Don't Try This on Your Site: Changing Contracts via Website Notice Alone

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On July 18, 2007, the Ninth Circuit issued its decision in *Douglas v. United States District Court for the Central District of California*, No. 06-75424, which addressed whether a service provider may change the terms of its service contract by posting a revised contract on its website without providing additional notice. The Court held that merely posting a revised contract to one's website was inadequate notice and the service provider's customers were not bound by the revised terms. This article will review *Douglas* and best practices in light of that decision.

Issue of First Impression

The Court wrote, "This is the first time any federal court of appeals has considered whether to enforce a modified contract with a customer where the customer claims that the only notice of the changed terms consisted of posting the revised contract on the provider's website. This issue is also of some significance, as it potentially affects the relationship of numerous service providers with millions of customers, and thus deserves immediate resolution." Slip Op. at 11.

Factual Background

The plaintiff, Joe Douglas, had contracted for long distance telephone service with America Online (AOL). Talk America subsequently acquired this business from AOL and continued to provide telephone service to AOL's former customers. According to Douglas, Talk America then added four provisions to the service contract: (1) additional service charges; (2) a class action waiver; (3) an arbitration clause; and (4) a choice-of-law provision pointing to New York law. Talk America posted the revised contract on its website but, according to Douglas, it never notified him that the contract had changed. Unaware of the new terms, Douglas continued using Talk America's services for four years.

Class Action Suit Filed

Douglas filed a class action lawsuit in the Central District of California, charging Talk America with violations of the Federal Communications Act, breach of contract, and violations of various California consumer protection statutes. Talk America moved to compel arbitration based on the modified contract and the district court granted the motion. Because the Federal Arbitration Act, 9 U.S.C. § 16, does not authorize interlocutory appeals of a district court order compelling arbitration, Douglas petitioned for a writ of mandamus.

Writ of Mandamus Granted

The Ninth Circuit's per curiam opinion granted the writ of mandamus, evaluating the five factors governing the grant of such a writ, as outlined in *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977). While not all five *Bauman* factors need be satisfied, the third, "The district court's order is clearly erroneous as a matter of law," is a necessary condition for granting a writ of mandamus.

The Ninth Circuit held that the district court's order compelling arbitration was clearly erroneous as a matter of law because it had held that Douglas was bound by the terms of the revised contract when he was not notified of the changes. Consequently, the Ninth Circuit vacated the district court's order compelling arbitration. The case, subject to a pending petition for rehearing *en banc*, will proceed in discovery on remand.

The Court reasoned that a party to a contract cannot unilaterally change the terms of the contract. It must obtain the other party's consent before doing so. A proposed revision to a contract is just that, a proposal or offer that does not bind the parties until accepted. The Court also stated that one cannot assent to an

offer unless one knows of its existence and hence it cannot be accepted until it is brought to the attention of the offeree. The Court rejected the idea that continued use of the service by Douglas could be considered assent without his receiving notice of the revisions. The Court would have likely been satisfied had notice been sent by mail or otherwise, or even had Douglas been a new customer "who necessarily would be on notice that they were required to assent to contract terms as a predicate for using the service." Slip Op. at 6. However, without some form of notice, Douglas was not bound by the revised terms.

"Probably" Unconscionable?

The Court held that the district court's order holding that Douglas was bound by the revised contract was an error sufficient to satisfy the third *Bauman* factor. But it also stated that even if Douglas were bound by the new terms of the contract, the new terms "probably would not be enforceable in California because they conflict with California's fundamental policy as to unconscionable contracts." Slip Op. at 6.

Under both New York and California law, a contract is unconscionable only if it is both procedurally and substantively unconscionable. The Ninth Circuit did not undertake a full unconscionability analysis, but it did disagree with the district court's holdings that the arbitration clause was not procedurally unconscionable and that the class action waiver clause was not substantively unconscionable. Therefore, in each case, the Ninth Circuit's opinion addressed only half of the unconscionability inquiry. However, given the Court's clear holding that these clauses, as additions to the original agreement without notice, were no part of the operative contract, the lower court itself will be unlikely to reach these issues unless Talk America can first overcome the issue of the lack of notice.

Petition for Rehearing en Banc

On August 1, 2007, real party in interest Talk America filed motions to recall the mandate and for rehearing *en banc*. Talk America argues that the panel made several errors. First, Talk America challenged the Ninth Circuit's acceptance of Douglas' affidavit that the terms of the original contract differed and that he had received no notice of the new terms. Significantly, neither the Ninth Circuit or the district court had before them the original contract. Thus, there is no way to know whether the original contract contained a change of terms clause by which users agreed that website notice of change of terms would suffice. If such a term did exist,then a different result *might* have been reached, based on the potential to find that the user had assented to that means of amending the contract.

Talk America also argues that Douglas is not a consumer, but rather that the telephone service at issue was used for business purposes. Consequently, some of the cases cited by the Ninth Circuit that suggested the agreement was "probably" unconscionable may not be applicable because they involved consumer contracts.

Depending on whether any Ninth Circuit judge takes an interest in the petition, the Court should rule on Talk America's petition in late August or early September.

Implications of the *Douglas* Opinion

While the primary holdings of *Douglas* relate to what are sometimes considered mundane principles of notice for any contract, the opinion could well suggest broader implications.

- Does *Douglas* require that all contract changes include actual notice, thereby holding that website change of terms clauses are unenforceable?

Possibly not. For one thing, the record in *Douglas* did not disclose whether a change in terms clause existed in the original agreement in that case. The *subsequent* agreement in *Douglas* included such a clause, but that was after the change had already been made. While *Douglas* may well stand for the proposition that the practice of unilaterally changing the terms of a contract without notice—beyond

posting the revised terms deep within a website—is inadequate, it fails to address directly whether one could contract in advance for mere website notice.

A case cited in *Douglas*, *Badie v. Bank of America*, 67 Cal. App. 4th 779 (Cal. Ct. App. 1998) involved a clause allowing change in terms through notice to be sent to credit card holders by mail. The decision recognized that unilateral changes transmitted as provided in the agreement—at least if providing actual notice—could be valid, but that a party's right to alter the agreement nonethless is always constrained by the covenant of good faith and fair dealing. Such changes thus cannot include the power to add terms dealing with matters "not within the reasonable contemplation of the parties when the contract was entered into." *Badie*, 67 Cal. App. 4th at 796.

Thus, whether the four clauses at issue in *Douglas* should become part of the agreement would depend at least in part on the meaning and scope of the substantive provisions and the change of terms provision in the original agreement. Since the original agreement has not yet been produced, we arguably have two premature court decisions that failed to reach this issue.

- Does *Douglas* make it harder to compel arbitration?

Perhaps. The Ninth Circuit refused to enforce an arbitration clause first announced without notice. It pointed out that *Badie* had rejected addition of an arbitration clause even with notice where such a clause had not been within the contemplation of the parties in the original agreement. Thus, *Douglas* is less a change in the law than an example to highlight an existing issue.

The fact that the Ninth Circuit reached out to issue a writ of mandamus, where the Federal Arbitration Act specifically forbids interlocutory appeals of orders compelling arbitration, may incite more plaintiffs to seek that course to avoid arbitration. However, more likely this is a rare instance in which the truly extraordinary writ of mandamus will be entertained in federal court. That the Ninth Circuit *did* issue the writ demonstrates at least this panel's serious concerns about enforcing contract changes without a clear finding of notice by the district court.

Best Practices for Changing Contractual Terms in Light of *Douglas*

While individual consideration of unique circumstances will always be needed, lessons can be learned regarding several categories of agreements and policies.

- Online Terms of Use Agreements

Online services or other websites that do not require registration or login often contain a statement informing the user that use of the site is subject to the site's terms of use. Courts have generally held such agreements enforceable if the user knew that such use was conditional on the user's acceptance of the agreement. *Douglas* reminds us that, to change the terms of use, non-registration sites must find a way conspicuously to notify users of the revisions.

Such sites can do two things: 1) next to the "Terms of Use" link, which should always be conspicuous and above the fold, provide the date of last update and, for some period after each update, highlight the fact that the terms have been revised; if possible, use cookies to track which users have visited since the date of such notice and 2) articulate in the terms of use that each visit to the site is a new transaction governed by the terms of use linked on the site at that time. If there is a new agreement with every visit, then this arguably limits *Douglas*' concern about notice of changes.

- Terms of Service for Interactive Sites

Online services or websites that do require registration or login will have an easier time providing notice of changes to their terms of service, as the login process itself provides an opportunity to get assent to any changes. It is also more likely that such sites have collected some form of contact information during registration.

Such sites should: 1) include in the terms of service a change of terms clause that indicates how notice of changes will be provided (e-mail / at login screen) and 2) develop a technical means of tracking which users

have assented to the new terms and which have not. The degree to which explicit assent to change is worth the user inconvenience will depend on the website—but in some situations it will be worth making the user click to accept.

- Terms of Service for Offline Services

Douglas involved long-distance telephone services and so it is most applicable to contracts that govern offline services. Users of such services may have no cause to visit the service provider's website, and so providing notice to changes to the terms of service may require offline contact (as in *Badie*).

Such providers should: 1) utilize whatever forms of contact they have to provide notice of changes to terms; 2) require users to keep their contact information current; and 3) identify ways of getting clear assent to changed terms. Continued use after notice is the minimal threshold for assent and so long as coupled with notice, *Douglas* does not hold that it is inadequate assent.

- Privacy Policies

Privacy policies, when they are contracts, can fall into any of the above categories. But in many cases they may merely be policies. In the United States, having an extra-contractual privacy policy is generally preferred, but in Europe, privacy policies require explicit consent and are more likely to be deemed contracts. Changes to US policies may nonetheless require notice (and possibly consent) to avoid running afoul of the FTC, or to avoid invading the user's legitimate expectation of privacy based on prior policies. Changing them will present choices about use of data already collected versus use of data collected prospectively that warrant advice of counsel.

- DMCA Notice and Takedown Policies

Similar to privacy policies, there may be good reason to keep DMCA policies outside of one's terms of service. If they are policies, but not contracts, then one can make changes, perhaps to one's repeat-infringer policy or other elements of the policy that are not statutorily constrained, without the burden of notice and additional remedies that a contract would create.

- Notice Generally

In all of the above categories, consider providing a more specific notice that enables the user to discern the scope and extent of the changes, as merely presenting the new agreement or policy with nothing more could give a court a reason to conclude such notice was inadequate. If an agreement or policy is totally revamped, say so by calling it a "new" agreement or policy. If instead there are small changes, provide both the old and revised documents or a bullet-point list of material changes.

The Ninth Circuit's short opinion in *Douglas* ultimately creates more questions than it answers. Navigating the world of changing contract terms will often prove to be an area where only individualized legal advice will do. However, with careful drafting at the outset and attention to details when providing notice, parties to a contract can successfully adjust terms to reflect changing conditions and find ways to do so that are fair to both parties, and enforceable by the courts.

The opinion is available at http://www.fenwick.com/docstore/Publications/Litigation/06-75424.pdf.

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