



AB 2511 (CHAU): “MY CHILD’S CONSENT IS NOT MY CONSENT!”

PROBLEM

SUMMARY:

- Should it be legal for a business to entice children to enter into legal agreements allegedly on behalf of their parents?
- Should it be legal when seeking the consent of children to treat children the same as adults?

Where social media is concerned, AB 2511 (Chaus) says “no!”

Children and teens are simultaneously both targets for on-line marketing and insufficiently capable of forecasting or managing the consequences of their participation in such marketing, including being unwittingly lured into becoming product endorsers themselves. Either meaningful child consent or parental consent should be required before a child is enticed into participating in marketing that profits someone else. Yet, neither kind of consent is happening on social sharing sites like Facebook, because buried in Facebook’s, and an increasing number of other generalized “fine print” terms and conditions, is a provision that astonishingly elicits *from children a promise that they have obtained consent from their parents* for the child to participate in privacy-implicating, marketing behavior. The exact language reads:

“If you are under the age of eighteen (18), you represent that a parent or legal guardian also agrees to this section on your behalf.”

Under California law, contracts (including terms and conditions) are not legally enforceable against children, who can disaffirm such contracts at any time.¹ And, of course, one person – especially a child on behalf of their parents – cannot lawfully enter into contracts or terms and conditions on behalf of someone else.² Moreover, such terms and conditions relying on children consenting for their parents buried in fine print encourage companies to avoid the difficult but important and innovating work of obtaining meaningful child or parental consent.

FRALEY v. FACEBOOK, INC., ET AL,

The language permitting children to consent for their parents came about in settlement to litigation. In March 2011, Facebook was sued via class action over its “Sponsored Stories” program. The lawsuit alleged that it was unlawful to use a child’s name and photos for advertising without their consent. Through Facebook’s “Sponsored Stories” program, whenever a child user clicked the “Like” button, Facebook could use that interaction to create an advertisement that is then broadcast to that child’s “Friends” on Facebook—turning those child users into unwitting spokespeople for Facebook advertisers.

The plaintiff class and Facebook proposed a settlement. Under the settlement, Facebook proposed to pay an amount equal to \$10 per class member (later raised to \$15), although each person’s claim was worth \$750 under state law. Plaintiffs’ counsel were, in contrast, awarded millions in fees.³

A diverse array of public interest groups objected to the settlement, including California Attorney General Kamala Harris, Public Citizen, Electronic Privacy Information Center, Center for Class Action Fairness and the Children’s Advocacy Institute. The district court approved the settlement in August 2013. Appeal was made to the Ninth Circuit.

¹ California Family Code section 6700 permits children to enter into contracts (“Except as provided in Section 6701, a minor may make a contract in the same manner as an adult, subject to the power of disaffirmance”) but section 6701 makes it clear that such contracts cannot actually be enforced against the child. They may at the discretion of the child be “disaffirmed.” Section 6701 unambiguously provides that “[e]xcept as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards[.]”

"As a general proposition, parental consent is required for the provision of services to minors for the simple reason that minors may disaffirm their own contracts to acquire such services." *Ballard v. Anderson* (1971) 4 Cal.3d 873, 878. "The law shields minors from their lack of judgment and experience and under certain conditions vests in them the right to disaffirm their contracts. Although in many instances such disaffirmance may be a hardship upon those who deal with an infant, the right to avoid his contracts is conferred by law upon a minor `for his protection against his own improvidence and the designs of others.' It is the policy of the law to protect a minor against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant. Any loss occasioned by the disaffirmance of a minor's contract might have been avoided by declining to enter into the contract." *Niemann v. Deverich* (1950) 98 Cal.App.2d 787, 793; accord *Burnand v. Irigoyen* (1947) 30 Cal.2d 861, 866. Indeed, the disaffirmance statute also reflects a policy "of discouraging adults from contracting with minors." *I.B. ex rel. Bohannon v. Facebook, Inc.*, --- F. Supp. 3d ----, No. 12-cv-01894-BLF, 2015 WL 1056178, at *4 (N.D. Cal. Mar. 10, 2015).

² In California, the elements for a viable contract are (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration. *U.S. ex rel. Oliver v. Parsons Co* (9th Cir. 1999) 195 F.3d 457, 462; see also Cal. Civ. Code § 1550. Acceptance of a contractual term or condition pursuant to Civil Code section 1585 "must be absolute and unqualified[.]" A child promising they have obtained the consent of a parent is legally insufficient to bind the parent.

Applying the “abuse of discretion” standard to the trial court’s approval of a settlement between private parties, in January 2016, the appellate court affirmed the trial court’s approval of the settlement, but, importantly, passed utterly no judgment on whether the settlement was good or wise policy. The court held:

When approving a settlement, a district court should **avoid reaching the merits of the underlying dispute**. *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996); see also *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). As a result, a district court abuses its discretion in approving a settlement only if the agreement sanctions “clearly illegal” conduct. *Robertson v. National Basketball Ass’n*, 556 F.2d 682, 686 (2d Cir. 1977) (emphasis added); see also *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990).

<https://assets.documentcloud.org/documents/2678209/13-16819.pdf> (emphasis added)

CHILDREN ARE MARKETING TARGETS. CONSENT OF CHILD DOES NOT EQUAL PARENTAL CONSENT.

Online marketers seek to emphasize children and teens in their marketing. “Teens may be unknowingly conscripted into being product ambassadors, encouraged to submit their own photos and share products and content with friends, all monitored and monetized. PBS Frontline, *Generation Like* (Feb. 18, 2014), <http://www.pbs.org/wgbh/frontline/film/generation-like/>; workgroup on Children’s Online Privacy Protection, *Report to the Maryland General Assembly on Children’s Online Privacy*, 17 (Dec. 30, 2013). “For years, companies have purposefully sought out the most influential young ‘connectors’ within their social groups and encouraged them to promote brands among their friends.” Montgomery & Chester, *Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age*, 45 J. of Adolescent Health S21 (2009), available at <http://digitalads.org/documents/>; see Am. Acad. of Pediatrics, *Children, Adolescents, and Advertising*, 118 Pediatrics 2563, 2563 (2006) (noting marketers increasingly target the young to create brand preference); Okan Akcay, *Marketing to Teenagers: The influence of Color, Ethnicity and Gender*, 3 Int’l J. Bus. & Soc. Sci. 10, 10 (2012) (discussing the importance of targeting teens, especially Hispanics, as a growing population segment with large purchasing power).

“Teens tend to be more impulsive than adults and, as a result, may voluntarily disclose more information online than they should, leaving them vulnerable to identity theft or adversely affecting potential employment or college admissions opportunities.” FTC, *Protecting Consumer Privacy in an Era of Rapid Change*, 70 (2012) (citing agency findings and academic studies on teens’ privacy attitudes).

According to a survey of 381 institutions, nearly a third of college admissions personnel check applicants’ social media presence in determining college entrance. Natasha Singer, *They Loved Your G.P.A. Then They Saw Your Tweets*, N.Y. Times, Nov. 10, 2013, at BU3.

THE OFFENDING TERMS AND CONDITIONS.

Post-*Fraley*, Facebook in its boilerplate, fine print terms and conditions seek from children consent on behalf of their parents:

About Advertisements and Other Commercial Content Served or Enhanced by Facebook

Our goal is to deliver advertising and other commercial or sponsored content that is valuable to our users and advertisers. In order to help us do that, you agree to the following:

1. You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it. ***If you are under the age of eighteen (18), you represent that a parent or legal guardian also agrees to this section on your behalf.*** (This language is included pursuant to a [court-approved legal settlement](#).)
2. We do not give your content or information to advertisers without your consent.
3. You understand that we may not always identify paid services and communications as such.

<https://www.facebook.com/legal/terms> (emphasis added).

And, look at what Facebook is asking children to agree to:

This means, for example, that you permit a business or other entity **to pay us to display your name and/or profile picture** with your content or information, without any compensation to you.

A child is here agreeing to be used as no less than a secret tool for a business to market products to other children through Facebook, with the aim of fooling the child's friends into thinking that the child means to endorse the product publicly. This means that Facebook is asking a child to agree to allow Facebook to use her face and name to endorse products or services that my child might or might not want to endorse to the world.

Other companies appear to be adopting this approach which, of course, also lets companies off the hook for innovating to obtain any meaningful parental or child consent. See, for example:

Section 1, Ability to Use the Services, of Pandora's Services Terms of Use contains the following language:

You hereby affirmatively represent that (a) you are at least the Minimum Age in the applicable Authorized Jurisdiction; (b) **you have the consent of your parent(s) to use the Services if you are under 18 years of age**; (c) you have all the applicable rights and authority to grant Pandora the rights granted herein; (d) you have read, understood, and agree to be bound by this Agreement.⁴

(emphasis added.) Pandora is not the only music streaming application to contain this language. Section 1 of Spotify's Terms and Conditions of Use contains the following language:

In order to use the Spotify Service and access the Content, **you need to (1) be 18 or older, or be 13 or older and have your parent or guardian's consent to the Agreements**, (2) have the power

⁴ The language in section 1 of Pandora's Services Terms of Use can be accessed through its main website. (See <https://www.pandora.com/legal>.)

to enter a binding contract with us and not be barred from doing so under any applicable laws, and (3) be resident in the United States. You also promise that any registration information that you submit to Spotify is true, accurate, and complete, and you agree to keep it that way at all times.⁵

(emphasis added.) Nintendo.com includes the following language:

The Services may not be used by anyone under the age of 18 without the supervision of a parent or legal guardian who agree to be bound by these Terms. You represent and warrant that you are at least 18 years of age (or the age of legal majority under applicable law), or, if not, that you have reviewed these Terms with your parent or legal guardian **and that he or she has agreed to be bound by these Terms.**⁶

See also: <http://www.graffitiover.com/tp> <http://www.amphub.io/terms/>
<https://www.theloyalist.com/terms>

SOLUTION.

Enact a bill that simply makes it unlawful for a social media site to allow children in fine print boilerplate to promise they have obtained consent of their parents for the child to be used in marketing. Make sure it is enforceable. But, do not presume to decree how companies must otherwise seek child or parental notice and consent. A prohibition on the preposterous consent will re-invigorate innovation in obtaining real and meaningful consent from both children and parents.

THE BILL IN-PRINT, EACH SECTION EXPLAINED.

SECTION 1.

Title 1.81.5 (commencing with Section 1798.99.1) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 1.81.5. The Parent’s Social Media Accountability and Child Protection Act

1798.99.1.

(a) A person or business that conducts business in California, that operates an Internet Web site or application that requires a password, and that enables a minor resident of California to use the site or application to create and share content, including, but not limited to, photographs, messages, digitally created pictures, and videos, shall not do any of the following:

NOTE: This language is more specific than current law that governs employers’ access to social media sites. Compare the above with Labor Code section 980:

(a) As used in this chapter, “social media” means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts,

⁵ The language of Spotify’s Terms and Conditions of Use can be accessed through its main website. (See [https://www.spotify.com/us/legal/end-user-agreement.](https://www.spotify.com/us/legal/end-user-agreement))

⁶ The language of Nintendo’s Terms of Use can be accessed through its main website (See [https://www.nintendo.com/terms-of-use.](https://www.nintendo.com/terms-of-use))

instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

(1) Solicit or knowingly permit the minor to agree to terms or conditions on behalf of an adult, including, but not limited to, the minor's parent or legal guardian.

NOTE: No ethical business should be enticing children to enter into agreements on behalf of adults – period. Indeed, no ethical business should even ask children to enter into agreements on behalf of other children.

(2) Presume that consent of the minor implies consent of an adult, including, but not limited to, a parent or a legal guardian.

NOTE: No ethical business should ever presume that a parent will consent to those things a child consents to. Treating the child's consent as if it was the parent's isn't parental consent. It is avoiding parental consent.

(3) Obtain or seek to obtain consent from the minor for any policy, practice, term, or condition through the business' generally applicable terms and conditions of use.

NOTE: No ethical business, when obtaining the consent of children, should treat children and adults the same. Child consent must mean something more than asking for it in fine print, boilerplate terms and conditions aimed at and written for adults.

(4) Require the minor or his or her parent or legal guardian, through any agreement or condition, to waive his or her ability to combine as a class to enforce the requirements of this section, whether in civil court or in arbitration.

NOTE: To promote enforcement, the bill prohibits social media companies from forcing children and parents to file serial, duplicative individual enforcement suits. Observe the bill does not offer liquidated penalties or damages, so class actions for money damages would be impossible because the money damages would most likely be based on invasion of privacy-emotional distress, something unique to each individual.

(b) In an action brought by a public prosecutor, a business or person that violates this section shall be subject to a civil penalty not exceeding seven thousand five hundred dollars (\$7,500) for each violation.

NOTE: To promote enforcement, civil penalties available only to government prosecutors is provided. This compares favorably with how California law protects celebrities from paparazzi. See, for example, Civil Code section 1708.9, which makes it "unlawful" to impede someone from entering "facilities." The law⁷ provides in relevant part:

(d) The Attorney General, a district attorney, or a city attorney may bring a civil action to enjoin a violation of subdivision (a), for compensatory damages to persons or entities aggrieved by the violation, and for the imposition of a civil penalty against each respondent. The civil penalty for a violation of paragraph (1) of subdivision (a) shall not exceed fifteen thousand dollars (\$15,000), or twenty-five thousand dollars (\$25,000**) for a second or subsequent**

⁷ All emphases supplied.

violation. The civil penalty for a violation of paragraph (2) of subdivision (a) shall not exceed five thousand dollars (\$5,000), or twenty-five thousand dollars (\$25,000) for a second or subsequent violation.