

**“PAPER WORLD” ANALOGIES TO WEB SITE TERMS
AND CONDITIONS: TRAVEL TICKETS AND OTHER
SIMILAR FORMS**

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In order to determine whether terms provided on a web site will be enforced against a user of the web site in the absence of a clear manifestation of assent (such as clicking on an “I agree” button), it is useful to look to analogies in the paper world. There are numerous cases addressing the enforceability of standard, non-negotiable terms in travel tickets and other similar forms, such as ski lift tickets. The cases discussed below should provide some guidance to businesses wishing to present enforceable terms of use on their web sites. In the following cases, there was no evidence that the ticket purchasers had read or agreed to the ticket terms before purchase. Because there was no clear manifestation of assent to the terms of the tickets at issue, the courts looked to the characteristics of the tickets to determine whether their terms should be enforceable against the purchaser.

A. Forum Selection Clauses in Cruise Tickets: *Carnival Cruise Lines v. Shute*

The U.S. Supreme Court in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), ruled that a forum selection clause in a cruise ticket issued by defendant Carnival was enforceable against the plaintiffs. While the case is of limited utility in answering the question of when a person is deemed to give assent to terms in a nonnegotiated form, it does set forth rules for determining whether a specific type of clause in a form contract, a forum selection clause, is enforceable.

The plaintiffs in *Carnival* bought two tickets for one of the defendant’s cruises. The plaintiffs booked the cruise through a travel agent, paid for their tickets and received the tickets in the mail sometime later. Each paper ticket contained a statement on its face that it was “subject to conditions of contract on last pages,” and the statement further warned the passengers to “please read contract [*sic*].” The “Terms and Conditions of Passage” stated that “the acceptance of this ticket by the . . . passengers shall be deemed to be an acceptance and agreement . . . of all of the terms and conditions of this Passage Contract Ticket.” One of the paragraphs in the Terms and Conditions contained a forum selection clause in which the passengers “agreed” that all disputes in connection with the ticket would be brought exclusively in courts located in Florida. One of the plaintiffs was injured on the cruise ship and sued Carnival in her home state, Washington, in contravention of the forum selection clause.

The majority opinion did not address the process of assent at all. Because the plaintiffs conceded that they had notice of the forum selection clause, the Court’s discussion of its enforceability was based on the assumption that the clause was reasonably communicated to the passengers. The dissenting opinion, on the other hand, did not as readily concede notice on the

part of the passengers and noted that only the “most meticulous of passengers” would likely have become aware of the contested provision. The dissent also noted that the passengers did not receive any notice of the provision until they purchased their tickets and that any cancellation of the trip would have been without a refund.

The Court’s most important statements are those regarding the enforceability of forum selection clauses in form contracts once notice is established. According to the Court, such clauses should be scrutinized for fundamental fairness. In finding that the forum selection clause at issue satisfied the test for fundamental fairness, the Court found that Carnival was not moved by bad faith in choosing Florida as the exclusive forum for the resolution of disputes because Carnival was based in Florida and many of its cruises left from Florida. As a result, the choice of Florida was not motivated by the desire to discourage passengers from pursuing their claims. Also, Florida was not a “remote alien forum.” In addition, the Court found no evidence that Carnival obtained the passengers’ agreement to the forum selection clause by fraud or overreaching. Again, the Court noted the Shutes’ concession that they had notice of the provision and presumed that the Shutes could have rejected the contract “with impunity” if they objected to the forum selection clause.

In sum, *Carnival* does not address the implied assent issue at all but focuses on the fairness of a forum selection clause in a form cruise ship ticket. So long as such a clause is “fundamentally fair,” it will be upheld, assuming that the ticket purchaser had notice of the clause.

B. *Carnival* Does Not Mean That All Cruise Ticket Clauses Are Enforceable: Was the Existence of the Clause “Reasonably Communicated” to the Plaintiff?

In cases decided after *Carnival*, courts have applied the fundamental fairness standard only after finding that the plaintiffs had notice of the disputed ticket clauses. To establish notice, courts look to whether or not the existence of the clause at issue was reasonably communicated to the plaintiffs. Courts deciding cruise ticket cases (and other cases involving standardized forms) have developed a two part “reasonable communicativeness” test. The first prong of the test requires the court to focus on the physical characteristics of the ticket or other form at issue. The second prong requires the court to evaluate the “circumstances surrounding the passenger’s purchase and subsequent retention of the ticket/contract.” *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002). This second prong allows the court to consider more subjective factors in determining whether the passenger had the ability to become meaningfully informed of the ticket’s terms.

The transaction in *Effron v. Sun Line Cruises*, 67 F.3d 7 (2nd Cir. 1995) is an example of one in which the passenger, in the opinion of the court, had the opportunity to become informed of the ticket’s terms. The Second Circuit found that the defendant cruise line reasonably communicated the existence of the forum selection clause at issue to the plaintiff, who, after being injured on one of the defendant’s ships, sued the cruise line in New York in contravention

of a clause choosing the courts of Athens, Greece as the exclusive forum. In so ruling, the court considered both the cruise line's promotional brochure and the "Passage Ticket and Contract." The promotional brochure contained a page of reservation information which included a paragraph labeled "Responsibility." This paragraph stated that the transportation of passengers was governed by the "Passenger Ticket Contract" and that the ticket could be inspected at any of the defendant's offices. It also stated that the passenger's acceptance of the ticket would constitute agreement to its terms.

The court in *Effron* then turned to the physical characteristics of the ticket itself. On the face of the ticket was the warning "IMPORTANT NOTICE - READ BEFORE ACCEPTING." This notice was in bold, medium sized lettering. Below the warning, the ticket contained a statement directing the purchaser's attention to the forum selection clause. After finding that the appearance of the ticket was sufficient to put passengers on notice that it contained important provisions, the court found that the forum selection provision itself was written in clear and unambiguous language.

An example of a ticket that did not reasonably communicate its terms is the one at issue in *Wallis v. Princess Cruises, Inc.* Mrs. Wallis sued the cruise line for damages arising from the death of her husband, who had fallen from the defendant's cruise ship off the coast of Greece. The defendant claimed that the amount of its liability should be limited to approximately \$60,000, based on a limitation in its "Passage Contract."

The "Passage Contract" at issue was contained in a ticket packet given to the plaintiff. It is not clear from the opinion when the plaintiff received the packet. The packet contained ticket coupons and the Passage Contract. At the bottom of five of the ticket coupons was the headline "IMPORTANT NOTICE," followed by a statement that "THIS TICKET INCLUDES THE PASSAGE CONTRACT TERMS SET FORTH AT THE END OF THIS PACKET WHICH ARE BINDING ON YOU. PLEASE READ ALL SECTIONS CAREFULLY AS THEY AFFECT YOUR LEGAL RIGHTS, PARTICULARLY . . . SECTIONS 15 THROUGH 18 LIMITING THE CARRIER'S LIABILITY AND YOUR RIGHTS TO SUE." The paragraph purporting to limit the carrier's liability stated that the carrier "shall be entitled to any and all liability limitations . . . applicable to it under the 'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention') which limits the Carrier's liability for death of or personal injury to a passenger to no more than the applicable amount of Special Drawing Rights as defined therein . . ."

In disputing the ticket's limitation of liability clause, the plaintiff argued that the Passage Contract did not reasonably communicate the limitation in such a way that a passenger could become "meaningfully informed" of its terms. To determine whether the liability limitation was binding on the plaintiff, the court applied the two part "reasonable communicativeness" test described above.

To apply the first prong of the test, the court considered the size of the type on the ticket,

the conspicuousness and clarity of notice on the face of the ticket and the ease with which a passenger could read the disputed provision. Although the type used in the limitation of liability clause was small, the court found that the ticket satisfied the first prong of the test because the paragraph was legible and the paragraph carried the heading “LIMITATION ON CARRIER’S LIABILITY: INDEMNIFICATION.” In addition, in at least five places, the ticket carried an “IMPORTANT NOTICE” headline reminding the passenger to read the paragraphs limiting the carrier’s liability.

Ultimately, the ticket failed the second prong of the reasonable communicativeness test. To apply the second prong of the test, courts consider the passenger’s familiarity with the ticket, the time and incentive to study the provisions of the ticket and any notice, outside of the ticket, that the passenger received. The ticket at issue failed this prong of the test because of the way the liability limitation was worded. The ticket simply referred to the Athens Convention and made reference to a liability limitation based on “Special Drawing Rights.” The passenger could not have determined the carrier’s liability without both reading the Athens Convention and determining the value, in United States dollars, of a Special Drawing Right, a term defined by the International Monetary Fund. Importantly, the United States is not a signatory to the Athens Convention, so in order for it to apply, it must be incorporated in a binding contract.

The second prong of the reasonable communicativeness test was also dispositive in *Ward v. Cross Sound Ferry*, 273 F.3d 520 (2nd Cir. 2001). The plaintiff in *Ward* was injured while boarding defendant’s ferry. When she sued the ferry company, the ferry company moved for summary judgment on the ground that the suit was time barred by a limitations clause in the plaintiff’s ferry ticket.

The court, in ruling that the limitations clause was unenforceable, applied the two part reasonable communicativeness test. The ticket at issue in *Ward* failed the second prong of the test because the passenger bought the ticket only two or three minutes before boarding and then handed the entire ticket to an agent of the carrier when she boarded the ferry. As a result, there was no way that the passenger could have familiarized herself with the terms of the ticket and no way that she could have consulted the ticket to learn whether or not there were any clauses limiting her ability to sue the carrier. The fact that the defendant collected the ticket within a few minutes after its issuance negated the idea that the tickets contained important contractual terms. The court rejected the reasoning of the District Court, which reasoned that the plaintiff could have obtained a copy of her ticket before she decided to sue. According to the Second Circuit, this reasoning impermissibly shifted the burden to the plaintiff to learn whether or not notice had been given. Carriers must give sufficient notice at the time their ticket contracts are entered into that the tickets contain important terms.

**C. The “Reasonable Communicativeness” Test Applied to Ski Lift Tickets:
*O’Brien v. Okemo Mountain, Inc.***

The U.S. District Court in Connecticut refused to enforce a forum selection clause

printed on a ski area lift ticket in *O'Brien v. Okemo Mountain, Inc.*, 17 F.Supp. 2d 98 (D. Conn.1998). In *O'Brien*, the plaintiff skier was injured while skiing at defendant's mountain and brought suit in the U.S. District Court in Connecticut, in contravention of a forum selection clause printed on the back of his lift ticket.

The court applied federal common law to determine the enforceability of the forum selection clause. The court acknowledged *Carnival*, but distinguished it based on the fact that the *Carnival* plaintiffs did not claim lack of notice of the forum selection clause. Applying the rule from *Carnival* that a forum selection clause in a contract of adhesion is not valid unless its existence is reasonably communicated to plaintiff, the court focused on the physical characteristics of the lift ticket in holding the clause to be unenforceable. Important to the court's decision was the fact that the clause was written in "very small typeface with only a single word capitalized." It was also important to the court that the front of the ticket contained no instructions to read its back and that the forum selection clause appeared at the bottom of the back of the ticket. According to the court, this ticket was different from the cruise ticket in *Effron v. Sun Line Cruises*, because the ticket in *Effron* contained a conspicuous warning telling the buyer to read the ticket before accepting it.

D. Man Versus Machine in 1962: *Steven v. Fidelity and Casualty Company of NY*

When comparing electronic forms to paper forms, it is important to consider whether there are any characteristics of electronic transactions that would necessitate different rules for such transactions. A 40-year-old case relied on in the *Carnival* dissent is particularly relevant for this purpose because it focuses on the reality of assent when a contract is delivered by a means other than from human to human. The plaintiff in *Steven v. Fidelity and Casualty Company of NY*, 377 P.2d 284 (Cal. 1962), was the beneficiary of an airplane trip insurance policy that had been purchased by her husband from a vending machine immediately before he died in a plane crash. Although the policy stated that it covered only travel on "scheduled air carriers," the plaintiff claimed coverage because her husband was forced to fly on a non-scheduled carrier arranged by his original airline due to flight delays. In holding that the policy's limitation of coverage clause was unenforceable, the California Supreme Court focused on the difference between buying a policy of insurance from an individual and buying one from a machine.

Mr. Steven had bought the insurance policy from a vending machine at the airport. He inserted money in the amount of the premium in the machine and the machine dispensed a form insurance contract which instructed the purchaser to send it to the beneficiary in the included envelope. The evidence presented at trial was inconclusive as to whether the aperture in the vending machine was large enough to display the clause limiting coverage to travel on scheduled carriers. When the machine dispensed the contract, it dispensed only one copy, the copy to be sent to the beneficiary.

In holding that the insured could recover, the court relied on general principles of contract interpretation, which it pointed out applied with "special force" when the contract is delivered by

a machine. The court focused on notice and in determining whether the insured had adequate notice of the limitation, the court considered the purpose and intent of the parties in entering into the contract, the insured's knowledge and understanding as a "reasonable layman," and the insured's normal expectation of the extent of the policy's coverage. Important to the court's holding was the fact that the insured did not have adequate time to read and understand the policy before boarding his flight. Also important was the fact that the vending machine could not have brought the disputed provision to the insured's attention.

The court made much of the differences between man and machine. Unlike a human insurance salesperson, the machine was unable to answer any questions that the insured might have had. While the evidence was not clear as to whether the limitation of liability was visible through the vending machine's window, the various clauses clarifying the limitation of liability were definitely hidden behind the machine. For instance, the policy's coverage was limited to travel on scheduled air carriers and substituted land conveyances. The definition of "scheduled air carrier" was not visible to the insured before he bought the policy. The court found that even if the definition were visible or brought to the insured's attention, it was ambiguous. The fact that the machine provided no duplicate was also important to the court. It was impossible for the insured to consult the policy before boarding the substitute transportation.

While the court did not say that insurers should not sell policies by machine, the court did focus on mistakes made by the insurer in this case. First, the insured could not possibly have read the policy before purchase. Second, because only one copy of the policy was provided and the machine was located near an airline ticket counter, the insured had no reasonable opportunity to consult the policy after purchase. Finally, the language of the policy was ambiguous and therefore did not reasonably communicate the liability limitation.

Like the Supreme Court in *Carnival*, the court in *Steven* did not focus on the enforceability of contract clauses in the abstract, but on the enforceability of the particular clause at issue. According to the court in *Steven*, clauses limiting liability will not be enforced in California if they are unclear, unexpected, inconspicuous or unconscionable. Because the clause in this case was unexpected and inconspicuous, the court declined to enforce it.

E. Conclusion

If the paper world is to be our guide, a web site user should be deemed to have notice of standard terms presented in web site terms of use, even if the web site user need not click a button to "agree" to the terms. In order for a web site to reasonably communicate the terms of use, the link behind which the terms can be found should be apparent on the web site's home page and worded in such a way to put the user on notice that the terms are important and potentially legally binding. The terms behind the link should be written in plain English and legal terms of art should be defined, either in the terms of use or behind an easily accessible link and any such definition should be clear and unambiguous. Because the computers of today are not the vending machines at issue in the *Steven* case, a visible explanation of the terms should be

possible. Once a web site user is deemed to have notice of such terms, the terms should generally be enforceable unless there is some rule preventing enforcement even when the person against whom enforcement is sought has notice of the terms. An example of such a rule would be that applied to forum selection clauses: such clauses will not be enforced unless they are “fundamentally fair.”

F. Further Reading

There is a recent student law review note that covers some of the same ground as this memo. *See*, Kaustuv M. Das, *Forum Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonably Communicated” Test*, 77 WASH. L. REV. 481 (2002).