts should recognize that such agreements, like other adhesive contracts, represent in substance a "blanket assent" to any terms that are not objectively unreasonable. Accepting this framework, such terms should be rigorously scrutinized for substantive unreasonableness, perhaps to a greater degree than they have been subjected thus far. . . .
>
> Exquisitely applicable and responsive to the stubborn problems presented by this case and countless others like it is the observation [that] . . . "The life of the law has

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[14] *See Nicosia*, 2017 U.S. Dist. LEXIS 133701, at *19-20.

[15] *Id.* at *33-34.

[16] *See Nicosia*, 384 F. Supp. 3d at 44-45.

[17] *Id.*

[18] *Nicosia*, 2020 U.S. App. LEXIS 17567, at *2.

> not been logic: it has been experience. The felt necessities of the time . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, Jr., The Common Law 1 (1881). Experience, not logic, has taught that a purchase on the internet is determined by rules different from a purchase of milk at the corner grocery, a thought expressed more simply and vividly by Judge Cardozo in *MacPherson v. Buick Motor Co.*: "Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today." 217 N.Y. 382, 391, 111 N.E. 1050 (N.Y. 1916).[19]

The Second Circuit's new decision

Following Judge Glasser's decision, plaintiff appealed again. Once more, he argued that he had not been aware of the arbitration clause and had never agreed to it.[20] But this time, the Second Circuit held that the record conclusively rebutted plaintiff's arguments. In doing so, the Court of Appeals did not adopt Judge Glasser's estoppel theory. Nor did it adopt the substantive due process analysis at the end of his opinion.

Instead, it followed the path laid down by Magistrate Judge Bloom in her report and recommendation. It agreed that plaintiff had clearly received notice of the arbitration clause at issue in September 2014 because of Amazon.com's initial motion that had referenced it. *Id.* at *3-4. After receiving that notice of the arbitration clause, Mr. Nicosia made 27 more purchases from the Amazon.com site (necessarily from its checkout page with the link to the terms and conditions of use that contained that clause). *Id.* at *3. Any reasonable person would interpret such conduct as assent. *Id.*

In addition (and as had both lower court judges), the Second Circuit rejected plaintiff's argument that Amazon.com had waived arbitration by continuing to participate in the litigation. *Id.* at *5. Plaintiff had shown no prejudice from that participation, and none of the litigation activity addressed the merits of the case. *Id.*

Why the new decision is important

The various opinions in the *Nicosia* saga are useful sources for answering many different arbitration questions in the online context, even though the Second Circuit's current opinion does not address all of the analyses in the District Court opinions. The relative narrowness of the Second Circuit's new opinion does not make it less important, however. Not only did the Court of Appeals find a way out of the jury trial issue that made its prior decision somewhat impracticable, but in doing so, it effectively agreed that evidence *subsequent* to contract formation in the online context can properly be dispositive of the issue of notice and arbitration.

This may be particularly important in the class action context. Even absent a class waiver, if it matters whether each class member who engaged in a challenged online transaction *later* engaged in further online activity that could make the first transaction subject to arbitration (or some other forum selection or similar contractual provision), defendants challenging class certification should be allowed to discover that—or to argue that such individualized discovery makes class certification inappropriate.

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[19] *Nicosia*, 384 F. Supp. 3d at 278-79 (various citations omitted).

[20] *Nicosia*, 2020 U.S. App. LEXIS 17567, at *3.

Conclusion

It is hard to know whether the *Nicosia* saga itself is yet done (there is still time for plaintiff to seek certiorari, for example—although the way in which the Court of Appeals decided the issue makes the opinion not ideal for Supreme Court review). But as the variety of analyses in the opinions in that saga indicate, it will hardly be the last chapter written on the subject of online contract formation and arbitration.

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