

## Take me out to the ball game ... and take away my right to a jury trial

By Edward C. Bassett Jr.



The right to a jury trial is a central feature of the U.S. Constitution. It is considered a fundamental principle of the American legal system. A jury of your peers

is supposed to even the playing field when a David takes on a Goliath.

However, corporations and institutions have figured out ways to force consumers to give up their right to a jury trial and to force consumers to submit their claims to arbitration. Studies have shown that arbitration awards tend to be substantially smaller than jury verdicts.

Most of us have dealt with the boilerplate adherence contracts we sign at the airport when we rent a car. Those standard contracts contain small print disclaimers that almost always include provisions requiring that all disputes will be resolved by arbitration at a location convenient to the car rental company. You cannot rent a car without signing the contract, and by signing the contract the courts have unanimously concluded that the consumer knowingly waived his or her right to a jury trial.

Although no one, except first-year law students, actually reads these boilerplate contracts, the law is well settled that the act of “signing” is a “manifestation” of the consumer’s intent to be bound by all of the terms and conditions.

These take-it-or-leave-it contracts requiring a signature on the last page are now “a fact of modern life.” Consumers routinely sign such agreements for rental cars, to obtain credit cards, to sign up for cellphone services, and for consumer loans.

In the time of COVID, online retailing has been dominant. More and more businesses are selling products and offering services online. Businesses will not finalize a sale or lease until the consumer has electronically clicked an icon or electronically checked a box.

The courts have held that the clicking

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of the icon or box is another example of a “manifestation” of the consumer’s agreement to all of the contract terms and conditions. Foremost among the terms and conditions is the waiver of a jury trial and an agreement to use arbitration as the sole means of resolving all disputes.

The courts explain that these electronic contracts and arbitration clauses are enforceable because the consumer had an opportunity to review the entire contract, and the electronic checkmark is sufficient manifestation of the consumer’s agreement.

Dell Computers figured out a way to include enforceable arbitration clauses in its online contracts without even requiring the consumer to electronically check a box or icon. On each page of the Dell contract there are hyperlinks to Dell’s terms and conditions.

The court that was asked to determine if Dell’s arbitration clause was enforceable reasoned that because the hyperlinks on each page were “conspicuous,” consumers had an opportunity to click on and read the hyperlinks, and therefore the arbitration clause was enforceable.

Courts have found that arbitration clauses are enforceable even if those clauses first appear when a product is delivered or a service is provided. In a typical transaction with cable TV providers, after the consumer signs up for service, a customer agreement (with an arbitration clause) is then delivered to the consumer. The customer agreement states that, after receiving the agreement, the consumer can either cancel the service or accept service with an arbitration clause.

Major League Baseball came up with an ingenious plan to require all ticket holders to give up their right to a jury trial by using a paper ticket to enter the ballpark.

On July 27, 2018, a young girl sustained horrific injuries during a Cubs game. Despite the fact that safety consultants had advised MLB that protective netting should be installed to protect ticket holders sitting in high-risk areas, the safety warnings were ignored and the young girl suffered serious facial fractures when she was struck by a foul ball.

When the suit was filed, MLB filed a motion to dismiss based on the fact that the young girl had entered Wrigley Field with a paper ticket. MLB argued that the mere presentation of the ticket constituted a waiver of her right to a jury trial. However, the young girl did not buy the ticket. Her father won the ticket in an office raffle and gave it to her.

On the front of the ticket in small print it stated: “subject to terms/conditions



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set forth on the reverse side.” On the reverse side of the ticket there were six paragraphs of small print including a phrase: “by using this ticket, ticket holders agree to terms and conditions available at [www.cubs.com/ticketback](http://www.cubs.com/ticketback).” The website contained pages and pages of onerous terms and conditions. One page included this language: “We are each waiving the right to a court or jury trial. You have the right to reject this arbitration agreement but must exercise this right within seven days of the event.”

During the seven-day period after the young girl was injured, she was hospitalized. Obviously, she had no realistic opportunity to opt out of the arbitration clause.

The court found that it was “unconscionable” to enforce the arbitration clause because the clause was “hidden in a maze of fine print” that required a ticket holder to access a website before entering the ballpark and to read all of the terms and conditions on the website. The arbitration provision was procedurally unconscionable because it was so difficult to find, read or understand that it could not be fairly said that the plaintiff was aware of what

she was agreeing to.

The terms and conditions on the website also stated that if an adult brought any minors to the park and the adult was not the parent or legal guardian of each child (with authority to bind each minor to the arbitration clause), then the adult and all of the children were required to leave the ballpark immediately!

Although the court in Cook County, Chicago, found the arbitration clause to be unconscionable, the court warned that future attempts to force ticket holders to agree to arbitration might be enforceable as long as the arbitration clause is displayed “conspicuously” on the ticket rather than on a separate website. Where a plaintiff’s conduct is merely that of a recipient of a preprinted agreement drawn by the defendant (such as a ticket), it must appear that “the terms were in fact brought home to him” before he can be found to have accepted them.

There may be ways in which MLB can require all persons entering a ballpark to submit to arbitration, but it will require a conspicuous disclosure to alert the ticket holder that he or she is giving up the constitutional right to a jury trial.