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## *Federal Court Voids Company's Website Terms Of Use/End User License Agreement*

A federal district judge recently invalidated a major company's website terms of use and set the stage for expensive litigation over a data security breach that it almost certainly had not expected. Any business owner with a website should take careful note of the decision and how it might impact their business.

Zappos.com is an online retailer of apparel, shoes, handbags, home furnishings, beauty products, and accessories. In January 2012, a hacker attacked the website and attempted to download files containing customer information, including names and addresses from a Zappos server. After Zappos notified customers that their personal information had been compromised, it was sued in multiple courts by affected customers. Zappos moved to dismiss the case, pointing to the mandatory arbitration clause in its website's terms of use. Under federal law, contractual agreements to arbitrate are generally valid, enforceable, and irrevocable, and Zappos wanted the cases dismissed in favor of less formal (and generally less expensive) arbitration.

The court denied Zappos's motion. It ruled that the arbitration clause was not enforceable because the terms of use were not a contract. As a general proposition, a contract is an enforceable agreement to which the parties have a meeting of the minds as to all essential terms. The terms of use on Zappos's website, like those for many websites, included a provision that any use of the website constituted an agreement to the terms. And, like many other websites, Zappos' reserved the right to change the terms of use, including its arbitration provision, at any time. These proved to be fatal flaws.

First, the court noted that there is a difference between clickwrap agreements, where the website user affirmatively agrees to the terms of use (e.g., clicking a box or clicking "I agree,"), and browsewrap agreements, where the website user does nothing more than visit the website. The court found that Zappos's terms of use was an unenforceable browsewrap agreement because the user never had to affirmatively accept the terms, the terms were not prominently displayed and users were not directed to them. The mere appearance of a link to the terms on each page of the website was not enough to make the terms enforceable.

Second, the court found that the terms would have been unenforceable in any event. As a general rule, an arbitration agreement is unenforceable where one party retains the unilateral, unrestricted right to terminate the agreement, especially where there is no obligation to receive consent from or even notify the other parties to the contract. In effect, such a term impermissibly binds one side to arbitration while giving the other side an escape hatch.

Fortunately, there are ways to craft terms of use to avoid these pitfalls. Butzel Long's Social Media, Privacy & Technology Specialty Team has long-time, extensive experience in advising clients on website terms of use, end-user agreements, and content licensing, as well as data and privacy protection requirements under U.S. and foreign law. Our team also has deep experience in handling other online issues affecting companies that do business online, including social media; copyright, trademark and patent registration and enforcement; anonymous posters; application of the Communications Decency Act and the Digital Millennium Copyright Act; endorsement issues; cybersquatting; and cybercrimes.

For more information, please contact the author of this alert or any member of Butzel Long's Social Media, Privacy & Technology Specialty Team.

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