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Disney's Hidden Mouse Trap: The Arbitrariness of Arbitration Clauses

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DISNEY'S HIDDEN MOUSE TRAP:
THE ARBITRARINESS OF ARBITRATION CLAUSES

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Abstract: With an increased reliance on technology and a surge in digital agreements, people have become desensitized to the binding nature of the terms to which they consent in everyday online interactions. This was made readily visible in the aftermath of the death of a woman named Kanokporn Tangsuan due to an allergic reaction in Disney Springs and how her widower found himself legally constrained by the Terms of Service of a free Disney+ trial that he had signed up for without second thought. This paper analyzes the case brought forth by Tangsuan's husband, Jeffrey Piccolo, the scope of arbitration clauses like those utilized by Disney, and how they restrict possible avenues of legal action. It brings into conversation the power imbalance often apparent in such legal clauses, the question of their continued validity on the basis of legal precedent, and why a reexamination of their prevalence in today's legal landscape is necessary.

The streaming platform Disney+ currently has over 150 million subscribers, and approximately half of Internet users with children under ten years old in the United States are subscribed to the platform.[2] With countless titles, and now encompassing the works of Marvel and LucasFilm, it is obvious why people would sign up for it. What many did not know was that they would be forfeiting their opportunity to pursue litigation if wronged as a condition of their subscription to Disney+. Disney has conveniently failed to mention in their advertising of the platform that the act of paying for this service, or even just signing up for a free trial, would restrict people's ability to take Walt Disney Company to court, as well as limiting discovery,

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[2] Tom Grater, "Half Of U.S. Families With Young Children Now Subscribe To Disney+ – Report." *Deadline* (blog), March 17, 2020. https://deadline.com/2020/03/half-of-us-families-young-children-subscribe-disney-report-1202885339/.

class actions, and other comprehensive remedies. After a New York University doctor died at a restaurant on Disney property and her family attempted to get restitution and justice for her death, Disney cited the Terms of Use agreed to on their Disney+ and Walt Disney Parks and Resort (WDPR) website as to why they could not pursue anything besides arbitration. This case raises many questions regarding the scope of these arbitration clauses, their applicability to this specific situation, and what this means in a wider sense regarding transparency in agreements and terms of service.

On October 5, 2023, Jeffrey Piccolo, his wife Kanokporn Tangsuan, and her mother dined at a restaurant in Disney Springs, which is an outdoor shopping and dining complex. They had chosen to eat at Raglan Road Irish Pub and Restaurant, specifically because "both WDPR and Raglan Road advertised and represented to the public that food allergies and/or the accommodation of persons with food allergies was a top priority and that patrons/guests could consult with a chef and/or special diets trained Cast Member before placing a food order."[3] Tangsuan had informed the group's server about her food allergies and was assured that the restaurant could properly accommodate them. After eating at Raglan Road Irish Pub and Restaurant, Tangsuan soon died of anaphylaxis resulting from elevated levels of nut and dairy. Piccolo filed a wrongful death lawsuit against Raglan Road and WDPR, but WDPR, in response, filed a Motion to Compel Arbitration and Stay Proceedings. It cited how Piccolo had no choice but to arbitrate because he had agreed to the Terms of Use when signing up for a free trial of Disney+ and using the WDPR website to buy park tickets for Epcot.[4]

Interestingly enough, despite their apparent ability to force arbitration, Disney decided to back down from this position. Disney Experiences Chairman Josh D'Amaro said in a statement:

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[3] *Jeffrey J. Piccolo, as Personal Representative of the Estate of Kanokporn Tangsuan, Deceased, v. Great Irish Pubs Florida, Inc., et al.,* Case No. 2024-CA-001616-O (Ninth Judicial Circuit, May 31, 2024).
[4] Ibid.

> "At Disney, we strive to put humanity above all other considerations. With such unique circumstances as the ones in this case, we believe this situation warrants a sensitive approach to expedite a resolution for the family who have experienced such a painful loss. As such, we've decided to waive our right to arbitration and have the matter proceed in court."[5]

Whether this decision was made because of an emotional epiphany regarding the victim's "humanity" or because of the immense backlash and publicity incited by the case is an issue that will not be discussed by this paper.

Before discussing the relevant statutes and cases that would inform the analysis of Disney's position, it is important to examine the arbitration clause at the heart of the dispute and the Terms of Use as a whole. In the Disney Terms of Use, it does clearly and concisely state at the beginning that:

> "Any disputes between you and us, except disputes resolved in small claims court or relating to the ownership or enforcement of intellectual property rights, are subject to a class action waiver and must be resolved by individual binding arbitration. Please read the arbitration provision (Section 8. Below) as it affects your rights under this contract."[6]

Furthermore, within Section 8, there are two clauses to note regarding the applicability and longevity of this arbitration clause. Section 8, Clause F, entitled "Arbitration Agreement Survival," states, "This arbitration agreement will survive the termination of your relationship with Disney, including any revocation of consent or other action by you to end your engagement

[5] Michael Bartiromo, "Disney No Longer Trying to Dismiss Wrongful Death Lawsuit after Claiming Protections from Disney+ Usage Terms." *KXAN Austin*, August 24, 2024. https://www.kxan.com/news/national-news/disney-no-longer-trying-to-dismiss-wrongful-death-lawsuit-after-claiming-protections-from-disney-usage-terms/.

[6] "English – Disney Terms of Use – United States." Disney Terms Of Use. Accessed January 4, 2025. https://disneytermsofuse.com/english/.

with or use of any Disney Products or any communication with us."[7] This means that even if the agreement to the terms of use occurred in the pretense of entering into a free trial, the arbitration waiver forgoing one's ability to bring Disney to court reaches to infinity and beyond.

> Interestingly enough, Disney does have an "opt-out" clause, which states:
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> "You may opt out of this arbitration agreement via mail. If you do so, neither party can force the other party to arbitrate. To opt out, you must notify us in writing no later than thirty (30) calendar days after first becoming subject to this arbitration agreement; otherwise you shall be bound to arbitrate Disputes on a non-class basis in accordance with this Agreement."[8]

In the relevant case, Piccolo had not notified Disney in writing of his unwillingness to be bound by the arbitration clause, but it is fair to assume that he, along with many others before the widespread coverage of this case, did not know of the binding aspect of the terms.

An area of interest in this case surrounds the location in which the incident occurred. Disney Springs, although utilizing the company name and being technically within Disney property, consists of many independent restaurants and stores that would seem to be outside of strict Disney management. Given the fact that Raglan Road is a third-party restaurant that is not owned by Disney but rather is a part of a mall-like complex, how could the plaintiffs be successful in their lawsuit against Disney? The plaintiff's complaint states, "Upon information and belief, DISNEY had control over the menu of food offered, the hiring and/or training of the wait staff, and the policies and procedures as it pertains to food allergies at DISNEY SPRINGS restaurants, such as RAGLAN ROAD."[9] Even though Raglan Road's status as an independent restaurant not owned by the Disney corporation might appear to limit liability and Disney's role

[7] Ibid.
[8] Ibid.
[9] *Piccolo v. Great Irish Pubs Florida, Inc., et al.*

in the case, the fact that Disney had control over various aspects of operation of Raglan Road makes them a viable and suitable candidate for Piccolo's wrongful death lawsuit.

From a perspective of precedent, WDPR's position of arbitration is supported. Originally in the case of *Discover Bank v. Superior Court of Los Angeles* in 2005, where Discover Bank had forced arbitration despite blatantly inflicting large amounts of damages to be dispersed amongst many consumers, the California Supreme Court ruled that "class action waivers," such as the one within Disney's Terms of Use, "in certain consumer arbitration agreements are unconscionable."[10] Yet, in the case of *AT&T Mobility LLC v. Concepcion* of 2011, in which customers of AT&T had claimed that the company engaged in fraudulent behavior regarding the promotion of a free phone offer, the Supreme Court decided that the Federal Arbitration Act, whose purpose was to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," preempted the *Discover Bank* rule.[11] Thus, "class-action waivers in consumer arbitration agreements are enforceable even where those waivers are unconscionable under applicable state law."[12]

Another case validating Disney's position is *Meyer v. Uber Technologies, Inc.*, which is particularly relevant given it relates to the validation of the arbitration clause of a company's Terms of Service. In *Meyer v. Uber Technologies Inc.*, the plaintiff-counter-defendant-appellee Spencer Meyer had alleged that the Uber application allowed third-party drivers to illegally fix prices; they had attempted to force arbitration because Meyer had made an Uber account and had thus agreed to an arbitration clause in the Terms of Service. The district court asserted that Meyer

[10] Smith, Steven, et al., "International Commercial Dispute Resolution." *The International Lawyer* 46, no. 1 (2012): 113–27. http://www.jstor.org/stable/23827354.
[11] Ibid., 114.
[12] Ibid., 114.

"did not have reasonably conspicuous notice of and did not unambiguously manifest assent to Uber's Terms of Service when he registered."[13]

Meyer's case was appealed to the United States Court of Appeals for the Second Circuit which emphasized the role of state contract law in determining the validity of the agreement and noted, "Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms."[14] The Second Circuit also commented on the fact that the signage of the Terms of Service occurred over the Internet, which adds layers of nuance, saying:

> "Courts around the country have recognized that [an] electronic [click] can suffice to signify the acceptance of a contract…[t]here is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.'"[15]

Just as in the Disney Terms of Use, the Uber Terms have a hyperlink that direct the user to the specific sections and clauses. Even though this seems to add a barrier to the user, the Second Circuit noted that "a reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not."[16] In the end, the Second Circuit vacated the initial order of the district court that denied the motion to compel arbitration and remanded the case to the district court to determine whether or not Disney had waived its rights to arbitration.

The manner in which Piccolo acted is also a major area of interest for the case. The capacity by which he acted when he originally signed Disney's Terms of Use, (when he signed

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[13] "Meyer v. Uber Technologies, Inc., No. 16-2750 (2d Cir. 2017)," *Justia Law*, https://law.justia.com/cases/federal/appellate-courts/ca2/16-2750/16-2750-2017-08-17.html.
[14] Ibid.
[15] Ibid.
[16] Ibid.

up for the free trial or used the website to buy park tickets,) differs from the capacity by which he is acting when filing a lawsuit against WPDR and Raglan Road. Indeed, it was Jeffrey Piccolo who signed the agreement of Disney+ that included the arbitration clause. This does not extend to Piccolo's role in the lawsuit, though, as the plaintiff in the case is "Jeffrey J. Piccolo as Personal Representative of the Estate of Kanokporn Tangsuan, Deceased."[17] Kanokporn Tangsuan was the individual who was wronged by Disney, and it was Piccolo, not her, who entered the agreement with Disney. It is on her behalf and estate that Piccolo is bringing forth the lawsuit, and thus the arbitration clause is not truly applicable to the plaintiff in question.

Raglan Road and other restaurants in the Disney Springs complex have been highlighted in recent news as well because of their 'independent' status, which is of much interest with liability cases such as this one. In September 2024, workers of restaurants in Disney Springs banded together to demand better conditions, such as higher wages and benefits like health insurance. In reference to this situation, Jeremy Haicken, president of the Unite Here Local 737, which represents Disney employees said, "we've discovered that there is a second class of workers at Walt Disney World, those workers are the subcontracted employees of restaurants that are not operated by Disney…These are restaurants that are operated by subcontractors at Disney Springs."[18] Not only does Disney distance itself from issues arising within these establishments by designating them as independent, but it provides reason by which it can deny these workers the same rights and benefits granted to those who work within the Disney parks themselves.

This case brings the scope of Disney's agreement and the arbitration clause as a whole into question and public scrutiny. It seems unconscionable that agreeing to terms and conditions

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[17] *Piccolo v. Great Irish Pubs Florida, Inc., et al.*

[18] James Wilkins, "'Second Class' in Disney Springs: Restaurant Workers Push for Better Pay, Benefits," *Tampa Bay Times*, September 19, 2024, https://www.tampabay.com/news/business/2024/09/19/second-class-disney-springs-restaurant-workers-push-better-pay-benefits/.

of a free trial of a streaming service means waiving the ability to litigate for damages and death caused by a restaurant at a Disney property. What does this mean going forward for entering into agreements with companies like Disney? Should consumers be more meticulous in their scanning of the terms of conditions, or should companies as expansive as Disney be forced to be more forthcoming and transparent with possible legal restrictions one may incur by entering into agreements with them?

Arbitration clauses have been criticized greatly for being situationally manipulative and skewed towards the larger entities including them. Drahozal (2001) notes concerns that arbitration clauses are "mandatory," referring to the fact that refusing to comply with these clauses precludes the obtaining of the good or service in question.[19] He also comments on the perception of arbitration itself as "unfair" because of "limited discovery, lack of a jury trial or a right to appeal, repeat-player advantages in selecting arbitrators, no class relief, and excessive fees unfairly disadvantage individuals bringing claims."[20] Finally, he considers the fears of arbitration clauses as "unfair" due to the fact that "clauses drafted by corporations provide for biased tribunals and distant locations for hearings, preclude recovery of attorneys' fees and punitive damages, shorten time limits for filing claims, and give the corporation, but not the individual, the ability to go to court for some or all claims."[21] He simultaneously assuages some concerns and claims that arbitration clause critics overlook information that would, to an extent, prevent corporations from abusing these clauses. He enumerates that business reputation's major role in how corporations operate in agreements and arbitration institutions' impetus to promote fairness as two constraining factors.[22] Regardless of whether or not fears of arbitration clauses

[19] Christopher R. Drahozal, "Unfair Arbitration Clauses," *University of Illinois Law Review* 2001, no. 3 (2001).
[20] Ibid.
[21] Ibid., 697
[22] Ibid., 766

are overstated, it is undeniable that their use could cause unimaginable damage if not put under strict scrutiny and regulation.

Although it is the consumer's duty to read through terms of service when entering into agreements, it seems truly unconscionable to slip something as far-reaching and substantial as an arbitration clause into something as inconspicuous as a free trial to a streaming service. The terms of a streaming service should pertain to the streaming service itself, not realms completely disconnected from the agreement at hand. Should someone be forbidden from bringing any lawsuit against Amazon if one used a week-long free trial to the Amazon Prime streaming service a number of years ago? It is completely unjust for companies to take advantage of the pages and pages of legal jargon that comprise the terms of even the most inconspicuous contracts. The average person would not even consider that subscribing to Disney+ in any capacity would hinder their legal rights vis-a-vis the Walt Disney Company, and to sift through the implications of such agreements would require the assistance of legal aid or one's own legal expertise. In order to ameliorate the divide between consumers' duties in assessing agreements and the underhand nature of such minute clauses, it should be a necessity that companies at a minimum summarize what is being asked of the individual for the sake of contract clarity.