SEPTEMBER 28, 2012

SECOND CIRCUIT REJECTS ATTEMPT TO ENFORCE EMAIL ARBITRATION CLAUSE IN THE ABSENCE OF CLEAR ASSENT

On September 7, 2012, the United States Court of Appeals for the Second Circuit rejected a defendant's attempt to enforce an arbitration clause contained in and presented to the plaintiffs only in unsolicited emails following the plaintiffs' alleged online enrollment in the defendant's service. (HYPERLINK TO OPINION) The defendant argued that the plaintiffs assented to the arbitration clause by enrolling in the service and then failing to cancel their enrollment after receiving the emails containing the arbitration clause.

The court focused on the issue of assent. It noted that the purported assent was largely passive. The court also noted that the defendant could not point to any evidence that the plaintiffs were on actual notice of the arbitration clause. The court then considered whether assent existed by virtue of (1) inquiry notice and (2) failure to cancel enrollment. Ultimately, the court declined to find assent in this case, but did suggest that: "A requirement that the plaintiffs expressly manifest assent to the arbitration provision together with such assent would likely have overcome the email's defects in providing notice." Those structuring transactions where terms and conditions will be presented electronically would be wise to keep this suggestion in mind.

Should you have any questions, please contact Spencer Goodson at 317.977.1416 or sgoodson@hallrender.com.

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