Read Before Signing

Important lessons from recent court rulings involving problematic contracts.

Read the Contract Before You Sign
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IN THREE COURT DECISIONS IN THE PAST SEVERAL MONTHS, two themes emerged: reading the contract before you sign and understanding the law that applies. In the first case, a court needed to decide which of two contracts controlled. In the second, the party seeking to enforce its contract was unable to do so because a provision on which it relied was unenforceable. In the third, an amendment made the contract enforceable even decades later. Courts typically enforce contracts as "written and agreed to" by two parties. Do-overs are disfavored. A fourth decision dealt with inadequate evidence of consumer "clickwrap" terms and conditions, in which a party failed to prove that a contract was read and signed by a particular consumer.

***Coinbase, Inc. v. Suski*, 144 S. Ct. 1186 (2024).** *Coinbase v. Suski* involved two contracts and a dispute over which one controlled:

> The first contained an arbitration provision with a delegation clause; per that provision, an arbitrator must decide all disputes under the contract, including whether a given disagreement is arbitrable. The second contract contained a forum selection clause, providing that all disputes related to that contract must be decided in California courts.

While the U.S. Supreme Court ruled that a court should decide contract enforceability, hindsight permits the observation: If there were two contracts, why was the second contract not clear that it replaced the first contract? Read the first contract when writing the second—and make it clear. Another solution could be adding a boilerplate clause that clarifies generally what happens if there are conflicting contracts. (To read the opinion, visit law.isba.org/3BzF6Dg.)

***Rodgers-Rouzier v. American Queen Steamboat Operating Co.*, 104 F.4th 978 (7th Cir. 2024).** In the *Rodgers-Rouzier* case, American Queen Steamboat may have outsmarted itself in exercising control over labor disputes. The contract specifically included an arbitration clause that said the Federal Arbitration Act applied. The drafter of the contract, unfortunately for American Queen Steamboat, apparently failed to either understand the business or to look up the statute, which excludes maritime contracts. The argument "we didn't mean just federal, we meant Indiana, too," was unsuccessful. Knowing what law applies, when the contract invokes that law, is fundamental. Similar to the first case, a boilerplate clause might have saved the intent—"federal arbitration applies, but if it doesn't, the law of the forum state applies …." (law.isba.org/3ZYYF27.)

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***Zimmer Biomet Holdings, Inc. v. Insall*, 108 F.4th 512 (7th Cir. 2024).** Zimmer has become a very successful company in the medical field. An important part of its business is making and selling implants for joint replacements. Innovation in certain implants was led by John Insall. Zimmer took ownership of Insall's patents and provided for royalties until "the expiration of the last to expire of the patents licensed hereunder or so long as Product is sold by ZIMMER, whichever is last to occur."

The contract was signed in 1991. Three years later "[t]he parties amended the agreement in 1994. Among other things, Insall promised to work exclusively for Zimmer through January 1, 2011." The amendment included a royalty calculation of .05 percent for "future knee systems." A 1998 amendment added 1 percent royalties "on all sales of the NexGen Knee and all subsequently developed articles, devices or components marketed by Zimmer as part of the NexGen Knee family of knee components and not at the rate provided for sales of 'future knee systems.'"

Zimmer continued to sell Insall-developed knee systems but decided to stop paying royalties in 2018 resulting in litigation to recover the unpaid money. While the decision does not reveal whether awareness of the law was specifically a factor in the 1994 and 1998 amendments, there was an argument that patent royalties were not permitted after a patent expired; but, when royalties were based on a patent plus some other rights, they could continue. The format of the amendments was consistent with having some royalties continue after patent expiration. Zimmer agreed to the amendments, presumably because they were good for business. Whether the original contract was or not, the amendments brought the deal within the limits of the law. Someone read the contracts—and applied the law. (law.isba.org/3zScjcG.)

Proof of reading, and the signature

***Gaines v. Ciox Health, LLC*, 2024 IL App (5th) 230565** dealt with a corollary: For there to be an enforceable contract there must be a meeting of the minds. The proponent of the contract must introduce evidence to show that meeting of the minds. Internet terms and conditions are ubiquitous, particularly for consumer transactions.

There are different types of online consumer agreements. These include clickwrap agreements, browsewrap agreements, and hybrid versions of those agreements. Regardless of the type of online agreement, the circumstances of the transaction must provide the offeree with reasonable notice that the terms are being offered and that certain acts or conduct by the offeree will constitute acceptance of the offer.

The conduct of a party is not effective as a manifestation of assent unless that party knows or has reason to know that the other party may infer from his conduct that he assents. Determining whether an internet user has agreed to online terms of service is a fact-intensive inquiry. Courts may consider whether webpages adequately communicated all the terms and conditions of the agreement and whether the circumstances support the assumption that the purchaser received reasonable notice of those terms and conditions. Thus, courts should look closely at the law and the facts to see if a reasonable person in the plaintiff's shoes would have realized that he was assenting to the terms and conditions of the website when he registered for an online service.

There are practical and administrative issues in proving these contracts (ignoring for a moment whether consumers actually read them). The question is whether the company seeking to enforce the contract has evidence to show that the particular consumer in the case was presented the particular version of the contract and that the consumer's later conduct manifested assent to the contract. Recording "clicks" might be fine, but a party must prove who did that clicking and whether an actual reading (or at least a scroll through the terms) had taken place. It is not enough to support the proposition that "everybody did it."

Ciox failed to produce competent evidence that the plaintiff agreed to the terms and conditions for Ciox e-delivery when he registered to use the online e-delivery portal. By all accounts, online self-registration for the Ciox e-delivery system, as it existed in 2019, was a multistep process. Ciox did not produce any documents or screen shots to replicate the self-registration process. Ciox did not describe or attach screenshots to show the number of screens that a registrant would have had to "click through" to locate the screen containing the e-delivery terms and conditions. According to the record, Ciox's e-delivery portal was updated and renamed in 2022. There is no indication of whether Ciox archived or preserved online records from the 2019 self-registration process.

General ideas of record keeping were unable to prove "offer, acceptance, and consideration" of particular terms and conditions by a particular party at a particular time. (law.isba.org/3Ngs3Z2.)

Conclusion

Experience, skill, and considering all relevant facts, coupled with writing contract terms consistent with the law, can go a long way toward ensuring that contract terms comport with what the parties imagined they were doing—the writing and intent evidence therein should reflect that imagination.

Read the contract and make sure it accomplishes what the parties have in mind. And if you are the party wishing to enforce a contract, keep a copy and be able to prove that the party on the other side read and signed it.