

United States Court of Appeals, Ninth Circuit.

Joe **DOUGLAS**, on behalf of himself and on behalf of all others similarly situated, Petitioner,
v.
UNITED STATES DISTRICT COURT FOR the CENTRAL DISTRICT OF CALIFORNIA, Respondent,

TalkAmerica Inc., a Pennsylvania corporation, Real Party in Interest.

Argued and Submitted June 7, 2007.

Filed July 18, 2007.

PER CURIAM:

We consider whether a service provider may change the terms of its service contract by merely posting a revised contract on its website.

Facts

Joe Douglas contracted for long distance telephone service with America Online. Talk America subsequently acquired this business from AOL and continued to provide telephone service to AOL's former customers. Talk America then added four provisions to the service contract: (1) additional service charges; (2) a class action waiver; (3) an arbitration clause; and (4) a choice-of-law provision pointing to New York law. Talk America posted the revised contract on its website but, according to Douglas, it never notified him that the contract had changed. Unaware of the new terms, Douglas continued using Talk America's services for four years.

After becoming aware of the additional charges, Douglas filed a class action lawsuit in district court, charging Talk America with violations of the Federal Communications Act, breach of contract and violations of various California consumer protection statutes. Talk America moved to compel arbitration based on the modified contract and the district court granted the motion. Because the Federal Arbitration Act, [9 U.S.C. § 16](#), does not authorize interlocutory appeals of a district court order compelling arbitration, Douglas petitioned for a writ of mandamus.

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Douglas alleges that Talk America changed his service contract without notifying him. He could only have become aware of the new terms if he had visited Talk America's website and examined the contract for possible changes. The district court seems to have assumed Douglas had visited the website when it noted that the contract was available on "the web site on which Plaintiff paid his bills." However, Douglas claims that he authorized AOL to charge his credit card automatically and Talk America continued this practice, so he had no occasion to visit Talk America's website to pay his bills. Even if Douglas had visited the website, he would have had no reason to look at the contract posted there. Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side.^{FN1} Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. [Union Pac. R.R. v. Chi., Milwaukee, St. Paul & Pac. R.R.](#), 549 F.2d 114, 118 (9th Cir.1976). This is because a revised contract is merely an offer and does not bind the parties until it is accepted. [Matanuska Val Farmers Cooperating Ass'n v. Monaghan](#), 188 F.2d 906, 909 (9th Cir.1951). And generally "an offeree cannot actually assent to an offer unless he knows of its existence." [1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 4:13, at 365 \(4th ed.1990\)](#); see also [Trimble v. N.Y. Life Ins. Co.](#), 234 A.D. 427, 255 N.Y.S. 292, 297 (1932) ("An offer may not be accepted until it is made and brought to the attention of the one accepting."). Even if Douglas's continued use of Talk America's service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes. Douglas claims that no such notice was given.

^{FN1} Nor would a party know *when* to check the website for possible changes to the contract terms without being notified that the contract has been changed and how. Douglas would have had to check the contract every day for possible changes. Without notice, an examination would be fairly cumbersome, as Douglas would have had to compare every word of the posted contract with his existing contract in order to detect

whether it had changed.

[Crawford v. Talk America, Inc.](#), No. 05-CV-0180-DRH, 2005 WL 2465909, at *4 (S.D.Ill. Oct. 6, 2005), and [Bischoff v. DirecTV, Inc.](#), 180 F.Supp.2d 1097, 1103-06 (C.D.Cal.2002), on which the district court relied, are not to the contrary. The customers in these cases received notice of the modified contract by mail. The service provider in [Bischoff](#) mailed the contract to the customer, [180 F.Supp.2d at 1101](#), and the service provider in [Crawford](#) gave notice to the customer that she could see the contract terms online or call the service provider to learn of the terms. [2005 WL 2465909, at *3 n. 3](#). Furthermore, [Crawford*1067](#) and [Bischoff](#) involved new customers who necessarily would be on notice that they were required to assent to contract terms as a predicate for using the service. By contrast, the California Court of Appeal has held that a *revised* contract containing an arbitration clause is unenforceable against existing customers, even when they are given notice by mail. [Badie v. Bank of Am.](#), [67 Cal.App.4th 779, 801, 79 Cal.Rptr.2d 273 \(1998\)](#).

The district court thus erred in holding that Douglas was bound by the terms of the revised contract when he was not notified of the changes. The error reflects fundamental misapplications of contract law and goes to the heart of petitioner's claim. * * * [T]he district court also committed two additional errors. Even if Douglas were bound by the new terms of the contract (which he is not for the reasons already explained), the new terms probably would not be enforceable in California because they conflict with California's fundamental policy as to unconscionable contracts. In New York, as in California, a contract is unconscionable only if it is both procedurally and substantively unconscionable. See [Armendariz v. Found. Health Psychcare Servs., Inc.](#), [24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 \(2000\)](#); [Gillman v. Chase Manhattan Bank, N.A.](#), [73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824 \(1988\)](#). That's where the similarities end. The district court erred in analyzing California law as to both procedural and substantive unconscionability.

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The district court held that the arbitration clause in the modified contract is not procedurally unconscionable (and therefore enforceable) because Douglas had meaningful alternative choices for telephoneservice. Under New York law this choice forecloses any procedural unconscionability claim. See [Ranieri v. Bell Atl. Mobile](#), [304 A.D.2d 353, 759 N.Y.S.2d 448, 449 \(2003\)](#). However, after the district court made its ruling, we noted that California "has rejected the notion that the availability ... of substitute ... services *alone* can defeat a claim of procedural unconscionability." [Nagrampa v. MailCoups, Inc.](#), [469 F.3d 1257, 1283 \(9th Cir.2006\)](#) (en banc). In California, a contract can be procedurally unconscionable if a service provider has overwhelming bargaining power and presents a "take-it-or-leave-it" contract to a customer-even if the customer has a meaningful choice as to service providers. [Id. at 1284](#).

Likewise, the district court held that the class action waiver provision is not substantively unconscionable. Such waivers aren't substantively unconscionable under New York law. See [Hayes v. County Bank](#), [26 A.D.3d 465, 811 N.Y.S.2d 741, 743 \(2006\)](#); [Tsadilas v. Providian Nat'l Bank](#), [13 A.D.3d 190, 786 N.Y.S.2d 478, 480 \(App.Div.2004\)](#); [Ranieri](#), [759 N.Y.S.2d at 449](#). The district court cited [Provencher v. Dell, Inc.](#), [409 F.Supp.2d 1196, 1201 \(C.D.Cal.2006\)](#), for the proposition that California law was in accord, but the California Court of Appeal in [Cohen v. DirecTV, Inc.](#), [142 Cal.App.4th 1442, 1455 n. 13, 48 Cal.Rptr.3d 813 \(Ct.App.2006\)](#), expressly disavowed [Provencher](#). A class action waiver provision thus may be unconscionable in California. Whether it is depends on the facts and circumstances developed during the course of litigation. The district court clearly erred in holding that the clauses (assuming that they are part of the contract at all) are consistent with California policy and therefore enforceable as a matter of law.

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The district court's order compelling arbitration is vacated.

PETITION GRANTED.