

Two Tips For Making Your Service Agreements More Enforceable

By John Fialcowitz

Have you ever had a customer challenge the terms contained in your standard service agreement? Many entrepreneurs and businesses place important terms on either the reverse side of their service agreement or on a separate page annexed to the agreement, only to have a non-paying customer later claim that they never read or agreed to them. Litigation then ensues over whether those terms are in fact enforceable.

This article outlines the law in New Jersey governing such claims and identifies simple steps you can take to make the terms contained in such service agreements more enforceable. In short, the key to defeating such claims is to prove that you “called” the terms to the customer’s attention at the time the parties entered into the agreement.

Rules Governing Contract Acceptance

It is well-settled that to create a binding contract under New Jersey law, “there must be a meeting of the minds, as evidenced by each side’s express agreement to every term of the contract.” State v. Ernst & Young, LLP, 386 N.J.Super. 600, 612 (App. Div. 2006)(internal quotation and citation omitted). Generally speaking, “affixing a signature to a contract creates

a conclusive presumption, except as against fraud, that the signer read, understood and assented to its terms.” Silvestri v. South Orange Storage Corp., 14 N.J.Super. 205, 212 (App. Div. 1951) (internal quotation and citations omitted). Thus, “[f]ailing to read a contract does not excuse performance unless fraud or misconduct by the other party prevented one from reading.” Young v. Prudential Ins. Co. of Am., 297 N.J.Super. 605, 619 (App. Div. 1997).

Nevertheless, to incorporate terms contained in a separate document, “the document to be incorporated must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had knowledge of and assented to the incorporated terms.” Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J.Super. 510, 533 (App. Div. 2009) (internal quotation and citation omitted). Likewise, “[a] party should not be bound by clauses printed on the reverse side of a document unless it is established that such matter was properly called to its attention and that it assented to the provisions there stated.” Grossman Furniture Co., Inc. v. Pierre, 119 N.J.Super. 411, 422 (Cty. D. Ct., 1972).

The Appellate Division’s decision in

Quinn illustrates the importance of “calling” your terms and conditions to the customer’s attention at the time she signs your service agreement. In that case, the defendant clients entered into a retainer agreement with the plaintiff law firm which stated, in relevant part, that the clients would be bound “by [the law firm’s] standard billing practices and firm policies.” 410 N.J.Super. at 535. After a billing dispute arose and the parties’ relationship soured, the law firm sued its clients to enforce its “standard billing practices and firm policies,” which included collection fees, interest on unpaid balances and withdrawal fees. Id., at 522-23. The trial court subsequently found that the retainer agreement expressly incorporated these terms by reference and granted the law firm’s motion for summary judgment. Id., at 524.

On appeal, the Appellate Division held that the law firm’s “standard billing practices and firm policies” were unenforceable under traditional contract principles because “there [was] no indication that the terms of the proposed incorporated document were known or assented to by [the clients].” Id., at 535. In particular, the court found that the law firm neither explained to the clients what its “standard billing practices and firm policies” were nor did it provide them with the separate

document that contained these terms. *Id.*, at 535-36. Accordingly, the Appellate Division found that the law firm's argument "that contract principles support its position fails." *Id.*, at 536.

Similarly, courts will enforce terms contained on the reverse side of an agreement only if the plaintiff can show that those terms were called to the customer's attention at the time she signed the agreement. For example, in *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299, 303 (8th Cir. 1986), the court found that a buyer had accepted a disclaimer printed on the back of a purchase order because "writing in large print on the front of the form, directly above the line for the buyer's signature, directed the buyer to the controlling terms on the back." In contrast, in *Tri-City Rent-a-Car and Leasing Corp. v. Vaillancourt*, 304 N.Y.S.2d 682, 683-84 (3d Dept. 1969), the court affirmed an order denying plaintiff's motion for summary judgment where the defendant denied that plaintiff had informed him about terms contained in fine print on the reverse side of an automobile rental agreement. In each case, the outcome turned on the plaintiff's ability to show that she called the terms to the customer's attention at the time of contracting.

Lessons from the Cases

Based upon the cases described above, entrepreneurs and businesses should take the following steps to make the terms in their service agreements more enforceable:

Tip No. 1: Draw the Customer's Attention to the Terms You Seek to Enforce. A court will be reluctant to enforce contract terms, especially against a con-

sumer, unless it can be shown that you called the terms to the customer's attention. For example, if the terms you seek to enforce are contained on the reverse side of your service agreement, the front side of the agreement should contain a prominent legend over the customer's signature block that states, in effect, that the individual signing the agreement on behalf of the customer acknowledges that he or she "has read and understands the terms and conditions on the back side of the agreement and agrees that these terms and conditions are a part of this agreement." Such a legend should go a long way towards making the terms contained on the reverse side enforceable.

Likewise, if the terms you seek to enforce are contained on a separate document from your service agreement, you should identify the separate document by name (i.e., "Supplemental Terms to Service Agreement") and provide your customer with a copy of this document prior to execution of the agreement. In addition, you should place a prominent legend above the customer's signature block on the front side of the agreement that states that the individual signing this agreement on behalf of the customer has been provided with a copy of the separate document, that he or she has read and understands the terms contained in the separate document and that he or she agrees that these terms are a part of the service agreement. Remember, *Quinn* teaches that to be enforceable as part of your service agreement, a separate document "must be described in such terms that its identity may be ascertained beyond doubt" and that the party to be bound "must have had knowledge of and assented to the incorporated terms." 410 N.J.Super. at 533.

Tip No. 2: Make the Terms Conspicuous. Regardless of where you place your contractual terms, a court still may refuse to enforce contractual terms printed in an illegible and inconspicuous typeface. See, e.g., *Rockel v. Cherry Hill Dodge*, 368 N.J.Super. 577, 586 (App. Div. 2004) (where "the language purporting to constitute plaintiffs' waiver of a trial by jury in the retail installment contract is set forth in small print on the back of a document which only cautions, in slightly larger print on the front, that 'important arbitration disclosures' appear on the reverse side," arbitration provision was unenforceable).

You can make your terms more conspicuous in several ways, such as increasing the font size of the text, employing descriptive headings for each term, leaving appropriate spacing between terms and by placing certain terms (such as limitation of liability and arbitration provisions) in capital letters. Above all, try to avoid burying important terms in a maze of fine print.

* * *

Given the current economic climate, entrepreneurs and businesses should expect an increasing number of legal challenges to the terms contained in their standard service agreements. By taking the simple steps described above, you should increase your likelihood of prevailing in such disputes.

John Fialcowitz practices commercial litigation and dispute resolution at the Law Office of John A. Fialcowitz, LLC in Morristown. He can be reached at 973.532.7208 and john@fialcowitzlaw.com.