

## What Is Required When Consent To Mandatory Arbitration Is Sought Online?



Internet users are increasingly confronted by websites that state that continued use of the site will result in binding them to various conditions. Often this includes an agreement to submit any future disputes to arbitration.

Recently, in *Berman v. Freedom Financial Network*, 30 F. 4th 849 (9th Cir. 2022), the U.S. Court of Appeals for the Ninth Circuit revisited an issue earlier addressed, asking: “Under what circumstances can the use of a website bind a consumer to a set of hyperlinked ‘terms and conditions’ that the consumer never saw or read?”

The matter involved various defendants, including Fluent, a digital marketing company that collects information about visitors to its websites by enticing them to provide contact information and answer survey information through gift offerings. This information is then used by Fluent in targeted marketing campaigns for its clients.

The plaintiffs in this class action claimed that they visited one of Fluent’s websites, provided some contact information, and, thereafter, were contacted by Fluent’s clients in telemarketing calls without their consent in violation of the Telephone Consumer Protection Act. In response, the defendants moved to compel arbitration, stating that the use of the website signified agreement to the mandatory arbitration provisions found in the hyperlinked terms and conditions. Both the district court and the Ninth Circuit rejected this argument. They concluded that the plaintiffs did not unambiguously manifest their assent to their terms when navigating through the website. Consequently, they never entered into a binding agreement to arbitrate their dispute.

The appellate court provided a graphic description (including actual representations in the appendix to its opinion) of what had confronted the plaintiffs.

Because one of these plaintiffs had earlier visited the Fluent website and provided contact information, “she saw stated, in large orange letters across the top of the page, “Welcome back, Stephanie!” In the middle of the screen, the webpage proclaimed, “Getting Free Stuff Has Never Been Easier!” and “included brightly covered graphics.”

Between those two lines of text there was a box that stated, "Confirm your zip code below," with a pre-populated box that contained a zip code. Below that box was a green button That the Federal Arbitration Act (FAA), state arbitration statutes and courts generally favor arbitration provisions in contracts is well-recognized. But what if the contract containing the arbitration agreement appears on its face to be invalid, unenforceable and against public policy under state law? Will the arbitration provision similarly be deemed unenforceable? Or will the arbitration provisions, nonetheless, remain valid and enforceable, resulting in the arbitration of the dispute? [READ MORE..](#)

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