

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

Judge Abraham J. Gafni (Ret.)

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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

inviting her to confirm the zip code so that she could proceed to the next page. The text inside the button to confirm the accuracy of the zip code stated “in easy-to-read white letters ‘This is correct, Continue!>>’“. Clicking on this button opened the next page, which asked that personal information be provided so that she might obtain free product samples and promotional deals. Information from another plaintiff reflected a similar situation. To receive a free gift, personal information was required including name, address, telephone number date of birth, and gender accompanied by a large green button and text in large white letters to “continue.”

But what of the mandatory arbitration provisions? Where were they? The court described them as follows: “Between the comparatively large box displaying the zip code and the large green ‘continue’ button ... were two lines of text that stated: ‘I understand and agree to the ‘Terms & Conditions’ which includes mandatory arbitration and ‘Privacy Policy.’” Those words, although underlined, appeared in the same gray font as the rest of the sentence rather than in blue, the color typically used to signify the presence of a hyperlink. Moreover, if the customer had seen and clicked on the “Terms and Conditions” hyperlink, “she would have been taken to a separate webpage displaying a lengthy set of legal provisions, one of which stated that any disputes related to telemarketing calls or text messages from Fluent or its marketing partners would have to be resolved through arbitration.”

The question for the court, therefore, was whether an arbitration agreement had been validly formed. Did the circumstances reflect that the website offered contractual terms regarding an arbitration agreement to those who use the site, and the user engaged in conduct manifesting acceptance of those terms, resulting in an enforceable arbitration agreement?

In considering this issue, the court distinguished between “clickwrap agreements” and “browsewrap agreements.” Clickwrap agreements present users with specified contractual terms on a pop-up screen and users must check a box stating “I Agree” before they might proceed. Because the user has received notice of the terms being offered and expressly has assented agreement, courts have routinely found clickwrap agreements enforceable.

These are distinguished from “browsewrap” agreements in which a website offers terms that are disclosed only through a hyperlink; and the user supposedly manifests assent to those terms simply by continuing to use the website. To avoid the unfairness that might arise from these circumstances, unless there is a clear showing that a user had actual knowledge of the agreement, courts have devised rules to determine whether meaningful assent has been given sufficient to create an enforceable provision:

- **Reasonably Conspicuous Notice:** The website must provide reasonably conspicuous notice of the terms that will bind the user. The font size and format of the notice here, however, were not so “conspicuous” such that one could fairly assume that a reasonably prudent user would have seen it. Rather, it was the “antithesis of conspicuous” as “It was in font so small that it is barely legible to the naked eye.” This contrasted with the larger font used in all of the surrounding text that drew the user’s attention elsewhere. In addition, the design of the page drew the user’s attention away from the barely readable—and buried—critical text. Moreover, while a hyperlink may be acceptable, simply underlining is insufficient. What is necessary is something that sets it sufficiently apart, including contrasting font color (typically blue according to the court) and all capital letters.

- **Unambiguous Manifestation of Assent:** The court rejected defendants' claim that there was such assent by the user's clicking on the large green word "Continue". It is not enough to state, "I understand and agree to the Terms and Conditions" without specifying what action would constitute assent to them.

"Rather, the notice must explicitly notify a user of the legal significance of the action she must take to enter into a contractual agreement." Moreover, "the presence of an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound is critical to enforceability."

The court even suggested that Fluent might have demonstrated such assent simply by including language such as, "By clicking the Continue>>button, you agree to the Terms & Conditions." This may have been an overstatement in the opinion, however, as the court also focuses repeatedly on font size, color and format as important factors.

The court also rejected the contention that the inclusion of the phrase in the textual notice "which includes mandatory arbitration" should have sufficed to put users on notice. For the court, the issue was not whether the users may have been aware of the mandatory arbitration provision, but whether they can be deemed to have knowingly manifested assent to any of the terms and conditions. Because the textual notice was not conspicuous and did not explicitly inform them that by clicking on the continue button they would be bound by its terms and conditions, the words, "which includes mandatory arbitration" were of no relevance.

Some of the apparent lessons when seeking to enforce online terms:

- Include language that specifically states that by checking a box or clicking a button, the customer is agreeing to the conditions.
- If a hyperlink is used, make it stand out by having it in a different color, all in capital letters and underlined.
- Have the language of assent adjacent to the checkbox or button and not in a smaller font size or otherwise less visible than the website features around it so that it is likely to be noticed and have attention drawn to rather than away from it. Put simply, MAKE IT CONSPICUOUS.

In summary, as the court noted, "Because online providers have complete control of their websites, the onus must be on them" to put the "reasonably prudent internet user, not the expert user" on notice of the terms to which they will be bound and by what actions the user will knowingly accept them. •

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