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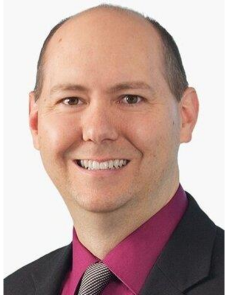
Can Chatbot Interactions Lead To Enforceable Contracts?

By **Shawn Helms, Jason Krieser and DC Wolf** (May 21, 2024, 5:24 PM EDT)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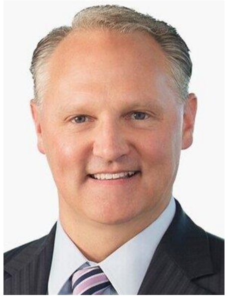
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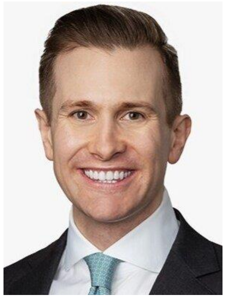
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An online retailer's order-tracking chatbot tells several customers they qualify for free international shipping that the retailer doesn't offer. A customer service chatbot on a stockbrokerage application tells customers inaccurately the app will protect them from losing trades.

These hypothetical examples illustrate challenges that can arise from using generative artificial intelligence chatbots in customer service channels. Even as such technologies increase the efficiency and availability of customer support, their unpredictable tendency to occasionally go off-script, or to "hallucinate," creates a degree of risk.

For example, a conversation with a chatbot led to a "purchase" of a Chevy Tahoe for $1, using prompt engineering in which the customer tricked the AI into agreeing with the customer's every proposal.[1] While this example is obviously a chatbot gone awry, there are chatbots being developed specifically to negotiate contracts, and the U.K.-based AI firm, Luminance, now claims that their AI model can negotiate contracts on its own.[2]

In at least one instance, the risk described above has materialized and led to litigation.

In a case decided in February in Canada's Civil Resolution Tribunal — Moffatt v. Air Canada — a chatbot on a major airline's website inaccurately told a customer he qualified for a special airfare the airline did not actually offer.[3] The customer filed a claim after he purchased a ticket, and the airline rejected his request to honor the chatbot's fare.

The tribunal enforced the chatbot's promise, ruling that Air Canada was liable for negligent misrepresentation by breaching its duty of "reasonable care to ensure its chatbot was accurate." In doing so, the tribunal rejected the airline's "remarkable submission" that implied that the chatbot was a "separate legal entity" and that Air Canada "cannot be held liable for information provided by one of its agents, servants, or representatives — including a chatbot."

"[I]t should be obvious to [the airline]," the tribunal explained, "that it is responsible for all the information on its website."

Contract Law Basics — Agents and Instrumentalities

Answering the question of contract formation requires going back to 1L contracts class, and to the fundamental ingredients for a valid contract — acceptance of an offer on sufficiently definite terms, supported by an exchange of consideration by parties who have legal capacity to enter a contract.

According to the Restatement (Second) of Contracts, Section 24, an "offer" is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[4] According to Section 50, "accepting" an offer requires manifesting assent "to the terms thereof ... in a manner invited or required by the offer."[5]

At common law, only human beings have the ability to enter contracts.[6] Additionally statutes have given artificial persons — namely, business entities — "legal personhood," which lets them own property, form contracts, and sue or be sued.[7]

But even those entities can act only through human agents. A chatbot does not have legal capacity to enter into a contract by itself because it is neither a natural person nor a legal person. Likewise, chatbots also cannot enter into a contract as an agent, because, again, they lack personhood of any kind.[8]

While it is never technically accurate to say that a chatbot can be an agent that can bind a principal to a contract, a chatbot can be an instrumentality.

The Restatement (Third) of Agency states that "it is not possible for an inanimate object or a nonhuman animal to be a principal or an agent under the common-law definition of agency. However, an animal or an inanimate object may serve as a person's instrumentality in a manner that may be legally consequential for the person."[9]

Regarding software, the Restatement observes that "computer programs are the instrumentalities of the persons who use them... If a program malfunctions, even in ways unanticipated by its designer or user, the legal consequences for the person who uses it are no different than the consequences stemming from the malfunction of any other type of instrumentality."[10]

The Restatement gives an illustration involving a dog whose owner trained it to make beer runs: The dog trots into town with a carrying pack and receives beer from a shopkeeper, who then bills the owner. But when the dog starts making unauthorized beer runs, the owner refuses to pay. According to the Restatement, the owner is on the hook for those beers, even though the dog was not an "agent" but is an instrumentality of the owner that can be used to form a binding contract.

A chatbot is not a separate entity that forms a contract for a principal, but can be a means by which a person can enter a contract. This is hardly different from a company that forms contracts with customers by automated means, such as vending machines or parking meters. Like those technologies, whether a chatbot can make or accept an offer in a way that binds the company that implemented the bot depends on whether customers reasonably understand that the chatbot is an authorized instrumentality of the company.

Suppose that a company lets users access a chatbot by clicking a link that says, "Problem with your order? Chat with our Customer Smart Assistant to get your questions answered." That might justify a customer in thinking that the company has provided the chatbot as its instrumentality, that is, an approved means by which the company provides accurate responses to assist with the customer's inquiries.

More broadly, anything that a company says or does to indicate that a chatbot is an official, company-approved way to interact with the company or get information about its products or services could increase the likelihood that a chatbot is deemed an instrumentality that can be used to bind the person or company that has implemented the chatbot.

The question of whether it is reasonable for customers to think that a chatbot is the instrumentality of a company is analogous to the doctrine of "apparent authority," even if the chatbot cannot technically be an agent. Apparent authority is an agency law doctrine under which someone who may not actually be authorized to act for a principal can still be deemed an agent if people interacting with that person reasonably infer — from the conduct or inaction of the principal — that the person is in fact authorized to act.[11]

While AI chatbots may not be agents in the formal sense, since they do not have legal personhood, agency law may be an intuitive analytical fit for examining whether a company should answer for what its chatbot says to customers.

Compare the Air Canada case, where the facts described by the Canadian tribunal might make it possible that airline customers could understand that the chatbot is an instrumentality of the company, versus the Chevy Tahoe case, where it seems unreasonable for anyone to think that a prompt-engineered chatbot that had agreed to sell a Chevy Tahoe for $1 was still an approved means for contracting to purchase a car.

If the customer had simply offered to buy the Tahoe at sticker price, could the dealership's chatbot have formed a valid contract to sell the vehicle? Maybe. But additional facts are important too, such as, what representations did the dealership make about the chatbot?

If the chatbot was offered as a way to buy a car, then it could well be deemed an instrumentality for that purpose. Compare this with efforts of Luminance AI, which is attempting to build a chatbot for the sole purpose of negotiating contracts. In that scenario, the chatbot's purpose is expressly to enter a contract, so it would very likely be viewed as an instrumentality of the entity deploying the chatbot, binding the company — even if it malfunctions.

Consideration is a bargained-for exchange. It is often a payment of money but can be any act, forbearance to act, change in legal rights, or promise to act, to refrain from acting, or to change legal rights.[12] This is going to be a fact-specific question.

In the hypotheticals at the beginning of this article, a customer who buys a product after learning — incorrectly — from a chatbot that the customer's order qualifies for free international shipping, could be said to have provided consideration by paying for the product. In one of the other hypotheticals, the following exchange could also potentially be argued to result in an enforceable agreement:

> Customer: "I want to trade stocks on the app but want to make sure I am protected from losses. Am I protected?"
>
> BrokerBot: "Yes."

> Customer: "Does that mean that if I net a loss on a trade, then I can ask you to reverse the transaction and restore the amount I originally invested?"
>
> BrokerBot: "Certainly!"

One might argue that the customer offered to make a trade using a brokerage app in exchange for the app maker's promise to protect the customer from downside. One might argue that this exchange of promises counts as consideration, thus forming a binding contract.

Even without a valid contract, courts can use rules of equity, such as promissory estoppel, to protect a customer's reasonable expectations. Under this doctrine, if there is an express promise, and the person making the promise should reasonably expect the promise to induce someone to act or not act, then if the person is in fact induced, a court will likely enforce the promise as needed to avoid injustice.[13]

Avoiding and Defending the Chatbot Contract Claims

The foregoing analysis suggests a host of ways in which chatbot interactions could lead to potentially enforceable customer expectations. But that is not the end of the story. Just as there may be numerous ways to argue that what a chatbot tells a customer should be legally enforceable, there are equally many ways to assert defenses and counterarguments.

If a customer acts in bad faith to secure an "agreement" with a chatbot — for example, by instructing the chatbot to agree unquestioningly with whatever a customer says, as in the Chevy Tahoe case, there is almost no chance that a court would treat any resulting "assent" as enforceable.

However, if the chatbot had been held out as a way to enter into contracts, this malfunction may not excuse the contract, unless it would reasonably appear to a customer that the bot is not functioning as intended.[14]

A chatbot might offer something so outrageous, or that is so counter to a company's interests, that it would be unreasonable for a customer to interpret it as a real expression of the company's intent. You might recall a well-known 1999 case, Leonard v. Pepsico Inc., in the U.S. District Court for the Southern District of New York, where a plaintiff tried — and failed — to claim that a soda company owed him a Harrier jet, based on a TV ad about the company's loyalty program.[15] The same could be true of a chatbot that makes unbelievable commitments or that says things that are mere salesmanship or puffery.

Many chatbot communications may be too vague or indefinite for a court to count as enforceable contracts.

In our BrokerBot example above, the app maker could argue that the customer's inquiry was too hypothetical and vague to create an enforceable contract, or that BrokerBot's "Certainly" response was merely an affirmation of a statement rather than a true acceptance. It is basic contract law that the terms of an offer and acceptance must be sufficiently definite for them to be enforced.

A chatbot's ability to make or accept an offer will likely depend on whether it appears to have been authorized to do so.

For example, depending on what the company's website says, the hypothetical aforementioned order-tracking bot might not have authority to do anything beyond communicating order or shipment status to customers. This could allow the company to argue that the overly friendly shipping terms are not enforceable.

Providing disclosures that a customer must acknowledge before interacting with a chatbot could help reduce a customer's ability to enforce inaccurate statements if the customer is told that a bot might generate false outputs. But such disclosures might also undermine the whole point of using chatbots to free up human customer support agents to focus on complex queries and to make a customer service function generally more efficient, more accessible and higher quality.

In addition, it would be helpful to combat an argument that a chatbot is forming binding contracts to expressly say that the chatbot does not have the ability to legally bind the company to a contract.

At a minimum, companies should provide clear disclosures that customers are interacting with an AI chatbot — which are required by law in some states — and carefully consider what sort of testing, diligence and disclosures might be appropriate prior to deploying AI chatbots in a production environment.

Conclusion

Generative AI chatbots are potentially capable of making and accepting offers that result in creation of binding agreements. Their ability to do this in a given situation depends on various factors, such as what the company has told consumers about the chatbot, the purpose of the bot, and the subject matter the bot discusses.

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[1] Lewin Day, Chevy Dealer's AI Chatbot Allegedly Sold a New Tahoe for $1, Recommended Fords, The Autopian, (Dec 18, 2023 9:05 am), https://www.theautopian.com/chevy-dealers-ai-chatbot-allegedly-recommended-fords-gave-free-access-to-chatgpt/.

[2] Ryan Browne, An AI just negotiated a contract for the first time ever — and no human was involved, CNBC, (Nov 12, 2023 10:56 am), https://www.cnbc.com/2023/11/07/ai-negotiates-legal-contract-without-humans-involved-for-first-time.html.

[3] Moffatt v. Air Canada, 2024 BCCRT 149, Civ. Resol. Trib. No. SC-2023-005609 (Feb. 14, 2024).

[4] Rest. (2d) of Contracts §24 (1981).

[5] Id. §50.

[6] Id. §12; Rest. (3d) of Agency §3.04(1) (using "individual" instead of "natural person" in the Restatement of Contracts).

[7] Id., §12, cmt. e; Rest. (3d) of Agency §3.04, cmt. d

[8] Rest. (3d) of Agency §3.05, cmt. d.

[9] Id. § 1.04, cmt. e. (including an illustration where a dog, acting on its own, is an instrumentality that binds its owner because of earlier arrangements with the counterparty).

[10] Id.

[11] Rest. (2d) Agency §8; see also Nandjou v. Mariott Int'l Inc., 985 F.3d 135 (1st Cir. 2021).

[12] Rest. (2d) of Contracts §71.

[13] Rest. (2d) Contracts §90

[14] See Rest. (3d) of Agency § 1.04, cmt. e. (noting that, the dog's owner is liable for the beer because the shopkeeper "had no notice that some of Fidelis's trips to [the] store had not been directed by [owner]").

[15] Leonard v. Pepsico Inc., 88 F. Supp. 2d 116 (S.D.N.Y. 1999).