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Litigation Alert

District Court Rules that Shrinkwrap Agreement May Be Enforceable

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On April 5, 2006, the District Court for the Eastern District of California ruled in the case of *Meridian Project Systems, Inc. v. Hardin Construction Co., L.L.C.*, Civ.04-2728, that an End User License Agreement ("EULA") contained within software packaging may be an enforceable "shrinkwrap" agreement. The Court further found that a contract action based on the EULA would not be preempted by the Copyright Act.

Facts:

Plaintiff Meridian Project Systems provides software solutions to manage construction projects, including the project management software Prolog Manager. Meridian's standard practice was to send Prolog customers a box containing a CD, a user manual, and a copy of the EULA. The EULA sets forth the terms of use, which a purchaser can reject by returning the software. Defendant Hardin Construction had purchased and used Prolog Manager in connection with its business since 1996 and had never returned any copies or objected to the terms of the EULA.

Meridian brought suit, among other things, for breach of contract and copyright infringement when Hardin violated terms of the EULA by copying and sending Prolog help file text to a competing software company. In opposing Meridian's summary judgment motion, Hardin contended, *inter alia*, that the validity of shrinkwrap licenses has not yet been determined by the Ninth Circuit, and that in any event a contract action based on such copying would be preempted by the Copyright Act.

Decision:

The Court acknowledged that, although shrinkwrap licenses are widely used in the software industry, there remains a dispute across Federal Circuits about their validity. Some courts have found such licenses invalid as unconscionable or unacceptable contracts of adhesion, while other courts have held that these types of licenses are valid and enforceable contracts.

The *Meridian* court found the EULA to be enforceable here notwithstanding the fact that Hardin could not review the license until it had already opened the package. It based its conclusion primarily on the Seventh Circuit's decision in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)). In *ProCD*, the Seventh Circuit found shrinkwrap licenses enforceable against end-users, basing its conclusion on policy considerations specific to the software industry, an industry in which many purchases are made over the Internet by consumers who never see a box. The *ProCD* court noted that the reality of the software industry is such that a license should not be unenforceable simply because the consumer was not able to read it before purchasing the product. The Seventh Circuit provided several examples in other areas where contracts are enforceable in a "pay first, agree later" form, including travel and concert tickets.

Here, the *Meridian* opinion noted that Hardin was provided with and had notice of the EULA. Hardin could have returned the software if it did not agree with the license terms, but it chose not to do so. Under these facts, the Court concluded that the EULA was neither an unconscionable contract nor an unacceptable contract of adhesion. The Court further found that Meridian's contract action was not preempted by the Copyright Act because it contained an "extra element" – the mutual assent and consideration required by a contract claim.

Impact:

While the issue of enforceability of such agreements has not been decided by the Ninth Circuit, this case adds to the growing body of case law in California District Courts suggesting that shrinkwrap agreements are enforceable, even when they are not visible to customers at the time of purchase.

If you have questions about the issues raised in this alert, please contact:

Patrick E. Premo, Partner, Litigation Group
ppremo@fenwick.com, 650-335-7963

Ilana S. Rubel, Associate, Litigation Group
irubel@fenwick.com, 650-335-7208