

# EDVA Judge Invalidates Arbitration Clause in Online Terms and Conditions

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In a recent decision, EDVA Judge Rossie Alston invalidated the arbitration clause in the terms and conditions for online sales through the Lowe's Home Centers website on the grounds that the terms and conditions were illusory and unconscionable. , Civil Action No. 1:23-cv-574 (RDA-LRV), 2024 U.S. Dist. LEXIS 141570 (E.D. Va. Aug. 8, 2024).

### **The “Sneak Into Basket” Tactic**

The plaintiff, Eleanor Lovinfosse, purchased a washing machine through the Lowe's website. The confirmation page for her order included a water hose, in addition to the washing machine, which was labeled as “Required for Use” in bold letters. Upon receiving her washing machine, the plaintiff learned that all necessary parts were supplied with the washing machine and that the water hose was, in fact, not necessary.

Lovinfosse filed a class action alleging various fraud and breach of contract claims. She alleged that the added water hose was an example of a fraudulent “sneak into basket” tactic in which an extra item is automatically added to a customer's cart and marked as a necessary accessory, even though any necessary parts are included in the main purchase.

### **The Website Terms and Conditions**

Lowe's moved to compel arbitration, alleging that Lovinfosse agreed to an arbitration clause by clicking on the electronic “Place Order” button when she made her purchase. Directly below the “Place Order” button, the webpage stated that “By placing an order, I agree to [Defendant't] Terms and Privacy Statement.” The word “Terms” was hyperlinked, and if Lovinfosse had clicked on the link, she would have been directed to Lowe's 31-page terms and conditions, which included, among other things, an agreement to arbitrate all disputes.

### **The Plaintiff Had Notice of the Website Terms and Conditions**

Lovinfosse argued that the arbitration clause was unenforceable for two reasons. First, she argued that she did not have sufficient notice of the clause to assent to it. Judge Alston disagreed, citing to EDVA cases holding that the terms and conditions of a web browser contract are enforceable where a user has actual or constructive notice of

those terms. Here, the layout of the website confirmation page provided at least constructive knowledge of the terms. Again relying on other EDVA cases involving similar notices, Judge Alston held that Lovinfosse was on sufficient notice of the specific terms, even though she was not expressly advised of the presence of an arbitration clause before she made her purchase.

### **Lowe's Unilateral Right to Modify the Terms and Conditions**

Lovinfosse's second grounds for disputing the arbitration provision met with more success. As an alternative, she argued that the arbitration clause was illusory or unconscionable because the terms and conditions allowed Lowe's to unilaterally modify any of the terms and conditions at any time, without notice.

Lowe's argued that unilateral modification provisions in an arbitration agreement do not automatically render the agreement unconscionable. Judge Alston pointed out, however, that the cases on which Lowe's relied allowed modification only after notice to the purchaser. By retaining a unilateral right to change the terms and conditions without notice, the arbitration provision was rendered illusory. Judge Alston also rejected Lowe's argument that the arbitrator should decide the unilateral modification issue, holding that the Fourth Circuit authority on which Lowe's relied confirmed that a court may address a challenge based on a unilateral modification clause in the first instance.

### **Takeaways**

The first takeaway from this decision is that, while the decision is limited to the arbitration clause, Judge Alston's reasoning would also apply to the other terms and conditions. Thus, Lowe's inclusion of a clause allowing it to change the terms of the parties' contract at any time and for any reason arguably invalidates their entire 31-page terms and conditions.

The second takeaway flows from the first, and that is the lesson that practitioners should refrain from overreaching when drafting contract terms. By including a broad unilateral modification provision that has little relevance to one-time website purchase contracts, Lowe's lost not only the right to require arbitration, but likely invalidated other terms, such as warranty disclaimers, choice of law and choice of venue provisions, that are valuable tools for commercial sellers.

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