

A Tale of Two Websites: Why the Sales Contract on Your Website Needs an Enforceable Forum Selection Clause

By John Fialcowitz¹

Each year, businesses sell a greater percentage of their products and services over the internet and via social media. Yet along with the growth of these internet sales has come new legal risks to your business that you may never have had to consider before. One such risk is the rise in the number of lawsuits filed by purchasers in out-of-state and foreign jurisdictions over legal claims arising from these internet transactions. These lawsuits force businesses such as yours to retain local counsel in each jurisdiction where a lawsuit is filed and may be decided by juries from a purchaser's home jurisdiction who favor the purchaser over your business. In short, litigating multiple disputes in multiple jurisdictions can significantly increase legal defense costs and the risk of unfavorable outcomes.

One solution to this logistical nightmare may be found in contractual provisions commonly referred to as "forum selection" clauses, by which the parties to a contract designate an exclusive forum for the resolution of disputes. The key to making a forum selection clause effective, in turn, lies with how well a website alerts prospective purchasers to the clause and secures their consent to the forum.

General Rules Governing Forum Selection Clauses

New Jersey courts follow the following rules when called upon to review and enforce a forum selection clause:

- If the seller drafts its forum selection clause in a clear and conspicuous fashion and provides prospective purchasers with fair notice of the clause on its website, the seller has a greater chance of enforcing the forum selection clause.²
- In contrast, if the seller unreasonably buries the clause from view on its website, a court may find the clause to be unenforceable.³
- Assuming that the seller can show that it provided fair notice of the forum selection clause to the purchaser and that the purchaser agreed to it, the clause generally will be upheld unless: (1) the clause in question is the product of either fraud or undue bargaining power; (2) the clause violates public policy; or (3) the forum selected would seriously inconvenience the parties at trial.⁴

Two decisions from New Jersey's Appellate Division illustrate the importance of alerting purchasers to the forum selection clause in your website sales contract and obtaining their consent to it.

The Caspi Case: An Example of an Enforceable Website Forum Selection Clause

In Caspi v. Microsoft Network, L.L.C., the defendant placed a forum selection clause at the top of the last paragraph of its on-line membership agreement, which made the courts of Kings County, Washington the exclusive jurisdiction for resolution of all disputes.⁵ The membership agreement -- an example of what is commonly referred to as a "clickwrap" agreement -- appeared on the subscriber's computer screen in a scrollable window next to blocks providing the choice "I Agree" and "I Don't Agree."⁶ The prospective member's registration could continue only after the potential subscriber viewed and agreed to the membership agreement, including the defendant's forum selection clause.⁷ Notwithstanding the fact that defendant's subscriber agreement contained the forum selection clause designating Washington State as the exclusive jurisdiction for all disputes, plaintiffs filed a class action lawsuit against defendant in the Superior Court of New Jersey.⁸

On appeal from the trial court's dismissal of plaintiffs' complaint, the Appellate Division held that the defendant's forum selection clause was valid and enforceable in light of the manner in which the defendant displayed the forum selection clause in its contract and requested and obtained plaintiffs' consent to its terms.⁹ The court found that while the clause appeared as the first item in the last paragraph of the electronic document, the defendant had nevertheless presented it "in exactly the same format as most other provisions of the contract."¹⁰ The court further found that there was nothing about "the style or mode of presentation, or the placement of the provision that can be taken as a basis for concluding that the forum selection was proffered unfairly, or with a design to conceal or de-emphasize its provisions."¹¹ Accordingly, the court affirmed the trial court's dismissal of the plaintiffs' class action complaint on the ground that plaintiffs had filed their lawsuit in the wrong forum.

The Hoffman Case: An Example of an Unenforceable Website Forum Selection Clause

Eleven years after it decided Caspi, the Appellate Division again reviewed the enforceability of a website forum selection clause in Hoffman v. Supplements Togo Management, LLC. In

that case, the defendant, an Arizona corporation engaged in the business of selling a dietary supplement, buried a forum selection clause within the following disclaimer on its website:

The descriptions and statements accompanying these products and vitamin supplements have not been evaluated by the FDA. These products are not intended to diagnose, treat, cure or prevent any disease. They are for use by healthy adults only. Consult your physician before beginning any bodybuilding or fitness program. Keep all products out of the reach of children. *By placing your order with STG Investors, LLC you are agreeing that any and all litigation will take place in the state of Nevada.*¹²

A prospective purchaser could not see the disclaimer containing the forum selection clause unless he or she scrolled down to a submerged portion of the webpage, and if a purchaser clicked on an item and added it to his or her electronic shopping cart, the webpage would skip ahead to new pages that did not contain the disclaimer.¹³

The plaintiff subsequently filed a lawsuit against defendant in the Superior Court of New Jersey alleging consumer and common law fraud on the ground that defendant made false and misleading claims regarding its dietary supplement.¹⁴ In reversing the trial court's dismissal of plaintiff's complaint, the Appellate Division found that the forum selection clause was unreasonably masked from the view of the prospective purchasers because "of its circuitous mode of presentation" and because "the website was designed in a manner that [made] it unlikely that consumers would ever see [the forum selection clause] at all on their consumer screen."¹⁵ As a result, the court held that the defendant's forum selection clause was "presumptively unenforceable" and remanded the case back to the trial court for further proceedings, which included costly discovery and further motion practice.¹⁶

Lessons from Caspi and Hoffman

Based upon the Caspi and Hoffman decisions described above, businesses can take the following steps to make forum selection clauses contained in their website sales contracts more enforceable:

Tip Number 1: Use a "Clickwrap" Agreement.

A "clickwrap" agreement, such as the website subscription contract at issue in Caspi, requires "that a user consent to any terms or conditions by clicking on a dialogue box on the screen in order to proceed with the internet transaction."¹⁷ In contrast, a "browsewrap" agreement allows the user to view the terms of the agreement by way of simply providing a link to view the terms and conditions, but does not require the user to take any affirmative action before the website performs its end of the contract.¹⁸

Because "clickwrap" agreements provide fair notice and obtain a prospective purchaser's consent to the contract before a purchaser is allowed to proceed, courts routinely uphold and enforce forum selection and other contractual clauses contained in "clickwrap" agreements.¹⁹ Accordingly, you should consider using a "clickwrap" agreement on your website.

Tip Number 2: Make Sure Your Forum Selection Clause Is Conspicuous.

Even if you decide not to use a "clickwrap" agreement and instead use a "browsewrap" or other form of on-line agreement, you should make sure that your website provides prospective purchasers with reasonable and conspicuous notice of the forum selection clause. For example, a website might provide notice to users through a prominent legend located throughout the website which advises prospective purchasers that use of the website constitutes acceptance of its terms and conditions, coupled with ready access to those terms and conditions through a visible hyperlink. Courts are more inclined to uphold a browsewrap agreement if the website provides purchasers with notice of the site's terms and conditions at the outset of internet transactions.²⁰

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Forum selection clauses can protect sellers from litigating disputes with internet customers in multiple and often inconvenient jurisdictions. By following the simple steps outlined above, you can increase your odds of prevailing in a legal challenge to your website's forum selection clause.

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² Caspi v. Microsoft Network, L.L.C., 323 N.J.Super. 118, 122 (App. Div. 1999).

³ Hoffman v. Supplements Togo Management, LLC, 419 N.J.Super. 596, 606-07 (App. Div. 2011).

⁴ Caspi, 323 N.J.Super. at 122.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id., at 120-121.

⁹ Id., at 125-26.

¹⁰ Id., at 125.

¹¹ Id., at 125-26.

¹² 419 N.J.Super. at 600 (emphasis added).

¹³ Id., at 611.

¹⁴ Id., at 598.

¹⁵ Id., at 611.

¹⁶ Id., at 612.

¹⁷ Feldman v. Google, Inc., 513 F.Supp.2d 229, 236 (E.D. Pa. 2007).

¹⁸ Id., at 236, n. 1 (internal quotation and citation omitted).

¹⁹ See, e.g., Caspi, 323 N.J.Super. at 125-26. See also Segal v. Amazon.com, Inc., 763 F.Supp.2d 1367 (S.D.Fla. 2011) (enforcing forum selection clause in clickwrap agreement where on-line sellers clicked agreement to the terms and conditions for using the Amazon Marketplace); Tradecom, com LLC v. Google, Inc., 693 F.Supp.2d 370, 377 (S.D.N.Y. 2010) (finding that Google's AdWords agreement provided the plaintiff with sufficient notice of forum selection clause); Feldman, 513 F.Supp.2d at 238 (upholding forum selection clause in a clickwrap agreement where plaintiff indicated his assent to the terms by clicking on the "Yes, I agree to the above terms and conditions" button).

²⁰ See, e.g., Major v. McCallister, 302 S.W.3d 227, 230 (Mo.Ct.App. 2009) (enforcing a forum selection clause contained in a browsewrap agreement where defendant put "immediately visible notice of the existence of license terms"—i.e., "By submitting you agree to the Terms of Use" and a blue hyperlink—right next to the button that [plaintiff] pushed."); Cairo, Inc. v. CrossmediaServs., Inc., No. C04-4825, 2005 WL 756610, at *4-6 (N.D. Cal. April 1, 2005) (enforcing forum selection clause where webpage displayed defendant's logo and notice of "Terms of Use" in underlined, highlighted text that showed hyperlink to actual terms); but see Specht v. Netscape Comms. Corp., 306 F.3d 17, 22 (2d Cir. 2002) (refusing to enforce browsewrap agreement where users of web page would not see any notice of agreement unless they scrolled down to another screen).