HANCOCK v. AMERICAN TELEPHONE & TELEGRAPH CO.

United States Court of Appeals for the Tenth Circuit
701 F.3d 1248 (10th Cir. 2012)

[The Court of Appeals affirmed the district court's dismissal of all claims brought by plaintiffs seeking to represent a class of customers dissatisfied with U-verse. The edited opinion below focuses on the standard contracting practices at issue in the case.]

BACKGROUND

U-verse is the brand name for a telecommunications service that includes digital television, voice-over Internet protocol, and high-speed Internet. At the time Plaintiffs purchased U-verse, customers could receive TV alone or bundle it with Voice and/or Internet for a discounted rate. One set of terms of service governs U-verse TV and Voice services. The TV/Voice terms have a forum selection provision stating that, in the event of litigation, AT & T and U-verse customers "agree to submit to the ... jurisdiction of the courts located within the county of Bexar County, Texas." Different terms of service govern U-verse Internet service. The Internet terms include an arbitration provision stating that AT & T and the customer "agree to arbitrate all disputes and claims ... based in whole or in part upon the [Internet service]."

Plaintiffs are individuals who purchased U-verse in either Florida or Oklahoma. This appeal principally involves three defendants: AT & T Operations, Inc.; Southwestern Bell Telephone Company; and BellSouth Telecommunications, Inc.

To show that Plaintiffs accepted the TV/Voice terms and Internet terms Defendants proffered declarations from AT & T employees, [which] recount the standard practice for customer acceptance of U-verse TV/Voice and Internet terms.

STANDARD PRACTICE FOR ACCEPTANCE OF TV/VOICE TERMS

When a customer orders U-verse TV/Voice service, the order is sent to AT & T's Global Craft Access System ("GCAS"). A technician reviews the order and responds to install the TV/Voice service. The technician provides the customer with a Welcome Kit, which contains a printed copy of the TV/Voice terms. The technician gives the customer an opportunity to review the TV/Voice terms before installation.

The technician then displays an acceptance form on the technician's laptop through the GCAS web application. The acceptance form has a check box next to "Terms Of Service." Below the check box, the form states in all capital letters: "Before acknowledging below, please review the appropriate documents pertaining to your new AT & T service(s). By selecting 'I Acknowledge' below, you are acknowledging that you have read, understand, and agree to the content of the documents checked above." The customer must click an "I Acknowledge" button below this statement to accept the TV/Voice terms. The acceptance form is then populated with the customer's name, order number, account number, and date of acceptance and stored on an AT & T server. For customers who prefer a written acceptance form, technicians provide paper copies. Technicians do not install U-verse TV/Voice service until customers accept the terms of service.

STANDARD PRACTICE FOR ACCEPTANCE OF INTERNET TERMS

An AT & T senior product manager for U-verse Internet customer registration and activation described the following standard practice for customer acceptance of U-verse Internet terms.

A new U-verse Internet customer is required to complete an online registration process to activate the service. During the registration process, the customer is presented with a screen that displays AT & T's Internet terms in a scrolling text box. Below the text box are three buttons labeled "Exit Registration," "I Reject," and "I Agree." The customer must click the "I Agree" button to continue with the registration. Until this process is completed, the new customer will automatically be directed to the U-verse registration page every time he or she attempts to connect to the Internet using a web browser over his or her U-verse High Speed Internet connection.

AT & T's records indicate that Plaintiffs Mutzig, Bollinger, and Hancock completed the U-verse Internet registration process. Plaintiffs Bollinger and Hancock received U-verse Internet when its terms of service included the Arbitration Clause. Plaintiff Mutzig's U-verse Internet registration date was September 29, 2008, before the Internet terms incorporated the Arbitration Clause. In October 2008, AT & T sent an e-mail to customers notifying them of changes to the Internet terms, including the addition of the Arbitration Clause. The e-mail states that "[b]y continuing to use the Service, [customers] signify [their] continued agreement to the terms and conditions set forth in the Terms of Service document." It is undisputed that Plaintiff Mutzig received this e-mail.

DISCUSSION

Plaintiffs assert they did not knowingly accept the TV/Voice and Internet terms, and therefore the Forum Selection and Arbitration Clauses cannot be enforced against them.

Plaintiffs contend that under Defendants' described standard practice, customers cannot knowingly accept the U-verse TV/Voice and Internet terms. This argument focuses on whether, as a matter of law, Defendants' standard practice gives U-verse customers adequate disclosure of the terms and an adequate opportunity to review and accept them.

DEFENDANTS' STANDARD PRACTICE AND CUSTOMER ACCEPTANCE OF TERMS

Defendants use "clickwrap" agreements as part of their standard practice for customer acceptance of the TV/Voice and Internet terms.

Plaintiffs *** argue that the process through which customers agree to U-verse terms of service, including Defendants' use of clickwrap agreements, is "so byzantine and confusing that Plaintiffs could not possibly have knowingly consented to the arbitration and forum selection clauses." Plaintiffs dispute whether Defendants' standard practice for customer acceptance of U-verse terms can form binding contracts as a matter of law.

We apply state law principles to determine whether a contract has been formed. *** Courts evaluate whether a clickwrap agreement's terms were clearly presented to the consumer, the consumer had an opportunity to read the agreement, and the consumer manifested an unambiguous

acceptance of the terms. See, e.g., *Specht*, 306 F.3d at 28–32. *** [B]asic contract law principles in Florida and Oklahoma indicate that if a clickwrap agreement gives a consumer reasonable notice of its terms and the consumer affirmatively manifests assent to the terms, the consumer is bound by the terms. ***

Plaintiffs argue that Defendants' clickwrap agreements do not give customers notice of and a meaningful opportunity to assent to the U-verse terms of service. Their argument relies primarily on the Second Circuit's decision in *Specht*. In that case, the Second Circuit concluded that plaintiffs who downloaded a software "plug-in" called "SmartDownload" could not have reasonably known of the software's associated license terms, which included an arbitration provision. To download the software, the plaintiffs visited a webpage and clicked on a "Start Download" button. The "sole reference to ... license terms on the ... webpage was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen." In effect, the layout concealed the license terms in a "submerged screen."

The *Specht* court *** held that the plaintiffs were not bound by the arbitration provision in the license terms because a reasonably prudent person downloading the free software "would not have known or learned, prior to acting on the invitation to download, of the reference to ... license terms hidden below the 'Download' button on the next screen."

Plaintiffs' arguments notwithstanding, Defendants' clickwrap agreements comply with the principles set forth in *Specht*. Defendants' clickwrap agreements do not conceal the U-verse terms of service. Under Defendants' description of the standard practice, technicians present customers with a Welcome Kit containing a printed copy of the TV/Voice terms and give customers an opportunity to review the terms. Before technicians proceed with installation, customers must agree to the TV/Voice terms by clicking on an "I Acknowledge" button on the GCAS web application, which is presented on the technician's laptop. The GCAS web application displays a checkbox for "Terms Of Service" and a statement that the customer acknowledges that he has "read, understand[s], and agree[s] to the content of the documents checked above."

Similarly, customers cannot access U-verse Internet service without going through a registration process on the customer's computer. The process gives the customer an opportunity to review the Internet terms in a scrolling text box. The customer must click an "I Agree" button to manifest assent to the Internet terms and to continue with the registration process and activation of U-verse Internet service.

Defendants' presentation of the U-verse TV/Voice and Internet terms is in stark contrast to the presentation of terms associated with the software download in *Specht*, where consumers had (1) no visible notice of accompanying terms, and (2) no indication that terms were being accepted. U-verse customers are given notice of the U-verse terms and must affirmatively manifest assent to the terms by clicking "I Acknowledge" and "I Agree" buttons. * * *

Defendants' clickwrap agreements are of the type that are "routinely ... upheld." We see no reason that such clickwrap agreements would not be valid and enforceable under Florida and Oklahoma law.

ADDITIONAL CHALLENGES TO DEFENDANTS' STANDARD PRACTICE

Plaintiffs assert four other reasons why, in their view, U-verse customers are prevented from knowingly agreeing to the terms of service. * * *

Third, Plaintiffs challenge AT & T's e-mail notifying customers who signed up for Internet service before October 2008, such as Plaintiff Mutzig, of the addition of the Arbitration Clause to the Internet terms. They argue that the "new arbitration provision is buried beneath a series of deliberately misleading statements."

Contrary to Plaintiffs' characterization, the e-mail does not bury the notification of the Arbitration Clause. After three short paragraphs explaining that the Internet terms are changing, the e-mail's first bullet point states: "Arbitration Agreement." We have added language that requires customer disputes with AT & T regarding AT & T Internet Services to be submitted to binding arbitration or small claims court." The e-mail concludes with a link to the new Internet terms and states that "[b]y continuing to use the Service, you signify your continued agreement to the terms and conditions set forth in the Terms of Service document." AT & T's e-mail sufficiently notifies customers that an arbitration provision has been added to the Internet terms. * * *

We conclude that Defendants' standard practice gives U-verse customers sufficient notice of the TV/Voice and Internet terms of service, as well as an adequate opportunity to manifest assent to the terms.